

SUPREME COURT OF NIGERIA
22ND APRIL, 2005. SC. 301/2001
CORAM:- S. U. ONU, U. A. KALGO, A. O. EJIWUNMI,
N. TOBI, D. O. EDOZIE, JJSC

STIRLING CIVIL ENGINEERING (NIG) LTD APPELLANT
AND
AMBASSADOR MAHMOOD YAHAYA RESPONDENT

COURTS - Judgment - Accidental slip - Court becomes functus officio - Once judgment is delivered - But it can be interfered with - So as to correct an accidental slip (H1)

JUDGMENTS - Accidental slip - Award of general damages - Inclusion of "loss of use" - Cannot be classified - As an accidental slip - And the error cannot be corrected - Save by cross appeal - Or respondents's notice (H2)

APPEALS - Issues - Suo motu raising of by court - Suggestion by lower court - That an issue must be formulated from each ground - Is not correct (H3)

APPEALS - Issues - Courts - Suo motu issue - Where raised by appeal court - Need to hear the parties - Before a decision is made (H4)

APPEALS - Issues - Raised suo motu by the court - Without input by counsel - Caused miscarriage of justice - In this case (H5)

APPEALS - Grounds of Appeal - Competence of - Where appellant's complaint is clear - And no rule of court is violated - Such ground is competent (H6)

APPEALS - Issues - Grounds of Appeal - An issue for determination - Is to be based on the complaint in the ground - And not on the particulars (H7)

COURTS - Damages - Award of - Interference by appellate court - May be necessary - Where the award - Is based on wrong principles - Or is either too small or extremely high (H8)

FACTS

Before the High Court of Kaduna State, the plaintiff/respondent brought an action against the defendant/appellant on the ground that the appellant a Civil Engineering Construction Company in the process of execution of a road construction project excavated large quantities of earth from the respondent's farmland thereby creating four large pits. The respondent therefore claimed N5,000,000.00 general damages for trespass, loss of use and mischief done to his economic trees. He also claimed N70,709,097.00 as cost of filling the pits. The trial court awarded N500,000.00 for the general damages and also ordered the appellant to refill the pits. Not satisfied with the decision, the appellant appealed to the Court of Appeal. That court in dismissing the appeal held that the appellant did not state the ground of his appeal and that the particulars of issue raised did not relate to the decision of the trial court. It also held that the phrase "loss of use" in the judgment was an accidental slip. The appellant not satisfied with the judgment has further appealed to the Supreme Court.

ISSUES FOR DETERMINATION

"1. Was the inclusion of loss of use in the award of general damages of N500,000.00 for trespass, loss of use and mischief by the trial court an accidental slip? (Ground A)

2. Whether the Court of Appeal was right to hold that the appeal was not competent because the particulars stated in support of the ground of appeal did not relate to the said ground? (Ground B)

3. In the circumstances of this case, was the Court of Appeal right to have raised the issue of incompetence of the appeal suo motu, argued same and dismissed the appeal without affording the parties opportunity to address on it? (Ground C)

4. Were the cases of Nwadike v. Ibekwe (1987) 4 NWLR (Pt. 67) 718 and Bereyin v. Gbobo (1989) 1 NWLR (Pt. 87) 372 cited and relied

upon properly applied to the instant case by the Court of Appeal? (Ground D)”

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

Judgment - Accidental slip

1. Admittedly, once a trial court delivers its final judgment, it becomes *functus officio* and ceases to be seized with the matter except for making ancillary orders such as stay of execution, etc. Nevertheless, the trial court has inherent power to interfere with its own judgment in order to correct accidental omissions or arithmetical errors.

By Order 1 Rule 20 of the Court of Appeal Rules Cap. 62 Vol. V, Laws of the Federation, 1990, then applicable, the Court of Appeal has the power to make an amendment in the judgment of the trial court before it in appropriate cases such as to amend or correct an accidental slip. The crucial question then is what is an accidental slip? In this regard, it is instructive to refer to the judgment of this court in the case of *Ogunsola v. NICON supra*, where it was held, per Uwais, CJN., as follows:-

“The words “accidental slip” have been judicially considered to inter alia, mean a clerical mistake in a judgment or order. Such error must be an error in expressing the manifest intention of the court. (p. 1045 G)

Accidental slip - Award of general damages

2. In the instant case, at p. 112 of the record, Salami, JCA., in his lead judgment made the following observation:-

“The inclusion of “loss of use” in the award of general damages is clearly an accidental slip. It cannot be otherwise, the learned trial Judge having expressly excluded it in his reasoning along with the payment already made by the Federal Ministry of Works and Housing.....”

I agree with the reasoning of the learned Justice that the trial court was wrong to have included the expression “*loss of use*” in the award of general damages but with much respect, I disagree that the inclusion can be classified as an accidental slip or arithmetical error which can be amended. It is certainly not a clerical error.

I am persuaded to hold that the reference to “*loss of use*” in the

judgment of the learned trial Judge is neither an accidental omission nor an arithmetical error and that in the absence of a cross-appeal or a respondent's notice under Order 3 Rule 14 of the Court of Appeal Rules, the court below could not correct the error. Indeed, it is the inclusion of the expression B complained of that formed the gravamen of the appellant's case and to jettison it unsolicited as the Court of Appeal did was to overreach the appellant. (p. 1046 D)

C ***Issues - Suo motu raising of by court***

3. The court below suo motu raised the issue of the competency of the appeal. It observed that the appellant did not indicate from which of the two grounds of appeal the issue for determination was distilled. The observation would appear to suggest that an issue for determination must be D formulated from each ground of appeal. This, however is not the case. The position is that a single issue should contain or encompass the points raised in one or more grounds of appeal. Thus, a number of grounds of appeal may raise a single issue. (p. 1047 E)

E

Courts - Suo motu issue - Need to hear the parties

4. There can be no doubt that an appeal court is entitled, in its discretion, to raise some points suo motu if it sees fit to do so, but that discretion must F be exercised sparingly and in exceptional circumstances only. Where the points are so raised, the parties must be given the opportunity to address the appeal court before decision on the point is made by the appeal court. This court has warned time without number against decisions of court being founded on any ground in respect of which it has neither received G arguments from either of the parties before it nor even raised by any of the parties.

