

**SUPREME COURT OF NIGERIA**  
15TH FEBRUARY, 2008. SC.262/2002  
**CORAM:- N. TOBI, S. A. AKINTAN, W. S. N.**  
**ONNOGHEN, F. F. TABAI, I. T. MUHAMMAD, JJSC**

1. CALABAR CENTRAL CO-OPERATIVE  
THRIFT & CREDIT SOCIETY LTD. .... DEFENDANTS/  
2. CHIEF E. E. UMOH ..... APPELLANTS  
3. CHIEF OKO E. EFFANGA  
AND  
BASSEY EBONG EKPO  
(Substituted by Edet Bassey Ekpo By ..... PLAINTIFF/  
Order of Late Hon. Justice Effanga, Chief ..... RESPONDENT  
Judge, (As he then was of June 16, 1997)

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APPEALS - Leave - Ground of appeal - Where it is a ground of fact  
- Failure to obtain leave of court - Renders it incompetent and liable  
to be struck out (H1)

APPEALS - Leave - Fresh issue - Finding not appealed against is  
binding - Save where leave was obtained - To raise it as a fresh issue  
(H2)

APPEALS - Preliminary objection - Grounds of appeal - Compe-  
tence of - Ground 3 being complaint against lower court's judgment  
- Is valid (H3)

PLEADINGS - Land matters - Parties & court - Are bound by the  
pleadings - Facts not pleaded ground to no issue - Brilliant argument  
of counsel - Is no substitute for pleadings and evidence (H4)

LAND USE ACT - Alienation - Governor's consent - S. 22 (1) of the  
Act - Clearly makes it unlawful for holder of right of occupancy - To  
alienate same - Without Governor's Consent (H5)

LAND USE ACT - Right of occupancy - Alienation vide deed of con-  
veyance - without obtaining mandatory Governor's consent - Makes

### **FACTS**

Before the High Court of Calabar, plaintiff/respondent filed an action against defendants/appellants vide an originating summons. The question presented for court's determination is whether in accordance with Land Use Decree, valid title has been passed from plaintiff to first defendant arising from the parties' agreement of 25-1-1987 over plaintiff's landed property. Plaintiff sought inter alia, that the purported conveyance between the parties is null and void for being against the provisions of the Land Use Act. The plaintiff/respondent was employed as a clerk by the 1st defendant/appellant and he rose to the position of senior travelling secretary. He was suspended from his employment for perpetrating some fraudulent acts, pending the result of an investigation into the matter. Respondent was at appellants' instance detained and or interrogated by the police several times. He alleged he was told by the police to sign a deed in respect of his landed property in dispute, to surrender ownership thereof to 1st appellant in discharge of an alleged debt of N80,000 with a threat of being thrown into the cells with hardened criminals if he refused to comply. He then signed Exhibit A (a deed of conveyance) and handed over all the original documents relating to the property to 1st appellant, after which he was released by the police. Respondent maintained that appellants used undue influence or duress to defraud him of his property.

Appellants denied ever intimidating respondent in executing Exhibit A, but maintained that the document was a voluntary act of respondent to avoid criminal prosecution for the fraud committed on 1st appellant. The trial court found in favour of the respondent and held that Exhibit A is not valid in law, the transaction being a nullity. Governor's consent was not obtained before or after Execution of the said Exhibit A that purportedly alienated respondent's right of occupancy. Appellant's Appeal to the Court of Appeal was dismissed. Still aggrieved, appellants have further appealed to the Supreme Court.

### **ISSUE FOR DETERMINATION**

*Whether or not the deed of conveyance Exhibit "A" to the*

*originating summons was null and void and of no effect whatsoever under the Land Use Act for the reason only that the consent of the Governor was not first sought and obtain before it was signed/executed.*

***HELD*** (Unanimously dismissing the appeal per **ONNOGHEN JSC**)  
***Ground of appeal - Where it is a ground of fact***

1. It is very clear that ground 1 together with the particulars thereof is simply a ground attacking a finding of facts by the court below; it is not a ground of error of law at all. To establish the existence of the debt of N80,000.00 one needs facts to prove same, not law so a finding that the existence of such a debt has not been established is a finding based on the facts presented in proof of the assertion, not otherwise. The above finding complained of being a finding of fact, it is settled law that for the appellants to successfully appeal against the finding, they must first of all obtain the leave of either the lower court or of this court. It would have been otherwise if the complaint was purely a complaint of error in law. It is clear from the record that appellants never obtained the leave of either the lower court or of this court to appeal on the facts so ground 1 of the grounds of appeal in so far as it is a complaint against the findings of facts is incompetent and is consequently liable to be struck out. (p. 978 E)

***Finding not appealed against is binding***

2. It is settled law, however, that a finding of a court or tribunal not appealed against is deemed accepted by the party against whom the finding was made - in the instant case, the appellants. However, if the appellants had sought and obtained the leave of the courts to appeal against the findings of facts or mixed law and facts or to raise fresh issues not raised in the court below, it would have been sufficient to sustain ground 1 of the grounds of appeal. Since no such leave was sought and obtained the affected ground is doomed to be struck out for being incompetent. I therefore order accordingly. (p. 979 F)

***APPEALS - Preliminary objection***

3. On the competence of ground 3 of the grounds of appeal, I hold the view that the complaint therein is against the judgment of the

lower court and therefore valid. What is being determined here is the competence of the ground not its merit, if any. In fact, the ground quoted a portion of the judgment of the lower court complained of. To that extent I hold that ground 3 is valid before this court and that the preliminary objection of the respondent partially succeeds.

B (p. 979 H)

***PLEADINGS - Land matters - Parties & court***

4. It is settled law that parties and the court are bound by the pleadings of the parties in any matter and that facts not pleaded ground to no issue. In the instant case, it is not the case of the appellants, as evidenced in their pleading, that the document of alienation, exhibit A, is inchoate neither is there evidence on record in support of same. That being the case, I hold the considered view that arguments of counsel, however brilliant is no substitute for the pleadings and evidence in proof of same and therefore ground to no issue. The argument of learned counsel for the appellants as to the inchoate nature of exhibit A is therefore discountenanced by me. (p. 983 D)

E ***LAND USE ACT - Alienation - Governor's consent***

5. The question that calls for determination is what is the meaning of the provisions of Sections 22 and 26 of the Land Use Act, 1978, supra? To me, the provisions are very clear and unambiguous and therefore ought to be given their literal interpretation or meaning. It is settled law that where the words of a statute or Constitution are clear and unambiguous, they call for no interpretation, the duty of the court in such a circumstance being to apply the words as used by the legislature. Section 22 (1) of the Act clearly provides that it shall be unlawful for a holder of a right of occupancy to alienate same or any part thereof by assignment, mortgage, transfer of possession, sublease or otherwise without the consent of the Governor first had and obtained. It is very clear that the said provision is by the tone and tenor, mandatory; it makes the obtaining of the governor's consent a precondition for the validity of any alienation of a right of occupancy, under the Land Use Act, 1978. Though there is no time limit to the obtaining of the said consent by the provision it is very clear that before the alienation can be valid or be said to confer the desired

right on the party intended to benefit there from, the consent of the governor of the state concerned must be "first had and obtained." That does not, by any means, make the transaction without the requisite consent inchoate. It makes it invalid until consent is obtained. It should be noted that it is not the case of the parties or any of them that exhibit A is an agreement for sale of land but a conveyance of the land in question - a completed act of the parties.(p. 983 F)

***Right of occupancy - Alienation vide deed of conveyance***

6. The consequence of the unlawful act of alienating a right of occupancy without the requisite consent of the governor is what is stated under Section 26, also supra. It makes the transaction, such as exhibit A expressly null and void. Section 26, in declaring such an act null and void used the word "shall" which, in the instant case makes the provision mandatory, not directory or discretionary. Learned counsel for the appellants wants the court to hold that Section 26 of the Act does not say that the alienation is void for all purposes but I do not see how that interpretation can be achieved. The provision, as earlier stated is clear and unambiguous and therefore calls for no interpretation - it says that an alienation made contrary to the provisions of the Act "shall be null and void" which to my mind, means "null and void" for all purposes under the sun; if it were not so the law would expressly or by necessary implication have stated so.

I therefore have no option than to come to the conclusion that the lower courts were right in coming to the conclusion that exhibit A is void for non compliance with the provisions of Section 22 of the Land Use Act, 1978. (p. 984 D)

***NOTABLE POINTS OF INTEREST  
TOBI JSC***

***1. Burden of proof in civil cases***

The law is elementary that the burden of proof is on the party who alleges the affirmative. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist (Section 135(1) of the Evidence Act). The burden of proof in a suit or proceeding lies

on that person who would fail if no evidence at all were given on either side. (Section 136 of the Evidence Act). In civil cases the burden of first proving the existence or non-existence of a fact lies on the party against whom the judgment of the court would be given if no evidence were produced on either side, regard being had to any  
 B presumption that may arise on the pleadings. (Section 137(1) of the Evidence Act). (p. 986 E)

*2. Justice - Mandatory statutes cannot be brushed aside*

C Learned counsel has urged this court to do justice in respect of this issue. A court of law cannot ignore provisions of a statute which are mandatory or obligatory and to the line of justice in the event that the statute has not done justice. Courts of law can only do so in the absence of a mandatory or obligatory provision of a statute. In other  
 D words, where the provisions of a statute are mandatory or obligatory, courts of law cannot legitimately brush the provisions aside just because it wants to do justice in the matter. That will be adulterating the provisions of the statute and that is not my function; the Judge that I am. I must say that I will be doing justice only to the appellants  
 E if I interpret Sections 22 and 26 of the Land Use Act in the way he has urged. But that will certainly be unjust to the respondent. He too, like the appellants, needs justice. As the independent umpire that I am, I am bound to do justice in the case before me. And that justice  
 F is to construe Sections 22 and 26 in their ordinary meaning, and I so construe the provisions against the appellants. (p. 989 G)

**MUHAMMAD JSC**

*3. Some general principles in determining whether a ground of appeal is one of fact or law*

G This court has, times without number, in a litany of cases, laid down the general principles in making the distinction between different types of grounds of appeal. For the purposes of elucidation however, I think I should re-state some of these principles.

