

SUPREME COURT OF NIGERIA
16TH JANUARY, 2004. SC. 161/1998
CORAM:- U. MOHAMMED, S. U. ONU, S. O. UWAIFO, N.
TOBI, I. C. PATS-ACHOLONU, JJSC

1. PATRICK IZUAGBE OKOLO
2. PACE INDUSTRIES NIG LTD ... PLAINTIFFS/APPELLANTS
AND
UNION BANK OF
NIGERIA LTD. DEFENDANT/RESPONDENT

APPEALS - Ground of appeal - Contesting an issue - Court of Appeal was wrong - In holding that amount of damages - Was not contested by the defendant (H8)

APPEALS - Issues for determination - Preliminary Objection raised against them - Is out of place in this case (H5)

APPEALS - Jurisdiction - Striking out - Where the appeal is incompetent - For want of jurisdiction - It would be struck out - Not dismissed (H4)

BANKING - Pleadings - Interest rate - Unilateral increase thereof - Not supported by any pleading - Is resolved against the defendant bank (H7)

JURISDICTION - Courts - Parties - Lack of jurisdiction - Brings a case to crumble - Parties cannot by connivance, acquiescence or waiver - Confer jurisdiction on the court (H2)

JURISDICTION - Filing fees payment - Is mandatory for court to have jurisdiction - Where not paid in respect of additional reliefs - The reliefs will be struck out (H3)

PLEADINGS - Necessity of - Facts not pleaded go to no issue - Rationale behind this principle - Is to save time (H6)

RULES OF COURT - Appeals - Objection - Extension of time to appeal - Granted by high court registrar - Is not provided for under the rules - Appellants are entitled to object as the granted extension is void ab initio (H1)

FACTS

The plaintiffs/appellants are the customers of the defendant/respondent in a banking relationship. Appellants' case is that the respondent bank failed to transfer the foreign exchange equivalent of N239,143.00 to their overseas customers within time. This delay caused business loss to the appellants. They alleged negligence against the respondent. Appellants sought an order for account of monies paid into their account with respondent, perpetual injunction restraining respondent from selling appellants' mortgaged landed property situate at Effurun, Delta State, refund of ₦5,155.35 (British pound) and or its current naira equivalent, etc. Appellants did not pay filing fees for two of the other reliefs sought by them. Defendant denied liability and filed a counter claim seeking possession of the mortgaged landed property.

After hearing, the learned trial judge delivered judgment. Non of the parties was satisfied with the judgment. Appellants appealed and the respondent cross appealed. The lower court dismissed the appeal and allowed the cross appeal in part. The appellants have further appealed to the Supreme Court and the respondent further cross appealed. Both parties raised preliminary objections, that of respondent dealing inter alia, with unlawful extension of time to appeal granted to appellants by Assistant Chief Registrar of the High Court and non payment of filing fees. The apex Court upheld respondent's preliminary objection and struck out appellants' appeal. Then it considered the issues for determination raised in the respondents cross appeal. See pp.17F - 20A for those issues which as the court observed seem not properly drafted being a repetition of the grounds of appeal.

HELD (Unanimously striking out the appeal, and allowing the cross appeal in part per lead judgment of **TOBI JSC**)

Appeals - Objection - Extension of time

1. I entirely agree with learned Senior Advocate that the only provision which deals with the registrar is order 3 rules 20 (1) and 21(4) and these rules do not provide for or anticipate what the Assistant Chief Registrar did, that is, the extension of time by a period of twenty days within which to file the relevant processes. Learned counsel for the appellants merely submitted that the respondent conceded to the procedure at the court below without making reference to the appropriate page of the Record. I am at a loss to justify the submission of counsel. Even if that is the correct position, I do not think the respondent can be stopped from raising the objection. In view of the fact that the registrar lacked the competence to extend time, the order he purportedly made is null and void ab initio. (p. 13 A & H)

Courts - Parties - Lack of jurisdiction

2. Jurisdiction is the pillar upon which the entire case stands, filling an action in a court of law presupposes that the court has jurisdiction. But once the defendant shows that the court has no jurisdiction, the foundation of the case is not only shaken but is entirely broken. The case crumbles. In effect, there is no case before the court for adjudication. The parties cannot be heard on the merits of the case. That is end of the litigation, unless the action is filed in a court of competent jurisdiction, in which case the action is resuscitated de novo.

Jurisdiction, being the threshold of judicial power and judicialism and by extension extrinsic to the adjudication, parties cannot by connivance, acquiescence or collusion confer jurisdiction on a court. Where a court lacks jurisdiction, parties in the litigation cannot confer jurisdiction on the court. As a matter of law, lack of jurisdiction cannot be waived by one or both parties.

It is a hard matter of law clearly beyond the compromise of the parties. This is because parties cannot conspire to vest jurisdiction in a court where there is none. (p. 13 D)

B Jurisdiction - Filing fees payment - Is mandatory

3. Payment of filing fees is a precondition to or condition precedent to the court's assumption of jurisdiction. Where filing fees are not paid, a court of law will have no jurisdiction to entertain the matter before it. This is because the rules of court make it mandatory for a party to pay filing fees. In this case, the respondent has clearly made out a case that the appellants did not pay filing fees for the additional reliefs 21 (d) and (e). Learned counsel for the appellants did not say that the necessary statutory fees were paid. In Onwugbufor v. Okoye¹ (1996) 1 NWLR (pt.424) 252 where the appellants failed to pay the appropriate fees for an additional claim for forfeiture, the supreme court held that the claim was incompetent. In the light of the above, I have not the slightest difficulty in accepting the invitation of Chief Akpofure to strike out the new reliefs Nos. 21E and D and I hereby accordingly strike them out. (pp. 14 A & 15 C)

F Appeals - Jurisdiction - Striking out

4. But does the law say that when an appeal is incompetent on the ground that the court has no jurisdiction to entertain it, the appeal must be dismissed? It appears to me to be the law that where a court lacks jurisdiction the proper order to make is striking out of the action. In the light of the foregoing, I am in extreme difficulty to accept the invitation of learned Senior Advocate to dismiss the appeal. I would rather strike out the action instituted in the High Court of Delta State on the ground that the appellants failed to get proper extension of time to file appeal. Since the action gave rise to this appeal by the appellants, the appeal itself is incompetent and it is hereby equally struck out. (pp. 15 G & 16 G)

Appeals - Issues for determination

5. My approach would look prolix but I do not have any alternative if I must take each of the objections one after the other. And that is what I have done. I am extremely surprised that learned B counsel can raise such objection in a very clear and obvious situation. Since this court, like all other courts, must consider any preliminary objection, however unmeritorious, I am left with no choice than to take the objection. The objection was clearly out C of place and a waste of the time of this court. I will say no more. (p. 20 B)

Pleadings - Necessity of

6. The basic law is that parties are bound to plead all facts they D intend to rely upon at the trial and facts not pleaded will go to no issue. One rationale behind this principle is that litigation must follow some restrictive order and not open-ended in order to save the time of both the courts and the litigants. If the procedure of E pleadings was not introduced in litigation, parties search for evidence could not have ended and that should have protracted litigation beyond expectation. (p. 25 C)

Banking - Pleadings - Interest rate

7. Where is the pleading to support the unilateral increase of the rate of interest? Instead of dealing with this important point, learned Senior Advocate dealt with conflict of evidence of the 1st respondent and relief sought. I think Achike, JCA (as he then G was) is correct. The issue is therefore resolved in favour of the respondents (for the purpose of the cross appeal) and against the cross-appellant. Since issue No.3 was argued together with issue H No. 1, and rightly too for that matter, issue No.3 is equally resolved in favour of the respondent and therefore against the cross-appellant. (p. 25 H)

