

**SUPREME COURT OF NIGERIA**

7TH MAY, 2004. SC. 118/1999

**CORAM:- M.L. UWAIS CJN, A.I. KATSINA-ALU,  
U.A. KALGO, S.O. UWAIFO, A.O. EJIWUNMI, JJSC**

OGUNDARE OSASONA ..... DEFENDANT/APPELLANT  
(SUBSTITUTED FOR EZEKIEL  
OLATUNDE - DECEASED)

AND

1. OBA ADETOYINBO AJAYI

The Elejelu of Ijelu Ekiti

(For himself and on behalf of all ..... PLAINTIFF/RESPONDENT  
Omo Owaas of Ilao and Ogbogbonudo

Ruling House

2. THE GOVERNOR OF EKITI STATE

3. THE COMMISSIONER FOR ..... DEFENDANTS/  
CHIEFTAINCY AFFAIRS RESPONDENTS

4. THE SECRETARY, CHIEFTAINCY  
COMMITTEE OYE LOCAL  
GOVERNMENT

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ACTIONS - Parties - Appeals - Preliminary objection - Creation of states  
- That made some defendants improper parties - Amendment of those  
parties before the Supreme Court - Makes the preliminary objection irrelevant (H1)

APPEALS - Rules of court - Grounds of appeal - Vagueness of - Justified their being struck out - By the Court of Appeal - For not complying with O.3 r .2 (4) Court of Appeal Rules (H2)

APPEALS - Grounds of appeal - Striking out - Particulars of error - Being incorporated within ground (3) - Court of Appeal was wrong - In suo motu striking it out (H3)

APPEALS - Issue - Not decided by the Court of Appeal - Will be remitted by the Supreme Court to that court to be determined - As there is no exceptional circumstance in this case (H4)

### **FACTS**

Before the High Court of former Ondo State sitting at Ikole Ekiti, plaintiff/appellant filed an action against the defendants/appellants. Plaintiff's claim is in respect of chieftaincy declaration, for the Elejelu of Ijelu chieftaincy. He sought inter alia, a declaration that the chieftaincy recommendation approved by the government is a negation and falsification of the true agelong native law, tradition and custom of Ijelu chieftaincy and therefore is void and of no legal effect. The trial judge granted some of the reliefs and refused the others. The 4th defendant appealed to the Court of Appeal while the plaintiff cross appealed against the judgment.

The appeal raised 8 issues from 10 grounds of appeal that were filed. The Court of Appeal struck out 4 of the grounds of appeal for failing to satisfy the requirement of O.3 r. 2 (2) of the Court of Appeal Rules. It dismissed the appeal and allowed the cross appeal. Being dissatisfied, 4th defendant (as presently substituted) has further appealed to the Supreme Court raising 6 issues. As issue (A) succeeds in part, the apex court remitted the case to the Court of Appeal to be determine de novo.

### **ISSUE FOR DETERMINATION**

*“(a) Whether it was right for the court below to strike out appeal grounds (3), (4), (5) and (8) as well as the accompanying issues (c), (d), (e) and (g) when counsel to the respondent did not complain that necessary particulars were not given in the grounds; when the court did not raise its objection to them in open court so that the view of both counsel could be heard on the matter but rather raised same at the judgment stage suo motu and decided thereon thus discountenancing all the submissions and arguments proffered (sic) on the issues raised on the four grounds of appeal.”*

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

**ACTIONS - Parties - Appeals**

1. In view of the objection, the appellant proceeded to amend his brief of argument to reflect the proper parties. But for Decree No. 36 of 1996, this would have been unnecessary. I think it can be said that the amendment was formally to take account of what followed from the said Decree No. 36 by which two States were created out of one as a constitutional reality. This court is bound to take judicial notice of that under Section 74(1)(a) of the Evidence Act. I am satisfied that the amendment was properly made at this stage in this court by the appellant. In the present case, the amendment is to correct the obvious misnomer of the names of functionaries in the relevant processes which occurred as from the effective date of Decree No. 36. The necessary amendment was allowed by this court but notwithstanding, the 1<sup>st</sup> respondent pressed the preliminary objection citing Odofin v. Agu (1992) 3 NWLR (Pt.299) 350 when the appeal came on for hearing. I am of the view that the amendment simply put the record straight and was without any injustice to the 1<sup>st</sup> respondent. I hold that the objection has no merit particularly as it has ceased to be relevant. I therefore overrule it. (p. 1246 E)