Although Order 3 Rule 4 of the Court of Appeal Rules permits the court to strike out any ground of appeal that does not comply with the H Rules, the court must be wary in doing so without an address on it by counsel. Afterwards, Order 3 Rule 6 has provided that in deciding an appeal, the court shall not be confined to the grounds set forth by the appellant provided that the court shall not if it allows the appeal rest its

decision on any ground not set forth by the appellant unless the respondent has had sufficient opportunity of contesting the case on that ground: see Labiyi v. Anretiola (1992) 8 NWLR (Pt. 258) 139 at 109. (p. 1048 A)

Issues - Raised suo motu - Caused miscarriage of justice

B

5. The effect of the court below deciding on the incompetency of the appeal before it without an input by counsel will depend on whether a miscarriage of justice had been occasioned thereby and this I will address later in this judgment.

I have already observed that the appellant's grounds of appeal are not incompetent. They are tolerably good and from them is formulated the issue as I had reframed above. It follows, therefrom, that the procedure adopted by the court below in raising suo motu the competency of the appeal and resolving same without an address of counsel had occasioned a miscarriage of justice.

In the light of the foregoing, this appeal has great merit and is accordingly allowed. (p. 1048 F / 1051 B)

Grounds of Appeal - Competence of

E

6. In respect of the competence of the appellant's grounds of appeal, I am unable to strike down the said grounds which looked upon liberally appear to be clear and unambiguous. The object of a ground of appeal is to apprise the opposite party of the nature of the complaint of the appellant and so where such a complaint is clear and unambiguous and no rule of court is violated, such a ground should be regarded as competent. Consistent with this liberal approach, it is not uncommon for an appeal court to formulate an issue or issues for determination based on the grounds of appeal filed where the issues formulated by the parties are inadequate for the determination of the appeal. (p. 1048 G)

An issue - Is to be based on the complaint in the ground

H

7. On a careful reading of the two grounds of appeal and their particulars, I am of the view that they are related to the sole issue for determination. The court below had at p. 109 observed that ground 2 did not raise any

issue about the quantum of damages and on page 112, it also observed with respect to particular C of the said ground 2 that the issue about lumping of a claim of trespass, mischief and loss of use was never raised before the trial court to enable it pronounce upon it and as such it constituted a fresh issue which could not be entertained on appeal without leave of court. With due deference, the law is that an issue for determination must be based on the complaint in the ground and not on the particulars as the particulars cannot be argued as separate grounds of appeal. (p. 1049 D)

Damages - Award of - Interference by appellate court

8. In addressing this issue, it is pertinent to bear in mind the circumstances under which an appellate court can interfere with the amount of damages awarded by a trial court. In this connection, it is settled law that in order to justify the interference with the amount of damages awarded by the trial Judge, an appeal court must be convinced either, that:

(a) the trial Judge acted upon some wrong principle of law; or

(b) that the amount awarded was so extremely high or so small as

to make it in the judgment of the appellate court an entirely erroneous estimate of the damages to which the plaintiff is entitled:

I am of the view that the award under consideration was made in violation of the first principle stated above, that is, it was made in violation of some principle of law. This is so because it is incongruous to make an award for a claim for special damages which had not been proved much less particularized. Trespass is a wrong redressible per se without proof of damage. Had the award been limited to nominal damages for trespass alone, perhaps this appeal would have been unnecessary. (p. 1050 C)

NOTABLE POINT OF INTEREST

TOBIJSC

1. Caution and right attitude in court's suo motu raising of issue

In our adversary system of adjudication, courts should be reluctant or loath to raise issues suo motu. This is because the litigation is not theirs but that of the parties. If a court raises an issue suo motu it has removed itself from its exalted position to flirt with the parties and in the course gets

itself soiled in the litigation.

This does not mean that a court of law is totally inhibited from raising issues suo motu. It can and in relevant circumstances. For instance, a court of law can raise an issue suo motu, if it is in the interest of justice to do so. Where the issue raised will determine the fortunes of B the case one way or the other, a court of law is entitled to raise it. There could be a situation where the case cannot be determined one way or the other without resolving the issue. In such a situation, a court is competent to raise it to enable it determine the case.

Though a court has the jurisdiction to raise an issue suo motu, it has not the jurisdiction to resolve the issue suo motu. The court must give an opportunity to the parties to react to the issue by way of address. On no account should a court of law raise an issue suo motu and resolve it suo motu. That is unjust and a party aggrieved has the right to complain in the D way the appellant has complained in this court. (p. 1057 C)

REPRESENTATION

No counsel appeared for the Appellant. E

Yahaya Mahmood Esq., (with him, Dr. Bello Fadile Esq.), for the Respondent.

CASES REFERRED TO

Minister of Lagos Affairs Mines and Power & Ors. v. Akin Olugbade & Ors. (1974) 11 SC (Reprint) 9 F

Chief Daniel Oghonnaya & Ors. v. Adopalm Nigeria Ltd. (1983) 6 SCNJ (Pt. 1) 22

Thyme v. Thyme (1955) 3 All ER 129, 146 G

Aja v. Okoro (1991) 7 NWLR (Pt. 260) 273

Saude v. Abdullahi (1989) 7 S.C. (Pt.II) 116; (1989) 7 SCNJ 216 at 229

Chief Ebba v. Chief Ogoto (1984) 4 S.C. 84-112

Hambe v. Hueze (2001) 2 S.C. 26 (2001) 4 NWLR (Pt. 703) 372 H

Lekwot v. Judicial Tribunal (1993) 2 NWLR (Pt. 271) 410

Sha (JNR) v. Kwam (2000) 5 S.C. 178; (2000) 8 NWLR (Pt. 670) 685

RULES REFERRED TO

Court of Appeal Rules 1981 O. 3 Rules 2(2), 2(3) and 2(4), O. 3 r. 3(7)
Court of Appeal Rules Cap. 62 Vol. V, Laws of the Federation, 1990 O.
1 r. 20

