

SUPREME COURT OF NIGERIA

12TH MAY, 2006. SC. 358/2001

**CORAM:- S. U. ONU, A. O. EJIWUNMI, D. MUSDAPHER,
W. S. N. ONNOGHEN, I. OGBUAGU, JJSC**

MR. VICTOR ADELEKAN	APPELLANT
AND		
ECU-LINE NV	RESPONDENT

APPEALS - Out of time - Application for extension of time - Within which to appeal - Or to apply for leave to appeal - Must set forth good and substantial reasons - For failure to appeal or to apply for leave within time (H1)

APPEALS - Leave - Jurisdiction - Where appeal requires leave - And time within which to appeal has expired - Appellant must obtain extension of time to seek leave - Leave and extension of time to appeal - For appellate court to have jurisdiction (H2)

APPEALS - Grounds of appeal - Must attack the ratio in the judgment - For issues arising therefrom - To result in setting aside of the judgment (H3)

COURTS - Federal High Court - Jurisdiction of - Does not extend to cases of simple contract - Or damages for negligence (H4)

FACTS

The Plaintiff/Appellant had a contract with the Defendant/Respondent for the carriage by sea of a photo plotter MIVA 25 Machine from Belgium to Nigeria, which contract respondent failed to fulfil. In fact Respondent misplaced the machine in its warehouse after it took possession of it. It admitted liability in letters dated 16th and 30th January, 1998, and offered monetary compensation which Appellant rejected as being below the replacement cost of the machine. By a letter dated 7th

October, 1998, Appellant's solicitors demanded payment of US \$98,520.00 as compensation for the loss but the Respondent contended that the claim was statute barred. Hence Appellant sued Respondent in the Federal High Court Ibadan, claiming damages for breach of contract of carriage or in the alternative, damages for negligent loss of goods.

Respondent did not file a statement of Defence but filed a demurrer for the dismissal of the action as being time-barred under the provisions of the Carriage of Goods by Seas Act, L.F.N 1990 and or the contract of affreightment. Trial judge held that the action was not time barred, dismissing the application of the Respondent. The Court of Appeal reversed this decision of the trial court upon appeal from the Respondent. Dissatisfied, Appellant brought this appeal to the Supreme Court. Whereupon the Respondent, having obtained necessary leave, filed a cross Appeal and a Notice of preliminary Objection praying this Court to strike out or dismiss the appeal on grounds of incompetence, as having been filed out of time without first obtaining leave of Court.

HELD (Unanimously striking out the main appeal and allowing the cross-appeal per **ONNOGHEN JSC**)

APPEALS - Out of time

1. Now Section 31 of the Supreme Court Act prescribes that where a person desires to appeal to the Supreme Court, he shall give his notice of appeal or notice of his application for leave to appeal in such manner as is prescribed by the Rules but within (a) fourteen days in the case of an interlocutory appeal and (b) three months in the case of an appeal against a final decision of the lower court.

However, the Supreme Court has power to extend the time allowed for doing anything by the Rules of court. For the court to exercise its discretion to extend time, every application for an enlargement of time in which to appeal or in which to apply for leave to appeal shall be supported by an affidavit setting forth good and substantial reasons for the failure to appeal or to apply for leave to appeal within the prescribed period. To the supporting affidavit must be exhibited:

- (i) a copy of the judgment from which it is intended to appeal;

(ii) a copy of other proceedings necessary to support the complaints against the judgment, and

(iii) grounds of appeal which prima facie show good cause why the appeal should be heard - see Order 2 Rule 31 of the Supreme Court Rules. (p. 1722 B)

APPEALS - Leave - Jurisdiction

2. It is settled law that the exercise of appellate jurisdiction is entirely statutory in that an appellate court derives its jurisdiction from the statute creating it including the Constitution and other enabling statutory provisions. The Supreme Court therefore derives its jurisdiction from the Supreme Court Act and the 1999 Constitution.

The right of appeal conferred by the Constitution on a party who desires to appeal is initiated by the filing of a notice of appeal since it is the filing of the notice of appeal against the judgment complained of that signifies the real and constitutional signal of dissatisfaction against the judgment - see *Tukur v. Government of Gongola State* (1989) 9 S.C. 1; (1988) 1 NWLR (Pt. 68) 39. The notice of appeal is therefore the foundation of the appeal.

It is settled law that where an appeal requires leave of court and time within which to lodge the appeal has also expired as in the instant appeal, the intending appellant must, in seeking leave to appeal also pray for extension of time within which to appeal in addition to seeking extension of time within which to apply for leave and leave to appeal. In short, an intending appellant who wishes to seek leave of court on any ground of appeal after the expiration of the statutory period prescribed under Section 31 of the Supreme Court Act, 1960, must seek three substantive prayers, to wit:-

- (a) extension of time to seek leave to appeal;
- (b) leave to appeal;
- (c) extension of time within which to appeal.