Appeals - Ground of appeal

8. On issue No. 2 the question is whether the court of Appeal was right when it held that the "*amount of the award is not contested nor is it covered by any ground of appeal.*" I think not. Although learned Senior Advocate relied on ground 6, I think the relevant ground is ground 5 at page 156 spreading over to page 157. The ground complained of the award of N50,000.00 damages. Particulars (d) is relevant. It reads: "*(d) The learned trial judge without basis found the defendant guilty of lack of negligence and awarded N50,000.00 as bonus to the plaintiff.*"

In the light of the above, the court of Appeal, with respect, was clearly in error in coming to the conclusion that the amount of the award was not contested. It was seriously contested and the contest is ground 5, and so the Court of appeal was also in error in concluding that there was no ground covering the complaint on the award of N50,000.00. Accordingly, I resolve this issue in favour of the cross-appellant. (p. 26 C)

NOTABLE POINTS OF INTEREST

MOHAMMED JSC

1. *Preliminary objection is not incompetent as held by CA*
The learned justice of the Court of Appeal, Achike JCA, (as he then was) who wrote the lead judgment considered the argument of the learned counsel and dismissed the preliminary objection on the ground that Order 3 Rules 15 (1) of the Court of Appeal Rules provided that a respondent intending to rely upon a preliminary objection to the hearing of the appeal should give the appellant three clear days notice of his intention to raise the issue before the hearing of the appeal. The learned justice ruled that the respondent did not give the required notice. With respect to the learned justice, the respondent had raised the preliminary objection in the Respondent's Brief and the learned counsel for the appellants had treated the issue in the plaintiffs/Appellants' Reply

Brief. The Court of Appeal is therefore wrong to say that the respondent did not comply with the provision of Order 3 Rule 15(1) of Court of Appeal Rules. (p. 29 G)

PATS-ACHOLONU JSC

B

2. Need for counsel to avoid intemperate language

It is most unfortunate and I must say a regrettable situation that the learned Counsel for the Appellants instead of replying to the points raised and answer same in the most fashionable way that should be redolent with the exposition of the law in the most forensic form resorted to the use of Language considered intemperate that would make sailor boys blush. I deplore in its totality the unbridled use of expressions that detract from the elegance of a beautiful prose. (p. 35 A)

D

REPRESENTATION

Appellants not represented.

Chief E. L. Akpofure (SAN) with him Godwin Odiete for respondent/cross appellant.

CASES REFERRED TO

Onwugbufo v. Okoye (1996) 34 LRCN 1, (1996) 1 KLR (Pt 37) 1 Management Enterprises Ltd. V. Otusanya (1987) 2 NWLR (pt.55) 179 F

Ogbuehi v. Governor of Imo State (1995) 9 NWLR (pt.417) 53 Okoye v. Nigeria Construction and Furniture Co. Ltd. (1991) 6 NWLR (pt.199) 501 G

Gombe v. P.W. (Nigeria) Ltd. (1995) 6 NWLR (pt.402) 402 Pharmatek Ind. Projects Ltd. V. Ofo (1996) 1 NWLR (pt.424) 332 at 334

Onowhosa v. Oduizou (1999) 1 NWLR (pt.586) 173 at 181 Shie v. Lokoja (1998) 3 NWLR (pt.540) 56 H

Union Bank of Nigeria v. Professor Ozigi (1994) 3 NWLR (pt.333) 385, (1994) 5 KLR 1

RULES REFERRED TO

Bendel State High Court (Civil Procedure) Rules 1988 O. 8 rr. 28 & 29, O. 3 rr. 20 (1) & 21 (4)

Court of Appeal Rules O. 3 r. 15(1)

B

LEAD JUDGMENT BY TOBI JSC

This appeal concerns bank/customer relationship. The appellants are the customers. The respondent is the bank. The case of the appellants is that the respondents failed to comply with foreign exchange transaction involving the transfer abroad timeously of the foreign exchange or currency equivalent of N239,143.00 to cover cost of goods supplied to them by their overseas customers, thus causing business loss to the appellants. The appellants alleged negligence on the part of respondent.

The appellants asked for the following reliefs:

"(a) *An order for Account of all monies paid into and debited against 2nd plaintiff's Account or Account with the defendant from 1986 till date and reversal of all wrongful and illegal debits made by the defendant on the said accounts from 1986 till date and payment over to the 2nd plaintiff of all monies excessively debited with interest at prevent (sic) long Bank Rate.*

(b) *An order of perpetual injunction restraining the defendant by herself, her servants and/or agents or otherwise howsoever from auctioning, selling, disposing of or in any way interfering with 1st plaintiffs title to possession over the property lying and situate at plot 16 Kodesoh Layout, Effurun.*

(c) *An order for the immediate refund of the sum of f5,155.35 (British pound) and/or its current Naira equivalent amount by the defendant to the plaintiff as directed at paragraph 16d(i) hereof.*

(d) *The sum of N1,000,000.00 being damages suffered by the plaintiffs.*

(e) *The sum of f5,155.35 (or its equivalent in Naira) including the current Bank interest rate of 30%, which said sum the*

Defendant have failed, refused or neglected to refund to plaintiffs despite repeated demands."

The respondent did not accept liability. It rather counter-claimed as follows:

*"Wherefore the defendant seeks the order of this Honour- B
able Court that the mortgage registered as No. 42 at page 42 in
volume 523 at the land Registry in the office in Benin City be
enforced against the plaintiffs by for-enclosure and the delivery
of possession to the defendant by the plaintiff the mortgaged prop- C
erty registered as No. 45 at page 45 in volume 273 at the Land
Registry in the office at Benin City in accordance with terms of
the said mortgage. Defendant shall rely on its letters dated 29/3/
89 and 14/4/89 at the trial."*

After hearing evidence, the learned trial judge, Bozimo, J., D
(as she then was) delivered judgment. Each of the parties was
not satisfied with the judgment. The appellant appealed. The re-
spondent also cross-appealed. At the court of appeal, that court
dismissed the appeal and allowed the cross-appeal in part. While E
the appellants have come on appeal to this court, the respondent
has also come to this court on a cross-appeal.

Briefs were filed and duly exchanged. Mr. Okiemute Odje, F
counsel for the appellants, was absent when the appeal was ar-
gued. By the rule of this court, the brief of the appellants and the
reply brief were regarded as argued.

In the respondent's brief, learned Senior Advocate, Chief G
E. L. Akpofure, raised a preliminary objection. Learned counsel
for the appellants, Mr. Okiemute Odje, in his appellants reply brief
has answered the preliminary objection raised by respondent. I
think I should take the preliminary objection first.

At paragraph 3 of the respondent's brief, Chief Akpofure H
raised the preliminary objection in the following terms:

*"The respondent shall at the hearing of this appeal raise
preliminary objection with the leave of this Honourable court in
accordance with the rules of the Honourable court that this ap-*

peal is incompetent on the following ground:

"That the conditions of appeal were not perfected within the stipulated period and no leave was sought by the appellants herein. This goes to the entire root and competence of this appeal as same bothers on jurisdiction."