H 1. The first and foremost is for one to examine thoroughly the grounds of appeal in the case concerned to see whether they reveal a misunderstanding by the lower court of the law, or a misapplication of the law to the facts already proved or admitted.

2. Where a ground complains of a misunderstanding by the lower court of the law or a misapplication of the law to the facts already proved or admitted, it is a ground of law.

3. Where a ground of appeal questions the evaluation of facts before the application of the law, it is a ground of mixed law and fact.

4. A ground which raises a question of pure fact is certainly a ground of fact. (etc. p. 999 A) B

*4. Land document not made subject to Governor's consent - Effect*  
The law under Section 22(2) of the Land Use Act recognizes cases where some form of written agreement executed in evidence of a transaction is submitted to the governor in order to obtain his consent as required by the section. In view of the fact that Exhibit 'A' was evidence of a complete action, Section 22 cannot save the situation as there is nothing on record to show that the Exhibit was made subject to the consent by the governor. Certainly, for a transaction of this nature to be valid, the parties to it must first enter into a binding agreement to alienate subject to the consent of the governor. It is that consent that vests a valid title on the purchaser. (p. 1007 H) D

### **REPRESENTATION**

Nta A. Nta for the Appellant

Charles E. Duke with him Mrs. B. Solomon for the Respondent E

### **CASES REFERRED TO**

Tibury v Oguniyi (1988) 1 NSCC 531

Akwiwu v Songonuga (1984) 5 S.C 184 at 186

Ojeme v Momodu III (1983) S.C 173

Erisi v Idika (1981) 4 NWLR 503 at 511 F

Solanke v Abed (1962) 1 ANLR 130

Savannah Bank Ltd v Ajilo (1989) 1 SCNJ 169

Adedeji v NBN Ltd (1989) 1 NWLR (pt. 96) 212

Awojugbagbe v Chinukwe (1995) 1 NWLR (pt. 270) 485

Jacobson Engineering Co. v UBA Ltd. (1993) 3 NWLR (Pt. 283) 586 G

Ogbo v Adoga (1994) 3 NWLR (Pt. 333) 469

Mainagge v Gwamna (1997) 11 NWLR (Pt. 528) 191 H

Ezenwa v Oko (1999) 14 NWLR (Pt. 637) 95

Onwuchekwa v Onwuchekwa & Anor (1991) 5 NWLR (pi 194) 739

Oba v Egberongbe (1999) 8 NWLR (pt.615) 485

Buswell v Goodwin (1971) 1 All E.R 418 at 421

**B STATUTES & RULES REFERRED TO**

Constitution of the Federal Republic of Nigeria, 1999 s. 233 (3)

Evidence Act ss. 135 (1), 136 & 137 (1)

Land Use Act, 1978 ss. 20, 22, 23, 26, 28

C Supreme Court Rules, O. 2 r. 32

**LEAD JUDGMENT BY ONNOGHEN JSC**

This is an appeal against the judgment of the Court of Appeal holden at Calabar in appeal No CA/C/5/99 delivered on the 24th day of April, 2007, in which the court dismissed the appeal of the appellants against the judgment of the High Court of Cross River State holden at Calabar in suit No C/11/95 delivered on the 20th day of November, 1995, in which it entered judgment for the present respondent who was the plaintiff in the suit.

E The action was instituted by respondent by way of originating summons for the determination of the question:

*"Whether, in accordance with the Land Use Decree 1978, valid title has been passed from the plaintiff to the 1st defendant arising from the agreement of 25th January, 1987, over the plaintiff's property situate at No 3C Enebong Avenue, Calabar?"*

F In addition to the above question, the plaintiff/respondent sought the following reliefs:-

*"(A) A declaration that the purported conveyance is null, void and of no effect whatsoever and is against the provisions of the Land Use Decree of 1978.*

*(B) An order directing the 1st defendant, its agents, servants, privies, assigns to vacate the property situate at No 3C, Enebong Avenue, Calabar.*

H *(C) An order directing that the original documents of the survey and building plans and the agreement originally conveying the plot/parcel of land known as 3C Enebong Avenue, Calabar to the plaintiff be returned to the plaintiff.*

*(D) The sum of N400, 000.00 (Four hundred thousand Naira) as general damages."*

The facts leading to the action include the following: The plaintiff/respondent was employed as a clerk by the 1st defendant/appellant sometime in July, 1964, and rose to the position of Senior Travelling Secretary by May, 1974. In June, 1987, the respondent was, by a letter, exhibit B suspended from his employment by the 1st appellant on the ground that the respondent perpetrated some fraudulent acts which tarnished the image of the 1st appellant, pending the result of an investigation into the matter. The suspension was with immediate effect. The respondent was subsequently arrested by the police at the instance of the appellants and detained for investigation and/or interrogation. In all, the respondent was arrested three times in the course of the investigation, the third of which saw the respondent being taken by the police to the Police Headquarters at Diamond Hill, Calabar where he was shown round the police cells occupied by hardened criminals (murderers and rapists) and was told by the police to sign a deed of "Mortgage" over his property situate at No 3C Enebong Avenue, Calabar, to surrender his ownership of the said property to the 1st appellant in exchange for or discharge of an alleged debt of N80,000.00 to the 1st appellant by the respondent with a threat of being thrown into the cells with the criminals, if he refused to comply. The respondent stated that he had no option than to sign Exhibit A which turns out to be a conveyance and handed over all the original documents relating to the said property to the 1st appellant, after which he was released by the police; that up to the time of instituting the action, the appellants had not released the result of the investigation or informed him of the outcome of any wrong doing or fraud he allegedly committed. Respondent maintained that the appellants exercised undue influence or duress over him resulting in his signing of exhibit A and that the appellants had thereby defrauded him of his property.

On the other hand, it is the case of the appellants that the respondent was suspended from duty on the ground that the respondent, in the course of his employment with the 1st appellant, defrauded the 1st appellant to the tune of N80,000.00 which later increased to N100,000.00 following the audit of the 1st appellant's

accounts by auditors; that the respondent admitted his role in the fraud at a management committee meeting of the 1st appellant as evident in exhibit A attached to the counter-affidavit - the minutes of that meeting. The appellants denied ever intimidating the respondent in executing exhibit A attached to the affidavit in support of the originating summons; that the conveyance - exhibit A - was a voluntary act of the respondent to avoid criminal prosecution for the fraud committed on the 1st appellant.

The learned trial judge, at pages 41 to 42 of the record held thus:

*"On the whole, I hold the view that fraud against the plaintiff has not been proved. If so, the plaintiff should have been charged to court. The idea of converting what should have been a criminal case into a civil one is wrong. The purported exchange of a house for the sum of N80,000.00 as contained in Exhibit A is completely wrong in law. Exhibit "A" itself from (sic) the foregoing is not valid in law, the transaction being a nullity.*

*Having regard to all the foregoing, I think I should accede to the reliefs sought and do so accordingly by making the following orders of this court .....*"

The court proceeded to grant reliefs A - C as claimed and the sum of N100,000.00 in respect of relief (D). The defendants were not satisfied with that judgment and consequently appealed to the Court of Appeal which appeal, as stated earlier in this judgment, was dismissed resulting in the instant further appeal to this court.

It is very important to note that though the learned counsel for the appellants identified seven issues for determination in the lower court to wit,

*"(a) Whether or not the question of nullity/voidity of a document/instrument particularly on ground of coercion/fraud (see basis of claims at p. 1 and judgment at p.38 lines 10-11 of proceedings) is a question of interpretation of the document and therefore fit to be taken vide the originating summons procedure or an issue to be proved on hard facts by viva vocae (sic) evidence allowing cross examination of witnesses. Did this non receipt of viva vocae evidence by the learned trial judge occasion a miscarriage of justice to the defendants/appellants*

(b) *Whether the totality of the evidence supports the judgment.*

(c) *Whether the learned trial Chief Judge was right at law when he held that the transaction between the plaintiff/respondent was void because the consent of the governor was not first sought and had.*

(d) *Whether or not it is competent for a party to benefit from his own omission to the detriment of another party to the same transaction.*

(e) *In the unlikely turn that the learned trial Chief Judge was right in his judgment, should he not have ensured restitution intergrum by ordering the refund of the purchase money? Should the plaintiff/respondent keep both the house and the money, particularly the sums paid by the 1st defendant/appellant to the plaintiff/respondent's creditors.*

(f) *Whether or not the 2nd and 3rd defendants/appellants are personally liable jointly, the two of them along with the 1st defendant/appellant or severally each of them, for any of the reliefs sought in the lower court.*

(g) *Whether or not in the circumstances of this case the Court of Appeal is competent to enter a proper judgment herein."*

The lower court, following the success of preliminary objections to some of the grounds from which some of the issues were formulated struck out grounds 1, 5 and 6 of the Amended grounds of appeal and issues (a), (e), (f) and (g) formulated there from thereby leaving issues (b) (c) and (d) for determination. It is also important to note that in determining the appeal, the lower court preferred the two issues formulated by learned counsel for the respondent, to wit:-

"1. *Whether on the evidence before the learned trial judge, the respondent proved his case and was entitled to judgment in his favour.*

2. *Whether there is a binding and enforceable contract between the appellants and the respondents"*

And used same to determine the appeal.

