

**SUPREME COURT OF NIGERIA**

13TH JULY 2001. SC. 41/ 1996

**CORAM:- E. O. OGWUEGBU, A. I. IGUH, A. I. KATSINA-ALU,  
U. A. KALGO, A. O. EJIWUNMI, JJSC.**

MADAM ASIAWU ADEPEJU KOREDE ..... APPELLANT  
AND  
PRINCE ADEDAPO ADEDOKUN & ANOR. .... RESPONDENTS

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*APPEALS - Briefs - Additional grounds of Appeal - Which are not incorporated in an Amended Notice of Appeal - Cannot be argued in the brief - Or the brief will become incompetent (H 2)*

*APPEALS - Notice of appeal - Incorporating grounds of appeal - Must have been filed at the High Court - In conformity with the Rules of Court - For an appellant to be heard (H 1)*

*APPEALS - Suo motu issues - Where court takes up points suo motu - Parties must be given opportunity to address the court - Before decision is made on the points (H 3)*

**FACTS**

At the High Court the appellant as plaintiff instituted an action in a representative capacity for herself and on behalf of the Olusokan family against the respondents. The reliefs sought were for declaration of title, special and general damages for trespass and injunction. The trial judge after address of counsel dismissed all the claims of the appellant whereupon she appealed to the Court of Appeal. Pursuant to the appeal, she filed a notice of appeal with 3 grounds of appeal dated 20th of June. She was further granted leave on the 26th of June 1992 to file an amended Notice of Appeal incorporating additional grounds of appeal.

At the appeal it appeared that the amended Notice of Appeal was not filed as ordered by the court but that the appellant had included and argued the proposed additional grounds of appeal in her brief. The Court

of Appeal therefore dismissed the appeal. The appellant has further appealed to the Supreme Court.

**ISSUE FOR DETERMINATION**

*"Was there a competent appellant's Brief of Argument before the Court of Appeal and was the appeal therefore not properly dismissed?"*

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

***Notice of Appeal***

1. A careful perusal of the above rule would reveal that an appellant desirous of being heard by the Appeal Court must have filed a Notice of Appeal in the High Court that decided the case against which he is appealing. And for that purpose he is required to incorporate in the said Notice of Appeal grounds of appeal which are in conformity with the Rules of Court set out in the Rules. (p. 2836 G)

***Appeals - Briefs***

2. Now it is evident that the appellant failed to take the procedural steps required of her following the leave granted to her to file an amended notice of appeal to incorporate the proposed additional grounds of appeal. The effect of that neglect to file her amended notice of appeal is that those grounds of appeal cannot be argued as was done in the appellant's brief. Indeed, the appellant's brief became incompetent for containing grounds of appeal, which had not been properly incorporated in an Amended Notice of Appeal as ordered by the court. In Ogbeide v. Onochie (1988) 1 NWLR 370 at 482, this Court, per Nnaemeka Agu JSC, said:

*"I scarcely need to emphasize that a brief or part thereof based on proposed grounds of appeal is incompetent. See Osinupebi v. Saibu & Ors. (1982) 7 S.C. 104 at pp 110 and 111; Government of Gongola State v. Tukur (No.2) (1987) 2 NWLR. 330. As it is so, it is wrong to go ahead and file a brief based on proposed grounds of appeal, even if, as in this case, counsel gives notice in the brief that leave would be sought and obtained. Steps should have been taken to obtain leave before the respondent's brief was filed on those grounds."*

It follows from what I said above, and the decision of this Court in that regard, that I must hold that the appellant's brief before the Court below was incompetent. (p. 2837 B)

***Suo motu issues***

3. There is no doubt that this court has said on a number of occasions that although an appeal court is entitled, in its discretion, to take points suo motu if it sees fit to do so, yet that discretion must be exercised sparingly and in exceptional circumstances only. Where the points are so taken the parties must be given the opportunity to address the appeal court before decision on the points is made by the appeal court. See Kuti & Anor. v. Jibowu & Anor. (1972) 1 ALL N.L.R. (Part II) p.192 (p. 2838 A)

**REPRESENTATION**

Adeniyi Akintola (with him O.A. Akinbode) for the Appellant.  
Alhaji A. Isola Gbenla for the Respondents.

