

SUPREME COURT OF NIGERIA
18TH JANUARY, 2008, SC.391/2001
CORAM:- N. TOBI, G. A. OGUNTADE, F. F. TABAI,
I. T. MUHAMMAD, P. O. ADEREMI, JJSC

EKANEM EKPO OTU DEFENDANT/APPELLANT
AND
A.C.B INTERNATIONAL PLAINTIFF/RESPONDENT
BANK PLC.
AND
ALHAJI KABIRU RUFAI INTERVENING PARTY/RESPONDENT

APPEALS - Preliminary objection - Grounds of appeal - Issues - The grounds complained against are competent - And issues formulated from them shall be considered (H1)

APPEALS - Error of trial court - Complaint against it - Can be made before the Supreme Court - Where appellant felt that Court of Appeal did not correct the error - But rather justified it (H2)

CONSTITUTIONAL LAW - Appeals - Leave - Meaning & rationale - Where leave is required vide s. 222 of 1979 Constitution - Or in the rules of court - Failure to seek and obtain leave - Removes Court's jurisdiction to grant the incompetent motion (H3)

MOTIONS - Opposition - Fair hearing - Where a party opposing an application - Was given opportunity to present his opposition - Against the motion for extension of time - He was given fair hearing (H4)

JUDGMENTS - Validity - Court has the jurisdiction to set aside its own order - In appropriate circumstances - Appellate Court will not interfere - Where the discretion is exercised judicially and judiciously (H5)

FACTS

Before the High Court of Lagos State, plaintiff/respondent filed this action against defendant/appellant. A banker - customer rela-

tionship existed between the parties. Respondent granted overdraft facilities to appellant which with accrued interest and bank charges amounted to the sum of N99,653.85. The loan was secured by a land certificate with registration No. MO 3500 registered at the Lagos Land Registry. Appellant refused or neglected to pay the debt or any part of it despite repeated demands. Appellant entered no appearance to the suit. Respondent as a result filed a motion on notice praying for final judgment, which was granted. Pursuant to another application, leave was granted for the attachment of appellant's landed property. It was purchased by intervening party/respondent (Alhaji Rufai) for the sum of N120,000.00, on 27-11-1990. He was issued with a certificate of occupancy, obtained high court's order of possession of the property, and thereafter demolished it and commenced its redevelopment.

On 6-2-1991, appellant filed an application before the trial court for an order setting aside the judgment, attachment of his landed property and claimed other reliefs. The trial Judge granted the prayers on the ground that the order to serve the statement of claim upon appellant by pasting was not complied with. Trial court ordered *inter alia*, that the matter will be heard on its merit and must be given accelerated hearing. Respondent appealed to the Court of Appeal. Alhaji Rufai who was not a party before the High Court, applied for extension of time to appeal as of right. The Court of Appeal granted extension of time as prayed, heard the appeal on its merits and allowed it. Aggrieved, appellant (as substituted by reason of death) has now appealed to the Supreme court.

ISSUES FOR DETERMINATION

"B.1. Whether the respondents (i.e. the plaintiff and the 3rd party) had a right of appeal from the High Court to the Court of Appeal against the ruling of the trial court of 17/5/1991, and if they had such right whether it was one that could be exercised without leave of either the trial High Court or the Court of Appeal?"

B.2. Whether the ruling and the judgment of the Court of Appeal denying the defendant hearing on merit are not unconstitutional and have not occasioned miscarriage of justice to the defendant/appellant?"

B.3. Whether from the record before the trial court, the Court

of Appeal was justified in upsetting the trial court's ruling that the statement of defence was not served?

B.4. Whether Alhaji Kabiru Rufai was a proper party in the proceedings before the trial court."

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

APPEALS - Preliminary objection

1. I do not agree with counsel that Ground 2 is incompetent and should therefore be struck out. Learned counsel did not tell this court why the ground is incompetent. The ground which complains about misdirection is competent, and I so hold.

In Ground 4, the appellant complained that the learned Justices of the Court of Appeal erred in their judgment when they held that the learned trial Judge arrived at her ruling suo motu without calling for evidence from the parties. This ground clearly arises from the proceedings, and so, I do not agree with learned counsel that the ground did not arise from the proceedings.

Issues are formulated from grounds of appeal and if they are based on valid grounds of appeal, an appellate court must consider them. (pp. 213 D/214 C)

APPEALS - Error of trial court

2. An appellant has the right to complain at the Supreme Court on error in the High Court where the intermediate Court of Appeal, in its view, did not correct the error but rather justified it in its judgment. In such a situation, there is nothing wrong to trace the error from its origin, the High Court, as it is in this appeal. That does not mean that the appellant is complaining of an error by the trial Judge straight to this court. No. The complaint, in my understanding, is that the plaintiff and the 3rd party had no right of appeal from the High Court to the Court of Appeal, without leave of either the High Court or the Court of Appeal. In other words, the complaint is that right of appeal in the circumstances does not vest in an appellant as a matter of course or routine but with leave of the court. This, in my view, should be the understanding of the respondent, in which case, there ought to be no objection. The objection therefore fails. (p. 214 E)

Appeals - Leave - Meaning & rationale

3. A party who has an interest in an appeal from the High Court to the Court of Appeal must, under section 222 of the Constitution, seek leave of either the High Court or the Court of Appeal to appeal.

B Leave, in this context, means permission. In other words, the party must seek permission to appeal. The rationale for the provision is to enable the court determines whether it is proper in law to grant the party permission to appeal in the circumstances of the case.

C Where leave is required either in the Constitution or in the rules of court, and leave is not sought and granted, the court has no jurisdiction to grant the motion as it is incompetent. An order on such an incompetent motion is invalid.

Learned counsel for the appellant quoted what I said in the case of Auto Import v. Adebayo (2003) 2 MJSC 44 at page 60 as follows:

E *"Rules of Court are meant to be obeyed ... failure to obtain leave for extension of time to appeal within the specified time or period is a substantial irregularity which affects the props and foundations of the appeal. It is beyond mere technicality which this court cannot forgive."*

I have no reason to depart from the above dictum. (p. 215 H)

F **MOTIONS - Opposition - Fair hearing**

4. A party who has opposed an application cannot complain of fair hearing because by the opposition he has obtained a hearing and the hearing remains fair in so far or as long as he was not inhibited in the hearing but given all the opportunity to make his case. As there is no complaint that the Court of Appeal did not allow the respondent to present his opposition of the application for extension of time, the issue of lack of fair hearing fails. (p. 217 B)

JUDGMENTS - Validity

H 5. A judgment, and this includes a ruling, of a court of law is valid or so presumed until it is set aside on appeal. A court of law, trial or appellate, has the power or jurisdiction to protect its judgment by providing teeth to bite any act of interference to weaken its legal

strength of enforcement or enforceability in the judicial process. In the judicial process, a court of law has the power or jurisdiction to set aside its own order in appropriate circumstances. It has the discretion to do so and once the discretion is exercised judicially and judiciously, an appellate court cannot interfere. After all, the court is the owner of the order and it can do anything with it, like every owner of property. (p. 217 G)

NOTABLE POINTS OF INTEREST

MUHAMMAD JSC

1. Summary judgment - Was rightly set aside

The learned trial judge in his wisdom, ordered for the service to include the plaintiffs statement of claim. The order referred to by learned counsel for the respondent and relied upon by the court below has not tied the hands of the trial judge that it is only the writ of Summons that should be served alone. The trial judge has a discretion, like in case of grant of bail, to impose necessary conditions that will ensure strict compliance with the terms imposed. It is trite that in civil proceedings, a statement of claim supersedes the writ of summons. Thus, statement of claim is more authoritative. (p. 217 G)