**APPEALS - Rules of court**

2. It seems to me that grounds (4), (5) and (8) are vague. I cannot comprehend what the real complaints are which the appellant intended the court below to consider in order to resolve the appeal in his favour. Those grounds have clearly failed to comply with Order 3. r.2(4) of the Court of Appeal Rules which states that:

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

The court below was fully justified to have struck out those grounds. A ground of appeal which is vague cannot be of help in resolving an alleged complaint against a judgment. It rather makes the alleged error

sought to be dealt with on the appeal difficult to identify, appreciate and correct. This is because being vague, it is too general, not clear, precise or definite in what it purports to be aggrieved above. It offends against the rule, such as r.2(4) stated above and must be struck out: see Osawaru v. Ezeiruka (1978) 6-7 S.C. 135 at 137. (p.1247 G)

***APPEALS - Grounds of appeal***

3. It is therefore settled that where the particulars of error in law or misdirection of the ground complained of are either not set out separately or not discovered through careful perusal as having been incorporated into the body of the ground of appeal, the ground of appeal will contravene the relevant rule which, in the present case, is Order 3, r.2 (2) of the Court of Appeal Rules. The ground will be incompetent and is liable to be struck out: see Nta v. Anigbo (1972) 5 S.C. 16 at 164; Anadi v. Okoli (1977) 7 S.C. 57 at 63.

A careful reading of ground (3) which was struck out by the court below reveals that the particulars of error are incorporated into it. I am satisfied that the court below was in error to have struck out ground (3) of the grounds of appeal. It did so suo motu but without giving any opportunity to the parties to be heard on the matter whether that ground was incompetent. This was certainly in breach of the well established principle. (p. 1249 G)

***APPEALS - Issue - Not decided by the Court of Appeal***

4. As it is, this court cannot embark upon deciding the issue in which the court below has offered no opinion as a result of having erroneously struck out the said issue. Where the Court of Appeal failed to consider an appeal on a particular issue, the Supreme Court would, in a proper case, remit the case to it by virtue of S. 22 Supreme Court Act, Cap 424 to rehear the appeal and decide that issue among others.

There could, however, be exceptional circumstances where the Supreme Court will decide issues not taken in the court below. An obvious case of exceptional circumstance is where the issue which the Court of Appeal failed to decide touches on the competence of the trial court to

entertain the claim or where it is a pure issue of law – simple in itself – and the facts are clear and undisputed. I do not find any exceptional circumstance in the present case to warrant this court deciding the issue arising from ground (3) which the court below ought to have decided.

The court below was not right to strike out ground (3). I therefore resolve issue (A) in favour of the appellant. It borders on the question of fair hearing. (p. 1250 E)

## NOTABLE POINTS OF INTEREST

### UWAIFO.JSC

#### *1. Grounds of appeal - Purpose and manner of presenting of error*

Now, it should be realized that particulars of the error alleged in a ground of appeal are intended to highlight the complaint against the judgment on appeal. They are the specification of the error or misdirection in order to make clear how the complaint is going to be canvassed in an attempt to demonstrate the flaw in a relevant aspect of the judgment. Particulars are not to be made independent of the complaint in a ground but ancillary to it. It has been said that the whole purpose of grounds of appeal is to give to the other side notice of the case it has to meet in the appellate court and so the errors of law or misdirection complained of must be sufficiently identified in the grounds of appeal.

It is the particulars of the error of law or misdirection alleged that will ensure that the ground of appeal is sufficiently set out. Where appropriate, those particulars should be set out or tabulated, particularly where a passage is quoted from the judgment appealed from as representing the error of law or misdirection alleged.

