

**SUPREME COURT OF NIGERIA**  
FRIDAY 15TH FEBRUARY, 2002. SC. 245/2000  
**CORAM:- A. B. WALI, E. O. OGWUEGBU,**  
**U. MOHAMMED, S. U. ONU, U. A. KALGO, JJSC**

THOR LIMITED ..... APPELLANT  
AND  
FIRST CITY MERCHANT BANK LTD ..... RESPONDENT

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APPEALS - Right of appeal - 1999 Constitution s. 233(2)(3) - Appeals may be as of right where grounds are of law - Or with leave of court where grounds are of mixed fact and law or of facts (H1)

APPEALS - Grounds - Nature - How determined - Ground is of law where it reveals misunderstanding of law - And is of mixed law and fact - Where it questions resolution of conflicting evidence (H2)

APPEALS - Grounds - Mixed law and fact - Since defendant failed to obtain leave - The grounds are incompetent and liable to be struck out (H3)

APPEALS - Issues - Raised from incompetent grounds - Fate - Such issues are inconsequential - And should be struck out (H4)

**FACTS**

Plaintiff/respondent claimed against defendant/appellant at the High Court of Lagos State the sum of N12, 303,145.19 (twelve million, three hundred and three thousand, one hundred and forty five Naira, Nineteen Kobo), being outstanding debt balance on appellant's account with respondent as at 31st December 1993 in respect of various credit facilities granted to appellant. Respondent also claimed interest on the said sum at the rate of 21% per annum from the 1st of January 1994 till the whole amount outstanding is fully liquidated. This action was commenced under Order 11 of the Lagos State High Court Civil Procedure Rules 1972.

Appellant filed a statement of defence and counter claim against respondent. Appellant claimed the sum of N1,943,000.00 being overpayment made to respondent over the material time, the sum

of US \$150,000.00 and the sum of N2,000 as damages for breach of contract. The trial judge in his ruling refused to grant leave to defend and entered judgment for respondent in the sum of N12,303,145.19 plus the interest. Dissatisfied, appellant filed an appeal at the Court of Appeal, Lagos against the decision of the trial court refusing to grant him leave to defend. The court unanimously dismissed the appeal whereupon appellant has further appealed to the Supreme Court on two grounds of appeal. Respondent has however raised a preliminary objection as to the validity of the grounds of appeal and the appeal itself.

**HELD** (Unanimously dismissing the appeal per **ONU JSC**)

*APPEALS - Right of appeal - 1999 Constitution s. 233(2)(3)*

**1. To further elucidate Section 213 (2) and (3) of the 1979 Constitution (now Section 233 (2) and (3) of the 1999 Constitution), the section gives a party a right of appeal from the decision of the Court of Appeal to the Supreme Court in that by virtue of subsection (2) thereof, a party who is aggrieved by the decision of the Court of Appeal has a right of appeal on grounds of appeal which are of law only. Where, however, the ground or grounds of appeal are not of law alone but of mixed law and fact or fact simpliciter, the right of appeal from the court of appeal to the Supreme Court can only be exercised where the aggrieved party has first sought and obtained the leave of either the Court of Appeal or the Supreme Court.**

**Since the Defendant's counsel in the instant case appears clearly to concede that the appeal was filed without leave, presupposing that the two grounds are of law, it is clear therefore that the appeal was brought under Sub-section (2) of Section 213 (ibid). For the appeal to be competent, the two grounds of appeal must perforce be of law only. Any of these grounds that is not that of law simpliciter, will not support an appeal under Sub-section (2) of section 213 and will therefore be incompetent. (p. 457 B)**

*APPEALS - Grounds - Nature - How determined*

**2. As Eso, JSC had occasion to point out in the case of J. B. Ogbechie & Ors. v. Gabriel Onochie & Ors. (1986) 2 NWLR (Part 23) 484 at page 491:**

***“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 grounds 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 requires 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.”***  
(Underlining is for emphasis.)

On determination of whether a ground of appeal is a ground of law or of mixed law and fact or fact.

