

SUPREME COURT OF NIGERIA

20TH MAY, 2005. SC. 115/2000

**CORAM:- M. L. UWAIS CJN, S. U. ONU, A. I. KATSINA-ALU,
U. A. KALGO, D. MUSDAPHER, JJSC**

1. MKPEN TIZA APPELLANTS
2. IORKYAAABAMUUN
AND
IORAKPEN BEGHA RESPONDENT

APPEALS - Courts - Jurisdiction - Where appeals do not comply with statutory requirements - Appellate court - Will lack jurisdiction (H1)

COURTS - Jurisdiction - Appeal - From Customary Court of Appeal - To Court of Appeal - Is limited to questions of customary law - Or as may be prescribed by an Act of National Assembly (H2)

JURISDICTION - Courts - Competence of - Where Challenged - Court shall deal with that issue - At earliest stage (H3)

APPEALS - Grounds of Appeal - Where no issue of customary law is raised - There will be no right to appeal - From Customary Court of Appeal - To Court of Appeal (H4)

FACTS

Before the Grade 1 Area Court Sankara, Benue State, the plaintiff/respondent made a claim of declaration of title to land and an order of perpetual injunction against the defendants/appellants. The respondent claimed to be the owner of the land at Tse-Nyamkyume which the appellants entered by force and farmed on without his consent. In proof of his claims, the plaintiff testified during which Exhibit “A”, minutes of traditional arbitration over the disputed land, was tendered and admitted in evidence without objection. The plaintiff also called a witness and closed his case. For the defence, the defendants testified and called one other witness.

The trial court visited the disputed land where the boundaries were shown by the parties. The trial court in its judgment granted the respondent's prayers. The appellants appealed to the Benue State Customary Court of Appeal. The appeal was allowed and a retrial was ordered. The respondent, aggrieved by that decision appealed to the Court of Appeal. The Court of Appeal allowed the appeal, set aside the decision of the Customary Court of Appeal and affirmed the decision of the trial court. The appellants have now appealed to the Supreme Court.

ISSUES FOR DETERMINATION

“(1) Whether or not the Court of Appeal, Jos, was right in not upholding the objection that the appeal before it was incompetent in view of the grounds of appeal and the objection before that court.”

“(2) Whether or not the Court of Appeal Jos, was right in allowing the appeal before it by evaluating Exhibit “A” minutes of the traditional arbitration when both the trial Area Court and the Customary Court of Appeal failed to evaluate same and incoming to the conclusion that the said Exhibit “A” was a “worthless document xxxxxxxxxx and so not worth pronouncing upon.”

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

Where appeals do not comply with statutory requirements

1. By virtue of Order 3, rule 15(1) of the Court of Appeal Rules, a respondent intending to rely upon a preliminary objection to the hearing of the appeal shall give the appellant three clear days notice thereof before hearing setting out the grounds of the objection. Notice of Preliminary Objection can also be given in the respondent's brief, but a party filing it in the brief, must ask the court for leave to move the objection the oral hearing of the appeal commences.

The object of the rule is to give an appellant before the hearing of his appeal notice of any preliminary objection to the hearing of his appeal and the grounds thereof in order to enable him to prepare to meet the objection at the hearing of the appeal. In the instant case the appellant adopted the correct procedure in raising the preliminary objection to the hearing of the appeal by the Notice under Order 3 Rule 15 aforesaid and

also in the respondents' brief before the Court of Appeal.

Preliminary objection to the incompetence of the grounds or ground of appeal may be predicated on many grounds, for example as in this case, that (i) "None of the grounds of appeal have valid particulars of error known to law; (ii) None of the grounds of appeal has raised an issue of customary law; (iii) ground iii of the appeal raises a fresh point that was never canvassed before, nor considered by the lower court and no leave of court has been sought and obtained before it has been raised."

Appeals generally are creature of statutes. Failure to comply with the statutory requirement prescribed by the relevant laws, under which such appeals may be competent and properly before the court will deprive such appellate court of jurisdiction to adjudicate on the appeal. (p. 1469 H)

Jurisdiction - Appeal - From Customary Court of Appeal

2. Now, the jurisdiction of the Court of Appeal to entertain or to adjudicate on any matter brought before it, is statutory. Thus, there may be circumstances when the court would have no constitutional jurisdiction to deal with a matter. So when the competence of an appeal is raised, the court is duty bound first to determine whether the appeal is competent before taking any further step in the appeal. The decision of the Court of Appeal in this case, that "But whether the said grounds are valid or not will be left to this court to decide at the end and not at the beginning xxxxxxxx", cannot, with respect, be correct. The failure to file an appeal within the ambit of the statutory or constitutional provisions would deprive the court of the jurisdiction to entertain the matter. See *Oranye v. Jibowu I* (1950) 13 WACA 41; *Ohene Moore v. Akeseh Tayee* 2 WACA 43 in which case the Privy Council was concerned with the failure of the appellant to fulfil certain statutory conditions requisite for the purposes of appeal, Lord Atkin, delivering the judgment of the court, said at p.45.

"xxxxxxxxxxxxx like any other court, (we) are bound by the statute law, and if the statute law says there shall be no jurisdiction in a certain event, and that event has occurred, then it is impossible for their Lordships or for any other court to have jurisdiction."

Thus, the jurisdiction of the Court of Appeal under the Constitution,

which is the relevant and applicable law in the instant case, is limited to a complaint on issues of customary law only. Section 224(1) of the 1979 Constitution provides:-

“An appeal shall lie from decisions of the Customary Court of Appeal as of right in any civil proceedings before the Customary Court of Appeal with respect to any question of customary law and such other matters as may be prescribed by an Act of the National Assembly.”