B High Court (Civil Procedure) Rules of Kaduna State Cap. 68, Laws of
Kaduna State, 1991 O. 24 r. 7

LEAD JUDGMENT BY EDOZIE JSC

C The material facts that gave rise to this case are undisputed. The
appellant, a civil engineering construction company in the process of the
execution of a road construction project, entered in the respondent's
farmland to excavate large quantities of earth thereby creating four large
burrows or pits referred to by the parties as craters. In consequence, the
D respondent as plaintiff sued the defendant/appellant in the Kaduna High
Court claiming reliefs formulated in paragraph 24 of the amended
statement of claim in the following terms:-

E *“24 WHEREOF the plaintiff claims from the defendant the
following:-*

*(a) General damages of five million naira (N5,000,000.00) for
trespass, loss of use and mischief caused or done to the economic trees
planted by the plaintiff.*

F *(b) That the defendant to pay the plaintiff the sum of seventy
million seven hundred and nine thousand ninety seven (70,709,097.00)
naira being the cost of filling with laterite the four craters which need
249,450 cubic metres at N283.46 per cubic metre.”*

G After both parties had joined issues on the pleadings filed and
exchanged by them, they called witnesses in proof of their averments and
at the conclusion of trial, the learned trial Judge, Bello, J., on 20th October,
1995, found in favour of the respondent in a judgment in which he
encapsulated his findings on pages 69-70 inter alia, thus:-

H *“From the foregoing findings and reasoning of this court, I am of
the opinion that the plaintiff has proved his () claim on the balance of
probability as required by the law. All his witnesses have testified to the
effect that the defendant went into his farm and dug some craters and for*

that he could not cultivate the place. I need not go into the elementary meaning of trespass, destructions and mischief. This was done not within the 50 metres right of way but inside the farm of the plaintiff, what was done within 50 metres right of way has been compensated.....

I believe the plaintiff ought to have display (sic) something before the court to show and or give it a clear (sic) of what he was earning from the farm and not to make a sweeping statement of the amount he is earning. Moreso, it is not the whole farm that is being destroyed by the plaintiff (sic) but just a portion of it.

On the whole I hold that the plaintiff has proved his 1st claim against the defendant but will definitely not be entitled to the claim of N5m as he is claiming for reasons enumerated above.

I finally enter judgment for the plaintiff against the defendant in the sum of N500,000.00k being general damages for trespass, loss of use and mischief done to the economic trees planted by the plaintiff in his farmland on Kaduna-Abuja Road.

Based on the consensus of both parties and their counsel, I hereby order that the defendant shall fill with laterite the 4 craters dug by it inside the said farmland of the plaintiff.” The sum of N5000 costs was awarded to the respondent.

My understanding of what the learned trial Judge said in the above extract is that, in respect of the 1st claim, the plaintiff has proved the act of trespass on his land but did not establish the claim for special damages done to his economic trees yet he is entitled to N500,000 as “general damages for trespass, loss of use and mischief done to the economic trees.” And in respect of the second head of claim, the defendant is to refill the pits dug on the plaintiff’s land based on the agreement of the parties.

The appellant did not take kindly to the decision in respect of the first claim adjudging him to pay the sum of N500,000 to the respondent. Consequently, he lodged an appeal to the Court of Appeal, Kaduna Division in respect of that part of the decision, though in the amended notice of appeal, it is erroneously indicated that the appeal is against the whole decision. The amended notice is predicated on two grounds of appeal and since the decision of the Court of Appeal turned on the competency of

these grounds of appeal, they are reproduced in extenso hereunder:-

“1. The learned judge erred in law when he awarded the sum of N500,000.00 to the plaintiff as general damages after he held that the claim for trespass and the destruction of economic trees failed.”

PARTICULARS

B

(a) Having refused the claim of N5,000,000.00 for economic trees cannot thereafter award N500,000.00 general damages for trespass, loss of use and mischief done to the economic trees.

C

(b) The judge having held that the plaintiff has not proved his claim for N5,000,000.00 general damages for trespass, loss of use and mischief done to the economic trees. (sic)

D

(c) The Judge having accepted in his judgment that compensation was paid to the plaintiff through his representative cannot thereafter award N500,000.00 for the same purpose of mischief done to the economic trees of the plaintiff.

2. The learned trial Judge erred in law when he awarded the sum of N500,000 damages to the plaintiff/respondent with N5,000.00 costs.

E

PARTICULARS OF ERROR

(a) The claim of the Plaintiff/Respondent as pleaded in his statement of claim was N5,000,000.00 general damages for trespass, loss of use and mischief done to the economic trees planted by him and N70,709,097.00 being cost of filling the craters dug with laterite.

F

(b) The Plaintiff/Respondent's claim for loss of use and mischief are claims of special damages.

(c) The Plaintiff/Respondent lumped his claim for damages for trespass, loss of use and mischief together.

G

(d) The Plaintiff/Respondent did not specifically plead the particulars of loss of use and mischief.

(e) The Plaintiff/Respondent gave evidence of and orally claimed the sum of N6,000,000.00 (six million naira)

H

(f) The learned trial Judge found that the Plaintiff/Respondent did not prove his claim of what he was earning from his farm.”

In the appellant's brief before the court below the sole issue for determination which was also adopted by the respondent in that court

reads thus:-

“Whether the learned trial Judge was right in awarding N500,000.00 damages to the respondent having regards (sic) to the statement of claim, evidence led and the findings of the court.”

Delivering the majority judgment of the Court of Appeal (in a split judgment of 2 to 1) Salami, JCA., observed that the appellant did not indicate from which of the two grounds of appeal the sole issue was formulated. He then held that no issue was formulated from ground 1 and consequently that it was deemed abandoned. In respect of ground 2, from which the court held the sole issue for determination was distilled, it observed that the said ground did not raise any issue of quantum of damages; that the ground did not relate to the decision of the trial court; that the particulars did not relate to the ground and that some of the particulars raise fresh points. The court therefore struck out the sole issue for determination and all the arguments canvassed thereunder.

