

SUPREME COURT OF NIGERIA

8TH JUNE, 2007 SC.131/2002

**CORAM :- N. TOBI, G. A. OGUNTADE, A. M. MUKHTAR,
W. S. N. ONNOGHEN, C. M. CHUKWUMA-ENEH, JJSC**

1. MARCUS OPUIYO

2. SOTONYE OPUIYO APPELLANTS

3. MICHAEL OPUIYO

[For themselves and as representing
the AMASO family of Ogoloma, Okrika]

AND

1. JOHNSON OMONIWARI (Deceased) RESPONDENTS

2. DAWARI JOHNSON OMONIWARI

APPEALS - Land matters - Issues - Leave - Issue of mixed law and fact
- Invitation to appellate court - To consider matters of fact not considered by the court below - Is an issue of fact or mixed law and fact (H1)

APPEALS - Competence - Leave - Grounds of appeal - Where of fact or mixed law and fact - Failure to obtain leave of court - Makes the appeal incompetent - Vide s. 233(3) 1999 Constitution (H2)

FACTS

The plaintiffs/appellants filed an action before the Port-Harcourt High Court against the defendants/respondents. Appellants claimed entitlement to statutory Right of Occupancy in respect of the land in dispute, order of forfeiture and perpetual injunction against the defendants. Both parties filed and exchanged pleadings. Appellants called three witnesses in support of their claim and the respondents called two. Both parties sought vide evidence to establish their various roots of title to the land in dispute.

At the conclusion of hearing, the trial Judge dismissed the case of the appellants. Their appeal to the Court of Appeal was also dismissed. Still aggrieved they have further appealed to the Supreme Court vide

three grounds of appeal. Respondents raised a preliminary objection contending that the appeal is incompetent as all the grounds of appeal were of fact or mixed law and fact, for which leave of court being mandatory was not obtained.

HELD (unanimously dismissing the appeal per **OGUNTADE JSC**)

APPEALS - Land matters - Issues - Leave

1. In the determination of the question whether or not a ground of appeal is of law or fact/mixed law and fact, it is important to consider together the principal complaint and the particulars of error provided thereunder. When the approach is followed in relation to the first ground of appeal above; there is no doubt that the ground is of mixed law and fact. As a matter of law, a court has the duty to consider the issues submitted to it for adjudication. Where a court fails to consider and adjudicate on such issues, it is usually an error of law because the omission constitutes a denial to the party complaining of his right of fair hearing as enshrined in the constitution. However, as the complaint is an invitation to the appellate court to consider those matters of fact which had not been considered by the court below, it becomes an issue of fact or mixed law and fact before the appellate court. The appellants' first ground of appeal above is an invitation to us to consider afresh those issues of fact which the court below had failed to consider. (p. 3116 F)

APPEALS - Competence

2. The result of all that I have said above is that all the grounds of appeal raised by the plaintiffs/appellants being of fact and or mixed law and fact ought not to have been raised without the leave of this court or the court below. It is now settled law that this court cannot hear an appeal on grounds of mixed law and fact unless leave of the court or the Court of Appeal has been obtained.

The plaintiffs/appellants failed to obtain the requisite leave. Clearly therefore their appeal is incompetent for non-compliance with section 233(3) of the 1999 Constitution. (p. 3117 H)

REPRESENTATION

No appearance for either party at the hearing on 12-03-07 although hearing notices has been sent to them on 20-10-06.

CASES REFERRED TO

Oluwole v. L.S.D.P.C. [1983] 5 S.C. 1

Adejumo v. State [1983] 5 S.C. 24

Mogaji v. Odofin (1978) 4 SC. 91 at 93-95

Ojemen v. Momodu [1983] 1 SCNLR 188

Customs v. Barau 1982 10 S.C. 48

Poly carp Ojogbune and Anor v. Ajie Nnubie and 4 ors 1972 1 All NLR part 2 page 226

Chidiak v. Laguda 1964 All NLR 160

Ukwumuenyi and Anor v. The State 1989 7 SCN J. 34

Enanga v. Adu 1981 11-12 SC 25

Adeye v. Adesanya 2001 6 NWLR part 708 page 1

Chukwueke v. Okoronkwo 1999 1 NWLR part 587 page 410

Olawuji V. Adeyemi (1990) 4 NWLR (Pt. 147) 746

STATUTE REFERRED TO

Constitution of the Federal Republic of Nigeria, 1999 s. 233

LEAD JUDGMENT BY OGUNTADE JSC

This appeal arose out of a land dispute between two families from Rivers State. The appellants (hereinafter referred to as ‘*the plaintiffs*’), for and on behalf of the Amaso family of Ogoloma in Okrika, Rivers State, brought a suit at the Port-Harcourt High Court against the 1st respondent Johnson Omoniwari, now deceased (hereinafter referred to as the defendant) of Kinugbe family of Koroni Biri, Ogoloma claiming the following reliefs:

“(a) that the plaintiffs are entitled to the Statutory Right of Occupancy to all that piece or parcel of land situate at Amaso Compound of Ogbimebiri or Polo, Ogoloma which said land is more particularly delineated on Plan No. CTH.30(L/D) and therein verged red.