Accordingly an appeal to Court of Appeal from the decision of the Customary Court of Appeal must be limited to a complaint with respect to a question of customary law and in the absence of a complaint by a ground or grounds of appeal raising the issues of customary law, the Court of Appeal would appear to have no jurisdiction to adjudicate on the matter. Unless the matter is brought within the enactment of the National Assembly extending the jurisdiction of the Court of Appeal to hear an appeal from the Customary Court of Appeal. I am not aware of any such legislation by the National Assembly. (p. 1473 G)

E Courts - Competence of - Where Challenged

3. In a situation such as in this case, where the grounds of appeal have been challenged as incompetent when they did not complain or raise issues of customary law, thus the issue of jurisdiction of the Court of Appeal is put in issue. It is now settled law that the jurisdiction of a court to adjudicate on a matter is a threshold issue. Consequently, without the necessary jurisdiction a court cannot make any valid order See A-G of Lagos State v. Dosunmu (1989) 6 S.C. (Pt.II) 1; (1989) 3 NWLR (Pt.III) 552. Whenever a challenge is made to the competence of a court to entertain a matter, the court should deal with that issue at the earliest opportunity and not wait till “at the end of the case” as opined by the Court of Appeal in this matter. See Nnonye v. Anyiche (2005) 2 NWLR (Pt.910) 623; Alabi v. Amoo (2003) 7 S.C. 154. (p. 1475 A)

H

Grounds of Appeal - Where no issue of customary law is raised

4. It is my view that the complaints contained in the grounds of appeal did not raise any issue of customary law. See Usman v. Umaru and Golok v.

Diyalpwan (supra), Ogolo v. Ogolo (2003) 12 S.C. (Pt.I) 56; (2003) 18 NWLR (Pt.852) 494. A decision is held to be in respect of a question of customary law when the controversy involves a determination of what the relevant customary law is, and the application of the customary law so ascertained to the question in controversy. See Pam v. Gwom (supra) See also Hirnor v. Yongo (2003) 4 S.C. (Pt.II) 18; (2003) 9 NWLR (Pt.824) 77. See also Okereke v. Nwankwo (2003) 5 S.C. (Pt.I) 16. B

In the instant case grounds 1 and 2 question the evaluation of evidence in Exhibit “A” and the third ground of appeal question the issue of jurisdiction. None of the grounds raised any issue of customary law. There is no such right of appeal from the decisions of the Customary Court of Appeal to the Court of Appeal since the complaints did not involve issues of customary law and the National Assembly did not by any legislation extend the jurisdiction of the Court of Appeal. (p. 1475 D) C D

REPRESENTATION

Mr. B. I. Hom, (with him, T. O. Aurabee), for the Appellants.

A. A. Ijohor, (with him, T. T. Igba), for the Respondent. E

CASES REFERRED TO

Nsirim v. Nsirim (1990) 3 NWLR (Pt.138) 285

Union Bank of Nigeria Ltd. (1988) 2 NWLR (Pt. 539) 618 F

Arewa Textiles Plc v. Abdullahi & Brothers Owsawa Ltd. (1998) 6 NWLR (Pt.554) 508

Ajide v. Kelani (1985) 3 NWLR (Pt.12) 248

Nwadike v. Ibekwe (1987) 4 NWLR (Pt.67) 178

Anosike Building Commercial Company v. F.C.D.A. (1994) 8 NWLR (Pt.363) 421 G

Ogbonnaya v. Adapalm (Nig.) Ltd. (1993) 5 NWLR (Pt.292) 147

Auto Import Export v. Adebayo (2002) 12 S.C. (Pt.I) 158; (2003) FWLR (Pt. 140) 1686 H

Kudiabor v. Kudano 6 WACA 14

Ogolo v. Ogolo (2003) 12 S.C. (Pt.I) 56

STATUTE & RULES REFERRED TO

Constitution of the Federal Republic of Nigeria 1979, ss. 224(1) and 247
 Court of Appeal Rules 1984, O. 3 rr. 2(2) & (3) and 15(1)

LEAD JUDGMENT BY MUSDA PHER JSC

B In the Grade 1 Area Court of Sankara, Benue State of Nigeria, in a
 Suit No. SAC/17/95, the plaintiff claimed against the defendants jointly and
 severally as follows:-

- C “(i) Declaration of title to the land;
- “(ii) An order of perpetual injunction restraining the defendants,
 their privies and/or agents from further acts of trespass.”

D It was claimed that the plaintiff was the owner of the land situate
 at Tse-Nyamkyume and that sometime in 1992, the defendants by use of
 force “entered and farmed on the plaintiff’s land without his consent.” In
 proof of his claims, the plaintiff testified during which Exhibit “A”,
 minutes of traditional arbitration over the disputed land, was tendered and
 admitted in evidence without objection. The plaintiff also called a witness
 E and closed his case. For the defence, the defendants testified and called
 one other witness. The trial court visited the disputed land where the
 boundaries were shown by the parties. After the address of counsel
 representing the parties, the trial Area Court Judge on the 20/12/1996
 F found for the plaintiff and granted his prayers.

