

SUPREME COURT OF NIGERIA
15TH DECEMBER, 2006 SC. 126/2000
CORAM:- I. L. KUTIGI, U. A. KALGO, S. A. AKINTAN,
W. S. N. ONNOGHEN, F. F. TABAI, JJSC

1. SAMPSON DANIEL UKPONG

2. AKPAN ABRAHAMETTEH

(For themselves and as representing all APPELLANTS

Senior/Junior Employees of Mobil

Producing Nigeria Unlimited, Qua

Iboe Terminal, Eket)

AND

1. COMMISSIONER FOR FINANCE

AND ECONOMIC DEVELOPMENT RESPONDENTS

2. THE CHAIRMAN, BOARD OF

INTERNAL REVENUE, AKWAIBOM STATE

APPEALS - Grounds of appeal - Preliminary objection against them - Is without foundation - As the grounds are competent and valid (H1)

APPEALS - Grounds of appeal - Error in law - Need for appellant to give particulars - Where not complied with - The ground will not be incompetent - If sufficient particulars can be gleaned therefrom (H2)

APPEALS - Competence - Leave - Tax Authority - S. 26 of the Finance Law - Confers right of appeal to the High Court - On person aggrieved by a decision on tax assessment - And appeal to Court of Appeal should be with leave - Vide s. 221 1979 Constitution (H3)

PRACTICE & PROCEDURE - Appeals - Competence - Leave - Appellate jurisdiction of High Court - In Taxation matters from the decision of Tax Authority - Is not destroyed because the appeal before the High Court - Is pursuant to the High Court Rules - As provided by the relevant statute (H4)

APPEALS - Reply - Finding of appellate High Court - That counter affidavit is not a reply - Where not appealed against - It remains binding on the parties (H5)

TAXATION - Appeals - Procedure - Ambiguity - Where the relevant Rules on the nature of reply - Required from the Commissioner in taxation matters - Is not ambiguous - It shall be upheld unto holding - That counter affidavit is not a reply (H6)

APPEALS - Acquiescence - Reply - Where not filed at all - As required by the relevant Rules - Appellants cannot be said to have acquiesced - To what never existed (H7)

TAXATION - Appeals - Leave - Representative action - As there is a common interest - On the issue of 1st respondent's vires - To reassess appellants' taxation - A representative capacity would avail appellants (H8)

APPEALS - Leave - Issue of law and jurisdiction - Though can be raised at any stage - It is not a free for all exercise - As some principles should be complied with (H9)

JURISDICTION - Appeals - Leave - Where lower court lacked jurisdiction - Over some grounds of appeal filed without leave - The other party's conduct in not objecting - Cannot legally confer jurisdiction (H10)

TAXATION - Assessment - Appeals - Unchallenged finding that 1st respondent lacks vires - For the assessment of taxes - Makes lower court's going into other issues unnecessary (H11)

APPEALS - Taxation - Reply - Points of law - Where no reply was filed by respondent - To appellants' statement of grounds of appeal - Before the appellate High Court - Respondents' point of law - Cannot be considered (H12)

FACTS

The appellants were employees of Mobil Producing Nigeria Unlimited, Eket, Akwa Ibom State. They have been paying their taxes which their employer has been deducting as assessed by the State taxing authority. But sometime in 1996, the State Military Government forwarded a debit advice to the employer of the appellants in the sum of N117,806,877 as under collection of PAYE tax for 1989 - 1994 due from the appellants. Mobil wrote the Government arguing that it was not liable for any tax underpayment since it deducted tax in accordance with the Tax Authority's directive. It suggested that the Government should notify the employees directly. In compliance, the Government issued various demand notices to the 292 employees for additional taxes.

Following imposition of the additional taxes, the employees/appellants appealed against it to the Akwa-Ibom State High Court, Uyo. They contended that the demand notices on liability for outstanding PAYE served on them were a nullity. Because they were signed by the State Commissioner for Finance whereas the person authorized by law to administer the finance law and to be responsible for assessment is the Commissioner for Internal Revenue. Their appeal was allowed by the High Court. The respondents' appeal to the Court of Appeal was allowed despite appellants' preliminary objection to the competence of that appeal. Being dissatisfied, appellant's have now appealed to Supreme Court.

ISSUES FOR DETERMINATION

(1) Whether the High Court of Akwa Ibom State hearing an appeal under The Finance Law by a tax payer against a wrongful imposition of tax or additional tax, exercises original (as opposed to appellate) jurisdiction and whether the appeal before the Court of Appeal was competent when no prior leave of the High Court or the Court of Appeal had been obtained.

2. Whether the requirements of Rule 9(1) of the Finance (Appeals) High Court Rules namely that "within 20 days of the service of the statement of grounds of appeal, the Commissioner (Chairman Board of Internal Revenue) shall file in the Registry of the Court a written reply and

one copy thereof, which shall be signed by the commissioner or by his advocate and shall set forth in paragraphs consecutively numbered a concise statement of the facts and the points of law upon which the commissioner intends to rely”, are satisfied by the mere filing of a counter
B *affidavit contesting the affidavit filed by the appellants to amplify the points raised in the statement of grounds of appeal.*

(3) Whether the respondents’ counter affidavit was competent as a written reply setting forth a concise statement of the facts and point of
C *law “upon which the commissioner intends to rely” and whether the Court of Appeal was competent to suo motu invoke the principles of estoppel by conduct (i.e. standing by, waiver or acquiescence) when neither the respondents nor the court raised these points at the hearing.*

(4) Whether the Court of Appeal was right when it held that the
D *appellants’ appeal to the High Court was incompetent since “the 292 employees of Mobil had 292 separate and distinct causes of action which could not be combined in one cause of action.*

(5) Whether the Court of Appeal was right when it upheld the
E *respondent’s contention that there was a conflict between Section 57(1) of the Personal Income Tax Decree, 1993 and Section 26(1) of the Finance Law of Akwa Ibom State and proceeded to void or nullify Section 26(1) of the Finance Law whereas such issue was not raised before the*
F *High Court and was raised for the first time in the Court of Appeal without the leave of the Court of Appeal.*

(6) Whether the learned Justices of the Court of Appeal were not
G *wrong when they failed to note that the State commissioner for finance had no power to impose taxes and that his purported imposition of additional taxes was an act done without jurisdiction; accordingly, that it was unnecessary to fulfil any “condition precedent” of applying under Decree 104 of 1993 to the appropriate Tax Authority to review an assessment which was ab initio illegal and merely purported.*

H

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

Grounds of appeal - Preliminary objection against them

1. From the reproduction of the three grounds of appeal supra, it be-

comes very obvious that the first arm or ground of objection in this appeal is clearly without foundation. The three grounds clearly attacked the decision of the lower court overruling the preliminary objection of the present appellants on the competence of the appeal as constituted before that court and in my view the grounds are very competent and valid. I hold the view that the legal authorities cited and relied upon by learned counsel for the respondents on this ground of objection are very irrelevant and are therefore discountenanced. (p. 3832 D)

Grounds of appeal - Error in law

2. On the competence of ground 6 of the grounds of appeal, it is settled law that though an appellant is required to give particulars of error(s) of law in a ground of appeal complaining of error in law, it is not every failure to do so that will render the ground so couched incompetent particularly where sufficient particulars can be gleaned from the ground of appeal in question and the opponent and the court are left in no doubt as to the particulars in which the ground is grounded - see *Hambe v. Hueze* (2001) 2 S.C. 26; (2001) 5 NSCQR 342 at 352. (E)

Ground 6 complains as follows:-

6. ERROR IN LAW

The Court of Appeal erred in law when it failed to hold that the Akwa Ibom State Commissioner for Finance and Economic Development had no power to impose taxes or additional taxes, not being a Commissioner of Internal Revenue (Chairman, Board of Internal Revenue) and accordingly that the purported assessment of additional taxes by the State Commissioner for Finance and Economic Development was done without jurisdiction and that the same was to that extent null and void ab initio". (F, G)

Can it properly and validly be argued that such a ground of appeal as comprehensive as it is particularized is without sufficient particulars thereby leaving the respondent and the court in doubt as to the particulars of the error in law being complained of therein? A close look at pages 97, 98, 211, 224 and 225 of the record clearly shows that the lower courts duly considered and determined issues relating to ground 6.

