

SUPREME COURT OF NIGERIA
18TH FEBRUARY, 2005. SC.75/1996
CORAM:- A. O. EJIWUNMI, N. TOBI, D. MUSDAPHER,
G. A. OGUNTADE, S. A. AKINTAN, JJSC

1. ROBERT I. IKWEKI
2. JOHN AWOVETO APPELLANTS
3. JAMES EZEWU

(For themselves and on behalf of the
Enegware Owwere and Osebakpor
families of Ughoton, Okpe Clan)

AND

1. MR. JAMES EBELE
2. AKPONUNU AFORIGHO RESPONDENTS
(For themselves and on behalf of
Ebele family of Okere village)

APPEALS - Leave of court - Adjournment - Appeal against refusal of adjournment - Will require obtaining leave of court - Or it will be incompetent (H1)

APPEALS - Competence - Notice of appeal - That dealt with ruling not appealed against - Leaving the final judgment appealed against - Is incompetent (H2)

APPEALS - Appellate jurisdiction - Conferred by the Constitution - Can only be properly activated - Through valid grounds of appeal (H3)

APPEALS - Competence - Notice of appeal - With grounds that raised complaints - Not contained in the judgment appealed against - Are all incompetent (H4)

APPEALS - Redemption - Notice of appeal - That is irredeemably bad - Court of appeal cannot redeem it - By relying on O. 1 r. 20(7) of the CA

Rules (H5)

APPEALS - Validity - Notice of appeal - That is valid - Must be in existence - Before Court of Appeal can seek to rely on O. 1 r. 20(7) CA Rules - Towards its redemption (H6)

FACTS

Before the High Court of the defunct Mid Western State Sapele plaintiffs/appellants filed an action against the defendants/respondents all in representative capacities. They claimed declaration of title to the parcel of land in dispute, damages, for trespass and perpetual injunction. The parties filed and exchanged their pleadings after which the case passed through the hands of some Judges before coming finally to be heard by Uwaifo J. (as he then was). The appellants called evidence in support of their claim and closed their case on 19-9-1985. The defence called two witnesses and were expected to call more. But their absence from court on subsequent adjourned dates led to the court fixing the case definitely for 23rd March, 1987. On that date one of the respondents was in court without their counsel. His request for adjournment was refused vide a ruling by the learned trial judge.

Appellants' counsel addressed the court and judgment was delivered on the next adjourned date being 11th May, 1987. The trial Judge found in favour of the appellants. Respondents appealed against the said judgment. But their Notice of appeal and the grounds therein contained complaints against the ruling of 23-3-1987 on the issue of refusal of adjournment without raising any complaint against the final judgment appealed against. The Court of Appeal relied on O. 1 r. 20(7) of the Court of Appeal Rules 1981 as enabling it to consider the said interlocutory ruling refusing adjournment. The said O. 1 r. 20(7) provided that the powers of the Court in respect of an appeal shall not be restricted by reason of any interlocutory order from which there has been no appeal. Court of Appeal allowed the respondents' appeal. Being aggrieved, appellants have now appealed to the Supreme Court.

ISSUES FOR DETERMINATION

“(i) Has the Court of Appeal jurisdiction to entertain a purported appeal against-

(a) the substantive judgment of the trial court by Notice of Appeal which did not contain any ground of appeal directed against the said substantive judgment?

(b) an interlocutory ruling of the trial court in respect of which the defendants did not appeal?

(ii) Did Order 1 Rule 20(7) of the Court of Appeal Rules confer on the Court of Appeal jurisdiction to entertain, adjudicate and determine a purported appeal against the substantive judgment on grounds directed against an interlocutory ruling against which the defendants did not appeal?

(iii) Was the appeal which the Court of Appeal heard and determined in this case competent in that court?

(iv) Were the learned Justices right to interfere with the exercise by learned trial Judge of his undoubted discretion to grant and or refuse application for adjournment on 23/3/97.”

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

Leave of court - Adjournment

1. In the instant case, if the defendants wished to appeal against the order of the trial court on 23rd March, 1987, refusing to grant them an adjournment, they would require the leave of the High Court or the Court of Appeal as the question involved being a matter of the exercise of discretion as whether to grant or refuse an adjournment would be one of fact or mixed law and fact. This is because the exercise of the discretion whether to grant or refuse a request for an adjournment involves a consideration of the facts and circumstances surrounding the request

If on the other hand the defendants wished to appeal against the judgment of 11th May, 1987, they could do so as of right, it being the final judgment of the High Court sitting as a court of first instance.

While discussing the need to obtain leave to appeal against an exercise of discretion in the grant of an adjournment, I must bear in mind

that if an aggrieved person who requires leave to appeal fails to obtain such leave before bringing such appeal, the appeal is incompetent. (p. 654 A)

Notice of appeal - That dealt with ruling not appealed against

B 2. Although the Notice of Appeal purports to be directed against the judgment delivered by the trial court on 11th May, 1987, all the grounds of appeal raised - original and additional - were in the nature of complaints against the refusal by the trial court to grant adjournment to the defendants on 23rd March, 1987. It follows therefore, that if the Notice of Appeal is taken as it should be, as a challenge against the judgment of the trial court delivered on 11th May, 1987, the Notice of Appeal must be pronounced as incompetent. This is because the judgment delivered by the trial court on 11th May, 1987, did not say anything about the grant of an adjournment to the defendants. In other words, the issues agitated under the defendants' grounds of appeal did not arise from the judgment delivered on 11th May, 1987. (p. 654 F)

E Appellate jurisdiction - Conferred by the Constitution

3. It is impermissible for a person to found his right of appeal from the decision of the High Court to the Court of Appeal on a matter that did not arise in the course of proceedings before the High Court.

F The Court of Appeal derives its appellate jurisdiction from the Constitution of Nigeria. The right of appeal as conferred under the provisions of the Constitution is tied to the questions the court is being invited to adjudicate upon. It is always the grounds of appeal that define the issues being submitted to the court for adjudication. It is therefore important that the grounds of appeal framed in an appeal be made clear and explicit as to properly activate the appellate jurisdiction of the Court of Appeal. It is through an examination of the grounds of appeal that it can be decided whether or not the appellate jurisdiction of the Court of Appeal is being appropriately invoked. For instance, if a Notice of Appeal carries no ground of appeal or carries grounds of appeal all of which are incompetent, the appellate jurisdiction of the court would not have been invoked by such grounds, it seems to me that a valid Notice of Appeal can

be likened to a key by which entry is gained into a house or an apartment; without the right key, the door to the house or apartment remains shut. (p. 656 E)

Notice of appeal - With grounds that raised complaints

4. The court below as well as this court in its appellate jurisdiction can only consider appeals in matters in which such appellate jurisdiction has been properly invoked through valid notices of appeal; not by incompetent notices of appeal. The Notice of Appeal filed by the defendants was incompetent as it did not carry a valid ground of appeal. If there had not been a valid Notice of Appeal, it would be an exercise in futility to raise grounds of appeal said to be additional to invalid ground of appeal contained in an incompetent Notice of Appeal. More than that however, even all the grounds raised as additional grounds were complaints against a decision not contained in the judgment delivered on 11th May, 1987. Those additional grounds of appeal were by themselves also incompetent. (p. 657 C)

Notice of appeal - That is irredeemably bad

5. In each of the cases Ikomi v. Agbeyege and Ige v. Obiwale, one could not fail to see that there was already a valid appeal before the court on the final judgment of the trial court and that the issue in respect of which a Rule similar to Order 1 Rule 20(7) of the Court of Appeal Rules was invoked was as to whether or not an interlocutory order made by the trial court in respect of which there was no appeal would be allowed to constitute a hindrance to the hearing on the merit of the appeal on the final judgment in respect of which there was a valid Notice of Appeal.