**CASES REFERRED TO**

Ogbeide v Onochie (1988) 1 NWLR 370 at 482  
Osinupebi v Saibu & Ors. (1982) 7 S.C. 104 at pp 110 and 111  
Government of Gongola State v Tukur (No. 2) (1987) 2 NWLR. 330  
Kuti & Anor. v. Jibowu & Anor. (1972) 1 ALL N.L.R. (Part II) p. 180 at p. 192  
Salawu Ajao v. Karimu Ashiru & Ors. (1973) 1 ALL N.L.R. (part II) p. 51 at p. 63  
Atanda & Anor. v. Lakenmi (1974) 1 ALL N.L.R. (Part I) p. 168  
Kuti v. Balogun (1978) 1 L.R.N. 353 at p. 357  
Olusanya v. Olusanya (1983) 15 CNLR 134 at p. 139  
Nwadika v. Ibakwe (1987) 4 NWLR (pt. 67) 718  
Makanjuola v. Balogun (1989) 3 NWLR (pt. 108) 192  
Okpala v. Ibeme (1989) 2 NWLR (pt. 102) 208  
Ogbechi v. Onochie (No. 2) (1988) 1 NWLR (pt. 70) 370 at 402  
Ebueku v. Amola (1988) 2 NWLR (pt. 75) 128

**STATUTE REFERRED TO**

Court of Appeal Rules Order 3 rule 2(1)

**LEAD JUDGMENT BY EJIWUNMI JSC**

B In this case we had before us an appeal against the judgment of the Court of Appeal, Ibadan Division, consisting of Muktar, Salami and Nsofor (JJCA). The proceedings before the Court below arose from the judgment of the High Court in suit No.1/433/88. In that suit, the appellant as plaintiff, instituted the action in a representative capacity for herself and on behalf of the Olusokan family, against the respondents. The reliefs sought were for (i) declaration of title; (ii) N50,000 for special and general damages for trespass committed by the respondents, their servants, agents, privies and all other persons coming to the land since May, 1988; and (iii) injunction to restrain the respondent, their servants agents, privies and all others coming to the land to lay it waste or in anyway howsoever dealing with the land to the detriment of the appellant.

E Pleadings were ordered, filed and exchanged. At the trial, both parties called evidence in support of their case as pleaded. Following the addresses of learned counsel, the learned trial judge in a well considered judgment dismissed all the claims of the appellant. Being dissatisfied with the judgment, the appellant appealed to the Court below. That Court also dismissed the appeal.

G As the appellant was still not satisfied with the judgment of the Court below, a further appeal was filed in this Court pursuant thereto two grounds of appeal were filed with the leave of the Court below. In accordance with the Rules of this Court, briefs of argument were filed and exchanged. The appellant also filed and served a reply brief.

H At the hearing of this Appeal, learned counsel for the parties adopted and placed reliance upon their respective briefs. Learned counsel also addressed the Court in elaboration of their arguments in the said briefs.

For the appellant, two issues were identified for the determination of the appeal. They read:-

(i) Whether there was a brief of argument properly before the appellate court i.e. Court of Appeal.

(ii) Whether it was proper for the appellate court to raise an issue suo motu without inviting counsel on both sides to address it on the issue so raised. B

For the respondents, however, the only issue thought fit for the determination of this appeal is as follows :-i.e.

*"Was there a competent appellant's Brief of Argument before the Court of Appeal and was the appeal therefore not properly dismissed?"* C

Having regard to the judgment of the Court below and the grounds of appeal filed, it seems to me that the issue identified in the respondents brief is that which is more germane for the determination of this appeal. I will therefore consider the merits of this appeal primarily on that issue raised in the respondent's brief. D

At the hearing, A. Akintola Esq., learned counsel for the appellant conceded only that at the Court below, leave was granted to the appellant to file grounds of appeal that were not filed, but, argued that issue 4 in the brief of argument of the appellant in the Court below was sufficient to sustain the appeal. He, however, complained that the Court below failed to consider the issue on its merits. Learned counsel therefore urged that the appeal be allowed, and that an order be made for the re-hearing of the appeal by the Court below. E

