

SUPREME COURT OF NIGERIA
FRIDAY 11TH JULY, 2003. SC. 149/1999
CORAM:- M. L. UWAI S CJN, U. MOHAMMED, A. I. IGUH,
A. I. KATSINA-ALU, D. MUSDAPHER, JJSC

1. TIJANI AMOO
2. KARIMU AGORO APPELLANTS
3. ADEDOKUN ADEDEJI
4. ASIRU ADEMOLA
5. ALIM I ASIRU (Alias Akanji Aba)
AND
1. ALHAJI BUSARI ALABI
2. KARIMU ADEDOKUN
3. NOSIRU AFOLABI RESPONDENTS
4. RABIU ADESOLA
5. SAKA AJENIFUJA
(For themselves and on
behalf of 21 other members
of Idagbasoke Modeke-Igboho)

JURISDICTION - Issue - Fundamentality of - Once the competence of a procedural step is challenged - Court is duty bound first to consider same - And rule on it (H1)

FUNDAMENTAL RIGHTS - Fair hearing - Breach - 1999 Constitution s.36 - Any breach of the provisions of fundamental rights - Renders the act subsequent to that breach - A nullity (H2)

APPEALS - Filing - Extension of time - Time prescribed in the Court of Appeal Act is not relevant - For purposes of filing appeal - After extension of time has been granted (H3)

APPEALS - Courts - Hearing - Jurisdiction - Once the record of appeal has been received by Court of Appeal - The High Court from which the appeal emanated - Will cease to have jurisdiction over same (H4)

SUPREME COURT - Orders - Appeals - Notice of Appeal - By or

dering that notice be filed in Court of Appeal - Supreme Court has clothed that court with jurisdiction - To look into competency of the notice (H5)

FACTS

Plaintiffs/respondents sued defendants/appellants before the High Court of Oyo State. Upon being served with the originating processes, appellants filed a motion on notice praying the court to strike out the suit for want of jurisdiction. The trial court heard and dismissed the application. Appellants failed to appeal against the ruling timeously. Later on, appellants applied to the Court of Appeal, Ibadan Division for extension of time to appeal against the ruling. The application was refused. So, appellants appealed to Supreme Court against the refusal by Court of Appeal to extend time for them to appeal. That appeal was allowed and the Supreme Court ordered that the notice of appeal should be filed at Court of Appeal without specifying the length of the extension granted appellants to file the appeal.

Following the order of Supreme Court, appellants filed two identical notices of appeal – one in the Court of Appeal and the second in the trial High Court. Upon being served with the notices, respondents filed a motion on notice praying the Court of Appeal to strike out both notices in that neither of them was filed within the time required by section 25(2) of Court of Appeal Act 1976. In reaction, appellants filed a notice of preliminary objection to the motion of respondents on the ground that Court of Appeal lacked the jurisdiction to entertain same in as much as the appeal has not been entered thereat. The court in its ruling held that both notices of appeal were incompetent and liable to be struck out. It did not hear or decide the objection filed by appellants. Aggrieved, appellants appealed to Supreme Court.

ISSUES FOR DETERMINATION

“1. Whether there was breach of the appellants’ constitutional right to be heard and an infringement of the principle of natural justice against the appellants (sic).

2. Whether the Court of Appeal had jurisdiction to entertain the application of the applicants/respondents even though the record of appeal had not been compiled by the Registrar of the High Court

and therefore nothing had yet reached the Court of Appeal for the purpose of the appeal being “entered” by the Court of Appeal on its cause list.”