(b) order of forfeiture of the Defendants use of the land and house granted to him without fee by plaintiffs ancestors.

(c) a perpetual injunction restraining the Defendants, their kinsmen, servants and agents from further interference with the plaintiffs B ownership and possession of the said land in dispute.”

Both parties filed and exchanged pleadings after which the suit was tried by Sagbe J. The plaintiffs’ case was simple and straightforward. They pleaded that the land in dispute, situate at Ogbikime Polo, in C Ogoloma was first allocated to plaintiffs’ ancestor Amaso. The land has since remained in the Amaso family through the descendants of their ancestor. The 1st defendant later, sought the permission of one Oruta of Amaso family to reside in a house built on the land by Amaso. The permission was granted. A time came when the plaintiffs’ family needed the D house because of the expansion as a result of population growth within the plaintiffs’ family. This imposed on the plaintiffs the necessity to ask the 1st defendant to quit the plaintiffs’ land. The 1st defendant refused to quit and instead claimed the ownership of the land in dispute. The plaintiffs E then sued claiming as earlier set out above.

The defendants in their statement of defence denied that they belonged to Kinigbo family of Koromibiri, Ogoloma or that the land belonged to plaintiffs’ ancestor Amaso. It was pleaded that the land in dispute F was first settled upon by one Kwo, the 1st Amanyanabo of Ogoloma who was 1st defendant’s great grandfather through his son Amawatanka who begat 1st defendant’s father Owoniware. It was pleaded further that the 1st defendant’s father, at his death, was buried on the land in dispute.

At the trial, the plaintiffs called three witnesses in support of their G case. The defendants called two witnesses. On 15-6-92, the trial judge in his judgment dismissed plaintiffs’ suit. He concluded the judgment in these words:

H *“The plaintiffs claim that the defendant left the land in dispute and returned to it after he had been deprived of the land allocated to him by the Obudibo family. The defendant denied this allegation and said that it was not true that the plaintiffs allowed him to return to the land conditionally. He also said that he had no relationship with the Obudibo*

family.

The accepted methods of proving ownership of land are traditional history of ownership and where that is inconclusive, then proof of acts of occupation and use of the land over a considerable long period of time without challenge or disturbance from any other claimant and where that fails, proof of exclusive possession without permission. In our instant case from the pleading and evidence adduced by the plaintiffs in support of their traditional history of ownership it cannot be said that they have proved exclusive ownership of the land in dispute.

In our instant case the defendant has led evidence both oral and documentary in proof of his customary title to the land in dispute and there is evidence of repeated acts of ownership by the defendant to give rise to the inference that he is the owner.

The plaintiffs' line of succession is unsatisfactory and poorly traced. The defendant's root of title is more probable. I, therefore, prefer the traditional history of the defendant to that of the plaintiffs.

In my view, the plaintiffs' family has not been able to prove that they have a better title to the land in dispute than the defendant. So that their claim for the customary right of occupancy over the land fails and is hereby dismissed.

Since the claim to customary right of occupancy fails the claim for forfeiture of defendant's use of the land and house also fails and is also hereby dismissed.

The order of perpetual injunction must also fail and it is hereby dismissed.

I accordingly hereby enter judgment for the defendant with costs assessed at N250.00"

The plaintiffs were dissatisfied with the judgment of the trial court. They brought an appeal before the Court of Appeal, Port-Harcourt (hereinafter referred to as 'the court below'). On 10-12-2001, the court below in its unanimous judgment dismissed the appeal and affirmed the judgment of the trial court. The plaintiffs were dissatisfied with the judgment of the court below. They have come before this court on a final appeal. In their appellants' brief, the issues for determination in the ap-

peal were identified as the following:

“(i) *Was there a miscarriage of justice to the fair and proper hearing of the appellants’ case in the treatment of only one (1) narrow issue by the Hon. Justices of the Court of Appeal instead of all the material issues raised by the parties and does this vitiate the judgment of the said Court of Appeal?*

(ii) *Was the Court of Appeal right to have ignored the complaint ab initio of the appellants that the learned Judge’s adopted approach did not conform with law particularly the guidelines in Mogaji v. Odofin [1978] 4 S.C. 91 at 93/95”*

The defendant filed a respondent’s brief. In the said brief, two issues were raised. The first of the two issues would in a strict sense not be a matter arising from the grounds of appeal raised by the plaintiffs/appellants. The issues read:

“3.01. *Whether this appeal is competent having regard to the failure of the appellants to obtain leave of this Honourable Court or the Court below in accordance with section 233(3) of the Constitution of the Federal Republic of Nigeria, 1999*

3.02. *Whether the solitary issue considered by the Court of Appeal regarding the trial court’s evaluation of evidence of traditional history in this case is enough and necessary to dispose of this appeal.”*

The respondent’s first issue above raises a very fundamental matter relating to the competence of the appeal. The learned counsel for the respondent in his brief has contended that the grounds of appeal filed by the plaintiffs/appellants were all of facts and or mixed law and fact for which the appellants needed to have first sought and obtained the leave of the court below or this Court before raising them. It was contended that the appellants not having obtained the requisite leave did not have a valid appeal before this court. Counsel urged us to strike out the appeal. He placed reliance on *Madukolu & Ors. v. Nkemdilim [1962] All NLR (Pt.2) 581 at 589-590*.

