

**SUPREME COURT OF NIGERIA**  
2ND MAY, 2008 SC. 262/2001  
**CORAM:- A. I. KATSINA-ALU, S. A. AKINTAN, M.**  
**MOHAMMED, W. S. N. ONNOGHEN,**  
**C. M. CHUKWUMA-ENEH, JJSC**

1. CHIEF ETETE S. OWOH
  2. CHIEF OTUGOTMA A. OWOH
  3. CHIEF PROMISE U. I. MBORH ..... APPELLANTS
  4. CHIEF ALBERT B. E. ISTEDANG  
(For themselves and as representing  
Asarama Community)  
AND
  1. CHIEF KINGSTON U. ASUK
  2. CHIEF JONATHAN M. EBIRTENE ..... RESPONDENTS
- 

APPEALS - Issues - Validity of - Issues not distilled - From any of the grounds of appeal filed by the Appellant - Are irrelevant - To determination of the appeal (H1)

COURTS - Decisions of - Nature of - Whether final or Interlocutory - Decision is final - Where it has the effect of determining finally - The right of the parties in the claim before the court - On the merits thereof (H 2)

ORDERS OF COURT - Nature of - Chieftaincy matters - Striking out order - Such order does not finally determine - Respective rights of parties in an action - These rights remain pending and can be subsequently revived (H3)

APPEALS - Interlocutory - Time within which to bring - Interlocutory appeal must be brought - Within fourteen days of decision complained of - Else it is incompetent - And robs appellate court of jurisdiction (H4)

**FACTS**

The plaintiffs/Appellants, for themselves and as representing

Asarama Community, brought an action against the Defendants/ Respondents at the high court of Rivers State claiming sundry declarations and injunctions contesting the appointment, installation and coronation of the 1st Respondent by the second set of Respondents as the Okan-Ama of Asarama, i.e. king of Asarama. It is the Appellants' contention that the appointment, installation and coronation was in contravention of the custom and tradition of Asarama/Andoni people and so irregular, null and void. The parties filed and exchanged their pleadings and trial commenced. But sometime during the course of trial, the parties told the trial court that they had settled their dispute and that the Appellants were no longer pursuing their claims against the Respondents. Learned counsel to the Appellants explained to the court that he was merely instructed to withdraw the action and not to apply for its discontinuance because the parties had decided to settle the dispute on their own without involving their counsel. But the judge was of the view that since the matter was part-heard, a formal application was required. While awaiting the parties to take appropriate steps to terminate the proceedings, another set of interested parties applied to be joined as plaintiffs. At the same time learned counsel to the existing parties, those who had earlier agreed to settle out of court, filed their terms of settlement duly executed, not by the parties to the action in person, but by their counsel on their behalf. Counsel applied to the court to adopt same as its judgment in the suit. The learned trial judge heard and dismissed the application for joinder. He also refused to adopt the terms of settlement as his judgment in the matter on the ground that the court was not satisfied that the parties themselves were involved in the drawing up of the terms. In the circumstance he made an order striking out the matter from the cause list. All these happened on 3rd April 1996.

Aggrieved by the decision, the respondents appealed to the court of Appeal which allowed the appeal, set aside the decision of the trial court and entered a consent judgment in accordance with the terms of settlement earlier rejected by the trial court. The notice of appeal was filed on 8th May 1996 - 35 days after the trial court's decision. Appellants have brought this appeal against the judgment of the Court of Appeal. It is their contention that the respondents' appeal to that court was brought out of time and without leave. Accordingly

the Court of Appeal lacked jurisdiction to entertain the appeal.

### **ISSUE FOR DETERMINATION**

*“(i) Whether the defendants appeal before the Court of Appeal was competent and the Court of Appeal had jurisdiction to entertain the same.”*

### **HELD** (Unanimously allowing the appeal per **MOHAMMED JSC**) **APPEALS - Issues - Validity of**

1. Although the respondents have formulated six issues in their Brief of Argument, issues (i) and (ii) as rightly observed by the appellants in their further Amended Reply Brief do not arise from any of the grounds of appeal filed by the appellants. The two issues in the respondents’ Brief are therefore irrelevant and shall be ignored in the determination of this appeal. (p. 2114 H)

### **COURTS - Decisions of - Nature of**

2. The question for determination in this issue as to whether or not the decision of the trial court was interlocutory or final has been well settled by this court in many of its decisions in several cases. It is generally accepted that there are two tests for determining whether an order or decision of court is interlocutory or final. This view is polarized between the cases which have applied. The less acceptable test formulated by Lord Esher, in Salamans v. Warner (1891) 1 QB 734, and those which have applied the more widely accepted view formulated by Lord Alverstone, CJ., in Bozson v. Altrincham Urban District Council (1903) 1 KB 547 at 548-549, where the learned Lord said:-