Referring to the order of the trial court, where it said:-

“I finally enter judgment for the plaintiff against the defendant in the sum of N500,000 being general damages for trespass, loss of use and mischief done to the economic trees planted by the plaintiff on his farmland along Kaduna-Abuja Road,”

it held that the words “loss of use” in the said judgment is an accidental slip. Upon the foregoing premises, the appellant’s appeal was dismissed with N4.000 costs.

Against that judgment, the appellant has further appealed to this court upon a notice of appeal premised on four grounds of appeal. Briefs of arguments were filed and exchanged. At the hearing of the appeal, respondent’s counsel who was in court adopted his brief while the appeal was deemed argued on the brief filed by the appellant who was not in court. The four issues formulated by the appellant and which were adopted by the respondent read as follows:-

“1. Was the inclusion of loss of use in the award of general damages of N500,000.00 for trespass, loss of use and mischief by the trial court an accidental slip? (Ground A)

2. Whether the Court of Appeal was right to hold that the appeal

was not competent because the particulars stated in support of the ground of appeal did not relate to the said ground? (Ground B)

3. In the circumstances of this case, was the Court of Appeal right to have raised the issue of incompetence of the appeal suo motu, argued same and dismissed the appeal without affording the parties opportunity to address on it? (Ground C)

4. Were the cases of Nwadike v. Ibekwe (1987) 4 NWLR (Pt. 67) 718 and Bereyin v. Gbobo (1989) 1 NWLR (Pt. 87) 372 cited and relied upon properly applied to the instant case by the Court of Appeal? (Ground D)”

Issue 1

For the appellant, it is submitted that there is no clerical mistake in the judgment of the trial court as the words “loss of use” included in the judgment are the exact words used by the respondent in formulating his claim. The case of Olu Ogunsola v. National Insurance Corporation of Nigeria (1996) 1 NWLR (Pt. 423) 126 at 136 was called in aid. The contention of the respondent in reply is that the expression complained of that is, “*loss of use*” in the award of damages was clearly an oversight which did not by itself occasion any miscarriage of justice.

Issues 2 and 3

These relate to the competency of the appeal. The appellant contends that ground 2 of the grounds of appeal is in compliance with Order 3 Rules 2(2), 2(3) and 2(4) of the Court of Appeal Rules, 1981, in that it concisely alleged error in law, it is concise, not vague or general in terms and does disclose reasonable ground of appeal.

Citing the case of Obala of Otan - Aiyegbaju & 5 Ors. v. Chief Joseph Adesina & 2 Ors. (1999) 2 S.C. 22; (1999) 2 SCNJ 1, learned counsel submitted that where some of the grounds of appeal are competent and others incompetent, the court has a duty to decide the appeal on the competent grounds. It was further contended on the authority of the case of Madam Asiawu Adepeju Korede v. Prince Adedepo Adedokun & 4 Ors. (2001) 7 S.C. (Pt. III) 68; (2001) FWLR (Pt. 65) 421 at 431 that the court could not raise an issue suo motu and proceed to resolve it without inviting counsel to address it on that issue. Finally, learned counsel contended that

the complaint of the appellant was not against assessment of damages, rather, it is that the award of the sum of N500,000.00 as general damages for trespass, loss of use and mischief done to economic trees was erroneous and that particulars were furnished to show that the award was not made out.

The response of the respondent is that the point raised in the particulars of ground 2 were not canvassed at the trial court and that by virtue of Order 3 Rule 3(7) of the Court of Appeal Rules, the Court of Appeal has the power to strike out any notice of appeal which for any reason is not competent. It is further the contention of the respondent that even if the Court of Appeal took a point suo motu and resolved it without an address of counsel on it, the decision on that issue is not vitiated if no miscarriage of justice occurred.

Issue 4

On this issue, the complaint of the appellant is that the cases of Nwadike v. Ibekwe (1987) 4 NWLR (Pt. 97) 718 and Bereyin & 5 Ors. v. Gbobo (1989) 1 NWLR (Pt. 97) 322 at 379 relied upon by the Court of Appeal in holding that the court will not engage itself in separating competent from incompetent particulars are not apposite. The respondent's reply is that the principle in Bereyin v. Gbobo supra was properly applied in the instant case.

The issues canvassed are related and in some cases dovetail one into the other. I therefore find it more convenient to consider all the issues together.

The starting point is the observation by the court that the inclusion of the expression of "loss of profit" in the judgment of the trial court is an accidental slip. **Admittedly, once a trial court delivers its final judgment, it becomes functus officio and ceases to be seized with the matter except for making ancillary orders such as stay of execution, etc. Nevertheless, the trial court has inherent power to interfere with its own judgment in order to correct accidental omissions or arithmetical errors.** See M. C. Cauphy v. Stringer (1947) 1 Ir 73; Adams and Harvey Ltd. v. International Maritime Supplies Ltd. (1967) 1 WLR 445, (1967) 1 All ER 533; Orukunkpor v. Itebu & Ors. 15 WACA 39,

Ogunsola v. NICON supra.

By Order 1 Rule 20 of the Court of Appeal Rules Cap. 62 Vol. V, Laws of the Federation, 1990, then applicable, the Court of Appeal has the power to make an amendment in the judgment of the trial court before it in appropriate cases such as to amend or correct an accidental slip. The crucial question then is what is an accidental slip? In this regard, it is instructive to refer to the judgment of this court in the case of *Ogunsola v. NICON supra*, where it was held, per Uwais, CJN., as follows:-

"The words "accidental slip" have been judicially considered to inter alia, mean a clerical mistake in a judgment or order. Such error must be an error in expressing the manifest intention of the court: see Sutherland and Company v. Hennering Brothers Ltd. (1921) 1 KB 336 at 340-341; Asiyanbi & Ors. v. Adeniji (1967) All NLR 88 at 94 (Reprint) and Adigun v. A.I.G. of Oyo State (No. 2) (1987) 2 NWLR (Pt. 56) 187."