B Chief Akpofure submitted that before an appellate court can successfully adjudicate over an appeal the conditions of appeal must be satisfied or fulfilled. Referring to page 161 of the record, learned senior Advocate contended that the appellants failed to
C perfect the conditions of appeal within the stipulated time. The appellants, instead of filing the relevant processes before the court of appeal, orally applied to the Assistant Chief Registrar of the trial court for extension of time within which to do so. The As-
D sistant Chief Registrar purporting to act under Order 8 rules 28 and 29 of the High court Civil Procedure Rules 1988 of the defunct Bendel State of Nigeria, now applicable to Delta State, purported to extend time by a period of twenty days with effect from
E May 2, 1995 in favour of the appellants. He argued that order 8 rules 28 and 29 does not give the Registrar any power to extend the period within which conditions of appeal could be fulfilled. He submitted that what the Registrar did is a nullity. He therefore
F urged the court to dismiss the appeal as the court lacks jurisdiction to entertain same.

Learned Senior Advocate also contended that the appellants failed to pay the requisite fees in line with the additional reliefs for the sum of N1,000,000.00 and £5,155.35p (British pound).
G Counsel urged the court to refuse the appellants claim in relation to reliefs 21D and E. As the relevant fees were not paid, the two reliefs were not properly before the court or they were otherwise incompetent, learned Senior Advocate argued. He cited
H Onwugbufor v. Okoye¹ (1996) 34 LRCN 1 at 38, 39, 40. He also urged the court to strike out the reliefs before the order dismissing the appeal is made.

To learned Senior Advocate, if the entire appeal is dismissed

without first striking out the two reliefs, it will mean that the order made by the learned trial judge in her judgment in relation to the two relief would still form part of the standing judgment of the trial court.

In his Reply to the preliminary objection, learned counsel B for the appellants, Mr. Okiemute Odje, submitted in his brief that the respondent's notice of preliminary objection is misconceived and lacks merit and therefore ought to be overruled.

Learned counsel submitted that since the issues raised in the preliminary objection have been conceded at the court below C by the respondent, this court cannot countenance the objection as it has no jurisdiction to entertain the same. He also argued that no ground of appeal was filed contending non fulfilment of the conditions of appeal by the appellants. It is therefore beyond any D thread of controversy that ground 1 of the notice of preliminary objection is a new or fresh issue raised for the first time in this court without prior leave, learned counsel submitted. He cited Onwugbufor v. Okoye (1996) 1 NWLR (pt.424) 252 at 261; Management Enterprises Ltd. V. Otusanya (1987) 2 NWLR (pt.55) E 179; Bankole v. Pelu (1991) 8 NWLR (pt.211) 523; Fadare v. Attorney-General Oyo State (1982) 4 SC 1; Mogaji v. Cadbury (Nig). Ltd. (1985) 2 NWLR (pt.7) 393; Kurfi v. Mohammed (1993) 2 F NWLR (pt.277) 602; Aladetoyinbo v. Adewumi (1990) 6 NWLR (pt.154) 98; Adaka v. Aneka (1997) 11 NWLR (pt.529) 417 at 420. Citing HMS Ltd. V. First Bank of Nig. Ltd. (1991) 1 NWLR (pt.167) 390, learned counsel submitted that parties cannot be G punished for the blunders or errors of their counsel.

Learned counsel submitted that this court should always do substantial justice and not stand on technicalities by punishing litigants for no fault of theirs. He cited Pharmatek Ind. Projects Ltd. V. Ofo (1996) 1 NWLR (pt.424) 332 at 334; Ogbuehi v. H Governor of Imo State (1995) 9 NWLR (pt.417) 53 at 58-59. He urged the court to refuse the preliminary objection and allow the appeal.

Learned counsel also raised preliminary objection in the cross-respondents brief of argument in the following terms:

"Preliminary objection is raised as to the competence of the issues purportedly but ineffectually formulated from the cross-Appellants Grounds of Appeal."

Counsel relied on the following grounds:

"(1) Issues 1-5 formulated at page 6-7 of the CROSS-APPELLANTS' Brief of Argument as arising for determination do not ARISE from and/or are not DISTILLED from the Grounds of Appeal purportedly filed in this court. Furthermore, the issues are not tied and/or not arranged under the relevant Grounds of Appeal as mandatorily stipulated in law."

(2) By reason of (1) supra, the said issues so far as they are not related to the said Grounds of Appeal are AB INITIO IN-COMPETENT and/or INCURABLY DEFECTIVE and ought to be DISMISSED and/or struck out."

(3) The said incompetent issues being INESCAPABLY FRESH or NEW ISSUE are INFRADIG in the absence of PRIOR LEAVE sought and granted to raise them."

Relying on Odofin v. Agu (1992) 3 NWLR (pt.229) 350 at 361 and Onowhosa v. Oduizou (1999) 1 NWLR (pt.586) 173 at 181, learned counsel urged the court to strike out the incompetent issues raised in the equally incompetent cross-appellant's brief of argument. He urged the court to dismiss the cross-appeal.

By way of preliminary issues, this appeal is a parade of preliminary objections, one each from the parties. Let me first take the one from the respondent. The appropriate provision in respect of the exercise of a registrar of the power to hear and determine applications in the High Court is order 8 rule 29. It provides as follows:

"No Registrar other than one who is also a qualified legal practitioner shall have the power to hear and determine any application which by these rules is conferred."

As it is, rule 29 empowers only a registrar who is a quali-

fied legal practitioner to hear and determine any application which by the rules is conferred upon a registrar. **I entirely agree with learned Senior Addition that the only provision which deals with the registrar is order 3 rules 20 (1) and 21(4) and these rules do not provide for or anticipate what the Assistant Chief Registrar did, that is, the extension of time by a period of twenty days within which to file the relevant processes.** B

Learned counsel for the appellants merely submitted that the respondent conceded to the procedure at the court below without making reference to the appropriate page of the Record. I am at a loss to justify the submission counsel. Even if that is the correct position, I do not think the respondent can be stopped from raising the objection. C

Jurisdiction is the pillar upon which the entire case stands, filling an action in a court of law presupposes that the court has jurisdiction. But once the defendant shows that the court has no jurisdiction, the foundation of the case is not only shaken but is entirely broken. The case crumbles. In effect, there is no case before the court for adjudication. The parties cannot be heard on the merits of the case. That is end of the litigation, unless the action is filed in a court of competent jurisdiction, in which case the action is resuscitated de novo. D E F

Jurisdiction, being the threshold of judicial power and judiciously and by extension extrinsic to the adjudication, parties cannot by connivance, acquiescence or collusion confer jurisdiction on a court. Where a court lacks jurisdiction, parties in the litigation cannot confer jurisdiction on the court. As a matter of law, lack of jurisdiction cannot be waived by one or both parties. It is a hard matter of law clearly beyond the compromise of the parties. This is because parties cannot conspire to vest jurisdiction in a court where there is none. G H

In view of the fact that the registrar lacked the com-

petence to extend time, the order he purportedly made is null and void ab initio

The next ground of objection was the failure of the appellants to pay filing fees in respect of two reliefs. **Payment of filing fees is a precondition to or condition precedent to the court's assumption of jurisdiction. Where filing fees are not paid, a court of law have no jurisdiction to entertain the matter before it.**² This is because the rules of court make it mandatory for a party to pay filing fees. In this case, the respondent has clearly made out a case that the appellants did not pay filing fees for the additional reliefs 21 (d) and (e). Learned counsel for the appellants did not say that the necessary statutory fees were paid.

