

SUPREME COURT OF NIGERIA
14TH JULY, 2006. SC. 124/2001
CORAM:- S. M. A. BELGORE CJN, U. A. KALGO, N. TOBI,
M. MOHAMMED, I. OGBUAGU, JJSC

UNION BANK OF NIGERIA PLC. APPELLANT
AND
1. MR. OLUSOJI SOGUNRO
2. THE ASSISTANT INSPECTOR
GENERAL OF POLICE (FHB)
ALAGBON CLOSE IKOYI, LAGOS. RESPONDENTS
3. THE A-G OF THE FEDERATION

APPEALS - Right of appeal - Fundamental rights - Application for leave to enforce - Decision thereon - Is not a decision under s. 241(d), 1999 Constitution - To entitle respondent - To appeal as of right (H1)

APPEALS - Interlocutory appeals - Right of appeal - Where ground is of fact - Or mixed law and fact - Appeal must be with prior leave - Of either trial court or Court of Appeal - Else it is incompetent - Under ss. 241 and 242 1999 Constitution (H2)

APPEALS - Grounds of - Question of fact - Nature of - Where question requires exercise of discretion by court - It is a question of fact - Or mixed law and fact - As exercise of discretion - Would necessarily be based on facts (H3)

COURTS - Issues - Duty of court - To pronounce thereon - Where preliminary objection succeeds - Court is not under a duty to consider arguments - On other issues for determination (H4)

FACTS

The 1st Respondent, as Applicant, had applied for leave to apply to enforce his fundamental right to personal liberty against the Appellant

and the rest of the Respondents, all as Respondents to the Motion for leave. The case of the 1st Respondent was that he was an employee of the Appellant. While so employed, allegations of financial misconduct were made against him by the Appellant. Whereupon the 1st Respondent, who was on leave at the material time, was recalled to appear and answer questions from the Auditors of the Appellant. After the session with the Auditors, 1st Respondent was later interdicted and placed on suspension during which period, he was asked to report to the police, the 2nd Respondent herein. On the strength of the allegations, the Police detained the 1st Respondent in the course of their investigation. Eventually, the police found that the allegations were not substantiated and so released the Respondent. It was following that release, that the 1st Respondent brought the said application for leave to enforce his fundamental right. On 18th October, 1999, the High Court of Lagos State granted to him the said leave. Appellant was dissatisfied with the grant and so appealed to the Court of Appeal. 1st Respondent thereupon raised a preliminary objection to the appeal on the ground that the ground of appeal was necessary but was neither sought nor obtained by Appellant. After hearing of the preliminary objection, the Court of Appeal upheld same and accordingly struck out the appeal. Appellant has brought this appeal to the Supreme Court against that decision of the Court of Appeal.

ISSUES FOR DETERMINATION

“1. Whether an appeal against the decision of a High Court granting leave to enforce the Fundamental right to personal liberty is as of right or must be with leave under the 1999 Constitution.

2. Whether the court below was duty bound to pronounce on all issues raised in the substantive appeal after upholding the preliminary objection to the competence of the appeal before it”.

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

Right of appeal - Fundamental rights

1. I agree with the appellant in its Paragraph 1. 1 of the brief, that “this is a very simple and straight forward appeal.” But strangely to me, it is submitted in the appellant’s brief, that an appeal against an order granting

leave to apply for the enforcement of Fundamental Right to personal liberty, is as of right. Section 241 (1) (d), (f) and (i) of the Constitution of the Federal Republic of Nigeria, 1999 is referred to and reliance is placed on (d) which reads as follows:

“decisions in any civil or criminal proceedings on questions as to whether any of the provisions of Chapter IV of this Constitution has been, is being or is likely to be, contravened in relation to any person”.

But and this is important and should and ought to be borne in mind, that a decision, is yet to be made in the substantive application. With respect, firstly, it is a misconception to submit that a decision on an application for leave to apply to enforce the fundamental right to personal liberty and which is through ex parte, is a decision under Section 241 (d) of the said Constitution and that the decision is one in which the liberty of the appellant is concerned. Very odd indeed to say the least. (p. 3216 C)

APPEALS - Interlocutory appeals

2. Another gross and grave misconception, is the submission on behalf of the appellant in Paragraph 4.6 of the Brief that although subsection (d), does not draw a distinction between grounds of appeal involving questions other than questions of law as does sub-section (b) and therefore, that an appeal shall lie as of right notwithstanding the nature of the questions raised by the ground of appeal.