In the instant case, the Notice of Appeal filed by the defendants/respondents including all the grounds of appeal raised were totally and irredeemably bad. On the assumption that all the grounds of appeal were directed against the order of 23rd March, 1987, the Notice of Appeal was bad because as the grounds raised complaints on the failure to grant an adjournment, the appeal, raised an issue of fact or mixed law and fact for which the leave of the High Court or the court below was required. Such

leave not having been obtained, the Notice of Appeal was incurably bad.
(p. 659 E)

APPEALS - Validity

B 6. If, on the other hand, one takes the view that the Notice of Appeal and the additional grounds of appeal were directed (as it claimed to be) against the judgment delivered on 11th May, 1987, the Notice of Appeal would be incompetent as the complaints made in the ground of appeal did not arise from the judgment of 11th May, 1987.

C The court below failed to observe that before the need arose for the invocation of Order 1 rule 20 (7) of the Court of Appeal Rules, there was the need first to have before the Court of Appeal a valid Notice of Appeal on the final judgment of the trial court. It is the existence of such valid
D Notice of Appeal on the final judgment which gives the court below the jurisdiction to hear the appeal in interlocutory orders on which there has been no appeal as provided under Order 1 rule 20 (7).

In this case, as there was no valid appeal before the court below
E against the final judgment of the trial court delivered on 11th May, 1987, the only course open to the court below was to strike out the appeal.
(p. 660 A)

NOTABLE POINT OF INTEREST **TOBIJSC**

1. Court cannot exercise discretion in the absence of jurisdiction

I ask: are courts of law vested with discretionary powers where they have no jurisdiction in the first place? I think not. Courts of law can only
G exercise their discretionary powers where they have jurisdiction in the matter. Discretionary power of courts does not fall from heaven but can only be exercised if the court has jurisdiction to hear the matter.

An appellant has not the freedom of the air to appeal on an
H interlocutory order or decision just like that. He has to seek leave of court either under Section 221 of the 1979 Constitution or under Section 15 of the Court of Appeal Act. (p. 670 C)

REPRESENTATION

T. J. Okpoko SAN., (with him, C. A. Ajuya and E. Emakpor), for the Appellants.

S. A. Omabegho, Esq., for the Respondents.

B

CASES REFERRED TO

Saraki v. Kotoye (1992) 9 NWLR (Pt. 261) 156 at 184

Atoyebe v. Govt. of Oyo State (1994) 5 NWLR (Pt. 344) 290 at 305

Ige v. Obiwale (1967) 5 NSCC 267

C

Odubeko v. Fowler (1993) 7 NWLR (Pt. 308) 637 at 653

Ajani v. Giwa (1986) 3 NWLR (Pt. 32) 796

Ikomi v. Agbeyegbe 12 WACA 379 at 381

Yekini Onigbede & Anor. v. Ishola Balogun & Anor. (1975) 1 All LR (Pt.1) 232

D

Tilbury Construction Ltd. v. Ogunniyi (1988) 2 NWLR (Pt. 74) 64

Nwadike v. Ibekwe (1987) 4 NWLR (Pt 67) 718

White v. Witt (1877) 5 CH. D. 589; 46 LJ. CH. 560; 36 LT. 123; 37 L.T. 110

E

STATUTES & RULES REFERRED TO

Constitution of Federal Republic of Nigeria, 1999 ss. 220, 221(d), 222(b)

Federal Supreme Court Rules 1961 O. 7 r. 25

F

Court of Appeal Rules 1981 O. 1 r. 20(7), O. 3 r. 2(1)

LEAD JUDGMENT BY OGUNTADE JSC

The appellants were the plaintiffs at the Sapele High Court of the old-Mid-Western State of Nigeria where they claimed as the representatives of the Eneghware Owere and Osebakpor families of Ughoton Okpe clan against the respondents as the representatives of Okere village jointly and severally for the following reliefs:

G

“(a) A declaration that the piece or parcel of land known as Ogbele land lying and situate in Ughoton but more particularly described and edged PINK in survey Plan No. TJM 1434 made on the 3rd day of April, 1973 by Theophilus John Esq., licensed surveyor and counter-signed by

H

the Surveyor-General, Mid-West State of Nigeria on the 8th day of October, 1973 and filed with this Statement of Claim is the exclusive and beneficial property of the plaintiff and their Enegware, Owwere and Osebakpor families of Ughoton town, Okpe clan, Western Urhobo division.

(b) N600.00 (Six Hundred Naira) damages for trespass on the said land.

(c) An order of perpetual injunction restraining the defendants, their relations, servants and agents from trespassing on the said Ogbele land.”

The parties filed and exchanged pleadings after which the case after passing through the hands of some Judges came finally to be heard by Uwaifo, J., (as he then was). On 11th May, 1987, the trial Judge gave judgment in favour of the plaintiffs. He granted the reliefs claimed by the plaintiffs including an award of Four Hundred Naira as damages for trespass.

The defendants were dissatisfied with the judgment. They brought an appeal against it before the Court of Appeal, Benin Division (hereinafter referred to as the ‘court below’). The court below in its unanimous judgment on 7th July, 1995, allowed the appeal. The judgment given by the trial Judge was set aside and the case was ordered to be retried.

The plaintiffs were dissatisfied with the judgment of the court below. They have brought this appeal before this court. In their appellants’ brief, they raised the following issues for determination in the appeal:-

“(i) Has the Court of Appeal jurisdiction to entertain a purported appeal against-

(a) the substantive judgment of the trial court by Notice of Appeal which did not contain any ground of appeal directed against the said substantive judgment?

(b) an interlocutory ruling of the trial court in respect of which the defendants did not appeal?

(ii) Did Order 1 Rule 20(7) of the Court of Appeal Rules confer on the Court of Appeal jurisdiction to entertain, adjudicate and determine a purported appeal against the substantive judgment on grounds directed

against an interlocutory ruling against which the defendants did not appeal?

(iii) Was the appeal which the Court of Appeal heard and determined in this case competent in that court?

(iv) Were the learned Justices right to interfere with the exercise by B learned trial Judge of his undoubted discretion to grant and or refuse application for adjournment on 23/3/97."

The issues for determination which the respondents formulated read:

"1. Whether the Court of Appeal was correct when it set aside C judgment of the trial court as a nullity on the basis that the whole proceedings of the High Court was null and void.

2. Whether the Court of Appeal was correct when it held that the powers of the Court of Appeal could not be restricted by the reason of the D fact that there was no appeal from any interlocutory decision.

3. Whether the Court of Appeal was correct to have sent the whole proceedings to the lower court for retrial.

4. Were the learned Justices right to interfere with the exercise by E learned trial Judge of his discretion to grant and/or refuse application for adjournment on 23/3/87."