With regard to issue 1, the lower court held, at pages 166 to 167, inter alia:

"Paragraphs 9, 10, 11, 12 and 13 of the respondent's main affidavit considered by the learned trial judge are mere Ipse dixit of

*the respondent and are admissible pieces of evidence resting on the assertion of the respondent who made them. But having been seriously challenged by the appellants in their counter affidavit, they are not enough for deciding the issue of duress without calling for oral evidence from witnesses. It was not the business of the judge to speculate on the issue of duress. Therefore, I disagree with the learned trial judge, and I hold the view that there is no evidence to show that exhibit A was procured by duress. Even though the circumstances of this case leading to the signing of Exhibit A, the deed of conveyance, by the respondent are not salutary I am however, not prepared to accept the view that there was duress on the respondent to sign Exhibit A. Indeed, I frown at the conduct of the appellants in compromising with the respondent and the police the case of fraud and embezzlement reported against the respondent and their colluding with the respondent to give away his property by signing Exhibit A, without prosecuting the respondent for the criminal allegations in a court of law. Then after about eight years of signing Exhibit A, the respondent was aroused from his complacency to challenge in the court his signature on Exhibit A, claiming that it was procured by duress or coercion on him. It is apparent to me from the surrounding facts of this case that the parties were interested in settling the criminal allegations against the respondent out of court by agreeing with the respondent to sign Exhibit A and also make Exhibit B (the statutory declaration of house ownership) in discharge of the purported debt of N80,000.00 owed by the respondent to the 1st appellant, which sum of money was equivalent to the said sum of N80,000.00 allegedly defrauded and embezzled by the respondent, rather than prosecute the respondent in court. The whole idea behind the execution of Exhibit A was to conceal the true facts and show the existence of an imaginary debt of N80,000.00 by the respondent to the 1st appellant, when in actual fact there was none. In my view, therefore, the respondent did not on the evidence before the court below prove that there was duress on him to entitle him to judgment on that score."*

From the above passage, it is very clear that the lower court resolved the first issue against the respondent and there is no appeal by the respondent on that score before this court.

On the second issue, the lower court held at pages 169 -170 inter alia as follows:

*"In the instant case, there is the deed of conveyance (Exhibit A) which does not bear the consent of the military governor as provided by Section 22 of the Land Use Act, 1978. It is therefore my firm view in the instant case that the deed of conveyance Exhibit A is null and void and of no effect whatsoever.*

*Finally the question of the respondent being allowed to benefit from his own fraud to take advantage of his own default is non sequitur. The respondent cannot be said to have benefited from the fraud and embezzlement alleged against him which were not established in a court of law. The learned trial judge was right in my view to hold in his ruling that he was not satisfied that the allegation of fraud had been established against the respondent and the question of his being allowed to benefit from his fraud did not arise .... In the final result therefore, I hold that this Appeal lacks merit and it is hereby dismissed."*

From the resolution of the two issues it is very clear that the appeal was dismissed based on the nullity of exhibit A, the deed of conveyance on the ground that the consent of the Military Governor of Cross River State was not first had and obtained contrary to Section 22 of the Land Use Act, 1978. The importance of the excursion into the issues before the lower court and their resolution will become apparent when one looks at the issues now formulated for the determination of the instant appeal which appeal is or ought to be primarily on the single issue resolved by the lower court against the appellants. With the above backgrounds in mind, one then wonders how learned counsel for the appellants could come by three issues for the determination of the instant appeal.

The issues as formulated in the appellant's brief tiled on 25/10/02 and adopted in argument of the appeal on 19/11/07 by Nta A. Nta, Esq., are as follows:-

*"(a) Whether or not the finding complained against in ground of appeal No 1 herein was erroneous having regard to the evidence, and incongruous with an earlier holding in the same judgment that the respondent was not coerced into signing away his property to the appellants.*

(b) *Whether or not the deed of conveyance Exhibit "A" to the originating summons was null and void and of no effect whatsoever under the Land Use Act for the reason only that the consent of the Governor was not first sought and obtain before it was signed/ executed.*

B (c) *Whether or not ground of appeal No 5 before the Court of Appeal arose from the decision of the High Court that Exhibit A, the deed of conveyance, was a nullity, and therefore a fit and proper ground of appeal."*

C On the other hand, learned counsel for the respondent, Charles E. Duke Esq., in the respondent's brief of argument submitted two issues for determination, namely:

D "1. *Whether on the evidence before the learned justices of the Court of Appeal, the appellants had proved their case that there was a genuine case of indebtedness against the respondent.*

2. *Whether Exhibit A confers a binding and enforceable contract between the appellants and the respondent."*

E Before proceeding any further, it is pertinent to note that learned counsel for the respondent has raised preliminary objection with regard to the competence of grounds 1 and 3 of the grounds of appeal.

F It is the submission of learned counsel for the respondent that ground 1 of the grounds of appeal is based on the concurrent findings of facts by the lower courts to the effect that fraud against the respondent has not been established but that the appellants have not obtained the leave of the Court of Appeal to appeal against such findings contrary to Order 2 Rule 32 of the Supreme Court Rules and Section 233(3) of the Constitution of the Federal Republic of G Nigeria, 1999 (herein after referred to as the 1999 Constitution); that it does not matter that counsel for the appellants christened the ground an error in law whereas in actual fact it is a complaint on facts; learned counsel cited and relied on the case of Tibury v Oguniyi (1988) 1 NSCC 531; Akwivu v Songonuga (1984) 5 S.C H 184 at 186; Ojeme v Momodu III (1983) S.C 173; Erisi v Idika (1981) 4 NWLR 503 at 511.

Secondly, learned counsel for the respondent submitted that ground 1 of the grounds of appeal contains complaints against facts

that are being challenged for the first time in this court and therefore need the leave of the court; that since no leave was obtained, the ground of appeal is incompetent and should be struck out.

Turning to ground 3 of the grounds of appeal, learned counsel submitted that it does not relate to the judgment on appeal and consequently incompetent; that a similar objection on a similar ground was raised in the court below and sustained, referring to pages 125, 160 and 161 of the record. B

Secondly, learned counsel submitted that the said ground 3 seeks to raise issues that were not canvassed at the lower court, relying on *Federal Mortgage Bank of Nigeria v Nigeria Deposit Insurance Corp.* (1999) 2 NWLR (pt. 591) 333 at 359 -360. C

On his part, learned Counsel for the appellants, Nta A Nta Esq., in the reply brief filed on 31/3/03 submitted that ground 1 is a ground of law, not facts; that ground I was not being raised for the first time in this court as it was dealt with under issue 1 before the Court of Appeal, which related to ground 2 of the grounds before the said court. D

In respect of ground 3 of the grounds of appeal, learned counsel submitted that the ground arose from the judgment of the trial court as well as the lower court in that they failed to make the appropriate consequential orders after holding that the conveyance between the parties was null and void and thereby allowed the respondent to benefit from the transaction to the detriment of the appellants and urged the court to dismiss the preliminary objection. E F

However, grounds 1 and 3 of the grounds of appeal complain as follows:-

*"1. The learned Justice of the Court of Appeal erred in law when they found and held thus:-* G

*"In the absence of the appellants establishing that there is in reality a genuine debt of N80,000.00 owed to the 1st appellant by the respondent for which the respondent's property at No 3C Eneobong Avenue, Calabar was conveyed to the 1st appellant by Exhibit A in discharge of the said debt, there is nothing that the respondent can be said to be taking advantage of. The appellants in the court below were unable to establish a genuine indebtedness and so cannot complain"* H

Particulars of error

(a) Exhibits C-C4 attached to the respondent's counter affidavit mentioned at pages 7 (paragraph 15 of counter affidavit at lines 8 -22) and 15 (paragraphs 9 & 10 of the further and better counter affidavit at lines 12 - 29) of the record before the Court of Appeal are  
B receipts/vouchers issued by the respondent to the 1st appellant to the respondent on account of the property the subject of this appeal.

(b) This finding is incongruous with the earlier holding that the respondent was not coerced into signing away his property to the  
C appellants.

3. The Court of Appeal erred in law when it held that:

"..... *It is my firm view that grounds 1, 5 and 6 thereof do not relate to or arise from the decision of the judgment being challenged by the appellants ..... They are hereby struck out.*"

D Particulars of error

(a) *The issue raised in ground 5 in the Court of Appeal was a consequential order which should ordinarily, without more, follow a finding of nullity of an agreement for which consideration had passed. Failure to make the order was therefore a proper ground of appeal.*"

E ***It is very clear that ground 1 together with the particulars thereof is simply a ground attacking a finding of facts by the court below; it is not a ground of error of law at all. To establish the existence of the debt of N80,000.00 one needs facts to prove same, not law so a finding that the existence of***  
F ***such a debt has not been established is a finding based on the facts presented in proof of the assertion, not otherwise. The above finding complained of being a finding of fact, it is settled law that for the appellants to successfully appeal against the***  
G ***finding, they must first of all obtain the leave of either the lower court or of this court. It would have been otherwise if the complaint was purely a complaint of error in law. It is clear from the record that appellants never obtained the leave of either the lower court or of this court to appeal on the facts so ground***  
H ***1 of the grounds of appeal in so far as it is a complaint against the findings of facts is incompetent and is consequently liable to be struck out.***

That apart, there is the second problem involving the said

ground 1, which is that it is a complaint against the concurrent findings of facts by the lower courts. In addition to the above observation, the lower court specifically found as a fact that appellants did not appeal against the finding of the High Court to the effect that:

*"On the whole, I hold the view that fraud against the plaintiff has not been proved. If so the plaintiff should have been charged to court. The idea of converting what should have been a criminal case into a civil one is wrong. The purported exchange of a house for the sum of N80,000.00 as contained in Exhibit A is completely wrong in law. Exhibit A itself from the foregoing is not valid in law, the transaction being a nullity" See page 170 of record.*

*By stating at page 170 of the record as follows:-*

*"I agree with him. There is no appeal against the above finding of the learned trial Chief Judge and there is no basis for this court to disturb it."*

Emphasis supplied by me.

I have to observe that the appellants in this court have not challenged the above finding by the lower court. They have not stated that the lower court was in error in finding/holding that there was no appeal against the above finding by the trial court. That being the case, it means simply that the lower court was right in so holding with the effect that it is rather too late in the day for the appellants to now turn round to appeal against that finding in this court whereas their appeal before this court is supposed to be based on the judgment of the lower court, not that of the trial court; ***it is settled law, however, that a finding of a court or tribunal not appealed against is deemed accepted by the party against whom the finding was made - in the instant case, the appellants. However, if the appellants had sought and obtained the leave of the courts to appeal against the findings of facts or mixed law and facts or to raise fresh issues not raised in the court below, it would have been sufficient to sustain ground 1 of the grounds of appeal. Since no such leave was sought and obtained the affected ground is doomed to be struck out for being incompetent. I therefore order accordingly.***

***On the competence of ground 3 of the grounds of appeal, I hold the view that the complaint therein is against the***

**judgment of the lower court and therefore valid. What is being determined here is the competence of the ground not its merit, if any. In fact, the ground quoted a portion of the judgment of the lower court complained of. To that extent I hold that ground 3 is valid before this court and that the preliminary objection of the respondent partially succeeds.**

As I had earlier stated in this judgment, the main decision of the lower court which was against the appellants is the confirmation of the declaration of nullity of the deed of conveyance, exhibit A, for non compliance with the provisions of Section 22 of the Land Use Act, 1978. That should, therefore, be the main focus of the appeal as the first issue in the lower court was resolved in favour of the appellants, as earlier demonstrated in this judgment.