In Onwugbufor v. Okoye¹ (1996) 1 NWLR (pt.424) 252 where the appellants failed to pay the appropriate fees for an additional claim for forfeiture, the supreme court held that the claim was incompetent. Delivering the leading judgment, Iguh, JSC, said at page 292 and I will quote him in extenso:

"Quite apart from the fact that court orders must be obeyed as directed, it cannot be overemphasized that for a valid and effective commencement of a claim, an intending plaintiff shall strictly comply with the provisions of relevant statutes and rules made thereunder and governing the claims made such as the High court Law and the Rules of Anambra State. It is the responsibility of the plaintiff inter alia to pay the requisite fees in respect of each and every relief claimed as prescribed by the rules to enable the court's judicial functions to commence. A court shall not entertain a relief claimed without payment of the prescribed requisite fees unless such fees have been waived or remitted by the court or such fees are payable by any Government Ministry or non-Ministerial Government Department or Local Government pursuant to the provisions of the said High Court Rules of Anambra State. If the default in payment is that of the plaintiff, the

claim in respect of which such prescribed fees have not been paid cannot be said to be properly before the court and should be struck out in the absence of an appropriate remedial action or application to regularize such anomaly.^{2a} In this present case, no payment whatsoever was made by the appellants in respect of their new claim for forfeiture. Payment of the prescribed fees being a condition precedent to the filing of a valid claim before the court, it seems to me clear that the claim for forfeiture in the present suit is incompetent, improperly before the court and ought to be struck out. In the circumstance, it becomes entirely idle and academic to examine the various reasons given by both courts below in refusing the appellants' claim for forfeiture which must be and is hereby struck out."

In the light of the above, I have not the slightest difficulty in accepting the invitation of Chief Akpofure to strike out the new reliefs Nos. 21E and D and 1 hereby accordingly strike them out.

Learned Senior Advocate for the respondent has urged this court to dismiss the appellant's appeal. He cited "order 3 & 20(1)" and "order 8 & 1" of supreme court Rules as amended. I have some problem with the citations. I should not hide my ignorance, if it is an ignorance at all. I think the sign "&" stands for "and". If I am correct then I must say that the Supreme Court Rules do not extend to order 20. Similarly, while there is an order 8 the "&" following the 8 refers to 1. Could this be order 1? If so, I must say that order 1 does not provide for the dismissal of an appeal. If the sign refers to rule, then I must say that rule 20(1) of order 3 of the Supreme Court Rules (as amended in 1999) does not deal with dismissal of appeal. There is some mix up somewhere.

But does the law say that when an appeal is incompetent on the ground that the court has no jurisdiction to entertain it, the appeal must be dismissed? It appears to me to be the law that where a court lacks jurisdiction the proper

order to make is striking out of the action. In Okoye v. Nigeria Construction and Furniture Co. Ltd. (1991) 6 NWLR (pt.199) 501, the supreme court held that the proper order to make where a court has no jurisdiction to entertain an action is that of striking out. Akpata, JSC, said at page 534:

"I now turn to the question of whether the trial court has right to have dismissed the suits of the appellants or whether the majority decision of the court of Appeal substituting an order of striking out the suits was proper in the court circumstance. Although Order 29 Rule 3 states that the court shall either dismiss the suit or order the defendant to answer the plaintiff's allegations of fact, I am in agreement with Oguntade and Uwaifo, JJ. CA that the proper order to make in the circumstance was an order striking out the plaintiffs' suits for lack of jurisdiction... In the instant case, however, as rightly pointed out by Uwaifo, JCA, as the suits stand no court has jurisdiction to entertain them. The plaintiffs can only validly react against the decision of Nwokedi, E J., by way of an appeal."

In Gombe v. P.W (Nigeria) Ltd. (1995) 6 NWLR (pt.402) 402, the supreme court also held that where a court holds that it has no jurisdiction to hear and determine the matter before it, the proper order to make is that of striking out the action and not dismissing same. See also Dim v. Attorney General of the Federation (1986) 1 NWLR (pt.17) 471; Akinbola v. Plisson Fisko Nigeria Ltd. (1988) 4 NWLR (pt.88) 335; Chief Okafor v. Alhaji Hashim (2001) 1 NWLR (pt.711) 88; Alhaji Baba v. Habid Nigeria Bank Ltd. (2001) 7 NWLR (pt.712) 496.

In the light of the foregoing, I am in extreme difficulty to accept the invitation of learned Senior Advocate to dismiss the appeal. I would rather strike out the action instituted in the High Court of Delta State on the ground that the appellants failed to get proper extension of time to file appeal. Since the action gave rise to this appeal by the appellants, the appeal itself is incompetent and it is hereby

equally struck out.

In the interest of fair hearing, the preliminary objection raised by Mr. Okiemute Odje in the cross-respondents' brief will be taken here. The objection reads in part:

".... As Counsel can be heard on behalf of the Appellants/ Cross Respondents by way of argument upon preliminary objection as to the competence of the issues purportedly but ineffectually formulated from Cross-appellants' grounds of appeal...."

Since I had earlier reproduce the grounds of the objection, I shall not repeat the exercise. What I should do now is to react to the objection. It is the law that issues must be formulated from the grounds of appeal. In other words, issues not formulated from the grounds of appeal will go to no issue. Issues should not be framed in the abstract but in concrete terms arising from and related to the grounds filed which represent the questions in controversy in the particular appeal. See Okpala v Ibeme (1989) 2 NWLR (pt.102) 208; Ehot V. The State (1993) 4 NWLR (pt.290) 644; Idike v. Erisi (1989) 2 NWLR (pt.78) 563 Madumere v. E Okafor (1996) 4 NWLR (pt.445) 637; Shie v. Lokoja (1998) 3 NWLR (pt.540) 56

Let me take each of the issues in relation to the grounds of appeal in the light of the preliminary objection. I will take the issues seriatim:

Issue No. 1 is in the following terms:

"Whether the justices of the Court of Appeal were right in law when they held at page 365 as follows:

'The order of the lower court with regard to interest charged by the cross-appellant which is pegged at the interest rate of 11% is consistent with relief sought by the respondent.' (ground 5)

Ground 5 reads as follows:

" The learned justices of the court of Appeal erred in law when they held at page 44 of the judgment (per Achike, JCA) thus:

'The order of the lower court will (sic) regard to interest

charged by the cross-appellant which pegged at the interest of 11% is consistent with the relief sought by the respondents"

It is clear to me that the ground of appeal is the same as the issue. The only difference is in the format. While the ground of appeal takes the format of a ground, the issue takes the format of an issue. With the greatest respect to the learned counsel, Mr. Odje, I do not see the basis of the objection. The objection therefore fails.

Issue No. 2 reads as follows:

"Whether the justices of the Court of Appeal were right in the law when they held as follows:

'Be that as it may, It must be noted that the amount of the award is not contested nor is it covered by any ground of appeal.

I am satisfied that having regard to the pleaded facts and the evidence lead (sic) by both parties coupled with the consideration made by trial judge in deciding the amount to be awarded by way of general damages it cannot be said that the award was not justifiable'

Ground 6 reads as follows:

"The learned justices of the court of Appeal erred in law when they held (per Achike, JCA) at page 45 thus:

'Be that as it may, it must be noted that the amount of the award is not contested nor is it covered by any ground of appeal. I am satisfied that having regard to the pleaded facts and the evidence led by both parties, coupled with the consideration made by the trial judge in deciding the amount to be awarded by way of general damages it cannot be said that the award was not justifiable"

This objection also fails.

Issue No. 3 provides in the following terms:

"Whether the justices of the court of Appeal were right in law (per Achike, JCA) when they held as follows:

'Therefore in the absence of pleadings and evidence to support any unilateral increase of the rate of interest it seems that

the only statutory approach to the mortgage should remain the amount mutually agreed by the parties and that is 11%. In the circumstance any interest paid or charged over and above the rate of 11% should be reversed in favour of the respondent," (Ground 8)

B

Ground 8 is in the following words:

"The learned justices of the Court of Appeal erred in law when they held (per Achike, JCA) at page 52 of the judgement as follows:

'Therefore in the absence of pleadings and evidence to support any unilateral increase of the rate of interest it seems that the only statutory approach to the mortgage should remain the amount mutually agreed by the parties and that is 11%. In the circumstance, any interest paid or charged over and above the rate of 11% should be reversed in favour of the respondent"

C

D

This objection accordingly fails.