A comparison of the two sets of issues for determination formulated by the parties shows that the substance if not the wording of the F issues is the same. The issues dovetail into each other. I shall therefore discuss them together. Before considering the issues, it is helpful for an appreciation of the conclusion reached and the reasoning leading to the conclusion to consider in some depth how the dispute arose. The appeal as will shortly appear arose from a purely procedural matter rather than the G merit of the judgment given by the trial court. It happened in this manner:

The plaintiffs (now appellants) had called evidence in support of their claim. On 19th September, 1985, they closed their case. The defence opened its own case on 7th October, 1985. As at 18th December, 1986, H when the case came before the trial court for further hearing, the defence had called two witnesses and were expected to call more on 18th December 1986. However, the defendants were absent from court as was

their counsel Mr. F. O. M. Mowoe; but Mr. Mowoe's brief was held by counsel Mr. Z. A. Smith. Hearing could not proceed. The trial Judge adjourned the case and in doing so made these remarks -

B *"However, this case will be adjourned to 8th and 9th January, 1987 for the further hearing at Auchi. Mr. Mowoe should ensure that he makes all necessary arrangements to conclude his defence on those days."*

The record of the court does not indicate what happened on 8th and 9th of January, 1987 to which dates the suit was adjourned on 18th December, 1986. The suit, however, next came up on 23rd March, 1987.
C The minutes of the court for that date play an important part in this appeal. I reproduce them here -

"W/176/76: Robert Ikweki & Akonunu Aforigho & Anor. 2nd & 3rd plaintiffs present; 1st plaintiff reported dead; Mr. V. E. Otomiewo for D the plaintiffs, 2nd defendant present; 1st defendant reported dead.

2nd defendant: I saw my lawyer on Saturday 21/3/87 since he sent to inform me that the case is fixed for hearing. He is not in court now. Without my lawyer I cannot continue with the case. I ask for an E adjournment.

Otomiewo: No other thing to say.

Court: I have had to travel all the way from Auchi to Warri to conclude this case on 18/12/86. On that day, Mr. F. O. M. Mowoe, learned counsel for the defendants, wrote to court to say he was travelling to Port F Harcourt to see his estranged wife that same day and would remain there the next day. He requested for an adjournment. I reluctantly granted the adjournment although I was not satisfied that the reason was good enough. But later it was discovered that Mr. Mowoe did not at all go to Port G Harcourt as he alleged. Rather he appeared in The Chief Magistrate's Court, Oleh in charge No MC/MISC/10c/86 and charge No. MCO/MISC/11c/86 on 18/12/86. In other words, he got an adjournment in this matter by fraudulent information. I have since seen, the record of proceedings in H those charges and Mr. Mowoe is shown therein as one of the lawyers who appeared. I have had again to give notice well in advance that I would sit in Warri today and tomorrow to conclude this case. The distance from Auchi is close to 300km. I cannot adjourn any longer. The application for

adjournment is refused. The 2nd defendant is called upon to continue his case.

2nd Defendant: I cannot continue:

Mr. Otomiewo: It means that is the close of the defendants' case. I am prepared to address the court.

Court: I agree that that is the logical conclusion that the defence have closed their case. I call upon learned counsel for the plaintiffs to address."

The record of proceedings shows that the plaintiffs' counsel immediately after the court's remarks above proceeded to deliver his final address. The suit was at the conclusion of plaintiffs' counsel's final address adjourned for judgment. As stated earlier in this judgment, the trial Judge on 11th May, 1987 delivered judgment, which was in favour of the plaintiffs.

The defendants were dissatisfied and on 10th August, 1987, filed a Notice of Appeal. The opening paragraph of the Notice of Appeal reads:

"TAKE NOTICE that the defendants being dissatisfied with the decision of the High Court of Justice, Warri court contained in the Judgment of Justice S. O. Uwaifo, Judge, dated 11th day of May, 1987 doth hereby appeal to the Court of Appeal upon the grounds set out in paragraph 3 and will at the hearing of the appeal seek the relief set out in paragraph 4."

The relief which the defendants wanted from the court below was stated in paragraph 4 of their Notice of Appeal thus:

"..... setting aside the said judgment of the lower court and entering judgment for the appellants."

Remarkably, although the defendants' Notice of Appeal was directed against the judgment delivered on 11th May 1987, yet the grounds of appeal were, in fact, a complaint against the trial court's refusal to grant the defendants' request for an adjournment on 23rd March, 1987. The 1st ground of appeal reads:

"1. The learned trial Judge erred in law in delivering judgment in favour of the respondents in the lower court without giving the appellants the opportunity of calling all their witnesses and adducing all the evidence

in favour of their case and without being addressed by appellants' counsel on the points of law and numerous issues of fact raised by the pleadings of the parties in the court below.

PARTICULARS OF ERROR

B (i) *After pleading had been exchanged as between the parties in the court, the suit proceeded to trial and the respondents herein as plaintiffs in the lower court called all their witnesses and adduced all the necessary evidence in favour of their case before closing same.*

C (ii) *Thereafter, the appellants herein who were defendants in the lower court, opened their defence and began to lead evidence.*

D (iii) *Whilst appellants herein who were defence and calling their witnesses and before the close of the defence, the learned trial Judge in the absence of appellants' counsel closed the case of the appellants against appellants' wish, took the final address of respondents' counsel and thereafter proceeded to deliver his judgment in respondents' favour without hearing the final address of appellants' counsel.*

E (iv) *The learned trial Judge was enjoined by law to allow appellants call all their witnesses and adduce all their evidence before deciding the issues as he did on the facts.*

F (v) *The learned trial Judge was enjoined by law to hear the final address of appellants' counsel on the issues of law raised before deciding those issues of law.*

G (vi) *Having denied appellants the opportunity of calling all their witnesses and adducing all the evidence in favour of appellants' case, the learned trial Judge had no alternative but to prefer the case of the respondents to that of the appellants and subsequently delivered judgment in respondents' favour."*

H The defendants later filed additional grounds of appeal dated 24th June, 1991. The said additional grounds of appeal were, as the original grounds complaining against the refusal of the trial court to grant an adjournment on 23rd March, 1987. Not one of the additional grounds raised the usual omnibus ground as to the weight of evidence.

It needs be said here in parenthesis that nowhere in the judgment

delivered by the trial court on 11th July 1987, was the refusal to grant adjournment on 23rd March, 1987, discussed or re-opened; rather the judgment discussed the merits on the evidence of the case of the parties. It was not disguised by the defendants in their original and additional grounds of appeal that their appeal which was ostensibly against the judgment of 11th May 1987, was in reality one against the ruling of 23rd March, 1987. B

When the appeal came up before the court below, the plaintiffs who were the respondents before that court raised a preliminary objection as to the incompetence of the appeal filed by the defendants who were the appellants before the court. The court below in a ruling on the preliminary objection read by Akpabio, JCA., and in which Ogede and Ubaezonu JJCA., concurred overruled the preliminary objection. The plaintiffs appealed against the ruling. The appeal was heard all the same by the court below. In the judgment of the court below delivered on 7th July, 1995, per Ige, JCA., the court below commenting on the preliminary objection observed: C D

“Before dealing with the substantive appeal, I shall make a few comments with regard to the Preliminary Objection raised by the respondents in this appeal. E

According to the respondents’ counsel in his brief of argument, he submitted that this Hon. Court has no jurisdiction to hear the complaints in the grounds of appeal not directed against the judgment of Uwaifo, J., dated 11th May, 1987. F

The Preliminary Objection was dealt with by my 3 other brother Justices: Akpabio, Ogebe and Ubaezonu JJCA., on 24th February 1995, and a lead ruling was delivered by Akpabio, JCA. G

I also agree with the lead ruling of Akpabio JCA., that the Preliminary Objection is misconceived and should be dismissed as of no consequence.

This court has jurisdiction to entertain this appeal, which is against the final judgment of the High Court of Justice, Warri delivered on 11/5/87. H

Order 1 Rule 20(7) of the Court of Appeal Rules has taken care of

the respondents' objection."