I agree with the 2nd and 3rd respondents' counsel's submission at page 2 paragraph 5.01 of their Brief, that it is now firmly settled that any ground of fact or mixed law and fact in an interlocutory appeal from the High Court to the court below, will be incompetent except with the prior leave of either the trial court or of the court below first sought and obtained. That is the essence or intendment of Sections 220(1) (b) and 221(1) of the 1979 Constitution of the Federal Republic of Nigeria now Sections 241 (1) (b) and 242(1) of the 1999 Constitution of the Federal Republic of Nigeria.

I hold that the appeal in respect of the lone ground of appeal required leave under Section 242(1) of the 1999 Constitution. I also hold that the Ruling or decision of the trial High Court, was not a final decision

since it did not finally dispose of the rights of the parties in the suit. In other words, an appeal in an interlocutory decision which is not on a ground of law alone, is not competent when prior leave was not sought and obtained. (pp. 3216 G & 3217 D)

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APPEALS - Grounds of - Question of fact

3. The phrase of “a question of law” and “a question of fact”, was examined in the cases of Metal Construction (W.A.) Ltd, v. D.A. Migliore & Ors. - In Re. Miss C. Ogundare (vice versa) (supra) and Otapo v. Sunmonu (1987) 2 NWLR (Pt. 58) 587. The said decision of the trial High Court, I repeat, was on an ex parte motion/application requiring the exercise of discretion as conceded by the appellant in its brief. Surely, exercise of such a discretion as rightly submitted at paragraph 5.01.2 of the 2nd & 3rd respondents’ Brief, would be based on the facts and circumstances to be married to the law on the subject-matter on mixed law and fact. See perhaps, the case of Incomex (sic) (it is Comex) Ltd. v. N.A.B. (i.e. Nigeria Arab Bank Ltd. (1997) 3 NWLR (Pt. 496) 643 at 655 cited and relied on in the Brief of the 2nd and 3rd respondents.

The decision of the court below, was premised on the fact that the ground of appeal which was against the exercise of discretion to grant leave, challenged in effect, both law and fact applied by the trial High Court. This fact in my view, is eloquently borne out and has support from the particulars of error in respect of the lone ground of appeal. While No. I particular is one of fact, particular II is law, particular III is fact and law and it is based on statute-barred which will invoke the calculation of days, months and years. (p. 3218 D)

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Issues - Duty of court - To pronounce thereon

4. In respect of Issue No. 2 of the 2nd and 3rd respondents, since the Preliminary Objection succeeded and was upheld by the court below, I agree with the learned counsel for the respondents in their Paragraph 5.02.1, of their Brief, that there was nothing left for the court below to pronounce upon. Such indulgence, in my respectful view, would have been an academic exercise. The court below was therefore, right and

H

justified, when it declined to go to any other issue and pronounce on it.

It is now settled that where a Preliminary Objection succeeds, there would be no need to go further to consider the arguments in support of other issue or issues for determination. The Preliminary Objection, was so fundamental and indeed, went to the root of the whole appeal and so, with the said decision of the court below, no appeal existed. (p. 3219 F)

NOTABLE POINTS OF INTEREST

TOBI JSC

1. Courts below Supreme Court should decide other issues in alternative

Where a preliminary objection succeeds, a court is not expected to take the merits of the matter. Courts below this court are however advised to take the merits of the matter in the alternative. This is to save litigation time in the event that the court wrongly upheld the preliminary objection. But this is not the situation here. The Court of Appeal rightly, in my view, upheld the preliminary objection. (p. 3223 B)

MOHAMMED JSC

2. Right of appeal is not for respondent under s. 241(1)(d) and (f)(i)

What the appellant failed to realize is that the right of appeal under Section 241(1)(d) and (f)(i) of the 1999 constitution is reserved for an appellant who is in pursuit of the exercise of his Fundamental Rights under Chapter IV of the Constitution or whose personal liberty is in issue in the decision of the High court being appealed against to the Court of Appeal. This right would have been available to the respondent if his Ex-parte application had been refused by the trial court warranting his desire to appeal. Certainly, the appellant which is not complaining of any breach of its Fundamental Rights or its personal liberty from the decision of the trial court, cannot file a ground of appeal of fact alone or of mixed law and fact to support its appeal to the Court of Appeal against the decision of the trial court granting leave to the 1st respondent to enforce his Fundamental Right in exercise of its discretion. (p. 3224 H)

REPRESENTATION

Nojim Tairu, for the Appellant

Duro Adeyele, for the 2nd and 3rd Respondents.