Issue No. 4 is in the following terms:

"Whether the Justices of the court of Appeal were right in law when they held as follows:

'The attack on this award is unjustified. Exhibit L-L2 as well as the evidence of DWL afford ample evidence which support the judges' holding that the respondents were entitled to the refund of f5,155.35 (Five thousand one hundred and fifty five pounds thirty five pence) or its Naira equivalent."

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Ground 9, in clearly almost the same languages, reads:

"The learned justices of the court of appeal erred in law to hold at page 53 of the judgment (per Achike, JCA) thus:

G

'The attack on this award is unjustified. Exh. L-L2 as well as the evidence of DWL afforded ample evidence which support the judges holding that the respondents were entitled to the refund of f5, 155. 35P or its naira equivalent."

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This objection also fails.

And finally Issue No. 5 reads thus:

"Whether the judgment of the justices of the court of ap-

peal is in line with the weight of evidence." (Ground 1)

Ground 1 reads as follows:

"The judgment of the court of appeal is against the weight of evidence."

B This objection also fails.

My approach would look prolix but I do not have any alternative if I must take each of the objections one after the other. And that is what I have done. I am extremely surprised that learned counsel can raise such objection in a very clear and obvious situation. Since this court, like all other courts, must consider any preliminary objection, however unmeritorious, I am left with no choice than to take the objection. The objection was clearly out of place and a waste of the time of this court. I will say no more.

I think I am now left with the cross appeal. Let me now deal with it. Chief Akpofure, SAN, taking issues 1 and 3 together, submitted that what the 1st respondent asked for at page 48 lines E 2 and 5 is in conflict with the relief sought in paragraph 21B, page 42H, lines 6-13. Pointing out that in the evidence of 1st respondent, he requested the court to revise the entries debited to his account and also credit his account as against the relief which F speaks of debiting and crediting the 2nd respondent's account, learned Senior Advocate submitted that the evidence is at variance with the relief sought. It is therefore clear that in law the learned trial judge ought not to have granted that relief nor were the justices of the court of Appeal right when they agreed with G the learned trial judge, learned Senior Advocate reasoned. He cited Egbunike v ACB Ltd. (1995) 2 NWLR (pt.375) 34 at 51 and Igbodim v Obianke (1976) 9 and 10 SC 179 at 190.

Learned counsel argued that no facts were pleaded and the H evidence thus led goes to no issue and ought not to have been received. Such evidence wrongly received ought to and should be expunged. Once expunged, there will be nothing upon which the learned trial judge and indeed the justices of the court of Ap-

peal would have based their finding, learned senior Advocate contented.

Counsel submitted that relief 21(b) does not deal with the issue of interest chargeable or not, and that the issue of the interest charged by the cross-appellant was not raised in the relief. B The issue of the interest rate being pegged at the rate of 11% does not also form part of the relief, learned Senior Advocate claimed.

Learned Senior Advocate submitted that a claim relating to either excessive charge of interest or otherwise is a specific relief. He also submitted that the case of Union Bank of Nigeria v. Professor Ozigi (1994) 3 NWLR (pt.333) 385 was wrongly applied and that the case was overruled by the supreme court. To learned Senior Advocate, the law is that the bank is at liberty to charge interest at the rate from time to time stipulated by the bank. This situation, learned Senior Advocate contended, exists where a mortgage has been entered into which carry a clause like the one in the Ozigi's case. D E

Still dealing with the claim relating to arbitrary or excessive charge of interest, learned Senior Advocate submitted that the court of Appeal fell into the same error as the trial court because there was no such relief. Citing Egonu v. Egonu (1978)11 F and 12 SC 111 and Ajakaiye v. Idehai (1994) 8 NWLR (pt.364 511 at 526, learned Senior Advocate argued that a court of law cannot grant a relief that was not sought.

On issue No. 2, learned senior Advocate adopted his submission on damages in the respondent's brief under the notice of preliminary objection. He quoted the relevant pages in the respondent's brief. He contended that the issue of damages was raised in ground 6 by the cross-appellant and that the court of Appeal was therefore in error when the court held that the issue was not covered by any ground of appeal. G H

It was the submission of learned Senior Advocate that paragraph 21(d) of the Amended Statement of Claim is in law an inde-

pendent and distinct cause of action and it must be complete by itself. He cited Savage v. Uwaechia (1972) 1 All NLR (pt.1) 241 on the definition of a cause of action.

On the award of N50, 000.00 general damages, learned Senior Advocate submitted that the learned trial judge had no jurisdiction to "*revise*" (sic) herself to award the damages to the plaintiffs having held that there was no breach of contract and that no claim for negligence was incorporated in paragraph 21 of the Amended Statement of claim. He urged the court to set aside the damages awarded by the learned trial judge.

On issue No. 4, learned Senior Advocate adopted the submission made in the respondent's brief under the second arm of the preliminary objection raised in the brief of the respondent to form part of the argument under this issue. Counsel submitted in the alternative that the learned justices of the court of Appeal were in error when they upheld the learned trial judge's holding that the respondents were entitled to refund of ₦5,155.35 of its naira equivalent.

Learned Senior Advocate submitted that the relief or claim being sought by the 1st appellant who incidentally was the only witness who testified on behalf of the respondents talks of the defendant being ordered to pay to him what he paid to his overseas customers. Referring to paragraphs 1, 3, 4, 5, 6, 8, 9, 10, 17, 18 (d) and (j) of the Amended Statement of claim, learned Senior Advocate submitted that the averments contained therein relate to the operation of an account by the 2nd respondent as well as the business of import and export also carried out by the 2nd respondent. The 1st respondent is only a managing director who used his property as a collateral in favour of his 2nd respondent and also entered into a guarantee on behalf of the 2nd respondent, learned Senior Advocate pointed out.

To learned Senior Advocate, whatever is being claim must be tied in law to the 2nd respondent with whom the appellants herein had a banking relationship. He argued that there is a mag-

nititude of difference in law between a managing director of a company, in this case the 1st respondent, and the limited liability itself in this case the 2nd respondent. In law the 1st respondent who is the managing director is an agent of the 2nd respondent who is his disclosed principal, counsel reasoned. Cited Yesufu v. B Kupper International NV (1996) 5 NWLR (pt.446) 17 at 28-29, counsel argued that in suing therefore, the managing director cannot as an agent of a disclosed principal sue or be sued on a contract like this in the instant appeal. Pointing out that the evidence proffered and reproduced above under 4 relates to a claim being asked for by the 1st respondent for his person and not on behalf of the 2nd respondent, learned Senior Advocate submitted that the award by the learned trial judge in relation to the refund of the sum of *f5,155.35p* and which award was upheld by the court of Appeal was erroneous and wrong in law. D

Again, Citing Magnusson v. Koiki (1973) 9 NWLR (pt. 317) 287 at 302-303 and Olodibia v. NCC Ltd. (1998) vol. 53, 2507 at 2543, learned Senior Advocate submitted that no court can grant either a claim not sought for or one in respect of which evidence was not led. He submitted that the court of Appeal was wrong in law when it held that the attack on the award of the refund of *f5,155.35p* or its naira equivalent was unjustified. F

On issue No. 5 learned Senior Advocate called the attention of the court to the state of pleadings and contended that the respondents admitted being indebted to the cross-appellant, and that all that they were disputing was the amount. He claimed that from the record both from pleadings filed by the respondent herein and the evidence of the 1st appellant who was the only witness for the respondent, no figure was given by them as being the debt owed by the 2nd respondent. He referred to the evidence of DW1 and DW2. G H

Calling in aid Ajibola v. Kolawole (1996) 10 NWLR (pt.476) 22 at 30; Ndiwe v. Okocha (1992) 7 NWLR (pt.252) 129 at 139-140, learned Senior Advocate argued that the award by the trial

judge in relation to the 2nd respondent's indebtedness to the cross-appellant and which award was wrongly upheld by the court of Appeal amounts to a judgment that is against the totality of the evidence adduced before the court. This also amounts to improper
B evaluation of evidence, counsel submitted. He urged the court to allow the cross-appeal.