In any event, the order remains a valid and subsisting court's order until set aside. It must be obeyed. As there was no proof of service of the statement of claim through the substituted means permitted, there was no proper service of the processes as ordered by the trial court. Service of court's process is so fundamental such that any failure to effect service of such processes can render proceedings conducted thereunder null and void as the Court lacks jurisdiction to adjudicate. (p. 217 G)

I think the trial court was not wrong in setting aside earlier decisions which it found to be in clear disobedience or contradiction of the orders it granted earlier. It has every right to set aside its null and void orders. (p. 228 D)

2. Need for counsel to ensure correctness/decency of records

Before I drop my pen, let me observe that the record of appeal before me now, is one of the shabbiest I have ever come across. Many important documents (some mentioned earlier) were missing;

many of the proceedings of the trial court and that of the court below were jumbled up; some pages remain unclear. This is disgusting and annoying. Learned counsel, particularly those whose responsibility it is to sponsor the compilation of records, must insist that a correct and decent record is transmitted to an appeal court. That will facilitate the quick and smooth dispensation of cases in the appeal courts. (p. 229 B)

ADEREMI JSC

3. *Court does not grant relief not sought - Locus standi to appeal*
 Prima facie, when no relief or order is sought, the court does not grant any; it will be an undeserved indulgence on the part of the court to so do. By virtue of Section 222 of the 1979 Constitution which is in pari materia with the provisions of Section 243 of the 1999 Constitution, only a party to an action can appeal against the decision in that action. Thus, a person interested or affected by the decision in that suit, must in addition to seeking and obtaining the leave of court to be joined in the suit, must also obtain the leave of the court to appeal. The interest envisaged under Section 222 of the 1979 Constitution is a legally, recognisable interest, not having sought and obtained the order of court to be made a party to the appeal and not having sought and obtained the leave to appeal, the notice of appeal of the party-interested is fraught with fundamental vice, he lacks locus standi in the matter. (p. 234 E)

REPRESENTATION

Chief Orok I. Ironbar, for the Appellant
 Chief F. O. Offia with him C. L. Nwaokoma, for the Respondent

CASES REFERRED TO

Nishizawa Ltd v. Jethwani (1995) 5 NWLR (Pt. 398) 668
 Odu v. Aqbor-Hemeson (2003) 2 NWLR (Pt. 804) 355
 Mohammed v. Olawunmi (1990) 2 NWLR (Pt. 133) 458 at 480
 Auto Import Export v. Adebayo (2003) 2 MJSC 44
 Ochonma v. Unosi (1965) NMLR 321
 Saleh v. Monguno (2006) 15 NWLR (Pt. 1001) 25
 Offor v. State (1999) 12 NWLR (Pt. 632) 608

Jonason v. Charles (2002) 12 MJSC 1

Idika v Erisi (1988) 2 NWLR (Pt. 78) 563

General Oil Limited v. Chief Ogunyade (1997) 4 NWLR (Pt. 501) 613

Chiwuba v. Alade (1997) 6 NWLR (Pt. 507) 85

Madumere v. Okafor (1996) 4 NWLR (Pt. 445) 637

Shie v. Lokoja (1998) 3 NWLR (Pt. 540) 56

Savannah Bank of Nigeria Plc v. Kyentu (1998) 2 NWLR (Pt. 536) 41

Ardo v. Ardo (1998) 10 NWLR (Pt. 571) 700

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STATUTES & RULES REFERRED TO

Constitution of Nigeria 1979 ss. 33 (1), 220, 221, 222

Constitution of Nigeria 1999 ss. 241(2)(a), 243

High Court of Lagos State (Civil Procedure) Rules 1972 O. 9(2) & (3)

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LEAD JUDGMENT BY TOBI JSC

Leo Attah Ekpo was the original defendant in this case. Following his death, Ekanem Ekpo Otu was substituted to take his place. That was on 16th September, 1997 in the Court of Appeal. A dead man is not in a position to handle or follow litigation. He lacks the capacity to be a party in litigation.

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The matter, which was commenced in the High Court of Lagos State, was for the recovery of the sum of N99,653.85, being amount of overdraft facilities (including interest) owed by Leo Attah Ekpo. Following the substituted service, the learned trial Judge gave judgment to the plaintiff/respondent in default of appearance of the defendant in the sum of N93,676.50. That was on 10th October, 1988. On 19th January 1990, the plaintiff/respondent applied and obtained from the court an order "to attach and sell the immovable property of the Defendant/Respondent/Debtor within the jurisdiction of the Honourable Court". Alhaji Kabiru Rufai was the beneficiary of the sale.

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On 6th February 1991, Leo Attah Ekpo brought an application to set aside both the judgment entered against him on 10th October, 1988 and the order of sale of 19th January, 1990. The

learned trial Judge granted the prayers. In the Ruling, Sotuminu, J. (as she then was) said at page 132 of the Record;

"It is my view that having failed to comply with the Order of this court that the statement of claim be served on the Defendant by pasting, the Judgment obtained therefrom should not be allowed to stand. I have inherent jurisdiction to set aside my Judgment made on the 10th day of October, 1988 because of the said non-compliance of my Order and the said judgment is hereby set aside accordingly. See Adegoke Motors v. Adesanya (1989) 3 NWLR Part 109 page 250 at page 273."

The learned trial Judge thereafter made the following orders and I read six of the seven orders:

"1. The Judgment in default given against the Defendant by this Court on the 10th day of October, 1988 is hereby set-aside.

2. The Order for sale of the Defendant's property made on the 29th day of January 1990 based on the said Judgment is also hereby set-aside.

3. The Plaintiff is hereby ordered to serve the Defendant the statement of claim as previously ordered by this Court within 7 days from today.

4. The Defendant shall file the statement of defence within 14 days thereafter.

5. The Plaintiff shall file a Reply if necessary within 7 days thereafter.

6. This matter will be heard on its merit and must be given accelerated hearing in the interest of justice."

Dissatisfied, the plaintiff/respondent appealed to the Court of Appeal. In that court, Alhaji Kabiru Rufai applied for extension of time to appeal as of right against the Ruling of the learned trial Judge. He was not a party to the proceedings in the High Court. He decided to appeal because he was the beneficiary of the annulled auction sale. The Court of Appeal granted the application by extending the time to appeal by fourteen days. The Court of Appeal then heard the appeal on its merits and allowed it.

This is an appeal against the ruling and the judgment of the Court. Briefs were filed and exchanged. Appellant formulated the following four issues for determination:

"B.1. Whether the respondents (i.e. the plaintiff and the 3rd party) had a right of appeal from the High Court to the Court of Appeal against the ruling of the trial court of 17/5/1991, and if they had such right whether it was one that could be exercised without leave of either the trial High Court or the Court of Appeal?"

B.2. Whether the ruling and the judgment of the Court of Appeal denying the defendant hearing on merit are not unconstitutional and have not occasioned miscarriage of justice to the defendant/appellant?"

B.3. Whether from the record before the trial court, the Court of Appeal was justified in upsetting the trial court's ruling that the statement of defence was not served?"

B.4. Whether Alhaji Kabiru Rufai was a proper party in the proceedings before the trial court."

The respondent formulated the following single issue for determination:

"Whether the Court of Appeal was right to hold that the procedure under O.9 of the Lagos State High Court (Civil Procedure) Rule 1972, did not make the service of the Statement of Claim on the defendant, absolutely necessary for a judgment in default of appearance to the Writ of Summons."