In the instant case, appellant filed the notice of appeal outside the prescribed three months and has not brought any application to regularized his position, to wit:-

- a) Praying the court for extension of time to seek leave to appeal;
- (b) leave to appeal; and,
- (c) extension of time within which to appeal.

Since appellant has not regularized his position, the appeal is fundamentally defective and incompetent and liable to be struck out. (p. 1722 G)

Grounds of appeal - Must attack the ratio

3. It is settled law that whereas grounds of appeal must relate to and challenge the validity of the decision appealed against, the issues for determination in the appeal must arise from the said grounds of appeal. For issues formulated to result in setting aside the judgment appealed against, they must be based on grounds of appeal that attack the ratio decidendi in the judgment on appeal. It follows therefore that where a ground of appeal from which an issue for determination is formulated is based on the obiter dicta of the Judge, a resolution of same in favour of the appellant will usually not be sufficient to set aside the judgment on appeal.

In the instant case, the objection is to the effect that the issues formulated by learned counsel for the appellant do not arise from the grounds of appeal. It is settled law that where no issue is formulated from any ground of appeal, the said ground is deemed abandoned. The same principle of law applies to a situation where it is found that issues formulated by an appellant do not relate to the grounds of appeal - the said grounds must be deemed abandoned since no issue(s) has/have been distilled from them and are therefore liable to be struck out. (p. 1724 A)

Federal High Court - Jurisdiction of

4. The single issue formulated by learned counsel for the respondent/cross appellant for determination is simply as follows-

“Whether the lower court, in any event, should not have struck out the cross-respondent’s suit on the ground that being a claim for simple contract, the Federal High Court lacked the requisite jurisdiction to entertain the matter.”

The provisions of Section 251 of the Constitution of the Federal

Republic of Nigeria, 1999, hereinafter called the 1999 Constitution, are very clear and unambiguous. It is the section that confers jurisdiction on the Federal High Court, which jurisdiction clearly does not include dealing with any case of simple contract or damages for negligence as envisaged by the action before the trial court. B

I therefore have no hesitation in agreeing with learned counsel for the cross-appellant that the trial court had no jurisdiction in the matter as framed before it and ought to have same struck out. (pp.1725C/1727G)

NOTABLE POINT OF INTEREST C

OGBUAGU JSC

1. Where court lacks jurisdiction it should strike out the matter, not dismiss it

What is more, by Section 230(1) of the Constitution of the Federal Republic of Nigeria, 1979 and even by Section 251 of the 1999 Constitution, the Federal High Court, has no jurisdiction in matters relating to simple contracts. Therefore, and this is settled, where a court finds it has no jurisdiction, the proper order to make, is one of striking out and not of D
dismissal. E

It must be stressed and this is settled, that where a preliminary objection succeeds, there would be no need to go further to consider the arguments in support of the issue or issues for determination. F
(p. 1733 G)

REPRESENTATION

Ayo Olorunfemi, Esq., for the Respondent/Cross-Appellant. G
No appearance for the Appellant/Cross-Respondent though served.

CASES REFERRED TO

National electric Power Authority v. Edeghero & Ors. (2002) 12 S.C. (Pt. II) 119; (2002) 18 NWLR (Pt. 798) 79, (2002) 12 SCNJ 173 H

Chief Lakanmi v. Adene & 3 Ors (2003) 4 S.C. (Pt. II) 92; (2003) 4 SCNJ 348 at 355 & 363

ANPP v. The Returning Officer, Abia State Senatorial District (Mr. Festus

1718 Adelekan v. ECU-Line NV (2006) 5 KLR Onnoghen JSC

Ukagwu) & 2 Ors. (2005) 6 NWLR (Pt. 920) 140 at 170, 171 CA

Krus Thompson Organization Ltd. v. University of Calabar (2004) 9 NWLR (Pt. 879) 631; (2004) 4 S.C. (Pt.1) 65; (2004) 4 SCNJ 121 at 133.

Modupe v. The State (1988) 9 S.C. 1; (1988) 4 NWLR (Pt. 87) 130;

B (1988) 9 SCNJ 1

Labiya v. Alhaji Anretiola & 5 Ors. (1992) 8 NWLR (Pt. 258) 139; (1992) 10 SCNJ 1

Premier Breweries Ltd. v. Anere Const. Co. Ltd. (1987) 3 NWLR (Pt. 62) 688

C N.B.N. v. NET (1986) 3 NWLR (Pt. 31) 667; Odofin v. Agu (1992) 3 NWLR (Pt. 229) 350

Tukur v. Government of Gongola State (1989) 9 S.C. 1; (1988) 1 NWLR (Pt. 68) 39

D Queen v. Resident Ijebu Province (1959) NLR 87

Ugwu v. A-G East Central State (1975) 6 S.C. (Reprint) 7; (1975) 6 S.C. 13

Moses v. Ogunlabi (1975) 4 S.C. (Reprint) 60; (1975) 4 S.C. 81.

