

SUPREME COURT OF NIGERIA
FRIDAY 7TH MARCH, 2003. SC. 25/1997
CORAM:- S. M. A. BELGORE, I. L. KUTIGI,
M. E. OGUNDARE, A. I. IGUH, A. I. KATSINA-ALU,
U. A. KALGO, S. O. UWAIFO, JJSC

JOSEPH EWETE APPELLANT
AND
PAUL GYANG RESPONDENT

STATUTES - High Court Law Northern Nigeria - Distinction in ss. 62 & 63 - While s. 62 confers appellate jurisdiction on High Court - S. 63(1) deals with composition of the court when hearing such appeals (H1)

COURTS - Constitution of - Correctness of - By ss.63(1) & 116(1) High Court Laws Northern Nig - Plateau State High Court was properly constituted by single judge - Over interlocutory applications in respect of appeals before it (H2)

APPEALS - Procedure - Applicable rules - High Court rules made pursuant to State law - Will not regulate practice and procedure - To be applied in appeal from High Court to Court of Appeal (H3)

SUPREME COURT - Judgment of - Setting it aside - Basis - For the court to overrule its previous decisions - It must be shown that such decisions are unjust - Given per incuriam or erroneous in law (H4)

FACTS

Plaintiff/appellant sued defendant/respondent in the Upper Area Court, Jos, claiming declaration of title to the property in dispute, injunction and damages for trespass. The case went to trial at the end of which the trial Court found for appellant and gave judgment accordingly. Dissatisfied, respondent appealed unsuccessfully first to the High Court, then to Court of Appeal, against the judgment. Respondent subsequently applied to the trial Court for an order setting aside the said judgment on the ground that it was given without

jurisdiction and was obtained by fraud.

After hearing, the Court granted respondent's application and set aside the judgment. Aggrieved, appellant appealed unsuccessfully to the High Court sitting in its appellate jurisdiction. The application was heard and granted by a single judge of the Court, whereupon appellant appealed to Court of Appeal. Respondent raised an objection to the appeal on the ground that in law no leave to appeal was obtained as the application for leave was heard and granted by a single judge instead of two judges of the High Court as provided by s.63 of the High Court Laws of Northern Nigerian Cap 48 1963. Court of Appeal upheld the objection and struck out the appeal. Aggrieved further, appellant filed appeal at Supreme Court, arguing that there is a specific provision in respect of interlocutory applications in appellate matters which allowed a single judge to hear such applications.

ISSUES FOR DETERMINATION

"1. Whether the High Court (Interlocutory Applications in Appellate Matters) Rules, made pursuant to Section 116(1) of High Court Law, Cap. 49, Laws of Northern Nigeria, 1963, (applicable to Plateau State) is ultra vires of and inconsistent with Section 63(1) of the High Court Laws aforesaid.

2. Whether the pronouncement/decision of the Supreme Court in *Ishola v. Ajiboye* (1994) 6 NWLR (Pt.352) 506, applies equally to the High Court of Plateau State when it sits to exercise its appellate jurisdiction in INTERLOCUTORY MATTERS"

HELD (Dismissing the appeal per OGUNDARE JSC, Kalso & Uwaaifo JJSC dissenting)

High Court Laws of Northern Nigeria ss. 62 & 63 - Distinction

1. I must quickly correct the submission of Mr. Pinheiro, learned leading counsel for the defendant that Sections 62 and 63(1) are not divisible. From the provisions of the two sections above, it is clear that while Section 62 confers appellate jurisdiction on the High Court to hear appeals from the courts stated therein, Section 63(1) deals with the composition of that court when hearing such appeals. These are two different things. And by the decisions of this Court in *Oloriegbe v. Omotosho* (1993) 1 NWLR (Pt.270) page 386, a judge

of the Sharia Court of Appeal no longer sits with the two Judges of the High Court when exercising the appellate jurisdiction conferred by Section 62. (p. 881 F)

COURTS - Constitution of - Correctness of

2. It is beyond argument that the High Court Law, Cap 49 Laws of Northern Nigeria, 1963, is an existing law within the meaning of that expression in Section 274 of the 1979 Constitution which was in force at all times relevant to the case on hand. I can see no inconsistency between Sections 63(1) and 116(1) of the Law. While Section 63(1) deals with the constitution of the High Court when sitting to hear an appeal, Section 116(1) and the Rule made thereunder deal with the composition of the Court when sitting to hear an interlocutory application in an appeal to be heard by the Court. That being so, I agree with the learned Senior Advocate that the High Court of Plateau State is properly constituted by a single Judge of that Court when sitting to hear an interlocutory application in an appeal yet to be heard by that Court.

(p. 882 C)

APPEALS - Practice & procedure - Applicable rules

3. An application for leave to appeal to the Court of Appeal will not, in my respectful view, be an interlocutory application in an appeal to be heard by the High Court. Such an application is brought after the appeal before the High Court might have been determined. An application for leave to appeal from the High Court sitting in its appellate jurisdiction to the Court of Appeal is an interlocutory application in the appeal to the Court of Appeal and not one in an appeal to the High Court from a lower court. The High Court (Interlocutory Application in Appellate Matters) Rules will only apply to appeals brought from lower courts to the High Court and not to appeals from the High Court to the Court of Appeal. Appeals from the High Court, whether sitting in its original or appellate jurisdiction to the Court of Appeal is a Federal matter and the State will have no jurisdiction to legislate on it. Therefore, the High Court (Interlocutory Application in Appellate Matters) Rules being Rules of the court made pursuant to State Law will not apply to regulate the practice and procedure to be applied in an appeal from the High Court to the Court of Appeal. (p. 882 G)