However, the particulars need not always be separately set out but may be embodied or incorporated in the ground of appeal itself provided the ground is so framed as to leave no one in doubt as to the error complained of. (p. 1248 F)

### KALGO.JSC

#### *2. Fair hearing is denied in suo motu striking out of issue (3)*

It is trite law that a court or tribunal should consider all issues for deter-

mination brought before it but failure to consider and pronounce on all issues submitted to the court or tribunal may not necessarily amount to a miscarriage of justice or denial of fair hearing. But in the circumstances of this case where the Court of Appeal suo motu, without inviting the parties to say anything decided to strike out the ground from which the issue was raised, there is in my respectful view a denial of fair hearing. (p. 1253 A)

**EJIWUNMIJSC**

**3. Clue for determination of nature of a ground of appeal**

There is no doubt that it is always difficult to distinguish a ground of law from a ground of fact but what is required is to examine through the grounds of appeal in the case concerned to see whether the grounds reveal a misunderstanding by the lower tribunal of the law or a misapplication of the law to the facts already proved or admitted, in which case it would be question of law, or one that would require questioning the evaluation of facts by the lower tribunal before the application of the law in which case it would amount to question of mixed law and fact. (p. 1254 B)

**REPRESENTATION**

A.O. Akanle, Esq., (with him. Isaac Ogba Esq.), for the Appellant.  
Alex Ajayi, Esq., for the 1st Respondent.  
2nd - 4th Respondents absent and not represented.

**CASES REFERRED TO**

Joseph Afolabi v. John Adekunle (1983) 8 S.C. 98  
Odofin v. Agu (1992) 3 NWLR (Pt. 299) 350  
Osawaru v. Ezeiruka (1978) 6-7 S.C. 135 at 137  
Saraki v. Kotoye (1990) 4 NWLR (Pt. 143) 144 at 160  
Nta v. Anigbo (1972) 5 S.C. 16 at 164  
Anadi v. Okoli (1977) 7 S.C. 57 at 63  
Katto v. Central Bank of Nigeria (1999) 5 S.C. (Pt. II) 21 (1999) 6 NWLR (Pt. 607) 399

**STATUTES & RULES REFERRED TO**

Evidence Act s. 74 (1) (a)

Decree No. 36 of 1996

High Court Rules of Ondo State 1988, O. 24 r. 2

Court of Appeal Rules O. 3 r. 2 (4)

B

**LEAD JUDGMENT BY UWAIFO JSC**

This suit was commenced by a writ of summons filed on 7<sup>th</sup> August, 1987, in Ikole Ekiti, then within the erstwhile Ondo State. The writ, which had contained three reliefs, was amended and filed on 4<sup>th</sup> June, 1992. In paragraph 56 of the final amended Statement of Claim, the plaintiff sought six reliefs as follows:

*“1. A declaration that the recommendation contained at page 49 of the Report of Oluwole Chieftaincy Review Commission concerning the Chieftaincy Declaration for the Elejelu of Ijelu Chieftaincy and the Government views on the report at Page 12 of the White Paper approving the recommendation is a negation and falsification of the true age-long Native Law, Tradition and Customs of Ijelu Chieftaincy and therefore unconstitutional, null and void and of no legal effect.*

***PARTICULARS OF FALSIFICATION AND OTHER IRREGULARITIES.***

*(1) Exhibit ‘1’ the Registered Declaration made Under Section 4(2) of the Chiefs Law of Western Nigeria, 1957 is a Registered declaration under which the Plaintiff was selected as the Elejelu of Ijelu Ekiti on 21/7/1977.*

*(2) There is already a vested right by the plaintiff under which his appointment, installation and selection was validly made by the 1<sup>st</sup> – 3<sup>rd</sup> defendants.*

*(3) The evidence of the 2<sup>nd</sup> plaintiff Chief Matthew Ajayi, the Obaleyin of Ijelu, one of the kingmakers who also gave evidence before the Oluwole Chieftaincy Review Commission which evidence accords with the Native Law and Custom of Ijelu was ignored by the said Commission.*

*2. A declaration that the recommendation of the said Commission and Government acceptance of same relating to the number and compo-*

sition of Ijelu Kingmakers and the number of bona fide Ruling houses of Ijelu is at variance with the revered time-honoured tradition and customs of Ijelu people and same be set aside.