That apart, having found that ground 1 of the grounds of appeal before this court is incompetent, it follows that appellants' issue (a) formulated there from is incompetent and is hereby struck out, thereby leaving us with issues (b) and (c) as formulated by the learned counsel for the appellants.

In respect of issue (b), learned counsel for the appellants submitted that the Land Use Act has no intention of forbidding and rendering null and void any alienation of rights of occupancy howsoever without requisite consent, hence the provisions in Sections 28(2) and (3) (d) making such an alienation without consent a ground for revocation of the right of occupancy; that the word "void" should not be interpreted to mean void for all purposes unless the statute so states, relying on the case of *Bucknor-Maclean v Inlaks Ltd* (1980) 8-11 S.C 1; that it is not the intention of Section 22 of the Land Use Act, 1978 to render every transaction by way of alienation without consent null and void for all purposes as parties clearly enter into transactions of alienation of rights of occupancy before seeking the Governor's consent, which in any event can be obtained even after the execution of the agreement or transaction such as Exhibit A in the instant case; that the court should do substantial justice between the parties in this case by not declaring the document, exhibit A, null and void as the effect of non obtaining of the Governor's consent renders the document, exhibit A inchoate not null and void, relying on the case of *Solanke v Abed* (1962) 1 ANLR 130; *Ogbo v Adoga*

(1994) 3 NWLR (pt 333) 369 at 476; that the case of Savannah Bank Ltd v Ajilo (1989) 1 SCNJ 169 which held that there can be no alienation without Governor's consent does not apply to the facts of this case since the transaction had not been duly registered but was at the agreement - exhibit A - stage and therefore inchoate as against Ajilo's case which was duly completed and registered; that a party cannot rely on his wrong to avoid his obligation, relying on Adedeji v NBN Ltd (1989) 1 NWLR (pt. 96) 212; Awojugbagbe v Chinukwe (1995) 1 NWLR (pt. 270) 485; that it is wrong for a party whose duty it is to seek for and obtain the Governor's consent, but failed to do so to turn round and benefit from the default by contesting that the agreement without the consent is null and void, relying on Buswell v Goodwin (1971) 1 All E.R 418 at 421; that the court should not adopt the literally interpretation principle since to do so would result in the respondent benefiting from his wrong arid urged the court to resolve the issue against the respondent and allow the appeal.

I have to observe that learned counsel for the appellants did not make any submission in relation to issue No C as formulated by him in the brief of argument and is consequently deemed to have been abandoned. The non presentation of arguments in relation to issue No C supra confirms my earlier view that only one issue actually calls for determination in this appeal arising from the judgment of the lower court, that is, whether the failure to seek and obtain the consent of the governor of Cross River State to the alienation evidenced in exhibit A renders the transaction null and void and of no effect whatsoever.

On his part, learned counsel for the respondent treated the matter under his issue No 2. Having regard to the fact that appellant's issue (a) was struck out for being formulated from an incompetent ground of appeal, the respondent's issue No 1 thereby becomes irrelevant and is therefore discountenanced by me.

In respect of issue 2, learned counsel for the respondent submitted that the lower court was right in holding that there was non-compliance with the provisions of the Land Use Act, 1978 in the alienation of the respondent's right of occupancy in respect of the property in issue and thereby declared the transaction null and void. Learned Counsel referred the court to Sections 22 and 26 of the

Land Use Act, 1978, the case of Savannah Bank of Nig. Ltd v Ajilo (1989) 1 NSCC 135; that no consent of the governor of Cross River State was sought or obtained in respect of the transaction in issue thereby rendering the same null and void; that the court is being called upon in the instant case, to interpret the provisions of the Land Use Act, 1978 not to consider equitable principles and as such the cases cited by learned counsel for the appellants on consideration of equitable principles do not apply to the facts of this case; that exhibit A was completed, not inchoate as contended by learned counsel for the appellants; that the transaction was never in stages; that it is the appellants who are contending that exhibit A is valid that have the duty or burden to seek the consent as decided in Rockonoh Property Co. Ltd v Nitel Plc. (2001) 14 NWLR (pt. 733) 468. Learned counsel urged the court to resolve the issue in favour of the respondent and D dismiss the appeal.

Two provisions of the Land Use Act, 1978 are relevant for the determination of the issue under consideration. These are Sections 22 and 26 of the Act.

Section 22 provides as follows:-

"22. It shall not be lawful for the holder of a statutory right of occupancy granted by the governor to alienate his right of occupancy or any part thereof by assignment, mortgage, transfer of possession, sublease or otherwise howsoever without the consent of the Governor first had and obtained:

Provided that the consent of the Governor -

(a) .....(c)

(2) The governor when giving his consent to an assignment, mortgage or sublease may require the holder of a statutory right of occupancy to submit an instrument executed in evidence of the assignment, mortgage or sub-lease and the holder shall when so required deliver the said instrument to the Governor in order that the consent given by the governor under subsection (1) of this section may be signified by endorsement thereon."

On the other hand, Section 26 of the Act provides that:

"26. Any transaction or any instrument which purports to confer on or rest in any person any interest or right over land other than in accordance with the provisions of this Act shall be null and void,"

It is not disputed that exhibit A is a conveyance between the 1st appellant and the respondent in respect of the respondent's property situate and lying at No 3C Enebong Avenue, Calabar for an alleged consideration of the sum of N80,000.00. Exhibit A therefore qualifies as an instrument crafted to alienate the right of occupancy of the respondent in the property in question by conveying same to the 1st appellant. Also not disputed is the fact that no consent of the governor of Cross River State was first sought and obtained prior to the making of exhibit A or anytime thereafter. It is therefore clear that at the time of institution of the action, which was about eight years after the execution of exhibit A, the purported alienation had been completed by the execution of exhibit A. It is not pleaded, neither is there any evidence on record to support or suggest that exhibit A was to be executed or made in stages so as to render same inchoate until the final stage is completed, ***it is settled law that parties and the court are bound by the pleadings of the parties in any matter and that facts not pleaded goes to no issue. In the instant case, it is not the case of the appellants, as evidenced in their pleading, that the document of alienation, exhibit A, is inchoate neither is there evidence on record in support of same. That being the case, I hold the considered view that arguments of counsel, however brilliant is no substitute for the pleadings and evidence in proof of same and therefore ground to no issue. The argument of learned counsel for the appellants as to the inchoate nature of exhibit A is therefore discountenanced by me.***

***The question that calls for determination is what is the meaning of the provisions of Sections 22 and 26 of the Land Use Act, 1978, supra? To me, the provisions are very clear and unambiguous and therefore ought to be given their literal interpretation or meaning. It is settled law that where the words of a statute or Constitution are clear and unambiguous, they call for no interpretation, the duty of the court in such a circumstance being to apply the words as used by the legislature. Section 22 (1) of the Act clearly provides that it shall be unlawful for a holder of a right of occupancy to alienate same or any part thereof by assignment, mortgage, trans-***

*fer of possession, sublease or otherwise without the consent of the Governor first had and obtained. It is very clear that the said provision is by the tone and tenor, mandatory; it makes the obtaining of the governor's consent a precondition for the validity of any alienation of a right of occupancy, under the*  
*B Land Use Act, 1978. Though there is no time limit to the obtaining of the said consent by the provision it is very clear that before the alienation can be valid or be said to confer the desired right on the party intended to benefit there from, the*  
*C consent of the governor of the state concerned must be "first had and obtained." That does not, by any means, make the transaction without the requisite consent inchoate. It makes it invalid until consent is obtained. It should be noted that it is not the case of the parties or any of them that exhibit A is an agree-*  
*D ment for sale of land but a conveyance of the land in question - a completed act of the parties.*

*The consequence of the unlawful act of alienating a right of occupancy without the requisite consent of the governor is what is stated under Section 26, also supra. It makes the trans-*  
*E action, such as exhibit A expressly null and void. Section 26, in declaring such an act null and void used the word "shall" which, in the instant case makes the provision mandatory, not directory or discretionary. Learned counsel for the appellants*  
*F wants the court to hold that Section 26 of the Act does not say that the alienation is void for all purposes but I do not see how that interpretation can be achieved. The provision, as earlier stated is clear and unambiguous and therefore calls for no interpretation - it says that an alienation made contrary*  
*G to the provisions of the Act "shall be null and void" which to my mind, means "null and void" for all purposes under the sun; if it were not so the law would expressly or by necessary implication have stated so.*

*I therefore have no option than to come to the conclu-*  
*H sion that the lower courts were right in coming to the conclusion that exhibit A is void for non compliance with the provisions of Section 22 of the Land Use Act, 1978 - see the case of Savannah Bank of Nig. Ltd v Ajilo supra.*

There is the argument that appeals to the conscience of the court as to whether the respondent should be allowed to benefit from his wrong etc. particularly in view of the fact that appellants did expend money to settle the indebtedness of the respondent in respect of the property which the court failed to order to be refunded by way of consequential order. It should be noted that I am not commenting on that submission because it is validly raised before this court, as it is the law that the court does not grant to a party what he does not request or ask. In the instant case the appellants never made an alternative prayer to the lower courts to that effect, hence it was never considered. However, the purpose for my commenting on the point is to advise the appellants to take up an action before the appropriate court to recover whatever money(s) they consider legitimately due to them in respect of the property. This court is not a Father Christmas. The original respondent is now late, as disclosed in the brief of argument of the appellants in an action to recover whatever sum deemed recoverable can be maintained against his estate. All is therefore not lost, as the appellants would want us to believe.

In conclusion I resolve the only issue for consideration in this appeal against the appellants and consequently find no merit whatsoever in the appeal which is hereby dismissed with costs, which I assess and fix at N10,000.00 against the appellants and in favour of the respondent.

Appeal dismissed.