In his reply, learned counsel for the respondents invited the Court to note that the case was not heard on its merits. This is because, he argued, the Court having found that the grounds of appeal for which leave was granted by the Court below were not filed, it did not consider the merits of the appeal. He concluded his submission by urging the Court to dismiss the appeal. F G

The genesis of this appeal may be put briefly thus:- As earlier noted, the appellant appealed to the Court below after the trial Court had dismissed her claim. Pursuant thereto, a notice of appeal, with three H grounds of appeal dated 20th of June, was filed on the same date. It would appear that by a motion dated 14th day of April 1997, the appellant sought for the following reliefs from the court below. They read:-

(i) *Granting the applicant leave to amend the notice of appeal by adding additional grounds of appeal exhibited to the affidavit.*

(ii) *Enlargement of time to file appellant's brief.*

(iii) *Deeming the brief of argument filed as duly filed and served.*

B That motion on notice was taken by the Court below on the 26th of June 1992, and all the prayers sought for by the appellant/applicant were granted. The Ruling of the Court reads thus:-

C *"Leave is hereby to granted to amend Notice of Appeal by adding additional grounds of appeal as exhibited to the affidavit. One day extension of time is hereby granted the appellant to file his brief. The said brief is deemed duly filed."*

D It is patent from that order that the appellant was granted leave by the Court below on the 26th day of June 1992 to file an amended Notice of Appeal incorporating the additional grounds of appeal that were required by the appellant to pursue the appeal. The appellant was also granted one day to file the appellant's brief and which was deemed duly filed accordingly.

E It would appear that that was how the matter stood until the appeal was heard. It then transpired that the amended Notice of Appeal was not filed as earlier ordered by the Court below. But it is also manifest that the appellant had before leave was obtained to amend the Notice of Appeal by the addition of the proposed additional grounds included and argued them in the appellants brief. That brief was dated and filed in the Court below on the 13th of April 1992, and it will be recalled that leave to file an amended notice of appeal was granted to appellant by the Court below on the 26th of June 1992.

G However, in view of the contention made for the appellant that the Court below should have sustained the appeal on issue 4 raised in the appellant's brief, I will set out first the grounds of appeal in the original Notice of appeal followed by the proposed additional grounds of appeal. H They read without their particulars as follows:-

*Grounds of Appeal in the Original Notice of Appeal.*

(1) *The learned trial judge erred in law when he held that the defendants came on the land in dispute in 1975.*

(2) *The learned trial judge erred in law when he held that a sale of the land in dispute to the 1st defendant by the Olusokan family under native law and custom has been perfected by Exhibit 1.*

(3) *The cost of ₦4,400.00k awarded as general damages and costs against the plaintiff and in favour of the defendants is punitive, B excessive and a wrong exercise of judicial discretion.*

(4) *The judgment is against the weight of evidence.*

*Proposed Grounds of Appeal*

(5) *The learned trial judge erred in law when he held that there C was a customary sale of the land in dispute to the defendants*

(6) *The learned trial judge erred in law in believing the evidence adduced by the defendants that Exhibit 1 was executed while the family head was alive when from the pleading of the defendants by paragraph 16 of the Amended Statement of Defence the case made out was D that Exhibit 1 was executed after the death of the family head.*

(7) *The learned trial judge misdirected himself on the facts and hereby came to a wrong conclusion by holding that three (3) branches of the family existed when from the pleading and evidence led by the plaintiff, it was certain that four (4) branches of the family existed. E*

(8) *The learned trial judge erred in law in disbelieving the evidence of the plaintiff and her witnesses as to what was the agenda of the family meeting held in 1978. F*

(9) *The learned trial judge erred in law in awarding general and special damages in favour of the defendants when from the evidence led before the court, the defendants did not prove such." F*

Upon all those grounds of appeal, the appellant formulated seven issues G for the determination of the appeal in the appellant's brief that was filed in the lower Court. They are as follows:

"(1) *Was the sale of the land to the defendant valid?*

(2) *Whether three (3) branches existed in the Olusokan family or whether there were four (4) branches. H*