In the instant case, at p. 112 of the record, Salami, JCA., in his lead judgment made the following observation:-

"The inclusion of "loss of use" in the award of general damages is clearly an accidental slip. It cannot be otherwise, the learned trial Judge having expressly excluded it in his reasoning along with the payment already made by the Federal Ministry of Works and Housing....."

I agree with the reasoning of the learned Justice that the trial court was wrong to have included the expression "loss of use" in the award of general damages but with much respect, I disagree that the inclusion can be classified as an accidental slip or arithmetical error which can be amended. It is certainly not a clerical error. In the case of *Minister of Lagos Affairs Mines and Power & Ors. v. Akin Olugbade & Ors. (1974) 11 S.C. (Reprint) 9; (1974) 1 All NLR (Pt. 2) 226, 235*, this court adopted with approval the dictum of Morris, CJ., in *Thyme v. Thyme (1955) 3 All ER 129, 146* to the following effect:-

"Where a court has decided an issue and the decision of the court is truly embodied in some judgment or order that has been effective then the court cannot re-open the matter and cannot substitute a different

decision in place of the one which has been recorded. Those who seek to alter must in those circumstances invoke such appellate jurisdiction as may apply.”

And in *Hattan v. Harris* (1992) AC 560, it was held that where there is only an accidental omission or arithmetical error,

“It is always within the competency of the court, if nothing has intervened which would render it inexpedient or inequitable to do so, to correct the record in order to bring it into harmony with the order which the Judge obviously meant to pronounce. The correction ought to be made on motion and not a matter either for appeal or rehearing.”

By the force of the above authorities, **I am persuaded to hold that the reference to “loss of use” in the judgment of the learned trial Judge is neither an accidental omission nor an arithmetical error and that in the absence of a cross-appeal or a respondent’s notice under Order 3 Rule 14 of the Court of Appeal Rules, the court below could not correct the error. Indeed, it is the inclusion of the expression complained of that formed the gravamen of the appellant’s case and to jettison it unsolicited as the Court of Appeal did was to overreach the appellant.**

The court below suo motu raised the issue of the competency of the appeal. It observed that the appellant did not indicate from which of the two grounds of appeal the issue for determination was distilled. The observation would appear to suggest that an issue for determination must be formulated from each ground of appeal. This, however is not the case. The position is that a single issue should contain or encompass the points raised in one or more grounds of appeal. Thus, a number of grounds of appeal may raise a single issue: see the cases of *Aja v. Okoro* (1991) 7 NWLR (Pt. 260) 273; *Madagwa v. State* (1988) 12 S.C. (Pt. I) 68; (1988) 5 NWLR (Pt. 92) 60; *Agbetoba v. Lagos State Executive Council* (1991) 4 NWLR (Pt. 188) 664. The court below still suo motu ruled that as no issue was derived from the 1st ground of appeal, it was deemed abandoned. Turning to ground 2 which it held is related to the sole issue formulated, it gave a number of reasons to hold that that ground was incompetent. Consequently, it held that since there was

no competent ground to support the issue for determination, the appeal was incompetent.

There can be no doubt that an appeal court is entitled, in its discretion, to raise some points suo motu if it sees fit to do so, but that discretion must be exercised sparingly and in exceptional circumstances only. Where the points are so raised, the parties must be given the opportunity to address the appeal court before decision on the point is made by the appeal court. This court has warned time without number against decisions of court being founded on any ground in respect of which it has neither received arguments from either of the parties before it nor even raised by any of the parties: see Shitta-Bay v. Federal Public Service Commission (1981) 1 S.C. (Reprint) 26; (1981) 1 S.C. 40; Saude v. Abdullahi (1989) 7 S.C. (Pt.II) 116; (1989) 7 SCNJ 216 at 229; Chief Ebba v. Chief Ogoto (1984) 4 S.C. 84-112.

Although Order 3 Rule 4 of the Court of Appeal Rules permits the court to strike out any ground of appeal that does not comply with the Rules, the court must be wary in doing so without an address on it by counsel. Afterwards, Order 3 Rule 6 has provided that in deciding an appeal, the court shall not be confined to the grounds set forth by the appellant provided that the court shall not if it allows the appeal rest its decision on any ground not set forth by the appellant unless the respondent has had sufficient opportunity of contesting the case on that ground: see Labiyi v. Anretiola (1992) 8 NWLR (Pt. 258) 139 at 109. The effect of the court below deciding on the incompetency of the appeal before it without an input by counsel will depend on whether a miscarriage of justice had been occasioned thereby and this I will address later in this judgment.

In respect of the competence of the appellant's grounds of appeal, I am unable to strike down the said grounds which looked upon liberally appear to be clear and unambiguous. The object of a ground of appeal is to apprise the opposite party of the nature of the complaint of the appellant and so where such a complaint is clear and unambiguous and no rule of court is violated, such a ground should

be regarded as competent: see the recent decisions of this court in *Aderounmu v. Olowu* (2000) 4 NWLR (Pt. 652) 253; *Hambe v. Hueze* (2001) 2 S.C. 26 (2001) 4 NWLR (Pt. 703) 372 at pp. 385, 389. **Consistent with this liberal approach, it is not uncommon for an appeal court to formulate an issue or issues for determination based on the grounds of appeal filed where the issues formulated by the parties are inadequate for the determination of the appeal:** see *Ogbunyinya v. Okudo* (No.2) (1990) 4 NWLR (Pt. 146) 551; *Bankole v. Pelu* (1991) 8 NWLR (Pt. 211) 523; *Lekwot v. Judicial Tribunal* (1993) 2 NWLR (Pt. 271) 410; *Sha (JNR) v. Kwam* (2000) 5 S.C. 178; (2000) 8 NWLR (Pt. 670) 685 at 708-709. Bearing the above principles in mind, it is proposed to examine the appellant's two grounds of appeal vis-a-vis the sole issue formulated for determination which had earlier been set out in this judgment.