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### **TOBI JSC**

The property in dispute is situate at No. 3C, Enebong Avenue, Calabar. It was conveyed to the defendants/appellants. The deed of conveyance is Exhibit A. It arose from Agreement of 25th January, 1987.

In an originating summons, the plaintiff/respondent asked for the following reliefs:

*"(a) A declaration that the purported conveyance is null, void and of no effect whatsoever and is against the provisions of the Land Use Decree of 1978.*

*(b) An order directing the 1st defendant, its agents, servants,*

*privies, assigns to vacate the property situate at No 3C Enebong Avenue, Calabar.*

(c) *An order directing that the original documents of the survey and building plans and the agreement originally conveying the plot/parcel of land known as 3C Enebong Avenue, Calabar to the plaintiff be returned to the plaintiff.*

(d) *The sum of N400, 000.00 (Four hundred thousand Naira) as general damages."*

The defendants/appellants contested the action. After hearing evidence and submission of counsel, the learned trial Judge granted all the reliefs sought and awarded N100,000.00 as general damages. The Court of Appeal affirmed the judgment of the trial judge and dismissed the appeal. This is a further appeal to this court. Briefs were filed and duly exchanged. The appellants formulated four issues for determination. The respondent formulated two issues. The appellants also filed a reply brief.

The respondent has raised a preliminary objection and it is on the competence of Grounds 1 and 3. I do not think I will take any time on the objection. It has no merit. It therefore fails.

The parties by their affidavit in support, counter affidavit, further and better affidavit and further and better counter affidavit joined issues on the matter, which necessitate proof. The law is elementary that the burden of proof is on the party who alleges the affirmative. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist (Section 135(1) of the Evidence Act). The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side. (Section 136 of the Evidence Act). In civil cases the burden of first proving the existence or non-existence of a fact lies on the party against whom the judgment of the court would be given if no evidence were produced on either side, regard being had to any presumption that may arise on the pleadings. (Section 137(1) of the Evidence Act).

In paragraph 7 of the further and better affidavit in support of the originating summons, the respondent on record deposed as follows:

*"That in answer to the aforementioned paragraphs, I depose*

*that I was actually coerced into the purported conveyance (Exhibit A in paragraph 4 of the Affidavit) and that my real consent was never given. Proof of this situation is contained in paragraph 10 of the counter-affidavit where the defendants only reported the matter to the police, and the usual sworn declaration (Exhibit B) in paragraph 13 of the counter-affidavit) 'by plaintiff expressing his desire to sell the building to the 1st defendant' as he 'was likely to face multiplicity of criminal prosecution and civil suits from 1st defendant.'* <sup>B</sup>

The burden is on the respondent to prove paragraph 4 of the affidavit in support and paragraph 7 of the further and better affidavit in support. Coercion has an element of force or threat and the deponent was under a duty to prove the coercion. It is not enough to depose that he was coerced into signing Exhibit A. The respondent ought to have deposed to the instrument or words used in the course of the coercion. There should be evidence of brutalization or a threat of brutalization of the person of the deponent, however slight that may be. Ebong Ekpo ought to have deposed that as a result of the coercion, he was not able to give his consent. <sup>C</sup>

Ebong Ekpo made reference to paragraph 10 of the counter affidavit as "proof of this situation". I take it that it refers to the deposition in paragraph 7. What is the deposition in paragraph 10 of the counter affidavit? It reads. <sup>E</sup>

*"That Paragraph 9 of the Affidavit is denied but in answer thereto defendants' counsel tells me and I verily believe him that plaintiff was suspended only after he had admitted at a management committee meeting, his role in the fraud. The defendants only reported the matter to the police. A photocopy of the report on the committee meeting is attached hereto and marked Exhibit A."* <sup>F</sup>

I do not see any coercion in the above deposition. It should have been a different one if Ebong Ekpo was suspended before he admitted the fraud at a Management Committee Meeting. That should have given rise to some force or duress. I should also say here that reporting a matter to the police ipso facto does not involve the act of coercion. Although the police station, by its very nature, conveys some sort of coercion, it is not such that will make a person sign a document under duress, without any unfriendly conduct emitting from the police. <sup>G</sup>

Learned counsel for the appellants quoted the following pas- <sup>H</sup>

sage of the record. The Court of Appeal said at page 166;

*"I have carefully perused the documentary Exhibits annexed to the affidavits of both parties and I am not convinced that duress can be discerned or ascertained from them. By no stretch of the imagination can one find any evidence of duress in the documents especially in Exhibits 'A', which is said to have been procured by duress or coercion on the respondent. ... Therefore, I disagree with the learned trial judge, and I hold the view that there is no evidence to show that Exhibit A was procured by duress."*

*Learned counsel thereafter submitted that "having held that Exhibit A was not obtained by duress or coercion, the natural conclusion which flows is that Exhibit A was good. How then did the Court of Appeal come to doubt the genuineness of the debt of N80,000.00 at page 170 of the records. We submit that these 2 findings on Exhibit A cannot stand together because Exhibit A cannot be both good and bad."*

By the above, learned counsel gives the impression that the Court of Appeal contradicted itself. I do not think so. There was no contradiction. This is clear when the judgment is read further down at pages 166 and 167 of the record. I will quote the portion in some detail:

*"Then after about eight years of signing Exhibit A, the respondent was aroused from his complacency to challenge in the court his signature on Exhibit A, claiming that it was procured by duress or coercion on him. It is apparent to me from the surrounding facts of this case, that the parties were interested in settling the criminal allegations against the respondent out of court by agreeing with the respondent to sign Exhibit A and also make Exhibit B (the Statutory declaration of house ownership) in discharge of the purported debt of N80,000.00 owed by the respondent to the 1st appellant, which sum of money was equivalent to the said sum of N80,000.00 allegedly defrauded and embezzled by the respondent, rather than prosecute the respondent in the court. The whole idea behind the execution of Exhibit A was to conceal the true facts and show the existence of an imaginary debt of N80, 000.00 by the respondent to the 1st appellant, when in actual fact there was none. In my view, therefore, the respondent did not on the evidence before the court below prove*

*that there was duress on him to entitle him to judgment on that score."* The above is an adequate answer to the submission of learned counsel for the appellants. In my view, the Court of Appeal did not contradict itself on Exhibit A. No.

The next issue is whether Exhibit A was null and void and of no effect under the Land Use Act on the ground that the Governor's consent was not first sought and obtained before it was signed or executed. Section 22 provides in part:

*"It shall not be lawful for the holder of a statutory right of occupancy granted by the governor to alienate his right of occupancy or any part thereof by assignment, mortgage, transfer of possession, sublease, or otherwise however without the consent of the Governor first had and obtained."*

Section 26 provides as follows:

*"Any transaction or any instrument which purports to confer on or vest in any person any interest or right over land other than in accordance with the provisions of this Act shall be null and void."*

As it is, Section 22 requires the consent of the Governor of a State before the alienation of a right of occupancy and Section 26 provides that any transaction or instrument which confers or vests interest or right over land not in accordance with the Act is null and void. Section 22 comes within Section 26 and therefore alienation of land without the consent of a Governor of a State is null and void. In my view, the provision of Section 22 is consistent with the status of the Governor who holds the land in the State in trust for the use and common benefit of all Nigerians in accordance with the provision of the Act. The case law is in great proliferation. See *Savannah Bank Ltd, v Ajilo* (1989) 1 NWLR (Pt. 97) 305; *Jacobson Engineering Co. v UBA Ltd.* (1993) 3 NWLR (Pt. 283) 586; *Ogbo v Adoga* (1994) 3 NWLR (Pt. 333) 469; *Mainagge v Gwamna* (1997) 11 NWLR (Pt. 528) 191; *Ezenwa v Oko* (1999) 14 NWLR (Pt. 637) 95.

Learned counsel has urged this court to do justice in respect of this issue. A court of law cannot ignore provisions of a statute which are mandatory or obligatory and to the line of justice in the event that the statute has not done justice. Courts of law can only do so in the absence of a mandatory or obligatory provision of a statute. In other words, where the provisions of a statute are mandatory or obliga-

tory, courts of law cannot legitimately brush the provisions aside just because it wants to do justice in the matter. That will be adulterating the provisions of the statute and that is not my function; the Judge that I am. I must say that I will be doing justice only to the appellants if I interpret Sections 22 and 26 of the Land Use Act in the way he has urged. But that will certainly be unjust to the respondent. He too, like the appellants, needs justice. As the independent umpire that I am, I am bound to do justice in the case before me. And that justice is to construe Sections 22 and 26 in their ordinary meaning, and I so construe the provisions against the appellants.

And that takes me to the third and final issue It is on Ground 5 in the Court of Appeal. It does not appear to me that Issue (C) was argued in the appellants' brief. I therefore stop here, in the light of the above and the fuller reasons given by my learned brother, Onnoghen, J.S.C, in his judgment, I dismiss the appeal. I abide by his order as to costs.

