

SUPREME COURT OF NIGERIA

27TH MAY, 2005. SC. 98/2002

**CORAM:- I. L. KUTIGI, A. O. EJIWUNMI, D. MUSDAPHER,
D. O. EDOZIE, S. A. AKINTAN, JJSC**

KANO TEXTILE PRINTERS LTD. APPELLANT
AND
GLOEDE AND HOFF (NIG) LTD. RESPONDENT

APPEALS - Grounds of appeal - Appeal from Court of Appeal to Supreme Court - On facts alone or mixed law and fact - Is subject to leave of court - In order to be competent (H1)

APPEALS - Ground of Appeal - Nature of - Where it raises issue of law - Based on accepted facts - It is a ground of law - But where it is based on facts in dispute - Then it is one of mixed law and fact (H2)

APPEALS - Issues for determination - Validity of - It must be derived from grounds of appeal - Which must relate to decision of the court - Against which appeal is lodged - Not trial court's decision (H3)

FACTS

Before the High Court of Kano, the plaintiff/respondent commenced an action against the appellant. The plaintiff made a claim for the sum of US\$341,759.79 for the balance of the price of goods sold and delivered by the plaintiff to the defendant. The plaintiff also claimed interest on the said sum. The action arose due to the defendant's failure to pay the outstanding sum due in respect of goods supplied and delivered to him and for which the defendant's bills presented for settlement of the debt were dishonoured. There were numerous adjournments mainly at the instance of the defendant.

When the trial finally commenced, the defendant and his counsel were absent even though the hearing day was fixed at their request. The defendant did nothing between the hearing date and the date fixed for

judgment by the trial court. The court eventually delivered judgment for the plaintiff. The defendant thereafter commenced an appeal against the judgment of the court based on denial of fair hearing. The Court of Appeal dismissed the appeal. Defendant has further appealed to the Supreme Court.

ISSUE FOR DETERMINATION

“Whether the learned trial Judge was right when after the proceeding of 12/3/97 adjourned the matter for judgment when the defendant had not cross examined the plaintiff’s witness or presented its own case. Or in the alternative, whether from the circumstances of the case the defendant has been afforded a fair hearing?”

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

Appeal from Court Appeal to Supreme Court

1. The main plank of the preliminary objection is that the grounds of appeal are at best of mixed law and facts and as they were filed without leave of court they are incompetent thereby rendering the issue distilled therefrom equally incompetent. It was contended that the said grounds of appeal and issue did not relate to judgment appealed against.

By Section 233(3) of the Constitution of the Federal Republic of Nigeria 1999, an appeal from the decision of the Court of Appeal to this court on facts alone or mixed law and fact is subject to the leave of the court below or this court before it can be filed. A ground of appeal for which leave is required, if filed without such leave being obtained, is incompetent. (p. 1398 C)

Ground of Appeal - Nature of

2. It is acknowledged that the division between a ground of law simpliciter and one mixed law and fact is thin. As was decided by this court in the case of Nigerian National Supply Co. Ltd. v. Establishment Sima of Vaduz (1990) 7 NWLR (Pt. 164) 526 per Nnaemeka-Agu, JSC., in the classification of a ground of appeal, it does not matter whether the appellant labelled it one of law, fact or mixed law and fact, what the court ought to do is to examine the particular ground together with its particulars if any

as a whole. Where the ground raises an issue of law based on accepted, undisputed or admitted facts as found by the court below, it is a ground of law but where it is based on facts in dispute or unascertained, it is one of mixed law and fact. (p. 1398 F)

Issues for determination - Validity of

3. It is a cardinal principle in the practice of brief writing that for an issue identified for determination to be valid, it must derive from the grounds of appeal which in turn must relate to the decision of the court against which the appeal is lodged. A ground of appeal and/or issue for determination which does not derive from the judgment appealed against is incompetent.

In the present appeal, the issue formulated relates to the findings of the judgment of the trial court instead of those of the Court of Appeal. It is therefore incompetent and accordingly struck out.

(pp. 1399 G & 1400 C)

REPRESENTATION

Rotimi Ogunewo, Esq., with A. S. Omotosho (Miss), for the Appellant
D. D. Odietan, Esq., with J. A. Anejo Esq., for the Respondent.