Dissatisfied with the decision contained in the said judgment of
 Sankara Area Court, the defendants appealed to the Benue State Custom-
 ary Court of Appeal. Makurdi. By a majority judgment, the defendants’
 appeal was allowed, the decision of the trial Area Court was set aside and
 G in its place, a retrial was ordered. Aggrieved by the majority decision of
 the Benue State Customary Court of Appeal, the plaintiff appealed to the
 Court of Appeal. In its judgment delivered on the 22nd November, 1999,
 the Court of Appeal unanimously allowed the plaintiff’s appeal and set
 H aside the majority decision of the Customary Court of Appeal and affirmed
 the minority decision which in turn affirmed the decision of the trial court.
 Thus restoring the decision of the trial court, which granted the plaintiff
 the declaration of the title to the land in dispute. This, now, is a further

appeal by the defendants against the decision of the Court of Appeal. It should be mentioned that the defendants filed a Notice of Preliminary Objection to the hearing of the appeal of the plaintiff before the Court of Appeal. The grounds of objection were:-

“(A) *The said appeal had no valid grounds of appeal as follows:-* B

(i) *None of the grounds of appeal has valid particulars of error known to law;*

(ii) *None of the grounds of appeal has raised issue of Customary law.*

(iii) *Ground 3 of the grounds of appeal raised a fresh point that was never canvassed before, nor considered by the lower court and no leave of court has been sought and obtained before it has been raised;* C

(B) *All the issues so formulated by the appellant having been derived from his incompetent grounds of appeal are incompetent.”* D

The ruling of the Court of Appeal on the preliminary objection was as follows: -

“*On the totality of the foregoing therefore, the preliminary objection of the respondents fails in its entirety and is hereby overruled with no order as to costs. I shall now proceed to consider the main appeal.*” E

Now, in this judgment, the defendants are referred to as the appellants and the plaintiff is referred to as the respondent. In their Notice of Appeal, the appellants have filed two grounds of appeal which read as follows:- F

“(1) *The Honourable Court of Appeal, sitting in Jos, erred in law when it overruled the preliminary objection of the defendants (herein appellants) as to the competence of the grounds of appeal and the entire appeal before it, and this error in law greatly occasioned a miscarriage of justice.*” G

PARTICULARS OF ERROR

(a) *The Court of Appeal wrongly held that “from the grounds reproduced xxxxxxxxxxxxxxxxxxxx all the grounds have particulars. But whether the said grounds are valid or not will be left to this court to decide at the end and not at the beginning. It is not a matter of form. It is only questions of formal defects or validity that should be made subject of* H

preliminary objection, and pronounced upon at the beginning of the case.”

(b) The Court of Appeal wrongly held that:

(i) The second ground of objection, namely none of the grounds of
B appeal raised an issue of Customary law” also failed;

(ii) Under the “relevant law - Section 247(1) of the 1979 Constitu-
tion xxxxxxxxxxxxxx an appeal from a trial Customary Court can go to a
Customary Court of Appeal if questions of Customary law were invoked
in the judgment or to Court of Appeal of Nigeria xxxxxxxxxxxxxx.”

C (iii) The objection should have been “made at Customary Court of
Appeal.”

(c) The Court of Appeal again wrongly held that;

“(i) A fresh point relating to jurisdiction could be raised for the first
D time before it without leave.

(ii) While agreeing “that as a general rule, fresh point of law which
was not canvassed at the court below cannot be entertained by an appellate
court unless leave of either the court below or the appellate court was first
E sought and obtained, nevertheless a ground of appeal that raises the issue
of jurisdiction is an exception to this general rule.+ xxxxx

(iii) The law allows it (such issue of jurisdiction) to be raised at any
stage of proceedings, even on appeal with or without leave, or even by the
F court suo motu.

“(2) The Honourable Court of Appeal, sitting at Jos, erred in law
when it allowed plaintiffs’ (respondents’ herein) appeal before it, over-
turning the majority decision of the Benue State Customary Court of
Appeal Makurdi, which had ordered a retrial of the case (instead of
G evaluating Exhibit “A”) and this error in law had greatly occasioned
miscarriage of justice.

PARTICULARS OF ERROR

(a) According to the Court of Appeal, Jos, “the main issue (was)
H whether the majority of the Customary Court of Appeal were right in
remitting the case to the lower court for retrial instead of looking at the
document - Exhibit “A” before it, and making pronouncement on it, which
the trial court has failed to make.”

(b) The Court of Appeal wrongly held, “*even before it evaluated Exhibit “A” the admitted minutes of the Customary Arbitration which was not pronounced upon by the trial Area Court that it was a worthless document xxxxxxxxxx and so not worth pronouncing upon.*”

(c) Having looked at Exhibit “A” the Court of Appeal proceeded to hold that: the findings therein were “not binding on any of the parties xxxxxxxxxx the decision in Exhibit “A” could not be said to have been final and so did not create any estoppel. Outside the question of estoppel. I do not see for what other reason Exhibit “A” could be said to have been relevant in this case.”

In his brief for the appellants the learned counsel has identified formulated and submitted to this court for the determination of the appeal the following two issues:-

“(1) *Whether or not the Court of Appeal, Jos, was right in not upholding the objection that the appeal before it was incompetent in view of the grounds of appeal and the objection before that court.*”

(2) *Whether or not the Court of Appeal Jos, was right in allowing the appeal before it by evaluating Exhibit “A” minutes of the traditional arbitration when both the trial Area Court and the Customary Court of Appeal failed to evaluate same and incoming to the conclusion that the said Exhibit “A” was a “worthless document xxxxxxxxxx and so not worth pronouncing upon.”*

The learned counsel for the respondent more or less accepted the issues formulated by the appellants’ counsel as the issues falling for the determination of the appeal. At the hearing of the appeal learned counsel in addition to the submissions canvassed in their respective written briefs made oral submissions. I shall now deal with the issues.