Learned counsel for the cross-respondents, Mr. Odjie, adopted his arguments in the appellants' brief, particularly all the arguments and judicial pronouncements in the list of authorities
C in general, in particular the case of Union Bank of Nigeria plc. V. Odusote Bookstores Ltd. (1995) 9 NWLR (pt.421) 558-594. Learned counsel also adopted the conclusion contained at pages 19 and 20 of the appellants' brief as the logical and inescapable
D reliefs that this court ought to make in order to prevent fraud and unjust enrichment.

Learned counsel submitted that the long and rambling arguments proffered rather verbosely at pages 7 to 26 of the cross-
E appellants' incompetent brief of argument are solely and wholly out of point and therefore not germane to the just determination of this appeal. He described the arguments in the brief as "*barren controversies*" which are uncalculatedly aimless of direction and
F headless of consequence; and same ought to be discountenanced.

Let me take the issues seriatim. In respect of issue No. 1, the learned trial judge said at page 120 of the record:

"Since neither of the parties gave evidence as to the prevailing rate of interest as at 1986-1990 when the sum of
G *N75,119.21 was said to be outstanding, I want to assume that interest was worked out at the rate of 11% per annum. In the circumstances judgment is hereby entered for the defendant against the 2nd plaintiff in the sum of N75,119.21 being the sum out-*
H *standing as at 20/7/90 as per counter claim of the defendant. The sum shall attract interest at the rate of 11% per annum which was the agreed rate of interest at the time of the transaction,"*

Dealing with the same issue, Achike, JCA (as he then was)

said:

"Therefore in the absence of pleadings and evidence to support any unilateral increase of the rate of interest it seems that the only statutory approach to the mortgage should remain the amount mutually agreed by the parties and that is 11%. In the circumstances any interest paid or charged over and above the rate of 11% should be reversed in favour of the respondent." B

Learned Senior Advocate did not deal with the important point made by Achike, JCA (as he then was) in respect of the cross-appellant not pleading what the learned justice called "unilateral increase of the rate of interest". I would like to think that the point is central to the whole argument of learned Senior Advocate. **The basic law is that parties are bound to plead all facts they intend to rely upon at the trial and facts not pleaded will go to no issue. One rationale behind this principle is that litigation must follow some restrictive order and not open-ended in order to save the time of both the courts and the litigants. If the procedure of pleadings was not introduced in litigation, parties search for evidence could not have ended and that should have protracted litigation beyond expectation.** C D E

Did the cross-appellant plead the unilateral increase of the rate of interest? I should refer to the counter - claim at page 63 of the Record. It is of three paragraphs. The relief is in paragraph 10. It reads: F

"WHEREFORE the defendant seeks the orders of this Honourable court that the mortgage registered as No. 42 at page 42 in volume 523 at the Lands Registry in the office in Benin City, be enforced against the plaintiffs by foreclosure and the delivery of possession to the defendant by the plaintiff the mortgage property registered as No.45 at page 45 in Volume 273 at the Lands Registry in the office at Benin City in accordance with terms of the said mortgage. Defendant shall rely on its letters dated 29/3/89 and 12/4/89 at the trial." G H

Where is the pleading to support the unilateral increase of the rate of interest? Instead of dealing with this important point, learned Senior Advocate dealt with conflict of evidence of the 1st respondent and relief sought. I think Achike, JCA (as he then was) is correct. The issue is therefore resolved in favour of the respondents (for the purpose of the cross appeal) and against the cross-appellant. Since issue No.3 was argued together with issue No. 1, and rightly too for that matter, issue No.3 is equally resolved in favour of the respondent and therefore against the cross-appellant.

On issue No. 2, the question is whether the court of Appeal was right when it held that the " amount of the award is not contested nor is it covered by any ground of appeal." I think not. Although learned Senior Advocate relied on ground 6, I think the relevant ground is ground 5 at page 156 spreading over to page 157. The ground complained of the award of N50,000.00 damaged. Particulars (d) is relevant. It reads:

"(d) The learned trial judge without basis found the defendant guilty of lack of negligence and awarded N50,000.00 as bonus to the plaintiff."

In the light of the above, the court of Appeal, with respect, was clearly in error in coming to the conclusion that the amount of the award was not contest. It was seriously contested and the contest is ground 5, and so the Court of appeal was also in error in concluding that there was no ground covering the complaint on the award of N50,000.00. Accordingly, I resolve this issue in favour of the cross-appellant.

I now come to Issue No. 4. I do not think the court of Appeal was right in coming to the conclusion that the learned trial judge was right in holding that the plaintiffs/respondents were entitled to the refund of ₦5,155.35p or its naira equivalent and that Exhibits E-E2 and the evidence of DW1 supported the decision of the trial judge.

The 1st plaintiff is a natural person while the 2nd plaintiff

is in law an artificial person. The dichotomy is important, particularly in the light of the evidence of the 1st plaintiff. He said:

"The defendant wrote to my overseas partners that the money is yet to be sent. I represented the R.D.F. In Nigeria and they were to take my agency. I was owing them ₦5,515.00. I scouted round and got foreign exchange and I went to the UK to pay them.... I now want the court to order the defendant to pay the equivalent of the sterling. I have paid to my overseas customers at the prevailing rate plus interest."

It is clear from the above evidence that the refund of ₦5,515.00 was made by the 1st plaintiff, Patrick Izuagba Okolo. This is borne out by the use of the personal pronoun "I" and "my" the possessive form of the personal pronoun "I".

The above gives rise to the pertinent question: Who was the customer of the Union Bank of Nigeria Limited? Was he Patrick Izuagba Okolo who gave the evidence or Pace Industries Nigeria Limited, the artificial or corporate person? Patrick Izuagba Okolo was the Managing Director of Pace Industries Nigeria Limited. Are the two persons the same to the extent that they can change places at will? I think not.

In the often cited English case of Solomon v. Solomon and Co. (1887) AC 22, the House of Lords held that the company is in law a person distinct from Solomon who formed the company with his wife and five children. In chief Yesufu v. Kupper International N.V. (1996) 5 NWLR (pt.446) 17, this court held that a director of a company is, in the eyes of the law, an agent of the company for which he acts and the general principle of the law of principal and agent would apply. Thus, where a director enters into a contract in the name of or purporting to bind the company, it is the company, the principal, which is liable on it, not the director.

The court of Appeal held that the attack on Exhibits E-E2 is unjustified. With the greatest respect, the attack is justified because the contents of Exhibits E to E2 conflict with the evidence

given by the 1st plaintiff. Exhibit E reads in part:

"Further to your correspondence with PACE INDUSTRIES (NIG) LTD. On this matter, we are writing to ask you to release to PACE the monies held by yourselves, to cover this I.B.C."