*“It seems to me that the real test for determining this question ought to be this. Does the judgment or order as made finally dispose of the rights of parties? If it does, then I think it ought to be treated as final order, but if it does not, it is then in my opinion, an interlocutory order.”*

The interpretation given to the words “interlocutory” or “final” in several decisions of this court is that if the order, decision or judgment of a court finally and completely determines the rights of the parties in the case, it is a final decision. However, where the order, decision or judgment of a court does not finally and completely determine the respective rights of the parties submitted for determination by the court in the case, it is an interlocutory decision only. These

cases have also generally decided that in order to determine whether the decision is final or interlocutory, the decision must relate to the subject matter in dispute between the parties and not the function of the court making the order or decision. In other words, the determining factor is not whether the court has finally determined an issue but it is whether or not it has finally determined the rights of the parties in the claim before the court. See *Igunbor v. Afolabi* (2001) 5 S.C. (Pt. I) 105; (2001) 11 NWLR (Pt. 723) 184 at 165, where Karibi-Whyte, stated the position of the law in this respect as follows:-

*"A final order or judgment at law is one which brings to an end the rights of the parties in the action. It disposes of the subject matter of the controversy or determines the litigation as to all parties on the merits. On the other hand, an interlocutory order or judgment is one given in the process of the action or cause, which is only intermediate and does not finally determine the rights of the parties in the action. It is an order which determines some preliminary or subordinate issue or settles some step or question but does not adjudicate the ultimate rights of the parties in the action. However, where the order made finally determines the rights of the parties, as to the particular issue disputed, it is a final order even if arising from an interlocutory application. For instance, an order of committal for contempt arising in the course of proceedings in an action is a final order - see *Toun Adeyemi v. Theophilus Awobokun* (1968) 2 All NLR 318." (p. 2116 H)*

### **ORDERS OF COURT - Nature of - Chieftaincy matters**

3. The ruling of the trial court delivered on 3rd April, 1996, refusing to adopt the terms of settlement as judgment of the trial court and merely striking out the action filed by the appellants against the respondents, did not touch anything on the subject matter of controversy in the chieftaincy dispute between the parties not to talk of any determination of the respective rights of the parties in the action before the trial court finally and on the merit.

Striking out of the plaintiffs/appellants' action certainly does not finally determine the respective rights of the parties in the action, nor does it adjudicate ultimate rights of the parties in the dispute placed before the trial court for determination. In this situation, where the claims or rights of the parties have not been examined or looked

into by the trial court and appropriate findings made thereon resulting in a determination, these claims or rights effectively remain pending and can be revived by any of the parties in any other court of concurrent jurisdiction or even the same court that handed down the striking out order for relisting under the appropriate Rules of the trial court on such terms as may be granted on application. See Woluchem v. Wokoma (1974) 3 S.C. 153 at 170-171; (1974) 3 S.C. (Reprint) 115, where this court said:-

*“We simply draw attention to the well known rule of practice that the court is without power to review any matter which it has struck out save on the application of either party.”*

Therefore having regard to the circumstances of this case, I entirely agree with the learned counsel for the appellants that the ruling of the learned trial Judge striking out the appellants’ action on 3rd April, 1996, was only an interlocutory decision. It was not a final judgment as strongly argued by the respondents. (p. 2119 B)

### ***APPEALS - Interlocutory - Time within which to bring***

4. Next for determination is whether or not the appeal was filed within the time prescribed by Section 25 of the Court of Appeal Act, Cap. 75, of the Laws of the Federation, 1990, which states:-

*“25 (1) Where a person desires to appeal to the Court of Appeal, he shall give Notice of Appeal or notice of his application for leave to appeal in such manner as may be directed by rules of court within the period prescribed by the provision of subsection (2) of this section that is applicable to the case.*

*(2) The periods for the giving of notice of appeal or notice of application for leave to appeal are:-*

*“(a.) In the appeal in civil case or matter, fourteen days where the appeal is against an interlocutory decision, and three months where the appeal is against a final decision.”*

It cannot be over-emphasized that failure to comply with the statutory requirements such as the filing of an appeal within the specific period prescribed by law from the date of decision or within such further extended period as may be granted by an order of court, deprives an appellate court of its jurisdiction to entertain or hear the appeal. Such irregularity cannot be regarded as a mere

technicality or misconception but constitutes a fundamental defect which renders the proceedings and judgment of the appellate court in respect of such purported appeal, incompetent and consequently null and void. An irregularity that renders proceedings incurably defective and null and void, may not be waived as acquiescence cannot  
B confer jurisdiction.