In the appellants' brief before this court, plaintiffs' counsel T. J. O. Okpoko, Esq., SAN., directed our attention to Section 222(b) of 1979 Constitution and Order 3 Rule 2 (1) of the Court of Appeal Rules. The former deals with the right of appeal and the latter with what a Notice of Appeal should contain. Counsel invited us to take a close look at all the grounds of appeal filed by the defendants before the court below. He said that all the grounds were in fact directed against the ruling of the trial court on 23/3/87 notwithstanding that the Notice of Appeal claimed to be an appeal against the judgment delivered on 11th May, 1987. Counsel submitted that it was an error on the part of the court below to have overruled the preliminary objection raised against the appeal brought by the defendant. Reliance was placed on *Oyebade v. Ajayi* (1993) 1 NWLR (Pt. 269) 313 at 329; *Saraki v. Kotoye* (1992) 9 NWLR (Pt. 264) 156; *Tijani v. Akinwunmi* (1990) 1 NWLR (Pt. 125) 327 at 250; *Ajani v. Giwa* (1986) 3 NWLR (Pt. 32) 796 and *Chief A. O. Awhinawhi v. S. E. Oteri* (1984) 5 S.C. 38.

Appellants' counsel next discussed the propriety of the court below interfering with the exercise of discretion by the trial court as to the grant or refusal of an adjournment. Counsel relied on *Odusote v. Odusote* (1971) 1 All NLR 219 at 222 and *Solanke v. Ajibola* (1968) 1 All NLR 46 at 54. Counsel finally urging us to allow the appeal submitted that as there was no competent appeal before the court below, it was not open to it to discuss whether or not there had been an infraction of the right to fair hearing in relation to the proceedings before the trial court.

The respondents' counsel, S. A. Omabegho, Esq., in his brief discussed at length the unfairness of the refusal of the trial Judge to grant an adjournment on 23rd March, 1987, and also for proceeding to receive the final address without affording the defendants an opportunity to address the court by their counsel. Counsel submitted that this was an infraction of the defendants' right to fair hearing. He relied on the point to *Salu v. Egeibon* (1994) 6 NWLR (Pt. 348) 23; *Kim v. State* (1992) 4 NWLR (Part 233); *Mohammed v. Kano N. A.* (1968) 1 All NLR 242; *State v. Onagoruwa* (1992) 2 NWLR (Pt. 221) 33; *Niger Construction v. Akugbene*

(1987) 4 NWLR (Pt. 67) 787; Obodo v. Olomu & Anor. (1987) 6 SCNJ 72; Ayisa v. Akanji (1995) 7 NWLR (Pt. 406) 129; Prince Yahaya Adigun & 2 Ors. v. A-G Oyo State & 18 Ors. (1987) All NLR 111 at 159; Idakwo v. Ejiga (2002) 7 S.C. (Pt. II) 168; (2002) 12 NWLR (Pt. 783) 156 at 167 and Ekiyor v. Bomor (1997) 9 NWLR (Pt. 519)1.

Counsel further discussed the right of appeal vested in the appellant and the impact which Order 1 Rule 20 (7) of the Court of Appeal Rules 1951, has on such right. Counsel submitted that the court below was right to deal with the issue of fair hearing arising from the refusal of the trial court to grant the defendants an adjournment to enable them put across their defence. Reliance was placed on Salu v. Egeibon (supra); Iloabuchi v. Ebigo (2000) 8 NWLR (Pt. 668) 177. Counsel finally submitted that the court below was right to interfere with exercise of the trial court's discretion to grant or refuse an adjournment.

I think I ought by way of a preface to this judgment stress that it was on 23rd March, 1987 that the trial court made its order refusing to grant the adjournment sought by the defendants and also that the judgment on the merit was delivered on 11th May, 1987. It is also not in dispute that in the Notice of Appeal filed by the defendants, they expressed therein that they were appealing against the judgment of 11th May, 1983. Further, it is apparent from the grounds of appeal raised by the defendants - original and additional that they were all complaints against the refusal of the trial court to grant the defendants an adjournment on 23rd March, 1987.

The ruling of the trial court on 23rd March, 1987 and the final judgment of 11th May, 1987 were under the 1979 Constitution of Nigeria both appealable to the Court of Appeal. Under Section 220(1) (a) and (b) of the said Constitution, a person aggrieved by a decision of the High Court could appeal to the Court of Appeal as of right in:

“(a) Final decisions in any civil or criminal proceedings before the High Court sitting at first instance.

(b) Where the ground of appeal involves questions of law alone, H decisions in any civil or criminal proceedings.”

Under Section 221 (d) of the same Constitution, an appeal shall lie subject to the provisions of Section 220 from the decision of the High

Court to the Court of Appeal.

In the instant case, if the defendants wished to appeal against the order of the trial court on 23rd March, 1987, refusing to grant them an adjournment, they would require the leave of the High Court or the Court of Appeal as the question involved being a matter of the exercise of discretion as whether to grant or refuse an adjournment would be one of fact or mixed law and fact. This is because the exercise of the discretion whether to grant or refuse a request for an adjournment involves a consideration of the facts and circumstances surrounding the request

If on the other hand the defendants wished to appeal against the judgment of 11th May, 1987, they could do so as of right, it being the final judgment of the High Court sitting as a court of first instance.

While discussing the need to obtain leave to appeal against an exercise of discretion in the grant of an adjournment, I must bear in mind that if an aggrieved person who requires leave to appeal fails to obtain such leave before bringing such appeal, the appeal is incompetent: See Yekini Onigbede & Anor. v. Ishola Balogun & Anor. (1975) 1 All LR (Pt.1) 232; Tilbury Construction Ltd. v. Ogunniyi (1988) 2 NWLR (Pt. 74) 64 and Nwadike v. Ibekwe (1987) 4 NWLR (Pt 67) 718.

Earlier in this judgment, I set out the opening paragraph of the Notice of Appeal filed by the defendants on 10th August, 1987 against the judgment of the trial court. Although the Notice of Appeal purports to be directed against the judgment delivered by the trial court on 11th May, 1987, all the grounds of appeal raised - original and additional - were in the nature of complaints against the refusal by the trial court to grant adjournment to the defendants on 23rd March, 1987. It follows therefore, that if the Notice of Appeal is taken as it should be, as a challenge against the judgment of the trial court delivered on 11th May, 1987, the Notice of Appeal must be pronounced as incompetent. This is because the judgment delivered by the trial court on 11th May, 1987, did not say anything about the grant of an adjournment to the defendants. In other words, the issues agitated

under the defendants' grounds of appeal did not arise from the judgment delivered on 11th May, 1987.

In Saraki v. Kotoye (1992) 9 NWLR (Pt. 261) 156 at 184, this court discussing the necessity for a ground of appeal to flow or arise from the judgment appealed against observed:

“It is a well settled proposition of law in respect of which there can hardly be a departure, that the grounds of appeal against a decision must relate to the decision and should constitute a challenge to the ratio of the decision - See Egbe v. Alhaji (1990) 1 NWLR (Pt. 546 at 590. Grounds of appeal are not formulated in nubibus. They must be in firma terra, namely arise from the judgment. However, meritorious the ground of appeal, based either on points of critical constitutional importance or general public interest, it must be connected with a controversy between parties. This is the precondition for the vesting of the judicial powers of the Constitution in the courts - See Senator Adesanya v. President of Nigeria (1981) 1 NCLR 358. Like pleadings, parties are bound by their grounds of appeal and are not at liberty to argue grounds not related to the judgment appealed against.