CASES REFERRED TO

Ogbechie v. Onochie (1986) 2 NWLR (Pt. 23) 484

Nwadike v. Ibekwe (1987) 2 NSCC 1219 at 1232

Biocon Agrochemicals (Nig) Ltd. & 3 Ors v. Kudu Holdings Ltd. & Anor (2000) 12 S.C. (Pt.1) 139; (2000) 14 NWLR (Pt. 691) 493 at 495, 496
Bankole & Ors v. Pelu (1981) 8 NWLR (Pt. 211) 523 at 537

Ojemen v. Momodu II (1983) 1 SCNLR 188 at 205.

Maigoro v. Garba (1999) 7 S.C. (Pt. III) 11; (1999) 10 NWLR (Pt. 624) 55 at 568

Akwiwu Motors Ltd. and Anor v. Sangonuga (1984) 5 S.C 184 at 188.

Erisu v. Iduka (1984) 4 NWLR (Pt. 66) 511 .

STATUTE REFERRED TO

Constitution of Federal Republic of Nigeria 1999, s. 233(3)

LEAD JUDGMENT BY EDOZIE JSC

Apart from the objection to the competency of this appeal, the narrow and the only issue canvassed in the appeal relates to the fairness of the trial in the court of first instance being the Kano High Court in a case in which the respondent as plaintiff sued the appellant therein defendant claiming the sum of USD 341,759.79 being the balance of the price of goods supplied to the defendant. In the alternative, the plaintiff claimed against the defendant as the drawer of several bills of exchange for the balance of the total sum due in the amount of USD 341,759.79 payable to the plaintiff which bills were duly presented for payment and dishonoured to the acknowledgment of the defendant.

Pleadings were duly filed, exchanged and amended and thereafter the trial commenced after several adjournments before it was eventually concluded and judgment delivered. As a complaint predicated on fair hearing has to do with the procedure at the trial, it is useful to give a resume of what transpired in the course of the proceedings leading to the judgment of the trial court as well set out in the judgment of the Court of Appeal, Kaduna Division, per leading judgment of Salami, JCA., in which at pages 206-207 he said:-

“After issues had been joined, the matter was fixed for hearing but it suffered several adjournments usually at the instance of the defendant. On 30th October, 1996, however, the suit was adjourned in the presence of counsel for both parties to the 25th November, 1996, for hearing. But the hearing did not go on that day.

The suit was then listed for hearing on 17th February, 1997 when the defendant and his counsel were not in court but sent a letter requesting for an adjournment to either the 10th, the 11th or the 12th March, 1997. The matter was consequently adjourned to the 12th March, 1997, when the defendant’s counsel was absent the court proceeded to hearing. The plaintiff called only one witness and tendered a large number of documents before closing its case. The learned trial Judge reserved judgment to 18th April 1997 coupled with an order that a hearing notice be issued to

defendant. The judgment was eventually delivered on 25th April, 1997. It is apt, at this stage to recite the observation of the learned trial Judge before delivering his reserved judgment:-

'Since the defendant is aware that the case is coming up for judgment but took no steps to regularize their position, I will now deliver my judgment. I have seen the proof of service on the defendant's solicitors with an endorsement showing that the hearing notice was received by one Zuwaira Yusuf who is a lawyer. Judgment is read in court'

In the judgment delivered, the learned trial Judge concluded, inter alia, as follows:-

'Judgment is hereby entered in favour of the plaintiff against the defendant in the sum of USD 341,769.79 United States of America Dollars or its equivalent at the current exchange rate approved by Central Bank of Nigeria plus 10% interest per annum with effect from 1st November, 1996, until full and total liquidation of the whole amount.'

Against the judgment of learned trial Judge, the defendant lodged an appeal to the Court of Appeal, Kaduna. The appeal, which was based on several grounds including lack of fair hearing, was dismissed and in relation to the issue on fair hearing, the Court of Appeal at pp. 34 and 35 of the record reasoned thus:-

"It is not the case of the appellant that it was unaware of the hearing date, 12th March, 1997. Neither is it its case that it was not aware that judgment had been adjourned to 18th April, 1997. Its case before us is that it ignored the invitations to attend to court on both occasions, the court should have, inspite of that, waited on it. Or in the alternative, the court should have looked for an (sic) served it personally.