In the present case, the respondents' appeal that was heard by the court below was manifestly irregular and incurably defective as it was clearly filed out of time without the leave of that court for extension of  
C time to file it in accordance with the provisions of Order 3 Rule 4 of the Court of Appeal Rules. This is because on the face of the Notice of Appeal filed by the respondents as appellants before the Court of Appeal, it shows at page 124 that the appeal was filed on 8th May, 1996, on payment of the appropriate filing fees on revenue receipt No. 626746.  
D Taking into consideration that the interlocutory decision being appealed against was given on 3rd April, 1996, it means that the appeal was not filed until after 35 days of the delivery of the decision of the trial court. The fact that the respondents' appeal was filed out of the time prescribed by law is not at all in doubt. The appeal as filed was thus, incompetent  
E thereby depriving the Court of Appeal of jurisdiction to hear and determine the same. In the absence of a valid and competent appeal before it, the court below was in grave error to have proceeded to hear and determine the appeal by setting aside the decision of the trial court striking out  
F the appellants/plaintiffs case and substituting it with a consent judgment based on the terms of settlement rejected by the learned trial Judge. It was an exercise in futility as the entire proceedings in the hearing of the incompetent appeal are a nullity. Although the issue was not raised at the court below, having regard to its fundamental nature, it was properly  
G raised by the appellants in this appeal. (p. 2120 B)

### **REPRESENTATION**

- O. C. J. Okocha, SAN., (with him; H.D.D. Uwom), for the Appellants.  
H Sylvia Shinaba, (with him; Adebola S.Sobowale), for the Respondents.

### **CASES REFERRED TO**

- Sanusi v. Ayoola (1992) 9 NWLR (Pt.265) 275 at 291  
 Ifediora v. Ume (1988) 2 NWLR (Pt. 74} 5  
 Kassim v. Ebert (1966) 1 All NLR 65  
 Igunbor v. Afolabi (2001) 5 S.C. (Pt. I) 105  
 Woluchem v. Wokoma (1974) 3 S.C. 153 at 170-171  
 Asore v. Lemomu (1994) 7 NWLR (Pt. 356) 284 at 290-291 B  
 Ohenemooore v. Akesseh Tayee (1933) 2 WACA 43  
 Kudiabor v. Kudanu (1932) 6 WACA 14  
 Chacharos v. Ekimpex Ltd. (1988) 1 NWLR (Pt. 68) 88 at 90  
 Oguntimehin v. Omotoye (1957) 2 FSC 56 C  
 Afuwape v. Shodipe (1957) SCNLR 265  
 Ude v. Agu (1961) 1 ALL NLR 65  
 Ebet v. Kassim (1966) NMLR 123  
 Omonuwa v. Oshodin (1985) 2 NWLR (Pt. 10) 924  
 Akinsanya v. U.B.A. Ltd. (1986) 4 NWLR (Pt. 35) 273 D

### **STATUTES & RULES REFERRED TO**

- Constitution of the Federal Republic of Nigeria, 1979, ss. 220 (1) (a), 221  
 Court of Appeal Act, Cap. 75, of the Laws of the Federation, 1990, E  
 s. 25 (2) (a)  
 Court of Appeal Rules, O. 3 r. 4

### **LEAD JUDGMENT BY MOHAMMED JSC**

This is an appeal from the decision of the Court of Appeal F  
 Port-Harcourt Division. In the judgment delivered by that court on  
 14th February, 2001, the court set aside the decision of Woryi, J., of  
 the High Court of Justice of Rivers State, Bori Division delivered on G  
 3rd April, 1996, striking out the plaintiffs' action brought against the  
 defendants. The appellants who were the plaintiffs at the trial High  
 Court, for themselves and as representing Asarama Community,  
 brought their action in 1988 against the respondents who were the  
 defendants in that court and in paragraph 30 of their Statement of  
 Claim, sought for the following reliefs; H

*“(1) A declaration that the defendant in the 1st set of defendants  
 is not the Okan-Ama His Royal Highness the Okan-Ama of Asarama,  
 Andoni.*

(2) *A declaration that his purported appointment, installation and coronation of the 1st set of defendant by the 2nd defendants as His Royal Highness the Okan-Ama of Asarama-King of Asarama on the 8th of January, 1988, is unconstitutional and against the custom and tradition of Asarama/Andoni people and to that extent, irregular, null and void and of no effect whatsoever.*

(3) *A declaration that the said purported installation and coronation is clandestine and fraudulent on the Asarama people and is null and void.*

(4) *A declaration that the procedure adopted by the 2nd set of defendants in the appointment, installation and coronation of the 1st defendant is irregular and contrary to the custom and tradition of Asarama/Andoni people and is thus, null and void and of no effect whatsoever.*

(5) *An injunction restraining the 1st set of defendant from parading himself as the Okan-Ama-King of Asarama in the Andoni or anywhere.*

(6) *An injunction restraining the 2nd set of defendants, their servants, agents or privies from holding out, parading or in any manner howsoever representing the 1st set of defendant as the Okan-Ama of Asarama."*