On a careful reading of the two grounds of appeal and their particulars, I am of the view that they are related to the sole issue for determination. The court below had at p. 109 observed that ground 2 did not raise any issue about the quantum of damages and on page 112, it also observed with respect to particular C of the said ground 2 that the issue about lumping of a claim of trespass, mischief and loss of use was never raised before the trial court to enable it pronounce upon it and as such it constituted a fresh issue which could not be entertained on appeal without leave of court. With due deference, the law is that an issue for determination must be based on the complaint in the ground and not on the particulars as the particulars cannot be argued as separate grounds of appeal; see *Chief Daniel Oghonnaya & Ors. v. Adopalm Nigeria Ltd.* (1983) 6 SCNJ (Pt. 1) 22. Moreover, it seems to me that the court below misapprehended the complaint of the appellant. A careful reading of its grounds of appeal reveals that it is not complaining about the assessment or quantum of damages as the court below erroneously thought, rather, the appellant was appealing against the principle of awarding N500,000.00 damages. The pith of the appellant's complaint, if I understand it, is that, the trial court having held that the respondent had proved his case with respect to

trespass to his land but did not prove his special damage for “loss of use and mischief done to the economic trees planted”, it was wrong for the trial court to have entered judgment for the respondent in the sum of N500,000.00 being general damages for the trespass (which was established) and loss of use and mischief done to the economic trees (which was not proved). Flowing from that, a proper issue for determination in the court below would have been framed thus:-

“Whether the trial court was right to have awarded the respondent a lump sum of N500,000.00 as general damages for trespass and special damages for damage to economic trees, having already held that the claim for damage to economic trees had not been proved.”

This issue as reframed by me is distillable from the two grounds of appeal and brings into focus the grouse of the appellant. **In addressing this issue, it is pertinent to bear in mind the circumstances under which an appellate court can interfere with the amount of damages awarded by a trial court. In this connection, it is settled law that in order to justify the interference with the amount of damages awarded by the trial Judge, an appeal court must be convinced either, that:**

- (a) the trial Judge acted upon some wrong principle of law; or
- (b) that the amount awarded was so extremely high or so small as to make it in the judgment of the appellate court an entirely erroneous estimate of the damages to which the plaintiff is entitled:

see Flint v. Lovell (1935) 1 KB 360; Ziks Press Ltd. v. Ikoku (1951) 13 WACA 188; Idahosa v. Oronsaye (1959) 4 FSC 165; (1959) SCNLR 703; Bale v. Bankole (1986) 3 NWLR (Pt. 27) 141, Onaga v. Micho & Co. (1961) 1 All NLR 238; Ijebu-Ode Local Government v. Adedeji Balogun & Co. Ltd. (1991) 1 NWLR (Pt. 166) 136.

I am of the view that the award under consideration was made in violation of the first principle stated above, that is, it was made in violation of some principle of law. This is so because it is incongruous to make an award for a claim for special damages which had not been proved much less particularized. Trespass is a wrong redressible per se without proof of damage. Had the award been limited to nominal

damages for trespass alone, perhaps this appeal would have been unnecessary. The error in making the award may be attributed to the improper manner learned counsel had formulated his claim. Inadvertently, perhaps the trial court adopted phraseology in the claim in entering judgment for the respondent. B

I have already observed that the appellant's grounds of appeal are not incompetent. They are tolerably good and from them is formulated the issue as I had reframed above. It follows, therefrom, that the procedure adopted by the court below in raising suo motu the competency of the appeal and resolving same without an address of counsel had occasioned a miscarriage of justice. C

In the light of the foregoing, this appeal has great merit and is accordingly allowed. The judgment of the trial court in relation to the first head of claim awarding the sum of N500,000.00 general damages for trespass and loss of use and damage to economic trees and the majority judgment of the court below affirming that judgment are hereby set aside and in their place the respondent's claim in that regard is dismissed. The judgment of the trial court in respect of the second head of claim directing the appellant to fill the craters in the respondent's land against which there was no appeal still stands. The appellant is entitled as against the respondent to costs assessed and fixed at N5,000 in the court below and N10,000 in this court. D E F

ONUJSC

I have had the advantage to read in draft the judgment just delivered by my learned brother, Edozie, JSC. By his entire treatment of the facts as well as his consideration of the law applicable thereto, I cannot but agree entirely with his reasoning and conclusion that this appeal is meritorious and ought therefore to succeed. G

In adding a few words of mine, I wish to briefly comment in expatiation as follows: H

By paragraph 24 of his Amended Statement of Claim, the plaintiff herein respondent, claimed against the defendant/appellant as follows:

"24. WHEREOF the plaintiff claims from the defendant the

following:

(a) *General damages of Five Million Naira (N5,000,000.00) for trespass, loss of use and mischief, caused or done to the economic trees planted by the plaintiff.*

B (b) *That the defendant to pay plaintiff the sum of Seventy Million Seven Hundred and Nine Thousand Ninety Seven (N70,709,097.00) Naira being the cost of filling with laterite the four craters which need 249,450 cubic meters at N283.46 per cubic meter.”*

C After the parties had joined issues on the pleadings and exchanged them, each side called witnesses. The learned trial Judge (Bello, J., of the Kaduna High Court) in his judgment concluded inter alia thus:

D *“On the whole I hold that the plaintiff has proved his 1st claim against the defendant but will definitely not be entitled to the claim of N5m as he is claiming for reasons enumerated above.*

I finally enter judgment for the plaintiff against the defendant in the sum of N500,000.00k being general damages for trespass, loss of use and mischief done to the economic trees planted by the plaintiff in his E farmland, Kaduna - Abuja road.

Based on consensus of both parties and their counsel, I hereby order that the defendant shall fill with laterite the 4 craters dug by it inside the said farmland of the plaintiff.”

F The sum of N500 costs was awarded as costs to the respondent. Not satisfied with the said decision, the appellant appealed to the Court of Appeal (hereinafter referred to as the court below) sitting in Kaduna.