Though ground one postulates that it is a ground of law, a thorough examination of it and its particulars show, in my opinion, that the complaint of the Defendant is that the Plaintiff’s case was weak and defective and could not sustain the claim on the Writ. See also the paragraphs of the Affidavit of Merits above. Certainly, a decision on this issue would have to take account of facts relied on by the Plaintiff in support of its claim. Having taken cognizance of those facts and whether these facts as alleged by the plaintiff are strong enough to entitle them to judgment, I take the view that the ground is one of mixed law and fact. After all, the mere christening of a ground of appeal as a ground of law does not make it necessarily so. (p. 457 F)

*APPEALS - Grounds - Mixed law and fact*

**3. The particulars of this ground of appeal on a careful and thorough examination also clearly demonstrate that the complaint is against the non-recognition of the facts as presented as being enough for the Defendant to be granted leave to defend. Unfortunately, however, they do not. I am therefore of the view that the Defendant having not obtained leave to ar-**

***gue this ground of appeal, it is accordingly declared incompetent and liable to be struck out.*** (p. 460 A)

*APPEALS - Issues - Raised from incompetent grounds - Fate*

**4. It is trite that where a ground of appeal is incompetent, any issue for determination based on such incompetent ground of appeal to which a concession was indeed made during hearing, goes to no issue and should be struck out.** (p. 460 B)

## C NOTABLE POINTS OF INTEREST

### **WALI JSC**

#### ***1. When a fact is an issue of law***

In a situation like this one it is only when the facts are undisputed and there is a wrong application of the law to such facts will the issue be of law. (p. 462 H)

### **KALGO JSC**

#### ***2. Failure to comply with S. 233(2) 1999 Constitution***

I might also add in the circumstances of this case, that the fact that the respondent filed his brief of argument and all other appeal papers properly does not provide a cure for the failure to comply with the provisions of S. 233 (3) of the 1999 Constitution. (p. 466 B)

## F **REPRESENTATION**

C. A. Candide-Johnson Esq. with F. A. Dalley Esq. for the Appellant  
Bambo Adesanya Esq. for the Respondent

### **CASES REFERRED TO**

- G *Mclardy v. Slateum* (1890) 24 QBD 504  
*Nishizawa Ltd. v. Stinchand N. Jetwani* (1984) 12 SC 234  
*Macaulay v. NAL Merchant Bank Ltd* (1990) 4 NWLR (Pt. 144) 283  
*Metal Construction W.A. Ltd v. Migliore* (1990) 1 NWLR (Pt. 126) 299  
H *Nwadike v. Ibekwe* (1987) 4 NWLR (Pt. 67) 718  
*Coker v. U.B.A PLC* (1997) 2 NWLR (Pt. 490) 641  
*Ogbechie v. Onochie* (1986) 2 NWLR (Pt. 23) 484  
*I.A.I. Ltd v. Chika Bros. Ltd.* (1987) 4 NWLR (Pt. 63) 92

Nigerian National Supply Co. Ltd v. Establishment Sima of Vaduz (1990) 7 NWLR (Pt. 164) 526

Agbaka v. Amadi (1998) 11 NWLR (Pt. 572) 16

Maigoro v. Garba (1999) 10 NWLR (Pt. 624) 555

Comex Ltd. v. N.B.B. Ltd (1997) 3 NWLR (Pt. 496) 625

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### **STATUTES & RULES REFERRED TO**

Constitution of Federal Republic of Nigeria 1999, s. 233(2)(3)

High Court of Lagos State (Civil Procedure) Rules 1972, O. 10 rr. 1 and 2

Supreme Court Rules 1985, O. 6 r. 2(1)

C

### **LEAD JUDGMENT BY ONU JSC**

In the High Court of Lagos State holden at Lagos, summary judgment was entered on 9th December, 1994 against the Appellant D who was Defendant (per A. Ade Alabi, J.) For N12,303,145.19 plus interest and costs under Order 10 (now Order 11) of the High Court (Civil Procedure) Rules, 1972. Briefly put, the Respondent (hereinafter referred to as the Plaintiff) claimed against the Appellant (in the rest of this judgment referred to as Defendant) the following reliefs: E

*“(a) The sum of N12,303,145.19 (Twelve Million, Three Hundred and Three Thousand, one hundred and forty Five Naira, Nineteen Kobo), being outstanding debit balance on the Defendant’s Account No. 50494001820 with the Plaintiff as at 31st of December, 1993, in respect of various credit facilities (Banker’s Acceptance, Revolving Credit and Overdraft granted by the Plaintiff to the Defendant between December, 1987 and February, 1989. F*

*(b) Interest on the said sum at the rate of 21% per annum for the 1st of January, 1994 until the whole amount outstanding is G fully liquidated. The Defendant can pay the amount claimed, the interest thereon and costs.”*

The Defendant on its part filed a Statement of Defence and Counterclaim and by Paragraphs 2-4 of the latter, the Defendant claimed against the Plaintiff as follows: H

*“2. The Defendant counter-claims against the Plaintiff the sum of N1,943,000.00 being overpayments made by the Defendants to the plaintiff over the material time.*