The case went into hearing on pleadings before Mannuel, J., where the plaintiffs' first witness testified in-chief. However, in 1992, the case was transferred to the same court presided by Woryi, J., where the matter was commenced afresh. It was here, that on 8th November, 1995, the parties told the trial court that they had settled their dispute and that the plaintiffs were no longer pursuing their claims against the defendants. Learned counsel to the plaintiffs explained to the court that he was merely instructed to the action and withdraw not to apply for its discontinuance because the parties had decided on their own without involving their learned counsel, to settle their dispute. Learned trial Judge however was of the view that since the matter was part-heard, a formal application was required. While awaiting the parties to take appropriate steps to terminate the proceedings in the matter before the trial court, another set of interested parties in the case applied to be joined as plaintiffs. At the same time learned counsel to the existing parties in the case who had earlier agreed to settle their dispute, also filed their terms of settlement duly executed not by the parties to the action



themselves but by their learned counsel.

The motion on Notice by the parties wishing to join the action as plaintiffs was heard by the trial court and in its ruling, the application was dismissed. In the same ruling delivered on 3rd April, 1996, the learned trial Judge also considered the terms of settlement filed by the parties but refused to adopt the same as the judgment of the court on the ground that the court was not satisfied that the parties themselves were involved in the drawing up of the said terms of settlement. Part of this ruling at pages 165 - 166 of the record of appeal reads -

*“Thus, a document containing the terms of settlement in a case, fought on a representative capacity, cannot be adopted by the court to have favoured fair trial or uninhibited mutual consent, if it is not duly executed by all or any of the authorizing or consenting parties in the suit. Howbeit, parties may settle orally without filing a written terms of settlement. It is not the duty of courts to compel parties who have reported amicable settlement out of court, to continue the court prosecution of such mutually settled case.*

*For these reasons, and in the interest of justice, the final order of this court shall be:*

*(1) That this case shall be and it is hereby, deemed as settled mutually and amicably by the parties themselves out of court.*

*(2) That the document titled ‘terms of settlement’ dated 10th January, 1996, and filed by the parties on 7th February, 1996, shall be and it is hereby rejected by the court. The court accordingly hereby declines to adopt it as the judgment of this court, for its not being duly, sufficiently and personally executed by the hands of any of the litigating parties themselves out of court.*

*(3) That having been deemed as mutually and amicably settled out of court by the parties; the oral testimonies having been long voluntarily suspended by the plaintiffs, and by virtue of the plaintiffs’ reports of amicable settlement made to the court by the parties in the open court, this Suit No. BHC/44/88, filed on 23rd September, 1988, is hereby struck out of the cause list.”*

The defendants, now respondents in this court, were not happy with the refusal of the trial court to adopt the terms of settlement filed by the parties as the judgment of the court and therefore appealed

against it to the Court of Appeal which after hearing the appeal, allowed it, set aside the decision of the trial court and entered a consent judgment in accordance with the terms of settlement executed by the learned counsel to the parties.

Dissatisfied with the judgment of the Court of Appeal delivered on 14th February, 2001, the plaintiffs now appellants have appealed to this court with the leave of the Court of Appeal granted on 9th May, 2001. In the Brief of Argument filed on behalf of the appellants, their learned senior counsel identified two issues for determination from the grounds of appeal. The issues are -

*“(i) Whether the defendants appeal before the Court of Appeal was competent and the Court of Appeal had jurisdiction to entertain the same.*

*(ii.) Whether, from the circumstances of this case, the Court of Appeal was right to allow the defendants’ appeal and enter consent judgment in line with the purported terms of settlement signed by counsel alone.”*

In the respondents’ Brief of Argument however, as many as six issues were formulated by their learned counsel. The issues are -

*“(i) Whether the learned trial Judge in his ruling of 8th November, 1995, on the withdrawal, made an order that the parties must file a formal application before they would withdraw the suit.*

*(ii) Whether if he so ordered, he was right to have done so.*

*(iii) Whether the order as made and applied/corrected by the Court of Appeal was a final or an interlocutory order.*

*(iv) Whether the learned Judge was right in refusing to adopt the terms of settlement signed by counsel on both sides in his decision for reason given by him.*

*(v) Whether the defendants’ Notice of Appeal to the Court of Appeal at pages 121 to 124 of the record was filed within or out of time.*

*(vi) Whether there was a proper basis for a consent judgment in this case.”*

The issues as identified in the appellants’ Brief of Argument which clearly arose from the grounds of appeal filed by the appellants, are the real issues to be considered and resolved in this appeal.

