

SUPREME COURT OF NIGERIA
FRIDAY 22ND MARCH, 2002. SC. 221/2001
CORAM:- S. M. A. BELGORE, E. O. OGWUEGBU,
U. MOHAMMED, S. O. UWAIFO,
A. O. EJIWUNMI, JJSC

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| 1. CENTRAL BANK OF NIGERIA | |
| 2. MR. SAM INEGBENSUN | APPELLANTS |
| AND | |
| 1. AITE OKOJIE (Practicing as
Aite Okojie's Chambers) | |
| 2. THE INSPECTOR-GENERAL
OF POLICE | |
| 3. MR. S.G. EHINDERO (CP) | |
| 4. MR. MONDAY ETIM (ASP) | RESPONDENTS |
| 5. MR. EMMANUEL ETIM
UDUBOI (CSP) | |
| 6. MR. WAHEED OLUSEGUN
KASSIM (CP) | |

APPEALS - Competence - Grounds - Mixed law & facts - By s.233(3)
1999 Constitution - Leave is required to file such grounds - Other-
wise the appeal is incompetent (H1)

FACTS

Plaintiff/1st respondent sued defendants/appellants at the Federal High Court, Lagos for unlawful arrest, unlawful detention, malicious prosecution and abuse of legal process. He was given judgment and awarded N6.5 million as exemplary and general damages. Dissatisfied, appellants/applicants appealed to the Court of Appeal, Lagos Division. On his own part, 1st respondent brought an application for leave to amend his statement of claim in line with the evidence already given which was said to be uncontroverted and acted upon by the trial court.

The court granted the application to amend in terms of the motion papers in the exercise of its discretionary power. Dissatisfied, appellants appealed to Supreme Court against the order of the Court of Appeal granting the application. Without obtaining the leave of

either the Court of Appeal or Supreme Court, appellants filed application seeking inter alia, to compile the record of appeal and for a stay of proceedings at the Court of Appeal.

HELD (Unanimously striking out the application per **BELGORE JSC**)

APPEALS - Competence

1. Against this application is the 1st respondent's counter affidavit deposing that the appeal is interlocutory in that Court of Appeal granted discretionary order for respondent to amend statement of claim in line with evidence before trial High Court. In that case leave ought to have been obtained to appeal to this court either from Court of Appeal or from this court. As no leave was obtained the appeal is incompetent as it offends S.233 (3) of the Constitution of the Federal Republic of Nigeria, 1999. Thus, there was a preliminary objection to the appeal filed in this court. The Constitution of 1999 in section 233 is clear as to what right of appeal exists especially in subsection 2 thereof. In respect of appeal on grounds other than that of law or mixed law and fact, subsection 3 thereof applies. The grounds of appeal in this instance appeal are clearly not of law but of mixed law and facts, and no leave having been obtained to file them, the appeal contravenes S.233 (3) of the Constitution and it is therefore incompetent.
(p. 540 F)

NOTABLE POINTS OF INTEREST

UWAIFO JSC

1. Vague ground of appeal – Instance of

The ground of appeal in question is supposed to be against the ruling in which the court below gave leave to make some amendment more or less of a clerical nature. I have no hesitation in agreeing with Mr. Okojie's preliminary objection that the ground of appeal is vague. Vagueness of a ground of appeal may arise where it is couched in a manner which does not provide any explicit standard for its being understood, or when what is stated is so uncertain that it is not sus-

ceptible of being understood. It may also be considered vague when the complaint is not defined in relation to the subject or it is not particularized, or the particulars are clearly irrelevant. (p. 544 G)

2. Exercise of discretion – Basis

A discretion is exercisable not on the mere figment of the person doing so but upon facts or circumstances necessary for the proper exercise of that discretion. This is a well established principle. Hence it is the law that a discretion should be exercised judicially and judiciously, i.e. reasonably, in the sense that relevant matters are taken into consideration while extraneous or irrelevant matters are avoided and a decision which suits the occasion is arrived at. (p. 545 B)