Learned counsel for the appellant, Chief Orok Ironbar, submitted on Issues Nos. 1, 2 and 4 together that the respondent and the 3rd party intervener, under sections 220(1)(a)(b), 221(1) and 222 of the 1979 Constitution, can only appeal with leave of either the trial court or the Court of Appeal. He referred to section 241(2)(a) of the 1999 Constitution, and the cases of *Nishizawa Ltd, v. Jethwani* (1995) 5 NWLR (Pt. 398) 668; *National Bank of Nig. Ltd. v. Weide and Co. (Nig) Ltd.* (1996) 8 NWLR (Pt. 465) 150; *Odu v. Aqbor-Hemeson* (2003) 2 NWLR (Pt. 804) 355; *Mohammed v. Olawunmi* (1990) 2 NWLR (Pt. 133) 458 at 480; *Auto Import Export v. Adebayo* (2003) 2 MJSC 44; *The Nigerian Air Force v. Wing Commander Shekete* (2003) 2 MJSC 63.

Learned counsel submitted that the 3rd party/intervener was not a proper party in the main suit as he was not named in and was not concerned with the main claims before the court. He referred to *Lebile v. The Registered Trustees of Cherubim and Seraphim Church*

212 Otu v. ACB Bank Plc (2008) 1 KLR Tobi JSC
(2003) 2 NWLR (Pt. 804) 399; *Ochonma v. Unosi* (1965) NMLR 321 and *Intercontractors Nig. Ltd, v. UAC (Nig) Ltd.* (1988) 2 NWLR (Pt. 76) 303.

Learned counsel contended that an appeal is not the inception of a new case. Accordingly, the issue of the purchased property, not being before the trial court for consideration, cannot be subject of an appeal concerning the proceedings before the trial court. He referred to *Ifeanyi Chukwu (Osondu) Nig. Ltd. v. Soleh Boney Ltd.* (2000) 5 NWLR (Pt. 656) 322. Arguing that the appellant was denied fair hearing in the Court of Appeal, counsel referred to section 33(1) of the 1979 Constitution and the case of *Offor v. State* (1999) 12 NWLR (Pt. 632) 608.

On Issue No. 3, learned counsel submitted that the Court of Appeal was not justified in setting aside the ruling of the trial Judge based on the non-service of the statement of claim. He referred to *Jonason v. Charles* (2002) 12 MJSC 1; *Nigerian Air Force v. Wing Commander Shekete* (supra) and *Onigbo v. Una* (supra). He urged the court to allow the appeal.

Learned counsel for the respondent, Chief F. O. Offia, raised a preliminary objection on Grounds 1, 2, 4, 5, 6 and 7 of the Grounds of Appeal. He contended that Grounds 1, 2 and 6 did not state full or adequate details of the misdirections complained of. He also contended that Grounds 4 and 5 do not arise from the proceedings and the judgment of the Court of Appeal respectively. On Ground 7, counsel argued that it is vague as no particulars are supplied. He also urged the court to strike out all the issues formulated by the appellant for determination based on the reasons contained in paragraph 6.08, page 11 of the respondent's brief.

Learned counsel submitted on the lone issue that once there is proof that the writ of summons was served on the defendant/appellant, there being no provision in Order 9 for the service also of the statement of claim, the order has been complied with, and if no appearance is entered, judgment may be entered in favour of the plaintiff. He also submitted that the Court of Appeal was right to hold that since there was no requirement that the statement of claim must be served on the defendant/appellant, the trial Judge erred when she set aside the orders based on the reason that no statement of claim

was not served. He urged the court to dismiss the appeal.

In the Reply Brief, learned counsel for the appellant argued that the grounds of appeal and the issues attacked by counsel for the respondent are valid. Counsel submitted on the merits of the case that the unconstitutionality of the judgment of the Court of Appeal was not defended by the respondent. He referred to the case of *Saleh v. Monguno* (2006) 15 NWLR (Pt. 1001) 25, on the sale or attachment of immovable property of a judgment debtor without an order of court. B

Let me take the preliminary objection first. It is in respect of Grounds 1, 2, 4, 5, 6 and 7 and all the three issues formulated by the appellant. Grounds 1, 2 and 6 which complain of misdirection, contrary to the submission of learned counsel for the respondent, contain details of the misdirection. Apart from providing for the details in the body of the grounds, the particulars copiously provide for the details of misdirection. The particulars specify how the Justices of the Court of Appeal misdirected themselves. ***I do not agree with counsel that Ground 2 is incompetent and should therefore be struck out. Learned counsel did not tell this court why the ground is incompetent. The ground which complains about misdirection is competent, and I so hold.*** C
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In Ground 4, the appellant complained that the learned Justices of the Court of Appeal erred in their judgment when they held that the learned trial Judge arrived at her ruling suo motu without calling for evidence from the parties. This ground clearly arises from the proceedings, and so, I do not agree with learned counsel that the ground did not arise from the proceedings. F

In Ground 5, the appellant complained that the learned Justices of the Court of Appeal relied too heavily in their judgment on the appellant's brief relating to facts and matters which were not established either before the trial court or before them. Again, I do not agree with learned counsel for the respondent that the ground is vague and does not state the error in law complained of and that the ground does not arise from the judgment of the court. A complaint that a court of law relied on appellant's brief relating to facts and matters not established in the court, cannot be described as vague. G
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Counsel is not also correct to say that the ground does not arise from the judgment. It arises and pages 298 to 313 of the Record vindicate the ground of appeal. It is quite a different thing for appellant to lead evidence in proof of the ground. I also reject the objection on Ground 7.

B And that takes me to the issues. Counsel for the appellant submitted that Issue No 1 is inappropriate as the appeal before this court is from the Court of Appeal and not from the High Court to the Court of Appeal. On Issue No. 2, he submitted that the issue is couched in abstract terms without concrete reference to the Record of Appeal
C and the judgment. On Issue No. 3, counsel submitted that the issue is a repetition of Issue No. 1 and is therefore incompetent.

Issues are formulated from grounds of appeal and if they are based on valid grounds of appeal, an appellate court must consider them. See *Idika v Erisi* (1988) 2 NWLR (Pt. 78) 563; *Management Enterprises Ltd. v. ABC Merchant Bank* (1996) 6 NWLR (Pt. 452) 249; *General Oil Limited v. Chief Ogunyade* (1997) 4 NWLR (Pt. 501) 613; *Chiwuba v. Alade* (1997) 6 NWLR (Pt. 507) 85; *Madumere v. Okafor* (1996) 4 NWLR (Pt. 445) 637; *Shie v. Lokoja*
E (1998) 3 NWLR (Pt. 540) 56.

An appellant has the right to complain at the Supreme Court on error in the High Court where the intermediate Court of Appeal, in its view, did not correct the error but rather justified it in its judgment. In such a situation, there is nothing wrong to trace the error from its origin, the High Court, as it is in this appeal. That does not mean that the appellant is complaining of an error by the trial Judge straight to this court. No. The complaint, in my understanding, is that the plaintiff and the 3rd party had no right of appeal from the High Court to the Court of Appeal, without leave of either the High Court or the Court of Appeal. In other words, the complaint is that right of appeal in the circumstances does not vest in an appellant as a matter of course or routine but with leave of the court. This, in my view, should be the understanding of the respondent, in which case, there ought to be no objection. The objection therefore fails.
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I do not see anything abstract in Issue No. 2. In my view, the

Issue is properly formulated or couched. It is the contention of the appellant that the ruling and the judgment of the Court of Appeal are unconstitutional and have occasioned a miscarriage of justice to the appellant. I do not understand what counsel meant when he said: "the issue making concrete reference to the Records of Appeal and the judgment." If by this, he means that the issue must cite pages of the Record of Appeal and the judgment, he has got it wrong. That is never the role or function of an issue. That should be in the body of the brief arguing the appeal. But what else does he mean? I am in some confusion. B