I answer the question in the negative and hold that the objections are very much misconceived and without merit and are accordingly overruled.
(p. 3832 G)

B APPEALS - Competence - Leave

3. Both parties are agreed that Section 26 of the Finance Law confers a right of appeal on a person aggrieved by a decision of the tax authority on assessment to appeal to the High Court. It is also not disputed that the proceedings before the High Court of Akwa Ibom State sitting at Uyo was commenced by a notice of appeal and memorandum of grounds of appeal, not a Writ of Summons and the parties thereto were described as appellants and respondents not plaintiffs and defendants. It is also not in dispute that by the provisions of Section 220 of the 1979 Constitution appeals against decisions of the High Court sitting at first instance is as of right while appeals against decisions of the High Court in the exercise of its appellate jurisdiction is with leave either of the High Court or the Court of Appeal under Section 221 of the 1979 Constitution. This is also trite law. It follows therefore that where an appeal is to be with leave but none was obtained, the condition precedent for the validity of such an appeal has not been fulfilled and as a result the appeal is, in law said to be incompetent and the appellate court is in consequence without jurisdiction to entertain same.

In the instant case, I hold the view that the notice and additional assessment giving rise to this case is a decision of the tax authorities which is subject to appeal under Section 26 of the Finance Law and that the said decision is in law a decision of an administrative agency. It is therefore not correct as argued by learned counsel for the respondents, that there was no decision of the tax authorities which could have given rise to a right of appeal to the High Court and as such the High Court sat and heard the matter in the exercise of its original jurisdiction with the resultant decision being appealable as of right. (p. 3834 G)

Appellate jurisdiction of High Court - In Taxation matters

4. The Court of Appeal then decided that “*if the parties before a High*

Court hearing an appeal pursuant to Rule 18(1) above are to be treated as plaintiffs and defendants, it follows logically that the High Court is not exercising its appellate jurisdiction; rather it is sitting as a court of first instance". With due respect to the court, I do not agree with that reasoning and conclusion. The mere fact that the appeal rules made pursuant to the Finance Law adopts the High Court Civil Procedure Rules as the applicable rules of practice and procedure does not mean that the appeal proceedings is a trial at first instant because if it were so there would have been no need to make the Finance Law (Appeals) High Court Rules in the first place. It is important to note that the Finance Law (Appeals) (High Court) Rules empowers the court hearing an appeal on income tax matters to ensure that the procedure shall be assimilated as nearly as may be and with such modifications as may be necessary to render them conveniently applicable. The law remains that no right of appeal exists except as statutorily prescribed. In the instant case, Section 26 of the Finance Law conferred on the appellants this right of appeal against the decision of the tax authority to the High Court which they duly exercised and I hold the view that the decision of the High Court on that appeal so lodged was in exercise of that court's appellate Jurisdiction and as such any appeal against that decision is an appeal not against the decision of the High Court in its original jurisdiction and therefore under the provisions of Section 221 of the 1979 Constitution, leave of the High Court or the Court of Appeal is required as a condition precedent for the validity or competence of that appeal. In the instant case both parties agree that no such leave was obtained before and or during the hearing of the appeal in the Court of Appeal. In consequence, I come to the irresistible conclusion that the appeal was incompetent and ought to have been struck out by that court. (p. 3836 A)

APPEALS - Reply - Finding of appellate High Court

5. It is clear from the record that after lodging the notice of appeal, appellants or their advocate must file a written statement of their grounds of appeal. On the other hand, the respondents filed a counter affidavit which is being contended is as good as the required written reply envis-

aged by the rules. The High Court found that it is not a written reply and there was no appeal against that finding before the Court of Appeal. The legal effect of that finding which was not appealed against as also conceded by learned counsel for the respondents is that the respondents are
B deemed to have accepted that finding which is therefore binding on the parties irrespective of the allegation that the point was raised suo motu by the court in its judgment. If it was so, it was the duty of the respondents against whom the finding was made to have appealed against same at the
C Court of Appeal which they failed to do. The law is that the finding stands unchallenged and therefore binding. It was not for the appellants in whose favour the finding was made to cross-appeal against same.
(p. 3838 G)

D TAXATION - Appeals - Procedure - Ambiguity

6. That apart, the provisions of Rules 6 and 9(1) of the relevant Rules are clear and unambiguous. While Rule 6 says that the written Statement of the grounds of appeal shall be signed by “the appellant or his advocate”,
E Rule 9(1) states clearly that the written reply to the statement of the grounds of appeal stating the facts and any points of law relied upon by the respondents shall be signed by the commissioner or by his advocate. It is not in dispute that the commissioner did not file a written reply
F containing a concise statement of the facts and points of law to be relied upon at the hearing of the appeal as required by the rules neither is there any evidence that the commissioner signed any such written reply. It is not on record that the counter affidavit regarded as the envisaged written
G reply by the lower court was signed by the commissioner or his advocate. That apart, It is the law that for an affidavit to be valid and used in any proceedings, it must contain statements of facts only and not law, whereas the written reply required in Rule 9(1) must contain in addition to statement of facts, points of law to be relied upon at the hearing of the
H appeal. That being the case, legally speaking, a counter affidavit cannot be a substitute for the written reply envisaged by Rule 9(1) and I so hold.
(p. 3839 C)

Acquiescence - Reply - Where not filed at all

7. On the sub issue as to whether appellants acquiesced, I hold the view that they did not, they cannot be said to have acquiesced to what never existed. No reply was filed and it cannot be pretended that any existed. The issue of acquiescence therefore did not arise in this case. Both parties and the High Court treated the counter affidavit for what it really is, a counter affidavit which also necessitated the filing of a further affidavit by the appellants. In whatever way one looks at the issues, they must be resolved in favour of the appellants and I so resolve them. (p. 3839 H) C

TAXATION - Appeals - Leave - Representative action

8. There is no doubt that the appellants were granted leave to prosecute the appeal for themselves and on behalf of the other appellants and that what was contested was not the quantum of the tax demanded from each employee neither were they claiming any damages. What was in contest was the exercise of reassessment which the High Court found “was done in one exercise..... their taxes are deducted at source from their income by their common employer and paid over to the taxing authority. In the present case, it is not necessary to consider the individual taxes and if the appeal succeeds, the entire exercise would be set aside to the benefit of all the appellants. A single order would therefore be made for the benefit of all the appellants”. I hold the view that the High Court is right in so finding and that the Court of Appeal was in error when it set aside that finding. I find no diverse interests of the appellants in the subject matter of the appeal but a common interest, the fundamental issue for determination in the appeal being whether the 1st respondent has the vires to reassess the appellants and demand payment of the reassessed tax not being a taxing authority. I hold the view that it is more convenient to have the issue determined in a single representative action, than for each of the 292 employees to bring separate appeals for the same relief(s). The effect of the appeal before the High Court is like the appellants seeking a declaration that the 1st respondent not being the taxing authority has no power to reassess and demand payment of additional tax from the appellants and I hold the view that in such a situation, a representative D E F G H

capacity would avail the appellants. I hold that to hold otherwise is to interpret the rules on representative capacity strictly which will lead to injustice and miscarriage of justice.

In the instant case, Order 11 Rule 8 of the High Court (Civil Procedure) Rules provides as follows:-

“where more persons than one have some interest in one suit, one or more of such persons may with approval of the court be authorized by the persons interested to sue or to defend in such suit for the benefit of or on behalf of all parties so interested”.

I hold the view that the above provisions clearly grounds the leave granted by the High Court to the appellants and that the Court of Appeal was in error in deciding otherwise. I therefore resolve the issue in favour of the appellants. (pp. 3841 D/ 3842 D)

D

Appeals - Leave - Issue of law and jurisdiction

9. From the submissions of both counsel, it is very clear that they are ad idem that no leave of the court was obtained before the issues as to the conflicts between the provisions of Decree 104 of 1993 and Finance Law as well as condition precedents to an appeal against assessment to the High Court were raised and determined by the Court of Appeal.