*3. The sum of US \$150,000.00 deposited by Decacia Inter-*

*national Limited as Red Letter portion of letters of credit issued in favour of the Defendant.*

*4. The Sum of N2,000.00 as damages for breach of contract to wit the unlawful and unilateral suspension.”*

By summons for judgment brought pursuant to Order 10 Rules 1 and 2 of the High Court of Lagos State (Civil Procedure) Rules 1972, the plaintiff sought an order of the Lower Court in the terms set out hereinbefore and attached thereto an affidavit of 38 paragraphs against the Defendants filed on 4th May 1994 with no exhibits attached termed “Affidavit of Merits” salient among which are:

*“1. That I am the Chief Executive Officer of the Defendant company and that I make this oath with all authority from facts in my personal knowledge.*

*2. That at all material times I did deal with the Plaintiff here in respect of the transactions that are the subject of this action.*

*3. That I do not know Mr. Ademola Bakre, do not believe that he is or was an employee or other officer of the plaintiff and he is certainly unable to swear positively to the facts related in his affidavit dated 8th April, 1994.*

*4. That I verify the facts averred in the Defence filed for the Defendant on 8th April, 1994.*

*5. That the alleged indebtedness of the Defendant arises from a series of credit arrangements each with distinct and different terms as to interest rate, repayment date, repayment source and method and all were fully collateralized by security in excess of the repayments due which security was easily realisable and at all times within the full control of the Plaintiff.*

*6. That the facility of N1.2 Million granted on 31/12/94 was a temporary cash advance against the Defendants domiciliary account balance of Pound Sterling 169,600 then valued at N1,272,000.00*

*7. This facility was to be repaid latest by 15th March, 1988 and effected by the recovery of the said foreign exchange to which the Plaintiff demanded and obtained a letter of set off dated 1st January, 1988.*

*8. That the Plaintiff did in fact realise this balance at its own convenience and in any event interest on this facility ceased to ac-*

*crue on the said 15th March, 1988 despite any default by the Plan to realise it.*

9. That the said credit was augmented under the terms of a letter of offer dated 12th February, 1988 by N4 Million secured against security provided to the Plaintiff as is requested by Decacia International Limited its long-standing customer and trading partner. B

10. That this facility was to be repaid from disposal of export proceeds receivable and received by the Plaintiff and disposed of by them accordingly from time to time.

11. That accordingly, it was a condition of the facility that a sizeable portion of the Defendants business with Decacia Limited would be channeled through the Plaintiff bank and this was a consideration accruing to the Plaintiff. C

12. That all times the business of Decacia International was crucial to the relations with the Defendant and the Defendant was treated accordingly as an agent of Decacia International at least to the extent that any facility of credit required the approval and support of Decacia International Limited. D

13. That this credit was available for 12 months and was never expressly or other wise renewed. E

15. That at the end of twelve months the facility was due and recoverable by the Plaintiff at which point interest and other charge due thereunder and calculated up to the due date ceased.

17. That at the expiry thereof by the latest, the Plaintiff recovered the said collateral which was at all times in its possession and control. F

19 That any sums outstanding due apart from the above sums was secured as indicated by the off shore primary obligations of Decacia International Limited. G

21. That all offers of alternative security in excess of any outstanding were refused by the plaintiff who meanwhile withdrew unilaterally from the Defendant the right to utilize such facilities.

22. This action was unreasonable and unfair and was in breach of the contracts under which the facilities were granted. H

23. That the Plaintiff refused to call in the guarantee of Decacia International and continued to negotiate with it, the credits of the Defendant without consulting the Defendant and accordingly continued to rely on the illegal off shore guarantee to sustain its continuing

*debts to the Defendant on the frozen accounts.*

24. That under secret arrangements made with Decacia International whose business it did not wish to loose, the Plaintiff extended the maturity of the Defendants letters of credit and reached with Decacia binding agreements for the full and final settlement of certain credits including the letter of credit No. 890284 upon which the plaintiff continued to debit charges and interest against the Defendant's account.

25. That in respect of interest, the Plaintiff continued to debit and capitalise interest on the Defendant's account while the account was frozen.

26. The Plaintiff also capitalised interest in respect of facilities that had been paid or recovered.

27. That the Plaintiff capitalised interest monthly before the expiry of facilities over a period when interest was not overdue.

28. That interest was calculated uniformly on the entire purported debit balance and the capitalization was illegal and contrary to banking practice or the agreement inter parties.