I agree entirely with Mr. Ayanlaja that in the absence of a factual controversy between the parties to which the grounds of appeal are related and tied, there is no live issue in respect of which this court can adjudicate. In the absence of a competent appeal in respect of which this court can adjudicate, the appeal must be struck out. See A-G of Oyo State & Anor. v. Fairlakes Hotel Ltd. (1985) 5 NWLR (Pt. 92)”

Also in Atoyebi v. Govt. of Oyo State (1994) 5 NWLR (Pt. 344) 290 at 305, this court observed per Iguh, JSC.:

“An appeal presupposes the existence of some decision which is appealed against on a given point or points. Where therefore there is no complaint in respect of a decision that has arisen from a judgment appealed against, such a decision may not form the basis of an issue for determination by an appellate court. The appellate jurisdiction of this court inter alia is to review the decisions/and or judgment of the Court of Appeal. If therefore, an issue never arose nor called for the determination of the Court of Appeal which therefore did not consider the issues, it seems

to me that such an issue may not form the basis of an appeal to the Supreme Court and a purported appeal to this court on such an issue will be incompetent and may be struck out. See Uhummwangho v. Okojie (1989) 5 NWLR (Pt. 122) 471 at 491.”

B And finally on the point, this court in *Odubeko v. Fowler* (1993) 7 NWLR (Pt. 308) 637 at 653 similarly observed:

“Now, in the first brief the appellant has elected to argue the ground (he in fact has abandoned ground 1 thereof). This court has held times without number that it is the issues and not the grounds that should be argued. This is founded in the established principle of law that it is on the basis of the issues, not the grounds that parties found their contention. See Macaulay v. NAL Merchant Bank (1990) 4 NWLR (Pt. 144) 283 at 321 and Chinweze v. Masi (1989) 1 NWLR (Pt. 97) 254, to mention but a few.
D *In doing this, it must always be borne in mind that in the quest for good brief-writing, grounds of appeal upon which issues for determination are formulated must relate to matters decided in the judgment from which the appeal springs. See Egbe v. Alhaji (1990) 1 NWLR (Pt. 128) 546 at 590.*
E *Since in the instant case, ground 1 which has been abandoned is not related to any of the issues proffered, it is accordingly struck out.”*

It only remains for me to say that the principle enunciated in the above cases applies with equal force to appeal emanating from the High Court to the Court of Appeal. **It is impermissible for a person to found his right of appeal from the decision of the High Court to the Court of Appeal on a matter that did not arise in the course of proceedings before the High Court.**

G **The Court of Appeal derives its appellate jurisdiction from the Constitution of Nigeria. The right of appeal as conferred under the provisions of the Constitution is tied to the questions the court is being invited to adjudicate upon. It is always the grounds of appeal that define the issues being submitted to the court for adjudication.**
H **It is therefore important that the grounds of appeal framed in an appeal be made clear and explicit as to properly activate the appellate jurisdiction of the Court of Appeal. It is through an examination of the grounds of appeal that it can be decided whether or not the**

appellate jurisdiction of the Court of Appeal is being appropriately invoked. For instance, if a Notice of Appeal carries no ground of appeal or carries grounds of appeal all of which are incompetent, the appellate jurisdiction of the court would not have been invoked by such grounds, it seems to me that a valid Notice of Appeal can be likened to a key by which entry is gained into a house or an apartment; without the right key, the door to the house or apartment remains shut. B

Now, all the grounds of appeal raised by the defendants before the court below were complaints arising from the proceedings of the trial court on 23rd March, 1987, and not from the judgment of 11th May, 1987. The court below as well as this court in its appellate jurisdiction can only consider appeals in matters in which such appellate jurisdiction has been properly invoked through valid notices of appeal; not by incompetent notices of appeal. The Notice of Appeal filed by the defendants was incompetent as it did not carry a valid ground of appeal. If there had not been a valid Notice of Appeal, it would be an exercise in futility to raise grounds of appeal said to be additional to invalid ground of appeal contained in an incompetent Notice of Appeal. More than that however, even all the grounds raised as additional grounds were complaints against a decision not contained in the judgment delivered on 11th May, 1987. Those additional grounds of appeal were by themselves also incompetent. D E F

As I stated earlier in this judgment, the plaintiffs/appellants raised a preliminary objection before the court below to the effect that the Notice and grounds of appeal filed by the defendants/respondents were incompetent. The court below overruled the preliminary objection and took umbrage under Order 1 rule 20(7) of the Court of Appeal Rules 1982 which provides: G

“(7) The powers of the court in respect of an appeal shall not be restricted by reason of any interlocutory order from which there has been no appeal.” H

There is nothing novel about Order 1 rule 20(7) above. The West African Court of Appeal Rules 1950 contained a similar provision. We also

had it under Order 7 rule 25 of the Federal Supreme Court Rules 1961.

In *Ikomi v. Agbeyegbe* 12 WACA 379 at 381, the appellant had filed a valid appeal against the final judgment of the High Court. The issue that arose before the West African Court of Appeal was whether or not the
B appellant could raise an issue concerning an interlocutory order in respect of which there had been no appeal. Verity CJ., at page 381 of the report said:

*“As to failure to appeal against the order, we think this is covered
C in the circumstances, of this case by rule 30 of the West African Court of Appeal Rules 1937, now Rule 34 of the West African Court of Appeal Rules, 1950 which provides that:-*

*‘No interlocutory order from which there has been no appeal shall
D operate so as to bar or prejudice the court from giving such decision on the appeal as may seem just.’*

*“As was said by Jessel M. R., in *Laird v. Briggs* (1881) 19 CH. D. 22; 45 LT. 238, a case in which liberty to appeal out of time from an interlocutory order was sought after Notice of Appeal from the judgment
E had been given,”*

‘As you have appealed from the whole judgment the whole case will be open on the appeal.’

*“It must not be thought that in no circumstances will failure to
F appeal against an interlocutory order bar an appellant from raising an issue which should have been dealt with by appeal from an interlocutory order for, as was said by James, J. in *White v. Witt* (1877) 5 CH. D. 589; 46 LJ. CH. 560; 36 LT. 123; 37 L.T. 110 in relation to similar English rule (Order LVIII rule 14)”:-*

*‘It was never intended that an interlocutory order which amounts
G to a finding of verdict, should be open to appeal after the twenty-one days because the time for appeal from the final order founded on it has not expired.’*

“Jessel, MR., in the same case said:-

This rule was only intended to prevent the right of appeal from being interfered with by the existence of an interlocutory order which incidentally involved a decision of the point.”

In Ige v. Obiwale (1967) 5 NSCC 267, an appeal had been brought before this court against the final judgment of the High Court. The appellant later brought an application before this court to file additional grounds of appeal. One of the grounds concerned the issue of jurisdiction, which the High Court had in an interlocutory ruling decided against the appellant. Respondent's counsel, Chief F. R. A. Williams argued that leave should not be granted on the ground dealing with jurisdiction as the appellant had not appealed against the interlocutory ruling on jurisdiction. This court decided that Order 7 rule 25 of the Federal Supreme Court Rules, 1961 (which is similar to Order 1 rule 20(7) of the Court of Appeal Rules (reproduced above) was authority for it to hear arguments on the additional ground on jurisdiction.

A consideration of the judicial authorities which the court below considered in arriving at its decision brings out most vividly the error made by the court below in its decision to sustain the respondent's appeal before it on the ground that Order 1 rule 20 (7) of the Court of Appeal Rules 1981 enabled it to consider the order made by the trial court on 23rd March, 1987, when the Notice of Appeal to it was only against the judgment delivered on 11th May, 1987.