B 3. A declaration that the inclusion of Ibodi as a Ruling House to the Elejelu Chieftaincy is a desecration of the Customs and Traditional History of the people of Ijelu Ekiti and same is unconstitutional, ultra vires, null and void and of no legal force whatsoever.

C 4. A declaration that the two authentic Ruling Houses for the Elejelu of Ijelu Chieftaincy are ILAO and OGBOGBOMUDU having regard to the Native Law, Customs and Traditions of Ijelu Ekiti in conformity with the Chieftaincy Declaration made by the Chieftaincy Committee of Ikole District Council on 11/7/60 and approved by the then Government of Western Region on 23<sup>rd</sup> September, 1960.

D 5. The plaintiff shall at or before the trial raise the question of jurisdiction of the High Court of Ondo State pursuant to Order 24 Rule 2 of Ondo State Rules of the High Court, 1988 to the following causes or matters:

E (a) The declaration of Custom relating to Elejelu of Ijelu Ekiti made in 1960 under Section 4(2) of the Chiefs Law of Western Nigeria 1957.

F (b) The selection, appointment and installation of the plaintiff as Elejelu of Ijelu Ekiti made pursuant to Section 28, Chiefs Law Cap. 20 Laws of Ondo State and Sections 161(3) and 165 of the 1963 Constitution.

G 6. An injunction restraining the Chieftaincy Committee of Ekiti North Local Government now Oye Local Government having regard to the Local Government Amended Decree of 1989 and 1990 its Secretary, the Commissioner for Chieftaincy Affairs, Military Governor of Ondo State, his Agents, Servants and or privies from acting on the said Approved Chieftaincy Declaration made by the said Chieftaincy Review H Commission and accepted by the Ondo State Government for the Elejelu of Ijelu Chieftaincy or for any purpose whatsoever.”

The 1<sup>st</sup> and 3<sup>rd</sup> defendants responded in 36 paragraphs while the 4<sup>th</sup> defendant responded in 24 paragraphs together with a counterclaim. A



reply to the defence and counter-claim of the 4<sup>th</sup> defendant was in 24 paragraphs. The suit was prompted by the Report of the Commission set up by the Government of the erstwhile Ondo State and the Government White Paper (or views) on it. The Commission was known as Oluwole Chieftaincy Review Commission concerning the Chieftaincy Declaration B for the Elejelu of Ijelu Chieftaincy. On 24<sup>th</sup> March, 1993, Akinyede, J., who heard the suit gave judgment in which he granted reliefs 2 and 5, as claimed, but relief 6 partially. He refused reliefs 1, 3 and 4.

The 4<sup>th</sup> defendant appealed while the plaintiff cross-appealed against C the judgment. The appeal raised 8 issues from 10 grounds of appeal filed.

The court below set out all the grounds of appeal and the issues, and observed, per Mohammed, JCA., who read the leading judgment, thus:

*“I have decided to quote in full all the grounds of appeal and the D issues identified by the appellant in his brief of argument to show how some of the grounds of appeal and issues said to have arisen from the grounds have been very carelessly drafted to the extent of making some of the grounds of appeal and the issues arising from them incompetent. E This is because some of the affected grounds of appeal were drafted in complete violation of the requirements of Order 3 Rule 2 sub-rules (2), (3) and (4) of the Court of Appeal Rules 1981 as amended. Although grounds (3), (4), (5) and (8) of the appellant’s grounds of appeal had F alleged error in law and misdirection in law, no attempt was made to give the particulars of the alleged error or misdirection. Therefore the 4 grounds of appeal having failed to satisfy the requirement of Order 3 rule 2(2) of the Rules of this court are incompetent.”*

G On 15<sup>th</sup> January, 1998, the court below dismissed the appeal and allowed the cross-appeal. By so doing, it meant that all the reliefs sought by the plaintiff in para. 56 of the Amended Statement of Claim were wholly granted. The 4<sup>th</sup> defendant, Ezekiel Olatunde, who has since died and has been substituted by Ogundare Osasona, has further appealed to H this court. He has raised 6 issues, the first of which asks:

*“(a) Whether it was right for the court below to strike out appeal grounds (3), (4), (5) and (8) as well as the accompanying issues (c), (d),*

(e) and (g) when counsel to the respondent did not complain that necessary particulars were not given in the grounds; when the court did not raise its objection to them in open court so that the view of both counsel could be heard on the matter but rather raised same at the judgment stage *suo motu* and decided thereon thus discountenancing all the submissions and arguments proffered (sic) on the issues raised on the four grounds of appeal.”