G The appeal which was premised on two grounds, had only one sole issue in which appellant complained and which respondent adopted as follows:

H *“Whether the learned trial Judge was right in awarding N500,000.00 damages to the respondent having regards (sic) to the Statement of Claim, evidence led and the findings of the court.”*

In a judgment delivered by the court below (a split decision of 2 to 1) coram: Salami, Muhammad and Oimage, JJCA., Salami, JCA., after observing that the appellant had failed to indicate from which of the two

grounds the sole issue was formulated, held that as no issue was formulated from ground A, that ground was deemed abandoned.

The appellant's contention on issue 1 is that the court below was wrong to say that the inclusion of loss of use in the award of general damages was an accidental slip. Indeed, it was further contended, it appeared that the Court of Appeal contradicted itself in that on the same page 112 of the record, the same court stated that the lumping together of trespass, loss of use and mischief was a fresh issue, which the trial court did not pronounce upon. The appellant therefore argued that if the trial court did not pronounce on it, how then did the Court of Appeal know that "loss of use" was expressly excluded by the trial court.

Furthermore, it was argued, how did the trial court commit the accidental slip if the issue of lumping together trespass, loss of use and mischief was not pronounced upon? In any case, it is also contended on inclusion of loss of use in the judgment of the trial court was not an accidental slip in the light of the fact that accidental slip has been judicially considered in a number of cases both by the Court of Appeal and this court. We were referred to the case of Olu Ogunsola v. National Insurance Corporation of Nigeria (1990) 1 NWLR (Pt. 423) 126 at 136 para G-H wherein this court held inter alia:

"The words accidental slip have been judicially considered to inter alia mean a clerical mistake in a judgment or order. Such error must be an error in expressing the manifest intention of the court."

It was further submitted that there being no clerical mistake in the instant case committed by the trial court, the words used in expressing its judgment were the exact words used in the Statement of Claim. And that as it was quoted verbatim by the trial court, where then is the clerical mistake or the accidental slip? In trying to justify the error of the trial court, it is further argued, the Court of Appeal sought to find solace in Order 24 Rule 7 of the High Court (Civil Procedure) Rules of Kaduna State, Cap. 68, Laws of Kaduna State, 1991 which stated as follows:

"But learned counsel for the appellant at the trial court under Order 24 Rule 7 had a duty to ask for better and further particulars which duty he failed to perform."

Much as Order 24 Rule 7 (supra) did not place any duty on counsel to ask for better and further particulars as stated by the Court of Appeal, it is maintained, it is the trial court that may order for same, adding that no such order for better particulars was made by the trial court in the instant B case.

In so far as the Court of Appeal lumped up together the N500,000.00 damages for trespass, loss of use and mischief, that act could not be said to manifest the intention of the trial court.

C It is for the above reasons and the fuller ones contained in the leading judgment of my learned brother, Edozie, JSC., that I too resolve the lone issue in favour of the appellant.

Consequently, I allow the appeal and make the same order as to costs as contained therein.
D

KALGO JSC

I had the privilege of reading in advance the judgment just delivered by my learned brother, Edozie, JSC., in this appeal. He has in my respectful E view properly considered the issues raised by the appellant in the determination of the appeal and I entirely agree with the reasoning and conclusions reached thereon. I accordingly find that there is merit in the appeal and I allow it. I set aside the majority decision of the Court of Appeal F and abide by the consequential orders made in the leading judgment including the order as to costs.

EJIWUNMIJSC

G I have had the privilege of reading before now in its draft form, the judgment just delivered by my learned brother, Edozie, JSC. In reading that judgment, it became clear to me that the facts in dispute in the appeal were properly reviewed and also the issues raised thereon carefully considered. I also agree with him that this appeal deserves to succeed. This is mainly H because the court below clearly misconstrued the grounds of appeal filed against the judgment of the trial court to the court below.

Unfortunately, having fallen into that error, the court below then raised suo motu the competence of the grounds of appeal, and without

inviting counsel to address the court, then proceeded to decide the appeal on its adjudged incompetence of the grounds of appeal. And in deciding to award damages to the respondent, the court below and with due respect, did not advert to the settled principles concerning when an appellate court may intervene with the award of damages by a trial court. See Jarmakani B Transport Ltd. v. Abeke (1963) 1 All NLR 180 where Coker, Ag. F.J. (as he then was), adopted with approval the observation of Viscount Simon on the applicable principles as follows:-

“The principles which apply under this head are not in doubt. C Whether the assessment of damages be by a judge or a jury, the appellate court is not justified in substituting a figure of its own for that awarded below simply because it would have awarded a different figure if it had tried the case at first instance. Even if the tribunal of first instance was D a Judge sitting alone, then, before the appellate court can properly intervene, it must be satisfied either that the judge, in assessing the damages, applied a wrong principle of law (as by taking into account some irrelevant factor or leaving out of account some relevant one; or, short of E this, that the amount awarded is either so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage (Flint v. Lovell approved by the House of Lords in Davies v. Powell Duffryn Associated Colliery Ltd. (1942) A.C. 601)).”

See also Agaba v. Otubusin (1961) 1 All NLR 299. F

It follows, having regard to the above reasons and the fuller reasons given in the lead judgment of my brother, Edozie, JSC., I also allow the appeal.

TOBI JSC

I have read in advance the judgment of my learned brother, Edozie, JSC., and I agree with him that this appeal has merit and should be allowed.

I will take only Issue No. 3. It deals with the Court of Appeal raising the issue of incompetence of the appeal suo motu. Learned counsel for the H appellant, Mr. Job S. Olorunleke, submitted in his brief that it was wrong, unfair and unjust of the Court of Appeal to have raised the issue of incompetence of the appeal suo motu, argued it and dismissed the appeal.

He argued that by raising the issue suo motu, the court did not only breach the fundamental principles of fair hearing but surprisingly acted as advocate for the respondent. He cited *Madam Korede v. Prince Adedokun* (2001) 7 S.C. (Pt. III) 68; (2001) FWLR (Pt. 65) 421 at 431.