Issue No.I

This issue is concerned with the competence of the grounds of appeal filed before the Court of Appeal and the ruling on the Preliminary Objection raised by the appellants. I have alluded to the Notice of Preliminary Objection filed by the appellants protesting the competency of the appeal before the court below. **By virtue of Order 3, rule 15(1) of the Court of Appeal Rules, a respondent intending to rely upon a**

preliminary objection to the hearing of the appeal shall give the appellant three clear days notice thereof before hearing setting out the grounds of the objection. Notice of Preliminary Objection can also be given in the respondent's brief, but a party filing it in the brief, must ask the court for leave to move the objection the oral hearing of the appeal commences. See *Nsirim v. Nsirim* (1990) 3 NWLR (Pt.138) 285; *Union Bank of Nigeria Ltd.* (1988) 2 NWLR (Pt. 539) 618; *Arewa Textiles Plc v. Abdullahi & Brothers Owsawa Ltd.* (1998) 6 NWLR (Pt.554) 508; *Ajide v. Kelani* (1985) 3 NWLR (Pt.12) 248.

The object of the rule is to give an appellant before the hearing of his appeal notice of any preliminary objection to the hearing of his appeal and the grounds thereof in order to enable him to prepare to meet the objection at the hearing of the appeal. In the instant case the appellant adopted the correct procedure in raising the preliminary objection to the hearing of the appeal by the Notice under Order 3 Rule 15 aforesaid and also in the respondents' brief before the Court of Appeal.

Preliminary objection to the incompetence of the grounds or ground of appeal may be predicated on many grounds, for example as in this case, that (i) "None of the grounds of appeal have valid particulars of error known to law; (ii) None of the grounds of appeal has raised an issue of customary law; (iii) ground iii of the appeal raises a fresh point that was never canvassed before, nor considered by the lower court and no leave of court has been sought and obtained before it has been raised." See *Nwadike v. Ibekwe* (1987) 4 NWLR (Pt.67) 178; *Anosike Building Commercial Company v. F.C.D.A.* (1994) 8 NWLR (Pt.363) 421; *Ogbonnaya v. Adapalm (Nig.) Ltd.* (1993) 5 NWLR (Pt.292) 147.

Appeals generally are creature of statutes. Failure to comply with the statutory requirement prescribed by the relevant laws, under which such appeals may be competent and properly before the court will deprive such appellate court of jurisdiction to adjudicate on the appeal. See *Auto Import Export v. Adebayo* (2002) 12 S.C. (Pt.I) 158; (2003) FWLR (Pt. 140) 1686, *Kudiabor v. Kudano* 6 WACA 14. It is now

necessary to reproduce the ground of appeal which the appellants in the court below objected to:-

“(i) The lower court erred in law when it allowed the appeal of the respondents only on the ground of failure to consider Exhibit “A” when such failure did not in any way occasion a miscarriage of justice.

B

PARTICULARS OF ERROR

(a) The lower court held “that trial court was bound to have made pronouncement on the said exhibit and failure to do so, its finding in respect of the boundary between the parties must definitely be perverse and cannot be allowed to stand.

C

(b) Exhibit “A” only contained the decision of the kindred head which the appellant rejected and decided to seek relief in the lower court.

(c) Exhibit “A” added nothing to the case of the respondents. Therefore, failure to (sic) by the trial court to make comments to the D proceedings therein led to no miscarriage of justice.

(ii) The lower court erred in law when it failed to evaluate Exhibit “A” but rather ordered a retrial when the lower court was competent to evaluate Exhibit “A” and come to a conclusion.

E

PARTICULARS OF ERROR

(a) An appellant (sic) court in considering a non-evaluation of evidence will order retrial only when non-evaluation is of the nature that only the trial Judge could have the singular advantage of seeing and hearing the witness and is better placed to have evaluated and prescribed probative value.

F

(b) An appellate court will not order a retrial on an issue not resolved by trial court where the appellate court itself can resolve the issue from printed record.

G

(c) Exhibit “A” being documentary evidence so that the lower court is equally competent to evaluate if the trial court failed to do so.

(iii) The lower court erred in law when it assumed jurisdiction over the appeal of the respondents when the issues or the grounds of appeal H canvassed by the respondents were not grounds or questions involving customary law.

PARTICULARS OF ERROR

(i) The complaints of the respondents in the lower court bordered on:-

(a) Non-evaluation of evidence of the parties as regards boundary by the trial court.

B (b) Non-evaluation and making of specific finding of Exhibit 'A' by the trial court.

(ii) Section 247(1) 1979 Constitution as amended gives the Customary Court of Appeal jurisdiction in civil proceedings involving questions of customary law alone."

C It is submitted by the learned counsel for the appellants that (1) the particulars of error had rendered the grounds incompetent and unarguable. (2) the grounds of appeal did not raise issues of customary law as required by Section 224(1) of 1979 Constitution to the court below lacked D jurisdiction to adjudicate on the matter and (3) the respondent herein as the appellant required leave to raise for the first time in the Court of Appeal fresh points of law. It is submitted further that the court below was (i) E and (ii) "But whether the said grounds are valid or not will be left to this court to decide at the end and not at the beginning." It is argued that the lower court was in error to have so held vide *Globe Fishing Industries Ltd. & Ors. v. Coker* (1996) 11 SCNJ 56 at 54.