(3) *Whether the evidence led to support Exhibit 1, the sale agreement is admissible.*

(4) *Whether the learned trial judge was right in holding that the*

*defendants came on the land in dispute in 1975.*

(5) *Whether the learned trial judge was right in awarding the damages, which he awarded in favour of the defendants?*

(6) *Whether the learned trial judge was right in rejecting the evidence of the plaintiff as to what constituted the agenda for the 1978 meeting.*

(7) *Whether the cost awarded in favour of the defendants is not excessive."*

I must first observe that the Court below took the view that all the issues raised were based on all the grounds of appeal filed by the appellant. Therefore the issues as framed could not be identified with particular grounds of appeal. In other words, whether any of the issues could be tied to the grounds of appeal that were validly before the Court.

Though it was conceded in the course of his argument at the hearing by the learned counsel for the appellant that the Amended notice of Appeal was not filed as ordered, yet the consequence flowing from that failure to comply with the order of the Court must be considered.

By Order 3 Rule 2(1) of the Court of Appeal Rules, it provided that:-

*"(1) All appeals shall be by way of rehearing and shall be brought by notice (hereinafter called "the notice of appeal") to be filed in the Registry of the Court below and which shall set forth the grounds of appeal, shall state whether the whole or part only of the decision of the Court below is complained of (in the latter case specifying such part) and shall state also the exact nature of the relief sought and the name and addresses of all parties directly affected by the appeal, and shall be accompanied by a sufficient number of copies for service on all such parties. It shall also have endorsed on it an address for service."*

**A careful perusal of the above rule would reveal that an appellant desirous of being heard by the Appeal Court must have filed a Notice of Appeal in the High Court that decided the case against which he is appealing. And for that purpose he is required to incorporate in the said Notice of Appeal grounds of appeal which are in conformity with the Rules of Court set out in the Rules.**



In this case, the appellant duly filed a Notice of Appeal in the High Court as required. But as the appellant wanted to contest decision of the trial court upon additional grounds, he sought the leave of the Court below so to do. But as already observed, the amended Notice of Appeal which he ought to have filed incorporating the additional grounds of appeal were not filed. But this additional grounds of appeal were incorporated and argued in the appellant's brief. **Now it is evident that the appellant failed to take the procedural steps required of her following the leave granted to her to file an amended notice of appeal to incorporate the proposed additional grounds of appeal.** The effect of that neglect to file her amended notice of appeal is that those grounds of appeal cannot be argued as was done in the appellant's brief. Indeed, the appellant's brief became incompetent for containing grounds of appeal, which had not been properly incorporated in an Amended Notice of Appeal as ordered by the court. In *Ogbeide v. Onochie* (1988) 1 NWLR 370 at 482, this Court, per Nnaemeka Agu JSC, said:

*"I scarcely need to emphasize that a brief or part thereof based on proposed grounds of appeal is incompetent. See Osinupebi v. Saibu & Ors. (1982) 7 S.C. 104 at pp 110 and 111; Government of Gongola State v. Tukur (No.2) (1987) 2 NWLR. 330. As it is so, it is wrong to go ahead and file a brief based on proposed grounds of appeal, even if, as in this case, counsel gives notice in the brief that leave would be sought and obtained. Steps should have been taken to obtain leave before the respondent's brief was filed on those grounds."*

It follows from what I said above, and the decision of this Court in that regard, that I must hold that the appellant's brief before the Court below was incompetent.

It has been urged in this appeal that the Court below was wrong to have considered, suo motu whether any of the issues raised in the appellant's brief could be said to have been based on any of the original grounds of appeal filed. The contention of the appellant as argued in the appellant's brief suggested that if counsel had been asked to assist the Court, the Court would have been properly assisted to decipher which of

the issues is tied to which of the grounds of appeal. However during the hearing, learned counsel who appeared was only able to suggest that the omnibus ground would have sustained issue 4 in the appellant's brief.