The law on the matter remains as set down by this court in very many cases some of which were cited and relied upon by learned counsel for the appellants to the effect that though a question of law and jurisdiction can be raised at any time in the proceedings, it is not a free for all exercise; that though the courts can raise a matter of law, Constitution, and jurisdiction at any time, the parties must be given the opportunity of addressing it on it so as not to breach the rules of fair hearing. The above principles form the basis for the rationale behind the principles of law that a party to an appeal that intends to raise a new or fresh issue or introduce a novel point or matter into an appeal must first seek leave to do so, otherwise that party will not be allowed to raise a fresh point which was not pronounced upon by the court below. (p. 3844 E)

Where lower court lacked jurisdiction - Over some grounds

10. Learned counsel for the respondents had agreed that since the issue was grounded on a ground of appeal before the lower court to which appellants raised no objection, they are in effect estopped from raising the complaint in this court. With due respect to learned counsel for the respondents, I do not agree that that is the correct statement of the applicable law. I hold the view that a party cannot by conduct or action confer jurisdiction on a court which would ordinarily have none in a particular matter. It follows therefore that the appellants' conduct in not opposing or objecting to the grounds of appeal without leave which in law robs the lower court of the jurisdiction to entertain and determine the issue cannot legally thereby confer jurisdiction on that court to so determine the issue brought before it without the requisite leave of court. (p. 3845 B)

TAXATION - Assessment - Appeals - Unchallenged finding

11. On the second arm of the submissions, I agree with learned counsel for the appellants that there was no specific ground of appeal against the specific finding by the High Court that the State Commissioner for Finance is not the person responsible for the assessment, collection of and accounting for the taxes imposed under the finance Law. The High Court consequently declared as null and void the additional tax assessment by the said State Commissioner for Finance and economic Development. If the Court of Appeal had given adequate consideration to that finding, the court would not have considered the question of conflict and conditions precedent with reference to Sections 57 and 60 of the Personal Income Tax Decree No. 104 of 1993. Were there a valid assessment, then the question of condition precedent to an appeal or further appeal against that assessment would have become relevant and applicable not when as found and held by the High Court, the assessment was invalid or null and void ab initio since the same cannot be said to qualify as assessment for additional tax. (p. 3845 E)

APPEALS - Taxation - Reply - Points of law

12. Finally, it must be noted that the respondents have been found not to have legally filed any reply to the appellants' statement of grounds of

appeal in which facts, questions or points of law to be relied upon at the hearing of the appeal before the High Court were raised. That being the case, it follows that like facts not pleaded going to no issue, the points of law such as conflict between the provisions of Decree No. 104 of 1993 and Finance Law and the condition precedent to the appeal against assessment to the High Court not being so raised in any reply, have no basis for consideration by either the High Court or the Court of Appeal and I so hold.

In whatever angle one looks at the issues under consideration, they have to be resolved in favour of the appellants. I therefore order accordingly.

In conclusion, I find merit in this appeal which is accordingly allowed. (p. 3846 A)

NOTABLE POINT OF INTEREST

AKINTAN JSC

1. Appeal without leave - Ought to be struck out for being incompetent
The appellants commenced their challenge of the new assessments first by applying to Uyo High Court for “*leave to the applicants to maintain and/or prosecute this appeal in a representative capacity.*” The leave sought was granted and this was followed by the filing of their “Notice of appeal” at the Uyo High Court. The Uyo High Court allowed their appeal. The respondents were dissatisfied with that verdict and they filed an appeal against the decision of the Uyo High Court to the Court of Appeal. The appeal filed to the Court of Appeal was, however, without leave. The Court of Appeal erroneously entertained the appeal, allowed it and set aside the decision of Uyo High Court. The present appeal is against the decision of the Court of Appeal. The lower court failed to take into consideration the competency of the appeal before it, having regard to the fact that the required leave was not sought and obtained before it was filed. The result therefore is that there was no competent appeal before the Court of Appeal and the respondents’ appeal ought to have been struck out. (p. 3848 E)

REPRESENTATION

N. E. Andem-Ewa (Mrs.) (with her, A. E. Attih and Fidelis Ibiang), for the Appellants.

Akin Akintoye II (with him, Solomon Olorukooba), for the Respondent.

B

CASES REFERRED TO

Mobil Oil Nigeria Ltd. v. Fed B. I. R (1977) 3 S.C. (Reprint) 1; (1977-1978) 11 NSCC 110

Nwosu v. Offor (1997) 2 NWLR (Pt. 487) 274

C

Ifeajuna v. Ifeajuna (1999) 1 NWLR (Pt. 587) 492

Hambe v. Hueze (2001) 2 S.C. 26; (2001) 5 NSCQR 342 at 352

Amachere v. Newington (1952) 14 WACA 901

Jov v. Dom (1999) 7 S.C. (Pt. III) 1; (1999) 9 NWLR (Pt. 620) 538

Ikeanyi v. ACB Ltd. (1997) 2 NWLR (Pt. 489) 509

D

A-G Oyo State v. Fairlakes Hotel Ltd. (1988) 12 S.C. (Pt. I) 1; (1988) 5 NWLR (Pt. 92) 1

Bankole v. Pelu (1991) 8 NWLR (Pt. 211) 528

Uor v. Loko (1988) 2 NWLR (Pt. 77) 430

E

Akibu v. Oduntan (2000) 7 S.C. (Pt. II) 106; (2000) 13 NWLR (Pt. 685) 446 or (2007) 7 SCNJ 189

FMBN v. NDIC (1999) 2 S.C. 44; (1999) 2 SCNJ 57 at 78 or (1999) 2 NWLR (Pt. 591) 333

F

Anambra State Environmental Sanitation Authority (ASESA) & Anor. v. Raymond Ekwenem (2001) FWLR (Pt. 51) 2034 at 2066

Salami v. Mohammed (2000) 6 S.C. (Pt. II) 37; (2000) 9 NWLR (Pt. 673) 469

G

STATUTES & RULES REFERRED TO

Constitution of the Federal Republic of Nigeria, 1979 s. 221(1)

Personal Income Tax Decree No. 104, 1993 s. 26, 57 and 60

Finance Law of Cross River State s. 26

H

Finance Law (Appeals) High Court Rules of Cross River State, rr. 6(1), 8, 9(1) and 26

LEAD JUDGMENT BY ONNOGHEN.JSC

This is an appeal against the judgment of the Court of Appeal, Calabar Division, in appeal No. CA/PH/267/97 delivered on 13th January, 2006, in which the court allowed the appeal of the present respondents.

B The appellants as employees of Mobil Producing Nigeria Unlim-
ited, Eket, Akwa Ibom State appealed against the imposition on 12/8/96
of additional taxes on them. Earlier on, the Akwa Ibom State Military
Government forwarded a debit advice to the employers of the appellants
in the sum of N117,806,877.5 as under collection of PAYE tax for 1989-
C 1994 due from the employees (appellants). In reaction, Mobil Producing
Nigeria Unlimited, (hereinafter called Mobil) wrote to the Government on
2/8/1996 arguing that it had no statutory duty to assess or determine the
tax payable by its employees not being the taxing authority and that it was
D not liable for any tax underpayment in amounts it correctly deducted in
accordance with official tax card duly prepared, endorsed and stamped
by the Tax Authority and finally suggested that the Government should
notify the employees directly. In compliance with the suggestion, the
E Government issued various demand notices to the 292 employees for
additional taxes. The notices were issued by the Akwa Ibom State Com-
missioner for Finance and not the Commissioner for Internal Revenue
a.k.a the Chairman, Board of Internal Revenue, who the appellants con-
F tend has the statutory responsibility to impose taxes.

Following the imposition of the additional taxes, the employees-
appellants appealed against same to the Akwa Ibom State High Court,
Uyo contending inter alia, that “the demand notices on liability for out-
standing PAYE served on the appellants are a nullity in that the same are
G signed by the State Commissioner for Finance and Economic Develop-
ment, whereas the person authorized by law to administer the finance
law and to be responsible for assessment is the Commissioner for Inter-
nal Revenue.