I wish at this stage to consider the preliminary objection raised by the 1<sup>st</sup> respondent to the appeal. It is based on the implication of the States (Creation Transitional Provisions) Decree No. 36 of 1996 which created Ekiti State out of the old Ondo State with effect from October 1, 1996. The subject-matter of this case is in Ekiti State. The appellant referred to the 2<sup>nd</sup> respondent as Military Governor of Ondo State, and also the 3<sup>rd</sup> and 4<sup>th</sup> respondents as if they were still functionaries of Ondo State. The objection therefore is that:

(1) The necessary, proper or desirable parties who are the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents are not before the Supreme Court as they had ceased to be necessary parties since on the 1<sup>st</sup> October, 1996 by virtue of the ‘STATES (CREATION TRANSITIONAL PROVISIONS) DECREE, NO. 36’

**In view of the objection, the appellant proceeded to amend his brief of argument to reflect the proper parties. But for Decree No. 36 of 1996, this would have been unnecessary. I think it can be said that the amendment was formally to take account of what followed from the said Decree No. 36 by which two States were created out of one as a constitutional reality. This court is bound to take judicial notice of that under Section 74(1)(a) of the Evidence Act. I am satisfied that the amendment was properly made at this stage in this court by the appellant.** In Joseph Afolabi v. John Adekunle (1983) 8 S.C. 98, the plaintiff, a head of family, apparently sued in his personal capacity but in fact his action was meant to establish his family’s title to family property. He was non-suited by the trial Judge for suing in his personal, instead of his representative capacity. This court amended the plaintiff’s capacity in the Writ of Summons to reflect his representa-

tive capacity. In the present case, the amendment is to correct the obvious misnomer of the names of functionaries in the relevant processes which occurred as from the effective date of Decree No. 36. The necessary amendment was allowed by this court but notwithstanding, the 1<sup>st</sup> respondent pressed the preliminary objection citing *Odofin v. Agu* (1992) 3 NWLR (Pt.299) 350 when the appeal came on for hearing. I am of the view that the amendment simply put the record straight and was without any injustice to the 1<sup>st</sup> respondent. I hold that the objection has no merit particularly as it has ceased to be relevant. I therefore overrule it.

I shall now set out grounds (3), (4), (5) and (8) which the court below struck out suo motu. They are:

*“(3) The lower court erred in law by not adopting the correct approach to issue of facts decided by a Judicial Commission of Inquiry which approach is to inquire whether the findings of the Commission were properly arrived at rather than going after the whole facts again and substituting its own in place of the ones found by the Commission.*

*(4) The decision of the lower court is an error in law as the same is absurd, unintelligible and confusing because it has resulted into a Chieftaincy Declaration in which the number of Ruling Houses is uncertain whether the same are two or three or four consequent upon which both Exhibits 1 and 2 are ruled against.*

*(5) The lower court erred in law in holding that evidence on oath led before a Commission whose findings are to be challenged and which evidence has been tendered as exhibit is not receivable before the lower court even when the witness who gave the evidence before the commission gave evidence before the court in support of the one given before the commission.*

*(8) The trial court misdirected itself in fact when it held that fourth defendant did not plead when he did in paragraph 6 of his defence.”*

**It seems to me that grounds (4), (5) and (8) are vague. I cannot comprehend what the real complaints are which the appellant intended the court below to consider in order to resolve the appeal in his favour. Those grounds have clearly failed to comply**

with Order 3. r.2(4) of the Court of Appeal Rules which states that:

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

The court below was fully justified to have struck out those grounds. A ground of appeal which is vague cannot be of help in resolving an alleged complaint against a judgment. It rather makes the alleged error sought to be dealt with on the appeal difficult to identify, appreciate and correct. This is because being vague, it is too general, not clear, precise or definite in what it purports to be aggrieved above. It offends against the rule, such as r.2(4) stated above and must be struck out: see Osawaru v. Ezeiruka (1978) 6-7 S.C. 135 at 137; Saraki v. Kotoye (1990) 4 NWLR (Pt. 143) 144 at 160.