***Although the respondents have formulated six issues in their***

***Brief of Argument, issues (i) and (ii) as rightly observed by the appellants in their further Amended Reply Brief do not arise from any of the grounds of appeal filed by the appellants. The two issues in the respondents' Brief are therefore irrelevant and shall be ignored in the determination of this appeal.*** See Ugo v. Obiekwe (1989) 2 S.C. (Pt. II) 41; (1989) 1 NWLR (Pt. 99) 566 and Sanusi v. Ayoola (1992) 9 NWLR (Pt. 265) 275 at 291. The appellants must however realise that their success in this appeal depends entirely on the force of their submission on the issues raised in their own Brief of Argument because the apparent shortcoming in the respondent's Brief of Argument will have no bearing whatsoever in strengthening the case of the appellants. See Akpan v. The State (1991) 5 S. C 1; (1992) 6 NWLR (Pt. 248) 439 at 466. B C

Going back to the issues for determination in this appeal, the first one is whether the defendants' appeal before the Court of Appeal was competent and the Court of Appeal had jurisdiction to entertain the same. It was argued for the appellants that taking into consideration that the terms of settlement filed by the parties was rejected by the trial court, coupled with the fact that the decision of the trial court striking out the plaintiffs' suit did not decree anything in favour of any of the parties that may be regarded as a determination of the rights of the parties in anyway, the decision of the trial court was an interlocutory decision within the context of Sections 220 and 221 of the Constitution of the Federal Republic of Nigeria, 1979, and Section 25 of the Court of Appeal Act. Several cases were cited and relied upon in support of this submission. The cases include Ifediora v. Ume (1988) 2 NWLR (Pt. 74) 5, Kassim v. Ebert (1966) 1 All NLR 65, Igunbor v. Afolabi (2001) 5 S.C. (Pt. I) 105; (2001) FWLR (Pt. 59) 1288 - 1289 at 1301, Woluchem v. Wokoma (1974) 3 S.C. 153 at 170-171; (1974) 3 S.C. (Reprint) 115 and Asore v. Lemomu (1994) 7 NWLR (Pt. 356) 284 at 290 -291. Learned appellants' senior counsel pointed out that since the decision of the trial court striking out the suit was an interlocutory decision given on 3rd April, 1996, which by Section 25 (2) (a) of the Court of Appeal Act, must be appealed against within 14 days, but the Notice of Appeal against that decision was not filed until 8th May, 1996, 35 days after the ruling, the appeal was incompetent for having been filed out of time D E F G H

thereby depriving the court below of jurisdiction to hear it.

In this issue, the defendants' appeal to the Court of Appeal was also attacked on the grounds that all the grounds of appeal were of mixed law and fact requiring leave to appeal under Sections 220(1) and 221 of the 1979 Constitution as laid down in the cases of Anoghalu v. Oraelosi (1999) 10-12 S.C. 1; (1999) 10 SCNJ 1 at 11, Apena v. Aiyetobi (1989) 1 NWLR (Pt. 95) 85 at 94, I. I. T. A. v. Amrani (1994) 3 NWLR (Pt. 332) 296 at 319, Western Steel Works Ltd. v. Iron & Steel Workers Union (1986) 6 S.C. 35 at 52 and Chacharos v. Ekimpex Ltd. (1988) 1 NWLR (Pt. 68) 88 at 90. It was finally submitted that since the Court of Appeal had no jurisdiction to hear and determine the appeal, it was not competent to set aside the decision of the trial court and to substitute same with a consent judgment. This court is therefore urged on this issue, to allow the appeal, set aside the decision of the Court of Appeal and restore the decision of the trial court and dismiss the defendant's appeal to the Court of Appeal.

Learned counsel to the respondents who were the defendants at the trial court saw the ruling of the trial court against which the respondents appealed to the Court of Appeal, as a final decision of the trial court which requires no leave to appeal before conferring jurisdiction on the Court of Appeal to entertain the appeal having regard to Section 220(1)(a) of the 1979 Constitution; that the decision having finally disposed of the issues in contention between the parties, the decision was final and not interlocutory as claimed by the appellants. Learned counsel called in aid the cases of Union Bank (Nigeria) Ltd. v. Penny Mart Ltd. (1992) 2 NWLR (Pt. 240) 228, Nwosu v. Ofor (1991) 2 NWLR (Pt. 175) 275 and Ogbogu v. Ndiribe (1992) 6 NWLR (Pt. 245) 40, in support of this submission. Learned counsel concluded by urging this court to hold that the issue of lack of jurisdiction or competence on the part of the Court of Appeal to hear and determine the respondents' appeal before it was misconceived particularly when all the grounds of appeal filed in support of the appeal, were grounds of law.