The appellants did not file an appellants’ reply brief in answer to the objection raised by the respondent as to the competence of the ap-

peal. I therefore have to decide the matter without the benefit of an input from the appellant,

Now the three grounds of appeal raised by the plaintiffs/appellants read:

1. The Court of Appeal erred in law in failing to dispassionately consider the material issues for determination set out by both parties in the appeal and its narrow consideration of only one solitary issue clearly resulted in a denial of fair and/or proper hearing of the case of the appellants. This, culminated in a miscarriage of justice.

C

PARTICULARS OF ERROR:

a. Appellants had complained to the Court of Appeal that the High Court judge failed to consider material issues of fact in the case J before him.

b. There was, further complaint that the said High Court quite apart from non-consideration, did not also evaluate all the material facts and/or issues raised by the parties in the case before arriving at its decision which was perverse.

D

Many instances were highlighted in the appellants brief.

E

c. By one kind of unknown reason for the coincidence the Court of Appeal did not dispassionately consider these material issues but narrowed them further. Both parties raised similar (3) three issues for determination by the Court of Appeal which were ignored except for (1) one issue. The Court of Appeal thus did not consider the crucial issues in the case or did so narrowly.

F

d. A just and dispassionate consideration of each of the issues raised by both parties should have ensured fair hearing and just determination of the matter as provided for in the constitution.

G

e. The consideration of only a solitary issue by the Court clearly circumscribed the fair and proper hearing of the appeal brought by the appellants and ultimately resulted in a miscarriage of justice.

Appellants right to a proper and fair determination of their case on the issues raised was further breached by the Court of Appeal. The complaints against the decision(s) of the High Court still remained unattended to.

H

2. The leaned justices of the Court of Appeal erred in law in failing to come to any decision on the complaints of the appellants that the learned trial Judge adopted a wrong approach or procedure in determining the case contrary to the guidelines in *Mogaji v. Odofin (1978) 4 S. C. B 91 at 93/95* and this *ab initio* resulted in a miscarriage of justice to the appellants.

a. The Court of Appeal had noted that one of the complaint of the appellants was the judicial approach of the High Court Judge in arriving at his decision.

b. The complaint was to the effect that the learned Judge failed to evaluate or make findings of facts on material issues raised in the case by a dispassionate consideration of all the available facts in line with the case of *Mogaji v. Odofin (supra)*.

c. This wrong judicial approach which negated fair and proper hearing, although alluded to by the Court of Appeal was never considered by the learned Justices or at all.

d. This complaint was fundamental to the judgment itself procured by the High Court and its non-consideration by the Court of Appeal resulted in a serious miscarriage of justice in the determination of the appellants' case. The fulcrum of the High Court judgment subject of appellants grievance was untreated by the learned Justices, thus the injustice complained by appellants persisted.

3. The judgment of the Court of Appeal was against the weight of evidence in the case."

In the determination of the question whether or not a ground of appeal is of law or fact/mixed law and fact, it is important to consider together the principal complaint and the particulars of error provided thereunder. When the approach is followed in relation to the first ground of appeal above; there is no doubt that the ground is of mixed law and fact. As a matter of law, a court has the duty to consider the issues submitted to it for adjudication. Where a court fails to consider and adjudicate on such issues, it is usually an error of law because the omission constitutes a denial to the party complaining of his right of fair hearing as enshrined in the constitu-

tion. However, as the complaint is an invitation to the appellate court to consider those matters of fact which had not been considered by the court below, it becomes an issue of fact or mixed law and fact before the appellate court. The appellants' first ground of appeal above is an invitation to us to consider afresh those issues of fact which the court below had failed to consider. This is the more so in view of the reliefs which the appellants are seeking" from this court in their Notice of appeal. The reliefs read:

"(1) To allow the appeal, set aside the decisions of Court of Appeal, Port Harcourt Division, dated 10-12-2001 and substitute therefore judgment for the plaintiffs/Appellants as per their endorsement on writ of summons.

ALTERNATIVELY, an order for a retrial by another judge of the High Court of Rivers State."

The position is that, if this Court engages itself in a determination of whether those matters which appellants stated were not considered, but if considered would have been decided in favour of the appellants, we would be considering in the process an issue of mixed law and fact. If on the other hand, we elect to consider a retrial, we would still engaged in an evaluation of the evidence not considered; and then determine whether a retrial would meet the justice of the case. See *Ojemen v. Momodu* [1983] 1 SCNLR 188; *Customs v. Barau* 1982 10 S.C. 48.

The second ground of appeal is in my view similar to the first ground although couched in a different language. It is still the same complaint that the court below failed to Consider the complaints raised before it as to the non-evaluation of evidence by the trial court. This ground is also of fact or mixed law and fact.

The third ground of appeal is the omnibus ground which is a complaint on the weight of evidence. This generally is regarded as a ground of fact in a civil case.