29. That several debits on the Defendant's account were purely unauthorized and were deliberate manipulations created to deceive the Central Bank of Nigeria.

30. That the Defendant relied on Plaintiff's advise in its response to the new guidelines from the Central Bank of Nigeria by offering new security yet the Plaintiff received the proposals and did not act on them while it debited the Defendant nearly N400,000.00 which it alleged was a penalty imposed upon it by the Central Bank upon the Plaintiff's own failure.

31. That the bankers acceptances debited to the Defendant were further manipulations not authorised by the Defendant whereby the Plaintiff funded its own credit by short term facilities held by itself and charged the Defendant for these without authority.

32. That the Plaintiff debited the Defendant for losses due to fluctuations of the value of either or both the Naira and foreign exchange which were incurred by default of the Plaintiff to exercise its right of set off.

33. The Plaintiff charged the Defendant several duplicated and imaginary sums in order to regularise its account with the Central Bank of Nigeria.



34. *That the Plaintiff without the knowledge or consent of the defendant manipulated or debited the Defendant's account against transaction to which it knew nothing about.*

35. *That it was later discovered by the Defendant that the Plaintiff was fronting with the Defendant's account in order to regularise its own account situation with the Central Bank of Nigeria.*

37. *That the Defendant has a valid defence to this action and a counter claim based on breaches by the Plaintiff of the credit contracts, which it is ready and willing to prosecute."*

The underlining above is mine and it is to underscore how formidable and unassailable the plaintiff's case was vis a vis the Defendant's Defence and Counterclaim.

Thus, by his earlier Ruling delivered on 9th of December, 1994 the learned trial Judge refused leave to defend and entered judgment for the Plaintiff by stating as follows:

*"Accordingly, an order is hereby made empowering the Plaintiff to enter judgment in the sum of N12,303,145.19. The Plaintiff also claimed interest at the rate of 21% per annum from the 1st of January, 1994 until the final liquidation of the whole debt with cost. It is obvious to me that the Plaintiff in this case is being kept out of money, which ought to have been paid to her. On the strength of the principle established in the case of N.G.S.C. Limited v. N.P.A. (1990) 1 NWLR (Part 129) page 741 at 748, I hold that the Plaintiff is entitled to interest at the rate of 10% per annum until judgment debt is finally liquidated. Costs assessed at N2,000.00 is awarded in favour of the Plaintiff."*

Aggrieved by the said decision, the Defendant filed a Notice of Appeal dated 17th January, 1995 containing two grounds to the Court of Appeal. The lone issue formulated from those two grounds for that Court's determination was:

*Whether the Defendant was entitled to be let in to defend the claim of the Plaintiff on the basis of the "Affidavit of Merit" and the Statement of Defence before the Court.*

After giving due consideration to the issues raised the court (per Oguntade, Aderemi and Nzeako, JJCA) held as follows:

*"In the case of Nishizawa Ltd. v. Stinchand N. Jethwani (1984) 12 SC 234, these principle were well examined and determined. In that case, one of the issues relevant to this appeal which the Supreme*

*Court had to determine was:*

*“Whether the Courts below were right in holding that the Defendant had duly established that he has a good defence to the action on the merits or that he had disclosed such facts as may be deemed sufficient to entitle him to defend the action.”*

B *One principle relevant to this appeal and which came out glaringly is that what the trial Judge will be looking for at that stage of the proceedings before him when considering a summons for summary judgment under Order 10, is whether the Defendant has disclosed by his affidavit such facts as may be deemed sufficient to entitle him to defend the action. What are deemed facts sufficient to entitle him to defend the action depend on the circumstances of the case. If, for example, the Defendant pleads facts which are grounded in law, and the issue of law is substantial, the Judge hearing the summons for judgment will not readily grant leave to the Plaintiff to enter judgment. He will let in the Defendant to defend the suit. If on the other, the facts seem to ground a defence, which is frivolous, or worthless or as the Courts sometimes describe it, “a sham” the Court will surely grant the Plaintiff leave to enter judgment and refuse to let in the Defendant. See *Mclardy v. Slateum* (1890) 24 QBD 504, *Nishizawa Ltd. v. Stinchard N. Jetwani* (supra). Also *Macaulay v. NAL Merchant Bank Ltd.* (1990) 4 NWLR (Part 144) 283. To pin the principles further down, what a trial judge looks for under the Order 10 procedure are facts, which raise triable issues. See *Nishizawa Ltd. case* (supra)”*

Applying the principles identified above, the lower court concluded in the following words:

G *“Was the learned trial Judge wrong in the light of the above? I think not. The learned trial Judge cannot be faulted in his consideration of the materials before him for each party-whether the Plaintiff complied with the Rules and properly put forward their cause of action under Rule 10, on the part of the Defendant, whether it complied with the rules and satisfied the requirements in decided cases by the Supreme Court by their Statement of Defence and Affidavit of Merit. I affirm that the Plaintiff (sic) duly complied with Order 10 and the principles I earlier set out.”*

It is against these core findings that the Defendant has appealed to this Court on a Notice of Appeal dated 25th day of Janu-

ary, 2000 containing two grounds, and the issues therein, to which the Plaintiff herein has raised a preliminary objection as to their validity as well as the appeal itself. The ground for this objection as demonstrated, is that the two grounds of appeal are at best grounds of mixed law and fact, for which neither the requisite leave of the lower court nor of this Court was obtained for the filing of the appeal. **To** **further elucidate Section 213 (2) and (3) of the 1979 Constitution (now Section 233 (2) and (3) of the 1999 Constitution)** **the section gives a party a right of appeal from the decision of the Court of Appeal to the Supreme Court in that by virtue of subsection (2) thereof, a party who is aggrieved by the decision of the Court of Appeal has a right of appeal on grounds of appeal which are of law only. Where, however, the ground or grounds of appeal are not of law alone but of mixed law and fact or fact simpliciter, the right of appeal from the court of appeal to the Supreme Court can only be exercised where the aggrieved party has first sought and obtained the leave of either the Court of Appeal or the Supreme Court. Since the Defendant's counsel in the instant case appears clearly to concede that the appeal was filed without leave, presupposing that the two grounds are of law, it is clear therefore that the appeal was brought under Sub-section (2) of Section 213 (ibid). For the appeal to be competent, the two grounds of appeal must perforce be of law only. Any of these grounds that is not that of law simpliciter, will not support an appeal under Sub-section (2) of section 213 and will therefore be incompetent.**

**As Eso, JSC had occasion to point out in the case of J. B. Ogbechie & Ors. v. Gabriel Onochie & Ors. (1986) 2 NWLR (Part 23) 484 at page 491:**

**"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 grounds 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 requires 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.***” (Underlining is for emphasis.) See also *Comex Ltd. v. N.A.B. Ltd.* (1997) 3 NWLR (part 496) 625 at page 658, paragraphs A - C (per Ogundare, JSC).

B ***On determination of whether a ground of appeal is a ground of law or of mixed law and fact or fact.*** See also the case of *Metal Construction (W.A.) Ltd. v. Migliore* (1990) 1 NWLR (Part 126) 299 and *Nwadike v. Ibekwe* (1987) 4 NWLR (Part 67) 718.

C In the light of my observation above I now proceed to the two grounds in the instant appeal, which complain as follows:

“GROUND ONE

D *The Honourable Justices erred in law when they held the Plaintiff was entitled to judgment on its application of summary judgment.*

*Particulars*

(i) *The Honourable Justices held (at paragraph 11) “that there is no doubt that the plaintiff’s application had been properly constituted having satisfied the requirement in the Order 10 procedure having verified the cause of action, the amount claimed and stating in their believe (sic) that there is no defence to the action.”*

(ii) *Mere compliance with the form or technicalities of Order 10 is not sufficient to discharge the plaintiff’s onus in order 10 procedure.*

F (iii) *The Plaintiff must “verify” which is to prove at least prima facie, his right to judgment and the court has no power to grant judgment not established by the Plaintiff whether the defendant filed an affidavit or not.*

G (iv) *The case of the Plaintiff was technically and evidently weak and did not show a prima facie right to judgment.*

(v) *The Defendant’s argument went deeply to falsifying the basis of the claim and these were rather critical to the discretion to give judgment.*

H (vi) *The Plaintiff’s own further affidavit falsified the basis for the claim and supported the Defendant’s objection.*

GROUND TWO

*The Honourable Justice misdirected themselves when they held that the Defendant had not placed before the Lower Court,*

sufficient facts to enable the Defendants obtain leave to defend.