The fault counsel finds in Issue No. 3 is that it is a repetition of Issue No. 1. With respect, I do not agree with him at all. While Issue No. 1 deals with leave to appeal, Issue No. 3 deals with the locus standi of the 3rd party/respondent. The two are kilometres apart; not proximate and so one cannot be a repetition of the other. In my humble view, the preliminary objection raised by the appellant is to no avail. It is struck out. C

I now take the merits of the appeal. As the Constitution which was in force when the cause of action arose is the 1979 Constitution, that is the Constitution that I will use. While section 220 of the 1979 Constitution provided for instances when appeal is of right, section 221 provided for instances when appeal is with leave of court. As the matter does not come within section 220, appeal will be with leave within the provision of section 221. Was the appeal of 3rd party/respondent with leave of the court within section 221 of the Constitution? The motion is at page 51 of the Record. It asked for six prayers. They are (i) extension of time to appeal; (ii) suspending the order of Sotuminu J.; (iii) suspending the ancillary order of Sotuminu, J.; (iv) suspending the order setting aside the order granting leave to sell the immovable property of the defendant/respondent; (v) stay of further proceedings of Suits Nos. ID/1002/87 and ID/24/55/50 and (vi) departure from the rules. There is no prayer for leave to appeal and that violates section 221 of the 1999 Constitution. F

A party who has an interest in an appeal from the High Court to the Court of Appeal must, under section 222 of the Constitution, seek leave of either the High Court or the Court of Appeal to appeal. Leave, in this context, means permis- H

sion. In other words, the party must seek permission to appeal. The rationale for the provision is to enable the court determines whether it is proper in law to grant the party permission to appeal in the circumstances of the case. See generally *The Registered Trustees Christ Apostolic Church Nigeria v. Uffiem* (1998) 10 NWLR (Pt. 569) 312; *In Re Williams* (No. 1) (2001) 9 NWLR (Pt. 718) 329; *In Re Ojukwu* (1998) 5 NWLR (Pt. 551) 673.

Where leave is required either in the Constitution or in the rules of court, and leave is not sought and granted, the court has no jurisdiction to grant the motion as it is incompetent. An order on such an incompetent motion is invalid. See *Nwadike v. Ibekwe* (1987) 4 NWLR (Pt. 67) 718; *Savannah Bank of Nigeria Plc v. Kyentu* (1998) 2 NWLR (Pt. 536) 41; *Ardo v. Ardo* (1998) 10 NWLR (Pt. 571) 700; *UTB v. Odofin* (2001) 8 NWLR (Pt. 715) 296; *The Nigerian Air Force v. Wing Commander Shekete* (2002) 18 NWLR (Pt. 798) 129; *REAN Plc v. Anumnu* (2003) 6 NWLR (Pt. 815) 52.

Learned counsel for the appellant quoted what I said in the case of *Auto Import v. Adebayo* (2003) 2 MJSC 44 at page 60 as follows:

"Rules of Court are meant to be obeyed ... failure to obtain leave for extension of time to appeal within the specified time or period is a substantial irregularity which affects the props and foundations of the appeal. It is beyond mere technicality which this court cannot forgive."

I have no reason to depart from the above dictum.

The second issue is in respect of denying the appellant a hearing on the merits before the ruling and the judgment of the Court of Appeal were delivered. The submission here is that the 3rd party/respondent ought to have brought an application for joinder. As no such application was brought; the appellant was denied a fair hearing. With respect, I do not understand the position of counsel; I do not see how the principles of fair hearing can apply here. I expected the principles of fair hearing to apply if the 3rd party/respondent brought an application for joinder and the court granted same without hearing the appellant. That is not the complaint and that cannot be the complaint, and so, why the furore on fair hearing? I think I can

go a bit further. The 3rd party/respondent applied to be joined as an interested party. And that application was the basis for the ruling of the Court of Appeal at pages 87 to 100 of the Record. It is clear from the Record that the respondent opposed the application by filing a counter-affidavit of twenty-seven paragraphs which the Court of Appeal in its ruling reproduced at pages 90 to 93. This apart, one B Sam I. Erugo, argued against the application at page 94 of the Record. And so, where lies the denial of fair hearing? **A party who has opposed an application cannot complain of fair hearing because by the opposition he has obtained a hearing and the hearing remains fair in so far or as long as he was not inhibited in the C hearing but given all the opportunity to make his case. As there is no complaint that the Court of Appeal did not allow the respondent to present his opposition of the application for extension of time, the issue of lack of fair hearing fails.** D

The third issue is in respect of the ruling of the learned trial Judge on the non-service of the statement of claim and the reaction of the Court of Appeal to the ruling. In its judgment at pages 305 to 307 of the Record, the Court of appeal said:

"The question that has to be determined is whether the learned E trial Judge was right in setting aside the judgment based on the reasons he gave, to wit that no Statement of Claim was served ... In my view the procedure under Order 9 does not make the service of the Statement of Claim necessary or absolutely indispensable or essential F to applying for a judgment in default of appearance to the writ of summons ... All what I am saying is that the learned trial Judge was wrong in setting aside the judgment entered in default of appearance simply for the failure to serve the Statement of Claim under the provisions of Order 9 of the Lagos State High Court (Civil Procedure) G Rules 1992 - since the judgment was not based on the Statement of Claim."

A judgment, and this includes a ruling, of a court of law is valid or so presumed until it is set aside on appeal. A court of law, trial or appellate, has the power or jurisdiction to protect H its judgment by providing teeth to bite any act of interference to weaken its legal strength of enforcement or enforceability in the judicial process. In the judicial process, a court

of law has the power or jurisdiction to set aside its own order in appropriate circumstances. It has the discretion to do so and once the discretion is exercised judicially and judiciously, an appellate court cannot interfere. After all, the court is the owner of the order and it can do anything with it, like every
 B ***owner of property.***

I do not think I will take the fourth issue. I have got enough to allow this appeal. I say by way of recapitulation that the 3rd party/ respondent was wrongly admitted to participate in this matter in the
 C Court of Appeal as he did not ask for leave to be joined as an interested party. This, to me, is the main plank for allowing the appeal. The appeal is accordingly allowed. I award N10,000.00 costs in favour of the appellant.

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OGUNTADE JSC

I have had the advantage of reading in draft a copy of the lead judgment by my learned brother Tobi J.S.C. I agree with his conclusion that this appeal is meritorious. The appeal brought before the
 E court below by the respondents should have been struck out by the court below for the reason that the 2nd respondent neither sought nor obtained the requisite leave to appeal as provided under section 222 of the 1979 Constitution. This is because the 2nd respondent
 F was not a party to the original suit at the High Court. See *The Registered Trustees Christ Apostolic Church Nigeria v. Uffiem* [1998] 10 NWLR (Pt.569) 312.

In all cases where the Constitution has provided that a party intending to appeal may only do so with leave, the court has no
 G discretion to hear such appeal unless the necessary leave has been obtained. See *Tilbury Construction Co. Ltd. & Anor. v. Ogunniyi* [1988] 2 NWLR (Pt. 74) 64; *Enang v. Adu* [1987] 11-12 SC 25, 42; *Okagbue v. Romaine* [1982] 5 S. C. 133 at 170.

I would also allow this appeal with costs as granted in the lead
 H judgment.

TABAI JSC

I have read in advance the leading judgment of my learned brother Niki Tobi J.S.C. and I agree that there is merit in the appeal which ought to be allowed. The result is that I also allow the appeal with costs which I too assess at N10,000.00

MUHAMMAD JSC

In a specially indorsed writ of summons taken from the Lagos State High Court of Justice (trial Court), the Plaintiff, African International Bank Limited but later changed name to ACB International Bank Plc, made the following claim against Mr. Leo Attah Ekpo Otu, the defendant:

"Whereof the Plaintiff claims from the said Defendant the sum of N99,653.85 plus interest at the rate of % per annum from 1st September, 1987 until the whole debt is liquidated. "

Now, there existed a banker-customer relationship between the parties first above mentioned. The plaintiff was a limited liability Company carrying on business as bankers with its Head office at No 106/108 Broad street, Lagos and having branches in various places in Nigeria including one at Martins Street, Lagos. The defendant trades under the name and style of Nigerland and Company, who was a customer of the plaintiff at its branch office at Martins Street, in Lagos.