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### **AKINTAN JSC**

The respondent, as plaintiff, commenced this action at Calabar High Court against the appellants as defendants. His claim was for:

*"(A) A declaration that the purported conveyance is null, void and of no effect whatsoever and is against the provisions of the Land Use Decree of 1978.*

*(B) An order directing the 1st defendant, its agents, servants, privies, assigns to vacate the property situate at No 3C Enebong Avenue, Calabar.*

*(C) An order directing that the original documents of the survey and building plans and the agreement originally conveying the plot/parcel of land known as 3C Enebong Avenue, Calabar to the plaintiff be returned to the plaintiff.*

*(D) The sum of N400, 000.00 (Four hundred thousand Naira) as general damages."*

The dispute that led to the action was in respect of a property at No. 3c Enebong Avenue, Calabar. The plaintiff/respondent was the owner of the property. He was also an employee of the 1st de-

fendant appellant from July 1964 until June 1987 when he was suspended on an allegation of committing some fraudulent acts which was being investigated. In the course of the said investigation, the respondent was arrested by police at the instance of the appellants on three occasions. He was taken to the state police headquarters during his third arrest and the police threatened to lock him up with hardened criminals unless he signed a mortgage deed in respect of his said property at No. 3c Enebong Avenue, Calabar. The mortgage deed was prepared by the appellants and the respondent has by the deed of mortgage assigned his interest in the property in favour of the 1st appellant. B C

The respondent signed the deed of mortgage so that he could avoid being incarcerated along with the hardened criminals in the police headquarters cell. This action was taken to set aside the transfer of the property to the 1st appellant as expressed in the mortgage deed. D

The appellants' defence was that the respondent's act in signing the deed of mortgage was voluntary and it was in consideration of N180,000.00 of the 1st appellants' fund said to have been embezzled by the respondent in the course of his employment with the 1st appellant. It was alleged that the respondent chose to give up his said property and avoid being prosecuted for his fraudulent act. E

The learned trial judge held that the plaintiff/respondent had proved his claim against the defendants/appellants. Judgment was accordingly entered for the plaintiff as per his claims A, B and C and N100,000.00 was awarded to him in respect of his claim D. An appeal filed by the appellants against the judgment of the High Court was dismissed by the Court of Appeal. The present appeal is from the judgment of the Court of Appeal dismissing their appeal. F

The full facts of the case are comprehensively set out in the lead judgment written by my learned brother, Onnoghen, J.S.C, the draft of which I had the privilege of reading. All the issues raised in the appeal are also fully discussed therein. I therefore do not intend to repeat them. All I have to say is that both the trial High Court and the Court of Appeal rightly rejected the appellants' case and accepted the plaintiff/respondent's case that he signed the deed under duress. These are concurrent findings of fact made by the two lower courts of which the appellants have failed to show why this court G H

should reverse the findings of fact as required by law.

For the above reasons and the fuller reasons given in the lead judgment which I also adopt, I dismiss the appeal with costs as assessed in the lead judgment.

B

### **TABAI JSC**

C This action was commenced at the Calabar Judicial division of the High Court of Cross River State when the originating summons was issued on the 13/1/95. The respondent herein was the plaintiff. He claimed against the defendants who are the appellants herein the following reliefs.

D *"A. A declaration that the purported conveyance is null, void and of no effect whatsoever and is against the provisions of the Land Use Decree of 1978.*

*B. An order directing the 1st defendant, its agents, servants, privies, assigns to vacate the property situate at No 3C Enebong Avenue, Calabar.*

E *C. An order directing that the original documents of the survey and building plans and the agreement originally conveying the plot/parcel of land known as 3C Enebong Avenue, Calabar to the plaintiff be returned to the plaintiff.*

F *D. The sum of N400, 000.00 (Four hundred thousand Naira) as general damages."*

G The case was fought and contested on affidavit evidence and the address of learned counsel for the parties. By its ruling/judgment on the 20/11/95 the claim was allowed in its entirety except relief (D) wherein N100,000.00 (one hundred thousand naira) was awarded instead of the N400,000.00 claimed.

The facts on which the case was fought are very ably recapitulated in the leading Judgment of my learned brother Onnoghen J.S.C and I need not reproduce them.

H The main issue which fell for consideration was whether the plaintiff/respondent defrauded the appellants of the sum of N80,000.00 and for which sum the parties executed the conveyance Exhibit 'A' by which the respondent transferred his property to the 1st appellant.

On this issue the learned trial Chief Judge at page 41 of the record held:

*"On the whole, I hold the view that fraud against the plaintiff has not been proved. If so the plaintiff should have been charged to court. The idea of converting what should have been a criminal case into a civil one is wrong. The purported exchange of a house for the sum of N80, 000.00 as contained in Exhibit A is completely wrong in law. Exhibit 'A' itself from the foregoing is not valid in law, the transaction being a nullity."*

Based on the above quoted reasoning and other reasons he allowed the claim.

The defendants were not satisfied with the decision of the trial court. They went on appeal to the court below. By its unanimous decision on the 24/4/2001 the appeal was dismissed for lack of merit. Still not satisfied the appellants have come before this court. The parties have filed and exchanged their briefs of argument. The appellant formulated three issues for determination. They were stated in the appellants' brief as follows:

(a) Whether or not the finding against on ground of appeal No 1 herein was erroneous having regard to the evidence and incongruous with an earlier holding in the same judgment that the respondent was not coerced into signing away his property to the appellants.

(b) Whether or not the deed of conveyance Exhibit 'A' to the originating summons was null and void and of no effect whatsoever under the Land Use Act for the reason only that the consent of the governor was not first sought and obtained before it was signed/executed.

(c) Whether or not ground of appeal No 5 before the Court of Appeal arose from the decision of the High Court that Exhibit 'A' the deed of conveyance was a nullity and therefore a fit and proper ground of appeal.

The respondent submitted only two issues for determination thus:

1. Whether on the evidence before the learned Justices of the Court of Appeal, the appellants had proved their case that there was a genuine case of indebtedness against the respondent.

2. Whether Exhibit 'A' confers a binding and enforceable contract between the appellants and the respondent.

As I said earlier in this judgment, the main issue revolves round the question of whether the respondent defrauded the appellants of the sum of N80,000.00 for which Exhibit 'A' was purportedly executed to convey the property No. 3c Enebong Avenue to the 1st appellant. The respondent strenuously denied committing the alleged fraud and asserted that he was coerced, through the appellant's employment of the police, to sign Exhibit 'A'. At page 38 of the record the learned trial Chief Judge relying on paragraphs 9, 11 and 12 of the respondent's affidavit, found that duress was established.

The court below disagreed with that finding, particularly having regard to the depositions in paragraphs 10, 11, 1, 13, 14 and 16 of the appellants' counter affidavit and held that the finding was merely speculative. I am persuaded by that opinion of the court below. I think the learned and Chief Judge went too far. In the face of the conflicting affidavit evidence on the point it cannot be rightly said that there were "relevant facts to show that Exhibit 'A' was procured by duress."

That however is not the end of the matter. The question still remains: Was the respondent owing the appellants the sum of N80,000.00 which he had fraudulently obtained from the appellants to justify the transfer of the property to the 1st appellant?

On this question the learned trial Chief Judge reacted as follows:

*"if the above allegation was true, then the police should have preferred a charge against the plaintiff but that was not done except the nasty experience he had with the police. That, even if believed, was not sufficient. I am not therefore satisfied that the allegation of fraud has been established and the question of his being allowed to benefit from his fraud does not arise."*

(See page 39 of the record)

Then at page 41 he concluded that fraud was not proved against the Respondent and that the purported exchange of N80, 000.00 for the property was wrong in law. I have earlier reproduced that finding above.

At page 170 of the record the court below reproduced the finding of the learned trial Chief Judge at page 41 of the record and endorsed same in its entirety. The court per Ekpe J.C.A. said:

*"I agree with him. There was no appeal against the above*

*finding of the learned trial Chief Judge and therefore there is no basis for this court to disturb it. In the absence of the appellants establishing that there was in fact and in reality a genuine debt of N80, 000.00 owed to the 1st appellant by the respondent for which the respondent's property at No 3c Enebong Avenue Calabar was conveyed to the 1st appellant by Exhibit A in discharge of the said debt, there is nothing that the respondent can be said to be taking advantage of the appellants in the court below were unable to establish genuine indebtedness and so cannot complain."*

I cannot find any reason to interfere with this concurrent finding of the two courts below. The alleged indebtedness of the respondent in the sum of N80,000.00 forms the very basis of the conveyance of Exhibit 'A'. If the Respondent admitted the indebtedness, then the matter ends there. But he denied any fraudulent procurement of the sum of N80, 000.00 or any sum at all. Before Exhibit 'A' can be sustained, the fraudulent procurement of N80,000.00 on which it is founded must be established. This was not established. In the light of this I have no choice but to also endorse the concurrent finding of the two courts below.

For the foregoing reasons and those contained in the leading judgment of my learned brother, I also hold that there is no merit in the appeal. In the event this appeal is also dismissed by me for lack of merit. I assess the costs of this appeal at N10,000.00 in favour of the respondent,

### **MUHAMMAD JSC**

The Court of Appeal, Calabar division, dismissed the appeal filed by in suit No C/11/95 delivered on 20th November, 1995.

By an originating summons, the plaintiff raised the following question for determination by the trial court:

*"Whether, in accordance with Land Use Decree 1978 valid title has been passed from the plaintiff to the 1st defendant arising from the agreement of 25th January, 1987 over the plaintiff's property situate at No 3C Enebong Avenue, Calabar."*

The plaintiff then prayed the trial court to grant him the following reliefs:

"A. A declaration that the purported conveyance is null, void and of no effect whatever and is against the provisions of the Land Use Decree of 1978.

B. An order directing the 1st defendant, its agents servants, privies, assigns to vacate the property situate at No 3C Enebong Avenue Calabar

C. An order directing that the original documents of the survey and building plans and the agreement originally conveying the plot/parcel of land known as 3C Enebong Avenue, Calabar to the plaintiff be returned to the plaintiff.

D. The sum of N400, 000.00 (Four Hundred Thousand Naira) as general damages."

After having considered the affidavit evidence placed before him and the addresses by the respective parties, the learned trial judge ruled as follows:

"Having regard to all the foregoing I think I should accede to the following orders of this, court namely:

E in Exhibit "A" is null, void and quo effect whatsoever and is against the provisions of the Land Use Decree of 1978.

F B. An order directing the 1st defendant, its agents, servants, privies, assigns, to vacate the property situate at No 3C Enebong Avenue, Calabar.

C. An order directing that the original documents of the survey and building plans and the agreement originally conveying the plot/parcel of land known as 3C Enebong Avenue, Calabar to the plaintiff be returned to the plaintiff.

G (1) That the plaintiff having claimed the sum of N400,000.00 (Four Hundred Thousand Naira) as general damages should content himself in the sum of N100,000.00 (One Hundred Thousand Naira) as general damages."

H Dissatisfied, the defendants appealed to the court below which, in the end, dismissed the appeal

Dissatisfied further, the appellant appealed to this court on three grounds of appeal as contained in the notice of appeal on pages 173 -157 of the printed record of appeal.