*Particulars;*

(i) *The burden of establishing or proving a case is on the Plaintiff who asserts, and the Defendant may present minimal materials sufficient to contradict the affidavit evidence of the Plaintiff, if the Plaintiff has not proved the case.*

B

(ii) *The Defendant's affidavit contradicted the Plaintiff in material and triable particulars and the law does not require evidence such as would be tendered at the trial.*

(iii) *The learned Justices failed to take note of the key issues that since the Plaintiff/Respondent at all times had exclusive possession of collateral, this was not simply a matter of loan granted but the plaintiff had the onus of explaining the utilization of the collateral.*

C

(iv) *The Justices failed to consider the impact of interlocutory applications as raising critical inquiries, which undermined the Plaintiff's case.*

D

(v) *The Defendants raised preliminary technicalities, which the Justices failed to resolve and which were fundamental to the case made."*

**Though ground one postulates that it is a ground of law, a thorough examination of it and its particulars show, in my opinion, that the complaint of the Defendant is that the Plaintiff's case was weak and defective and could not sustain the claim on the Writ. See also the paragraphs of the Affidavit of Merits above. Certainly, a decision on this issue would have to take account of facts relied on by the Plaintiff in support of its claim. Having taken cognizance of those facts and whether these facts as alleged by the plaintiff are strong enough to entitle them to judgment, I take the view that the ground is one of mixed law and fact. See Coker v. U.B.A PLC (1997) 2 NWLR (Part 490) 641 at 664 (D); Ogbechie & Ors. v. Onochie & Ors (1986) 2 NWLR (Part 23) 484 at 487; I.A.I. Ltd v. Chika Bros. Ltd. (1987) 4 NWLR (part 63) 92 and Comex Ltd. v. N.A.B. Ltd (supra). After all, the mere christening of a ground of appeal as a ground of law does not make it necessarily so.**

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Ground two of the grounds of appeal states:

*"The Honourable Justices misdirected themselves when they held that the Defendant had not placed before the Court sufficient*

*facts to enable the Defendant obtain leave to defend.”*

***The particulars of this ground of appeal on a careful and thorough examination also clearly demonstrate that the complaint is against the non-recognition of the facts as presented as being enough for the Defendant to be granted leave to defend. Unfortunately, however, they do not. I am therefore of the view that the Defendant having not obtained leave to argue this ground of appeal, it is accordingly declared incompetent and liable to be struck out.*** Vide Maigoro v. Garba (1999) 10 NWLR (Part 624) 555 at 568. ***It is trite that where a ground of appeal is incompetent, any issue for determination based on such incompetent ground of appeal to which a concession was indeed made during hearing, goes to no issue and should be struck out.*** See Agbaka v. Amadi (1998) 11 NWLR (Part 572) 16 at 24 E-F. I accordingly have no hesitation in striking out the two issues for determination identified and argued in the Defendant’s Brief as incompetent. The two Grounds of appeal and issues for Determination being incompetent, the appeal itself is incompetent.

Accordingly, I strike out this appeal and award N10,000.00 costs to the Plaintiff.

### **WALI JSC**

Learned counsel for the Respondent raised the preliminary objection in his brief of argument as regards the competence of the appeal in that the two grounds of appeal filed and from which the two issues formulated and argued in the appellant’s brief are at best of mixed law and fact which were filed without leave of the court of Appeal or this Court. Learned counsel referred to section 233(3) of the 1999 constitution and some decisions of this Court on the said section. He urged that the appeal be struck out.

In the Reply Brief filed by learned counsel for the appellant, he conceded that ground 2 in the Notice of Appeal is at least a ground of mixed law and fact but that “the plaintiff/respondent having assumed the validity of the appeal, has not been prejudiced;” that :-

*“(vi) The plaintiff (sic) [defendant/appellant] will at or before the hearing of the appeal seek (sic) extension of time within which to appeal, leave to appeal. The Plaintiff will urged that the issues raised*

*are substantial and of general importance, upon which legal practice will benefit from the considered opinion of this highest court. A separate Applicants brief and supporting papers has been filed in compliance with Order 6 rule 2, Supreme Court Rules.*

*(vii) In light of the fact that briefs are concluded the Plaintiff will urge this Honourable Court respectfully, to deem the appeal and all other papers as properly filed.”*

The right of appeal to the Supreme Court against the decision of the Court of Appeal as of right is provided under section 233(2) of the 1999 Constitution which reads as follows:

*“(2) An appeal shall lie from decision of the Court of Appeal to the Supreme Court as of right in the following cases:*

*(a) where the ground of appeal involves questions of law alone, decisions in any civil or criminal proceedings before the Court of Appeal;*

*(b) decisions in any civil or criminal proceedings on questions as to the interpretation or application of this Constitution;*

*(c) decisions in any civil or criminal proceedings on questions as to whether any of the provisions of Chapter IV of this Constitution has been, is being or is likely to be, contravened in relations to any person;*

*(d) decisions in any criminal proceedings in which any person has been sentenced to death by the Court of Appeal or in which the Court of Appeal has affirmed a sentence of death imposed by any other court;*

*(e) decisions on any person-*

*(i) whether any person has been validly elected to the office of President or Vice President under this Constitution,*

*(ii) whether the term of office of President or Vice president has ceased,*

*(iii) whether the office of president or Vice president has become vacant; and*

*(f) such other cases as may be prescribed by an Act of the National Assembly.*

Other than as provided in sub-section 2 of section 233 above, the National Assembly has not made any law enlarging the scope of the right of appeal as of right.