H The appeal was allowed by the High Court but the Court of Appeal
overruled that decision resulting in the present appeal before this court. It
is very important to note that the appellants did raise a preliminary objec-
tion to the competence of the appeal then pending before the Court of

Appeal which objection was overruled in the judgment of that court.

In the appellants' brief of argument filed on 13/11/2000 by A. Ekong Bassey, Esq, SAN., and adopted in argument of the appeal on 18/9/2006, by Nella Andem-Ewa (Mrs.) of counsel, the following issues have been identified for determination; namely:

“(1) Whether the High Court of Akwa Ibom State hearing an appeal under The Finance Law by a tax payer against a wrongful imposition of tax or additional tax, exercises original (as opposed to appellate) jurisdiction and whether the appeal before the Court of Appeal was competent when no prior leave of the High Court or the Court of Appeal had been obtained. C

2. Whether the requirements of Rule 9(1) of the Finance (Appeals) High Court Rules namely that “within 20 days of the service of the statement of grounds of appeal, the Commissioner (Chairman Board of Internal Revenue) shall file in the Registry of the Court a written reply and one copy thereof, which shall be signed by the commissioner or by his advocate and shall set forth in paragraphs consecutively numbered a concise statement of the facts and the points of law upon which the commissioner intends to rely”, are satisfied by the mere filing of a counter affidavit contesting the affidavit filed by the appellants to amplify the points raised in the statement of grounds of appeal. D E

(3) Whether the respondents' counter affidavit was competent as a written reply setting forth a concise statement of the facts and point of law “upon which the commissioner intends to rely” and whether the Court of Appeal was competent to suo motu invoke the principles of estoppel by conduct (i.e. standing by, waiver or acquiescence) when neither the respondents nor the court raised these points at the hearing. F G

(4) Whether the Court of Appeal was right when it held that the appellants' appeal to the High Court was incompetent since “the 292 employees of Mobil had 292 separate and distinct causes of action which could not be combined in one cause of action. H

(5) Whether the Court of Appeal was right when it upheld the respondent's contention that there was a conflict between Section 57(1) of the Personal Income Tax Decree, 1993 and Section 26(1) of the Fi-

nance Law of Akwa Ibom State and proceeded to void or nullify Section 26(1) of the Finance Law whereas such issue was not raised before the High Court and was raised for the first time in the Court of Appeal without the leave of the Court of Appeal.

B (6) Whether the learned Justices of the Court of Appeal were not wrong when they failed to note that the State commissioner for finance had no power to impose taxes and that his purported imposition of additional taxes was an act done without jurisdiction; accordingly, that it was unnecessary to fulfil any “condition precedent” of applying under Decree 104 of 1993 to the appropriate Tax Authority to review an assessment which was ab initio illegal and merely purported.”

C On the other hand, learned counsel for the respondents, Akin Akintoye II in the respondents brief of argument deemed filed on 30/4/2003 formulated five issues for determination as follows:

“ISSUE ONE:

Whether in the course of hearing this case, the High Court Uyo in Akwa Ibom can be said to have sat in its original or appellate jurisdiction for the purpose of determining whether leave of court is required to be obtained when appealing against its judgment.

“ISSUE TWO:

Whether from the circumstances of this case, the appellants are entitled to raise and succeed on the impropriety or otherwise of the respondents’ counter affidavit which was deemed to be a reply by court and relied upon without objection.

“ISSUE THREE:

Whether the action of the appellants at the High Court which is grounded in assessment and demand of additional taxes can be maintained in a representative capacity having regard to the cause or causes of action and parties involved.

“ISSUE FOUR:

H Whether the Court of Appeal was right in nullifying Section 26(1) of the Finance Law of Akwa Ibom State on grounds of inconsistency with Section 57(1) of the Personal Income Tax Decree No. 104 of 1993.

“ISSUE FIVE:

Whether from the circumstances of the case, the Court of Appeal has jurisdiction to pronounce on the exercise of power or otherwise of the 2nd respondent with regard to assessment and demand of taxes in Akwa Ibom State.”

In addition to the above issues, learned counsel for the respondents filed a notice of preliminary objection on the 9th day of March, 2004, against grounds 2, 3 and 6 of the grounds of appeal on the following grounds:-

“1. Grounds two and three and issues argued therein are in respect of the preliminary objection raised by the appellants/respondents in the court below which they have not appealed against;

2. Ground 6 is an error in law to which no particular is given. The nature of the complaint demands that adequate particulars be furnished.

3. Ground 6 never arose for determination before the court below and no leave of this court was obtained to raise it as a fresh issue”.

Arguments in respect of the objection are preferred in the respondents’ brief of argument. In respect of grounds 2 and 3 of the grounds of appeal before this court, learned counsel noted that the grounds are based on the preliminary objection raised by the then respondents in the lower court which objection was overruled but that appellants have not appealed against that ruling, and that none of the grounds of appeal directly or specifically attacked the decision; that the above grounds only attacked some aspects of the issues and materials considered by the lower court before arriving at the decision appealed against, relying on Akibu v. Oduntan (2000) 7 S.C. (Pt.II) 106; (2000) 13 NWLR (Pt. 685) 446 or (2007) 7 SCNJ 189 and that any complaint not so related is irrelevant, relying on FMBN v. NDIC (1999) 2 S.C. 44; (1999) 2 SCNJ 57 at 78 or (1999) 2 NWLR (Pt. 591) 333.

On ground 6 of the grounds of appeal, learned counsel submitted that the ground is incompetent in law since no particulars of the alleged error in law have been supplied by the appellants as required by law relying on Anambra State Environmental Sanitation Authority (ASESA) & Anor. v. Raymond Ekwenem (2001) FWLR (Pt. 51) 2034 at 2066

which is a Court of Appeal decision.

Secondly, learned counsel submitted that the complaint in ground 6 never arose for determination before the lower court as it did not form part of the grounds of appeal and there was no cross-appeal; that the same ground not being related to the decision is incompetent, relying on Akpunonu v. Beakart Oversees (2006) 7 SCNJ 105.

Thirdly, that the lower court did not determine the matter because the High Court did not determine the competence of the Commissioner for Finance to impose taxes before the name of the 1st respondent was struck out. Finally, that the matter was a fresh issue since it was neither decided by the High Court, nor Court of Appeal, for which prior leave of this court is required, relying on Salami v. Mohammed (2000) 6 S.C. (Pt. II) 37; (2000) 9 NWLR (Pt. 673) 469. Learned counsel then urged the court to strike out grounds 2, 3 and 6 of the grounds of appeal.

On her part, learned counsel for the appellants, Nella E. Andemewa (Mrs.), in the appellants' reply brief filed on 15/9/06, submitted that it is erroneous to contend that there is no appeal against the decision on the preliminary objection particularly as the decision forms part of the judgment of the lower court appealed against; that an appellant needs not give separate particulars of error in law when the same are sufficiently embodied in the grounds of appeal as contained in ground 6 and that the court and respondents are in no doubt as to the particulars, relying on Hambe v. Hueze (2001) 2 S.C. 26; (2001) NSCQR 342 and 352; that the issue of striking out of the name of 1st respondent was pronounced upon by the Court of Appeal and that the issue was raised both as a ground of appeal and as issue for determination by the respondents themselves; that pages 97, 98, 211 and 225 of the record confirm that the lower court considered and determined issues relating to ground 6 contrary to the submission of counsel for the respondents before this court. Learned counsel urged the court to overrule the preliminary objection.

It must be noted that the objection in the lower court was two prone:

i. that the case at Uyo High Court having been brought by way of appeal in accordance with the Finance (Appeals) High Court Rules of

Cross River State, the respondents ought to seek leave of court before appealing to the Court of Appeal as required by Sections 220 and 221 of the 1979 Constitution, and

ii. that the respondents having failed to file a reply at the Uyo High Court in accordance with Rule 9(1) of the Finance Law (Appeal) B High Court Rules, can not raise the issues raised at the Court of Appeal without prior leave of court.

Also to be noted is the fact that the Court of Appeal did not deliver a separate ruling in the preliminary objection on a different date C from the judgment on the appeal but a single judgment on the merit of the appeal in which the objection was considered and overruled. Thirdly, the Notice of Appeal against the judgment of the Court of Appeal at pages 231 to 235 of the record particularly at page 231 thereof states clearly D that the appeal is against the “whole decision” which in effect means that the ruling on the preliminary objection contained in the said judgment of the Court of Appeal appealed against is included.