As regards ground (3), it is true that no particulars of the alleged error in law were tabulated in order to expose them readily. It is probably because of this that the court below held the view that although the ground alleged error in law “no attempt was made to give the particulars of the alleged error.” What Order 3, r.2 (2) of the Court of Appeal Rules says is simply that:

*“If the grounds of appeal allege misdirection or error in law, the particulars and the nature of the misdirection or error shall be clearly stated.”*

Now, it should be realized that particulars of the error alleged in a ground of appeal are intended to highlight the complaint against the judgment on appeal. They are the specification of the error or misdirection in order to make clear how the complaint is going to be canvassed in an attempt to demonstrate the flaw in a relevant aspect of the judgment. Particulars are not to be made independent of the complaint in a ground but ancillary to it: see Globe Fishing Industries Ltd. v. Coker (1990) 7 NWLR (Pt. 162) 265 at 300 per Akpata, JSC. It has been said that the whole purpose of grounds of appeal is to give to the other side notice of

the case it has to meet in the appellate court and so the errors of law or misdirection complained of must be sufficiently identified in the grounds of appeal: see N.I.P.C Ltd. V. Thompson Organisation (1969) 1 AII NLR 138 at 142 per Lewis, JSC.

It is the particulars of the error of law or misdirection alleged that will ensure that the ground of appeal is sufficiently set out. Where appropriate, those particulars should be set out or tabulated, particularly where a passage is quoted from the judgment appealed from as representing the error of law or misdirection alleged: Adeniyi v. Disu (1958) SCNLR 408 at 409 per Abbott, FJ.; Anyaoke v. Adi (1986) 2 NSCC (Vol. 17) 799 at 805-806 per Uwais, JSC., (now CJN.).

However, the particulars need not always be separately set out but may be embodied or incorporated in the ground of appeal itself provided the ground is so framed as to leave no one in doubt as to the error complained of: see Atuyeye v. Ashamu (1987) 1 NWLR (Pt.49) 267 at 282; Koya v. United Bank for Africa Ltd. (1997) 1 NWLR (Pt. 481) 251 at 265-266 per Onu, JSC. In Nsirim v. Nsirim (1990) 3 NWLR (Pt. 138) 285 at 297, Obaseki, JSC., in his leading judgment observed:

*“I have examined the five grounds of appeal and I find that each of the grounds was framed or couched in an unorthodox style. They all contain particulars of misdirection or errors and their nature. The particulars were incorporated into the body of the ground of appeal and not set out under the usual heading of PARTICULARS in bold letters as is now the normal practice.*

*It cannot therefore be said that the respondent (then appellant) failed to supply the particulars and nature of error or misdirection so alleged in the said grounds.”*

See also United Bank for Africa Ltd. V. Achoro (1990) 6 NWLR (Pt. 156) 254 at 283 per Karibi-Whyte, JSC.

**It is therefore settled that where the particulars of error in law or misdirection of the ground complained of are either not set out separately or not discovered through careful perusal as having been incorporated into the body of the ground of appeal, the ground of appeal will contravene the relevant rule which, in the present**

case, is Order 3, r.2 (2) of the Court of Appeal Rules. The ground will be incompetent and is liable to be struck out: see Nta v. Anigbo (1972) 5 S.C. 16 at 164; Anadi v. Okoli (1977) 7 S.C. 57 at 63.

A careful reading of ground (3) which was struck out by the court below reveals that the particulars of error are incorporated into it. The ground itself complains that the trial court erred in law by failing to adopt the correct approach to issue of facts decided by a Judicial Commission of Inquiry. The particulars of error in support of this complaint are: (a) The court was merely to inquire whether the findings of the Commission were properly arrived at. (b) The court rather went after the whole facts again. (c) The court substituted its own findings in place of those made by the Commission. Upon this analysis of the said ground (3), it becomes fairly clear, in my view, that the ground is competent.