The Plaintiff at the request of the defendant granted him overdraft facilities which accrued interest and bank charges, amounted to the sum of N99,653.85. The overdraft granted was secured by a land Certificate with Registration No. MO 3500 registered at the land Registry in Lagos. The Plaintiff sent regular statements of account of the defendant to his known address at No.20 Campbell Street, Lagos and none of the statements of account was returned unclaimed. Despite repeated demands, the defendant refused or neglected to repay the debt or any part of it.

The Plaintiff averred that the defendant had refused to enter appearance to the suit against him after the writ of summons and the statement of claim were served on him. And that the defendant had no defence to the action.

The plaintiff, as a result, filed a motion of Notice on 5th of July, 1988, for an Order:

"Entering final Judgment as per the plaintiff/applicant's writ of summons and statement of claim against the defendant for failure to enter appearance to this suit."

B Judgment was entered in favour of the Plaintiff on the 10th of October, 1998. It is to be noted however, that neither the ruling in respect of that Motion on Notice nor the trial court's proceedings of the 10th of October, 1998 is contained in the printed record of this appeal. What is made available is the enrolled order made by the C trial court on same date.

On the 29th day of January, 1990, an order was made by the trial court pursuant to a Motion on Notice by the Plaintiff for the attachment of defendant's immovable property. Leave was so granted D to the Plaintiff/Applicant/Judgment creditor, to attach and sell the immovable property of the defendant/respondent/judgment debtor within the jurisdiction of the trial court.

On the 6th of February, 1991, the defendant/judgment debtor filed an application before the trial court for an order setting aside the E judgment of 10th of October, 1988 and the order of 29th January, 1990, in addition to other reliefs. On the 17th day of May, 1991, the learned trial judge granted the prayers. The judgment of 10th of October, 1988 and the order of 29th of January, 1990 were both set F aside. Some other consequential orders were also made. Earlier on, however, and pursuant to the court's order of 10th October, 1988 and order of attachment of the defendant's property, one Alhaji Kabiru Rufai, purchased the said property for the sum of N120,000.00 on the 27th of November, 1990. Alhaji Kabiru had since been issued G with a Certificate of Occupancy by the Lagos State Government. (pp 15-17 of the record). He further obtained from the High Court an order of possession of the property in dispute (p.27 of the record) and thereafter moved into the property, demolished it and commenced the re-development of same.

H Among the reasons given by the defendant for seeking for setting aside was that he was never aware that an action had been instituted against him or that judgment was obtained against him.

It is to be noted that although Alhaji Rufai was listed on the

Motion on Notice for setting aside as one of the 3 parties to be served with the said Motion, no service was effected on him. So, by the time the motion was heard and determined, he (Alhaji Kabiru) had not been put on notice thereof and he was never heard. As he was out of time to take any steps in the trial court, Alhaji Kabiru made an application to the Court of Appeal. The Court of Appeal granted him extension of time on the 6th of April, 1993, with which to appeal against the judgment of the trial Court of the 17th May, 1991. Thus, Alhaji Kabiru now became an appellant before the Court of Appeal by filing his Notice of Appeal on the 14th of April, 1993.

On the 16th of May, 1996, ACB Plc, filed a motion before the Court of Appeal, Lagos for an order extending the time within which to apply for leave to appeal. Leave was granted and time was extended for ACB to appeal against the trial court's judgment of 17th of May, 1991 which set aside the judgment of 10th of October, 1988 and the order of 29th of January, 1990. Accordingly, a Notice of Appeal was filed subsequently. The Court of Appeal took both appeals, considered them and allowed them. The orders made by the learned trial judge on 17th of May, 1991 were set aside. The decisions of the learned trial judge of 10th of October, 1988 and the order of 29th of January, 1990 were restored.

Dissatisfied, the defendant/respondent and now appellant filed his Notice of Appeal which contains 7 grounds of Appeal, praying that the decision/judgment of the court below of 8th of April, 1998 be set aside and restore the orders of the trial court of 17th of May, 1991.

On the hearing date of this appeal, learned counsel for the appellant adopted and relied on the brief he filed on behalf of the appellant. He set out four issues for determination. Learned counsel for the plaintiff/respondent adopted his brief of argument on behalf of the plaintiff/respondent. He too set out four issues therein. All these issues were reproduced by my learned brother, Tobi, J.S.C. I need not repeat them. I need not also repeat the submissions of the learned counsel for the respective parties as these were professionally condensed by my learned brother, Tobi, J.S.C. in his judgment.

In my treatment of the appeal, I will comment on one aspect which is covered by appellant's issue (3). For the preliminary objec-

tion and the remaining issues, I totally agree with my learned brother, Tobi, J.S.C. in his reasoning and conclusion.

The bone of contention in issue (3) of the appellant's issues is the setting aside of a ruling and an order of attachment of property made by the trial Court. I think I need to reproduce the ruling which
B set aside the ruling and order of 10th of October, 1988 and 29th of January, 1990 respectively. In the ruling of 17th of May, 1991 which appears on pages 61-65 of the record of appeal, the learned trial Judge held, inter alia:

C *"I hereby make the following orders:*

1. The Judgment in default given against the defendant by this Court on the 10th day of October, 1988 is hereby set aside.

2. The order for sale of the defendant's property made on the 29th day of January, 1990 based on the said Judgment is also
D *hereby set- aside.*

3. The plaintiff is hereby ordered to serve the defendant the statement of claim as previously ordered by this Court within 7 days from today.

4. The defendant shall file the statement of defence within 14
E *days thereafter.*

5. The plaintiff shall file a Reply if necessary within 7 days there- after.

6. This matter will be heard on its merit and must be given
F *accelerated hearing in the interest of justice. "*

As indicated earlier in the Judgment, the plaintiff filed a Motion on Notice on 5th of July, 1988, praying the trial Court to enter final Judgment as per its claim in the writ of summons and statement of claim against the defendant for failure to enter appearance to the
G suit. In the affidavit in support of the Motion on Notice, one Oval Egbighe, averred to the following facts, on oath:

"5. That the defendant has no defence to this action.

9. The defendant has refused to enter appearance to this suit after the writ of summons and statement of claim was (sic) served on him."

H In the enrolled order (made available in the record of appeal), the learned trial judge, pursuant to the Motion on Notice of 5th of July, 1988, made the following orders:

"It is hereby ordered as follows:

1. *That Judgment shall be entered for the plaintiff/applicant against the defendant/respondent in default of appearance for the sum of N93,676.50k being the balance of money lent out by plaintiff/appellant to the defendant/respondent in the normal course of Plaintiff's business as banker to the defendant.*

2. *That defendant/respondent shall pay 15% interest per annum on the judgment debt calculated from 1st day of September, 1887. Until final liquidation of the judgment debt.*

3. *That defendant/respondent shall pay N400.00 costs to the plaintiff/applicant. "*

Further, sequel to another motion which was reflected in the enrolled order of 29th January, 1990, but not contained in the record of this appeal, and pursuant to which an order of attachment of the immovable property of the judgment debtor was made, the learned trial judge held as follows:

"It is hereby ordered that leave shall be granted the plaintiff/applicant-judgment /creditor to attaché and sell the immovable property of the defendant/respondent judgment/debtor within the jurisdiction of this honourable court."