Looking at the grounds of appeal, grounds 1, 2, and 3 complain without particulars as follows:- E

1. ERROR IN LAW

The learned Justices of the Court of Appeal erred in law when they overruled the respondents’ preliminary objection challenging the jurisdiction of the Court of Appeal to entertain the defendants/ respon- F dents’ appeal without the leave of the High Court or the Court of Appeal, as since the proceedings before the High Court was an appeal, a further appeal only lay to the Court of Appeal with leave (not as of right).....

2. ERROR IN LAW

The Justices of the Court of Appeal erred in law when they held G that the respondents did comply with the provisions of Rule 9(1) of the Appeal Rules by filing a counter affidavit in place of the statutory requirement that the commissioner will file “a written reply which shall be signed H by the Commissioner or by his advocate and shall set forth in paragraphs consecutively numbered, a concise statement of the facts and any points of law upon which the commissioner intends to rely”.....

3. MISDIRECTION

The learned Justices of the Court of Appeal misdirected themselves in law when they held inter alia “..... I accept it as a correct principle of law that a fresh issue not raised in the lower court cannot be entertained on appeal except with the leave of the Court of Appeal and under special circumstances.... from the record, it is unarguable that the appellants filed a reply in the form of a counter affidavit..... Granting but without conceding that the appellants’ reply by way of counter affidavit was not the reply envisaged by Rule 9(1) of the Appeal Rules, learned counsel to the respondents did not timeously object to its being used as a reply, instead he acted on it and having done so, it does not lie on his mouth to say that the appellants failed to file a reply. A party cannot be heard to later complain about an irregular procedure to which he had acquiesced “and this misdirection has occasioned substantial miscarriage of justice.....”

From the reproduction of the three grounds of appeal supra, it becomes very obvious that the first arm or ground of objection in this appeal is clearly without foundation. The three grounds clearly attacked the decision of the lower court overruling the preliminary objection of the present appellants on the competence of the appeal as constituted before that court and in my view the grounds are very competent and valid. I hold the view that the legal authorities cited and relied upon by learned counsel for the respondents on this ground of objection are very irrelevant and are therefore discountenanced.

Finally, learned counsel for the respondents only attacked grounds 2 and 3 leaving out ground 1 (supra). This clearly means learned counsel concedes that ground one validly challenges the decision of the lower court on the preliminary objection and therefore competent.

On the competence of ground 6 of the grounds of appeal, it is settled law that though an appellant is required to give particulars of error(s) of law in a ground of appeal complaining of error in law, it is not every failure to do so that will render the ground so couched incompetent particularly where sufficient particulars can be gleaned from the ground of appeal in question and the opponent and the

court are left in no doubt as to the particulars in which the ground is grounded - see *Hambe v. Hueze* (2001) 2 S.C. 26; (2001) 5 NSCQR 342 at 352.

Ground 6 complains as follows:-

6. ERROR IN LAW

The Court of Appeal erred in law when it failed to hold that the Akwa Ibom State Commissioner for Finance and Economic Development had no power to impose taxes or additional taxes, not being a Commissioner of Internal Revenue (Chairman, Board of Internal Revenue) and accordingly that the purported assessment of additional taxes by the State Commissioner for Finance and Economic Development was done without jurisdiction and that the same was to that extent null and void *ab initio*".

Can it properly and validly be argued that such a ground of appeal as comprehensive as it is particularized is without sufficient particulars thereby leaving the respondent and the court in doubt as to the particulars of the error in law being complained of therein? A close look at pages 97, 98, 211, 224 and 225 of the record clearly shows that the lower courts duly considered and determined issues relating to ground 6. I answer the question in the negative and hold that the objections are very much misconceived and without merit and are accordingly overruled.

Turning to the merit of the appeal, in arguing issue 1, learned counsel for the appellants submitted that the Court of Appeal erred in holding that the High Court in hearing the appeal of the appellants acted in its original jurisdiction and therefore no leave was required for an appeal to the Court of Appeal against its decision in the circumstances particularly as the fact that the Appeal Rules under the Finance Law adopts the High Court Civil Procedure Rules cannot be interpreted to mean that the proceedings thus become a trial at first instance; that it is not disputed that the right of appeal exercised by the appellants in the court was pursuant to the provisions of Section 26 of the Finance Law which is a statutory provision conferring the right of appeal on tax matters and that the reasoning of the lower court that there can be no appeal except from

the decision of a court of record cannot be correct. Learned counsel referred the court to the definition of “Appeal” in Black’s Law Dictionary 5th Ed. and submits that a statute can confer a right of appeal from the decision of an inferior court or tribunal or an administrative agency and
 B further submitted that the Board of Internal Revenue or Tax Authority is an administrative agency whose decision is appealable to the High Court pursuant to Section 26 of the Finance Law; that the failure of the appellants in the court below to obtain the leave of the High Court or Court of
 C Appeal which was a condition precedent to the validity of the appeal rendered the purported appeal to the Court of Appeal incompetent, relying on Anyalogu v. Agu (1988) 1 NWLR (Pt. 532) 129; Lamai v. Orbih (1980) 5-7 SC. 28; Nwosu v. Offor (1997) 2 NWLR (Pt. 487) 274; Ifeajuna v. Ifeajuna (1999) 1 NWLR (Pt. 587) 492.

D On his part, learned counsel for the respondents submitted that the lower court was right in holding that the High Court in considering the appeal acted in its original jurisdiction as opposed to its appellate jurisdiction particularly as the parties to that proceedings were to be re-
 E garded or treated as plaintiffs and defendants and that Section 220 of the 1979 Constitution empowers an aggrieved party or person to appeal against the decision of a High Court to the Court of Appeal as of right where it is a final decision in any civil or criminal proceeding without leave; that
 F there was no adjudication on the matter by the tax authorities before the alleged appeal to the High Court because appellants’ objection to the additional assessment was never placed before the tax authorities for review but headed straight to the High Court upon receipt of the notice of assessment; that the word “appeal” as used in the Finance Law is different
 G from the same word used or envisaged in the Constitution.

**Both parties are agreed that Section 26 of the Finance Law confers a right of appeal on a person aggrieved by a decision of the tax authority on assessment to appeal to the High Court. It is also
 H not disputed that the proceedings before the High Court of Akwa Ibom State sitting at Uyo was commenced by a notice of appeal and memorandum of grounds of appeal, not a Writ of Summons and the parties thereto were described as appellants and respondents**

not plaintiffs and defendants. It is also not in dispute that by the provisions of Section 220 of the 1979 Constitution appeals against decisions of the High Court sitting at first instance is as of right while appeals against decisions of the High Court in the exercise of its appellate jurisdiction is with leave either of the High Court or the Court of Appeal under Section 221 of the 1979 Constitution. This is also trite law. It follows therefore that where an appeal is to be with leave but none was obtained, the condition precedent for the validity of such an appeal has not been fulfilled and as a result the appeal is, in law said to be incompetent and the appellate court is in consequence without jurisdiction to entertain same. See *Nwosu v. Offor* (1997) 2 NWLR (Pt. 487) 274 and *Ifeajuna v. Ifeajuna* (1999) 1 NWLR (Pt. 587) 492.

In the instant case, I hold the view that the notice and additional assessment giving rise to this case is a decision of the tax authorities which is subject to appeal under Section 26 of the Finance Law and that the said decision is in law a decision of an administrative agency. It is therefore not correct as argued by learned counsel for the respondents, that there was no decision of the tax authorities which could have given rise to a right of appeal to the High Court and as such the High Court sat and heard the matter in the exercise of its original jurisdiction with the resultant decision being appealable as of right. It is also very important to note that the Court of Appeal in coming to the decision that the High Court sat in its original jurisdiction in considering and determining the appeal of the appellants relied on the provisions of Rule 18(1) of the Finance Law (Appeals) (High Court) Rules of Cross River State as applicable in Akwa Ibom State which provides for the practice and procedure to be followed in an appeal under Section 26 of the Finance Law which practice and procedure shall be “*assimilated as nearly as may be to the practice and procedure of the High Court in the exercise of its civil jurisdiction and the High Court rules and any other rules amending or substituted for the same shall apply with such modifications as may be necessary to render them conveniently applicable as if the appellant and the com-*”

missioner were respectively the plaintiff and the defendant in an action and evidence in relation to any such appeal may be advanced in any manner in which it may be advanced in an action”.