I am satisfied that the court below was in error to have struck out ground (3) of the grounds of appeal. It did so suo motu but without giving any opportunity to the parties to be heard on the matter whether that ground was incompetent. This was certainly in breach of the well established principle: see Odiase v. Agho (1972) 1 ALL NLR (Pt.1) 170 at 176; Ugo v. Obiekwe (1989) 2 S.C (Pt.II) 41, (1989) 1 NWLR (Pt. 185) 267 at 280; Umaru v. Abdul-Mutallabi (1998) 11 NWLR (Pt. 573) 247 at 256. As it is, this court cannot embark upon deciding the issue in which the court below has offered no opinion as a result of having erroneously struck out the said issue. Where the Court of Appeal failed to consider an appeal on a particular issue, the Supreme Court would, in a proper case, remit the case to it by virtue of S. 22 Supreme Court Act, Cap 424 to rehear the appeal and decide that issue among others. See Katto v. Central Bank of Nigeria (1999) 5 S.C. (Pt.II) 21 (1999) 6 NWLR (Pt.607) 399.

It seems to me that the said ground (3) raised matters upon which the opinion of the court below ought to be known. For, as observed by Lord Birkenhead L.C., in North Staffordshire Railway Co. v. Edge (1920) A.C. 254 at 263, cited in a passage referred to by this court in Djukpan v. Oruvuyovbe (1967) 1 AII NLR 134 at 138:

*“The efficiency and the authority of a Court of Appeal, and especially of a final Court of appeal, are increased and strengthened by the opinions of learned Judges who have considered these matters below.”*

**There could, however, be exceptional circumstances where the Supreme Court will decide issues not taken in the court below:** see Dweye v. Iyomahan (1983) 8 S.C. 76; Ogunma v. IBWA (1988) 1 NWLR (Pt. 73) 658; Oniah v. Onyia (1989) 2 S.C. (Pt. 1) 69, (1989) 1 NWLR (Pt.99) 514. **An obvious case of exceptional circumstance is where the issue which the Court of Appeal failed to decide touches on the competence of the trial court to entertain the claim:** see Yusuf v. Cooperative Bank Ltd. (1994) 7 NWLR (Pt. 359) 676; **or where it is a pure issue of law – simple in itself – and the facts are clear and undisputed:** see Katto v. Central Bank of Nigeria (supra). **I do not find any exceptional circumstance in the present case to warrant this court deciding the issue arising from ground (3) which the court below ought to have decided.**

**The court below was not right to strike out ground (3). I therefore resolve issue (A) in favour of the appellant. It borders on the question of fair hearing.** It seems to me that the issue arising from ground (3) not having been considered in the court below as a result of that ground having been struck out, the proper thing to do is to remit the case to that court as was done in Enigbokan v. American International Insurance Co. (Nig.) Ltd. (1994) 6 NWLR (Pt. 348) 1. I accordingly allow this appeal on that issue alone. It is ordered that the appeal be remitted to the Court of Appeal, Benin Division, to be reheard by a panel differently constituted from that which decided the appeal on 15<sup>th</sup> January, 1998. I award the appellant N10,000.00 costs against the plaintiff/respondent.

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**UWAIS CJN**

I have had the opportunity of reading the judgment read by my learned brother, Uwaifo, JSC. I quite agree that the appeal has merit and that it should be allowed.

Accordingly, I too hereby allow the appeal with N10,000.00 costs to the appellant against the respondents. The case is hereby remitted to the Court of Appeal, Benin Division, to be heard de novo by a different panel from that constituted by Akintan, Mahmud Mohammed and Rowland, JJCA.

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### KATSINA-ALU JSC

Editor's Note – The judgment of Katsina-Alu JSC, was not available as at the time of going to press.

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### KALGO JSC

I have read before now the judgment of my learned brother, Uwaifo, JSC., just delivered in this appeal. I agree that the appeal ought to be allowed and the case remitted to the Court of Appeal to consider what was issue (A) in this court. The issue is fundamental to the consideration and determination of this appeal and it is therefore essential for this court to have the views or decision of the Court of Appeal on the issue, before this court decides on it. This was not done by the Court of Appeal which suo motu struck out ground of appeal 3 before it, from which issue (a) was distilled. I agree that the Court of Appeal was wrong in striking out ground of appeal number 3.