***The question for determination in this issue as to whether or not the decision of the trial court was interlocutory or final has been well settled by this court in many of its decisions in several cases. It is generally accepted that there are two tests for***

**determining whether an order or decision of court is interlocutory or final. This view is polarized between the cases which have applied. The less acceptable test formulated by Lord Esher, in *Salamans v. Warner* (1891) 1 QB 734, and those which have applied the more widely accepted view formulated by Lord Alverstone, C.J., in *Bozson v. Altrincham Urban District Council* (1903) 1 KB 547 at 548 - 549, where the learned Lord said:-**

***“It seems to me that the real test for determining this question ought to be this. Does the judgment or order as made finally dispose of the rights of parties? If it does, then I think it ought to be treated as a final order, but if it does not, it is then in my opinion, an interlocutory order.”***

The courts in this country, it would seem, have quoted and consistently applied the above view of Lord Alverstone. This is because the words “interlocutory” or “final” in relation to the decision, judgment or order of court, are not clearly defined or interpreted in any law, rules of court or the Constitution itself which only defines the word “decision” as “any determination of that court and includes judgment, decree, order, conviction, sentence or recommendation.”

Therefore, **the interpretation given to the words “interlocutory” or “final” in several decisions of this court is that if the order, decision or judgment of a court finally and completely determines the rights of the parties in the case, it is a final decision. However, where the order, decision or judgment of a court does not finally and completely determine the respective rights of the parties submitted for determination by the court in the case, it is an interlocutory decision only. These cases have also generally decided that in order to determine whether the decision is final or interlocutory, the decision must relate to the subject matter in dispute between the parties and not the function of the court making the order or decision. In other words, the determining factor is not whether the court has finally determined an issue but it is whether or not it has finally determined the rights of the parties in the claim before the court. See *Oguntimehin v. Omotoye* (1957) 2 FSC 56, *Afuwape v. Shodiye* (1957) SCNLR 265, *Ude v. Agu* (1961) 1 ALL NLR 65, *Ebet v. Kassim* (1966)**

NMLR 123, Omonuwa v. Oshodin (1985) 2 NWLR (Pt. 10) 924, Akinsanya v. U.B.A. Ltd. (1986) 4 NWLR (Pt. 35) 273, Ifediora v. Ume (1988) 2 NWLR (Pt. 74) 5 and **Igunbor v. Afolabi (2001) 5 S.C. (Pt. I) 105; (2001) 11 NWLR (Pt. 723) 184 at 165, where Karibi-Whyte, stated the position of the law in this respect as follows:-**

***“A final order or judgment at law is one which brings to an end the rights of the parties in the action. It disposes of the subject matter of the controversy or determines the litigation as to all parties on the merits. On the other hand, an interlocutory order or judgment is one given in the process of the action or cause, which is only intermediate and does not finally determine the rights of the parties in the action. It is an order which determines some preliminary or subordinate issue or settles some step or question but does not adjudicate the ultimate rights of the parties in the action. However, where the order made finally determines the rights of the parties, as to the particular issue disputed, it is a final order even if arising from an interlocutory application. For instance, an order of committal for contempt arising in the course of proceedings in an action is a final order - see Toun Adeyemi v. Theophilus Awobokun (1968) 2 All NLR 318.”***

Returning to the present case where the dispute between the parties that was before the trial court for determination involves chieftaincy surrounding the appointment, installation and coronation of the 1st defendant as Okan-Ama Paramount Ruler of Asarama Community of Andoni in Rivers State whose appointment was being challenged by the plaintiffs/appellants on the ground that he was not qualified to fill the vacant stool, while the defendants/respondents were asserting that the 1st defendant/respondent was qualified for the appointment, the question of whether the decision of the trial court striking out the case was final or interlocutory needs very close examination of the facts giving rise to that decision. It is not in dispute that pleadings had been duly filed and exchanged between the parties and the plaintiffs/appellants' case had been fixed for hearing before the issue of settlement of the matter out of court cropped up. Although the terms of settlement drawn up and signed by the learned counsel to the parties was duly

filed on behalf of the parties for adoption by the trial court as the judgment of the court as agreed by the parties, the learned trial Judge who was not satisfied with the said terms of settlement which was not executed by the parties involved in the dispute but by their learned counsel, rejected the document and proceeded to accede to the earlier application of the learned counsel to the plaintiffs/appellants to withdraw the case as instructed by his clients and accordingly struck out the action. Relevant part of this ruling has been earlier quoted in full in this judgment. ***The ruling of the trial court delivered on 3rd April, 1996, refusing to adopt the terms of settlement as judgment of the trial court and merely striking out the action filed by the appellants against the respondents, did not touch anything on the subject matter of controversy in the chieftaincy dispute between the parties not to talk of any determination of the respective rights of the parties in the action before the trial court finally and on the merit.***