The Court of Appeal then decided that “*if the parties before a High Court hearing an appeal pursuant to Rule 18(1) above are to be treated as plaintiffs and defendants, it follows logically that the High Court is not exercising its appellate jurisdiction; rather it is sitting as a court of first instance*”. With due respect to the court, I do not agree with that reasoning and conclusion. The mere fact that the appeal rules made pursuant to the Finance Law adopts the High Court Civil Procedure Rules as the applicable rules of practice and procedure does not mean that the appeal proceedings is a trial at first instant because if it were so there would have been no need to make the Finance Law (Appeals) High Court Rules in the first place. It is important to note that the Finance Law (Appeals) (High Court) Rules empowers the court hearing an appeal on income tax matters to ensure that the procedure shall be assimilated as nearly as may be and with such modifications as may be necessary to render them conveniently applicable. The law remains that no right of appeal exists except as statutorily prescribed. In the instant case, Section 26 of the Finance Law conferred on the appellants this right of appeal against the decision of the tax authority to the High Court which they duly exercised and I hold the view that the decision of the High Court on that appeal so lodged was in exercise of that court’s appellate Jurisdiction and as such any appeal against that decision is an appeal not against the decision of the High Court in its original jurisdiction and therefore under the provisions of Section 221 of the 1979 Constitution, leave of the High Court or the Court of Appeal is required as a condition precedent for the validity or competence of that appeal. In the instant case both parties agree that no such leave was obtained before and or during the hearing of the appeal in the Court of Appeal. In consequence, I come to the irresistible conclusion that the appeal was incompetent and ought to have been struck out by that court.

Learned counsel for the appellants, rightly in my view, argued issues 2 and 3 together. Simply put, the issue is whether under the provisions of the applicable rules, a counter affidavit can be said to be the same thing as a reply and where no reply, strictly so called, is filed raising such facts and points of law upon which the respondents intended to rely, the respondents then appellants can raise such points of facts and law subsequently and in the Court of Appeal without prior leave of the court.

In arguing the issues, learned counsel for the appellants referred the court to Sections 6(1) and 9(1) of the Finance Law (Appeals) (High Court) Rules and submitted that it is the Chairman, Board of Internal Revenue that is acknowledged by law to be the respondent in such appeals but that the said respondent never filed a reply in the appeal in issue neither was any filed by his advocate. Rather, a counter affidavit was filed, not even deposed to by the Chairman. Learned counsel then submitted that not having filed a reply as required by law but a counter affidavit, the facts deposed to therein goes to no issue since they were not pleaded, relying on George v. Dominion Flour Mills (1963) 1 All NLR 71; Akpakpuna v. Obi (1983) 7 S.C. 1 and Ipinlaiye II v. Olukotun (1996) 6 NWLR (Pt. 453) 148.

On the holding of the Court of Appeal to the effect that failure to file a reply was an irregularity which the appellants are estopped from raising on the ground of acquiescence, learned counsel for the appellants submitted that failure to file a reply was not adoption of a wrong procedure and that the respondent had the discretion either to file or refuse to do so; that in any event, the point of waiver was raised suo motu by the court without opportunity to the appellants to address the court on it and relied on the cases of Ladipo v. Ajani (1997) 8 NWLR (Pt. 517) 356; Kati v. Jubowu (1972) 1 All NLR (Pt. 2) 180; Atanda v. Lakanmi (1974) 3 S.C. (Reprint) 80; (1974) 3 S.C. 109; Metalimpax v. A.G. Leventis (1976) 2 S.C. (Reprint) 48; (1976) 2 SC. 99; Ogunlowo v. Ogundare (1993) 7 H NWLR (Pt. 307) 610 to urge the court to overrule the decision of the Court of Appeal on the issue.

On his part, learned counsel for the respondents submitted that

the counter affidavit was deemed to be the reply envisaged by Rule 9(1) of the Finance Law because appellants' counsel did not object to its use as such but responded to it by filing a further affidavit; that the issues of the counter affidavit not being a reply was raised suo motu in the judgment of the High Court and that the propriety or otherwise of the counter affidavit being used as a reply was not a subject of appeal at the lower court neither was there any cross appeal on it and that the issue was only used to support preliminary objection on grounds that the contents of the counter affidavit not being a reply raised fresh issues for which leave is required; that the Court of Appeal was right in holding that the counter affidavit satisfied the requirements of Rule 9(1) of the Appeals Rules and urged this court to so hold; that the Court of Appeal was merely stating the obvious that appellants had acquiesced in the use of the counter affidavit as reply without objection.

Now, Rule 6 of the finance Law, (Appeals) (High Court) Rules provides as follows

1. *“within thirty days of the day of lodgment of the notice of appeal, the appellant shall file a written statement of his ground of appeal in the registry of the court together with one copy of such statement;*

2. *the statement shall be signed by the appellant or by his advocate.”*

That apart, Rule 9(1) of the said Rules provides as follows:

“within twenty-one days of the service of the statement of grounds of appeal, the commissioner shall file in the registry of the court, a written reply and one copy thereof which shall be signed by the commissioner or by his advocate and shall set forth in paragraphs consecutively numbered, a concise statement of the facts and any point of law upon which the commissioner intends to rely”.

It is clear from the record that after lodging the notice of appeal, appellants or their advocate must file a written statement of their grounds of appeal. On the other hand, the respondents filed a counter affidavit which is being contended is as good as the required written reply envisaged by the rules. The High Court found

that it is not a written reply and there was no appeal against that finding before the Court of Appeal. The legal effect of that finding which was not appealed against as also conceded by learned counsel for the respondents is that the respondents are deemed to have accepted that finding which is therefore binding on the parties irrespective of the allegation that the point was raised suo motu by the court in its judgment. If it was so, it was the duty of the respondents against whom the finding was made to have appealed against same at the Court of Appeal which they failed to do. The law is that the finding stands unchallenged and therefore binding. It was not for the appellants in whose favour the finding was made to cross-appeal against same.

That apart, the provisions of Rules 6 and 9(1) of the relevant Rules are clear and unambiguous. While Rule 6 says that the written Statement of the grounds of appeal shall be signed by “the appellant or his advocate”, Rule 9(1) states clearly that the written reply to the statement of the grounds of appeal stating the facts and any points of law relied upon by the respondents shall be signed by the commissioner or by his advocate. It is not in dispute that the commissioner did not file a written reply containing a concise statement of the facts and points of law to be relied upon at the hearing of the appeal as required by the rules neither is there any evidence that the commissioner signed any such written reply. It is not on record that the counter affidavit regarded as the envisaged written reply by the lower court was signed by the commissioner or his advocate. That apart, It is the law that for an affidavit to be valid and used in any proceedings, it must contain statements of facts only and not law, whereas the written reply required in Rule 9(1) must contain in addition to statement of facts, points of law to be relied upon at the hearing of the appeal. That being the case, legally speaking, a counter affidavit cannot be a substitute for the written reply envisaged by Rule 9(1) and I so hold.

On the sub issue as to whether appellants acquiesced, I hold the view that they did not, they cannot be said to have acqui-

esced to what never existed. No reply was filed and it cannot be pretended that any existed. The issue of acquiescence therefore did not arise in this case. Both parties and the High Court treated the counter affidavit for what it really is, a counter affidavit which also
 B necessitated the filing of a further affidavit by the appellants. In whatever way one looks at the issues, they must be resolved in favour of the appellants and I so resolve them.