.....
.....

The principle that the other party must be heard in my respectful opinion does not mean that he must be heard willy nilly. The rule of audi alteram partem means no more than offering each party opportunity to be heard. If after affording a party opportunity to be heard, and if such party fails to avail itself of the opportunity, it is his own funeral, it does not mean that the other party should be put in jeopardy."

Dissatisfied with that judgment, the appellant had lodged the instant appeal upon a notice of appeal anchored on two grounds of appeal still complaining about lack of fair hearing at the trial court. Briefs, consisting of appellant's brief, respondent's brief and appellant's reply brief were
 B filed, exchanged and adopted by learned counsel for the parties at the hearing of the appeal. By a notice of preliminary objection, the plaintiff raised objection against the competency of the appeal on the ground that both the grounds of appeal thereof and the sole issue distilled therefrom are incompetent. Arguments on the objection were developed in the
 C respondent's brief and responded to in the appellant's reply brief.

The main plank of the preliminary objection is that the grounds of appeal are at best of mixed law and facts and as they were filed without leave of court they are incompetent thereby rendering
 D **the issue distilled therefrom equally incompetent. It was contended that the said grounds of appeal and issue did not relate to judgment appealed against.**

By Section 233(3) of the Constitution of the Federal Republic
 E of Nigeria 1999, an appeal from the decision of the Court of Appeal to this court on facts alone or mixed law and fact is subject to the leave of the court below or this court before it can be filed. A ground of appeal for which leave is required, if filed without such leave being
 F **obtained, is incompetent; vide Ojemen v. Momodu II (1983) 1 SCNLR 188 at 205; Maigoro v. Garba (1999) 7 S.C. (Pt. III) 11; (1999) 10 NWLR (Pt. 624) 55 at 568; Akwiwu Motors Ltd. and Anor v. Sangonuga (1984) 5 S.C 184 at 188.**

It is acknowledged that the division between a ground of law
 G **simpliciter and one mixed law and fact is thin. As was decided by this court in the case of Nigerian National Supply Co. Ltd. v. Establishment Sima of Vaduz (1990) 7 NWLR (Pt. 164) 526 per Nnaemeka-Agu, JSC., in the classification of a ground of appeal, it does not**
 H **matter whether the appellant labelled it one of law, fact or mixed law and fact, what the court ought to do is to examine the particular ground together with its particulars if any as a whole: see Ogbechie v. Onochie (1986) 2 NWLR (Pt. 23) 484; Nwadike v. Ibekwe (1987) 2**

NSCC 1219 at 1232. **Where the ground raises an issue of law based on accepted, undisputed or admitted facts as found by the court below, it is a ground of law but where it is based on facts in dispute or unascertained, it is one of mixed law and fact.** In the light of the foregoing principles, I have scrutinised the first ground of appeal together with its particulars. That ground of appeal alleged that the Court of Appeal erred in law when it held that the appellant was given fair hearing or an opportunity to be heard notwithstanding that from the facts before the court, the case was never adjourned for defence. From the particulars subjoined to that ground, it seems to me that the issue of fair hearing raised in the first ground of appeal is based on undisputed or admitted facts and consequently the ground is one of law and therefore competent. The second ground of appeal is superfluous as it raises the same issue of fair hearing on grounds substantially the same as the first ground of appeal. It is accordingly struck out. The result is that the appeal is predicated on one valid ground of appeal.

The appeal can be sustained on this solitary ground if a proper issue for determination is distilled therefrom. As reflected on page 3 of the appellant's brief, the issues formulated by the appellant is:-

"Whether the learned trial Judge was right when after the proceeding of 12/3/97 adjourned the matter for judgment when the defendant had not cross examined the plaintiff's witness or presented its own case. Or in the alternative, whether from the circumstances of the case the defendant has been afforded a fair hearing?"