***Striking out of the plaintiffs/appellants' action certainly does not finally determine the respective rights of the parties in the action, nor does it adjudicate ultimate rights of the parties in the dispute placed before the trial court for determination. In this situation, where the claims or rights of the parties have not been examined or looked into by the trial court and appropriate findings made thereon resulting in a determination, these claims or rights effectively remain pending and can be revived by any of the parties in any other court of concurrent jurisdiction or even the same court that handed down the striking out order for relisting under the appropriate Rules of the trial court on such terms as may be granted on application. See Woluchem v. Wokoma (1974) 3 S.C. 153 at 170-171; (1974) 3 S.C. (Reprint) 115, where this court said:-***

***"We simply draw attention to the well known rule of practice that the court is without power to review any matter which it has struck out save on the application of either party."***

***Therefore having regard to the circumstances of this case, I entirely agree with the learned counsel for the appellants that the ruling of the learned trial Judge striking out the appellants' action on 3rd April, 1996, was only an interlocu-***

**tory decision. It was not a final judgment as strongly argued by the respondents.** Thus, being an interlocutory order or decision, the relevant provisions of the 1979 Constitution and the Court of Appeal Act, Cap. 75 of the Laws of the Federation of Nigeria, 1990, must apply in any steps taken to appeal against the ruling.

B Having come to the conclusion that the decision of the trial court of 3rd April, 1996, against which the respondents appealed to the Court of Appeal by their Notice and Grounds of Appeal contained at pages 121 - 124 of the record of appeal is an interlocutory decision, **next for determination is whether or not the appeal was filed within the time prescribed by Section 25 of the Court of Appeal Act, Cap. 75, of the Laws of the Federation, 1990, which states:-**

C ***“25 (1) Where a person desires to appeal to the Court of Appeal, he shall give Notice of Appeal or notice of his application for leave to appeal in such manner as may be directed by rules of court within the period prescribed by the provision of subsection (2) of this section that is applicable to the case.***

D ***(2) The periods for the giving of notice of appeal or notice of application for leave to appeal are:-***

E ***“(a.) In the appeal in civil case or matter, fourteen days where the appeal is against an interlocutory decision, and three months where the appeal is against a final decision.”***

F It cannot be over-emphasized that failure to comply with the statutory requirements such as the filing of an appeal within the specific period prescribed by law from the date of decision or within such further extended period as may be granted by an order of court, deprives an appellate court of its jurisdiction to entertain or G hear the appeal. Such irregularity cannot be regarded as a mere technicality or misconception but constitutes a fundamental defect which renders the proceedings and judgment of the appellate court in respect of such purported appeal, incompetent and consequently null and void. See F.I. Oranye v. O. H T. Jibowu (1950) 13 WACA 41, Ohenemoore v. Akeseh Tayee (1933) 2 WACA 43 and Kudiabor v. Kudanu (1932) 6 WACA 14. **An irregularity that renders proceedings incurably defective and null and void, may not be waived as acquiescence cannot con-**



**fer jurisdiction.** See *Skenconsult (Nig.) Ltd. and Anor. v. Godwin Ukey* (1981) 1 S.C. 6 at 26; (1981) 1 S.C. (Reprint) 4, *Management Enterprises Ltd. & Anor. v. Jonathan Otusanya* (1987) 2 NWLR (Pt. 55) 1979 and *Obimonure v. Erinosho & Anor.* (1966) 1 All NLR 250.

***In the present case, the respondents' appeal that was heard by the court below was manifestly irregular and incurably defective as it was clearly filed out of time without the leave of that court for extension of time to file it in accordance with the provisions of Order 3 Rule 4 of the Court of Appeal Rules. This is because on the face of the Notice of Appeal filed by the respondents as appellants before the Court of Appeal, it shows at page 124 that the appeal was filed on 8th May, 1996, on payment of the appropriate filing fees on revenue receipt No. 626746. Taking into consideration that the interlocutory decision being appealed against was given on 3rd April, 1996, it means that the appeal was not filed until after 35 days of the delivery of the decision of the trial court. The fact that the respondents' appeal was filed out of the time prescribed by law is not at all in doubt. The appeal as filed was thus, incompetent thereby depriving the Court of Appeal of jurisdiction to hear and determine the same. See Madukolu & Ors. v. Nkendelim & Ors. (1962) 2 SCNLR 341; (1962) 1 All NLR (Pt. 4) 587. In the absence of a valid and competent appeal before it, the court below was in grave error to have proceeded to hear and determine the appeal by setting aside the decision of the trial court striking out the appellants/plaintiffs case and substituting it with a consent judgment based on the terms of settlement rejected by the learned trial Judge. It was an exercise in futility as the entire proceedings in the hearing of the incompetent appeal are a nullity. Although the issue was not raised at the court below, having regard to its fundamental nature, it was properly raised by the appellants in this appeal. See Western Steel Workers Ltd v. Iron & Steel Workers Union (1987) 1 NWLR (Pt. 49) 284 and Chacharos v. Ekimpex Ltd. (1988) 1 NWLR (Pt. 68) 88 at 90. Had the issue of competence of the respondents' appeal been raised at the court below, the appropriate order that court should have made would have been to strike out the appeal.***