The result of all that I have said above is that all the grounds of appeal raised by the plaintiffs/appellants being of fact and or mixed law and fact ought not to have been raised without the leave of this court or the court below. It is now settled law that this court

cannot hear an appeal on grounds of mixed law and fact unless leave of the court or the Court of Appeal has been obtained. See *Oluwole v. L.S.D.P.C. [1983] 5 S.C. 1* and *Adejumo v. State [1983] 5 S.C. 24*.

The plaintiffs/appellants failed to obtain the requisite leave. Clearly therefore their appeal is incompetent for non-compliance with section 233(3) of the 1999 Constitution. The appeal must be and is hereby struck out with N10,000.00 costs in favour of the respondents.

C

TOBI JSC

This appeal is in respect of land situate at Amaso Compound of Ogbikimebiri Polo, Ogoloma. Both parties rely on traditional history of title to the land in dispute. The case of the appellants, who were the plaintiffs in the High Court, is that the land belonged to Amaso, their ancestor who inherited same from Ogbikima, both of whom were early and or original settlers in Ogoloma. Amaso had built a house on the land in dispute for his daughter, Oruta, who was married to one Omoniware from Kinugbe family, also in Ogoloma. Omoniware came to live on the land with his wife, Oruta and they begat their offsprings, including Johnson Omoniware, the 1st respondent. The 1st defendant later got the permission of the appellants' family to reside on the land without preconditions, when he was dispossessed of land hitherto given to him by Obudibo House of Ogoloma. When the appellants wanted to use the land, they requested the respondents to vacate the land who refused to do so. He claimed ownership of the land. The appellants filed the action.

The case of the respondents is that the original owner of the land was Kwo the 1st Amanyanabo of Ogboloma. Kwo the 2nd inherited the land from Kwo, the 1st, his father, who had two children, Koko and Agbaka. Koko, as the first son inherited the land in dispute. Koko had seven children. Koko granted the land in his lifetime to Amawatarika, his first son. Amawatarika begot Omoniware and two others. Amawatarika built a house on the land and farmed on it. Omoniware, as the first son,

inherited the land. Omoniwari had three children; one of them was Johnson Omoniwari, the 1st respondent (deceased) on the record. Johnson Omoniwari inherited the land on the death of his father. He lived on the land with his brother without disturbance until he died and was buried on the land.

On the above evidence the learned trial Judge rejected the traditional evidence of the appellants. He accepted the traditional evidence of the respondents. He therefore dismissed the case of the appellants. In the concluding paragraphs of his judgment, the learned trial Judge, St. Sagbe, J., said at page 32 of the Record:

“... In our instant case from the pleadings and evidence adduced by the plaintiffs in support of their traditional history of ownership it cannot be said that they have proved exclusive ownership of the land in dispute.

In our instant case the defendant has led evidence both oral and documentary in proof of his customary title to the land in dispute and there are evidence of repeated acts of ownership by the defendant to give rise to the inference that he is the owner.

The plaintiffs’ line of succession is unsatisfactory and poorly traced. The defendant’s root of title is “more probable. I, therefore, prefer the traditional history of the defendant to that of the plaintiffs.

In my view, the plaintiffs family have not been able to prove that they have a better title to the land in dispute than the defendant, so that their claim for the customary right of occupancy over the land fails and is hereby dismissed.

Since the claim to customary right of occupancy fails the claim for forfeiture of defendant’s use of the land and house also fails and is also hereby dismissed.

The order of perpetual injunction must also fail and it is hereby dismissed”.

The appeal to the Court of Appeal was also dismissed. Relying on the above findings and conclusions of the learned trial Judge, the Court of Appeal, per Ikongbeh, JCA, said:

“Of course, the appellants have no answer for any of this. The

record is clear. They pleaded one root of title and gave evidence of another... The learned trial Judge in the circumstances was perfectly justified in his conclusion. That being the case, the complaint that the Judge did not consider the evidence of the defendants lacks merit. On the state of the pleadings and the evidence the plaintiffs' case merited instant dismissal without further ado."

Dissatisfied, the appellants have come to this court. Briefs were filed and duly exchanged. The appellants formulated two issues for determination:

"4.01. Was the failure of the Court of Appeal to consider the issues for determination as submitted by the appellants not a denial of fair hearing prejudicial to the appellants?"

4.02. Was the Court of Appeal right to have ignored the complaint *ab initio* of the appellants that the learned judge's adopted approach did not conform with the law particularly the guidelines enunciated in *MOGAJI VS. ODOFIN (1978) 4 SC 91 at 93/95.*"

The respondents also formulated two issues for determination:

"301. Whether this appeal is competent having regard to the failure of the Appellants to obtain leave of this honourable court or the court below in accordance with section 233(3) of the Constitution of the Federal Republic of Nigeria, 1999.

3.02. Whether the solitary issue considered by the Court of Appeal regarding the trial courts evaluation of evidence of traditional history in this case is enough and necessary to dispose of this appeal."