As rightly observed by learned counsel for the respondent the issue formulated by the appellant is an attack against the judgment of the trial court and not a challenge of the judgment of the Court of Appeal appealed against. **It is a cardinal principle in the practice of brief writing that for an issue identified for determination to be valid, it must derive from the grounds of appeal which in turn must relate to the decision of the court against which the appeal is lodged:** See Biocon Agrochemicals (Nig) Ltd. & 3 Ors v. Kudu Holdings Ltd. & Anor (2000) 12 S.C. (Pt.1) 139; (2000) 14 NWLR (Pt. 691) 493 at 495, 496. **A ground of appeal and/or issue for determination which does not derive from the**

judgment appealed against is incompetent. In the case of Bankole & Ors v. Pelu (1981) 8 NWLR (Pt. 211) 523 at 537, this court, per Uche Omo, JSC., in considering the validity of grounds of appeal and issue for determination commented thus:-

B *“Issue 3 comprises an argument and also poses a question not relevant to the grounds of appeal filed challenging findings of facts of the trial court (sic). What should be addressed are findings of fact of the Court of Appeal, even if they are merely confirmatory of the trial court’s findings.....*

C *Respondent’s issue 7 refers to the judgment of the trial court. That is wrong. Issues 3, 5 and 7 are therefore also struck out.”*

In the present appeal, the issue formulated relates to the findings of the judgment of the trial court instead of those of the Court of Appeal. It is therefore incompetent and accordingly struck out.

Since the appeal was argued on the sole incompetent issue for determination, the appeal is equally incompetent. The preliminary objection is therefore sustained and the appeal is hereby struck out with N10,000 costs to the respondent.

KUTIGIJSC

F I read before now the judgment just delivered by my learned brother, Edozie, JSC. I agree with him that there being no competent issue to sustain the appeal, the appeal is struck-out with N10,000.00 costs to the respondent.

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EJIWUNMIJSC

H As I have had the privilege of reading before now the draft of the judgment just delivered by my learned brother, Edozie JSC., I have since read it, formed the clear view that this appeal lacks merit, and for the reasons given was deservedly struck out. I also would strike out the appeal. In doing so I need not review the facts which have been sufficiently

set out in the lead judgment. This appeal turns upon whether the grounds of appeal filed by the appellant are competent or not to retain the appeal, having regard to the preliminary objection raised against them in the respondent's brief.

The grounds of the preliminary objection read thus:-

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“(a) The Grounds of Appeal filed in this court are at best of mixed law and facts are therefore incompetent, leave of court not having been obtained.

(b) The issues formulated by the appellant for your Lordships' determination do not relate to the Grounds of Appeal filed in this court but are an attack on the judgment of the trial court.

C

(c) Particulars of grounds of appeal not related to grounds.

(d) The brief is not based on the appeal as decided by the Court of Appeal.”

D

In order to appreciate why the respondent had to raise the preliminary objection related above, I think it is desirable to also relate the appellant's grounds of appeal in this judgment. They read thus without their particulars:-

E

"(i) The Court of Appeal erred in law when it held that the appellant was given fair hearing or an opportunity to be heard when from the facts before the court, the case was never adjourned for defence.

(ii) The Court of Appeal erred in law when it stated thus at page 33 of its judgment per Salami, JCA.:

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‘The appellant's behaviour to a clear directive of the court below on hearing date is tardy. It is not entitled to a discretion of the court. The appellant did not go to the trial court on the day fixed at their instance for trial of their action. It failed to proffer explanation for not being in court on that day 12th March, 1997, and the day fixed for judgment. The matter was adjourned for judgment on 18th April, 1997. The appellant did not go to court with his (sic) counsel and witness to pray the court to allow it to present its defence. The mere fact that judgment had been reserved does not shut out the defendant from presenting its defence if only it had been vigilant, diligent and proffering a real defence.’

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Now, it is undoubted law that a party who is dissatisfied with the

decision of the Court of Appeal has every right to appeal against the decision to the Court of Appeal. But to do that effectively, the appeal must be in accordance with Section 233 (3) of the Constitution of Nigeria 1999 which provides that an appeal from the decision of the Court of Appeal to this court on facts alone or mixed alone or mixed law and fact is subject to the leave of the court below or this court before it can be filed. A ground of appeal filed without such leave is incompetent. Consequently, such a ground of appeal must be struck out. See *Obiguru v. Ozoms* (1986) 2 NWLR (Pt. 6) 167; *Erisu v. Iduka* (1984) 4 NWLR (Pt. 66) 511 and *Orakosim v. Menkiti* (2001) FWLR 2068.