No appearance for the 1st Respondent served.

B

CASES REFERRED TO

Chief A. O. Nwosu & Anor. v. Chukwurah Offor (1997) 2 NWLR (Pt. 487) 274 at 282

C Chief Brief Onyemah & Ors. V. Lambert Egbuchulam & Ors. (1996) 5 NWLR (Pt. 448) 255 at 268

Nepa v. Ango (2001) 15 NWLR (Pt. 737) 627 at 645 C.A

ANPP v. The Returning Officer, Abia State Senatorial District (Mr. Festus Udeagwu) & 2 Ors. (2005) 6 NWLR (Pt. 920) 140 at 170-171

D Okonji & Ors. v. Njokonma & Ors. (1991) 7 NWLR (Pt. 202) 131.
Anyaduba & Anor. v. Nigeria Renowned Trading Co. Ltd. (No. 2) (1992) 5 NWLR (Pt. 243) 535

E 7Up Bottling Co. Ltd. Ors. v. Abiola & Sons Bottling Co. Ltd. (2001) 6 S.C. 73; (2001) 13 NWLR (Pt. 730) 469

Aina v. Jinadu (1992) 4 NWLR (Pt. 233) 91 at 110

Ichie Anoghalu & 3 Ors. v. Nahan Oraelosi & Sole Administrator Ihiala Local Govt. (1999) 10-12 S.C 1; (1999) 10 SCNJ 1 at 10, 12; (1999) 13 NWLR (Pt. 634) 297

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Blay v. Solomon 12 WACA 175 at 176

Bozen v. Altrineham Urban District Council (1903) 1 KB 547

Akinsanya v. U.B.A. Ltd. (1986) 4 NWLR (Pt. 35) 273

Ajani v. Giwa (1989) 3 NWLR (Pt. 32) 796 at 803-804

G Nwadike & Ors. v. Ibekwe (1987) 4 NWLR (Pt. 67) 718 at 721; (1987) 11-12 SCNJ 72

Migliore & Ors. v. Metal Construction (West Africa) Ltd

Re: Miss C. Ogundare (1990) 2 S.C. 33; (1990) 1 NWLR (Pt. 126) 299
H at 314; (1990) 2 SCNJ 20; (1990) ANLR 142 at 149-150 an

STATUTE REFERRED TO

Constitution of the Federal Republic of Nigeria, 1999; ss. 46, 241 and

LEAD JUDGMENT BY OGBUAGU JSC

This is an appeal against the decision of the Court of Appeal, Lagos Division delivered on 14th February, 2001 whereby, it struck out the appellant's appeal on the ground that it is incompetent as leave was neither sought by the appellant nor granted/obtained before the said appeal was filed.

Dissatisfied with the said decision, the appellant has appealed to this court on three (3) grounds of appeal. Without their particulars, they read as follows:

GROUND ONE

"The Court of Appeal erred in law in striking out the appellant's appeal on the basis of the 1st respondent's objection without considering the appellant's counsel's arguments on the objection as canvassed on 22-11-2000".

GROUND TWO

The Court of Appeal erred in law when it held per Amiru Sanusi, JCA., as follows:

"From the facts of the instant case, it is not in dispute that this appeal is on interlocutory matter since it is not on final judgment of the court. It is trite law that an appeal against a decision of High Court on interlocutory matters lies in the Court of Appeal as of right where it relates to question of law. But where the appeal is on ground other than that of law, only then, prior leave of the High Court or the Court of Appeal must be sought and obtained. Failure to obtain such leave would render the appeal incompetence (sic) (See Section 221 (1) of the 1979 Constitution). See also Akwuwu Motors Ltd. v. Sangonuga (1984) 5 S.C. 184; Anaghelu v. Oraelosi (supra), Nwosu v. Offor (supra). It is equally clear from the fact of this case that the appellant in this case did not seek for and obtain leave of the lower court or this court before bringing this appeal which as I said is on an interlocutory matter.

Thus, in the light of all that I have said above, I see merit in the

first leg of the preliminary objection. I therefore uphold the 1st leg of the respondent's objection. I, as such, hold that the appellant's failure to obtain leave from either the lower court or this court renders the appeal incompetent.