REPRESENTATION

Chief B. Aluko-Olokun, SAN, with Simon Nnadi, Esq., for the Appellants

Aite Okojie, in person C. I. Okpoko (Legal Officer, Federal Ministry of Justice), for the Respondents

STATUTES & RULES REFERRED TO

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

Supreme Court Act Cap 424 LFN 1990, s. 21(2)

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

LEAD RULING BY BELGORE JSC

This is an application by the appellants/applicants praying for:

i. Waiver of the Rules of this court so that documents which the applicants compiled be used for the purpose of the appeal in this court.

ii. Further proceedings in Court of Appeal in the appeal No. CA/L/121/1999 be stayed pending the hearing of the appeal in this court.

iii. Abridgment of time to file parties brief of argument.

iv. Accelerated hearing of the appeal in this court.

The application is supported by an affidavit and also an affidavit of verification of documents. It is however pertinent to set out the reasons deposed to in the affidavit in support of the application which is as follows:

AFFIDAVIT IN SUPPORT

"I, Tumi Aluko-Olokun, male, Christian, Nigerian and a legal practitioner of No 5 Lokoja Road, Kaduna do hereby make oath and state as follows:

- 1. That I am one of the counsel in the law firm of B. Aluko-Olokun & Co., solicitors for the appellant in this case.*
- 2. That I am conversant with the facts I deposed to herein by virtue of my aforementioned position.*
- 3. The appellant has appealed against a decision of the Court of Appeal sitting in Lagos. It is an interlocutory appeal.*
- 4. The appellant has compiled the record of appeal. A copy of the record of appeal compiled by the appellant is exhibited hereto and marked as exhibit A.*
- 5. Hearing has not commenced in respect of the substantive appeal in the Court of Appeal.*
- 6. If this appeal succeeds on the issues raised therein the time of the court and parties and the expenses that will be incurred by parties in prosecuting the action will be greatly reduced.*
- 7. If further proceedings in the Court of Appeal are not stayed and the Court of Appeal proceeds to hear and determine, the appeal before the appeal in the Supreme Court is determined irreparable injury will be done to the case of the appellant before the Court of Appeal and miscarriage of justice will be caused to the appellants.*
- 8. It is therefore proper and just to grant the application for stay of the proceedings of the Court of Appeal pending the determination of the appeal to this honourable court.*
- 9. The contents of this affidavit are true and correct."*

Against this application is the 1st respondent's counter affidavit deposing that the appeal is interlocutory in that Court of Appeal granted discretionary order for respondent to amend statement of claim in line with evidence before trial High Court. In that case leave ought to have been obtained to appeal to this court either from Court of Appeal or from this court. As no leave was obtained the appeal is incompetent as it offends S.233 (3) of the Constitution of the Federal Republic of Nigeria, 1999. Thus, there was a preliminary objection to the appeal filed in this court. The Constitution of 1999 in section 233 is clear as to what right of appeal exists espe-

cially in subsection 2 thereof. In respect of appeal on grounds other than that of law or mixed law and fact, subsection 3 thereof applies. The grounds of appeal in this instance appeal are clearly not of law but of mixed law and facts, and no leave having been obtained to file them, the appeal contravenes S.233 (3) of the Constitution and it is therefore incompetent. B
See Metal Construction (West African) Ltd. v. Migliore & Ors. (1990) 1 NWLR (pt. 126) 299, 305.

I therefore find merit in the objection and hold there is no valid appeal before this court. That being the case, this application has no standing or the peg to hang it. The application and the purported appeal are incompetent, and they are accordingly struck out. C
I award N1000.00 costs to the 1st respondent.