SUPREME COURT - Judgments - Setting it aside - Basis

4. The conclusion I have just reached is in line with the previous decisions of this Court in Akerele v. Alapata and Ishola v. Ajiboye both decisions we are called upon to depart from and overrule. Although
 B this Court has the inherent power to depart from its earlier decisions for compelling reasons which proved them erroneous, it will not do so readily or without much hesitation or in the absence of proof that the previous decisions were clearly erroneous and against the
 C public good and welfare - per Obaseki, JSC., in Odi v. Osafire (1985) ANLR 20 at p.43. To justify our overruling the previous decisions of this Court it must be clearly shown that such previous decisions are (1) vehicles of injustice and (2) given per incuriam or (3) clearly erroneous in law. (p. 883 E)

D NOTABLE POINTS OF INTEREST

BELGORE JSC

1. Constitution only provided for minimum member of judges

The appellate jurisdiction of the High Court of Plateau State (as in
 E some states of the country especially North) is made up of at least two judges. The very fact that the Constitution says the High Court is made up of at least one judge does not preclude states making the appellate jurisdiction High Court to be made of at least two judges. The Constitution by providing minimum number of Judges does not
 F make invalid any existing law that provides for two or more.
 (p. 884 D)

KATSINA-ALU JSC (Dissenting)

2. S. 116(1)(0) covers every application before the High Court

G The first thing to note is this. The entire purpose of Section 116(1) and the Rules is to enable a single judge to deal with an application in connection with or in respect of an appeal before the High Court. In my view, the provision covers all applications before the High Court whether in respect of an appeal to be heard by the court or in
 H connection with an appeal that has been heard and disposed of by the High Court. Before now all such applications must be heard by two judges of the High Court. The purpose of Section 116(1) and the

Rules is to obviate the difficulty in having two judges to constitute the court even in respect of simple applications. Rule 2 may have been inelegantly drafted, but that does not derogate from the intention and purpose for which this enactment was made. (p. 889 C)

3. The phrase “to be heard” refers to the applications not “appeals.” B

The second thing to note is this. The phrase “to be heard by the High Court” in my view refers more to the applications coming before the High Court than to the appeals. Let me explain. The High Court C does not exercise original jurisdiction over matters that come to it on appeal from the Native Court. It would be tautologous to speak of appeals to be heard by the High Court. If however an application to appeal to the Court of Appeal from a judgment of the High Court made to the High Court has elapsed, such an application cannot be D heard and disposed of by the High Court. Again if an application for stay of execution of the judgment of the High Court is made to that court when the appeal has been entered in the Court of Appeal such an application cannot be heard and disposed of by the High Court. They will of necessity be made to the Court of Appeal. (p. 889 E) E

KALGO JSC (Dissenting)

4. In view of the constitution leave granted by single judge is valid F

Since this appeal deals with the question of leave to appeal to the Court of Appeal from the decision of the High Court in exercise of its appellate jurisdiction, any jurisdiction to be exercised thereon must be in accordance with S.63(1) as modified by the 1979 Constitution applicable to this case. And by S.238 of that Constitution, any jurisdiction of the High Court, whether original or appellate, substantive G or interlocutory can be exercised by at least “one judge of that court”. That being the case the leave to appeal granted to the appellant by a single judge Atsi, J., in this case is perfectly valid and in order and I so hold. Therefore the Court of Appeal was wrong to strike out the H appeal of the appellant before it.

This would not affect the decision of this court in Ajiboye’s case where this court held that S.63(1) is not inconsistent with S.238 of the 1979 Constitution. This is so because the 1979 Constitution

provides for a minimum of one judge and S.63(1) as modified provides for two judges. The decision in *Akerele v. Alapata* (1973) NWLR 138 was correctly decided at the time it was decided. (p. 891 C)

UWAIFO JSC (Dissenting)

B 5. S. 116 (2) applies to all applications in connection with an appeal

The question is whether this provision applies only to an interlocutory application made before and during the hearing of the appeal which comes before the court, and not after the appeal has been determined.

C I do not think the use of the phrase “any appeal or proposed appeal to be heard by the High Court” can justify such an interpretation.

When that appeal has been determined, an application made under Rule 2 of the said Rules is an “interlocutory application in connection with” that appeal. One such example is an application for stay of

D execution of the judgment in that appeal. This can, by virtue of Section 116(1) and the Rules, be taken by a single judge. This is clearly because the application is in connection with the appeal now decided. A distinction must, in my view, be recognised between “every

E interlocutory application in connection with” and “every interlocutory application for the purpose of” any appeal or proposed appeal to be heard by the High Court. (p. 892 H)

REPRESENTATION

F G. Ofodile-Okafor, SAN with S. Oyawole and E. O. Okoro, for the Appellant

O. A. U. Pinheiro, Esq with A. Kamoru, for the Respondent

CASES REFERRED TO

Akerele v. Alapata (1973) NWLR 138

G *Isola v. Ajiboye* (1994) 5 NWLR (Pt. 352) 506

Oloriegbe v. Omotesho (1993) 1 NWLR (Pt. 270) 386

STATUTES & RULES REFERRED TO

Constitution of the Federal Republic of Nigeria 1979, s. 221, 238 & 274 High Court Laws of Northern Nigeria Cap 49 LFN 1963, s. 62, 63 & 116

H High Court (Interlocutory Applications Appellate Matters) Rules, r. 2

LEAD JUDGMENT BY OGUNDARE JSC

This appeal raises yet again the validity or otherwise of an order for leave to appeal on grounds other than of law only from the decision of a High Court in any of the Northern States (in this case, Plateau State) sitting in its appellate jurisdiction to the Court of Appeal. One would have thought that the question raised has been put to rest by the decision of this Court in *Alhaji Oloyede Ishola v. Memodu Ajiboye* (1994) 6 NWLR 506. This Court by majority, decided, *inter alia*, in that case that in considering an application for leave to appeal, the High Court of Kwara State must be constituted by two Judges of that Court as required by Section 63(1) of the High Court Laws of Northern Nigeria, Cap. 49, Laws of Northern Nigeria, 1963 (applicable also in Plateau State). We are now being called upon in this appeal to depart from that decision and to hold that such an order is valid where it is made by a single Judge of the High Court of the State.