B *I therefore uphold the objection and strike out the appeal”.*

GROUND THREE

The Court of Appeal erred in law when it held per Amiru Sanusi, JCA., as follows:

C *“Having so hold (sic) I do not see any use in dealing with the issues for determination raised by the appellant in the appeal. I therefore hereby strike out the appeal with N5000.00 costs against the appellant in favour of the respondent”.*

D The facts of the case briefly stated are that the 1st respondent, was an employee of the appellant. Allegations of financial misappropriation and/or improper and unapproved grant of overdraft facilities to some named customers at the Branch where the 1st respondent, worked were made. The 1st respondent who was on leave, was recalled to appear and answer questions from the Auditors of the appellant. He duly attended and after hearing from him, he was later interdicted and placed on suspension during which period, he was asked to report to the Police - i.e. the 2nd respondent.

F On the strength of the allegations, the Police detained the 1st respondent in the course of their investigation. Eventually, the police found the said allegations against the 1st respondent, not substantiated and in consequence, released him. On his release, the 1st respondent, took out an Originating Motion Ex-Parte at the High Court of Lagos seeking the leave of that court, to enforce his fundamental right to personal liberty. G On 18th October, 1999, that court, granted leave to him to apply to enforce his said Fundamental Right. The appellant, dissatisfied with the said grant or decision, appealed to the Court of Appeal (hereinafter called H “the court below”) on a lone ground of appeal. Briefs were filed and exchanged. In the 1st respondent's Brief, he raised and argued a Preliminary Objection as to the competency of the appeal, on the ground, that the said one ground of appeal having regard to the “Particulars of Error”,

was one of mixed law and fact. That since no prior leave of the court was neither sought nor obtained, the court below, was urged by the 1st respondent, to strike out the appeal. After hearing the learned counsel for the parties on 22nd November, 2000, the court below in its said Judgment, upheld the Preliminary Objection and accordingly, struck out the appeal of the appellant. It is against that decision, that the appellant has appealed to this court. B

The appellant, has formulated two (2) issues for determination, namely:

“1. Whether an appeal against the decision of a High Court granting leave to enforce the Fundamental right to personal liberty is as of right or must be with leave under the 1999 Constitution.” C

2. Whether the 1st respondent’s action in the High Court of Lagos State would not have been liable to be struck out if the court below had considered the merits of the appeal before it” D

On its part, the 2nd and 3rd respondents, formulated also two (2) Issues for determination, namely:

“1) Whether the sole ground of appeal at the court below was of mixed law and fact such as to require the leave of that court or of the trial court for the appeal which was an interlocutory appeal to be competent.” E

2) Whether the court below was duty bound to pronounce on all issues raised in the substantive appeal after upholding the preliminary objection to the competence of the appeal before it”. F

I note that the subject-matter of the application to enforce an alleged Fundamental Right, is strictly one of Master and Servant. But this is not the issue here. It is in fact, to enforce the Fundamental Right to personal liberty. Again, this is not the issue in the instant appeal. G

I note that in Paragraph 4.2 of the Appellant’s Brief, the appellant concedes that the Order made by the High Court of Lagos State on 18th October, 1999 - granting leave to the 1st respondent (who I note, did not file a Brief nor was he represented in this appeal) was an interlocutory Order in that or because, it did not finally determine the rights of the parties. The cases of Olatunde v. Obafemi Awolowo University & Anor. H

3216 Union Bank of Nig. Plc v. Sogunro (2006) 7 KLR Ogbuagu JSC
(1998) 4 S.C. 91; (1998) 5 NWLR (Pt. 549) 178 at 186 (it is also reported in (1998) 4 SCNJ. 59); Balogun v. Adejobi (1995) 2 NWLR (Pt. 375) 131 at 161 and Akinsanya v. U.B.A. (1986) 4 NWLR (Pt. 39) 273 at 293 are cited and relied on in respect thereof.

B It is also conceded by the appellant in its Paragraph 4. 3 of the Brief, that an application for leave, involves the exercise of discretion by the trial court. The cases of bank of Ireland v. Union bank of Nigeria Ltd. & Anor. (19998) 7 S.C. Pt. II) 189; (1998) 10 NWLR (Pt. 569) 178 at 192 (it is also reported in (1998) 7 SCNJ 385) and Maigoro v. Garba C (1999) 7 S.C. (Pt. III) 11; (1999) 10 NWLR (Pt. 624) 555 at 568 are cited and relied on in respect thereof.