OGWUEGBU JSC

I had a preview of the ruling of my learned brother Belgore, JSC and I agree with him that the application is incompetent as it has its foundation on an incompetent appeal. The appellants/applicants were defendants/appellants in the court below while the 1st respondent was the plaintiff. The plaintiff/respondent brought an application in the court below for leave to amend his statement of claim in line with the evidence already given which was said to be uncontroverted and acted upon by the trial court. The court below granted the plaintiff/respondent leave to amend in terms of the motion papers in the exercise of its discretionary power. The defendants/appellants appealed to this court against the order of the court below granting the application. They filed a motion on 20/7/2001 for the following orders: E F

"1. An order that compliance with the rules of the Supreme Court be waived so that the record of proceedings and processes of the Federal High Court in suit No. FHCL/CS/1331/96 and the Court of Appeal in the appeal No. CAL/CS/121/96 in respect of this action which are contained in the bundle of papers exhibited hereto and marked as Exhibit A shall be utilized as the record of appeal in this appeal..." G H

2. An order that further proceedings in the hearing of the appeal No. CAL/121/99 before the Court of Appeal shall be stayed pending the hearing and determination of the appeal which the Cen-

tral Bank of Nigeria has lodged against the ruling of the Court of Appeal dated 16/7/2001 ...

3. An order that the time granted to parties for the filing of briefs of argument be abridged...

4. An order for accelerated hearing of this appeal."

B The learned respondent's counsel filed a notice of preliminary objection to the application. The grounds of the objection are that:

"1. The honourable court has no jurisdiction to grant a stay of further proceedings pending the determination of the appeal as there is no valid notice of appeal as prior leave of Court was not obtained.

C *2. The notice of appeal is incompetent as the only ground of appeal is vague and a vague ground of appeal cannot grant a stay of further proceedings pending appeal."*

D Section 233 of the Constitution provides for the appellate jurisdiction of this court. It enumerates the decisions that could be appealed against from the Court of Appeal to this court as of right. It covers questions of law alone, the interpretation or application of the Constitution, whether there has been a violation of a fundamental right or a threatened violation of the same as provided in Chapter IV
E of the Constitution. (See section 233(2) of the Constitution) The above instances are not exhaustive.

F The appeal filed by the appellants/applicants is in respect of the grant by the Court below of leave to amend the statement of claim which is an appeal against an interlocutory decision of that court made in the course of appeal No. CA/L/121/99 pending before it. By virtue of section 21(2) of the Supreme Court Act, Cap.424, Laws of the Federation of Nigeria, 1990, an appeal against such a decision lies to this court by leave of the court below or this court.
G The appellants/applicants neither obtained the leave of the court below nor of this court before filing their notice of appeal. The appeal is also against the exercise of the discretionary power of the court below which is invariably a question of mixed law and fact as the only ground of appeal filed happens to be. The notice of appeal filed is accordingly incompetent. As there is no competent appeal before this court,
H the application by the appellants/applicants is incompetent. The preliminary objection is upheld by me and I hereby strike out the application for incompetence. Respondent is entitled to N1,000.00 costs.

MOHAMMED JSC

I agree that both the application and the interlocutory appeal filed by the applicants are incompetent. No leave of the Court of Appeal and of this court was obtained before filing the appeal. Also, the grounds of appeal, being grounds of mixed law and fact cannot be filed without leave. Both the appeal and the grounds of appeal are therefore struck out. N1,000.00 costs to respondent. B

UWAIFO JSC

I agree with the ruling of my learned brother Belgore, JSC, that there being no competent appeal, the application is also incompetent. The 1st respondent as plaintiff sued the defendants at the Federal High Court, Lagos for unlawful arrest, unlawful detention, malicious prosecution and abuse of legal process. He was given judgment and awarded N6.5 million as exemplary and general damages. D The present appellants/applicants appealed to the Court of Appeal, Lagos Division. Upon an application brought by the 1st respondent, paragraph 21 of the statement of claim was amended by that court. The amended paragraph now reads:

“The Nigerian Police officers and Central Bank officials got the parties arrested by the Director of Trade and Exchange acting through the 2nd defendant from 9.00 a.m. to 5p.m. and handed over to the Federal Investigations and Intelligence Bureau, Alagbon Close, Ikoyi Lagos of the Nigeria Police Force.” E

The amendment to the original paragraph was that the italicized word “and” replaced the “in” and the word “officials” was inserted. The court below in its undoubted exercise of discretion going by the affidavit in support of the application for leave to amend and the one in opposition thereto, and having regard to the evidence led at the trial court granted leave to amend on the ground that it was in the interest of justice and not prejudicial to the other party. The appellants/applicants then appealed against the decision to this court upon the following ground of appeal: F G

“The ruling of the Court of Appeal is erroneous in law in that it did not apply the correct legal principle because: H

(i) It is settled principle of law that an amendment which seeks to introduce a new issue, on which the adverse party will be deprived the light to amend his statement of defence and give evidence thereon

will not be granted.