E

STATUTES & RULES REFERRED TO

Admiralty Jurisdiction Act, 1991, s. 2

Carriage of Goods by Sea Act, Cap 44, L.F.N; 1990

F Constitution of the Federal Republic of Nigeria 1979, S. 230(1)

Constitution of the Federal Republic of Nigeria 1999, S. 251

Federal High Court (Civil Procedure) Rules, 1976, O. 27

Supreme Court Act, 1960, s. 31

Supreme Court Rules (As amended), O. 6 r. 7

G

LEAD JUDGMENT BY ONNOGHEN JSC

This is an appeal against the judgment of the Court of Appeal sitting at Ibadan in Appeal No. CA/I/186/2000 delivered on 5/4/2001 allowing the appeal of the present respondent against the ruling of the trial court delivered on 3/3/2000 dismissing the demurrer application of the said respondent.

Sometime in 1996, the present appellant entered into a contract

with the respondent for the carriage by sea of S.T.C. Photo Processing Machine from Canada to Nigeria for valuable consideration. Later on, appellant entered into yet another contract with the respondent, this time for the carriage by sea of a Photo Plotter MIVA 25 Machine from Belgium to Nigeria.

In May, 1997 the respondent by fax notified the appellant that the goods have been placed on board the M. V. KAGORO, which was expected to berth in Nigeria on or before 25th May, 1997. Along with the fax message came a copy of the Bill of Lading No. 3054 - MTL- LAG which did not include the Photo Plotter MIVA 25 Machine; the Bill of Lading only contained the S.T.C. Photo Processing Machine. Appellant immediately notified the respondent of the omission.

When the ship arrived in Nigeria, appellant discovered that the Photo Plotter MIVA 25 machine was not included and the respondent was duly notified and it was later discovered that the Photo Plotter MIVA 25 machine was misplaced by the respondent in its warehouse.

The respondent admitted liability in letters dated 16th and 30th January, 1998 and offered monetary compensation which the appellant rejected by letters dated 18th January, 1998 and 13th February, 1998 because, according to the appellant, it was below the replacement cost of the machine. By a letter dated 7th October, 1998, the appellant's solicitors demanded payment of US \$98,520.00 as compensation for the loss but the respondent replied on 19th October, 1998 expressing sympathy but contended that the claim was statute barred. The appellant therefore instituted an action in the Federal High Court, Ibadan in Suit No FHC/IB/CS/10/99 claiming N14,925,639.00 being the money payable by the respondent to the appellant for breach of contract of carriage of goods by sea and the negligent loss of goods. The appellant contended in the Statement of Claim that the Photo Plotter MIVA 25 machine was misplaced within the respondent's warehouse and that no Bill of Lading was ever processed for its shipment; that it was never loaded on board the M. V. KAGORO and that the respondent could therefore not avail itself of the defence of limitation of time under the Hague Visby Rules for the bringing of an action in respect of carriage of goods by sea.

The respondent did not file a Statement of Defence but filed a demurrer for the dismissal of the action on the ground that the action was time barred on the provisions of the Carriage of Goods by Sea Act, Cap. 44 Laws of the Federation of Nigeria, 1990 and/or the Contract of Affreightment evidenced by the relevant bill of lading pleaded by and/or upon which the plaintiff's claim is founded.

In deciding the application, the learned trial Judge held that the action was not statute barred and dismissed the application. The respondent was not satisfied with the ruling and appealed to the Court of Appeal which set aside the ruling of the trial Judge. The appellant is dissatisfied with that judgment and has consequently appealed to this court.

In the appellant's brief filed on 10/5/2002 by learned counsel for the appellant, Akeem Agbaje Esq., the following four issues have been identified for determination.

"1. Whether the Court of Appeal was right in holding that the subsidiary issue raised by the plaintiff, namely, that the error of law complained of by the defendant in issue 1 which was conceded by him in favour of the defendant, could not have occasioned a miscarriage of justice did not arise from any of the grounds of appeal before it and thereby ignored all the arguments in respect thereof in the plaintiff's brief of argument before it? (Grounds 1 and 2)

2. Whether the Court of Appeal was right in holding that the submission of the plaintiff in his brief of arguments in that court in respect of issues 2-4 before it raise academic issues? (Ground 3)

3. Whether in a Demurrer application, the court can consider facts or documents outside the Statement of Claim and whether or not on the applicable law and the relevant facts the plaintiff's claim against the defendant is statute or time barred? (Grounds 4 and 5)

4. Whether the refusal of the Court of Appeal to consider any of the arguments on the issues submitted before it for determination amounts to a denial of fair hearing (Ground 6)."

At this stage, it is necessary to point out that the respondent did file a Cross Appeal and a Notice of Preliminary Objection. The Preliminary Objection was filed on 20/12/04 and arguments thereon are con-

tained in the respondent's brief of argument filed by learned counsel for the respondent/cross appellant, Ayo Olorunfemi, Esq., on 20/12/04. I have carefully gone through the record and have found no Reply Brief filed by the appellant/cross respondent in this appeal.