This case has a chequered history. The plaintiff, who is now the appellant in the appeal now before us, had in 1988 in the Upper Area Court Jos, in suit No. JUAC-09cv-1988 sued the defendant, now respondent, claiming-

“(a) A declaration that the plaintiff is the rightful and exclusive owner of the property situate at and known as No. T45A Laranto Village, Jos, covering a total Area of 0.012 hectares.

(b) A perpetual injunction restraining the defendant, his servants and/or agents howsoever from trespassing into or remaining in occupation of the aforesaid property.

(c) The sum of N4,000.00 being general damages for trespass.”

The case went to trial at the conclusion of which the trial court found for the plaintiff and adjudged:

“I hereby give judgment in favour of plaintiff against the defendant, and declare that plaintiff is the rightful owner of the land situated at and known as No. T45A Laranto covering 0.012 hectares and order that the defendant should not trespass or interfere with the said land and whatsoever, and court hereby awards the sum of N1,500.00 (One Thousand Five Hundred Naira) against the defendant. Court orders defendant to pay the cost of action N140.00 plus

N100.00 counsel appearance and N30.00 taxi to locus in quo.”

The defendant being dissatisfied with this judgment made fruitless applications to both the High Court and the Court of Appeal to appeal against the said judgment. Still undaunted, he applied to the Upper Area Court Jos - the trial Court - for an order

B “setting aside the judgment of this Honourable Court delivered in this suit on the 12th October, 1988, as well as all other ancillary processes based thereon”

on the grounds that:

C “(i) There was a fundamental defect which goes to the issue of jurisdiction and competence of this Honourable Court on the days it heard the case and delivered the judgment.

(ii) The judgment was obtained by fraud.”

The application was supported by an affidavit to which there were annexed some documents. The plaintiff also filed a counter affidavit - to which also were annexed the previous judgment and rulings in the matter. After a protracted hearing of the application, the trial Upper Area Court Jos, granted it and ordered as follows:

E “It is ordered that the judgment of this Court delivered on the 12th of October, 1988, in suit No. JUAC/09/88 is hereby set aside and the hearing de novo the claim of N4,000.00 for trespass may commence. However, the hearing may commence at the Upper Area Court II Kabong.”

F The plaintiff appealed against this judgment to the High Court of Plateau State sitting in Jos. That Court, (Coram - Atsi and Ogbe, JJ.), dismissed the appeal. The plaintiff, being further dissatisfied, applied to the High Court for leave to appeal to the Court of Appeal. The application was heard by Atsi, J., sitting alone, and granted. Following the grant of leave, an appeal was lodged to the Court of Appeal.

G At the Court of Appeal, the defendant filed a notice of preliminary objection which reads:

H “TAKE NOTICE that the Respondent shall by way of preliminary objection challenge the competence of this appeal on the grounds inter alia that the Appellant has not complied with the mandatory requirement of Section 221 (1) of the Constitution of Nigeria, 1979, as amended in that leave was not obtained before bringing this appeal.

AND TAKE NOTICE that the Respondent shall urge that the appeal be struck out.”

The Court took arguments from learned counsel for the parties and, in a ruling, upheld the objection and struck out the appeal with costs. It held, per Oguntade, JCA:

“In the final result, I must express that the High Court as constituted on 30/1/95 when it purported to grant leave to the appellant to appeal to this court is not properly constituted. The order granting leave to the appellant is invalid, null and void. The consequence is that there is no valid appeal before this Court. See Udekwe Erisi & Ors. v. Uzor Idika & Ors. (1987) 4 NWLR (Pt.66) 503 S.C. The appeal is accordingly struck out with N500.00 costs to the Respondent.”

It is against this decision that the plaintiff has further appealed to this court upon two grounds of appeal which read:

“1. The learned Justices of the Court of Appeal Jos erred in law when they held:

‘The position now is that whereas Section 63(1) as modified, imposes that two Judges of the State High Court in Plateau State must seat (sic) when the High Court sits in its appellate jurisdiction to hear appeals from the Upper Area Court, the subordinate legislation relied upon by Mr. G. O. Okafor allows one Judge to sit. It seems to me that the said rules do not apply to the situation when the High Court is sitting in its appellate jurisdiction to hear appeal from Upper Area Courts. If however the intention of the makers of the rules in question is to make them apply to that situation, the conclusion I must reach is that the rules are invalid as being ultra vires arising from their inconsistency with Section 63(1) of Cap.49”

Particulars of Error of Law

(1) Section 63(1) of the High Court Law, Cap. 49, Laws of Northern Nigeria applicable to Plateau State, imposes two Judges of the High Court of Plateau State to hear appeals from Upper Area Courts.

(2) But the High Court (Interlocutory Applications Appellate Matters) Rules made pursuant to Section 116 of the High Court Law allows a single Judge to hear interlocutory applications.

(3) Similarly by virtue of Section 238 of the 1979 Constitution, the High Court of Plateau State shall be duly constituted if it consists of at least a single judge.

(4) Motion for leave to appeal to the Court of Appeal is an interlocutory application.

(5) Both Section 63(1) and the rules made pursuant to Section 116 are all existing law by virtue of Section 274 of the 1979 Constitution.

B (6) The rule allowing a single Judge to hear and determine interlocutory application is in conformity with S.238 of the 1979 Constitution and not in conflict with Section 63(1) of the High Court Law.

C 2. The learned Justices of the Court of Appeal, Jos Division, erred in law when they held as per the lead judgment of Oguntade, JCA., that:

“I only need to add here that the pronouncement of the Supreme Court in *Ishola v. Ajiboye* (supra) applies equally to the High Court of Plateau State when it sits to exercise appellate jurisdiction.”

D Particulars of Error of Law

(1) The Supreme Court in the case of *Ishola v. Ajiboye* did not consider the effect of the High Court (Interlocutory Applications in Appellate Matters) Rules on Section 63(1) of the High Court Laws.

(2) There are two types of appellate jurisdiction:

E (i) Jurisdiction relating to Interlocutory Matters.

(ii) Jurisdiction relating to the Substantive Appeal.