HELD (Unanimously allowing the appeal per **MUSDAPHER JSC)**

JURISDICTION - Issue - Fundamentalality of

1. The law is well settled that when the competence of a procedural step or of an appeal is challenged, the court is duty bound first to consider the competence and rule on it. If it holds that the step taken or the appeal is competent, it shall pronounce so and may reserve its reasons in the decision where the preliminary objection is taken along with the issues brought before it in the appeal. In the instant case, the Court of Appeal clearly abdicated its sacred duty of considering and ruling on whether the application was competent or not. It was wrong to proceed to hear the application of the respondents without making a determination on the competency or otherwise of the application before it. Once the competency of a procedural step is challenged, it means that the jurisdiction of the court to determine the procedural step is put in issue. It is thus fundamental to consider the issue of jurisdiction first because where a court takes upon itself to exercise jurisdiction which it does not possess, its decision amounts to a nullity. (p. 2103 G)

Fair hearing - Breach

2. There is no dispute whatever that from the record of the appeal the court below neither ruled on the preliminary objection nor heard arguments before it proceeded to determine the application before it. This amounts to a breach of the constitutional right of the appellants enshrined in Section 36 of the Constitution. It is settled law that any breach of the provisions of the fundamental right provisions renders the act subsequent to that breach a nullity. (p. 2104 E)

APPEALS - Filing - Extension of time

3. The Order extending the time to file the Notice of Appeal granted by this court did not contain any time frame. While it is not expected for the appellants to sit idly by for any length of time, the appellants in this case cannot be said to have slept or abandoned the appeal. The prescribed time contained in the Court of Appeal Act is not relevant for the purposes of filing an appeal after an extension of time has been granted. (p. 2105 F)

APPEALS - Courts - Hearing - Jurisdiction

4. Where an appeal is brought by the filing of a Notice of Appeal in the trial court, the Court of Appeal may appear to share concurrent jurisdiction with the trial court especially under but not limited to the provisions of Sections 15, 18 and 25 of the Court of Appeal Act, 1976.

But the true position is that where the Court of Appeal has already received the record of appeal compiled from the lower court and the appeal has been entered in the cause list, any interlocutory application must be made to the Court of Appeal. At such a stage, the Court of Appeal will appear to have exclusive jurisdiction to deal with the appeal.

In the case of Ezomo v. A.G. Bendel State, supra, Karibi-Whyte, JSC., put the position thus:-

“Thus there is the period between when an appeal is deemed brought, i.e. Notice of Appeal is filed, and before the record of appeal is forwarded to the Court of Appeal; and the time after the record of appeal is received in the Court of Appeal. It is well settled that until the appeal is entered in the Court of Appeal, that court has no control over the proceedings as between the parties. In such a circumstance every application should be made to the court in which Notice of Appeal was given. After the appeal has been entered in the Court of Appeal, the High Court from which the appeal emanated will cease to have jurisdiction. (p. 2106 H)

SUPREME COURT - Orders - Appeals - Notice of Appeal

5. The situation at hand is clearly different. The Supreme Court

has directed, when granting extension of time to file the Notice of Appeal, to file the Notice of Appeal in the Court of Appeal. Thus, in my view, when the Notice of Appeal is filed on the direction of the Supreme Court, Court of Appeal is clearly in control of the proceedings as between the parties. In any event, the trial court which made its ruling in the matter, the subject of the appeal would have no jurisdiction to entertain the respondents' motion. In my view, the Supreme Court by its order to file the notice in the Court of Appeal, had clothed the Court of Appeal with the jurisdiction to look into the competency of the Notice of Appeal with reference to the time frame. I accordingly resolve the second issue against the appellants. (p. 2107 E)

REPRESENTATION

Appellants absent. Not represented
Chief K. A. Akinyele, for the Respondents

CASES REFERRED TO

- Ike v. Nzekwe (1975) 2 S.C. 1 E
Coker v. Adeyemo (1965) 1 All NLR 120
Afolabi v. Adekunle (1983) 2 SCNLR 141
Adewoyin v. Adeyeye (1962) 2 All NLR 108
Obodo v. Olomu (1987) 3 NWLR (Pt. 59) 111 F
Saraki v. Kotoye (1992) 9 NWLR (Pt. 264) 156
Bendel State (1986) 4 NWLR (Pt. 36) 448
Ogigie v. Obiyan (1997) 10 NWLR (Pt. 524) 179
Adigun v. A.G. Oyo State (1987) 1 NWLR (Pt. 53) 687
Dangyang v. Ladapo & Co. Ltd. (1993) 4 NWLR (Pt. 286) 226 G
Onyemeh v. Egbuchulam (1996) 5 NWLR (Pt. 448) 225
Peenok Invest. Ltd. v. Hotel Presidential Ltd. (1983) 4 NCLR 122
Adeyemi v. Y.R.S. Ike-Oluwa Ltd. (1993) 8 NWLR (Pt. 271) 517
Onyemeh v. Egbuchulam (1996) 5 NWLR (Pt. 448) 255
Shell Dev. Co. Ltd. v. Isaiah (2001) 5 S.C. (Pt. II) 1 H