F On the issue of the jurisdiction of the Court of Appeal to hear appeals from Customary Court of Appeal on issues of customary law alone, the lower court was in error to have merely glossed over the objection. The jurisdiction of the Court of Appeal to adjudicate on appeals from Customary Court of Appeal was governed by Section 224(1) of 1979 Constitution G and was limited to only the issue of customary law, the decision of the Court of Appeal, to wit:-

"This court (meaning the Court of Appeal) has jurisdiction to hear appeals from any court or Tribunal in the country whether from High H Court, Customary Court of Appeal or even Sharia Court of Appeal. This ground of objection therefore fails,

is wrong. It is again submitted that since the grounds of appeal do not contain any issue of customary law, the Court of Appeal had no

jurisdiction to adjudicate in the matter. Learned counsel referred to and relied on the following cases:- Babang Golok v. Mambo Diyalpwan (1990) 5 SCNJ 198.; M. Ahmadu Usman v. M. Sidi Umaru (1992) 7 SCNJ (Pt.II) 388; Joseph Ohai v. Samuel Akpoemonye (1999) 1 SCNJ 73 Dang Pam v. Sale Dang Gwom (2000) 1 S.C. 56; (2000) 1 SCNJ 36. B

It is finally submitted that where the respondent has raised fresh issue of jurisdiction of the Customary Court of Appeal, leave was required to ague or canvass the ground of appeal raising it; learned counsel referred to the case of Akaer Jov v. Kutuku Dom (1999) 7 S.C. (Pt.III) 1; (1999) 7 SCNJ 27. C

It is submitted by the learned counsel for the respondent, on the other hand, that the particulars of error supplied were valid and did not offend the mandatory provisions of Order 3, Rule 2(2) of the Court of Appeal Rules, the particulars of error supplied to the grounds of appeal were not mere arguments nor narratives. The Court of Appeal acted correctly when it held that the particulars of error supplied were valid. D

It is again submitted that grounds 1 and 2 raised issues of customary law as required by Section 224(1) of the 1979 Constitution. See Pam v. E Gom (2000) P.4 LRCN 23 at 43. It is submitted that since grounds 1 and 2 complained against the evaluation of Exhibit “A”, the minutes of Customary Arbitration, its evaluation by the appellate court must of necessity be an issue and a determination of Customary law. F

On the question of law raised as fresh issue, it was an issue raised under ground 3. It is submitted that the ground of appeal is valid because where the issue of jurisdiction is raised as a fresh point, leave is not required. Learned counsel referred to the cases of Oloba v. Akereja (1987) 7 SCNJ (Pt.I) 56; ITT Nigeria Ltd. v. Okpon (1989) 2 NWLR (Pt.103) 337; Timi-Timi v. Amabebe 14 WACA 374. Madukolu v. Nkemdilim (1962) 2 SCNLR 34. G

Now, the jurisdiction of the Court of Appeal to entertain or to adjudicate on any matter brought before it, is statutory. Thus, there may be circumstances when the court would have no constitutional jurisdiction to deal with a matter. So when the competence of an appeal is raised, the court is duty bound first to determine whether H

the appeal is competent before taking any further step in the appeal. The decision of the Court of Appeal in this case, that “But whether the said grounds are valid or not will be left to this court to decide at the end and not at the beginning xxxxxxxxx”, cannot, with respect, be correct. The failure to file an appeal within the ambit of the statutory or constitutional provisions would deprive the court of the jurisdiction to entertain the matter. See *Oranye v. Jibowu I* (1950) 13 WACA 41; *Ohene Moore v. Akesehe Tayee* 2 WACA 43 in which case the Privy Council was concerned with the failure of the appellant to fulfil certain statutory conditions requisite for the purposes of appeal, Lord Atkin, delivering the judgment of the court, said at p.45.

“xxxxxxxxxxxx like any other court, (we) are bound by the statute law, and if the statute law says there shall be no jurisdiction in a certain event, and that event has occurred, then it is impossible for their Lordships or for any other court to have jurisdiction.”

Thus, the jurisdiction of the Court of Appeal under the Constitution, which is the relevant and applicable law in the instant case, is limited to a complaint on issues of customary law only. Section 224(1) of the 1979 Constitution provides:-

“An appeal shall lie from decisions of the Customary Court of Appeal as of right in any civil proceedings before the Customary Court of Appeal with respect to any question of customary law and such other matters as may be prescribed by an Act of the National Assembly.”

Accordingly an appeal to Court of Appeal from the decision of the Customary Court of Appeal must be limited to a complaint with respect to a question of customary law and in the absence of a complaint by a ground or grounds of appeal raising the issues of customary law, the Court of Appeal would appear to have no jurisdiction to adjudicate on the matter. Unless the matter is brought within the enactment of the National Assembly extending the jurisdiction of the Court of Appeal to hear an appeal from the Customary Court of Appeal. I am not aware of any such legislation by the National Assembly.

In a situation such as in this case, where the grounds of appeal have been challenged as incompetent when they did not complain or raise issues of customary law, thus the issue of jurisdiction of the Court of Appeal is put in issue. It is now settled law that the jurisdiction of a court to adjudicate on a matter is a threshold issue. Consequently, without the necessary jurisdiction a court cannot make any valid order See A-G of Lagos State v. Dosunmu (1989) 6 S.C. (Pt.II) 1; (1989) 3 NWLR (Pt.III) 552. Whenever a challenge is made to the competence of a court to entertain a matter, the court should deal with that issue at the earliest opportunity and not wait till “at the end of the case” as opined by the Court of Appeal in this matter. See Nnonye v. Anyiche (2005) 2 NWLR (Pt.910) 623; Alabi v. Amoo (2003) 7 S.C. 154.

I have reproduced the grounds of appeal complained of by the appellants as the respondents in the Court of Appeal. **It is my view that the complaints contained in the grounds of appeal did not raise any issue of customary law.** See Usman v. Umaru and Golok v. Diyalpwan (supra), Ogolo v. Ogolo (2003) 12 S.C. (Pt.I) 56; (2003) 18 NWLR (Pt.852) 494. A decision is held to be in respect of a question of customary law when the controversy involves a determination of what the relevant customary law is, and the application of the customary law so ascertained to the question in controversy. See Pam v. Gwom (supra) See also Hirnor v. Yongo (2003) 4 S.C. (Pt.II) 18; (2003) 9 NWLR (Pt.824) 77. See also Okereke v. Nwankwo (2003) 5 S.C. (Pt.I) 16.