Learned counsel for the appellants submitted that the Court of Appeal failed to consider the material issues in the appeal, *seriatim* after stating them. He contended that the way and manner the court treated the issues raised denied the appellants a full, dispassionate and proper hearing of the appeal on the merit and this unwittingly denied the appellants fair and proper hearing of their case. Counsel also submitted that the Court of Appeal was wrong in ignoring the submission that the approach adopted by the learned trial Judge in the evaluation of the evidence before him did not conform with the law, particularly the guidelines enunciated in *Mogaji v. Odojin (1978) 4 SC. 91 at 93-95*. He urged, the court to

allow the appeal.

Learned counsel for the respondents would appear to raise a preliminary objection to the effect that the appeal is incompetent on the ground that the appellants failed to obtain the leave of court as the grounds of appeal are mixed law and fact. Counsel submitted in the alternative, B that a Court of Appeal is right ‘to dispose of an appeal on only one issue and that it is under no obligation to consider all other issues posed by a party in his brief. He urged the court to dismiss the appeal.

Let me take the objection and it is on the grounds of appeal and the need to obtain leave of court. It appears to me that all the grounds of C appeal deal with evaluation of evidence and that is clearly a matter of fact or at best mixed law and fact for which leave of court is necessary. In view of the fact that leave was not sought, I come to the inescapable conclusion that the appeal is incompetent. It is hereby struck out. The D above apart, it does not appear to me that the appeal could have succeeded on the merits.

MUKHTAR JSC

In their amended brief of argument, the appellants raised two issues for determination, as follows:-

“1. Was the failure of the Court of Appeal to consider the issues F for determination as submitted by the Appellants not a denial of fair hearing prejudicial to the Appellants?”

2. Was the Court of Appeal right to have ignored the complaint ab initio of the appellants that the learned judge’s adopted approach did not conform with law particularly the guideline enunciated in MOGAJI vs. G ODOFIN (1978) 4 S.C. 91. AT 93/95.”

The respondents in their brief of argument raised the following issues for determination: -

“1. Whether this appeal is competent having regard to the failure H of the Appellants to obtain leave of this honourable court or the court below in accordance with Section 223 (3) of the Constitution of the Federal Republic of Nigeria 1999.

2. *Whether the solitary issue considered by the Court of Appeal regarding the trial courts evaluation of evidence of traditional history in this case is enough and necessary to dispose of this appeal.*”

Rather than make the first issue into a form of preliminary objection to the appeal which should have been raised separately and argued in the body of the respondents’ brief of argument, the learned counsel for the respondent thought it fit to pass the complaint as an issue. At any rate learned counsel canvassed argument in respect of the issue and sought a dismissal of the appeal in the absence of leave to appeal by the Court of Appeal or this court, as required by the law, the grounds of appeal being those of mixed law and fact. I agree with my learned brother Oguntade, JSC that the appeal becomes incompetent because of the lapse or omission, and deserves to be struck out. Learned Counsel for the respondent after arguing issue canvassed arguments in the event that his issue (1) fails. Below are my reasonings on this.

The appellants having failed in the court of first instance on his claims and the Court of Appeal on its appeal filed and argued a further appeal to this court on their amended brief of argument. The history of this case and the facts upon which the claim was predicated has already been stated in the lead judgment, but I will reproduce the reliefs sought by, the appellants hereunder. They are:-

“(a) *that the plaintiffs are entitled to the statutory right of occupancy to all that piece or parcel of land situate at Amaso Compound of Ogbikimebiri or polo, Ogoloma which said land is more particularly delineated on plan No. CTH.30 (L/D) and therein verged red.*

(b) *order of forfeiture of the Defendants use of the land arid house granted to him without fee by plaintiffs ancestors,*

(c) *A perpetual injunction restraining the Defendants, their kingsmen servants and agents from further interference with the plaintiffs ownership and possession of the said land in dispute.”*

The complaint of the appellants under issue (1) supra is the failure of the Court of Appeal to consider all the issues for determination they raised in that court. Learned Counsel for the appellants relied on the cases of Poly carp Ojogbune and Anor v. Ajie Nnubie and 4 ors 1972 1 All NLR

part 2 page 226, and Chidiak v. Laguda 1964 All NLR 160. I will now look at the issues raised in the lower court, which the appellants are complaining were not considered. The issues are:-

“(a) Was the learned trial judge correct to state that plaintiffs did not prove the boundaries of the land and used that as a basis to dismiss plaintiffs’ case. B

(b) Was the learned trial Judge right in law to hold that the burial of the defendants’ father (hitherto a party to the suit) during the pendency of the suit constituted an act of ownership of the land in dispute. C

It is on record (to be found on page 3 or the printed record) that Ikongbe JCA (of blessed memory) in the lead judgment of the lower court, before treating the arguments made the following observation:-

“I think this appeal can be effectively disposed of on issue (c) in either brief, which raised the same question. The other issues only raise peripheral questions.” D

The learned counsel for the appellant has submitted that where the Court of Appeal fails to consider the issues or any issue raised on appeal before it, the Supreme Court can consider it. He placed reliance on the case of Ukwumuenyi and Anor v. The State 1989 7 SCN J. 34. I agree that this court has the power to consider the issues as per the above authority, but then me think the supra issues raised in the lower court are issues revolving around the evaluation of evidence which can both be classified as coming within issue (c) which the lower court adopted and treated in the lead judgment. To illustrate this view I will reproduce a pertinent excerpt of the judgment of the trial court. Related to issue (a) in the Court of Appeal, is the following:-