STATUTE & RULES REFERRED TO

Court of Appeal Act, 1976, Cap. 5, L.F.N. 1990, s. 25
Court of Appeal Rules, O. 3

LEAD JUDGMENT BY MUSDAPHER JSC

This is an appeal from the Ruling delivered by the Court of Appeal, Ibadan Division, on the 28th of September, 1999 in appeal No. CA/1/M.70/97 wherein the Court of Appeal, (Onalaja, Adamu and Tabai, JJCA.), granted the respondent's application by striking out the two Notices of Appeal dated the 27th day of June, 1996 and 4th July, 1996 filed by the appellants herein in Suit No. HSK/48/91 respectively at the Registry of the Court of Appeal and the High Court Registry, Saki, Oyo State, as being incompetent as same were filed outside the time prescribed by Section 25(2) of the Court of Appeal Act, Cap. 75, Laws of the Federation of Nigeria, 1990. But before the consideration of the Grounds of Appeal herein and the issues distilled therefrom, it is convenient at this stage to sketch out the background facts.

The respondents herein were the plaintiffs in Suit No. HOY/48/91 later transferred to Saki Division, Oyo State and renumbered HSK/48/91. On the said suit, the claims were against the appellants herein as the defendants. Immediately the Statement of Claim was served on the defendants, the defendants filed a Motion on Notice praying the court to strike out the suit against them on the ground, amongst others, that the court lacked the jurisdiction to entertain the suit. By a Ruling delivered on the 15th of June, 1992, the defendants' application was dismissed by the trial court. The defendants being dissatisfied with the Ruling of the trial court filed a Notice of Appeal on the 24th of June, 1992 without seeking and obtaining leave of either the High Court or the Court of Appeal. It should be mentioned that the grounds were of mixed law and facts. Based on the purported Notice of Appeal, the defendants also filed a Motion on Notice praying the trial court to stay the proceedings in the suit pending the determination of the appeal. In the interval, Saki Judicial Division was created out of the Oyo Judicial Division as HSK/48/91. The defendants' application for stay of proceedings was argued and refused on the grounds that the leave of either the High Court or Court of Appeal was not sought and obtained before filing the Notice of Appeal relied upon by the defendants as the basis for the application for stay of the proceedings, the grounds of appeal being of mixed law and fact. After some futile attempts, the defendants on

2/12/1993 filed an application praying amongst other reliefs, for an extension of time within which to appeal against the ruling delivered on the 15/6/1992, leave to appeal and extension of time within which to apply for leave to appeal. By a ruling delivered by the Court of Appeal, Ibadan Division on 21/2/1994, the court refused the said application. The defendants felt unhappy with the Ruling refusing leave to appeal, appealed to this court in Appeal No. SC. 49/1999 and by the judgment of this court delivered on the 2/4/1996, the defendant's appeal was allowed. This court per Uwais, CJN., stated:-

"The appeal succeeds and it is hereby allowed. The ruling of the Court of Appeal is set aside. In its place, I grant the application as prayed. The Notice of Appeal to be filed in the Court of Appeal shall contain only the proposed 1st and 2nd grounds of appeal."

The defendants in pursuance of the extension of time to appeal to the Court of Appeal granted by this court aforesaid, caused to be filed two Notices of Appeal in the Court of Appeal, Ibadan and in the High Court, Saki on 27/6/1996 and on 4/7/1996 respectively. When the plaintiffs were served with the Notices of Appeal, they filed a Motion on Notice in the court below challenging the competence of the Notices of Appeal. The motion filed by the plaintiffs was in these terms:-

"(1) An Order of the Honourable Court striking out the two Notices of Appeal filed by the Appellants/Respondents in their suit, i.e. one filed on the 27/6/1996 at the Court of Appeal Registry, Ibadan, and the second one filed on 4/7/1996 at the Oyo State High Court Registry, Saki, Oyo State respectively for being incompetent."