These were the two processes sought to be set aside by the learned trial judge and were in deed, set aside.

On appeal to the court below, the court below allowed the appeals; set aside the order made by the learned trial judge on the 17th of May, 1991 and restored and upheld the decisions made by the learned trial judge on 10th of October, 1988 and the subsequent order made on the 29th of January, 1990.

Was the court below correct in its decision of 8th of April, 1988? Let me begin by examining the proceedings of the trial court.

In an enrolled order, a motion-ex parte for substituted service (motion not contained in the record of appeal) was argued and subsequently granted by the learned trial judge. The order made therein reads:

"It is hereby ordered that the writ of summons, statement of claim and all other processes connected with this shall be served on the Defendant/Respondent by pasting same on the door of the last known place of business of the Defendant/Respondent i.e. No 20, Campbell Street, Lagos and such service shall be deemed good and

sufficient service on the Defendant/Respondent."

This was the trial court's order for a substituted service on the defendant. The only defendant as at that time was one Leo Attah Ekpo Otu (who was trading under the name and style of Nigerland & Company). What that order required can be summarized as follows :

B

- (1) The writ of Summons,
- (2) Statement of claim and
- (3) All other processes connected with this (suit),
- (4) Shall be served on the defendant/respondent,
- (5) By pasting same,

C

(6) On the door of the last known business of the defendant/respondent, i.e No. 20 Campbell Street, Lagos.

D

Although that order was granted ex-parte there is no evidence in this record that it was set aside by the same court or any other court. That order remained valid and subsisting till when it is set aside. That is the position of the law see: F.A.T.B Ltd. v. Ezegbu (1992)9 NWLR (pt. 264) 132; Ezeokafor v. Ezeilo (1999) 9 NWLR (pt.619) 513.

E

In the affidavit in support of the Motion for setting aside the said processes, the defendant, who personally deposed to the affidavit, averred as follows:

F

" 1. *That I returned to Calabar after my retirement from the Federal Civil Service about 1970 from where I visit Lagos very infrequently.*

G

2. *That the premises known as No 24 Western Avenue, Surulere, Lagos belong to me, and I have tenants therein. It will hereafter be referred to simply as "the property".*

H

3. (a) *That on Monday the 27th day of November, 1990 one Innocent Nwokeomah who is a Clerk with the firm of Solicitors of Orok Ironbar & Associates of 11, King Street, Calabar rushed to me at my residence in Calabar to state that a phone call from their Lagos office indicated that my said property was about to be sold by auction.*

(b) *That this information met me on my sick bed as I have been ill in the last few years.*

4. *That as I was startled by this information as I do not recall*

any reason for such Auction nor do I owe any person(s). I knew that there was urgent need to restrain the defendants from selling my property.

5. That as I was ill and could not immediately get money to travel to Lagos my family members advised me upon which I contacted Messrs Orok Ironbar & Associates (Solicitors) to institute action on my behalf and stop the said sale. Copy of the writ of summons is attached hereto Exhibit 'A'.

6. (a) That I have never been served with Notice, Summons, Motion, letters or any either document indicating that there was any dispute over my property. I also had no knowledge whatsoever of any pending suit against me by African Continental Bank.

(b) That only after notice of the said irregular Auction did my son Ekanen Ekpo Otu go to search at the High Court registry and discovered enrolment order of 29/1/90 Exhibit 'B' attached. My said son also resides within the property.

(7) That I am opposed to the said sale by Auction of my property and I know that the said auction exercise must be orchestrated by the respondent with irregular intent because it is to the knowledge of the respondent and all my business associates and friends that I am now resident in Calabar. "

However, in the Counter-affidavit filed on behalf of the plaintiff (Judgment creditor/respondent, one Aijo Ikuesan, a litigation Clerk in the law firm of Afam Nwobodo & Co. averred as follows:

"2. That I have the authority and instructions of our Client, African Continental Bank Limited to make this counter-affidavit.

3. That the defendant/judgment debtor/applicant was as at 31st of July, 1987 indebted to our Client, African Continental Bank Limited to the tune of Ninety Nine Thousand Six Hundred and Fifty G Three Naira, Eighty Five Kobo only (N99,653.85) pursuant to an Overdraft facility extended to him.

4. That the known business address of the defendant/judgment debtor/applicant was No 20 Campbell Street, Lagos.

5. Furthermore, that the plaintiff/judgment creditor/respondent sent regular statements of Account of the defendant/judgment debtor/applicant to the said address and none of these statements of Accounts was returned unclaimed.

6. *That pursuant to paragraph 5 above, all the processes arising from the above-stated suit was served on the defendant/judgment debtor/applicant at the said No 20 Campbell Street, Lagos pursuant to an order of substituted service of this Honourable Court. The said order is hereto attached and marked Exhibit 'A'.*

B 7. *That in answer to paragraph 7 of the affidavit of the Defendant/Judgment Debtor/Applicant, the Creditor/Respondent Plaintiff/Judgment informs me and I verily believe same, that he does not know and has never been informed, orally or in writing, that the*
 C *Defendant/Judgment Debtor/Applicant now resides in Calabar.*

8. *That the Defendant/Judgment Debtor/Applicant has never communicated his residential address to the Plaintiff/Judgment Creditor/Respondent, save his known business address at No 20 Campbell Street, Lagos. "*

D My Lords, I find it pertinent to quote in extenso what the learned trial judge said in his ruling setting aside his earlier decisions. Below is what he held, among other things:

"At the hearing of the application both learned Counsel addressed the Court and cited several legal authorities. I do not intend
 E to go into details on those authorities in this ruling in order not to prejudice the case itself. I have carefully considered the affidavit and counter affidavit which I have reproduced above in the ruling. I have also taken the pains to go through the case file. In Paragraph 7 of the
 F affidavit in support of the application the Applicant deposed to the fact as follows:

"That I am opposed to the sale by auction of my property and that I know that the said auction exercise must be orchestrated by the Respondent with irregular intent because it is to the knowledge of the
 G *Respondent and all my business associate and friends that I am now resident in Calabar ".*

The Respondent in its reply at paragraph 8 of the counter affidavit states as follows:

"That the defendant/judgment debtor/applicant has never com-
 H *municated his residential address to the plaintiff /judgment creditor/ respondent save his known business address at No 20 Campbell Street, Lagos.*

With this conflict in the affidavit and counter-affidavit, I found

in the case file the affidavit of service of the writ of summons sworn to by one Akeju the bailiff of this Court that the writ of summons was pasted at the door of No 20 Campbell Street, Lagos on the 9th of June 1988. There is an endorsement on the copy of the said writ that it was so pasted but there is no endorsement nor an affidavit that the statement of claim was served on the defendant by pasting as ordered by this court on the 14th of March 1988. At paragraph 9 of the affidavit in support of the application for judgment brought by the plaintiff/respondent under order 9 rules 2-3 of the High Court of Lagos state civil procedure rule 1972 on the (not clear) which judgment was given, the plaintiff's agent one Mr. (name not clear) sworn on oath on the 5th day of July, 1988 as follows and I quote: 'The defendant has refused to enter appearance to this suit after the writ of summons and statement of claim were served on him'.

As stated earlier in this ruling there is no evidence that the statement of claim was served on the defendant which in effect means that the order of this court made on the 10th of October, 1988 that both the writ of summons and the statement of claim be served by pasting on the defendant's address at No. 20 Campbell Street, Lagos was not complied with. It is my view that if a party has not been served with the statement of claim as ordered by the court any proceedings based on it is null and void, and when a party claims as in the present case before me, he is saying in effect that the judgment was a nullity. See Skenconsult v. Ukay (1981) 1 SC page 6. Nzom v. Jinadu (1987) NWLR (Pt. 5) page 533.