The objection prays the court "for an order that the appeal and/or issues formulated by the appellant be struck out and/or dismissed on the grounds that they are incompetent."

The grounds on which the objection is based are stated as follows:-

"(a) No leave of court was sought and/or obtained before the filing of the appellant's Notice of Appeal.

(b) The issues are not supported by any ground of appeal filed and should be discountenanced, and

(c) In any event, the learned trial Judge had no jurisdiction to entertain the appellant's claim as constituted before it"

In arguing the preliminary objection in respect of ground (a) of the objections, learned counsel for the respondent/cross appellant submitted that by filing the Notice of Appeal on 4/7/01 against the judgment of the Court of Appeal delivered on 5/4/01, the appellant was doing so after the three months statutorily allowed for appeal particularly as he was two days late; relying on *Okenwa v. Military Governor, Imo State* (1997) 6 NWLR (Pt. 507) 136; that appellant did not ask for nor obtain the requisite leave of the Court of Appeal or this court for extension of time within which to appeal and an extension of time within which to seek leave to appeal; relying on *Odofin v. Agu* (1992) 3 NWLR (Pt. 229) 350.

Learned counsel further submitted that appellant having failed to seek leave, extension of time within which to seek leave and file Notice of Appeal out of time, the appeal is incompetent and ought to be struck out.

As stated earlier in this judgment, learned counsel for the appellant has filed no reply brief so the arguments of learned counsel for the respondent on the preliminary objection have not been countered.

From the record, the judgment of the Court of Appeal at pages 73-

98 of the record, was delivered on the 5th day of April, 2001 while the Notice of Appeal against that judgment was filed, as can be verified at page 100 of the record, on 4/7/01. This is clearly two days outside the statutory period of three months after delivery of the judgment appealed against.

Now Section 31 of the Supreme Court Act prescribes that where a person desires to appeal to the Supreme Court, he shall give his notice of appeal or notice of his application for leave to appeal in such manner as is prescribed by the Rules but within (a) fourteen days in the case of an interlocutory appeal and (b) three months in the case of an appeal against a final decision of the lower court.

However, the Supreme Court has power to extend the time allowed for doing anything by the Rules of court. For the court to exercise its discretion to extend time, every application for an enlargement of time in which to appeal or in which to apply for leave to appeal shall be supported by an affidavit setting forth good and substantial reasons for the failure to appeal or to apply for leave to appeal within the prescribed period. To the supporting affidavit must be exhibited:

(i) a copy of the judgment from which it is intended to appeal;

(ii) a copy of other proceedings necessary to support the complaints against the judgment, and

(iii) grounds of appeal which prima facie show good cause why the appeal should be heard - see Order 2 Rule 31 of the Supreme Court Rules.

It is settled law that the exercise of appellate jurisdiction is entirely statutory in that an appellate court derives its jurisdiction from the statute creating it including the Constitution and other enabling statutory provisions. The Supreme Court therefore derives its jurisdiction from the Supreme Court Act and the 1999 Constitution - See Queen v. Resident Ijebu Province (1959) NLR 87; Ugwu v. A-G East Central State (1975) 6 S.C. (Reprint) 7; (1975) 6 S.C.

13, *Moses v. Ogunlabi* (1975) 4 S.C. (Reprint) 60; (1975) 4 S.C. 81.

The right of appeal conferred by the Constitution on a party who desires to appeal is initiated by the filing of a notice of appeal since it is the filing of the notice of appeal against the judgment complained of that signifies the real and constitutional signal of dissatisfaction against the judgment - see *Tukur v. Government of Gongola State* (1989) 9 S.C. 1; (1988) 1 NWLR (Pt. 68) 39. The notice of appeal is therefore the foundation of the appeal.

It is settled law that where an appeal requires leave of court and time within which to lodge the appeal has also expired as in the instant appeal, the intending appellant must, in seeking leave to appeal also pray for extension of time within which to appeal in addition to seeking extension of time within which to apply for leave and leave to appeal. In short, an intending appellant who wishes to seek leave of court on any ground of appeal after the expiration of the statutory period prescribed under Section 31 of the Supreme Court Act, 1960, must seek three substantive prayers, to wit:-

(a) extension of time to seek leave to appeal;

(b) leave to appeal;

(c) extension of time within which to appeal, see *Premier Breweries Ltd. v. Anere Const. Co. Ltd.* (1987) 3 NWLR (Pt. 62) 688; *N.B.N. v. NET* (1986) 3 NWLR (Pt. 31) 667; *Odofin v. Agu* (1992) 3 NWLR (Pt. 229) 350.

In the instant case, appellant filed the notice of appeal outside the prescribed three months and has not brought any application to regularized his position, to wit:-

a) Praying the court for extension of time to seek leave to appeal;

(b) leave to appeal; and,

(c) extension of time within which to appeal.

Since appellant has not regularized his position, the appeal is fundamentally defective and incompetent and liable to be struck out.