(2) And for such further or other orders as this Honourable Court may deem fit to make in the circumstances."

AND TAKE FURTHER NOTICE that the ground upon which this application is brought is stated hereunder:-

"That the two Notices of Appeal filed in this suit pursuant to the Order for extension of time granted by the Supreme Court on Tuesday, the 2nd day of April, 1996, are incompetent, same not having been filed within the time required by Section 25(2) of the Court of Appeal Act, 1976."

The said application was filed at the Court of Appeal, Ibadan Division on the 28/5/1997. The defendants filed a Notice to rely upon preliminary objection to the hearing of the plaintiff's application, the

grounds of the objection were:-

“(1) *The court below lacked the jurisdiction “to entertain the application inasmuch as the appeal has not been entered.” and (2) The application was not made to the court below though there ‘are no special circumstances which make it impossible or -impracticable to apply to the court below.’*”

The court below on the 28th of September, 1999 after hearing the argument of counsel decided that the two Notices of Appeal filed by the defendants were incompetent and the two notices were consequently struck out. The Court of Appeal per Onalaja, JCA., with Adamu and Tabai, JJCA., concurring held :-

On 1st April, 1996, the Supreme Court stated as follows:-

“The Notice of Appeal to be filed in the Court of Appeal shall contain only the proposed 1st and 2nd grounds of appeal.”

By virtue of this Order the respondent was to file the said Notice of Appeal in the Court of Appeal on or before 14 days from the 1st of April, 1996.

It is common ground that the said Notice of Appeal was filed on the 27/6/1996 which was a period, beyond the statutory period. Applying Section 25, Court of Appeal Act, Cap. 75 and Order 3 Rule (3) 5 Court of Appeal Rules, 1981 as amended, the Notice of Appeal filed is incompetent and therefore invalid, so the Notice of Appeal filed by the appellants/ respondents are incompetent for non-filing within the statutory period and there is no notice filed for a prayer to extend the time to file the Notice of Appeal. The application succeeds and two notices of appeal filed being incompetent are struck out.”

I have referred to the preliminary objection to hearing of the plaintiffs’ application filed by the defendants. The court below did not give any hearing to it and consequently did not decide or make any reference to it.

The defendants hereinafter referred to as the appellants (and the plaintiffs as the respondents) submitted the following issues for the determination of the appeal.

“1. *Whether there was breach of the appellants’ constitutional right to be heard and an infringement of the principle of natural justice against the appellants (sic).*

2. *Whether the Court of Appeal had jurisdiction to entertain the application of the applicants/respondents even though the record*

of appeal had not been compiled by the Registrar of the High Court and therefore nothing had yet reached the Court of Appeal for the purpose of the appeal being “entered” by the Court of Appeal on its cause list.”

The learned counsel for the respondents gave notice of preliminary objection to the hearing of the appeal on the ground that the appellants’ grounds of appeal Nos. 1 and 2 did not arise from the ruling appealed against and the appellants have failed to raise the issues as fresh issues. The learned counsel, however conceded to the competency of the grounds when his attention was drawn to the fact that the lower court refused to consider or deal with the preliminary objection filed by the appellant, and this neglect manifestly led to the questioned two grounds of appeal. The preliminary objection raised by the respondents was eventually withdrawn and struck out.

At the hearing of the appeal, the learned counsel for the appellants was absent and the appellants’ appeal was deemed argued on the brief of argument filed. The learned counsel for the respondents adopted the issues formulated in the appellants’ brief. He argued that though this court when granting extension of time to the appellants “to file the Notice of Appeal at the Court of Appeal” it did not give any time limit but the appellants should have filed the Notice of Appeal within the time limited by Section 25 (2) of the Court of Appeal Act and Order 3 rule 5 of the Court of Appeal Rules.