B Counsel argued that the Court of Appeal did not show any exceptional circumstances that made it raise the issue or issues suo motu and decided the appeal before it, based on the issue or issues without calling on the parties to address it.

C While conceding that the Court of Appeal can dismiss the appeal if it is clearly incompetent on the face of the appeal, learned counsel contended that in the circumstances of the case where the court had to scout for reasons to justify its assumption that the appeal was not competent, the parties ought to be invited to address the court before the
D appeal was dismissed.

Learned counsel for the respondent, Yahaya Mahmood, Esq., submitted in respondent's brief that the case of *Madam Korede v. Prince Adedokun* (supra) cited at page 6 of the appellant's brief was not that any
E point so taken and decided upon without hearing the parties would be wrong, as it will depend on whether (i) by so doing miscarriage of justice was caused or occasioned, and (ii) there was no other reasons for either dismissing or allowing the appeal in the case. To learned counsel, assuming
F that the issue was raised suo motu in favour of the appellant (without so conceding) it will not be sufficient to reverse the decision of the Court of Appeal in the case.

Did the Court of Appeal raise the issue of incompetence of the appeal suo motu? I think so. The court did so at pages 7-9 of the Record.
G

*"Before returning to the issue of competence of this appeal it must be observed that the issue of the plaintiff lumping a claim of trespass, mischief and loss of use was never raised before the trial court to enable it pronounce upon it. The appellant can only properly appeal against a
H judgment by raising a ground challenging ratio decidendi of the trial court's judgment. It appears that ground of appeal does not relate to the decision. He is raising therefore, a fresh issue on appeal. He did not raise the issue of lumping together of the loss of use, trespass and mischief in*

the trial court. Neither did the trial Judge pronounce on same... A ground of appeal to be proper and valid must relate to its particulars. The penalty for the particulars not flowing from or relating to ground of appeal is striking out of the unrelated particulars... The ground is incompetent because the particulars do not relate to the ground and is struck out.” B

I have thoroughly examined the proceedings in the Court of Appeal and the issue of competence or incompetence of the appeal was not raised at any time by the parties. Accordingly, the Court of Appeal raised the issue suo motu.

In our adversary system of adjudication, courts should be reluctant or loath to raise issues suo motu. This is because the litigation is not theirs but that of the parties. If a court raises an issue suo motu it has removed itself from its exalted position to flirt with the parties and in the course gets itself soiled in the litigation. C D

This does not mean that a court of law is totally inhibited from raising issues suo motu. It can and in relevant circumstances. For instance, a court of law can raise an issue suo motu, if it is in the interest of justice to do so. Where the issue raised will determine the fortunes of the case one way or the other, a court of law is entitled to raise it. There could be a situation where the case cannot be determined one way or the other without resolving the issue. In such a situation, a court is competent to raise it to enable it determine the case. E F

Though a court has the jurisdiction to raise an issue suo motu, it has not the jurisdiction to resolve the issue suo motu. The court must give an opportunity to the parties to react to the issue by way of address. On no account should a court of law raise an issue suo motu and resolve it suo motu. That is unjust and a party aggrieved has the right to complain in the way the appellant has complained in this court. G

The case law is in great proliferation. Let us take a few cases. In Chief Oje v. Chief Babalola (1991) 4 NWLR (Pt. 185) 267, this court held that on no account should a court raise a point suo motu, no matter how H clear it may appear to be, and proceed to resolve it one way or the other without hearing the parties.

In University of Calabar v. Dr. Essien (1996) 10 NWLR (Pt. 477)

255, this court deprecated the practice of a court taking up a point suo motu and making it the basis of its decision without hearing the parties on it. In *Hon. Araka v. Ejeagwu* (2000) 12 S.C. (Pt. I) 99; (2000) 15 NWLR (Pt. 692) 684, this court held that when an issue is not placed before an appellate court it has no business whatsoever to deal with it. Similarly, on no account should a court of law raise a point suo motu no matter how clear it may appear to be and proceed to resolve it one way or the other without hearing the parties. If it does so, it will be in breach of the parties' right to fair hearing. The court referred to *Olatunji v. Adisa* (1995) 2 NWLR (Pt. 376) 167; *Oro v. Falade* (1995) 5 NWLR (Pt. 396) 385; *Oje v. Babalola* (1991) 4 NWLR (Pt. 185) 267.

In *Comptroller, Nigerian Prisons Services, Ikoyi, Lagos v. Dr. Adekanye* (Nos. 1, 2, 3,) 2002 7 S.C. (Pt. II) 182, 188, 212 respectively; (2002) 15 NWLR (Pt. 790) 332, this court held that although an appeal court is entitled, in its discretion, to take points suo motu if it sees fit to do so, yet that discretion must be exercised sparingly and in exceptional circumstances only. In addition, where the points are so taken, the parties must be given the opportunity to address the appeal court. See also *Ibrahim v. JSC* (1998) 12 S.C. 20; (1998) 14 NWLR (Pt. 584) 1; *Ndiwe v. Okocha* (1992) 7 NWLR (Pt. 252) 129; *Okonji v. Njokanma* (1999) 12 S.C. (Pt. II) 150; (1999) 14 NWLR (Pt. 638) 250; *Owhonda v. Ekpechi* (2003) 9-10 S.C. 1; (2003) 17 NWLR (Pt. 849) 326.

Before this court will allow an appeal on the ground that a point was raised suo motu without giving the parties opportunity to address it, it must lead to a miscarriage of justice. See *Imah v. Chief Okogbe* (1993) 9 NWLR (Pt. 316) 159. In the instant appeal, the issue raised on the grounds of appeal which affected the competence of the appeal touched the entire appeal, as it resulted in its dismissal by the Court of Appeal. There is no doubt that it occasioned a miscarriage of justice.

It is for the above and the fuller reasons given by my learned brother, Edozie, JSC, in the leading judgment that I too allow the appeal. I award N10,000.00 costs in favour of the appellant.