The second ground on which the objection is based is that the

issues as formulated by learned counsel for the appellant do not arise from the grounds of appeal. For this, learned counsel referred the court to the case of Labiyi v. Anretiola (1992) 8 NWLR (Pt. 258) 139 at 157, and urged the court to disregard the issues.

B It is settled law that whereas grounds of appeal must relate to and challenge the validity of the decision appealed against, the issues for determination in the appeal must arise from the said grounds of appeal. For issues formulated to result in setting aside the judgment appealed against, they must be based on grounds of appeal that attack the ratio decidendi in the judgment on appeal. It follows therefore that where a ground of appeal from which an issue for determination is formulated is based on the obiter dicta of the Judge, a resolution of same in favour of the appellant will usually not be sufficient to set aside the judgment on appeal.

E In the instant case, the objection is to the effect that the issues formulated by learned counsel for the appellant do not arise from the grounds of appeal. It is settled law that where no issue is formulated from any ground of appeal, the said ground is deemed abandoned. The same principle of law applies to a situation where it is found that issues formulated by an appellant do not relate to the grounds of appeal - the said grounds must be deemed abandoned since no issue(s) has/have been distilled from them and are therefore liable to be struck out.

G Looking at the second ground of the objection, it assumes that the appeal is competent and valid which is not the case since I have earlier found that no valid notice of appeal exists in this appeal. That being the case, it would be an exercise in futility to consider that ground of objection on the merit. It is accordingly discountenanced.

H The third and final ground of objection to the competence of the appeal deals with the issue of jurisdiction of the trial court. Learned counsel for the respondent referred the court to paragraph 39 of the Statement of Claim in which the relief is pleaded and submitted that since it is the case of the appellant that his claim is in simple contract and not an admiralty matter, the Federal High Court in which he sued has no jurisdiction in the

matter including the alternative claim for damages for negligence. Learned counsel referred the court to Section 251 of the 1999 Constitution and Section 2 of the Admiralty Jurisdiction Act, 1991.

I have decided to deal with this ground of objection which in effect attacks the appeal on the merit because it forms the substratum of the cross-appeal by the respondent, otherwise, having found the appeal incompetent for having been filed out of time and without leave, that would have been the end of the appeal. On the other hand, the Cross-Appeal of the respondent is an independent and valid appeal, the same having been authorized by the order of this court on 6/12/04.

The single issue formulated by learned counsel for the respondent/ cross appellant for determination is simply as follows-

“Whether the lower court, in any event, should not have struck out the cross-respondent’s suit on the ground that being a claim for simple contract, the Federal High Court lacked the requisite jurisdiction to entertain the matter.”

Paragraph 39 of the Statement of Claim pleads as follows:-

“39. WHEREOF the plaintiff claims from the defendant as follows:-

(a) the sum of N14,858,752.25 (Fourteen Million, Eight Hundred and Fifty-Eight Thousand, Seven Hundred and Fifty Two Naira, Twenty-Five Kobo) as damages for breach of contract or in the alternative damages for negligence.

(b) Interest at the rate of 21% on the said sum from 30th June, 1997, until judgment is delivered.”

It should be noted that appellant has filed no cross respondent’s brief to the cross-appeal.

Section 251 of the 1999 Constitution provides as follows.-

“251. (1) Notwithstanding anything to the contrary contained in this Constitution and in addition to such other jurisdiction as may be conferred upon it by an Act of the National Assembly, the Federal High Court shall have and exercise jurisdiction to the exclusion of any other court in civil causes and matters-

(a) relating to the revenue of the Government of the Federation in

which the said Government or any organ thereof or a person suing or being sued on behalf of the said Government is a party;

(b) connected with or pertaining to the taxation of companies and other bodies established or carrying on business in Nigeria and all other persons subject to Federal taxation;

(c) connected with or pertaining to customs and excise duties and export duties, including any claim by or against the Nigeria Customs Service or any member or officer thereof, arising from the performance of any duty imposed under any regulation relating to customs and excise duties and export duties;

(d) connected with or pertaining to banking, banks, other financial institutions, including any action between one bank and another, any action by or against the Central Bank of Nigeria arising from banking, foreign exchange, coinage, legal tender, bills of exchange, letters of credit, promissory notes and other fiscal measures;

Provided that this paragraph shall not apply to any dispute between an individual customer and his bank in respect of transactions between the individual customer and the bank;

(e) arising from the operation of the Companies and Allied Matters Act or any other enactment replacing that act or regulating the operation of companies incorporated under the Companies and Allied Matters Act;

(f) any Federal enactment relating to copyright, patent, designs, trademarks and passing-off, industrial designs and merchandise marks, business names, commercial and industrial monopolies, combines and trusts, standards of goods and commodities and industrial standards;

(g) any admiralty jurisdiction, including shipping and navigation on the River Niger or River Benue and their affluents and on such other inland waterway as may be designated by any enactment to be an international waterway, all Federal Ports, (Including the Constitution and powers of the ports authorities for Federal ports) and carriage by sea;