Now issue No. 1 distilled from grounds of appeal Nos. 1 and 2 have been conceded by the respondents. There is no dispute whatever that the court below had failed to deal with the preliminary objection filed by the appellants against the respondents’ motion praying that the respondents’ motion to strike out the Notices of Appeal was incompetent. ***The law is well settled that when the competence of a procedural step or of an appeal is challenged, the court is duty bound first to consider the competence and rule on it. If it holds that the step taken or the appeal is competent, it shall pronounce so and may reserve its reasons in the decision where the preliminary objection is taken along with the issues brought before it in the appeal. In the instant case, the Court of Appeal clearly abdicated its sacred duty of considering and ruling on whether the application was competent or not. It was wrong to proceed to hear the application***

of the respondents without making a determination on the competency or otherwise of the application before it. Once the competency of a procedural step is challenged, it means that the jurisdiction of the court to determine the procedural step is put in issue. It is thus fundamental to consider the issue of jurisdiction first because where a court takes upon itself to exercise jurisdiction which it does not possess, its decision amounts to a nullity. See *Peenok Investments Ltd. v. Hotel Presidential Ltd.* (1983) 4 NCLR 122. *Ike v. Nzekwe* (1975) 2 S.C. 1; *Shell Dev. Co. Ltd. v. Isaiah* (2001) 5 S.C. (Pt. II) 1; (2001) 11 NWLR (Pt. 723) 168 at 177. In the case of *Onyemeh v. Egbuchulam* (1996) 5 NWLR (Pt. 448) 225 at 268-269, Ogwuegbu, JSC., put it thus:-

“Where the grounds of appeal are found to be incompetent, the Court of Appeal will lack the jurisdiction to entertain the appeal. The issue of Jurisdiction is fundamental to the question of the competence of the court adjudicating. It is therefore crucial for any court adjudicating first to determine the issue. The issue cannot be taken for granted as the court below did in this appeal. See *Kalio v. Daniel Kalio* (1977) 2 S.C. 15; *Barclays Bank of Nigeria v. Central Bank of Nigeria* (1976) 6 S.C. 175 and *Odofin v. Agu* (1992) 3 NWLR (Pt. 229) 350.”

In the instant case, **there is no dispute whatever that from the record of the appeal the court below neither ruled on the preliminary objection nor heard arguments before it proceeded to determine the application before it. This amounts to a breach of the constitutional right of the appellants enshrined in Section 36 of the Constitution. It is settled law that any breach of the provisions of the fundamental right provisions renders the act subsequent to that breach a nullity.** See *Adigun v. A.G. Oyo State* (1987) 1 NWLR (Pt. 53) 687, *Obodo v. Olomu* (1987) 3 NWLR (Pt. 59) 111 and *Okafor and Ors. v. A.G. Anambra State & Ors.* (1991) 6 NWLR (Pt. 200) 659.

As shown above, the learned counsel for the respondents has conceded this issue at the hearing of the appeal. He was right to have conceded the point. Issue of jurisdiction as pointed out is fundamental and once it is raised, the court must first decide whether it has jurisdiction to entertain the matter before it or not before embarking to deal with the main matter placed before it for adjudication.

Before I part with this issue, I need to emphasise that by virtue of Section 25 of the Court of Appeal Act, 1976, the periods prescribed for appealing against a final decision is three months and 14 days for an interlocutory decision. It accordingly follows that where an appellant has failed to appeal within the period of time stipulated, he must, to have a competent appeal, obtain leave to appeal out of time. See *Ogigie v. Obiyan* (1997) 10 NWLR (Pt. 524) 179 and *Adeyemi v. Y.R.S. Ike-Oluwa & Sons Ltd.* (1993) 8 NWLR (Pt. 271) 517. The appellants in the instant case failed to file the appeal within the prescribed time. They applied for extension of time to appeal and the Court of Appeal refused to extend time. They appealed to the Supreme Court against the refusal and the Supreme Court extended the time. An Order refusing an extension of time within which to appeal is not a decision on the merit. As such it does not constitute, in law, a bar to a further application. It is regarded as a matter of procedure which does not affect the constitutional right to seek to appeal. See *Saraki v. Kotoye* (1992) 9 NWLR (Pt. 264) 156. It is not an abuse of the court process for a party to file a further application to take a procedural step after initial refusal by the court. Rules of Court are designed to aid the due administration of justice and not intended to impede effective and efficient administration of justice. The duty to do justice is fundamental to its administration. Accordingly, wherever the rules of procedure which are the indefensible handmaids of the administration of justice can be made to have optimum effect, nothing should stand in the way of the court to rely on it in doing substantial justice in the determination of a case. See *Afolabi v. Adekunle* (1983) 2 SCNLR 141. ***The Order extending the time to file the Notice of Appeal granted by this court did not contain any time frame. While it is not expected for the appellants to sit idly by for any length of time, the appellants in this case cannot be said to have slept or abandoned the appeal. The prescribed time contained in the Court of Appeal Act is not relevant for the purposes of filing an appeal after an extension of time has been granted.*** In any event, the failure of the court below to decide on the fundamental issue of the competency of the respondents' application is sufficient for me to resolve this issue in favour of the appellants.