(ii) It is also a settled principle of law that an amendment which seeks to torpedo any ground of appeal of an appellant will not be granted.

(iii) The appellants had revealed to the plaintiffs and the trial court the purport of the pleadings and despite this the plaintiff did not apply to amend his statement of claim."

No leave to appeal was obtained either from the Court of Appeal or this court.

In an application brought in this court, the appellants/applicants ask for orders

(1) to compile the record of appeal,

(2) to stay further proceedings in the appeal before the Court of Appeal pending the determination of the appeal to this court,

(3) to abridge the time for filing briefs and

(4) to accelerate the hearing of the appeal.

The 1st respondent however raised a preliminary objection by notice to the competency of the notice of appeal that was filed without leave and also that the sole ground of appeal was vague.

After hearing argument, I was in no doubt that the ground of appeal filed in this matter is in contravention of Order 8, rule 2(4) of the Supreme Court Rules (as amended) which reads:

"No ground which is vague or general in terms which discloses no reasonable ground of appeal shall be permitted, save the general ground that the judgment is against the weight of evidence, and any ground of appeal or any part thereof which is not permitted under this rule may be struck out by the court of its own motion or on application by the respondent."

The ground of appeal in question is supposed to be against the ruling in which the court below gave leave to make some amendment more or less of a clerical nature. I have no hesitation in agreeing with Mr. Okojie's preliminary objection that the ground of appeal is vague. Vagueness of a ground of appeal may arise where it is couched in a manner which does not provide any explicit standard for its being understood, or when what is stated is so uncertain that it is not susceptible of being understood. It may also be considered vague when the complaint is not defined in relation to the subject or it is not particularized, or the particulars are clearly irrelevant. See

Atuyeye v. Ashamu (1987) 1 NWLR (Pt.49) 267; (1987) NSCC (Vol. 18 pt. 1) 117. In the present case the ground of appeal is incompetent for incurable vagueness and being the sole ground, the notice of appeal is accordingly incompetent. The other arm of the objection is that the appeal being against the exercise of discretion leave must be obtained. A discretion is exercisable not on the mere figment of the person doing so but upon facts or circumstances necessary for the proper exercise of that discretion. This is a well established principle. Hence it is the law that a discretion should be exercised judicially and judiciously, i.e. reasonably, in the sense that relevant matters are taken into consideration while extraneous or irrelevant matters are avoided and a decision which suits the occasion is arrived at: see *University of Lagos v. Aigoro* (1985) 1 NWLR (Pt.1) 143 at 148; *Oyeyemi v. Irewole Local Government* (1993) 1 NWLR (Pt. 270) 462 at 484. When a challenge is made as to the improper exercise of discretion, it will necessarily involve facts and circumstances, and it is usually at best, a question of mixed law and fact: see *Ogbechie v. Onochie* (1986) 2 NWLR (Pt.23) 84; *Metal Construction (WA.) Ltd. v. Migliore* (1990) 1 NWLR (Pt. 126) 299. Therefore, by virtue of section 233(3) of the 1999 Constitution, leave must be obtained in order to appeal from a decision of the Court of Appeal given in the exercise of its discretion. As leave was not so obtained in this case, the notice of appeal is also incompetent on that ground. There is accordingly no appeal upon which the present application can be based. I too uphold the preliminary objection of the 1st respondent. The application itself being incompetent is struck out with N1,000.00 costs to the 1st respondent.

EJIWUNMI JSC

I was privileged to have read before now the ruling just delivered by my learned brother, Belgore, JSC. For the reasons given in the said ruling which I have adopted as my own, I also find no merit in the objection raised in respect of this application. As the application lacks merit, it follows that there is no valid appeal. As the application and purported appeal are incompetent, the respondent is awarded costs in the sum of N1,000.00. Application struck out.