(h) diplomatic, consular and trade representation;

(i) citizenship, naturalization and a liens, deportation of persons who are not citizens of Nigeria, extradition, immigration into and emigration from Nigeria, passports and visas;

- (j) bankruptcy and insolvency;
- (k) aviation and safety of aircraft;
- (l) arms, ammunition and explosives;
- (m) drugs and poisons;
- (n) mines and minerals (including oil fields, oil mining geological surveys and natural gas);
- (o) weights and measures;
- (p) the administration or the management and control of the Federal Government or any of its agencies
- (q) subject to the provisions of this Constitution, the operation and interpretation of this Constitution in so far as it affects the Federal Government or any of its agencies;
- (r) any action or proceeding for a declaration or injunction affecting the validity of any executive or administrative action or decision by the Federal Government or any of its agencies; and
- (s) such other jurisdiction civil or criminal and whether to the exclusion of any other court or not as may be conferred upon it by an Act of the National Assembly;

Provided that nothing in the provisions of paragraphs (p), (q) and (r) of this subsection shall prevent a person from seeking redress against the Federal Government or any of its agencies in an action for damages, injunction or specific performance where the action is based on any enactment, law or equity;

(2) The Federal High Court shall have and exercise jurisdiction and powers in respect of treason, treasonable felony and allied offences.

(3) The Federal High Court shall also have and exercise jurisdiction and powers in respect of criminal causes and matters in respect of which jurisdiction is conferred by subsection (1) of this section.”

The provisions of Section 251 of the Constitution of the Federal Republic of Nigeria, 1999, hereinafter called the 1999 Constitution, are very clear and unambiguous. It is the section that confers jurisdiction on the Federal High Court, which jurisdiction clearly does not include dealing with any case of simple contract or damages for negligence as envisaged by the action before the trial court.

I therefore have no hesitation in agreeing with learned counsel for the cross-appellant that the trial court had no jurisdiction in the matter as framed before it and ought to have same struck out.

In conclusion, I allow the cross appeal for being meritorious and order
B that Suit No. FHC/IB/CS/10/99 be and is hereby struck out with costs
which I assess and fix at N10,000.00 to the cross-appellant.

It is further ordered that the main appeal be and is hereby struck
out for being incompetent while the cross-appeal is allowed.

C _____

ONU JSC

I have been privileged to read before now the judgment prepared
by my learned brother, Onnoghen, JSC. I am in entire agreement with
D him that the preliminary objection is meritorious and ought therefore to
succeed.

The cross-appeal having regard to the claim of the appellant be-
comes otiose since cross-respondent filed no reply to the cross-appeal,
E the suit be and is accordingly struck out with similar consequential or-
ders as to costs as contained in the lead judgment.

EJIWUNMI JSC

F I have had the privilege of reading in advance the draft of the
judgment just delivered by my learned brother, Onnoghen, JSC. In that
judgment, the facts relevant to this appeal have been succinctly set out
and I do not need to set them down in this judgment. However, it is
G pertinent to note that the first part of this appeal relates to the preliminary
objection filed by the respondent against the appeal, which is for an order
that the appeal and/or issues formulated by the appellant be struck out
and/or dismissed on the grounds that they are incompetent.

H Specifically, the grounds on which the objection is based are:-

*“(a) No leave of court was sought and/or obtained before the
filing of the appellant’s Notice of Appeal.*

(b) The issues are not supported by any ground of appeal filed and

should be discountenanced, and

(c) In any event, the learned trial Judge had no jurisdiction to entertain the appellant's claim as constituted before it."

It is manifest from the records that the Notice of Appeal filed by the appellant against the judgment of the court below was not filed within B the period of time allowed by the rules under Section 31 of the Supreme Court Act, 1960, an appellant who has failed to appeal timeously must seek and be granted the following prayers by this court They are -

"(a) Extension of time to seek leave to appeal.

(b) Leave to appeal; and

(c) Extension of time within which to appeal."

As the appellant failed to seek to regularise his appeal in accordance with the Rules of Court, this appeal is incompetent. I do not need to consider the other grounds raised by the respondent's preliminary objection as I agree with the fuller reasons given in the lead judgment of my D brother, Onnoghen, JSC. I also abide with the order made as to cost.

MUSDAPHER JSC

I have read before now the judgment of my Lord, Onnoghen, JSC., just delivered and I entirely agree. For the same reasons ventilated in the judgment, which I adopt as mine, I too strike out the appeal as F being incompetent and I allow the cross-appeal in that the trial court has no jurisdiction in the matter and Suit No. FHC/IB/CS/10/99 be and is hereby struck out. The respondent/cross-appellant is entitled to costs assessed at N10,000.00.

OGBUAGU JSC

I have had the privilege of a preview of the judgment of my learned brother, Onnoghen, JSC., just delivered. I am in entire agreement with H him that the main appeal is incompetent and therefore should be struck out while the cross-appeal should be allowed as it is meritorious.