In all other cases the appeal must be with either the leave of

the Court of Appeal or the Supreme Court as the case may be, as provided in section 233(3) of the 1999 constitution which also reads:

B “3. Subject to the provisions of subsection (2) of this section an appeal shall lie from the decisions of the Court of Appeal to the Supreme Court with the leave of the Court of Appeal or the Supreme Court.”

C As I have earlier stated, learned counsel for the appellant has conceded ground (2) of the Notice of Appeal to be at least a ground of mixed law and fact and filed in contravention of section 233(3) of the 1999 Constitution. The other ground of appeal which is ground I reads as follows with its particulars:

“GROUND ONE : The Honourable Justices erred in law when they held the Plaintiff was entitled to judgment on its application of summary judgment.

D Particulars

(i) The Honourable Justices held (at paragraph 11) “that there is no doubt that the plaintiff’s application had been properly constituted having satisfied the requirement in the Order 10 procedure having verified the cause of action, the amount claimed and stating E in their believe that there is no defence to the action.

(ii) Mere compliance with the form or technicalities of Order 10 is not sufficient to discharge the plaintiff’s onus in order 10 procedure.

F (iii) The Plaintiff must “verify” which is to prove at least prima facie, his right to judgment and the court has no power to grant judgment not established by the Plaintiff whether the defendant filed an affidavit or not.

G (iv) The case of the Plaintiff was technically and evidently weak and did not show a prima facie right to judgment.

(v) The Defendant’s argument went deeply to falsifying the basis of the claim and these were rather critical to the discretion to give judgment.”

H Looking at the particulars provided in support of this ground, one cannot reach the conclusion that the facts involved in the case and upon which both the trial court and the Court of Appeal relied in giving judgment to the respondent are undisputed. Particulars (iii) (iv) and (v) will in my humble view justify and support the conclusion that the facts relied on by the courts below are not undisputed. In a



situation like this one it is only when the facts are undisputed and there is a wrong application of the law to such facts will the issue be of law. See METAL CONSTRUCTION (W.A.) LTD v. MIGLIORE (1990) 1 NWLR (PT. 126) 299; NWADIKE v. IBEKWE (1987) 4 NWLR (PT. 67) 718, at 744-745 and COMEX LTD. v. N.B.B. LTD (1997) NWLR (Pt. 496) 643. Having said as above, I have no hesitation in coming to the conclusion that ground I of the grounds of Appeal is also of mixed law and fact. It is therefore incompetent having been filed against the provision of section 233(3) of the 1999 Constitution.

As the two grounds of appeal filed in support of the appeal are incompetent having been file in contravention of section 233(3) of the Constitution and Order 6 rule 2(1) of the Supreme Court Rules 1985 (as amended), I come to the conclusion that it is incompetent and I hereby accordingly strike it out with N10,000.00 costs to the Respondents.

It is for these reasons that I agree with the lead judgment of my learned brother, Onu JSC which I have had the privilege of reading before now, that the appeal is incompetent.

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**OGWUEGBU JSC**

I had a preview of the judgment just delivered by my learned brother Onu, JSC. I agree with his reasoning and conclusion that the two grounds of appeal are of mixed law and fact and the appellant not having applied or obtained leave to file and argue them, the grounds are incompetent. The issues for determination distilled from them are also incompetent. I therefore strike out the appeal.

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**MOHAMMED JSC**

I have had a preview of the judgment of my learned brother, Onu, JSC, and I agree with him that the two grounds of appeal filed by the appellant are not grounds of law. Since no leave of the lower court or this court had been obtained before filing the grounds they are incompetent and the issues raised on them are also incompetent. The appeal is therefore incompetent and it is struck out. I award N10,000.00 to respondent.

**KALGO JSC**

I have had the privilege of reading before now, the judgment of my learned brother Onu JSC delivered in this appeal. I agree entirely with his reasoning and conclusion for striking out the appeal.