(3) While the High Court (Interlocutory Applications in Appellate Matters) Rules provides for a quorum in interlocutory applications, Section 63(1) of the High Court Law provides a quorum for the substantive appeal.”

F and sought the relief that the ruling of the Court of Appeal be set aside and an order that the appeal be heard on its merits by the Court of Appeal.

G Pursuant to the rules of this Court, the parties filed and exchanged their respective written briefs of argument. In the Appellant’s Brief, the plaintiff in paragraph 5.15 thereof urged us to “expressly overrule its decision *Ishola v. Ajiboye* (1994) 6 NWLR (Pt.352) 506 and *Oladunni Akerele v. Jimoh Alapata* (1973) NNLR 138.” Two issues are distilled from the grounds of appeal and they are:

H 1. Whether the High Court (Interlocutory Applications in Appellate Matters) Rules, made pursuant to Section 116(1) of High Court Law, Cap. 49, Laws of Northern Nigeria, 1963, (applicable

to Plateau State) is ultra vires of and inconsistent with Section 63(1) of the High Court Laws aforesaid.

2. Whether the pronouncement/decision of the Supreme Court in *Ishola v. Ajiboye* (1994) 6 NWLR (Pt.352) 506, applies equally to the High Court of Plateau State when it sits to exercise its appellate jurisdiction in INTERLOCUTORY MATTERS” B

I shall, however, in my judgment consider the two issues together as each is one side of a coin.

The thrust of the arguments of Mr. Ofodile-Okafor, SAN, learned leading counsel for the plaintiff/appellant, both in his written brief and in oral submissions is that the attention of this Court was not drawn in *Ishola v. Ajiboye* (supra) to Section 116(1) of the High Court Law of Northern Nigeria (applicable in this case) and the rules made thereunder. It is learned Senior Advocate’s submission that Section 63(1) of the Laws only provided for the constitution of the High Court when hearing an appeal whereas Section 116(1) and the rule made thereunder provided for the constitution of the Court when hearing interlocutory matters in an appeal. He submitted that there was no inconsistency in the two provisions of the Law. Learned Senior Advocate submitted that, in any event, Section 63(1) of the Law was inconsistent with Section 238 of the 1979 Constitution (now Section 273 of the 1999 Constitution). C D E

Mr. Pinheiro, learned leading counsel for the defendant/respondent, submitted that *Ishola v. Ajiboye* was rightly decided. He submitted that Sections 62 and 63 of the Law were indivisible. He further submitted that the Rule made pursuant to Section 116(1) of the Law, a single Judge of the High Court could sit to hear interlocutory matters in an appeal. Learned counsel argued that no new materials have been put forward to justify this Court departing from *Ishola v. Ajiboye* (supra). He pointed out that Section 116 was referred to on page 552 E-F of the report. He urged the Court to dismiss the appeal. F G

If *Ishola v. Ajiboye* (supra) was rightly decided, that would be the end of this appeal. It is, therefore, not surprising that the appellant now urges us to depart from it, moreso that the decision of the Court below was based on it. For Oguntade, JCA., in his lead ruling with which Edozie, JCA., as he then was and Muntaka-Coomasie, JCA., agreed, said: H

“In this ruling, I must say that I tread a path which has been

pre-charted by binding judicial authorities. In *Oladunni Akerele v. Jimoh Alapata* (1973) NNLR 138, the Supreme Court held that an application to the High Court for leave to appeal against the decision of that court in the exercises of its appellate jurisdiction is made to the High Court in its appellate jurisdiction. And in *Ishola v. Ajiboye* (1994) 7-8 SCNJ 1, the Supreme Court held that Section 63(1) of the High Court Law, Cap. 49, Laws of Northern Nigeria, 1963, is not inconsistent with Section 238 of the Constitution of the Federal Republic of Nigeria. As an existing Law, the High Court of Kwara State is enjoined to observe it. It was further decided that the High Court of Kwara State in the exercise of its appellate jurisdiction to hear and determine appeals from Upper Area Courts must be constituted of two judges of the High Court. I only need to add that the pronouncement of the Supreme Court in *Ishola v. Ajiboye* (supra) applies equally to the High Court of Plateau State when it sits to exercise its appellate jurisdiction.”

Before I proceed further with this judgment I think this is the appropriate stage for me to set out the relevant provisions of the law that come for consideration.

(i) Constitution of the Federal Republic of Nigeria, 1979:
“238 - For the purpose of exercising any jurisdiction conferred upon it under this Constitution or any law, a High Court of a State shall be duly constituted if it consists of at least one judge of that court.”

(ii) High Court Law of Northern Nigeria, Cap.49:
“Section 62: The High Court shall have jurisdiction to hear appeals (other than appeals in respect of matters which are the subject of the jurisdiction of the Sharia Court of Appeal) from grade A and grade A limited native courts and Provincial Courts.

Section 63: (1) In the exercise of its jurisdiction under Section 62, the High Court shall be constituted of three members two of whom shall be judges of the High Court and one of whom shall be a Judge of the Sharia Court of Appeal.”

Section 116(1): The Chief Justice with the approval of the Governor may make rules of court for carrying this Law into effect, and in particular for all or any of the following matters-

(o) prescribing what part of the business which may be transacted and of the jurisdiction which may be exercised by judges

of the High Court in chambers may be transacted or exercised by registrars or other officers of the High Court, and for providing that any interlocutory application to be made in connection with or for the purpose of any appeal or proposed appeal to be heard by the court shall be heard and disposed of before a single Judge." (Underlining are mine) B

(iii) "The High Court (Interlocutory Applications in Appellate Matters) Rules:

(Section 116)

Date of commencement: 2nd February, 1956 C

1. These rules may be cited as the High Court (Interlocutory Applications in Appellate Matters) Rules.

2. Every interlocutory application in connection with or for the purpose of any appeal or proposed appeal to be heard by the High Court may be heard and disposed of before a court constituted either of not less than two judges or a single judge." (Underlining is mine for emphasis) D