“It will be observed that none of the boundary witnesses called to testify for the plaintiffs except P.W. 3. It is however, strange that the land of this witness is not indicated in Exhibit “A” which is plaintiffs’ plan. If this only boundary witness’s land is not shown in Exhibit ‘A’ (sic). I am unable to fully comprehend what purpose this witness’s evidence is meant to achieve. Evidence before the court is that the land in dispute is surrounded by the land of people of Koko family or compound. The defendant says he is of Koko compound. The plaintiffs say they are not of Koko G

compound. Exhibit 'A', is plaintiffs' plan while Exhibit 'C' is defendant's plan. Since plaintiffs say Ogbikime compound is not Koko compound and the land is almost surrounded by land of people of Koko's compound it stands to reason that the land in dispute is in Koko's compound."

The learned justice of the Court of Appeal did consider issue (a) in the lead judgment, and even it did not consider issue (a) I do not think that, that omission would have affected the merit of the appeal. All the principles and issues relevant to the case for title to land have been considered and dealt with.

On issue (2) in the present appeal, I am satisfied that there was a proper evaluation of evidence before the trial court. The guidelines in *Mogaji v. Odojin* supra were adhered to, and the judgment of the trial court cannot be faulted. This is an appeal on concurrent findings of fact, which this court cannot disturb, because the findings are not perverse as they are supported by credible evidence, and no miscarriage of justice has been occasioned. See *Enanga v. Adu* 1981 11-12 SC 25, *Adeye v. Adesanya* 2001 6 NWLR part 708 page 1, and *Chukwueke v. Okoronkwo* 1999 1 NWLR part 587 page 410.

ONNOGHEN JSC

This is an appeal against the judgment of the Court of Appeal holden at Port Harcourt in appeal No.CA/PH/188/94 delivered on the 10th day of December, 2001 in which the court affirmed the judgment of the trial court in suit No.PHC/196/82 delivered by that court on the 15th day of June, 1992.

By a statement of claim filed on the 31st day of March, 1983, the plaintiffs, now appellants, claimed against the respondent in paragraph 13 thereof as follows:-

"13 Wherefore the plaintiffs claim: -

(a) that the plaintiffs are entitled to the statutory right of occupancy to all that piece or parcel of land situate at Amaso compound of Ogbikimebiri or Polo, Ogoloma which said land is more particularly

delineated an plan No.CTH.30 (L/D) and therein verged red.

(b) order of forfeiture of the Defendants use of the land and house granted to him without fee by plaintiffs ancestors.

(c) a perpetual injunction restraining the Defendants, their kinsmen, servants and agents from further interference with the plaintiffs B ownership and possession of the said land in dispute.”

The case of the parties is based on traditional history. Whereas the appellants contend they were the first to settle on the land through one Amaso who inherited the land from his father by name Ogbikime and that Amaso later built a house thereon for his daughter known as Oruta; that while Oruta was on the land Omoniwari, the father of the 1st respondent came from Kinugbe family, and married her and thereafter continued to live with Oruta in the said, house built for her by her father; that Omoniwari later married one Idewokuamama who gave birth to Johnson Omoniwari while still in the same house with Oruta and they lived therein until Omoniwari and Oruta died; that Johnson Omoniwari was later granted land by Obudibo family of Ogoloma where he built a house and lived with his family, but when he later had problem with Obudibo family, the appellants family granted him a piece of land on which he built a house and lived therein without any condition. When the appellants family later wanted the said Johnson Omoniwari to vacate the land to enable the appellants erect a building to accommodate some members of their, family, Johnson Omoniwari claimed ownership of the land resulting in the suit. C D E F

On the other hand, it is the case of the respondents that the original owner of the land in dispute, is Kwo the 1st; the Amanyano of Ogoloma and that Kwo the 2nd later inherited the land from Kwo the 1st who was his father; that Kwo the 2nd had two sons who were Koko and Agbaka; that Koko was the 1st son and consequently inherited the land; that Koko had seven children and granted the land in his life time to Amawatarika who was his 1st son; that Amawatarika begot Omoniwari and two others but that Omoniwari who was the 1st son inherited the land; that Amawatarika built and lived on the land apart from farming on part thereof; that Omoniwari continued to live and maintain the said house which he later rebuilt; that Omoniwari had three children, one of whom G H

is Johnson Omoniware, the 1st respondent, who later inherited the land on the death of his father; that Omoniware died about 90 years ago and was buried on the land as well as the 1st respondent; that the respondents had been in continuous peaceful occupation or possession of the land and that the 1st respondent never left the land to build and live anywhere else during his life time; that 1st respondent had nothing to do with the Obudubo family and no grant was made to him in respect of the land in dispute.

The High Court of Rivers State was not impressed with the traditional history of the appellants and consequently dismissed their claims which judgment was affirmed by the Court of Appeal holden at Port Harcourt giving rise to the instant appeal to this court.