This case was decided on the provisions of the Order 10 of the High Court of Lagos (Civil Procedure) Rules 1972, which deals with summary judgments in that High Court. The appellant was the defendant at the trial court and his application for leave to defend the action failed in that court. Summary judgment was given in favour of the respondent under the Order 10 procedure. He appealed to the Court of Appeal which after hearing the appeal dismissed it and so he appealed to this court. In his notice of appeal to this court he filed only 2 grounds which without particulars read thus:

*“1. The Honourable Justices erred in law when they held the Plaintiff was entitled to judgment on its application of summary judgment.*

*2. The Honourable Justices misdirected themselves when they held that the Defendant had not placed before the Court sufficient facts to enable the Defendant obtain leave to defend.”*

In his brief of argument on pages 5-6, the respondent raised a preliminary objection to the validity of the two grounds of appeal. His objection was to the effect that the two grounds are at best ground of mixed law and fact for which the leave of the Court of Appeal or this court must be obtained before filing them. There was no such leave had and obtained before the appeal was filed, according to the learned counsel in his brief. Learned counsel therefore submitted in the brief that the two grounds are incompetent and the issues for determination raised from them go to no issue. He urged the court, in the brief, to hold that the two grounds of appeal and the issues there-from are incompetent and to strike out the appeal.

In his reply brief, the learned counsel for the appellant had this to say about the preliminary objection:-

*“(i) The plaintiff concedes that one or more of its grounds of appeal may be of mixed law and facts. It is a failure of counsel that leave was not sought even out of abundance of caution, but plaintiff having assumed the validity of the appeal has not been prejudiced.*

*(ii) Respectfully, the plaintiff will at or before the hearing of the appeal seek extension of time within which to appeal, leave to*

*appeal. The Plaintiff will urge that the issues raised are substantial and of general importance, upon which legal practice will benefit from the considered opinion of this highest court.*

*(iii) In light of the fact that briefs are concluded the Plaintiff will urge this Honourable Court respectfully, to deem the appeal and all other papers as properly filed.”* B

At the hearing of the appeal learned counsel for the parties adopted and relied upon their respective briefs including the reply brief and did not advance any argument on the preliminary objection. This means that they have adopted and relied on their respective briefs on that issue too. C

Looking at what the learned counsel for the appellant said in his reply brief on the preliminary objection in item (1) above, it is clear that he has conceded that “one or more” of his grounds of appeal are of mixed law and fact. That is why in item (ii) therefore, D he expressed his intention to apply to this court, at the hearing of the appeal, for leave to appeal and extension of time within which to appeal. It is pertinent to observe however that despite his admission that the grounds of appeal were of mixed law and fact, he did not at the hearing move the court for leave to appeal but only adopted his E brief and the reply brief. Learned appellant’s counsel also seems to have the impression that the mere fact that the briefs were concluded by the parties before the preliminary objection was raised confirmed that the respondent has assumed the validity of the appeal itself and F was not prejudiced. Even if that is so, it will not ipso facto validate the appeal.

With due respect to the learned counsel for the appellant it goes without saying that all appeals to this court must be in accordance with and in full compliance with the provisions of section 233(3) G of the Constitution of Federal Republic of Nigeria 1999, i.e. where the ground of appeal involves questions of law alone or where the court itself grants leave to argue the grounds in the appeal. I have carefully examined the 2 grounds of appeal filed by the appellant in this appeal together with their particulars and I agree with the submission of the learned counsel for the respondent that they are at H most grounds of mixed law and fact. This confirms what the appellant himself admitted to in the reply brief. I have also observed that no where on the record was it shown that leave to file such grounds

was obtained and the appellant did not say so himself. It is also well settled that the fact that a party coins his ground of appeal as a ground of law when in fact it is a ground of fact, does not make it one of law.

See *Nigerian National Supply Co. Limited v. Establishment Sima of Vaduz* (1990) 7 NWLR (pt. 164) 526 *Metal Construction Ltd v.*

B *Migliore* (1990) 1 NWLR (pt. 126) 299; *Nwadike v. Ibekwe* (1987) 4 NWLR (pt 67) 718; *Ogbechie v. Onochie* (1986) 2 NWLR (pt. 23)

484. I might also add in the circumstances of this case, that the fact that the respondent filed his brief of argument and all other appeal

C papers properly does not provide a cure for the failure to comply with the provisions of S. 233 (3) of the 1999 Constitution.

From what I said above and the more detailed reasons given by my Lord Onu JSC in the leading judgment, I find that the appellant's grounds of appeal and the issues raised from them are incompetent.

D As there cannot be a valid appeal without grounds of appeal, the appeal of the appellant must be and is hereby struck out. I abide by the orders of costs made in the leading judgment.

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