I agree with the appellant in its Paragraph 1. 1 of the brief, that “this is a very simple and straight forward appeal.” But strangely
D **to me, it is submitted in the appellant’s brief, that an appeal against an order granting leave to apply for the enforcement of Fundamental Right to personal liberty, is as of right. Section 241 (1) (d), (f) and (i) of the Constitution of the Federal Republic of Nigeria, 1999**
E **is referred to and reliance is placed on (d) which reads as follows:**

“decisions in any civil or criminal proceedings on questions as to whether any of the provisions of Chapter IV of this Constitution has been, is being or is likely to be, contravened in relation to any person”.

F **But and this is important and should and ought to be borne in mind, that a decision, is yet to be made in the substantive application. With respect, firstly, it is a misconception to submit that a decision on an application for leave to apply to enforce the fundamental right to personal liberty and which is through ex parte, is a**
G **decision under Section 241 (d) of the said Constitution and that the decision is one in which the liberty of the appellant is concerned. Very odd indeed to say the least.**

Secondly, another gross and grave misconception, is the sub-
H **mission on behalf of the appellant in Paragraph 4.6 of the Brief that although subsection (d), does not draw a distinction between grounds of appeal involving questions other than questions of law as does sub-section (b) and therefore, that an appeal shall lie as of**

right notwithstanding the nature of the questions raised by the ground of appeal.

Learned counsel referred to the case of Aqua Ltd. v. Ondo State Sports Council (1998) (sic) (it is (19880 10-11 S.C. 31; (1988) 4 NWLR (Pt. 91) 655; (it is also reported in (1988) 10-11 SCNJ 26) – per Wali, B JSC., in which it was clearly held that before a person exercises the same provision as in Section 241 (1)(a) of the 1999 constitution, all that is required before a person exercises the right conferred by the sub-section, is that the decision being appealed against, is a final decision of a C High Court sitting as court of first instance.

I wish to state that the “worry” of the appellant’s learned counsel in Paragraphs 5.5 and 5.6 of its Brief that matters relating of Fundamental Right Enforcement, should be heard expeditiously’s, with respect, of no moment. It is otiose. It does not arise and it is indeed a non-issue. D Equally, the action being statute-barred, is certainly, irrelevant and it is of no consequence in the circumstances of the issue in controversy.

I agree with the 2nd and 3rd respondents’ counsel’s submission at page 2 paragraph 5.01 of their Brief, that it is now firmly E settled that any ground of fact or mixed law and fact in an interlocutory appeal from the High Court to the court below, will be incompetent except with the prior leave of either the trial court or of the court below first sought and obtained. That is the essence or F intendment of Sections 220(1)(b) and 221(1) of the 1979 Constitution of the Federal Republic of Nigeria now Sections 241 (1) (b) and 242(1) of the 1999 Constitution of the Federal Republic of Nigeria. See the cases of Co-operative & Commerce Bank of Nigeria PLC v. Attorney-General of Anambra State & Anor. (1992) 8 NWLR (Pt. 261) G 512 at 552 and 554; (it is also reported in (1992) 10 SCNJ137); Chief Nwosu & Anor. v. Of for (1997) 2 NWLR (Pt. 487) 274 at 282 (it is also reported in (1997) 1 SCNJ 193 at 198, 200); and Akinwale v. Bon (2001) 4 NWLR (Pt. 704) 448 at 455 - 456 cited and relied on in the said brief. H

I hold that the appeal in respect of the lone ground of appeal required leave under Section 242(1) of the 1999 Constitution. I also hold that the Ruling or decision of the trial High Court, was

not a final decision since it did not finally dispose of the rights of the parties in the suit. See also the cases of *Blay v. Solomon* 12 WACA 175 at 176; *Bozen v. Altrineham Urban District Council* (1903) 1 KB 547; *Akinsanya v. U.B.A. Ltd.* (1986) 4 NWLR (Pt. 35) 273; *Ajani v. Giwa* B (1989) 3 NWLR (Pt. 32) 796 at 803-804; *Nwadike & Ors. v. Ibekwe* (1987) 4 NWLR (Pt. 67) 718 at 721; (1987) 11-12 SCNJ 72, *Migliore & Ors. v. Metal Construction (West Africa) Ltd.* In Re: *Miss C. Ogundare* (1990) 2 S.C. 33; (1990) 1 NWLR (Pt. 126) 299 at 314; (1990) 2 SCNJ C 20; (1990) ANLR 142 at 149-150 and *Chief Nwosu & Anor. v. Of for* (supra) and many others. **In other words, an appeal in an interlocutory decision which is not on a ground of law alone, is not competent when prior leave was not sought and obtained.** See *Ichie Anoghalu & 3 Ors. v. Nahan Oraelosi & Sole Administrator Ihiala Local Govt.* D (1999) 10-12 S.C 1; (1999) 10 SCNJ 1 at 10, 12; (1999) 13 NWLR (Pt. 634) 297 per Ogundare, JSC., (of blessed memory).