I must quickly correct the submission of Mr. Pinheiro, learned leading counsel for the defendant that Sections 62 and 63(1) are not divisible. From the provisions of the two sections above, it is clear that while Section 62 confers appellate jurisdiction on the High Court to hear appeals from the courts stated therein, Section 63(1) deals with the composition of that court when hearing such appeals. These are two different things. And by the decisions of this Court in Oloriegbe v. Omotesho (1993) 1 NWLR (Pt.270) page 386, a judge of the Sharia Court of Appeal no longer sits with the two Judges of the High Court when exercising the appellate jurisdiction conferred by Section 62. E F

It is the submission of Mr. Ofodile-Okafor, SAN, that the above Rule enables a single Judge of the High Court to entertain an interlocutory application in an appellate matter, such as application for leave to appeal as in the case on hand. Learned Senior Advocate further submitted that as the Rule was made pursuant to Section 116(1) of the Law, it is valid and is not inconsistent with Section 63(1) which, according to learned Senior Advocate, only applied to the actual hearing of an appeal. He further argued that as Section 238 of the Constitution allowed for a single Judge to constitute a High Court, the constitution of the High Court of Plateau State in granting leave to appeal in this matter was in line with of the 1979 G H

Constitution and that it was Section 63(1) that was inconsistent with the Constitution.

I find the argument of learned Senior Advocate rather plausible but not convincing when looked into in-depth. It is beyond argument that the High Court Law, Cap 49 Laws of Northern Nigeria, 1963, is an existing law within the meaning of that expression in Section 274 of the 1979 Constitution which was in force at all times relevant to the case on hand. I can see no inconsistency between Sections 63(1) and 116(1) of the Law. While Section 63(1) deals with the constitution of the High Court when sitting to hear an appeal, Section 116(1) and the Rule made thereunder deal with the composition of the Court when sitting to hear an interlocutory application in an appeal to be heard by the Court. That being so, I agree with the learned Senior Advocate that the High Court of Plateau State is properly constituted by a single Judge of that Court when sitting to hear an interlocutory application in an appeal yet to be heard by that Court.

Such an interlocutory application, in my humble view, would be an application for extension of time, to amend notice of appeal, to add to the grounds of appeal and for substitution of parties. An application for leave to appeal to the Court of Appeal will not, in my respectful view, be an interlocutory application in an appeal to be heard by the High Court. Such an application is brought after the appeal before the High Court might have been determined. An application for leave to appeal from the High Court sitting in its appellate jurisdiction to the Court of Appeal is an interlocutory application in the appeal to the Court of Appeal and not one in an appeal to the High Court from a lower court. The High Court (Interlocutory Application in Appellate Matters) Rules will only apply to appeals brought from lower courts to the High Court and not to appeals from the High Court to the Court of Appeal. Appeals from the High Court, whether sitting in its original or appellate jurisdiction to the Court of Appeal is a Federal matter and the State will have no jurisdiction to legislate on it. See *Fari v. Kano Native Authority* (1959) 4 FSC 147 at p.148. Therefore, the High Court (Interlocutory Application in Appellate Matters) Rules being Rules of the court made pursuant to State Law will not apply to regulate the practice and procedure to be applied in an appeal from the High Court to the Court of Appeal.

The High Court when considering an application for leave to appeal to the High Court sits in its appellate jurisdiction - See *Akerele v. Alapata* (supra) and must be duly constituted by two Judges of that Court as required by Section 63(1) of the High Court Law, Cap.49 (as modified by *Oloriegbe v. Omotesho* (supra) - *Akerele v. Alapata* (supra); *Ishola v. Ajiboye* (supra). B

The conclusion I have just reached is in line with the previous decisions of this Court in *Akerele v. Alapata* and *Ishola v. Ajiboye* both decisions we are called upon to depart from and overrule. Although this Court has the inherent power to depart from its earlier decisions for compelling reasons which proved them erroneous, it will not do so readily or without much hesitation or in the absence of proof that the previous decisions were clearly erroneous and against the public good and welfare - per Obaseki, JSC., in *Odi v. Osafire* (1985) ANLR 20 at p.43. To justify our overruling the previous decisions of this Court it must be clearly shown that such previous decisions are (1) vehicles of injustice and (2) given per incuriam or (3) clearly erroneous in law - see: *In re Sarah I. Adadevoh & Ors.* and in the matter of the Estate of Samuel Herbert Macaulay (deceased) (1951) 13 WACA 304, 310; *Johnson v. Lawanson* (1971) ANLR 58; *Odi v. Osafire* (supra) and *Ishola v. Ajiboye* (supra) at page 616, per Uwais, JSC., as he then was. C D E

I agree with Mr. Pinheiro that no new materials have been brought before us to justify our departing from *Akerele v. Alapata* and *Ishola v. Ajiboye* we are called upon to overrule in this appeal. Mr. Ofodile-Okafor, SAN, says that Section 116 and the High Court (Interlocutory Applications in Appellate Matters) Rules are new materials not considered by this Court in *Ishola v. Ajiboye*. That submission cannot, with respect to learned Senior Advocate, be correct. For in my lead judgment in that case I did say: F G

“The High Court Laws, Cap. 49 together with rules of court made pursuant to Section 116 thereof governed the practice and procedure applicable in the court.”

In my respectful view, both *Akerele v. Alapata* and *Ishola v. Ajiboye* were rightly decided. And by the decision in the later case, Section 63(1) of the High Court Law is not inconsistent with Section 238 of the 1979 Constitution; it is valid. H

In view of all I have said above, this appeal fails and it is

hereby dismissed by me with N10,000.00 costs to the Respondent.