On issue No. 4, learned counsel for the appellants submitted that
 C the lower court erred in holding that a representative action was not maintainable with respect to the subject matter of the appellants' complaints particularly as the interest of each of the appellants is not the same or common to the interests of those they represent; that the case of
 D Amachere v. Newington (1952) 14 WACA 901 relied upon by the lower court in coming to that conclusion is not applicable to the facts of this case and therefore distinguishable particularly as none of the appellants complained of damages and the exercise resulting in the action was not separately conducted; that also not applicable is the case of Oregbada v.
 E Onitigu (1962) 1 All NLR 32; that the order granting leave to the appellants to prosecute the appeal in a representative capacity was made on 19th December, 1996, while the appeal against that order was lodged on 10th December, 1997 without extension of time within which to appeal
 F and leave to so appeal, relying on Tijani v. Akinwunmi (1990) 1 NWLR (Pt. 125) 237 and Rtldsda v. A-g (1990) 9 NWLR (Pt.214) 210; that what was being contested by the appellants was not the quantum of tax demanded but the exercise of reassessment which was common to and of interest to all the appellants; that even if appellants cannot represent others, they can represent themselves in the appeal which was "for themselves and as representing all senior/junior employees of Mobil Producing Nigeria Unlimited, Qua Iboe Terminal, Eket" and that the Court of Appeal was wrong in applying strict interpretation to the rule on representative action rather than relaxing the said rules and urged the court to
 G resolve the issue in favour of the appellants.

On his part, learned counsel for the respondents submitted that the complaints of the appellants challenged the respondents' assessment

and demand of additional taxes on each of the 192 employees; that the assessment contained separate and distinct figures of tax due from each worker; that the Court of Appeal was right in holding that the 292 workers had 292 separate causes of action which cannot be combined in one cause of action, relying in addition to the earlier cases, on Ukatta v. Ndinaeze B (1997) 4 SCNJ. 117. On the argument that the appeal against the order granting leave to prosecute the appeal in a representative capacity being out of time, learned counsel submitted that the argument is not backed by any grounds of appeal as ground 4 on which the issue is distilled did not attack the issue; in any event that the issue of representative capacity C was mentioned in the main judgment hence the right of the respondents to appeal against same. Finally, learned counsel urged the court to resolve the issue against the appellants.

There is no doubt that the appellants were granted leave to D
prosecute the appeal for themselves and on behalf of the other
appellants and that what was contested was not the quantum of the
tax demanded from each employee neither were they claiming any
damages. What was in contest was the exercise of reassessment E
which the High Court found “was done in one exercise..... their
taxes are deducted at source from their income by their common
employer and paid over to the taxing authority. In the present case,
it is not necessary to consider the individual taxes and if the appeal F
succeeds, the entire exercise would be set aside to the benefit of all
the appellants. A single order would therefore be made for the ben-
efit of all the appellants”. I hold the view that the High Court is
right in so finding and that the Court of Appeal was in error when it
set aside that finding. I find no diverse interests of the appellants G
in the subject matter of the appeal but a common interest, the
fundamental issue for determination in the appeal being whether
the 1st respondent has the vires to reassess the appellants and de-
mand payment of the reassessed tax not being a taxing authority. I H
hold the view that it is more convenient to have the issue deter-
mined in a single representative action, than for each of the 292
employees to bring separate appeals for the same relief(s). The

effect of the appeal before the High Court is like the appellants seeking a declaration that the 1st respondent not being the taxing authority has no power to reassess and demand payment of additional tax from the appellants and I hold the view that in such a situation, a representative capacity would avail the appellants. I hold that to hold otherwise is to interpret the rules on representative capacity strictly which will lead to injustice and miscarriage of justice. From the facts of this case, it is very clear that the decision of the West African Court of Appeal in the case of Amachere v. Newington supra is inapplicable on the facts. In that case, nine appellants were detained at the same time and in the same place. They sued the respondent claiming a single amount as damages for assault and false imprisonment but the court held that the relevant rules of court permitted joinder of plaintiffs but not joinder of causes of action and that the damages caused to each plaintiff could only be personal to each of them so the suit was improperly constituted.

In the instant case, Order 11 Rule 8 of the High Court (Civil Procedure) Rules provides as follows:-

“where more persons than one have some interest in one suit, one or more of such persons may with approval of the court be authorized by the persons interested to sue or to defend in such suit for the benefit of or on behalf of all parties so interested”.

I hold the view that the above provisions clearly grounds the leave granted by the High Court to the appellants and that the Court of Appeal was in error in deciding otherwise. I therefore resolve the issue in favour of the appellants.

Issues 5 and 6 of the appellants were argued together in the appellants’ brief. In relation to these, learned counsel submitted that the Court of Appeal wrongly entertained the question of conflict between Section 57(1) of the Personal Income Tax Decree No. 104 of 1993 and Section 26(1) of the Finance Law of Akwa Ibom State and that the said court failed to hold that the purported additional assessments were signed and issued by the Akwa Ibom State Commissioner for Finance and Economic Development who has no power under the Finance Law to carry

out income tax assessments instead of by the Chairman, Board of Internal Revenue; that there was no doubt in the lower court as to which law governed the proceedings i.e. Cap. 45 Laws of Cross River State as applicable to Akwa Ibom State and neither was there any doubt as to the applicable rules being the Finance Law (Appeals) High Court/Rules which was made pursuant to Section 5 of the said law; that the issue of application of Decree No. 104 of 1993 was neither taken nor decided at the High Court let alone its conflict with Section 26(1) of the Finance Law. Learned counsel submitted that since the issue was not canvassed before the High Court, the Court of Appeal was without jurisdiction to determine same as there was no leave to raise and argue it, the issue being a fresh issue raised for the first time in the appeal before it, relying on Jov v. Dom (1999) 7 S.C. (Pt. III) 1; (1999) 9 NWLR (Pt. 620) 538; Ikeanyi v. ACB Ltd. (1997) 2 NWLR (Pt. 489) 509; A-G Oyo State v. Fairlakes Hotel Ltd. (1988) 12 S.C. (Pt. I) 1; (1988) 5 NWLR (Pt. 92) 1. Bankole v. Pelu (1991) 8 NWLR (Pt. 211) 528; Uor v. Loko (1988) 2 NWLR (Pt. 77) 430.

Learned counsel further submitted that if the Court of Appeal had considered the finding of the High Court that the 1st respondent had no vires to issue the reassessment and that the said reassessment was void ab initio, particularly as there was no specific ground of appeal before that court challenging the said finding, it would not have been necessary for the court to have wandered into a consideration of conflict between the provisions of the Personal Income Tax Decree and the Finance Law and condition precedent because condition precedent can only exist with reference to a legally valid assessment by the appropriate taxing authority and urged the court to resolve the issue in favour of the appellants.

On his part, learned counsel for the respondents stated that the issue of conflicts between Decree 104 of 1993 and the Finance Law forms part of a ground of appeal before the lower court and that the appellants did not object to it; that having not objected, it is now belated to raise it as the lower court never pronounced upon it and urged the court to discountenance the complaint. In the alternative, learned counsel

submitted that the contention of the appellants is misconceived; that references were made by respondents to provisions of the Decree and Finance Law before the High Court which provisions were duly considered by that court in its judgment and that courts are to take judicial notice of all laws. Relying on *Ukatta v. Ndieze* (1997) 4 SCNJ 117, learned counsel submitted that the issue being of law is such that could be taken by this court.

Learned counsel referred to his submission in the preliminary objection to the competence of ground 6 of the grounds of the appeal which ground gave rise to issue No. 6 and submitted that the issue was not before the lower court and that court had no jurisdiction to pronounce upon same; that the High Court struck out the name of the 1st respondent suo motu resulting in an appeal by the respondents that the proper order ought to have been dismissal which appeal was not allowed by the Court of Appeal; that there is no appeal against that decision before this court thereby leaving the 1st respondent completely out of the case, though the case survived; that the court cannot therefore pronounce on the legality of the exercise of power of 1st respondent and urged the court to resolve the issue against the appellants.

From the submissions of both counsel, it is very clear that they are ad idem that no leave of the court was obtained before the issues as to the conflicts between the provisions of Decree 104 of 1993 and Finance Law as well as condition precedents to an appeal against assessment to the High Court were raised and determined by the Court of Appeal.