In their brief of argument, the appellants set out the following issues for this court's determination:

*"a) Whether or not the finding complained against in ground of appeal No 1 herein was erroneous having regard to the evidence, and incongruous with an earlier holding in the same judgment that the respondent was not coerced into signing away his property to the appellants."* B

*b) Whether or not the deed of conveyance Exhibit 'A' to the originating summons was null and void and of no effect 'whatsoever under the Land Use Act for the reason only that the consent of the governor was not first sought and obtained before it was signed/executed."* C

*c) Whether or not ground of appeal No 5 before the Court of Appeal arose from the decision of the High Court that Exhibit 'A' the deed of conveyance, was a nullity, and therefore not a fit and proper ground of appeal."* D

The respondent on 23/01/2003 filed a notice of preliminary objection challenging the competency of grounds 1 and 3 of the appellant's grounds of appeal. He at the same time filed his brief of argument. Arguments on the preliminary objection were embedded in the brief of argument. The following two issues on the appeal were raised by the respondent:

*"1. Whether on the evidence before the learned Justices of the Court of Appeal, the appellants had proved their case that there was a genuine case of indebtedness against the respondent."* F

*2. Whether Exhibit A confers a binding and enforceable contract between the Appellants and the respondent"*

I think I should consider the preliminary objection first. It challenges competency of grounds 1 and 3. I quote herein below these grounds: G

"1. The learner (sic) Justices of appeal erred in law when they found and held thus:

*'in the absence of the appellants establishing that there was in reality a genuine debt of N80, 000.00 owed to the appellant by the respondent for which the respondent's property at' No 3C Eneobong Avenue, Calabar was conveyed to the 1st appellant by Exhibit A in discharge of the said, debt, there is nothing that the respondent can be said to be taking advantage of. The appellants in the court below* H

*were unable to establish a genuine indebtedness and so cannot complain'*

Particulars of error

(a) Exhibits C - C4 attached to the respondent's counter-affidavit mentioned at pages 7 (paragraph 15 of counter affidavit at lines 8 - 22) & 15 (paragraphs 9 & 10 of further and better counter affidavit at lines (12 -29) of the records before the court appeal are receipts/vouchers issued by the respondent to the first appellant indicating payment of the sum of N80, 000.00 by the 1st appellant to the respondent on account of the property the subject of this appeal.

(b) This finding is incongruous with the earlier holding that the respondent was not coerced into signing away his property to the appellants.

3. The court of appeal erred in law when it held that:

"..... it is my firm view that grounds 1, 5 and 6 thereof do not relate to or arise from the decision of the judgment being challenged by the appellants ..... They are hereby struck out."

Particulars of error

*The issue raised in ground 5 in the Court of Appeal was a consequential order which should ordinarily, without more, follow a finding of nullity of an agreement for which consideration had passed. Failure to make the order was therefore a proper ground of appeal."*

The main submission of learned counsel for the respondent on the above ground of appeal can be summarised as follows:

On ground No. 1:

(a) That the findings as contained in that ground were concurrent findings of the two lower courts that no fraud was established against the respondent

(b) That the ground is based on facts rather than of law

(c) That there is no appeal against that finding of fact of the trial court on fraud which was agreed to by the court below

(d) That leave of this court is required under Order 2 Rule 32 of this Court's Rules 1991, as amended.

(e) That leave was not sought and obtained and the ground should be struck out.

On ground No 3, learned counsel argued that it did not relate to or arise from the judgment of the lower court nor did it relate to issues

raised by the learned Justices of the court below.

I think the criterion of distinguishing whether a ground of appeal is that of law, fact or of both mixed law and facts poses some difficulties and alludes the minds of many counsel. But this court has, times without number, in a litany of cases, laid down the general principles in making the distinction between different types of grounds of appeal. For the purposes of elucidation however, I think I should re-state some of these principles. B

1. The first and foremost is for one to examine thoroughly the grounds of appeal in the case concerned to see whether they reveal a misunderstanding by the lower court of the law, or a misapplication of the law to the facts already proved or admitted. C

2. Where a ground complains of a misunderstanding by the lower court of the law or a misapplication of the law to the facts already proved or admitted, it is a ground of law. D

3. Where a ground of appeal questions the evaluation of facts before the application of the law, it is a ground of mixed law and fact.

4. A ground which raises a question of pure fact is certainly a ground of fact.

5. Where the lower court finds that particular events occurred although there is no admissible evidence before the court that the event did in fact occur, the ground is that of law. E

6. Where admissible evidence has been led, the assessment of that evidence is entirely for that court. If there is a complaint about the assessment of the admissible evidence, the ground is that, of fact. F

7. Where the lower court approached the construction of a legal term of art in a statute on the erroneous basis that the statutory wording bears its ordinary meaning, the ground is that of law.

8. Where the lower court or tribunal applying the law to the facts in a process which requires the skill of a trained lawyer, this is a question of law. G

9. Where the lower court reaches a conclusion which cannot reasonably be drawn from the facts as found, the appeal court will assume that there has been a misconception of the law. This is a ground of law. H

10. Where the conclusion of the lower court is one of possible resolutions but one which the appeal court would not have reached

if seised of the issue, that conclusion is not an error in law.

11. Where a trial court fails to apply the facts which it has found corrective to the circumstance of the case before it and there is an appeal to a court of appeal which alleges a misdirection in the exercise of the application by the trial court, the ground of appeal alleging the misdirection is a ground of law not of fact.

12. When the Court of Appeal finds such application to be wrong and decides to make its own findings such findings made by the court of appeal are issues of fact and not of law.

13. Where the appeal court interferes in such a case and there is a further appeal to a higher court of appeal on the application of the facts, the grounds of appeal alleging such misdirection by the lower court of appeal is a ground of law not of fact.

14. A ground of appeal which complains that the decision of the trial court is against evidence or weight of evidence or contains unresolved contradictions in the evidence of witnesses., it is purely a ground of fact (which requires leave for an appeal to a court of appeal or a further court of appeal).

The above principles accord with the previous practice of this court in considering the thorny and intricate issues of law and fact. See the cases of: Board of Customs and Excise v Barau (1982) 10 SC 48; Ogbechie v Onochie (1980) 2 NWLR (Pt.23) 484; In fact in a more concise form Karibi-Whyte J.S.C; summarised these general principles as follows:

*"question of law is capable of three different meanings. First it could mean a question the court is bound to answer in accordance with a rule of law ... Concisely stated a question of law in this sense is one predetermined and authoritatively answered by the laws. The second meaning is as in what the law is. In this sense an appeal on a question of law means an appeal in which the question for argument and determination is what the true rule of law is on a certain matter .... A question of the construction of statutory provision falls within this meaning. The third meaning is in respect of those questions which normally answers questions on law only. Thus, any question which is within the province of the judge instead of the jury is called a question of law, even though in actual sense it is a question of fact. The cases which readily come to mind are the interpretation of docu-*

*ments. Often a question of fact, but is within the province of a judge. Also the determination of reasonable and probable cause for a prosecution in the tort of malicious prosecution. Which is one of fact, but is a matter of law to be decided by the judge.*

*On what a question of fact is the learned Justice stated thus, "Like of law, question of fact has more than one meaning:* B

*The first meaning is that a question of fact is any question which is not determined by a rule of law. Secondly, it is any question except a question as to what the law is. Thirdly, any question that is to be answered by the jury instead of by the judge is a question of fact."* C

I can now proceed to consider the complaints raised against grounds 1 and 3 In this appeal. As already seen earlier, ground one in essence complains of appellants' inability to establish that there was in reality a genuine debt of N80, 000.00 owed to the appellant by the respondent. The particulars went further to allege that there were exhibits C - C4 attached to the respondents counter affidavit; receipts and voucher issued by the respondent to the 1st appellant vindicating payment of the sum of N80,000.00. This, in my understanding, relates to assessment or evaluation of evidence to be done by the trial court/court of appeal as the case may be. Assessment or evaluation of evidence is a ground of fact; it requires the examination of documents used in securing the debt or payment thereof. Secondly, on the issue of non establishment of fraud at the trial court, which Was affirmed by the court of appeal, there appears to be no appeal on that issue. It will appear strange to seek to file a direct appeal on such a concurrent finding without first seeking and obtaining leave of court, this is what Order 2 Rule 32 of this Court's Rules is saying: D E F

*"Where in an appeal to the court from the court below, the court below has affirmed the findings of fact of the court of first instance, any application to the court in pursuance of its jurisdiction under Section 233(3) of the Constitution for leave to appeal shall be granted only in exceptional circumstances."* G

In this appeal, the matter is even worse. There was no any application of that nature. It has also been said in several authorities that a ground of appeal does not translate into a ground of law because it is so named in the notice of appeal. The ground itself and its particulars of the error alleged must unequivocally point that the ground is that H

of law. See: *Tilbury v Oguniyi* (1988) 1 NSCC 531; *Erisi v Idika* (1987) 4 NWLR (Pt.) 503. Ground 1 in this appeal is that of fact and not of law. It requires leave. As no such leave was sought and obtained it is incompetent. I hereby strike it out. I strike out equally, any issue and arguments thereof which relate to it.

B The next ground challenged by the respondent is ground No 3. I already reproduced ground 3 above. I do not agree with the learned counsel for the respondent that ground 3 of the grounds of appeal filed does not relate to or arise from the judgment being appealed against. But I do agree with the learned counsel for the appellant on his submission in the reply brief filed by the appellant that ground 3 is contained in the judgment of the court below and formed part of its judgment.

D In its judgment, the court below, per Ekpe, J.C.A, who delivered the lead judgment stated as follows:

E *"It is a settled principle of law by a long line of decided cases both in the Supreme Court and in the Court of Appeal that grounds of appeal against a decision or judgment must of necessity relate to the decision and be ground of appeal cannot be fixed and circumscribed within a particular issue in controversy in the judgment challenged, such a ground of appeal cannot justifiably be regarded as related to the decision. In Saraki & Ors v Kotoye (1992) 9 NWLR (Pt.264) 156; (1992) 3 NSCC 331 at page 345, Karibi-Whyte, J.S.C has this to say"*

F *"It is a well settled proposition of law in respect of which there can hardly be a departure that the grounds of appeal against a decision must relate to the decision and should constitute a challenge to the ratio of the decision."*

G *In Bello v Aruwa (1999) 8 NWLR (Pt.615) 454 it was held that grounds of appeal are not formulated in abstract. They must arise from the judgment in the same way as the issues arise from the grounds of appeal. And however meritorious a ground of appeal may be, it must be connected with the controversy between the parties at the trial court. In Abiola v Abacha (1997) 6 NWLR (pt.509) 413 it was held that the grounds of appeal must stem from the decision of the court below. See: Onwuchekwa v Onwuchekwa & Anor (1991) 5 NWLR (pi 194) 739; Oba v Egberongbe (1999) 8 NWLR (pt.615)*

485.