**There is no doubt that this court has said on a number of occasions that although an appeal court is entitled, in its discretion, to take points suo motu if it sees fit to do so, yet that discretion must be exercised sparingly and in exceptional circumstances only. Where the points are so taken the parties must be given the opportunity to address the appeal court before decision on the points is made by the appeal court. See *Kuti & Anor. v. Jibowu & Anor.* (1972) 1 ALL N.L.R. (Part II) p.192; *Salawu Ajao v. Karimu Ashiru & Ors.* (1973) 1 ALL N.L.R. (Part II) p.51 at p.63; *Atanda & Anor. v. Lakanmi* (1974) 1 ALL N.L.R. (Part I) p.168 at p.178; *Kuti v. Balogun* (1978) 1 D L.R.N. 353 at p.357; *Olusanya v. Olusanya* (1983) 15 CNLR. 134 at p.139.**

However, it is manifest that in the instant case, the Court below had first found that the Appellant's brief was incompetent. That should have been the conclusion of the matter, but the court of its own decided to look through the grounds of appeal to see if any of the grounds of appeal could save the appeal having regards to the issue raised. But this was a totally unnecessary basic, and nothing came out of the exercise.

I do not consider that what happened in the Court below can be considered in the light of the principles enshrined in the cases referred to above.

In the result, it is my respectful view that this appeal is devoid of any merit. It is therefore dismissed and the judgment of the Court below is hereby affirmed.

The respondents are awarded costs in the sum of N10,000.00.

**OGWUEGBU JSC**

I have had a preview of the judgment just delivered by my learned brother Ejiwunmi J.S.C. For the reasons given in the judgment, with which I entirely agree, I too will dismiss this appeal.

The appellant filed a motion in the court below under Order 3 rules 4(1) and (16) of the Court of Appeal Rules, 1984 as amended praying for the following orders:

*"(i) Granting the Applicant leave to Amend the Notice of Appeal contained therein additional grounds of Appeal contained in Exhibit 'A' attached to the affidavit in support of this motion.*

*(ii) Granting the applicant enlargement of time within which to file the Appellant's brief in this appeal.*

*(iii) Deeming the brief of argument already filed as properly filed and served."*

The motion is dated 14-4-92. On 25-6-92 the court below granted the appellant/applicant's motion in the following terms:-

*"(i) that leave be and is hereby granted to the appellant/applicant to amend the Notice of Appeal by adding additional grounds of appeal;*

*(ii) that one day extension of time be and is hereby granted to the appellant to file his brief of argument;*

*(iii) that the brief filed be and is hereby deemed duly filed; and*

*(iv) that cost assessed at one hundred Naira (N100.00) be and is hereby awarded to the respondents."*

Exhibit "A" contains nine additional grounds of appeal. Before applying for leave to amend her notice of appeal, the nine additional grounds and five original grounds of appeal had been argued in the appellant's brief of argument. Even though the first prayer of the applicant stated that the additional grounds of appeal contained in the said Exhibit "A" was *"attached to the affidavit in support of the motion,"* the affidavit in support of the motion deposed to by Bayo Adenipekun, a Legal Practitioner did not refer to the Exhibit "A". ( the additional grounds of appeal) nor was the document marked Exhibit "A". The document was in fact not before the court when leave to amend the notice of appeal was granted by the court. A further affidavit was deposed to by the same deponent (Bayo Adenipekun) which would have referred to Exhibit "A" but it did not and the purpose of the further affidavit cannot be gathered from the averments except that it averred that his chambers received the brief of

argument of the respondent on 20-5-92. While the appellant prayed the court to deem the brief of argument already filed as properly filed and served, she did not ask for a similar relief in respect of the amended notice of appeal and she did not file an amended notice of appeal which  
B could have been regularised.

Since the document (Exhibit "A") containing the additional grounds of appeal was not filed, the additional grounds of appeal should not have been argued in the brief. The appellant compounded the matter when formulating the issues for determination in the appeal. The issues  
C formulated encompassed the original as well as the additional grounds of appeal. The issues and the arguments on them were mixed up to the extent that the court below was unable to separate the arguments on the issues based on the original grounds of appeal from those distilled from  
D the additional grounds of appeal. In the result, the court below held that the appellant's brief of argument was incompetent and dismissed the appeal for want of diligent prosecution.