In the instant case grounds 1 and 2 question the evaluation of evidence in Exhibit “A” and the third ground of appeal question the issue of jurisdiction. None of the grounds raised any issue of customary law. There is no such right of appeal from the decisions of the Customary Court of Appeal to the Court of Appeal since the complaints did not involve issues of customary law and the National Assembly did not by any legislation extend the jurisdiction of the Court of Appeal.

I do not think it is now necessary for me to consider and deal with

any other issues or points raised in this appeal. The fact that the complaints raised by the grounds of appeal in the Court of Appeal did not raise issues of customary law was sufficient to deprive the Court of Appeal of any jurisdiction to decide the matter brought before it. The Court of Appeal acted in error to have ruled against the preliminary objection. I accordingly hold that the Court of Appeal had no jurisdiction to entertain the matter and consequently, this appeal is allowed and the decision of the Court of Appeal is set aside as it was made without jurisdiction. The majority decision of the Customary Court of Appeal, Benue State, is affirmed. The case is hereby sent back for retrial as ordered by the Customary Court of Appeal. The appellants are entitled to costs assessed at N10,000.00 and N5,000 at this court and lower court respectively.

D **UWAIS CJN**

I have had the opportunity of reading in draft the judgment read by my learned brother, Musdapher, JSC. I entirely agree with him that on the preliminary objection raised by the respondent thereat (now appellant) the Court of Appeal had no jurisdiction to entertain the appellant's (now respondent) appeal.

Section 224 subsection (1) of the 1979 Constitution, which is applicable to the facts of this case, provides:-

F “224(1) An appeal shall lie from decisions of the Customary Court of Appeal as of right in any civil proceedings before the Customary Court of Appeal with respect to any question of customary law and such other matters as may be prescribed by an Act of the National Assembly.”

G The National Assembly has not or is yet to pass any Act, as envisaged by Section 224 subsection (1) of the 1979 Constitution. It, therefore, remained that an appeal to the Court of Appeal from the decision of the Customary Court of Appeal was only valid or competent, if the grounds of appeal thereto raised only question of customary law and H nothing else. This stance has since been supported by the decisions in - See Golok v. Diyalpwan (1990) 3 NWLR (Pt. 139) 411 at pp.418 C-D, 419H, 420 D-E and 421A and Malgit v. Dachen (1997) 9 NWLR (Pt.519) 72 at p.78 D-E.

It was therefore wrong of the Court of Appeal to defer consideration of the preliminary objection raised before it, since it touched on whether the appeal before it was competent and whether it had the jurisdiction to hear it. For this reason, this appeal must be allowed and it is not necessary for us to consider the other issues raised in the appeal. B

Accordingly, the appeal succeeds and it is hereby allowed. The consequential order in the leading judgment, made by my learned brother, Musdapher, JSC., is adopted as mine.

ONUJSC

Having been privileged to read before now the judgment of my learned brother, Musdapher, JSC., I agree with him that this appeal is meritorious and therefore ought to succeed. I wish to add a few comments of mine as follows: D

Learned counsel for the appellant, Mr. Hom, in arguing his appeal in which he filed an appellant's Brief and a Reply Brief dated 20th September, 2000, and 15th March, 2004, respectively, submitted on the first issue which queries as follows: E

“Whether the Court of Appeal had the jurisdiction to entertain the appeal of the plaintiff/respondent in view of the grounds of appeal before the court.”

Learned counsel then submitted that the main question in the appeal F is whether the Court of Appeal was right in relying on an appeal coming from the State Customary Court of Appeal when the issue has no bearing on customary law pursuant to Section 224(1) of the 1979 Constitution. An erroneous reference, he argued, was made to Section 247 of the 1979 G Constitution, whereas they, the appellants, had shown that no issue of Customary Law came up to the Court of Appeal for decision.

In further argument on their Brief, learned counsel further submitted that all the grounds of appeal and the particulars thereto filed by the plaintiff/respondent in the Court of Appeal were valid and did not offend H the mandatory provisions of Order 3, Rule 2(2) of the Court of Appeal Rules, 1981, as amended. The particulars supplied to the grounds, it was further argued, are not mere arguments or narratives, adding that all

grounds of appeal filed by the plaintiff/respondent alleged error on the part of the court. The particulars complained of, he contended, merely itemized the complaint of each ground, adding that the particulars contained only statements of facts and not argument.

B The particulars, it was further added, were in support of the grounds and thereby stated the position of the proceedings complained of and sought to give the reasoning thereby projecting the errors complained of in the grounds. It was therefore submitted that the particulars were not in direct conflict with the provisions of Order 3 Rule 2(2) of the Court of Appeal Rules. It was therefore further submitted that the Court of Appeal C was right when it held that “there has been no breach of Order 3 Rule 2 (2).....” This is because, it is argued, Order 3, Rule 2 (2) stipulates:

D “(2) If the grounds of appeal allege misdirection or error in law the particulars and the nature of the misdirection or error shall be clearly stated.”

As to whether the grounds of appeal before the Court of Appeal raised any questions of Customary Law as required by Section 224(1) of E the 1979 Constitution to render them valid, adding that grounds I and II complied with the provisions of Section 224(1) of the 1979. The question which then arises from the foregoing is, when is a decision in respect of Customary Law? The case Pam v. Gom (2000) 1 S.C. 56; (2000) 4 LRCN F 23 at page 43 (per Ayoola, JSC) provides an answer to the effect:-

G *“I venture to think that a decision is in respect of a question of Customary Law when controversy involves a determination of what the relevant Customary Law is and application of the Customary Law so ascertained to the question in controversy..... However, where, notwithstanding the agreement of the parties as to the applicable customary law, there is a dispute as to the extent and manner in which such customary law determines and regulates the right obligation or relationship of the parties having regard to the facts established in the case, in my opinion, H be regarded as a decision with respect to a question of customary law.”*

Applying the above postulated test, it was the submission of counsel for the applicant that grounds I and II raised issues or questions involving customary law. Learned counsel then submitted in addition that what

stems from ground I and II is that Exhibit 'A', being minutes of Customary arbitration, the Court of Appeal should weigh same against the established fact and determined as between the plaintiff and defendant, who is the rightful owner of the land in dispute. The learned counsel for the appellants further contended that in weighing Exhibit A, certainly the court would B have to determine whether that exhibit meets the requirements of a valid customary arbitration and such a determination certainly involves question of Customary Law.