See Okoye v. Nigerian Construction & Furniture Co. Ltd. (1991) 7 S.C. (Pt. III) 33; (1991) 6 NWLR (Pt. 199) 501, Esuku v. Leko (1994) 4 NWLR (Pt. 340) 625, Gombe v. P.W. (Nig.) Ltd. (1995) 6 NWLR (Pt. 402) 402 and the recent decision in Alor & Anor. v. Ngene & Ors. (2007) 2 S.C 1; (2007) All FWLR (Pt. 362) 1836 at 1846 -  
 B 1847. The Notice of Appeal being incompetent, the need to examine the grounds contained therein to determine whether they are grounds of law or not, does not even arise. The appeal having succeeded on this fundamental issue of competence alone, there is no  
 C longer any need to look into the second issue predicated on the validity of the consent judgment entered by the court below as the issue has been swept away by the incompetence of the respondents' appeal.

In the result this appeal succeeds and the same is hereby allowed.  
 D The consent judgment of the court below entered without jurisdiction on 14th February, 2001, is hereby set aside and replaced with an order striking out the defendants/respondents' appeal.  
 I do not regard it appropriate to make any order on costs.

E

### **KATSINA-ALU JSC**

I have read before now, in draft, the judgment delivered by my learned brother, Mahmud Mohammed, JSC., in this appeal. I agree entirely with it and, for the reasons he has given, I also allow the appeal, set  
 F aside the consent judgment of the court below entered without jurisdiction on 14th February, 2001. I enter an order striking out the defendants/respondents' appeal.

I also make no order as to costs.

G

### **AKINTAN JSC**

The appellants were the plaintiffs in this action which they instituted at the High Court of Justice of Rivers State, Bori Judicial Division.  
 H The respondents were the defendants. The plaintiffs sought from the court a number of declaratory and injunctive reliefs in respect of a chieftaincy dispute between the parties. Pleadings were filed and exchanged. The trial had in fact commenced before Manuel, J., where the first plain-

tiffs' witness had given his evidence-in-chief. But the case was then transferred to another court presided over by Woryi, J., where the trial had to start de novo. There the parties informed the trial court that they had resolved to settle the dispute out of court. Learned counsel for the plaintiffs said that his instruction was to withdraw the claim since the parties had reached an amicable settlement. B

A drawn up terms of settlement was filed by learned counsel to the parties. But meanwhile, there was an application by a set of interested parties to be joined in the suit. The motion was taken and a ruling refusing the application was delivered. The learned trial Judge then made an order striking out the entire claim. This was done without acting on the terms of settlement filed by the learned counsel in the case. C

The defendants, now respondents, were dissatisfied with the order made by the court striking out the case and they challenged the said ruling. The court below in its judgment allowed the appeal and set aside the order striking out the claim. It replaced it with an order entering judgment in line with the terms of settlement filed at the trial court. The present appeal is against the judgment of the court below. D

The parties filed their Briefs of Argument in this court. The main issue raised and canvassed in the appellants' Brief is whether the defendants' appeal before the court below was competent and the court below had jurisdiction to entertain same. It is the contention of the appellants that the ruling of the trial court striking out the claim was interlocutory in nature since the dispute between the parties remained unresolved. As the appeal was interlocutory, the period within which the appellants had to file their notice of appeal was not met. The notice of appeal was not filed within the time prescribed by law and no extension of time, to file the notice was sought and granted. E F G

There is no doubt that the dispute between the parties was yet unresolved by the trial court which struck out the claim. The contention that the order of the trial court striking out the claim is interlocutory is therefore right. It follows then that the notice of appeal filed at the court below was not filed within time. The appeal before the court below was therefore incompetent. H

For the above reasons and the fuller reasons given in the leading judgment written by my learned brother, Mahmud Mohammed,

JSC., the draft of which I have read. I allow the appeal and make similar consequential orders as are made in the leading judgment, including that on costs.

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B

**ONNOGHEN JSC**

I have had the benefit of reading in draft, the leading judgment of my learned brother, Mohammed JSC., just delivered.

I agree with his reasoning and conclusion that the appeal before the lower court was incompetent on the ground that the same being an interlocutory appeal was filed outside the time legally allotted for the filing of same, particularly as no application for extension of time was presented to nor granted by the lower court before the filing of the said interlocutory appeal. I therefore allow the appeal and set aside the judgment of the lower court and abide by the other consequential orders contained in the said leading judgment including the order as to costs.

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**CHUKWUMA-ENEH JSC**

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I have read before now the judgment of my learned brother, Mohammed, JSC., just delivered with which I agree. There is merit in the appeal and I also allow it and abide by the consequential orders made in the leading judgment, including that on costs.

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