The phrase of “a question of law” and “a question of fact”, was examined in the cases of *Metal Construction (W.A.) Ltd, v. D.A. Migliore & Ors. - In Re. Miss C. Ogundare* (vice versa) (supra) and *Otapo v. Sunmonu* (1987) 2 NWLR (Pt. 58) 587. The said decision of the trial High Court, I repeat, was on an ex parte motion/application requiring the exercise of discretion as conceded by the appellant in its brief. Surely, exercise of such a discretion as F rightly submitted at paragraph 5.01.2 of the 2nd & 3rd respondents’ Brief, would be based on the facts and circumstances to be married to the law on the subject-matter on mixed law and fact. See perhaps, the case of *Incomex (sic) (it is Comex) Ltd. v. N.A.B. (i.e. Nigeria Arab Bank Ltd. (1997) 3 NWLR (Pt. 496) 643 at 655 cited and relied on in the Brief of the 2nd and 3rd respondents.* G

The decision of the court below, was premised on the fact that the ground of appeal which was against the exercise of discretion to grant leave, challenged in effect, both law and fact applied H by the trial High Court. This fact in my view, is eloquently borne out and has support from the particulars of error in respect of the lone ground of appeal. While No. I particular is one of fact, particu-

lar II is law, particular III is fact and law and it is based on statute-barred which will invoke the calculation of days, months and years.

See the case of Aina v. Jinadu (1992) 4 NWLR (Pt. 233)91 at 110 cited and relied on in the 2nd to 3rd Respondents' Brief and particular IV will be based on fact and law.

The court below, was therefore, right when it - per Sanusi, JCA., at pages 63-64 of the Records, stated inter alia, as follows:

"From the facts of the instant case, it is not in dispute that this appeal is on interlocutory matter since it is not on final judgment of that court. It is trite law that an appeal against a decision of High court on interlocutory matters lies in the court of Appeal as of right where it relates to question of law. But where the appeal is on ground other than that of law, only then, prior leave of the High Court or the Court of Appeal must be sought and obtained. Failure to obtain such leave would render the appeal incompetent (sic). (See Section 221 (1) of the 1999 Constitution. See also Akwuwu (sic) (Akwiwu) Motors Ltd. v. Sangonuga (1984) 5 S.C. 184; Anoghalu v. Oraelosi (supra), Nwosu v. Offor (supra). It is equally clear from the fact of this case that the appellant in this case did not seek for and obtain leave of the lower court or this court before bringing this appeal which as I said is on an "interlocutory matter".

As regards Issue 2 of the appellant, with the greatest respect, it is most irrelevant. This is because, considering the merits of the appeal, it did not arise from the said lone ground of appeal. The said issue is therefore, discountenanced by me and in fact, it is hereby and accordingly, struck out.

In respect of Issue No. 2 of the 2nd and 3rd respondents, since the Preliminary Objection succeeded and was upheld by the court below, I agree with the learned counsel for the respondents in their Paragraph 5.02.1, of their Brief, that there was nothing left for the court below to pronounce upon. Such indulgence, in my respectful view, would have been an academic exercise. The court below was therefore, right and justified, when it declined to go to any other issue and pronounce on it. See the cases of Okonji & Ors. v. Njokonma & Ors. (1991) 7 NWLR (Pt. 202) 131. (it is also reported in

(1991) 9-10 SCNJ 27); Anyaduba & Anor. v. Nigeria Renowned Trading Co. Ltd. (No. 2) (1992) 5 NWLR (Pt. 243) 535 (it is also reported in (1992) 6 SCNJ 204) and 7Up Bottling Co. Ltd. Ors. v. Abiola & Sons Bottling Co. Ltd. (2001) 6 S.C. 73; (2001) 13 NWLR (Pt. 730) 469 at B 493 - 494 (it is also reported in (2001) 6 SCNJ 18) cited and relied on by the 2nd and 3rd respondents in their Brief.