In each of the cases Ikomi v. Agbeyegbe and Ige v. Obiwale, one could not fail to see that there was already a valid appeal before the court on the final judgment of the trial court and that the issue in respect of which a Rule similar to Order 1 Rule 20(7) of the Court of Appeal Rules was invoked was as to whether or not an interlocutory order made by the trial court in respect of which there was no appeal would be allowed to constitute a hindrance to the hearing on the merit of the appeal on the final judgment in respect of which there was a valid Notice of Appeal.

In the instant case, the Notice of Appeal filed by the defendants/respondents including all the grounds of appeal raised were totally and irredeemably bad. On the assumption that all the grounds of appeal were directed against the order of 23rd March, 1987, the Notice of Appeal was bad because as the grounds raised complaints on the failure to grant an adjournment, the appeal,

raised an issue of fact or mixed law and fact for which the leave of the High Court or the court below was required. Such leave not having been obtained, the Notice of Appeal was incurably bad. If, on the other hand, one takes the view that the Notice of Appeal and the additional grounds of appeal were directed (as it claimed to be) against the judgment delivered on 11th May, 1987, the Notice of Appeal would be incompetent as the complaints made in the ground of appeal did not arise from the judgment of 11th May, 1987.

The court below failed to observe that before the need arose for the invocation of Order 1 rule 20 (7) of the Court of Appeal Rules, there was the need first to have before the Court of Appeal a valid Notice of Appeal on the final judgment of the trial court. It is the existence of such valid Notice of Appeal on the final judgment which gives the court below the jurisdiction to hear the appeal in interlocutory orders on which there has been no appeal as provided under Order 1 rule 20 (7).

In this case, as there was no valid appeal before the court below against the final judgment of the trial court delivered on 11th May, 1987, the only course open to the court below was to strike out the appeal.

Accordingly, I would allow this appeal. The judgment of the court below is set aside. In its place, I make an order striking out the appeal brought before the court below by the defendants/respondents. The appellants are entitled to costs in the court below and this court which I assess at N17, 500.00.

G

EJIWUNMIJSC

I have had the privilege of reading before now the draft of the judgment just delivered by my learned brother, Oguntade, JSC. He has in that judgment set out the facts and the main issue raised in the appeal. This being, whether it was open to the court below to hear and determine an appeal on an interlocutory ruling.

The facts that are relevant to my comments in this appeal may be

stated thus: In the trial court after the plaintiffs had closed their case, the matter was adjourned to a definite date for the defence to begin. The hearing, however, could not go on that day. It suffered several adjournments as the records show that the court, per Uwaifo, J., had in the meantime been transferred from Warri. Eventually the matter was fixed B for the 18th of December 1986, for hearing and counsel was duly informed. But learned counsel for the defendants, Mr. Mowoe was not present and the court had to adjourn. The matter was again fixed for the 23rd & 24th March 1987 and counsel for the parties were duly advised that C the matter would be heard to its conclusion on those dates. Mr. Mowoe, learned counsel for the defendants was again not in court. His client, the 2nd defendant said he saw him before that date and he promised that he would be in court. As the court was not willing to adjourn the matter any longer, it asked the 2nd defendant to proceed with the defence. The 2nd D defendant declined as he stated that he couldn't do so without his counsel. The court then closed the case for the defence and invited learned counsel for the plaintiffs to address it. After receiving the address of counsel, the learned trial Judge delivered a considered judgment on the 11th May, 1987, E and upheld the claims of the plaintiffs.

As the defendants were dissatisfied with the judgment, they appealed against it. Pursuant, they filed one original ground of appeal to the court below and with the leave of that court, 4 additional grounds of appeal F were filed.

At the hearing before the court below, learned counsel for the plaintiffs raised a preliminary objection on the competency of the appeal. The court below then decided to hear counsel first on the preliminary G objection. The short point in this regard was that the grounds of appeal were not directed against the judgment of the court below, delivered on 11th May, 1987, rather all the grounds of appeal were apparently directed against the ruling of the court made on the 23/3/87 refusing the request of the defendant for a further adjournment of the hearing of the case. That H preliminary objection was overruled by the court below by its ruling delivered on the 24th February, 1995. Hence the plaintiffs have now appealed to this court.

In this court, both parties, as they are wont to do, filed and served their respective briefs of argument. For the purpose of this judgment, I wish to consider issues (1) and (2) raised in the plaintiffs' brief, which read thus:-

B "i. *Has the Court of Appeal jurisdiction to entertain a purported appeal against:*

(a) *the substantive judgment of the trial court by Notice of Appeal which did not contain any ground of appeal directed against the said substantive judgment?*

C (b) *an interlocutory ruling of the trial court in respect of which defendants did not appeal?*

ii. *Did Order 1 Rule 20 (7) of the Court of Appeal Rules on the Court of Appeal jurisdiction to entertain, adjudicate and determine a purported appeal against the substantive judgment on grounds directed against an interlocutory ruling against which the defendants did not?"*

In substance, the argument of learned counsel to the plaintiffs is that the court below erred when that court held thus:-

E "With regard to the point raised by the counsel for the respondents that the appellants cannot be heard on issues formulated to question the propriety or otherwise of the interlocutory decision of 23/3/87, I have answered the question earlier on in my comments on the respondent's preliminary objection. But for the avoidance of doubt I am now restating
F that the provisions of Order 1 Rule 20(7) of the Court of Appeal Rules, 1981 have answered that question adequately. This court has powers to look into the order of the trial court made on 23/3/87 and it has done so rightfully."

G In support of this argument, he referred in the appellants' amended brief to the following cases which support his contention that the Court of Appeal cannot depend on the provisions of Order 1 Rule 20 (7) of the Court of Appeal Rules to adjudicate upon an interlocutory ruling of the trial
H court against which there was no appeal to that court. These cases are Oyeade v. Ajayi (1993) 1 NWLR (Pt. 269) 313 at 328; Saraki v. Kotoye (1992) 9 NWLR (Pt. 264) 156; Tijani v. Akinwunmi (1990) 1 NWLR (Pt. 125) 327 and 250; Onwe v. Ogbunya (2001) FWR (Pt. 37) 1031 at 1042.

The learned counsel for the defendants has taken both in his oral arguments before and in the respondents' brief, a view diametrically opposed to that of the appellants. He has argued very strenuously that the court below was right to have determined the appeal on the basis of the grounds of appeal filed against the judgment of the trial court to that court. B And that the court was right to have relied on the provisions of Order 1 Rule 20 (7) of the Court of Appeal Rules to determine the appeal and to hold that the defendants were denied fair hearing by the trial court. In support of this, he referred to several cases some of which are: Salu v. Egeibon (1994) C 6 NWLR (Pt. 348) 23; Kim v. State (1992) 4 NWLR (Pt. 233) 17 at 37; Mohammed v. Kano N. A. (1968) 1 All NLR 242. There can be no doubt all these authorities proclaim that parties to an action must be given fair hearing by any court seised with the determination of their case. It is also manifest that where they are denied this right to fair-hearing, which also D include the rule of audi alteram partem. This principle was immortalized by Ademola CJN., in Mohammed v. Kano (supra) when His Lordship said-

"We think fair hearing must involve a fair trial and a fair trial of a case consist of the whole hearing." E

Also in the State v. Onagoruwa (1992) 2 NWLR (Pt. 221) 33 where at 56 Karibi-Whyte, JSC., said:-

"The violation of the rule of audi alteram partem per se lies in the breach of the fundamental human right. Once the right is violated, it is F irrelevant whether a decision made subsequent there is correct..."