Further, it was contended on behalf of the appellant, that since the case bordered on land dispute and parties thereto relied on traditional evidence and minutes of customary arbitration and not on conveyance or certificate of occupancy to prove title to land, the question of Customary Law was involved. It was further argued on appellant's behalf that grounds I and II which raised the issue that Exhibit 'A' being printed D minutes of customary arbitration, the Court of Appeal is in the same position as the trial court to evaluate same. Thus, if the trial court fails to evaluate it, it is pointed out, such involved a determination of question of customary law. Further, it is argued, both grounds I and II do not offend E the provisions of Section 224(1) of the 1979 Constitution. Appellant concluded by conceding that ground III which raises the issue of jurisdiction does not involve a question of customary law.

Appellant in reply to the issue of whether he required leave to raise F the issue of jurisdiction for the first time on appeal, submitted that leave is not required. This, it is argued, is because the issue of jurisdiction is fundamental to any effective adjudication which can even be raised by the court itself where parties fail to raise it. The case of *Oloba v. Akereja* (1987) 7 SCNJ ((Pt.I) 56 at 64 per Obaseki, JSC., *ITT Nigeria Ltd. v. Okpon* (1989) 2 NWLR (Pt. 103) 337; *Timi-Timi v. Amabebe* 14 WACA 374 and *Madukolu v. Nkemdilim* (1962) 2 SCNLR 341 were cited to buttress the contention.

This issue is resolved in appellants' favour. H

ISSUE II

The appellants' contention under this issue is whether the Court of Appeal was right to have evaluated Exhibit "A" (which constitutes of

customary arbitration) the duty of the trial court which saw and heard witnesses that can evaluate the evidence and make a pronouncement on their credibility or probative value and not a Court of Appeal which neither heard nor saw the witnesses to observe their demeanour in the witness box.

However, it is pointed out, a Court of Appeal is in the same position to evaluate the evidence as the trial court where that court failed to do so. See *Ayoola v. Adebayo* (1969) 1 All NLR 159; *Obi v. Owolabi* (1994) 5 NWLR (Pt. 153) 702 at 704.

In the case in hand I agree with the appellants' submission that the Court of Appeal was right when that court weighed Exhibit "A" and found that it did not meet the requirements of a valid customary arbitration. See *Ebba v. Ogodo* (1984) 11 S.C. 1 at 27. The finding of the Court of Appeal that Exhibit A is worthless is therefore not demonstrably perverse.

It is now trite law that concurrent findings of the trial court and the Court of Appeal cannot be set aside by this court except such finding is not supported by evidence. See *Emeagwara v. Stan PPL* (2000) 78 LRCN E 1701 at 1720.

The trial court found that the plaintiff is the owner of the land in dispute and that Orasoho is the natural boundary between the plaintiff and the defendants. The Court of Appeal confirmed this finding.

For the reasons I have given and the fuller and more comprehensive ones contained in the judgment of my learned brother, Musdapher, JSC., I, too, will allow the appeal, set aside the decision of the court below and award costs assessed at N10,000.00 in favour of the appellant.

G KATSINA-ALUJSC

I have had the advantage of reading in draft the judgment of my learned brother, Musdapher, JSC. I agree with it.

The main issue in this appeal is whether the Court of Appeal, Jos Division has jurisdiction to hear the appeal from the Customary Court of Appeal having regard to Section 224(1) of the 1979 Constitution. Section 224(1) provides as follows:

“(1) An appeal shall lie from decisions of the Customary Court of

Appeal of a State to the Court of Appeal as of right in any civil proceedings before the Customary Court of Appeal with respect to any question of customary law and such other matters as may be prescribed by an Act of the National Assembly.” (Underlining mine).

The appeal in question was from the decision of the Benue State Customary Court of Appeal. It was the submission of the learned counsel for the appellants that the grounds of appeal did not raise questions involving customary law. B

In order to appreciate the submission of the learned counsel for the appellants. I shall read the grounds of appeal in question. These grounds read as follows: C

“(i) The lower court erred in law when it allowed the appeal of the respondents only on the ground of failure to consider Exhibit “A” when such failure did not in any way occasion a miscarriage of justice. D

PARTICULARS OF ERROR

(a) The lower court held that “the trial court was bound to have made pronouncement on the said exhibit and failure to do so, its finding in respect of the boundary between the parties must definitely be perverse and cannot be allowed to stand. E

(b) Exhibit “A” only contained the decision of the kindred head which the appellant rejected and decided to seek relief in the lower court.

(c) Exhibit “A” added nothing to the case of the respondents. F
Therefore, failure by the trial court to make comments to the proceedings therein led to no miscarriage of justice.

(ii) The lower court erred in law when it failed to evaluate Exhibit “A” but rather ordered a retrial when the lower court was competent to evaluate Exhibit “A” and come to a conclusion. G

PARTICULARS OF ERROR

(a) An appellant court in considering a complaint of non-evaluation of evidence will order a retrial only when non-evaluation is of the nature that only the trial Judge who had a singular advantage of seeing and hearing the witness is better placed to have evaluated and prescribed probative value. H

(b) An appellate court will not order a retrial on an issue not resolved

by trial court where the appellate court itself can resolve the issue from printed record.