The law on the matter remains as set down by this court in very many cases some of which were cited and relied upon by learned counsel for the appellants to the effect that though a question of law and jurisdiction can be raised at any time in the proceedings, it is not a free for all exercise; that though the courts can raise a matter of law, Constitution, and jurisdiction at any time, the parties must be given the opportunity of addressing it on it so as not to breach the rules of fair hearing. The above principles form the basis for the rationale behind the principles of law that a party to an

appeal that intends to raise a new or fresh issue or introduce a novel point or matter into an appeal must first seek leave to do so, otherwise that party will not be allowed to raise a fresh point which was not pronounced upon by the court below, see A-G Oyo State v. Fairlakes Hotel Ltd. *supra* Jov v. Dom *supra*; Bankole v. Pelu also *supra*, B etc, etc, etc.

Learned counsel for the respondents had agreed that since the issue was grounded on a ground of appeal before the lower court to which appellants raised no objection, they are in effect estopped from raising the complaint in this court. With due respect to learned counsel for the respondents, I do not agree that that is the correct statement of the applicable law. I hold the view that a party cannot by conduct or action confer jurisdiction on a court which would ordinarily have none in a particular matter. It follows therefore that the appellants' conduct in not opposing or objecting to the grounds of appeal without leave which in law robs the lower court of the jurisdiction to entertain and determine the issue cannot legally thereby confer jurisdiction on that court to so determine the issue brought before it without the requisite leave of court. C D E

On the second arm of the submissions, I agree with learned counsel for the appellants that there was no specific ground of appeal against the specific finding by the High Court that the State Commissioner for Finance is not the person responsible for the assessment, collection of and accounting for the taxes imposed under the finance Law. The High Court consequently declared as null and void the additional tax assessment by the said State Commissioner for Finance and economic Development. If the Court of Appeal had given adequate consideration to that finding, the court would not have considered the question of conflict and conditions precedent with reference to Sections 57 and 60 of the Personal Income Tax Decree No. 104 of 1993. Were there a valid assessment, then the question of condition precedent to an appeal or further appeal against that assessment would have become relevant and applicable not when as found and held by the High Court, the as- F G H

assessment was invalid or null and void ab initio since the same cannot be said to qualify as assessment for additional tax.

Finally, it must be noted that the respondents have been found not to have legally filed any reply to the appellants' statement of grounds of appeal in which facts, questions or points of law to be relied upon at the hearing of the appeal before the High Court were raised. That being the case, it follows that like facts not pleaded going to no issue, the points of law such as conflict between the provisions of Decree No. 104 of 1993 and Finance Law and the condition precedent to the appeal against assessment to the High Court not being so raised in any reply, have no basis for consideration by either the High Court or the Court of Appeal and I so hold.

In whatever angle one looks at the issues under consideration, they have to be resolved in favour of the appellants. I therefore order accordingly.

In conclusion, I find merit in this appeal which is accordingly allowed. It is further ordered that the judgment of the Court of Appeal in this matter delivered on the 13th day of January, 2000, be and is hereby set aside. In its place, it is hereby ordered that the judgment of the appellate High Court at Akwa Ibom State delivered on the 7th day of August, 1997, be and is hereby restored.

I assess and fix the costs of this appeal at N10,000.00 in favour of the appellants and against the respondents.

KUTIGIJSC

I read before now the judgment just rendered by my learned brother, Onnoghen, JSC. He has fully set out the facts of the case and discussed all the issues raised before us. I will also allow the appeal and set aside the decision of the Court of Appeal. The appellants are awarded costs assessed at N10,000.00.

KALGO JSC

I have read the judgment of my learned brother, Onnoghen, JSC., in this appeal before today and I am in full agreement with him that there is merit in the appeal and it ought to be allowed.

This case came before the High Court of Akwa Ibom State by virtue of the provisions of Section 26 of the Finance Law (Appeals) (High Court) Rules which also empowers the court on hearing an appeal on Income Tax matters to adopt and apply the practice and procedure of the High Court Civil Procedure Rules of the State with necessary modifications. The proceedings commenced by filing notice of appeal and memorandum of grounds of appeal, it was not commenced by Writ of or Originating Summons as is normal before a High Court. The appellant was therefore exercising his right of appeal under Section 26 of the Finance Law (supra) on tax matters, and the clear intention of the law was to confer on the High Court the status of an appellate court for the purpose of hearing appeals on tax matters from relevant tax authorities. It is my respectful view therefore that the Court of Appeal, in this case, misinterpreted the decision of this court in Mobil Oil Nigeria Ltd. v. Fed B. I. R (1977) 3 S.C. (Reprint) 1; (1977-1978) 11 NSCC 110. The fact that an appellant under Section 26 of the Finance Law (supra) is likened to a plaintiff and the respondent likened to a defendant for hearing in tax matters cannot amount to a decision that the appellant becomes a plaintiff and the respondent a defendant for all purposes because the applicable rules only apply with such modifications as may be necessary. Therefore, since the parties came to the High Court as appellant and respondent, the relevant rules of the High Court must apply to them with necessary modification. This does not affect or change their status before the High Court.

The decision of the High Court of Akwa Ibom State in this case, is a decision on appeal to it. Therefore, any further decision to the Court of Appeal from it, must, in accordance with the provisions of Section 221(1) of the 1979 Constitution, be with leave of that High Court or the Court of Appeal. In this case, it is abundantly clear that no such leave was obtained by the respondent before filing his appeal in the Court of

Appeal. Therefore, that appeal was incompetent, and should have been struck out.

This should be the end of the whole matter since there was no competent appeal before the Court of Appeal to justify any further appeal B to this court. Be that as it may, I resolve issue I in favour of the appellant and agree with the findings and conclusions reached by my learned brother, Onnoghen, JSC., in respect of Issues 2-6 of the appellant. I also find merit in this appeal. I allow it, set aside the decision of the Court of C Appeal and restore that of the High Court. I award the appellant N10,000.00 costs against the respondent.

AKINTAN JSC

D The dispute in this appeal arose over additional tax assessments raised against the appellants who were employees of Mobil Nigeria Un- limited and who had hitherto been having their taxes deducted monthly from their salaries by their said employer. The Commissioner for Finance E was the one that decided that the appellants were not properly assessed and he therefore raised the additional assessment which was the subject-matter that led to the present appeal.

The appellants commenced their challenge of the new assess- F ments first by applying to Uyo High Court for “*leave to the applicants to maintain and/or prosecute this appeal in a representative capacity.*” The leave sought was granted and this was followed by the filing of their “Notice of appeal” at the Uyo High Court. The Uyo High Court allowed their appeal. The respondents were dissatisfied with that verdict and they G filed an appeal against the decision of the Uyo High Court to the Court of Appeal. The appeal filed to the Court of Appeal was, however, without leave. The Court of Appeal erroneously entertained the appeal, allowed it and set aside the decision of Uyo High Court. The present appeal is against H the decision of the Court of Appeal. The lower court failed to take into consideration the competency of the appeal before it, having regard to the fact that the required leave was not sought and obtained before it was filed. The result therefore is that there was no competent appeal before

the Court of Appeal and the respondents' appeal ought to have been struck out.

I was privileged to have read the leading judgment prepared by my learned brother, Onnoghen, JSC. He has set out the full facts of the case and discussed all the issues raised in the appeal which I also adopt. B

For the reasons given above, I hold that the respondents' appeal before the lower court should be struck out and once that is done, there is nothing left to further adjudicate upon. The appellants' appeal is therefore allowed in that I hereby order the striking out of the respondents' appeal before the lower court. I abide by the order on costs made in the leading judgment. C

TABAI JSC

I have had the privilege of reading, in advance, the leading judgment of Onnoghen, JSC., and I agree that the appeal be allowed. The issue of condition precedent to an appeal against an assessment of a tax authority derivable for the provisions of Decree No. 104 of 1993 as opposed to the provisions of the Finance Law was raised and determined by the court. While it is the law that the court can suo motu raise a point of law, Constitution or jurisdiction at any time, parties should be given the opportunity to be heard on it; otherwise such determinations can occasion a breach of the rules of natural justice and fair hearing under the Constitution. The judgment of the Court of Appeal is therefore set aside and in its place is substituted the judgment of the High Court. I abide by the assessment of costs contained in the leading judgment. F

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