B The heading of the letter is Re-IBC No. 0971/81: ₦5,155.35 RED Inflatable" in Exhibit E1, on the same subject, part of the letter reads:

C *"On the 20th January 1989 we received a letter from the drawers Messrs. RDF Limited asking us to release the Local currency held in respect of this Bill to Pace....."*

Finally, Exhibit E2 reads in part:

D *"If you decide to withdraw this application and to instruct us to pay the naira cover to Pace Industries Nigeria Limited, Please let us have the following..."*

It is clear that in all the above Exhibits, it was the 2nd plaintiff, Pace Industries (Nig) Ltd. That was the basis of the transaction; not the 1st plaintiff, Patrick Izuagba Okolo. I expected the E court of Appeal to reconcile the contradiction in the evidence of the 1st appellant and Exhibits E to E2. In the light of the above, I resolve issue No. 4. In favour of the cross-appellant.

F I do not think I will waste any time on issue No. 5. It is the usual omnibus ground. Since I have dealt with the specific issues, Issue No. 5 becomes otiose. I therefore resolve it in favour of the respondent, the Union Bank of Nigeria Limited.

G In sum, the cross-appeal succeeds in part. For the avoidance of doubt, the cross-appeal succeeds only in respect of the award of N50,000.00 damages and the refund of the sum of ₦5,155.35p or its naira equivalent. Of course, my order striking out the appellants' appeal remains. I make no order as to costs.

H **MOHAMMED JSC**

I have had a preview of the judgement of my learned brother, Niki Tobi, JSC, in draft, and I agree with him that the main appeal is incompetent and ought to be struck out. I also agree that

the cross-appeal succeeds in part.

I will only comment briefly on the notice of preliminary objection filed by Chief E. L. Akpofure the learned SAN, challenging the competency of the appeal filed by the appellants before the Court of Appeal; Benin City Division. Chief Akpofure submitted that when the appellants wanted to appeal from the decision of the High Court to the Court of Appeal they did not perfect the conditions of appeal within the stipulated time. I have looked at page 161 of the record and found that the appellants were told by the Assistant Chief Registrar of the High Court of Delta State that they must perfect the conditions of appeal within 45 days. This the appellants failed to do and the Assistant Chief Registrar informed them that having failed to do so their appeal was regarded as abandoned. Seven days later, from the proceedings at page 63 of the record, the Assistant Chief Registrar wrote a letter to the learned counsel for the appellants, Okiemute Odje, that he, in exercise of the powers conferred on him under order 8 Rules 28 and 29 of the High Court (Civil Procedure) Rules 1988, of the defunct Bendel State of Nigeria, applicable to Delta State, had extended by 20 days the time within which the appellants could perfect the conditions of appeal.

Learned Senior Advocate submitted that there is no provision in the High Court Rules giving power to the Registrar to extend the time within which the appellants could perfect the condition of appeal. There is also no such power given to the Assistant Chief Registrar by either the court of Appeal Act or Court of Appeal Rules. Another Learned Counsel who appeared for the respondent at the Court of Appeal raised similar preliminary objection before the hearing of the appeal at the Court of Appeal. The learned justice of the Court of Appeal, Achike JCA, (as he then was) who wrote the lead judgment considered the argument of the learned counsel and dismissed the preliminary objection on the ground that Order 3 Rules 15 (1) of the Court of Appeal Rules provided that a respondent intending to rely upon a

preliminary objection to the hearing of the appeal should give the appellant three clear days notice of his intention to raise the issue before the hearing of the appeal. The learned justice ruled that the respondent did not give the required notice.

B With respect to the learned justice, the respondent had raised the preliminary objection in the Respondent's Brief and the learned counsel for the appellants had treated the issue in the plaintiffs/ Appellants' Reply Brief. The Court of Appeal is therefore wrong to say that the respondent did not comply with the provision of C Order 3 Rule 15(1) of Court of Appeal Rules.

I will now consider whether the Assistant Chief Registrar of Delta High Court had jurisdiction to extend time for the appellants to comply with the conditions laid down for the prosecution D of the appeal before the Court of Appeal. The Assistant Chief Registrar said that he extended the time in exercise of the powers conferred on him under Order 8 Rules 28 and 29 of the High Court (Civil Procedure) Rules 1988 (supra). It is pertinent there- E fore to look into the Rules which the Assistant Chief Registrar relied upon to extend the time. The Rules provide as follows:

"28 A Registrar hearing any application by virtue of the provision of these rules shall have and exercise all the powers F conferred by these rules on the Court or a judge when dealing with such application.

"29 No Registrar other than one who is also a qualified legal practitioner shall have the power to hear and determine G any application which by these rules is conferred upon a Registrar"

I have gone through the Rules and I agree with Chief Akpofure SAN that there is no provision in those Rules confer- H ring powers on the Assistant Chief Registrar to extend time within which a party wishing to appeal from the High Court to the Court of Appeal can perfect the conditions of appeal. If a party wishes to appeal it is the responsibility of the Registrar to prepare the copies of the proceedings. The only obligation on the appellant is

to make a deposit of a sum of money as may be ordered by the Registrar for the preparation of the records. In case of lateness to pay the estimated fees the court has power to enlarge the period of time - see Chukwu v. Akagha (1959) 3 ENLR 65. It is therefore only the court that has the power to extend the time B and not the Registrar.

For these reasons and fuller reasons in the lead judgment I agree that this notice of preliminary objection succeeds. This appeal is therefore incompetent since the judgment of the Court C of Appeal cannot stand as the process of filing the appeal to the Court of Appeal from the High Court was defective. In consequence, I set aside the judgment of the Court of Appeal and strike out this appeal. I make no order as to costs.

D

ONU JSC

Having had the privilege of reading the judgment of my learned brother Niki Tobi, JSC just delivered, I agree with him entirely that for the various reasons he has given, the appellants E appeal be and is hereby accordingly struck out for incompetence while the cross - appeal in respect of the award of N50,000.00 damages and the refund of ₦5,155.35p succeeds. I too make no order as to costs.

F

UWAIFO JSC

I agree with the judgment of my learned brother Tobi JSC that the appeal is incompetent; and also that reliefs 21 (d) and (e) not having been G paid for, could not be regarded as part of the reliefs sought.

The plaintiffs (now appellants) took out a writ of summons on 6 July, 1986 at the High Court, Warri. The claim was apparently drawn up in a rather incomprehensible manner. It read in continuous prose almost like one relief. It would appear that it was the learned trial judge, in the H course of preparing her judgment on 31 October, 1994, that tried to breakdown the claim as stated on the writ to various reliefs when she said:

"Although the claim as postulated on the writ is very clumsily framed, the plaintiffs' claim can however be detangled (sic: disentangled) from the vast confusion.

These are:-

B *1. A declaration that the defendant and his agents are not entitle to sell 1st plaintiff's property at plot 16 Kodeshoh Layout, Effurun because*

(a) The Governor did not give his consent to the Mortgage trans-
C *action between the parties before it was registered.*

(b) That consequently the transaction is null an void.

2. A declaration that the alleged amount been (sic) claimed as the balance of overdraft/loan by the 2nd plaintiff is not correct.