(c) Exhibit “A” being documentary evidence is that the lower court is equally competent to evaluate if the trial court failed to do so.

B (iii) The lower court erred in law when it assumed jurisdiction over the appeal of the respondents when the issues or the grounds of appeal canvassed by the respondents were not grounds or questions involving customary law.

C PARTICULARS OF ERROR

(i) The complaints of the respondents in the lower court bordered on:-

(a) Non-evaluation of evidence of the parties as regards boundary by the trial court.

D (b) Non-evaluation and making of specific finding of Exhibit ‘A’ by the trial court.

(ii) Section 247(i) 1979 Constitution as amended gives the Customary Court of Appeal jurisdiction in civil proceedings involving questions of customary law alone.”

F A close study of these grounds of appeal reveals that none of them raised any question of customary law. The failure of the Customary Court of Appeal to consider and evaluate Exhibit ‘A’ is not an incidence of customary law. This is the complaint in grounds 1 and 2. Ground 3 raised the issue of jurisdiction. This, plainly does not involve a question of customary law.

G By the express provisions of Section 224(i) of the 1979 Constitution, it is plain that an appeal lies from a decision of the Customary Court of Appeal of a State to the Court of Appeal as of right with respect to complaints on any question of customary law or such other matters as may be prescribed by an Act of the National Assembly. No such other matters have so far been prescribed by an Act of the National Assembly. Clearly H therefore an appeal for the time being does not lie from a decision of the Customary Court of Appeal to the Court of Appeal on a ground which does not raise a question of customary law. See *Hirnor v. Yongo* (2003) 4 S.C. (Pt.II) 18; (2003) 9 NWLR (Pt.824) 77.

As I have already shown above, the three grounds of appeal in the instant appeal do not raise questions of customary law. In the result I, too, would allow this appeal and set aside the decision of the Court of Appeal. Jos Division. I also award N10,000.00 costs to the appellants against the respondent.

B

KALGO JSC

I have had the privilege of reading in advance the judgment just delivered by my learned brother, Musdapher, JSC., in this appeal. I entirely agree with his reasoning and conclusions reached therein. The two issues raised by the appellant for the determination of this court in the appeal have been fully and exhaustively considered, in my view, in the said judgment. I however wish to add a few words of mine by way of emphasis.

C

The substantive or central issue in this appeal is whether grounds of appeal of the respondents in the Court of Appeal were competent and arguable. Learned counsel for the appellant contended in this brief that the grounds did not contain valid particulars to render them competent and arguable; and what is more did not raise any questions involving customary law.

D

The grounds are fully set out in the leading judgment and on p. 128-130 of the record of appeal.

It is well settled that a ground of appeal must set out concisely and distinctly the complaints of the appellant against the decision appealed against and upon which he intends to rely without any argument or narrative. And the particulars required or necessary to support the ground must be such that they point directly to the error or misdirection as the case may be complained of in the ground, without being independent complaints themselves. See *Globe Fishing Industries & Ors. v. Chief Folarin Coker* (1990) 7 NWLR (Pt. 162) 265.

F

G

I have carefully examined the particulars to the grounds of appeal I mentioned above, and I find that the particulars thereto are to a certain extent argumentative and narrative, and as such not in proper compliance with Order 3, rule 2(3) of the Court of Appeal Rules 1981. Such examination has also revealed to me that the whole grounds and the

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particulars thereto did not, in my view, raise any specific question of customary law for the Court of Appeal to entertain as required by the provisions of Section 224(1) of the 1979 Constitution which applied to this appeal. The appeal came from the Customary Court of Appeal, Makurdi, to the Court of Appeal, Jos, and Section 224(1) of the 1979 Constitution says:-

“An appeal shall lie from decisions of the Customary Court of Appeal to the Court of Appeal as of right in any civil proceedings before the Customary Court of Appeal with respect to any question of customary law and such matters as may be prescribed by an Act of the National Assembly.” (Underlining mine)

From the above, it is abundantly clear that any ground of appeal to the Court of Appeal against the decision of the Customary Court of Appeal which does not raise any question of customary law, is not a competent ground and that the Court of Appeal has no jurisdiction to entertain the appeal on that ground. See *Golok v. Diyalpwan* (1990) 5 SCNJ 198 at 202-204, *Usman v. Umaru* (1992) 7 NWLR (Pt.254) 377; *Ohai v. Akpoemonye* (1999) 1 NWLR (Pt.588) 521. I also have no doubt in my mind that fresh point or issue raised for the first time in this court or any appeal court irrespective of the stage it was raised before judgment, must be with leave of this or that court as the case may be. See *Adisa v. Boneh Nig. Ltd.* (1975) 1 NMLR 364; *Fadiora v. Gbadebo* (1978) 3 S.C. (Reprint) 149; (1978) 3 S.C. 219; *Oredoyin v. Arowolo* (1989) 7 S.C. (Pt.II) 1; (1989) 4 NWLR (Pt.114) 172. In this case, the issue of jurisdiction was raised for the first time in the Court of Appeal without leave. The Court of Appeal was clearly wrong to accept and entertain it as it did. In sum, and for the above reasons, I resolve issue I in favour of the appellants.

On issue 2, I adopt the consideration and conclusions reached in the leading judgment of Musdapher, JSC., and resolve it also in favour of the appellants.

In the final analysis, I find merit in this appeal and I allow it. I set aside the decision of the Court of Appeal and retain the majority decision of the Customary Court of Appeal Makurdi. I abide by the order of costs made in the leading judgment.