It is now settled that where a Preliminary Objection succeeds, there would be no need to go further to consider the arguments in support of other issue or issues for determination. See Chief Brief C Onyemah & Ors. V. Lambert Egbuchulam & Ors. (1996) 5 NWLR (Pt. 448) 255 at 268; Nepa v. Ango (2001) 15 NWLR (Pt. 737) 627 at 645 C.A. and recently ANPP v. The Returning Officer, Abia State Senatorial District (Mr. Festus Udeagwu) & 2 Ors. (2005) 6 NWLR (Pt. 920) 140 D at 170-171. **The Preliminary Objection, was so fundamental and indeed, went to the root of the whole appeal and so, with the said decision of the court below, no appeal existed.**

In the end result or final analysis, this appeal, even though it is E very frivolous, yet the appellant, is complaining of delay in the hearing of the substantive matter, the delay of course, is the handiwork of the appellant. It cannot eat its cake and have it at the same time. The appeal fails and it is accordingly dismissed.

F Costs follow the event. The 2nd and 3rd respondents are entitled to costs assessed and fixed at N10,000.00 (ten thousand naira) payable to them by the appellant.

G **BELGORE CJN**

I agree with the lead judgment just read by my learned brother, Ogbuagu, JSC. The appeal has no merit and I also dismiss it with the same order as to costs as contained in the lead judgment.

H **KALGO JSC**

I have read in advance the judgment just delivered by my learned

brother, Ogbuagu, JSC. He has, in my view, properly considered all the issues arising in the appeal and I fully agree with his conclusions thereon. I also find no merit in the appeal and I dismiss it with costs as assessed in the said judgment.

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TOBI JSC

I have read in draft the judgment delivered by my learned brother, Ogbuagu, JSC., and I agree with him, I will add this bit of mine.

C

On 18th October, 1999, the High Court of Lagos State granted leave to the 1st respondent as applicant to enforce his fundamental right to personal liberty. The learned trial Judge ordered as follows:

“That leave is hereby granted to the applicant to apply to enforce his Fundamental Rights to personal liberty.”

D

On appeal to the Court of Appeal, a preliminary objection was raised as to the competence of the appeal on the ground that the only ground of appeal was mixed law and fact and leave was neither sought nor obtained before it was filed. The Court of Appeal upheld the objection and struck out the appeal.

Dissatisfied, the appellant has come to this court canvassing two issues:

‘1. Whether an appeal against the decision of a High Court granting leave to enforce the Fundamental Right to personal liberty is as of right or must be with leave under the 1999 Constitution.

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2. Whether the 1st respondent’s action in the High Court of Lagos State would not have been liable to be struck out if the court below had considered the merits of the appeal before it.”

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The 2nd and 3rd respondents formulated two issues:

“1. Whether the sole ground of appeal at the court below was of mixed law and fact such as to require the leave of that court or of the trial court for the appeal which was an interlocutory appeal to be competent.

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2. Whether the court below was duty bound to pronounce on all issues raised in the substantive appeal after upholding the preliminary

objection to the competence of the appeal before it.”

The main issue formulated by the appellant in Issue No. 1 is whether an appeal against the decision of a High Court granting leave to enforce the fundamental right to personal liberty is as of right or must be with leave under the 1979 Constitution. It is the submission of the appellant that an appeal against an order granting leave to apply for the enforcement of the fundamental right to personal liberty is as of right. It is the submission of the 2nd and 3rd respondents that the sole ground of appeal at the Court of Appeal, being one of mixed law and fact, leave was required for the appeal which was interlocutory.

The Court of Appeal said at page 63 of the Record and I will quote the court in extenso:

“From the facts of the instant case, it is not in dispute that this appeal is on interlocutory matter since it is not on final judgment of the court. It is trite law that an appeal against a decision of High Court on interlocutory matter lies in the Court of Appeal as of right where it relates to question of law. But where the appeal is on ground other than that of law, only then, prior leave of the High Court or Court of Appeal must be sought and obtained. Failure to obtain such leave would render the appeal incompetent. It is equally clear from the fact of this case that the appellant in this case did not seek for and obtain leave of the lower court or this court before bringing this appeal which as I said is on an interlocutory matter. Thus, in the light of all that I have said above, I see merit in the first leg of preliminary objection.”

The ground of appeal in focus reads:

“The learned trial Judge erred in law when he granted leave to the respondent to apply to enforce his fundamental right to personal liberty against the appellant.”

The ground of appeal is followed by four particulars. I have no hesitation to come to the conclusion that the ground is not one of law only but of mixed law and fact for which the 1979 Constitution required leave of court to appeal. I cannot therefore fault the decision of the Court of Appeal. Where a court process needs to be filed with leave of court, it must be so filed. Where it is not filed with the leave of court, the court

process is a nullity ab initio.