There is no doubt that this principle lies at the heart of our judicial system. But an appellant who wishes to benefit from this principle has to attack directly the failure of the trial court to observe it. This then leads me to the critical consideration of the grounds of appeal filed in the instant G appeal.

The original ground of appeal dated 7th day of August, 1987, without its particulars, read thus:-

"1. The learned trial Judge erred in law in delivering judgment in H favour of the respondents in the lower court without giving the appellants the opportunity of calling all their witnesses and adducing all the evidence in favour of their case and without being addressed by appellants' counsel

on the points of law and numerous issues of fact raised by the pleadings of the parties in the court below.”

And with the leave of the court below, the defendants filed the following additional grounds of appeal dated 24th June, 1991. They read:-

B “2. *The learned trial Judge erred in law in closing the case of the appellants against their wish when:-*

PARTICULARS OF ERROR

(a) *Second appellant had not finished testifying and was being led in evidence in chief.*

C (b) *Appellants had not called all their witnesses in the lower court including boundary witnesses.*

(c) *The learned trial Judge was in a hurry to conclude the suit and in the process sacrificed justice on the altar of speed.*

D (d) *The lower court failed to comply with the provisions of Section 33(1) of the 1979 Constitution.*

3. *The learned trial Judge failed to give the appellants a fair hearing when he based his judgment on the final address of the respondents’ counsel without giving appellants and their counsel the opportunity to finish their case and address the court.*

PARTICULARS OF ERROR

F (a) *The lower court closed the appellants’ case before the conclusion of same and called upon respondents’ counsel to address the court.*

(b) *The lower court failed to give appellants the opportunity to present a final address.*

G (c) *The learned trial Judge based his judgment on the final address of respondents’ counsel particularly as it relates to the Plan Exhibit “A” and the acts of possession given in evidence by respondents.*

4. *The learned trial Judge erred in law when he failed to grant appellants an adjournment in the absence of their counsel on the 23rd day of March, 1987.*

PARTICULARS OF ERROR

H (a) *The appellants’ application for adjournment on the 23rd day of March, 1987 was occasioned by the absence of their counsel from court.*

(b) *The learned trial Judge failed to exercise his discretion*

judiciously when he refused appellants' application for an adjournment by failing to consider appellants' constitutional right to have their case properly presented by a legal practitioner who alone can do so.

5. *The learned trial Judge failed to give the appellants a fair hearing when:-*

(a) *He closed appellants' case before the conclusion of same.*

(b) *He failed to give appellants and their counsel opportunity to call their witnesses.*

(c) *He failed to give appellants and their counsel opportunity to deliver a final address before judgment.*

(d) *He denied appellants their right to have their case properly presented.*

(e) *He based his judgment on the final address of respondents' counsel."*

After a critical study of the grounds of appeal, it is manifest that they were not targeted against the judgment of the trial court delivered on 11th May, 1987. It is settled law that grounds of appeal must be prepared in such a way as to bring the errors in the judgment of the court against which an appeal has been filed to the appellate court. In *Saraki v. Kotoye* (1992) 9 NWLR (Pt. 261) 156, this court had occasion to lay down the applicable principles in the following passage at page 184:-

"It is a well settled proposition of law in respect of which there can hardly be a departure, that the grounds of appeal against a decision must relate to the decision and should constitute a challenge to the ratio of the decision - See Egbe v. Alhaji (1990) 1 NWLR (Pt. 128) 546 at 590. Grounds of appeal are not formulated in nubibus. They must be in firma terra, namely arise from the judgment. However, meritorious the ground of appeal, based either on points of critical constitutional importance or general public interest, it must be connected with a controversy between parties. This is the precondition for the vesting of the judicial powers of the Constitution in the courts - See Senator Adesanya v. President of Nigeria (1981) 1 NCLR 358. Like pleadings, parties are bound by their grounds of appeal and are not at liberty to argue grounds not related to the judgment appealed against

I agree entirely with Mr. Ayanlaja that in the absence of a factual controversy between the parties to which the grounds of appeal are related and tied, there is no live issue in respect of which this court can adjudicate. In the absence of a competent appeal in respect of which the court can
 B *adjudicate, the appeal must be struck out. See A-G of Oyo State & Anor. v. Fairlakes Hotel Ltd. (1985) 5 NWLR (Pt. 92)."*

I must therefore hold that in the absence of a valid ground of appeal against the judgment of the court delivered on the 11th May, 1987, it was
 C not open to the Court of Appeal to fall on the provisions of Order 1 Rule 20 (7) to determine the appeal. The position would of course have been different if an appeal had been lodged touching upon the decision of the trial court with regard to its ruling delivered on the 23rd March, 1987.

I would allow this appeal for the above reasons and the fuller
 D reasons given in the leading judgment. I also abide with the consequential orders made thereon including the order as to costs.

E **TOBI JSC**

This appeal is based on a very fine and subtle aspect of the grounds of appeal. In summary, it is the complaint of the appellants that as the original and additional grounds of appeal were not directed at the judgment
 F of the trial Judge delivered on 11th May, 1987, the Court of Appeal was in error in its judgment of 7th July, 1995.

The appellants have clearly set out the relevant facts of the case. The plaintiffs started evidence on 1st June, 1983. They closed their evidence on 19th September, 1985. The learned trial Judge adjourned to
 G 7th and 8th October, 1985 for defence. 1st defendant commenced evidence on 8th October, 1985. As the 1st defendant could not complete his evidence, further hearing was adjourned to 4th and 5th of November, 1985 for continuation of his evidence. On 18th December, 1986, the case
 H was adjourned to 8th and 9th of January, 1987 for continuation of the evidence of the 1st defendant. The adjournment was at the instance of the defence. After some further adjournments, the case came up for hearing on 23rd March, 1987. The learned trial Judge asked the defendants to

continue with their evidence, but they could not. The trial Judge closed the case of the defence and after address of counsel for the plaintiffs, delivered judgment on 11th May, 1987, in favour of the plaintiffs.

Let me record here a bit of the proceedings leading to the closure of the case of the defendants by the trial Judge at pages 114 and 115 of the Record:

“Court: I have heard again to give notice in advance that I would sit in Warri today and tomorrow to conclude this case. The distance from Auchi is close to 300 km. I cannot adjourn any longer. The application for adjournment is refused. The 2nd defendant is called upon to continue his case.”

2nd defendant: I cannot continue.

Mr. Otomiewo: It means that is the close of the defendants’ case. I am prepared to address the court.

Court: I agree that that is the logical conclusion that the defence have closed their case. I call upon learned counsel for the plaintiffs to address.”

I should mention right away that the above interlocutory ruling is not in the judgment and therefore not part of it. The appellants had the constitutional right to appeal on it but they did not. Rather they purportedly appealed on the interlocutory ruling as if it was in the judgment of the learned trial Judge. That, to me, is the crux of this appeal.

I do not think I make myself clear. Let me sound clearer by copying the ground of appeal and the particulars of error at pages 139 and 140 of the Record:

“GROUND OF APPEAL

“1. The learned trial Judge erred in law in delivering judgment in favour of the respondents in the lower court without giving the appellants the opportunity of calling all their witnesses and adducing all the evidence in favour of their case and without being addressed by appellants’ counsel on the points of law and numerous issues of fact raised by the pleadings of the parties in the court below.”

PARTICULARS OF ERRORS

(i) After pleadings, had been exchanged between the parties in the

court, the suit proceeded to trial and the respondent herein as plaintiffs in the lower court called all their witnesses and adduced all the necessary evidence in favour of their case before closing same.