I wish however, to make my own contribution if only to expatiate

thereof. The appellant who was the plaintiff, took out a Writ of Summons against the defendant who is the respondent in this appeal. In paragraph 39 of the Statement of Claim, the following appear:

“39. *WHEREOF the plaintiff claims from the defendant as follows:*

(a) *The sum of N14,858,752.25 (Fourteen Million, Eight Hundred and Fifty-Eight Thousand Seven Hundred and Fifty Two Naira Twenty-Five Kobo) as damages for breach of contract or in the alternative damages for negligence.*

(b) *Interest at the rate of 21% on the said sum from 30th June 1997, until judgment is delivered and hence until judgment the judgment debt (sic) is liquidated”.*

The respondent did not file a Statement of Defence, but instead filed a demurrer pursuant to the then applicable Order 27 of the Federal High Court (Civil Procedure) Rules, 1976, and therein urged the court, to dismiss the suit on the ground that the appellant’s claims are time barred based on the provisions of the Carriage of Goods by Sea Act, Cap. 44 Laws of the Federation of Nigeria, 1990. The respondent also filed an affidavit in support of the application. The appellant in opposition to the said application, filed a counter-affidavit. After hearing arguments from both learned counsel for the parties, the learned trial Judge - Nnamani, J., in a considered Ruling held that the applicable limitation period is nine (9) months and that the writ was not issued within the said period. In spite of this finding of fact, his Lordship dismissed the respondent’s said application.

Comment: By filing a demurrer, the defendant is deemed to have admitted all the facts in the Statement of Claim.

The respondent, understandably, appealed to the court below that allowed the appeal and dismissed the appellant’s said suit. The appellant aggrieved by the said decision, had appealed to this court. The Notice of Appeal, is dated 25th June, 2001 but was filed on 4th July, 2001 -(i.e two days late). The respondent also filed a cross-appeal on 6th December, 2004 with the leave of this court.

I note that by a motion dated and filed on the same 20th Decem-

ber, 2004, the respondent gave Notice of Preliminary Objection to the appeal of the appellant. This court, on that 6th December, 2004, also granted leave to the respondent, to also raise and argue, a fresh issue of jurisdiction, which was not raised in the court below.

In the said Notice of Preliminary Objection, the respondent, is B praying for an order of the court that the appeal and/or issues formulated by the appellant, be struck out and/or dismissed on the ground that they are incompetent. Specifically, the grounds for the reliefs sought, are stated to be as follows:

“(a) No leave of court was sought and/or obtained before the C filing of the Appellant’s Notice of Appeal.

(b) The issues are not supported by any ground of appeal filed and should be discountenanced, and

(c) In any event, the learned trial Judge had no jurisdiction to D entertain the appellant’s claim as constituted before it.”

On 6th March, 2006, when this appeal came up for hearing there was no appearance for the appellant who was himself absent and there was no reason for their absence even though there was evidence that E there was service of the Hearing Notice on the learned counsel for the appellant. In the circumstances, the appellant’s brief of Argument filed on 10th March, 2002, was deemed by the court as having been duly argued. Thereafter, Olorunfemi, Esq., learned counsel for the respon- F dent, referred to their notice of preliminary objection and the arguments therein incorporated in the respondent’s brief at pages 2 and 3. He also referred to their cross-appeal and the brief of argument filed in respect thereof. He pointed out and it is noted by me, and the court, that the G appellant never filed a Reply to the respondent’s said cross-appeal. He adopted the two briefs and urged the court to dismiss the appellant’s appeal and allow the respondent’s appeal.

It is not in doubt, that the judgment of the Court of Appeal - i.e. H the court below, was delivered on 5th April, 2001, while the Notice of Appeal, was filed on 4th July, 2001 - i.e. (2) two days after the expiration of the statutory period for filing appeals to this court. There is no application by the appellant for leave or for an extension of time and none was

filed or granted. There is no reply filed by the appellant to the respondent's Brief of Argument incorporating the preliminary objection in order to show that the failure to file the said notice within time, did not occasion a miscarriage of justice. However, on the decided authorities, where a
 B Notice of Appeal is/was filed outside the statutory period provided in the Rules of Court and there is no application for leave to file the same out of time, and none was granted, the consequence is that such a Notice of Appeal is incompetent and therefore, liable to be struck out. See Order 6
 C rule 7 of the Supreme Court Rules (as amended in 1999). It is now firmly settled, that a Notice of Appeal or rather, a competent Notice of Appeal is the foundation and substratum of every appeal. Any defects thereto, will render the whole appeal incompetent and the appeal court will lack the requisite jurisdiction to entertain it including any interlocutory application
 D based on the said appeal. See *Aviagents Ltd. v. Balstraust Investment Ltd* (1966) 1 All ER 450; *Anadi v. Okoli* (1977) 3 S.C. (Reprint) 112; (1977) 3 S.C. 37 and *Olarewaju v. Bon Ltd.* (1994) 8 NWLR (Pt. 364) 622 just to mention but a few.