I realize that the appellant did not address the real question in controversy in his Issue No. 1. The crux of the controversy is not on leave to enforce fundamental right to personal liberty per se but one involving a ground of appeal on mixed law and fact. B

That takes me to Issue No. 2. It is simple and straightforward. Where a preliminary objection succeeds, a court is not expected to take the merits of the matter. Courts below this court are however advised to take the merits of the matter in the alternative. This is to save litigation time in the event that the court wrongly upheld the preliminary objection. C
But this is not the situation here. The Court of Appeal rightly, in my view, upheld the preliminary objection.

In sum, this appeal has no merit. It is dismissed. I award N10,000 costs in favour of the respondents. D

MOHAMMED JSC

The judgment of my learned brother, Ogbuagu, JSC., which he E has just delivered was read by me in draft before today. I entirely agree with his reasoning and conclusion in resolving the issues for determination in this appeal. The facts of the case have been set out fully in the leading judgment. I shall only mention such of the facts that will lead to a F better understanding of my own contribution.

By Originating Motion Ex-parte dated 23-9-99, brought pursuant to the provisions of Section 46(1) of the Constitution of the Federal Republic of Nigeria, 1999, and the Fundamental Rights (Enforcement Procedure) Rules, 1979, the 1st respondent applied before the Lagos State G High Court of Justice for an order to enforce his Fundamental Rights against the appellant and the 2nd and 3rd respondents. After hearing the application, the learned trial Judge, Rhodes-Vivour, J. (as he then was) on 18-10-99, granted the application and ordered: - H

“(1) That leave be and is hereby granted to the applicant to apply to enforce his Fundamental Rights to personal liberty.

That the respondents shall be served with all the processes in the

suit immediately.

That the return date shall be 1st day of November, 1999.”

The record of this appeal does not show what really happened on the return date for the hearing of the application after the respondents
B in the application had been served. However it appears from the record, that the appellant on being served with the Ex-parte Order of the trial court and other processes, reacted by filing a Notice of Appeal against the Ex-parte Order granting leave to the 1st respondent to enforce his
C Fundamental Rights. The Notice of Appeal filed on 28-3-2000 was regularized by the order of the court below granted on 22-6-2000, to 5 file the notice and ground of appeal out of time. The appellant’s appeal was however struck out for being incompetent on a preliminary objection raised by the 1st respondent, resulting in the present further appeal to this court
D by the appellant.

The two issues raised by the appellant in its brief of argument have been adequately dealt with in the lead judgment. The appellant seemed to have relied heavily on the provisions of Section 241(1)(d) and (f)(i) of
E the 1999 Constitution giving an appellant the right to appeal as of right to the Court of Appeal against the decision of a High Court in any civil or criminal proceedings on questions as to whether any provisions of Chapter IV of the Constitution has been, is being or is likely to be contravened
F in relation to any person and in decisions given by the High Court where the liberty of a person or the custody of an infant is concerned. The only ground of appeal filed by the appellant to challenge the Ex-parte Order of the trial court in its appeal at the court below is clearly not a ground of
G law having regard to the number of particulars thereof. The fact that the ground of appeal was filed without leave of the trial court or the Court of Appeal, is also not in dispute. I therefore agree with my learned brother that the court below rightly upheld the preliminary objection of the 1st respondent in striking out the appellant’s appeal which had no valid ground
H of appeal to support it.

What the appellant failed to realize is that the right of appeal under Section 241(1)(d) and (f)(i) of the 1999 constitution is reserved for an appellant who is in pursuit of the exercise of his Fundamental

Rights under Chapter IV of the Constitution or whose personal liberty is in issue in the decision of the High court being appealed against to the Court of Appeal. This right would have been available to the respondent if his Ex-parte application had been refused by the trial court warranting his desire to appeal. Certainly, the appellant which is not complaining of any breach of its Fundamental Rights or its personal liberty from the decision of the trial court, cannot file a ground of appeal of fact alone or of mixed law and fact to support its appeal to the Court of Appeal against the decision of the trial court granting leave to the 1st respondent to enforce his Fundamental Right in exercise of its discretion. See Chief A. O. Nwosu & Anor. v. Chukwurah Offor (1997) 2 NWLR (Pt. 487) 274 at 282.

In the final result, I agree that this appeal should be dismissed. Accordingly, the appeal is hereby dismissed with N10,000.00 costs to the 2nd and 3rd respondents.

Appeal dismissed.

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