(ii) *Thereafter, the appellants herein who were defendants in the lower court, opened their defence and began to lead evidence.*

(iii) *Whilst appellants herein who were defence and calling their witnesses and before the close of the defence, the learned trial Judge in the absence of appellants' counsel closed the case of the appellants against appellants' wish, took the final address of respondents' counsel and thereafter proceeded to deliver his judgment in respondents' favour without hearing the final address of appellants' counsel.*

(iv) *The learned trial Judge was enjoined by law to allow appellants call all their witnesses and adduce all their evidence before deciding the issues as he did on the facts.*

(v) *The learned trial Judge was enjoined by law to hear the final address of appellants' counsel on the issues of law raised before deciding those issues of law.*

(vi) *Having denied appellants the opportunity of calling all their witnesses and adducing all the evidence in favour of appellants' case, the learned trial Judge had no alternative but to prefer the case of respondents to that of appellants and subsequently delivered judgment in respondents' favour."*

The appellants have filed the following four additional grounds of appeal:

(2) *The learned trial Judge erred in law in closing the case of the appellants against their wish*

(3) *The learned trial Judge failed to give the appellants a fair hearing when he based his judgment on the final address of the respondents' counsel without giving appellants and their counsel the opportunity to finish their case and address the court.*

(4) *The learned trial Judge erred in law when he failed to grant appellants an adjournment in the absence of their counsel on the 23rd day of March, 1987.*

(5) *The learned trial Judge failed to give the appellants a fair*

hearing when"

The above four additional grounds of appeal are nothing but a mere expatiation of the original ground of appeal and they zero on the alleged fair hearing of the appellants arising from the trial Judge closing the case of the appellants when they refused to proceed with the case. B

I have carefully gone through the judgment of the learned trial Judge, Uwaifo, J., (as he then was), and I cannot place my hands on any aspect of that judgment dealing with his refusal to grant the appellants adjournment and of his request for address from the parties after closing the case of the appellants. There is no doubt that, that, of course, was the interlocutory ruling of the trial Judge which was however not appealed against. C

Grounds of appeal, in order to be valid, must complain on or about the judgment of the court. Where grounds of appeal do not complain on or about the judgment of the court, they merely gallivant in the appeal process and therefore to no effect. I think learned Senior Advocate for the appellants, Mr. Okpoko, got the point properly when he submitted that as the grounds of appeal were not directed at the judgment appealed against, the Court of Appeal was wrong in its decision. D E

The Court of Appeal invoked Order 1 rule 20 (7) of its Rules in arriving at its 24th February, 1995 Ruling. The court said at page 209 of the record: F

"I have carefully considered all the arguments canvassed above by learned counsel on both sides and agree with the learned counsel for the appellants that we are bound by the mandatory provisions of Order 1 Rule 20(7) of the Rules of this court which provides... Learned Senior Counsel for the respondents has not brought to our attention any superior statutory or constitutional provision which says that once a party failed to appeal against an interlocutory ruling or decision of a court when it was made he should be precluded from subsequently raising the same matter in a final appeal. As for the decided authorities I am of the respectful view that the three cases of Ikani v. Agbeyegbe (supra), Ige v. Obiwale (supra) and Provost Alvan Ikoku College of Education v. Amuneke (supra) cited by learned counsel for appellants are more apt and to the point than the case G H

of Oyebade v. Ajayi (supra) cited by the learned senior counsel for respondents, which had nothing to say about propriety of attacking an interlocutory ruling in a final appeal.”

Let me read Order 1 Rule 20(7) of the Court of Appeal Rules:

B “The powers of the court in respect of an appeal shall not be restricted by reason of any interlocutory order from which there has been no appeal.”

C Does Order 1 rule 20(7) apply in the circumstances of this case where the grounds of appeal are not directed against the judgment of the court? In invoking Order 1 Rule 20(7) and Order 3 Rule 22 of Rules of the Court of Appeal, the Court of Appeal held that it has discretionary powers to treat complaints relating to interlocutory orders or rules in respect of which there has been no separate appeal. I ask: are courts of law vested D with discretionary powers where they have no jurisdiction in the first place? I think not. Courts of law can only exercise their discretionary powers where they have jurisdiction in the matter. Discretionary power of courts does not fall from heaven but can only be exercised if the court has E jurisdiction to hear the matter.

An appellant has not the freedom of the air to appeal on an interlocutory order or decision just like that. He has to seek leave of court either under Section 221 of the 1979 Constitution or under Section 15 of F the Court of Appeal Act. See Ajani v. Giwa (1986) 3 NWLR (Pt. 32) 796. Assuming, but without conceding, that the construction I placed on Order 1 Rule 20(7) is wrong, the rule has no strength or capacity in the face of the constitutional and the statutory provisions cited above.

G I do not think the cases cited by the Court of Appeal are apposite. I am more inclined to the argument of learned Senior Advocate for the appellants that the cases dealt with a situation where there were competent appeals which vested jurisdiction in the courts. But here, we are dealing with incompetent appeal which ousted the jurisdiction of the court.

H The case law on the issue appears to me to be settled. In Egbe v. Alhaji (1990) 1 NWLR (Pt. 128) 546, this court held that the grounds of appeal against a decision must relate to the decision and should be a challenge to the validity of the ratio of the decision. In Saraki v. Kotoye

(1992) 9 NWLR (Pt. 264) 156, Karibi-Whyte, JSC., said at page 184 of the report:

“It is a well settled proposition of law in respect of which there can hardly be a departure, that the grounds of appeal against a decision must relate to the decision and should constitute a challenge to the ratio of the case... Grounds of appeal are not formulated in nubibus. They must be in firma terra, namely arise from the judgment. However, meritorious the ground of appeal, based either on points of critical constitutional importance or general public interest, it must be connected with a controversy between the parties.”

It is for the above reasons and the more detailed reasons given by my learned brother, Oguntade, JSC, in his judgment that I too allow the appeal. I abide by the costs awarded in the leading judgment.

MUSDAPHERJSC

I have had the honour to read in advance the judgment of my Lord, Oguntade, JSC., just delivered in this matter with which I entirely agree. His Lordship has comprehensively and lucidly dealt with all the issues submitted for the determination of the appeal. The judgment is meticulously clear. I respectfully adopt the reasoning as mine. I also allow the appeal and set aside the judgment of the Court of Appeal. In its place, I also make an order striking out the appeal brought by the respondents to the court below. I abide by the order for costs contained in the aforesaid leading judgment.

AKINTANJSC

I had the privilege of reading the draft of the leading judgment just delivered by my learned brother, Oguntade, JSC. He has extensively dealt with all the issues raised in the appeal and I entirely agree with his conclusion that the lower court was wrong in its decision that the appeal before it was in order.

The main question to be resolved in the appeal is whether an appeal

can be said to be valid when none of the grounds of appeal filed along with the Notice of Appeal challenges or queries any aspect of the judgment against which the appeal was filed. The position in the present case is that none of the grounds of appeal filed against the judgment has anything to do with the judgment. Rather, all the grounds of appeal filed were querying an interlocutory ruling delivered earlier during the course of the trial. While it is permissible to incorporate and argue such grounds of appeal along with other grounds challenging the final judgment, provided the necessary leave of the lower court or this court was sought and obtained, they cannot however, stand once there is no valid appeal challenging the final judgment as in this case. This is why I also hold that there is merit in the appeal and I allow it with costs as assessed in the leading judgment.

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