BELGORE JSC

B The appellate jurisdiction of the High Court of Plateau State (as in some states of the country especially North) is made up of at least two judges. The very fact that the Constitution says the High Court is made up of at least one judge does not preclude states making
 C the appellate jurisdiction High Court to be made of at least two judges. The Constitution by providing minimum number of Judges does not make invalid any existing law that provides for two or more. But for appeal to Court of Appeal from the High Court of Plateau State, the interlocutory application to appeal must be granted by not less than two judges of the High Court. Therefore S.12(1) High Court Laws of Plateau State is not inconsistent with the Constitution. The Rules made pursuant to S.116 of High Court Laws of Plateau State, i.e. the High Court (Interlocutory Application In Appellate Matters) Rules, 1956, in Rule 2 is therefore straight to the point. The Rule refers to the appeals to be heard by the High Court, not to the appeals to be
 D heard by the Court of Appeal. I therefore agree with Ogundare, JSC., that this appeal has no merit and I dismiss it with N10,000.00 costs to respondent.
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F

KUTIGI JSC

I read in advance the judgment just delivered by my learned brother, Ogundare, JSC. I agree with him that this appeal must fail.

It is doubtless that this Court in the case of Akerele v. Alapata (1973) NNLR 138 (S.C.) decided amongst others that when hearing
 G an application for leave to appeal to the Supreme Court (now Court of Appeal), the High Court was exercising an appellate jurisdiction and as such that Court was not properly constituted by a single judge. Also in Isola v. Ajiboye (1994) 5 NWLR (Pt. 352) 506, this Court also held that Section 63(1) of the High Court Law, Cap. 49, Laws of Northern Nigeria, 1963, was not inconsistent with Section 238 of
 H the 1979 Constitution. And again by the decisions of this Court in Oloriegbe v. Omotesho (1993) 1 NWLR (Pt.270) 386, a judge of the

Sharia Court of Appeal no longer sits with two Judges of the High Court when exercising the appellate jurisdiction conferred by Section 62 of the High Court Law.

I think the decisions above should be left alone. The appellant has woefully failed to show why they should be overruled by this Court. What the High Court does with the interlocutory applications relating to appeals coming/pending before it, is entirely its own business. It is in this light that I find nothing wrong with “The High Court (Interlocutory Application in Appellate Matters) Rules, 1956, made by the Chief Judge under Section 116 of the High Court Laws, wherein it is provided thus-

“2. Every interlocutory application in connection with or for the purpose of any appeal to be heard by the High Court may be heard and disposed of before a Court constituted either of not less than two judges or a single judge.” (Underlining supplied by me)

To me the Rule above which is clear and unambiguous is applicable only to appeals yet to be heard or decided by the High Court and not to appeals to be heard by Courts after the High Court. The Rule should be confined to interlocutory applications in connection with appeals to be heard by the High Court only.

The appeal therefore fails and it is hereby dismissed. The Ruling delivered by the Court of Appeal on 15/1/97 is hereby affirmed. The Respondent is awarded costs of N10,000.00.

IGUH JSC

I have had the privilege of reading in draft the judgment just delivered by my learned brother, Ogundare, JSC., and I am in total agreement with him that this appeal is without substance and should be dismissed.

The genesis of this case has been fully stated in the leading judgment and I do not intend to review it all over again. I need only set out the provisions of Sections 62, 63(1) and 116(1) of the High Court Law, Cap. 49, Laws of Northern Nigeria, 1963, applicable to Plateau State of the Federal Republic of Nigeria which directly come into play in the determination of this appeal.

Section 62 of the said High Court Law provides as follows:-
“62: That High Court shall have jurisdiction to hear appeals

(other than appeals in respect of matters which are the subject of the jurisdiction of the Sharia Court of Appeal) from grade A and grade A limited native courts and Provincial Courts.”

There is next Section 63(1) of that Law which stipulates thus:-

“63(1) In the exercise of its jurisdiction under Section 62 the
B High Court shall be constituted of three members two of whom shall be judge of the High Court and one of whom shall be a judge of the Sharia Court of Appeal.”

Section 116(1) goes thus:-

“116(1) The Chief Justice with the approval of the Gover-
C nor may make rules of court for carrying this Law into effect, and in particular for all or any of the following matters-

(o) prescribing what part of the business which may be
transacted and of the jurisdiction which may be exercised by judges
of the High Court in chambers may be transacted or exercised by
D registrars or other officers of the High Court, and for providing that any interlocutory application to be made in connection with or for the purpose of any appeal or proposed appeal to be heard by the court shall be heard and disposed of before a single judge.”

There are finally the High Court (Interlocutory Applications
E in Appellate Matters) Rules which were made pursuant to Section 116(1) of the High Court Law of Northern Nigeria, 1963. Rule 2 thereof provides as follows:-

“2. Every interlocutory application in connection with or for
F the purpose of any appeal or proposed appeal to be heard by the High Court may be heard and disposed of before a court constituted either of not less than two judges or a single judge.”

It is apparent from the above provisions of the High Court
Laws, Cap.49 that while Section 62 confers jurisdiction on the High
Court to hear appeals from courts specifically stipulated therein,
G Section 63 deals with the constitution of such appellate High Court when hearing appeals from the designated courts below.

It is now well settled that the High Court of Plateau State,
indeed the High Courts of the States from which the former North-
ern Region of Nigeria were created, in the exercise of their appellate
jurisdiction to hear and determine appeals from the Upper Area
H Courts shall be constituted of two judges of the High Court. See Section 63(1) of the High Court Laws, Cap. 49 ante as modified by

the decision of this court in *Oloriegbe v. Omotosho* (1993) 1 NWLR (Pt.270) 386. A judge of the Sharia Court of Appeal does not now sit along with the order two judges of the High Court in the exercise of the appellate jurisdiction conferred by Section 62 of the High Court Laws of Northern Nigeria.