The determination of whether a ground of appeal is a ground of law or one of mixed law and fact does not depend on how it is described, but on what it depicts. In that regard, that a ground of appeal is stated as a ground of law does not necessarily mean that it would be accepted as such as a ground of law by the appellant court. Of course, where it is adjudged as a ground of law, no leave is required for it to be a competent ground of appeal. I have with the above principles in mind come to the conclusion that ground 1 of the grounds of appeal is properly described as a ground of law. The 2nd ground of appeal is also clearly a competent ground of law being an appeal against the undisputable finding of the court below.

But this appeal must however fail, having regard to the objection raised to the competence of the issue raised in respect of the only competent ground of appeal in the appellant's brief which was framed as follows:-

"The appellant respectively contends that there is only one issue arising for determination in this appeal and that is, whether the learned trial Judge was right when after the proceeding of 12/3/97 adjourned the matter for judgment when the defendant had not cross-examined the plaintiff's witness or presented its own case. Or in the alternative, whether from the circumstances of this case the defendant has been afforded a fair hearing."

It does not require any special study of the issue raised to agree with the contention of the learned counsel for the respondent that the issue raised in this appeal for determination of this appeal was directed against the judgment of the trial court and not the Court of Appeal. It is simply

impossible for this court to appraise the complaint of the appellant, as the issue was not raised against the decision and or findings of the Court of Appeal. See Bankole & Ors. v. Pelu (1991) 8 NWLR (Pt. 211) at 537.

It is amazing that though the appellant filed a reply brief to the respondent's brief, yet it seems to me that the points at issue in this appeal was completely unused by learned counsel for the appellant. The inevitable result of this inadvertence of the appellant is that this appeal must fail. However, as the appeal has not been considered on its merit because of the error in the framing of the issue raised and as noted above, the appeal would be struck out only.

I, therefore, will strike out this appeal for the above reasons and the fuller reasons given the leading judgment of my brother, Edozie, JSC., with costs in the sum of N10,000.00 only.

MUSDAPHERJSC

I have had the honour to read before now, the decision of my Lord Edozie, JSC., just read, with which I entirely agree. The preliminary objection in relation to the sole issue for determination is well taken by the respondent.

This court has no jurisdiction to discuss an issue challenging the decision of the High Court. I, too, strike out the appeal and abide by the order for costs contained in the judgment of my Lord aforesaid.

AKINTANJSC

The present respondent, as plaintiff, commenced this action at Kano High Court as Suit No. K/128/92 against the present appellant as defendant. The plaintiff's claim was for the sum of US\$341,759.79 being the balance of the price of goods sold and delivered by the plaintiff to the defendant. The plaintiff also claimed interest on the said sum. It is clear from the pleadings filed by the parties that the claim arose over failure of the defendant to pay the outstanding sum due in respect of goods supplied and delivered to the defendant and for which the defendant's bills

presented for settlement of the debt were dishonoured.

There were numerous adjournments, mainly at the instance of the defendant. However, when the trial finally commenced, the defendant and its counsel were again absent even though the hearing on that day was at
B their request. The plaintiffs only witness testified on that day and at the end, the plaintiff closed its case and the court adjourned the case for judgment. The defence did nothing between the period of the hearing and the date fixed for judgment by the trial court. The court eventually delivered its
C judgment for the plaintiff and thereafter the defendant commenced the process of appeals against the judgment of the court. The main attack was not on the merit or demerit of the claim. Rather, the main plank of attack was that the defendant was not given a fair hearing. The lower court went into the matter and dismissed the claim.

D The same point is the basis of the present appeal in this court. But the appellant has based his attack on the judgment of the trial court instead of the Court of Appeal. The issue formulated by the appellant clearly also disclosed that the attack is against the judgment of the trial court. This is
E unacceptable and the respondent rightly raised an objection.

I have read the leading judgment prepared by my learned brother, Edozie, JSC., which has just been delivered. I entirely agree with his reasoning and conclusion as expressed therein. For the reasons I have
F given above and the fuller reasons given in the leading judgment, which I also adopt, I also uphold the preliminary objection raised by the respondent as to the competency of the appeal and I accordingly strike out the appeal as incompetent with N10,000 costs in favour of the respondent.

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