It is my view that having failed to comply with the order of this court, that the statement of claim be served on the defendant by pasting, the judgment obtained therefrom should not be allowed to stand. I have the inherent jurisdiction to set aside my judgment made on the 10th day of October, 1988 because of the said non-compliance of my order and the said Judgment is hereby set aside accordingly. See Adegoke Motors Ltd. v. Adesanya (1989) 3 NWLR part 109 page 250 at page 273."

He set aside his earlier decisions because one of the conditions precedent which he gave in his ruling was not met i.e service of the plaintiff's statement of claim. I am in total agreement with the learned trial judge that if a party has not been served with the statement of claim so ordered by the court, any proceedings based on it is null

and void. This means that the learned trial judge realized that he gave judgment without jurisdiction. It is an elementary principle of the law that any judgment or decision given without jurisdiction is a nullity and ought to be set aside. See: *Skenconsult Nig. Ltd. v. UKay* (1981) 6 Sc.

B It has been argued by learned counsel for the respondent that once there is proof that the Writ of summons was served on the defendant/appellant, there being no provision in order 9 (2) and (3) of the Lagos State High Court Rules, 1972, for the service of the statement of claim, the order has been complied with and then if no
C appearance is entered, then judgment may be entered in favour of the plaintiff.

I think, the essence of court rules is to facilitate the courts in arriving at justice without undue adherence to technicalities. I do not
D need to set out the requirements of order 9 (2) and (3) of the 1972 Lagos High Court Rules of Civil Procedure (which is now contained in cap.61 of Laws of Lagos State 1994). What I need to draw attention to, however, is that the learned trial judge in his wisdom, ordered for the service to include the plaintiffs statement of claim. The order
E referred to by learned counsel for the respondent and relied upon by the court below has not tied the hands of the trial judge that it is only the writ of Summons that should be served alone. The trial judge has a discretion, like in case of grant of bail, to impose necessary conditions that will ensure strict compliance with the terms
F imposed. It is trite that in civil proceedings, a statement of claim supercedes the writ of summons. Thus, statement of claim is more authoritative. See: *Udechukwu v. Okwuka* (1956)1 FSC 70

In any event, the order remains a valid and subsisting court's
G order until set aside. It must be obeyed. As there was no proof of service of the statement of claim through the substituted means permitted, there was no proper service of the processes as ordered by the trial court. Service of court's process is so fundamental such that any failure to effect service of such processes can render proceedings
H conducted thereunder null and void as the Court lacks jurisdiction to adjudicate. See: *Julius Berger Plc. v Femi* (1993) 5 NWLR (pt.295) 612.

I think the trial court was not wrong in setting aside earlier

decisions which it found to be in clear disobedience or contradiction of the orders it granted earlier. It has every right to set aside its null and void orders. See: *Sili Yun v. Mashi* (1975) 1 NMLR 55; *Agunbiade v. Okunnuaga* (1961) 1 All NLR 110. After all, it only asks the parties to go for a trial on the merit.

Before I drop my pen, let me observe that the record of appeal before me now, is one of the shabbiest I have ever come across. Many important documents (some mentioned earlier) were missing; many of the proceedings of the trial court and that of the court below were jumbled up; some pages remain unclear. This is disgusting and annoying. Learned counsel, particularly those whose responsibility it is to sponsor the compilation of records, must insist that a correct and decent record is transmitted to an appeal court. That will facilitate the quick and smooth dispensation of cases in the appeal courts.

Finally, I am in complete agreement with my learned brother, Tobi, JSC that this appeal has merit and it should be allowed. I allow the appeal. I abide by all the consequential orders made by my learned brother in his lead judgment, including order as to costs.

ADEREMI JSC

The appeal is against the judgment of the court below (Court of Appeal - Lagos Division) delivered on 8th April, 1998 in Appeal No. CA/L/211/91 in which the court below allowed the two appeals before it as filed by the two appellants before it (i.e. Alhaji Kabiru Rufai - the present interested party/2nd respondent and African Continental Bank Ltd - the present 1st respondent); consequently set aside the orders made by the trial judge on the 17th of May 1991 and restored the decision the trial judge made on the 10th of October 1988.

At this stage, I consider it very important to preface the consideration of the appeal with the facts leading to it. The 1st respondent (African Continental Bank Ltd), as plaintiff before the trial court (High Court of Lagos State, holden at Ikeja Judicial Division) had taken out a writ of summons claiming the sum of N99,653.85 (ninety-nine thousand, six hundred and fifty-three Naira, eighty-five kobo) against one Leo Attah Ekpo Otu (now deceased and substituted by the

present appellant by leave of court) as the sum outstanding against the said deceased on account as overdraft facilities with accrued interest thereon. Sequel to the service of the specially indorsed writ of summons on the deceased and there being no reaction from that end (the defendant/deceased's end) the 1st respondent brought a motion of notice filed on the 5th of July 1988 praying the trial judge to enter final judgment in its favour as per the endorsement on the writ of summons. The said motion was granted on the 10th of October 1988 and judgment was entered in favour of the plaintiff/1st respondent in the sum of N93,676.50 being the balance of the money lent to the defendant in the normal course of plaintiffs business as a banker to the defendant. Following the application for the attachment of the property of the defendant to realise the judgment-debt, the learned trial judge granted the plaintiff, as the judgment-creditor before the court for that purpose, leave to attach and sell the immovable property of the defendant, who himself was the judgment-debtor for that purpose. Thus the property of the defendant/judgment-debtor situate at 24 Western Avenue, Surulere, Lagos was sold to one Alhaji Kabiru Rufai - the present interested-party/2nd respondent by the court. By an application on notice filed on 6th February 1991, the defendant/judgment-debtor moved the trial court to set aside the sale of the property for the reasons set out in the supporting affidavit accompanying the notice. That application was granted on the 17th of May 1991 and consequently, the judgment in default entered against the defendant on the 10th of October 1988 together with the order of the sale of the defendant's property made on the 29th of January 1990 were set aside. It was further ordered that the defendant be served with the statement of claim preparatory to getting the case to be heard on its merit. Dissatisfied with the order of 17th May 1991, the interested-party who is styled here as the 2nd respondent and who was never a party to the suit from inception, lodged an appeal against the ruling of 17th May 1991. Because the time within which to appeal had expired, he (interested-party) brought an application dated 30th April 1992 for an order extending the time within which to appeal. The application, which prayed for an order extending time to appeal was granted on the 6th of April 1993 by the court below. A Notice of Appeal dated 14th April 1993 was then filed. The

defendant (Leo Attah Ekpo Otu) also cross-appealed. The appeal and the cross-appeal were thereafter taken by the court below after the filing of the respective briefs of the parties and arguments thereon were canvassed. Before then, while the appeal and cross-appeal were still pending before the court below, Leo Attah Ekpo Otu, the original defendant died on the 21st of June 1996. His son (Ekanem Ekpo Otu - the present appellant), was substituted for him by the order of the court below. In allowing the appeal and the cross-appeal on the 8th of April, 1998, the court below had reasoned: -

"Now, the appellant purchased the property of the 1st respondent from the Deputy Sheriff under a writ of execution, he took possession of the property and was since issued with a Certificate of Occupancy by the Lagos State Government. In a proceeding to set aside the execution of the judgment and the sale of the property to him, could he be said not to have locus standi or interest to be heard in the proceedings? the question therefore to be settled is (sic) the action that cannot be effectually and completely settled unless he is a party Can the matter of setting aside the sale of the property in this case be settled effectually and completely without making the appellant a party? The questions that arose for determination before the lower court included the setting aside of the sale. In my view, the interest of justice demands that the purchaser should be made a party to be heard since his interest in the property will be affected. He has locus standi to protect his proprietary rights to the property. I reject the submissions of the learned counsel for the respondent that the matter did not affect the appellant. He purchased the property. He took possession and he was issued with a Certificate of Occupancy. He ought to have been joined as a party. I accordingly resolve the third issue in favour of the appellant.