*After a hard look at grounds 1, 4, 5 and 6 of the amended grounds of appeal complained of in the notice of preliminary objection, and guided by the authorities cited above, it is my firm view that grounds 1, 5 and 6 thereof do not relate to or arise from the decision or the judgment being challenged by the appellants. They were not canvassed at the court below/ and in deed they are extraneous matters to the decision of the court below. Clearly, therefore, grounds 1, 5 and 6 of the amended grounds of appeal are incompetent. They are hereby struck out. See Salami v Mohammed (2000) 9 NWLR (Pt.673) 469. Consequently, issues No (a), (e) and (f) respectively formulated from the incompetent grounds 1, 5 and 6 aforesaid are also incompetent. In law, issues for determination of an appeal can only be validly formulated from valid and competent grounds of appeal. Where grounds of appeal are incompetent and are struck out, the issues formulated from them cannot stand alone. An appellate court will not entertain any argument or submission on issues not covered by competent and subsisting ground or grounds of appeal. See Akpan v the State (1992) 6 NWLR (Pt.248) 439; Agunde v Gberbo (1999) 9 NWLR (Pt.617) 71. Accordingly, issues No (a), (e) and (f) are hereby struck out."*

I think what the appellant was asking in ground 3 is whether the court below was right in holding that grounds 1, 5 and 6 filed before the lower court were incompetent. These grounds of appeal filed before the court below read as follows;

*"1. Ground one*

*The learned trial judge erred in law in deciding the case vide the originating summons procedure. The wrong adoption of this procedure therefore occasioned a miscarriage of justice to the defendants/appellants.*

*Particulars*

*Viva vocae (sic) evidence which 'would have enabled the cross-examination of witnesses was shut out.*

*2. Ground two*

*The judgment is against the weight of evidence.*

*3. Ground three*

*The learned trial Judge erred in law when he held that failure*

*to obtain Governor's consent prior to the transaction between the parties herein rendered the agreement null and void*

*Particulars*

*Failure to obtain governor's consent only renders the transaction incomplete and not void.*

B 4. Ground four

*The learned that judge erred in law when he failed to find that it was the plaintiff/respondent's duty to obtain Governor's consent for the transaction in issue and therefore failed to arrive at the appropriate legal effect/consequence of that failure which error occasioned a miscarriage of justice to the defendants/appellants.*

C 5. Ground five

*The learned trial judge erred in law when he ordered the return of the property No 3C Enebong Avenue, Calabar, to the plaintiff/respondent, but failed to order the return of the purchase money to the 1st defendant/appellant.*

*Particulars*

*Where consideration fails, money paid should be returned.*

6. Ground six

E *The 2nd and 3rd defendants/appellants were wrongly joined as none of the reliefs sought was exactable from the 2 of them jointly or each severally."*

So, these grounds in my view stemmed from the judgment of the court below as per the excerpt quoted earlier from that court's judgment.

F In its judgment the court below reiterated the position of the Saw on what makes a ground of appeal competent. This is what the court below stated:

G *"It is a settled principle of law by a long line of decided cases both in the Supreme Court and in the court of appeal that grounds of appeal against a decision or judgment must of necessity relate to the decision and be ground of appeal cannot be fixed and circumscribed within a particular issue in controversy in the judgment challenged, such a ground of appeal cannot justifiably be regarded as related to the decision. In Saraki & Ors v Kotoye (1992) 9 NWLR (Pt.264) 156; (1992) 3 NSCC 331 at page 345, Karibi-Whyte, J.S.C has this to say"*

*'It is a well settled proposition of law in respect of which there can hardly be a departure, that the grounds of appeal against a decision must relate to the decision and should constitute a challenge to the ratio of the decision'*

In *Bello v Aruwa* (1999) 8 NWLR (Pt.61 5) 454 it was held that grounds of appeal are not formulated in abstract. They must arise from the judgment in the same way as the issues arise from the grounds of appeal. And however meritorious a ground of appeal may be, it must be connected 'with the controversy between the parties at the trial court, in *Abiola v Abacha* (1997) 6 NWLR (pt. 509) 413 it was held that the grounds of appeal must stem from the decision of the court below. See: *Onwuchekwa v Onwuchekwa & Anor* (1991) 5 NWLR (pt. 194) 739; *Oba v Eqberonqbe* (1999) 8 NWLR (pt. 515)

Thus, ground 5 in the appeal before us now, as far as it relates to the judgment of the court below is a competent ground. The issue of whether the challenge posed in the grounds struck out by the court below will succeed before us or not is entirely a different issue. This is purely a matter to be based on merit of each of these grounds struck out. This can hardly be achieved except when each of the grounds is properly examined by looking at the reasoning process of the court below to see whether this court will come to same conclusion as arrived by the court below, so hold that ground 5 of the grounds of appeal and the issue to which it relates are competent.

Turning to the main appeal, I will only want to say in relation to Exhibit A, the deed of conveyance which was said to have been executed by the respondent "under duress" that the Land Use Act, 1978 vests all land comprised in the territory of each state (except land vested in the Federal Government or its agencies) solely in the governor of the state who would hold such land in trust for the people and would be responsible for allocation of land in all urban areas to individuals resident in the state and to organisations for residential, agricultural, commercial and other purposes. The law relating to alienation of property granted under statutory right of Occupancy is very clear with the advent of the Land Use Act, 1978, (LUA), as contained in Cap. 202 of the Laws of the Federation of Nigeria, 1990, it is only with the consent of a state Governor that such alienation/transfer can

be effective. Section 22 of Land Use Act provides:

*"22. It shall not be lawful for the holder of a statutory right of occupancy granted by the governor to alienate his right of occupancy or any part thereof by assignment, mortgage, transfer of possession, sublease or otherwise howsoever without the consent of the governor first had and obtained:*

*Provided that the consent of the governor-*

*(a) shall not be required to the creation of a legal mortgage over a statutory right of occupancy in favour of a person in whose favour an equitable mortgage over the right of occupancy has already been created with the consent of the Governor.*

*(b) shall not be required to the reconveyance or release right of occupancy which that holder or occupier has mortgaged to that - mortgagee with the consent of the governor;*

*(c) to the renewal of a sub-lease shall not be presumed by reason only of his having consented to the grant of a sub- lease containing an option to renew the same*

*(2) The governor when giving his consent to an assignment, mortgage or sublease may require the holder of a statutory right of occupancy to submit an instrument executed in evidence of the assignment, mortgage or sub-lease and the holder shall when so required deliver the said instrument to the Governor in order that the consent given by the governor under subsection (1) of this section may be signified by endorsement thereon."*

Another provision of the Land Use Act, which is of relevance, is Section 26. It provides as follows:

*"26. Any transaction or any instrument which purports to confer on or vest in any person any interest or right over land other than in accordance with the provisions of this Act shall be null and void."*

Thus by Exhibit 'A' the intendment was to transfer or convey the title in the property situate and identified as No 3C Enebong Avenue, Calabar whose statutory right of occupancy was in the name of the respondent to the appellants when the whole deal did not satisfy the requirements of the above provisions of the Land Use Act. It is trite law in landed matters governed by the Land Use Act that while dealing in a right of occupancy where the right granted or deemed granted under the provisions of the Act, requires under Section 22 of the Act,

the consent of the Governor of a state first had and obtained, otherwise the purported transaction is rendered null and void under Section 26 of the Act. It is never shown in this appeal that the said consent of the Governor of Cross River State was ever sought and obtained at any stage of the deal. I cannot see how such a whole-some transaction be referred to as inchoate deal/transaction. See: *Savanah Bank of Nigeria Ltd v Ajilo* (1989) 1 MSCC 135. Granted that it is inchoate, shall the appellant continue to hold an inchoate title perpetually? I do not think so. Section 20 of the Act as cited and relied upon by the appellant cannot in my view provide good defence to the appellants. This is because the said section as argued by learned counsel for the respondent, envisages a situation whereby a person already in possession of a statutory right of occupancy is in breach of the provisions in Sections 22 and 23 of the Land Use Act. The appellants cannot, in this respect, seek refuge under Section 20(1) of the Act. Exhibit 'A' stands in law, void and nullified as it is in breach of the mandatory provisions of the Land Use Act, 1978.

Exhibit 'A' has been referred to an 'agreement' between the appellants and it was the contention of the respondent that he was 'coerced' to enter into that contract. This is what he averred to in his affidavit in support of his summons.

*"12. That in view of the psychological trauma, the shame of having been arrested several time, the imminent torture I was likely to undergo in the cell and the frail state of my health, I was thus obliged to sign Exhibit A and hand over all the original documents pertaining to my property at No 3C Enebong Avenue, Calabar which included the survey and building plans and the agreement conveying the said land to me.*

*13. That on signing Exhibit A, I was eventually freed from further intimidation by the defendants but with no house to go to as the only one I had, had been given away via Exhibit A.*

*16. That the defendants had by the aforesaid Agreement exercised undue influence over me and defrauded me of my only property whose site plan is attached here and marked Exhibit C."*

Whether there was coercion or not, the law under Section 22(2) of the Land Use Act recognizes cases where some form of written

agreement executed in evidence of a transaction is submitted to the governor in order to obtain his consent as required by the section. In view of the fact that Exhibit 'A' was evidence of a complete action, Section 22 cannot save the situation as there is nothing or record to show that the Exhibit was made subject to the consent by the governor. Certainly, for a transaction of this nature to be valid, the parties to it must first enter into a binding agreement to alienate subject to the consent of the governor. It is that consent that vests a valid title on the purchaser. See the cases of: *Awojugbagbe v Chinukwe* (1995) 4 SCNJ 162; *International Textile (Nig.) Ltd v Aderemi* (1999) 8 NWLR (Pt.614) 268.

For the above reasons and the more detailed reasons of my learned brother Onnoghen, J.S.C, I too, dismiss the appeal. I abide by order as to costs.

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