The issues for determination, as identified by learned counsel for the appellants in the appellants' brief of argument filed on 16/12/02, are as follows:-

"4.01 Was the failure of the Court of Appeal to consider the issues for determination as submitted by the Appellants not a denial of fair hearing prejudicial to the Appellants?"

4.02 Was the Court of Appeal right to have ignored the complaint ab initio of the appellants that the learned judge's adopted approach did not conform with law particularly the guidelines enunciated in MOGABI Vs ODOFIN (1978) 4 S.C 91 at 93/95."

In the respondents' brief of argument filed by learned counsel for the respondents B.C. EMECHETA Esq. on the 12th day of August, 2002, it is submitted that the appeal is incompetent as it involves issues of 'facts or mixed law and facts and the appellants failed or neglected to obtain the leave of Court to appeal to the Supreme Court as required by section 233(3) of the Constitution of the Federal Republic of Nigeria, 1999 (herein after referred to as the 1999 constitution) and urged the court to strike same out.

It should be noted that the learned counsel for the appellants has not deemed it fit to file a reply brief to profer arguments against the above preliminary objection of the learned counsel for the respondents. I hold the view that the failure of the learned counsel for the appellants to file a

reply brief to counter the arguments of the learned counsel for the respondents on the competence of the appeal amounts, in law, to a concession of the point being contended.

Looking closely at the grounds of appeal contained in the Notice of Appeal at pages 119-122 of the record coupled with the two issues B formulated by learned counsel for the appellants earlier reproduced in this judgment, it is very clear that the complaints in the grounds of appeal are on facts and mixed law and facts. It is settled law that for there to be a valid or competent appeal based on facts and/or mixed law and facts, C the leave of either the lower court or the appellate court is required before filing the Notice and Grounds of such appeal. I have carefully gone through the record and there is no evidence that any leave was obtained by the appellants before filing the instant appeal. In the circumstance it is my view that the appeal is, for that reason, incompetent and liable to be D struck out.

I therefore agree with the reasoning and conclusion of my learned brother OGUNTADE, JSC, in the lead judgment that the appeal is incompetent and should be struck out. I order accordingly and abide by the E consequential orders made in the said lead judgment including the order as to costs.

Appeal struck out.

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CHUKWUMA-ENEH JSC

The plaintiffs in this matter is claiming against the defendants at the High Court Port Harcourt Judicial division Rivers State the statutory G right of occupancy to a piece or parcel of land situated at Amaso section of Ibulu war canoe house of Ogbikime Polo, Ogolomo in Okrika District of Odelga, an order of forfeiture of the defendants customary tenancy and house granted without fee by the plaintiffs and a perpetual injunction.

Parties filed and exchanged their respective pleadings. At the trial H the 1st plaintiff testified and called 2 witnesses and tendered the survey plan of the land in dispute as Exhibit A. The 2nd Defendant testified as DW1 for the defence and called 1 witness. They tendered Exhibits B, B1

and C. At the conclusion of evidence the trial Court, in a considered judgment, dismissed the plaintiffs' case holding at P. 52 LC11 - 18 of the record as follows:

"In my view, the plaintiffs' family have not been able to prove that they have a better title to the land in dispute than the defendant. So that their claim for the customary right of occupancy over the land fails and is hereby dismissed."

Since the claim for customary right of occupancy fails the claim for forfeiture of defendant's use of the land and house also fails and is also hereby dismissed."

The order of perpetual injunction must also fail and it is hereby dismissed"

The plaintiffs, aggrieved by the decision, have appealed to the Court of appeal (court below) which also dismissed the plaintiffs' claim and affirmed the decision of the trial Court. Still aggrieved by the decision of the Court of Appeal the plaintiffs have finally appealed to this Court by a Notice of Appeal filed on 8/1/2002 and have raised 3 grounds of Appeal. The plaintiffs are the appellants while the Defendants are the respondents in this Court. Parties have filed and exchanged their respective briefs of argument.

The appellants in their brief of argument have identified 2 issues for determination as follows:-

"(1) Was the failure of the Court of Appeal to consider the issues for determination as submitted by the Appellants not a denial of fair hearing prejudicial to the Appellants?"

(2) Has the Court of Appeal right to have ignored the complaint ab initio of the appellants that the learned judge's adopted approach did not conform with law particularly the guidelines enunciated in Mogaji V. Odofin (1978) 4SC 91 at 93/95"

The respondent in his brief of argument raised also two issues as follows:

"(1) Whether this appeal is competent having regard to the failure of the Appellants to obtain leave of this honourable Court or the Court below in accordance with Section 233(3) of the Constitution of the Fed-

eral Republic of Nigeria 1999.

(3) Whether the solitary issue considered by the Court of Appeal regarding the trial Courts evaluation of evidence of traditional history in this case is enough and necessary to dispose of this appeal”.