E In other words, a Notice of Appeal against the judgment complained of, is the real and constitutional signal of disaffection against the judgment. See *Alhaji Tukur v. Government of Gondola State* (1988) 1 NWLR (Pt. 65) 39; (1988) 1 SCNJ 54.

F It is perhaps, pertinent to refer to the case of *Peter Odofin & Anor v. Chief Agu & Anor.* (1992) 3 SCNJ 161; (1992) 3 NWLR (Pt. 229) 350 at 369; cited and relied on by the appellant's learned counsel in their brief. *Karibi-Whyte, JSC.*, stated inter alia, as follows:

G *"The compliance vel non of a court is a legal condition which cannot be waived by the parties. Where the condition of want of compliance exists, it is not a mere irregularity which can be cured by consideration of substantial justice but a fundamental defect fatal to the adjudication....."*

H *Nnaemeka-Agu, JSC.*, at page 373 of the NWLR, stated, inter alia as follows:

"Where the statutory period of appeal has expired, the appellate court loses jurisdiction to hear an appeal on the matter. Jurisdiction is a

threshold issue in that a court must have jurisdiction before it can enter into the cause or matter at all or before it can make a binding order in it. Where a court has no jurisdiction in a cause or matter, the only order it can validly make is one striking out the proceedings”.

In respect of ground (b), having regard to the cross-appeal, I, B with respect, do not agree that the issues formulated, are not supported by any of the grounds of appeal filed by the appellant and should therefore, be discountenanced. But I will not go further than this. I am aware that it is now firmly established, that where any issue is not covered by any ground of appeal, the court lacks the power to deal with it and it is not proper for the court to adjudicate on it. See *Krus Thompson Organization Ltd. v. University of Calabar* (2004) 9 NWLR (Pt. 879) 631; (2004) 4 S.C. (Pt.1) 65; (2004) 4 SCNJ 121 at 133. Such an issue, will be discountenanced by the court. See *Modupe v. The State* (1988) 9 S.C. 1; D (1988) 4 NWLR (Pt. 87) 130; (1988) 9 SCNJ 1 and *Labiya v. Alhaji Anretiola & 5 Ors.* (1992) 8 NWLR (Pt. 258) 139; (1992) 10 SCNJ 1.

However, since the said Notice of Appeal, has been held by me to be incompetent and that this court has no jurisdiction to entertain this E appeal, I accordingly discountenance the said ground.

As regards ground (c), I had earlier in this judgment, reproduced the claims of the appellant in paragraph 39 of his Statement of Claim. I repeat that these, in my respectful view, are clearly, a case based on a F simple contract and certainly not on admiralty. A claim for damages for breach of contract, or even the alternative claim for damages for negligence (which as rightly submitted in the brief of the respondent will only be collateral to the contract), cannot be entertained and determined in the Federal High Court. Therefore, the learned trial Judge, lacked the jurisdiction to entertain the claim in simple contract. See *Omosowan & 2 G Ors. v. Chiedozie* (1998) 9 NWLR (Pt. 566) 477 at 484 CA.

What is more, by Section 230(1) of the Constitution of the Federal Republic of Nigeria, 1979 and even by Section 251 of the 1999 Constitution, the Federal High Court, has no jurisdiction in matters relating to simple contracts. Therefore, and this is settled, where a court finds it has no jurisdiction, the proper order to make, is one of striking out and not of

dismissal. See *National electric Power Authority v. Edegbere & Ors.* (2002) 12 S.C. (Pt. II) 119; (2002) 18 NWLR (Pt. 798) 79, (2002) 12 SCNJ 173 and *Chief Lakanmi v. Adene & 3 Ors* (2003) 4 S.C. (Pt. II) 92; (2003) 4 SCNJ 348 at 355 & 363.

B It must be stressed and this is settled, that where a preliminary objection succeeds, there would be no need to go further to consider the arguments in support of the issue or issues for determination. See *National electric Power Authority v. Ango* (2001) 15 NWLR (Pt. 737) 645 at 646 CA., and recently, *ANPP v. The Returning Officer, Abia State Senatorial District (Mr. Festus Ukagwu) & 2 Ors.* (2005) 6 NWLR (Pt. 920) 140 at 170, 171 CA.

D Before concluding this judgment, I need to stress the fact that jurisdiction was certainly not an issue before the court below. What was before it, in my respectful view, was the question of whether the action was statute-barred. Afterwards, in the said demurrer (where the filing of a Statement of Defence is not necessary), the prayer sought therein by the respondent, was for the dismissal of the suit for being statute-barred.

E In the circumstances, I uphold the Preliminary Objection. Both the main appeal and the said suit are hereby and according struck out by me.

F CROSS -APPEAL

Since I have hereinabove held that the learned trial Judge had no jurisdiction in respect of the subject-matter of the suit and the said suit is struck out by me, consequently, the cross-appeal, in my respectful view, has merit. I also allow the same.

G I abide by the consequential order in respect of costs.

H