3. A declaration that the charges on the overdraft/ loan by virtue
D *of some inflation is null and void.*

4. A declaration that the 2nd plaintiff has fully paid all outstand-
ing balance to the defendant.

5. An order of perpetual injunction restraining the defendant by
E *itself, its agents, servants from auctioning, selling or otherwise disposing of the 1st plaintiff's property that was mortgage to the defendant."*

But assuming that the above reliefs could be ascertained from "the vast confusion" stated in the writ of summons, the said reliefs would be
F those paid for at the time the writ was filed. But on 26 February, 1992, the plaintiffs filed an amended statement of claim and in paragraph 21 claimed as follows:-

"21. Wherefore the plaintiffs claim against the defendant as fol-
G *lows:-*

(a) A declaration that the defendant by herself, her servants and
or agents is not entitled to sell, auction or deal in any other manner with
1st plaintiff's property lying and situate at plot 16 Kodesoh Layout, Effurun
and registered as No.45, at page 45 in volume 273 at the Lands Registry
H *in Benin City in purported exercise of power of sale conferred under a*
Mortgage Deed between the 1st plaintiff and the defendant registered as
instrument No.45 page 45 in volume 523 at the Lands Registry Benin
City in that the prior consent of the Military Governor was not obtained

before the Mortgage was effected in compliance with the Land Use Act, 1978 consequently the same is null and void and unenforceable.

(b) An order for Account of all monies paid into and debited against 2nd plaintiff's account or Accounts with the Defendant from 1986 till date and reversal of all wrongful and illegal debits made by the Defendant on the said account from 1986 till date and payment over to the 2nd plaintiff of all monies excessively debited with interest at present Bank Rate.

(c) An Order of perpetual injunction restraining the Defendant by herself, her servants and or agents or otherwise howsoever from auctioning, selling, disposing of or in any way interfering with 1st plaintiff's title to possession over the property lying and situate at plot 16 Kodesoh Layout, Effurun

(d) The sum of N1,000,000.00 being damages suffered by the plaintiffs.

(e) The sum of ₦5,155,35 (or its current equivalent in Naira) including the current Bank interest rate of 30% which said sum the Defendant has failed, refused or neglected to refund to plaintiffs despite repeated demands."

The reliefs in paragraph 21 (d) and (e) were obviously not paid for. But the judgment which was given by the learned trial judge in favour of the plaintiffs was essentially in respect of those reliefs. The relief in paragraph 21 (d) for N1,000,000.00 general damages was allowed up to ₦50,000.00 while the relief in paragraph 21 (e) for ₦5,155.35 was granted in full. As has been shown, those reliefs could not be competently entertained, not have been lawfully claimed by paying the necessary fees for them: see *Onwugbutor v. Okoye* (1996) 1 NWLR (PT.424) 252. The cross-appeal concerns the award of those sums of money. Since the reliefs in question were incompetent the awards must be set aside and those reliefs struck out. The cross-appeal therefore succeeds to that extent.

As for the appeal itself, I agree with my learned brother Tobi JSC that it is incompetent. The Assistant Chief Registrar of the High Court exercised power which he did not possess to extend the time within

which to fulfil the conditions of appeal earlier given to the appellants. That made the appeal to the Court of Appeal a nullity; and accordingly to this court a nullity. I too strike out the appeal. I make no order for costs.

PATS-ACHOLONU JSC

B

I have read in draft the judgment of my learned brother Niki Tobi JSC and I agree with him.

C

I shall however make a few comments of mine. This appeal arose from a suit hitherto filed by the plaintiffs now the Appellants. The matter was against the allegation by the Appellants that Defendants now the Respondents failed to effectuate in good time and in consonance with the agreement of the parties, the foreign exchange transaction by which the Appellants would have transferred some money to their overseas partners.

D

The Respondents had sought to dispose of the Appellants' property on the ground that they were owed some money and the time limit to foreclose had arrived having regard to the nature of the agreement between the parties which is reflective of Bank and customer relationship involving foreign exchange transmission of money. The Appellant instituted an action and claimed for an order of account from 1986 till the date of the determination of the case, injunctive order restraining the Respondents from in any way alienating their property used as security for the facility hitherto granted by the Respondents to the Appellants, and refund of the sum of /5,155.35 paid by the Appellant to the Respondents.

F

In the Court below judgment was given to the Respondents. The Appellants appealed and the Respondents equally cross-appealed. The appeal lodged by the Appellants was dismissed while that of the Defendants was allowed. Whereupon the Appellants appealed again and as if to match the exuberance of the Appellants in the appeal process, the Respondents equally cross-appealed again to this Court.

G

However, in this Court the learned Counsel for the Respondents raised a preliminary objection as to the competence of the main appeal based on the premise that the extension of time allowed to the Appellants to fulfil the conditions of appeals which was made to the Assistant Reg-

H

istrar of the High Court instead of the High Court was irregular and void and therefore the Assistant Registrar having no jurisdiction on such matters, the order of extension given was invalid. Another leg of the objection was nonpayment of the filing fees.

It is most unfortunate and I must say a regrettable situation that the learned Counsel for the Appellants instead of replying to the points raised and answer same in the most fashionable way that should be redolent with the exposition of the law in the most forensic form resorted to the use of Language considered intemperate that would make sailor boys blush. I deplore in its totality the unbridled use of expressions that detract from the elegance of a beautiful prose. Such expressions as

(a) *"This omission which resulted in monumental injustice of unwittingly rewarding an adjudged contract breaker, the respondent herein led to the appeal by the Appellants to the lower court which fell into the same error as the trial Court..."*

(B) *"Nothing can be more UNJUST or UNPALATABLE if not OPPRESSIVE and ARBITRARY as has been the sad DESTINY of the Appellants in this case who have had their hard-earned MONIES SEQUESTERED for about 20 (twenty) years NOW."*

(C) *"Tangentially, this said attitude tends to ERODE as it did in this case the CONFIDENCE of the LITIGANTS who by the conflicting SIGNALS and/or inconsistent decisions based on very similar facts have queried whether JUSTICE was not of double standard and/or not actually denied them for reasons which were not legally tenable."*

(D) *"Particularly damaging to its case was Exhibit L that is a letter written to the Appellants dated 2/9/86 containing the BLATANT and PATENT MOTHER of all FALSEHOODS"*

are not in the least edifying and should not appear in the briefs.

The learned counsel for the appellants talked of the duty of the court not to rely on technicalities and cited cases which do not apply in this instance. It must be stated unflinchingly that

where the statute and subsidiary legislation prescribe the mode of initiating a process or proceedings before the court and it is not followed, or is spurned, the only reasonable conclusion is that the party affected which fails to comply with the requirements cannot be taken seriously. That being the case, it is my view and I hold that there is no appeal to which this Court could be called upon to adjudicated. The invocation of the term technicalities is merely to confuse matters and a ploy to try to hoodwink the court to over look a very essential ingredient that would have given life to the appeal.

On the issue of the preliminary objection raised by the counsel for the Appellants in respect of the issues formulated in the brief of the cross-appellant, I have nothing to add to what my learned brother had already said. I would however comment tritely that I am surprised that a very senior counsel as the Appellants' counsel could in all seriousness consider and be confident in raising those objections. It makes me wonder.

With regard to the cross-appeal filed by the Respondents, there were framed 5 issues for determination. There is not much for me to add beyond stating that the arguments proffered by the (Appellants) Cross Respondents are replete with words which do not seriously address the issue being canvassed and agitated. Besides, the intemperate words detract from the exposition of the law one would have wished in a matter such as this. In the final result the cross-appeal succeeds. I abide by the consequential orders made in the lead judgment.

¹ (1996) 1 KLR (Pt 37) 1

^{2/2a} It is hoped that counsel should take advantage of the court's view in handling omission of payment of filing fees. Instead of relying merely on the submission that error of counsel should not be visited on his client, pay the filing fee as soon as the omission occurs to you or as the matter is raised by the other side. This may be an appropriate remedial action anticipated by Iguh JSC in the case of Onwugbufor v. Okoye herein cited.