I think the court below was right in dismissing the appeal since  
E there was no brief to support it. See OSINUPEBI V. SAIBU & ORS. (1982) 7 SC. 104 and OGBECHIE V. ONOCHIE (1988) 1 N.W.L.R. (Pt.70) 370.

For these reasons and the fuller reasons contained in the judgment of my learned brother Ejiwunmi, JSC, I also dismiss the appeal and  
F affirm the judgment of the court below. I abide by the order as to costs proposed in the said judgment.

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G **IGUH JSC**

I have had a preview of the judgment just delivered by my learned brother, Ejiwunmi, J.S.C. and I agree with his reasoning and conclusion.

I, too, dismiss this appeal for want of merit and I abide by the  
H order as to costs therein made.

**KATSINA-ALU JSC**

I have had the advantage of reading in draft the judgment just delivered by my learned brother Ejiwunmi, JSC. in this appeal. I entirely agree with it and for the reasons he has given I, too, dismiss this appeal with N10,000.00 costs to the Respondents.

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**KALGO JSC**

I have had the privilege of reading in advance the judgment of my learned brother Ejiwunmi JSC just delivered in this appeal, and I agree with his reasoning and conclusions. I am also of the view that there is no merit in the appeal and it ought to be dismissed.

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The main contention in the appeal is whether the appeal in the Court of Appeal was competent and valid. The Court of Appeal held that the appeal was incompetent and it dismissed it.

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It is common ground that the application of the appellant to amend the notice of appeal in the matter to include additional grounds of appeal was granted and was ordered to file the amended Notice of Appeal. The appellant did not file any amended Notice of Appeal but proceeded to argue the additional grounds in his brief which was duly filed. At the hearing of the appeal, the Court of Appeal was unable to distinguish which issues raised by the appellant in the brief related to which grounds, as only the original grounds of appeal were before the Court, even though the appellant argued both original and additional grounds of appeal in the brief. The Court of Appeal found that the brief was not in compliance with the provisions of Order 3 Rule 2 (5) of the Court of Appeal Rules 1981 as amended, and struck it out as incompetent and dismissed the appeal for want of diligent prosecution. It held, per Salami JCA that:-

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*"This is a mixed grill served and I am of the firm view that it is not the business of the court to shift the chaff from the grains by performing a surgical operation on the appellant's brief to extract argument in respect of the valid grounds from the invalid ones as such an exercising may involve the court in descending into the arena... and of necessity becloud its judgment. The duty of the court is that of an umpire whose*

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*duty in the interest of justice is to tender the rope and not to step into the brawl by exercising argument on good grounds of appeal from bad ones. See Horika Sawmill (Nigeria) Limited V Mary Okojie Hoff (1994) 2 NWLR (Pt.326) 252 at 262 and Nwandika V. Ibakwe (1987) 4 NWLR B (Pt. 67)718."*

I fully agree with the above view as expressed by the Court of Appeal and find that in the circumstances of this case, it was not wrong for that court to proceed to consider the appellant's brief without calling upon him to address that court Makanjuola V Balogun (1989) 3 NWLR C (Pt. 108) 192. This court has on many occasions made it abundantly clear that issues in a brief must relate to the grounds of appeal filed. See Latunde Lajinfin (1989) 3 NWLR(pt.108) 177;OkpalaV Ibeme (1989) 2 NWLR (pt. 102) 208 and that no brief of a party in an appeal should be D based on grounds proposed by that party unless and until those grounds have been duly filed in a notice of appeal. See Ogbechi V Onochie (No 2) (1988) 1 NWLR (pt. 70) 370 at 402.

I therefore find that the appellant's brief in the Court of Appeal E was not in accordance with the rules and was therefore incompetent See Ebueku V Amola (1988) 2 NWLR (pt. 75) 128. It was properly struck out by the Court of Appeal and the appeal properly dismissed for want of diligent prosecution.

F For the above reasons and those fully set out by my learned brother Ejiwunmi JSC in the leading judgment, I also dismiss this appeal and affirm the decision of the Court of Appeal. I award N10,000.00 costs to the respondent.

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