This is concerned with the question whether the court below was competent to deal with the respondents' motion at the time it did, when the records of proceedings had not been transmitted to the Court of Appeal from the trial court. It is submitted that the appeal had not been entered in the Court of Appeal and as such the Court of Appeal lacked the competence to deal with the respondents' application. Learned counsel referred to and relied on Order 1 rule 22 of the Court of Appeal Rules and the cases of *Biocon Agrochem Ltd. v. Kudu Holdings (Pt. 4) Ltd.* (1996) 3 NWLR (Pt. 437) 378 at 380 and *Ezomo v. Attorney-General, Bendel State* (1986) 4 NWLR (Pt. 36) 448 at 460.

The learned counsel for the respondents on the other hand argued that once a Notice of Appeal is filed, an appeal has been brought and that both the trial court and the Court of Appeal have the inherent jurisdiction to entertain interlocutory applications. Learned counsel referred to: *Kigo Nig. Ltd. v. Holman (Bros) Nig. Ltd.* (1980) 5 - 7 S.C. 60. It is further submitted that by the Order of this court directing that the Notice of Appeal be filed in the Court of Appeal, the Supreme Court had clothed the Court of Appeal with the necessary competence to deal with the matter. It is further submitted that the Order of the Supreme Court to file the Notice of Appeal in the Court of Appeal rather than in the trial court had made it impossible and impracticable to file the application to strike out the Notice of Appeal in the trial court. Learned counsel referred to *Mohammed v. Olawunmi* (1993) 4 NWLR (Pt. 287) 254 and *Dangyang v. Ladapo & Co. Ltd.* (1993) 4 NWLR (Pt. 286) 226.

Now, the jurisdiction of the Court of Appeal to entertain any matter is statutory, thus there may be circumstances when the court would have no constitutional jurisdiction to deal with a matter and there are other circumstances, where due to the operation of law, the jurisdiction is shared with the trial court and other circumstances when the jurisdiction is merely put on hold pending compliance with certain preconditions or pending the occurrence of a certain event.

Where an appeal is brought by the filing of a Notice of Appeal in the trial court, the Court of Appeal may appear to share concurrent jurisdiction with the trial court especially under but not limited to the provisions of Sections 15, 18 and 25 of the Court of Appeal Act, 1976. See *Ogunremi v. Dada* (1962) 2

SCNLR 417, Yola v. Agogo (1975) 1 NMLR 245.

But the true position is that where the Court of Appeal has already received the record of appeal compiled from the lower court and the appeal has been entered in the cause list, any interlocutory application must be made to the Court of Appeal. At such a stage, the Court of Appeal will appear to have exclusive jurisdiction to deal with the appeal. See Coker v. Adeyemo (1965) 1 All NLR 120 and Adewoyin v. Adeyeye (1962) 2 All NLR 108. ***In the case of Ezomo v. A.G. Bendel State, supra, Karibi-Whyte, JSC., put the position thus:-***

“Thus there is the period between when an appeal is deemed brought, i.e. Notice of Appeal is filed, and before the record of appeal is forwarded to the Court of Appeal; and the time after the record of appeal is received in the Court of Appeal. It is well settled that until the appeal is entered in the Court of Appeal, that court has no control over the proceedings as between the parties. In such a circumstance every application should be made to the court in which Notice of Appeal was given. After the appeal has been entered in the Court of Appeal, the High Court from which the appeal emanated will cease to have jurisdiction. See Ogunremi v. Dada (1962) 1 All NLR 663, Order 1 rule 22.”