The appellant has not filed a reply brief to deal with the objection B taken by the respondent against all the grounds of appeal filed by the appellants in the matter. I have, all the same to consider the objection being an issue of law and to decide whether or not to uphold it. See: Olawuji V. Adeyemi (1990) 4 NWLR (Pt. 147) 746. Even on a cursory C perusal of the 3 grounds of appeal filed by the appellant it is evident that the preliminary objection is fundamental and goes to the competency of the appeal and if upheld completely disposes of the appeal. In this regard, I set the grounds of Appeal as follows:

“1. The Court of appeal erred in law in failing to dispassionately D consider the material issues for determination set out by both parties in the appeal and its narrow consideration of only one solitary issue clearly resulted in a denial of fair and/or proper hearing of the case of the appellants. This culminated in a miscarriage of justice. E

PARTICULARS OF ERROR:

a. Appellants had complained to the Court of Appeal that the High Court Judge failed to consider material issues of fact in the case before him. F

b. There was further complaint that the said High Court quite apart from non-consideration, did not also evaluate all the material facts and/or issues raised by the parties in the case before arriving at its decision which was perverse. Many instances were highlighted in the appel- G lants brief.

c. By one kind of unknown reason for the coincidence the Court of Appeal did not dispassionately consider these material issues but narrowed them further. Both parties raised similar (3) three issues for determination” by the Court of Appeal which were ignored except for (1) one H issue. The Court of Appeal thus did not consider the crucial issues in the case or did so narrowly.

d. A just and dispassionate consideration of each of the issues

raised by both parties should have ensured fair hearing and just determination of the matter as provided for in the constitution.

e. The consideration of only a solitary issue by the Court clearly circumscribed the fair and proper hearing of the appeal brought by the appellants and ultimately resulted in a miscarriage of justice.

f. Appellants right to a proper and fair determination of their case on the issues raised was further breached by the Court of appeal. The complaints against the decision(s) of the High court still remained unattended to.

2. The learned justices of the Court of Appeal erred in law in failing to come to any decision on the complaints of the appellants that the learned trial Judge adopted a wrong approach or procedure in determining the case contrary to the guidelines in MOGAJI VS ODOFIN (1978) 4 S.C. 91 AT 93/95.

And that this ab initio resulted in a miscarriage of Justice to the appellants.

PARTICULARS OF ERROR:

a. The Court of Appeal had noted that one of the complaint of the appellants was the judicial approach of the High Court Judge in arriving at his decision.

b. The complaint was to the effect that the learned Judge failed to evaluate or make findings of facts on material issues raised in the case by a dispassionate consideration of all the available facts in line with the case of Mogaji Vs Odofin (Supra).

c. This wrong judicial approach which negated fair and proper hearing, although alluded to by the Court of Appeal was never considered by the learned Justices or at all.

d. This complaint was fundamental to the judgment itself procured by the High Court and its non-consideration by the Court of appeal resulted in a serious miscarriage of justice in the determination of the appellants case. The fulcrum of the High Court judgment subject of appellants grievance was untreated by the learned Justices, thus the injustice complained by appellants persisted.

3. The judgment of the Court of Appeal was against the weight of

evidence in the case.”

To determine whether leave is required under Section 233(3) of the 1999 Constitution as against appealing as of right has to be ascertained by reading the ground of appeal against the particulars of error together so as to crystalise the issues raised in the grounds and to see whether they relate to questions of law or facts simpliciter or are matters of mixed law and facts as it is not tag put on a ground of appeal by a party that has to determine its fate in this regard. This requirement is a constitutional one so that dire consequences follow where the requirement of first seeking leave is breached. A further implication of Section 233(3) of the Constitution is that, where leave is not sought, that is, where particularly it should, then the grounds of appeal are incompetent leading to want of jurisdiction of the Court to entertain such grounds.

With these settled principles of law on Section 233 of the 1999 Constitution in mind I now scrutinize the said 3 grounds of appeal. Before then Section 233(3) of the Constitution provides as follows:

“Subject to the provisions of subsection(2) of this section, an appeal shall lie from the decision of the Court of Appeal with leave of the Court of Appeal or the Supreme court”.

On ground 1:

On the showing of paragraphs (a), (b) and (f) of particulars of error there can be no doubt that they raise questions of facts in the sense of that non-evaluation of the material facts can at best only culminate on issue of mixed law and fact. So that this ground of appeal definitely, requires leave of the Court below or this Court.

On ground 2:

The said ground of appeal along with its paragraph (b) of the particulars of error have raised the issue of evaluation or making findings of facts on some material questions in the matter. Again, there can be no way this can be achieved without discussing evidence tendered in the proceedings. At best this raises issues of mixed law and facts. This ground requires leave of either the Court below or this Court.

On ground 3:

That is, Ominibus ground of appeal; authorities are galore to the

effect that it is a question of fact and so requires leave under Section 233(3) of the Constitution.

The foregoing resume shows clearly that none of the 3 grounds of appeal is truly a question of law. As all the grounds of appeal; 3 of them; B raise issues of mixed law and facts, leave under 233(3) is required. Since the Notice of Appeal does not carry any ground of appeal on question of law the instant Notice of Appeal is incompetent and so also the appeal itself. The appeal is accordingly struck out.

C In this regard I agree with the reasoning and conclusion reached in the lead judgment of Oguntade JSC that the appeal should be struck out. And I so order and abide by the order on costs.

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