In the Court of Appeal, the appellant formulated 8 issues for determination but with the striking out of grounds of appeal (3), (4), (5) and (8), only 4 issues were considered by the Court of Appeal. As issue (A) was distilled from ground 3, it was not considered by the Court of Appeal in reaching its decision. In the Court of Appeal the issue (c) raised from ground 3 was substantially the same as issue (A) in this court and it reads:-

*“(c) whether or not the trial court adopted the right attitude in handling the case by going into detailed evidence of the matter and thus reopening all facts and issues instead of finding out if the Oluwole Commission rightly came to conclusion at which it arrived.”*



The Court of Appeal did not consider this issue because it struck out the ground from which it was distilled. It is trite law that a court or tribunal should consider all issues for determination brought before it but failure to consider and pronounce on all issues submitted to the court or tribunal may not necessarily amount to a miscarriage of justice or denial of fair hearing. United Bank of Nigeria Ltd. v. Nwaokolo (1995) 6 NWLR (Pt. 400) 127. But in the circumstances of this case where the Court of Appeal suo motu, without inviting the parties to say anything decided to strike out the ground from which the issue was raised, there is in my respectful view a denial of fair hearing. See Kotoye v. C.B.N. (1989) 2 SC. (Pt.1) 1, (1989) 1 NWLR (Pt. 98) 419. It is also my view that although by virtue of Section 22 of the Supreme Court Act, 1960, an issue not requiring further evidence as in this case can be considered by this court, the overriding consideration here is that it is essential to have the views or opinion of the Court of Appeal first on the issue, before this court decides on it. See Bamaiyi v. The State (2001) 4 S.C. (Pt.1) 18, (2001) 8 NWLR (Pt. 715) 270.

For the above and the more reasons given by Uwaifo, JSC., in the leading judgment, I also allow this appeal on issue (A) alone and abide by the consequential orders made therein.

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#### EJIWUNMI JSC

I have had a preview of the judgment of my learned brother, Uwaifo, JSC., in this appeal. I agree entirely with it. One of the complaints in this appeal is “*whether it was right for the court below to strike out appeal grounds (3), (4), (5) and (8) as well as the accompanying issues (c), (d), (e) and (g) when counsel to the respondent did not complain that necessary particulars were not given in the grounds; when the court did not raise its objection to them in open court so that the view of both counsel could be heard on the matter but rather raised same at the judgment stage suo motu and decided thereon, thus discountenancing all the submissions and arguments proffered (sic) on the issues raised on the four grounds of appeal.*”

The question here in simple terms is, whether the court below was right to have struck out the above noted grounds of appeal because particulars of the alleged errors of law and/or the misdirection of the facts were not stated in respect of each ground of appeal.

- B There is no doubt that it is always difficult to distinguish a ground of law from a ground of fact but what is required is to examine through the grounds of appeal in the case concerned to see whether the grounds reveal a misunderstanding by the lower tribunal of the law or a misapplication of the law to the facts already proved or admitted, in which case it would be question of law, or one that would require questioning the evaluation of facts by the lower tribunal before the application of the law in which case it would amount to question of mixed law and fact. See Ogbechie v. Onochie (1986) 2 NWLR (Pt. 23) 484 at 491; Balogun & Qrs. v. Agboola (1974) 1 AII NLR (Pt. 11) p. 66.

Having heard the grounds of appeal struck out by the court below, and with the above principle in mind. I think the court below was wrong to have struck out ground 3 of the grounds of appeal. It seems to me that embedded in the said ground though, is a question of law which deserved the consideration of that court. The other grounds namely, (4), (5) and (8) were properly struck out as they are vague and are therefore in breach of Order 3 r.2 (4) of the Court of Appeal Rules.

- F In the result, this appeal is also allowed by me for the above reasons and the fuller reasons given in the lead judgment of my learned brother, Uwaifo, JSC. I also abide with the other orders made in the said judgment.

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