As mentioned above, the plaintiff, African Continental Bank, also appealed against the decision and in their brief offered the same arguments as those offered by the learned counsel for Alhaji Kabiru Rufai. The learned counsel for the 2nd respondent offered also similar arguments. In view of what I said above, I see no point in repeating myself. The facts are the same. The complaints are the same and the issues raised are identical

In any event, in view of what I discussed above, I allow the two appeals and I set aside the orders made by the learned trial judge on the 17th day of May, 1991, I restore and uphold the decisions made by the trial judge on 10/10/1988 and the subsequent order made on the 29/1/1990."

B For a proper understanding of the facts of this case, I wish to say that by the judgment of the court below, the extract of which I reproduced above, what was set aside was order of the trial court setting aside the sale of the property made on the 29th January 1990
C and the judgment entered against the defendant on the 10th of October 1988.

Aggrieved by the judgment of the court below, the defendant/appellant appealed therefrom to this court per a notice of appeal dated 11th May 1998 - which notice carries seven grounds of appeal. The
D briefs filed and exchanged by the parties before this court are, (a) the appellant's brief of argument deemed to have been properly filed and served on the 16th of March 2005, (b), the plaintiff/respondent's brief filed on the 10th of October, 2006 and (c) the appellant's reply brief deemed to have been properly filed and served on the 22nd of
E October 2007. The appellant has distilled four issues from the grounds of appeal in his Notice and as set in his brief of argument, they are in the following terms: -

*"(1) Whether the respondents (i.e. the plaintiff and 3rd party)
F had a right of appeal from the High Court to the Court of Appeal against the ruling of the trial court of 17/5/1991, and if they had such right, whether it was one that could be exercised without leave of either the trial High court or the Court of Appeal?*

(2) Whether the ruling and the judgment of the Court of Appeal denying the defendant hearing on merit are not unconstitutional and have not occasioned miscarriage of justice to the defendant/appellant?

*(3) Whether from the record before the trial court, the Court of Appeal was justified in upsetting the trial court's ruling that the
H statement of defence was not served?*

(4) Whether Alhaji Kabiru Rufai was a proper party in the proceedings before the trial court?"

The plaintiff/respondent, by way of preliminary objection urged

this court to strike out grounds 1, 2, 4, 5, 6 and 7 and by the same token, the issues distilled therefrom for various reasons such as allegation of misdirection in law without stating the particulars, vagueness and not arising from the proceedings in the court below.

The only issue that was not attacked is, issue No. 3 on the appellant's brief. Only one issue was raised by the plaintiff/respondent for determination by this court; and as couched in its brief of argument, it is as follows: -

"Whether the Court of Appeal was right to hold that the procedure under 0.9 of the Lagos State High Court (Civil Procedure) Rules 1972, did not make the service of the statement of claim on the defendant, absolutely necessary for a judgment in default of appearance to the writ of summons."

I have had a close study of the issues raised for determination; it is my respectful view that issues Nos. 1 and 4 in the appellant's brief of argument can be taken together; issue No.2 on the appellant's brief can be taken together with the only issue identified for determination by the plaintiff/respondent. I shall now take the issues serially.

By the order made by the trial court on the 17th of May 1991, the judgment in default of appearance entered against the defendant for the sum of N93,676.50 was set aside, order for the sale of the defendant's property made on 29th January 1990 was also set aside while it was further ordered that the statement of claim be served on the defendant who should file his defence within 14 days thereafter with the plaintiff being at liberty to file a reply within 7 days thereafter; while it was finally ordered that the matter be heard on its merits. By the afore-mentioned ruling of 17th May 1991, it is clear that the case before the trial court had not been decided on its merit. The specially indorsed writ was taken out on the 25th of September 1987; it therefore follows that it is the provisions of the 1979 Constitution that are applicable to this matter. The relevant provision of the 1979 Constitution is Section 220 (2) (a) which reads: -

*"Nothing in this section shall confer any right of appeal -
(a) from a decision of any High Court granting unconditional leave to defend an action."*

The equivalent of the afore-mentioned provision of the 1979

Constitution in the 1999 Constitution is Section 241 (2) (a). It follows that to appeal to the Court of Appeal from the High Court under the afore-mentioned provisions of the Constitution either by the 1979 one or the 1999 one, leave of the Court of Appeal or the Supreme Court (where the appeal is to the Supreme Court) is required. It seems to me clear from the wordings of sub-section (2) (a) supra that the right of appeal is barred. Consequently, there is no right of appeal to the Court of Appeal from the decision of any High Court granting unconditional leave to defend an action. See *N.B.N. Ltd. v. Weide & Co. Nig. Ltd.* (1996) 8 NWLR (pt. 465) 150. There is nothing on record to show that the party interested who styled himself as defendant/appellant at the court below sought and obtained the leave of court to appeal against the said ruling. The Notice of Appeal filed by him against the said ruling is therefore null and void. The lower court was right in saying that in the interest of justice, the party interested i.e. the purchaser should be made a party to the suit since his interest in the property would be affected. But the question is did he apply to be joined as a party to the case. I venture to say that going through the entire record of proceedings there is nothing to show that the party interested even made any application to be joined as a party to the suit. *Prima facie*, when no relief or order is sought, the court does not grant any; it will be an undeserved indulgence on the part of the court to so do. By virtue of Section 222 of the 1979 Constitution which is in *pari materia* with the provisions of Section 243 of the 1999 Constitution, only a party to an action can appeal against the decision in that action. Thus, a person interested or affected by the decision in that suit, must in addition to seeking and obtaining the leave of court to be joined in the suit, must also obtain the leave of the court to appeal. See *Ikonne v. C.O.P. Imo State & Anor* (1986) 2 N.S.C.C. 1130 and *Ubagu & Ors v. Okachi & Ors* (1964) N.S.C.C. 20. The interest envisaged under Section 222 of the 1979 Constitution is a legally, recognisable interest, not having sought and obtained the order of court to be made a party to the appeal and not having sought and obtained the leave to appeal the notice of appeal of the party-interested is fraught with fundamental vice, he lacks *locus standi* in the matter. Issues Nos. 1 and 4 on the appellant's brief are answered in the negative; they are resolved in

favour of the appellant in this appeal.

On Issue No. 2 on the appellant's brief, it is very obvious from the factual account that the appellant was not given hearing at all, not to talk of fair hearing. Hence, the order of the trial court for a trial of the case on the merit. The treatment of this issue is so detailed in the leading judgment of my learned brother Tobi, J.S.C. that I am of the humble view that I cannot improve upon it. I resolve that issue in favour of the appellant. B

On Issue No. 3 on the appellant's brief and the only issue identified by the respondent, I wish to say, borne out by several decisions of this court that rules of court, the like of Order 9 (2) and (3) of the 1972 Lagos High Court (Civil Procedure) Rules are no more than an aid to course of justice. The order made by the trial judge regarding pleadings does not, by any strained interpretation, strike at the foundation of the justice of the case. Rather to me, it promotes the justice of the matter. The orders made by the trial judge are in the best interest of justice of the matter. That Issue No.3 is therefore answered in the negative. D

In the final analysis, for what I have been saying supra, but most especially for the very lucid discourse of the entire issues by my learned brother Tobi, J.S.C., I also come to the conclusion that the appeal is meritorious and it is allowed. I set aside the judgment of the court below. I abide by all the other consequential orders made by my learned brother in the leading judgment including the order as to costs. F

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