Turning now to Rule 2 of the High Court (Interlocutory Applications in Appellate Matters) Rules, 1956, it is plain that every interlocutory application in connection with or for the purpose of any appeal or proposed appeal to be heard by the High Court may be heard and determined by a court constituted by either a single judge or a panel of not less than two Judges. An interlocutory application for leave to appeal to the Court of Appeal, such as is the case in the present appeal, must be distinguished from an interlocutory application in connection with or for the purpose of an appeal or proposed appeal to be heard and determined by the High Court in the exercise of its appellate jurisdiction under Section 62 of the High Court Laws of Northern Nigeria, Cap. 49 of 1963. The former which concerns an interlocutory application in connection with or for the purpose of an appeal or proposed appeal to be heard and determined by the Court of Appeal is clearly in no way covered by the provisions of the said Rule 2 of The High Court (Interlocutory Application in Appellate Matters) Rules. In other words, an interlocutory application in connection with or for the purpose of an appeal or proposed appeal to be heard not by the High Court in its appellate jurisdiction but by the Court of Appeal cannot under the present state of the law be competently heard and determined by the High Court constituted of only one single judge pursuant to the provision of Rule 2 of the said High Court, (Interlocutory Applications in Appellate Matters) Rules made pursuant to Section 116 of the High Court Law of Northern Nigeria, Cap. 49 of 1963. In the circumstance, I can find no reason to depart from the decisions of this court in *Akerele v. Alapata* (1973) NWLR 138 and *Ishola v. Ajiboye* (1994) 6 NWLR (Pt. 352) 506.

Without doubt, the present appeal is concerned with an interlocutory application in connection with an appeal to be heard not by the High Court in its appellate jurisdiction but by the Court of Appeal. It is clear to me that the application in issue ought to have been heard and determined by the High Court in its appellate juris-

diction and consisting of not less than two judges as prescribed under Section 63(1) of the High Court Law, Cap. 49, Laws of Northern Nigeria, 1963, as modified by the decision of this court in *Oloriegebe v. Omotesho* (supra) and not by a single judge.

B It is for the above and the more detailed reasons contained in the judgment of my learned brother, Ogundare, JSC., that I, too, find no substance in this appeal. It is accordingly dismissed by me with costs to the respondent against the appellant which I assess and fix at N10,000.00.

C _____

KATSINA-ALU JSC (Dissenting)

D I have had the advantage of reading in draft the judgment delivered by my learned brother, Ogundare, JSC. With due respect I find myself unable to agree with him.

E Section 62 of the High Court Law of Northern Nigeria, 1963, (Cap.49) gives the High Court the jurisdiction to hear appeals from grade A and grade A Limited Native Courts and Provincial Courts. Section 63 thereof provides for the constitution of the court in the exercise of its appellate jurisdiction. It provides:

F “In the exercise of its jurisdiction under S.62, the High Court shall be constituted of three members two of whom shall be judges of the High Court and one of whom shall be a judge of the Sharia Court of Appeal.”

Following the decision of this court in *Ishola v. Ajiboye* (1994)6 NWLR (Pt.352) 506 two High Court judges constitute the appellate court in the exercise of its jurisdiction under Section 62.

G Section 116(1) of the High Court Law empowers the Chief Judge of a State to make rules to carry into effect any of the matters listed therein. In pursuance of this provision the Chief Judge of Plateau State made the High Court (Interlocutory Application in Appellate Matters) Rules. Rule 2 thereof reads:

H “Every interlocutory application in connection with or for the purpose of any appeal or proposed to be heard by the High Court may be heard and disposed of before a court constituted either of not less than two judges or a single judge.”

The first thing to note is this. The entire purpose of Section

116(1) and the Rules is to enable a single judge to deal with an application in connection with or in respect of an appeal before the High Court. In my view, the provision covers all applications before the High Court whether in respect of an appeal to be heard by the court or in connection with an appeal that has been heard and disposed of by the High Court. Before now all such applications must be heard by two judges of the High Court. The purpose of Section 116(1) and the Rules is to obviate the difficulty in having two judges to constitute the court even in respect of simple applications. Rule 2 may have been inelegantly drafted, but that does not derogate from the intention and purpose for which this enactment was made.

The second thing to note is this. The phrase “to be heard by the High Court” in my view refers more to the applications coming before the High Court than to the appeals. Let me explain. The High Court does not exercise original jurisdiction over matters that come to it on appeal from the Native Court. It would be tautologous to speak of appeals to be heard by the High Court. If however an application to appeal to the Court of Appeal from a judgment of the High Court made to the High Court has elapsed, such an application cannot be heard and disposed of by the High Court. Again if an application for stay of execution of the judgment of the High Court is made to that court when the appeal has been entered in the Court of Appeal such an application cannot be heard and disposed of by the High Court. They will of necessity be made to the Court of Appeal.

In my judgment, the interpretation placed on Rule 2 is too narrow and restrictive. In the result I allow this appeal and order that the appeal struck out be reinstated and heard on its merits by a different Panel of the Court of Appeal, Jos. I award N10,000.00 costs to the appellant.

KALGO JSC (Dissenting)

Having read in advance the judgment of my learned brother, Ogundare, JSC., just delivered in this appeal, I find myself unable to agree with him that this appeal must fail.

S.63(1) of High Court Laws of Northern Nig. 1963, (Cap.49) applicable to Plateau State where this appeal emanates provides:-

“In the exercise of its jurisdiction under S.62, the High Court shall be constituted of three members two of whom shall be judges of the High Court and one of whom shall be a judge of the Sharia Court of Appeal.”

B Section 62 empowers the High Court to hear appeals from the decisions of all the courts below it in the State except on matters exclusive to the Sharia Court of Appeal. By virtue of the decision of this court in *Ishola v. Ajiboye* (1994) 6 NWLR (Pt.352) 506-561, S.63(1) was found to be valid and consistent with S.238 of 1979 C Constitution after its modification by the removal of the judge of the Sharia Court of Appeal. Section 238 of the Constitution provides that:-

“For the purpose of exercising any jurisdiction conferred upon it under this constitution or any law, a High Court of a state shall be duly constituted if it consist of at least one judge of that court.”

D “That Court” in S.238 means the High Court of a State, and “any jurisdiction” means original or appellate. The section provides the minimum of judges (to be one) to exercise any jurisdiction of the High Court, and did not include a Sharia Court judge.