But ***the situation at hand is clearly different. The Supreme Court has directed, when granting extension of time to file the Notice of Appeal, to file the Notice of Appeal in the Court of Appeal. Thus, in my view, when the Notice of Appeal is filed on the direction of the Supreme Court, Court of Appeal is clearly in control of the proceedings as between the parties. In any event, the trial court which made its ruling in the matter the subject of the appeal, would have no jurisdiction to entertain the respondents’ motion. In my view, the Supreme Court by its order to file the notice in the Court of Appeal, had clothed the Court of Appeal with the jurisdiction to look into the competency of the Notice of Appeal with reference to the time frame. I accordingly resolve the second issue against the appellants.***

But in view of what I have stated with reference to issue number one, this appeal succeeds and is allowed by me. The decision of

the court below striking out the Notice of Appeal is set aside and the respondents' motion is dismissed. Each of the parties shall bear their own costs.

B **UWAIS CJN**

I have had the opportunity of reading in draft the judgment read by my learned brother, Musdapher, JSC. I agree with him. I too will therefore allow the appeal and set aside the decision of the Court of Appeal. In its place I hereby dismiss the motion by the Respondents herein before that court. I make no order in respect of this appeal as to costs. Each party shall bear its costs.

D **MOHAMMED JSC**

I have had the privilege of reading the opinion of my learned brother, Musdapher, JSC, in the judgment he has written on this appeal. I agree with him that the appeal has merit and ought to be allowed. Accordingly, the appeal is allowed by me. The decision of the Court of Appeal striking out the Notice of Appeal is set aside. The respondents' motion is dismissed. Parties to bear own costs.

F **IGUH JSC**

I have had the opportunity of reading in draft the judgment just delivered by my learned brother, Musdapher, JSC., and I agree that there is merit in this appeal and that the same ought to be allowed.

G It is trite law that the issue of jurisdiction in any court of law is fundamental to the question of competence of such court to adjudicate on the matter. When the competence of the application before the court below was challenged, that court was duty bound to take this preliminary objection raised before it first and rule on the issue before taking any further step in the proceedings before it. It is also a basic principle of law pursuant to the audi alteram partem rule that a decision on issues may only be reached by the court after both parties have been heard or have been duly granted the opportunity to be heard. See *Onyemeh and Ors. v. Egbuchulam and Ors.* (1996) 5

NWLR (Pt. 448) 255.

In the present case, the court below never called on the appellants to address it on the preliminary objection filed by them. No hearing, never mind fair hearing, was therefore given to the appellants in respect of their preliminary objection. There was, in my view, a breach of the appellants' constitutional right to fair hearing as enshrined in Section 36 of the Constitution of the Federal Republic of Nigeria, 1999. This breach is also an infringement of one of the cardinal principles of natural justice, the audi alteram partem rule. In my view, a decision arrived at by the court below in the face of such very serious breaches should not be allowed to stand and must be set aside. See *Adigun and Ors. v. Attorney-General of Oyo State and Ors.* (1987) 1 NWLR (Pt. 53) 678 and *Igboho, Irepo Local Government Council and Community v. The Boundary Settlement Commissioner and Another* (1988) 1 NWLR (Pt. 69) 189.

It is for the above and the more detailed reasons contained in the leading judgment that this appeal succeeds and it is hereby allowed by me. The decision of the Court of Appeal striking out the notice of appeal is set aside and the respondents' motion is dismissed. I also order that the parties do bear their respective costs of this appeal.

KATSINA-ALU JSC

I have had the advantage of reading in draft the judgment delivered by my learned brother, Dahiru Musdapher, JSC. I agree with it and for the reasons which he gives, I too would allow the appeal. I also make no order as to costs.