E Section 116 of the High Court empowered the Chief Justice of Northern Nigeria to make rules to carry into effect any of the matters listed therein. It is in pursuance of this provision that the Chief Justice of Northern Nigeria made the High Court (Interlocutory Applications in Appellate Matters) Rules under S.116(1) of the High Court Law.

F Rule 2 of the Rules provides:-

“Every interlocutory application in connection with or for the purpose of any appeal or proposed appeal to be heard by the High Court may be heard and disposed of before a court constituted either of not less than two judges or a single judge.” (Underlining mine)

G In this case the appellant sought for and was granted leave to appeal by a single judge of the High Court to file an appeal in the Court of Appeal. This clearly means that the appeal was not going to be heard by the High Court. This therefore takes it out of the ambit or application of S.116(1) of the High Court Law.

H The provisions of S.63(1) and Rule 2 of the Rules made pursuant to Section 116(1) (o) of the High Court Law, appear to me to create two distinct situations. S.63(1) is dealing with substantive appeal and S.116(1) is dealing with interlocutory matters for the

purpose of an appeal to be heard by the High Court. They are not, in my respectful view inconsistent with each other.

Since this appeal deals with the question of leave to appeal to the Court of Appeal from the decision of the High Court in exercise of its appellate jurisdiction, any jurisdiction to be exercised thereon must be in accordance with S.63(1) as modified by the 1979 Constitution applicable to this case. And by S.238 of that Constitution, any jurisdiction of the High Court, whether original or appellate, substantive or interlocutory can be exercised by at least “one judge of that court”. That being the case the leave to appeal granted to the appellant by a single judge Atsi, J., in this case is perfectly valid and in order and I so hold. Therefore the Court of Appeal was wrong to strike out the appeal of the appellant before it. B
C

This would not affect the decision of this court in Ajiboye’s case where this court held that S.63(1) is not inconsistent with S.238 of the 1979 Constitution. This is so because the 1979 Constitution provides for a minimum of one judge and S.63(1) as modified provides for two judges. The decision in Akerele v. Alapata (1973) NWLR 138 was correctly decided at the time it was decided. D

In the circumstances, there is no justification or any reason at all for this court to revisit or overrule its earlier decisions on this point referred to earlier in this judgment. I accordingly so hold. E

For the reasons stated above I find that there is merit in this appeal and I allow it. I set aside the decision of the Court of Appeal and uphold the leave to appeal granted to the appellant in this case by the single judge of the High Court of Plateau State. I order that the appeal to the Court of Appeal be heard by another panel of that Court. I award N10,000. 00 costs to the appellant against the respondent. F
G

UWAIFO JSC (Dissenting)

I had the opportunity to read in advance the judgment of my learned brother, Ogundare, JSC. I agree with him that Section 116(1) of the High Court Law (Cap.49) Laws of Northern Nigeria, 1963, and the Rules made thereunder permitting a single judge to hear an interlocutory application in an appeal to be heard by the H

High Court are constitutionally valid. What I find myself unable to agree with, with due respect, is the restrictive interpretation that the said provisions do not apply after the said appeal has been heard and determined by the High Court.

B In my view, the entire purpose of Section 116(1) and the Rules is to enable a single judge to deal with an interlocutory application in respect of an appeal which comes to the court for hearing and determination by virtue of the jurisdiction conferred on it by Section 62 of the Law.

C Section 62 gives the High Court the jurisdiction to hear appeals from grade A and grade A limited native courts and Provincial Courts. Section 63(1) provides (following the decision of this court in *Ishola v. Ajiboye* (1994) 6 NWLR (Pt.352) 506) for two High Court judges to constitute the appellate court in the exercise of its jurisdiction under Section 62.

D As a result of Section 116(1) which has been set out in the judgment of Ogundare, JSC., the High Court (Interlocutory Applications in Appellate Matters) Rules (also set out in that judgment) were made. Rule 2 reads:

E “Every interlocutory application in connection with or for the purpose of any appeal or proposed appeal to be heard by the High Court may be heard and disposed of before a court constituted either of not less than two Judges or a single judge.” (Emphasis mine)

F The question is whether this provision applies only to an interlocutory application made before and during the hearing of the appeal which comes before the court, and not after the appeal has been determined. I do not think the use of the phrase “any appeal or proposed appeal to be heard by the High Court” can justify such an interpretation. It cannot be disputed that, that phrase simply identifies an appeal which falls to be heard by virtue of Section 62 the full text of which provides thus:

G “The High Court shall have jurisdiction to hear appeals (other than appeals in respect of matters which are the subject of the jurisdiction of the Sharia Court of Appeal) from grade A and grade A limited native courts and Provincial Courts.”

H I cannot see a better or more appropriate phrase used in Section 116(1) and the Rules to describe any appeal contemplated by Section 62; that is to say, a description of any appeal that as of

necessity is brought or taken steps to be brought before the High Court. When that appeal has been determined, an application made under Rule 2 of the said Rules is an “interlocutory application in connection with” that appeal. One such example is an application for stay of execution of the judgment in that appeal. This can, by virtue of Section 116(1) and the Rules, be taken by a single judge. This is clearly because the application is in connection with the appeal now decided. A distinction must, in my view, be recognised between “every interlocutory application in connection with” and “every interlocutory application for the purpose of” any appeal or proposed appeal to be heard by the High Court. B
C

It is my view that a single judge can entertain an application to appeal from the judgment arrived at by the High Court of Plateau State in its appellate jurisdiction so long as it is still within the jurisdiction of the court to do so; that is to say, if the time within which to appeal has not elapsed. To hold otherwise will stifle the true intendment of Section 116(1) and the Rules made under it to confer jurisdiction on a single judge to attend to every interlocutory application in connection with any appeal coming before the High Court. D
E

I therefore on that basis hold that the court below was in error to have struck out the appeal before it as incompetent on the ground that leave to appeal was given by a single judge. In consequence, I allow this appeal and order that the appeal struck out be reinstated and heard on its merit by a different panel of the Court of Appeal, Jos Division. I award N10,000.00 costs to the appellant. F

G

H