

SUPREME COURT OF NIGERIA
27TH JUNE, 2008. SC. 41/2005
CORAM:- N. TOBI, G. A. OGUNTADE, F. F. TABAI,
P. O. ADEREMI, C. M. CHUKWUMA-ENEH, JJSC

ALHAJI B. ABUBAKAR APPELLANT
AND

1. ALHAJI ABUBAKAR
DANTYA WAZIRI

2. ALHAJI UMARU EDOTA
WAZIRI

3. ALHAJI MOHAMMED RESPONDENTS
LIMA WAZIRI

4. ALHAJI MOHAMMED
YAUJI WAZIRI

(For themselves and as the
representatives of the children of
Alhaji A. B. Waziri)

APPEALS - Leave - Grounds of appeal - Whether of law or facts -
Grounds of fact or mixed law and fact are incompetent - Unless prior
leave is obtained - But ground 2 herein is purely of law for which
leave is not required (H1)

PLEADINGS - Averments - Clarity - Necessity of - Pleadings must
not be evasive - It must be cogent and pungent - Court should not
allow evidence in respect of facts not pleaded - Or those not clearly
pleaded (H2)

DOCUMENTS - Power of Attorney relating to land - Unregistered &
not pleaded - Evidential value - It must be registered in order to be
pleaded or adduced in evidence - Under land Registration Laws of
Niger State s. 15 - As neither was done in this case - Court of Appeal
was wrong in giving judgment to plaintiffs (H3)

FACTS

The plaintiffs/Respondents sued the Defendant/Appellant for

an order for the Appellant to give account of the assets of the late Alhaji A.B. Waziri (Respondents' father), an order for the Appellant to disengage from the administration of the estate of the said deceased and an order for the Appellant to surrender the estate to the Respondents. It is not in dispute that the assets belonged to the deceased. It is the case of the Respondents that the Appellant was appointed after the death of their father to administer the intestate estate. Though Appellant did not file any statement of Defence to the suit, he nonetheless maintained that it was the Board of Directors of a limited liability company that was given a power of attorney to administer the assets and not him as a person. Accordingly, he had sought by an application to have the company joined as a 2nd defendant but was refused by the court. Though Respondents mooted the fact of power of attorney in their statement of claim, they did not positively aver that they donated a power of attorney to the Appellant nor did they tender any in evidence.

At the end of hearing, trial court dismissed Respondents' claims as it held that no power of attorney was vested in the Appellant. Respondents successfully appealed to the Court of Appeal. Hence, Appellant has brought this appeal against the judgment of the Court of Appeal.

ISSUES FOR DETERMINATION

“(1) Whether the Court of Appeal was right in holding that the trial court should not have gone into the issue of Power of Attorney?”

“(2) Whether the plaintiffs had proved their case upon a preponderance of evidence?”

HELD (Allowing the appeal per **ADEREMI JSC**, Chukwuma-Eneh JSC, dissenting)

Grounds of appeal - Whether of law or facts

1. It is basic constitutional principle that, where grounds of appeal are of mixed law and facts or facts alone, it is imperative that leave of court must first be sought and obtained otherwise the Notice of Appeal carrying such grounds on that leave of court is incompetent and it is as good as an appeal not having been filed and if such grounds are additional grounds and no leave is sought and obtained in respect of them, an issue arising therefrom will be regarded as incom-

petent and will be struck out. However, an appeal shall lie from decisions of the Court of Appeal to the Supreme Court as of right where the ground of appeal involves question of law alone in any civil or criminal proceedings. See Section 233 (2) (a) of the aforesaid Constitution. I have had a very careful study of the four grounds and it seems to me that ground 2 is purely a ground of law and it therefore sustains the Notice of Appeal. (p. 2674 E, G /2675 C)

PLEADINGS - Averments - Clarity - Necessity of

2. It has been a long standing principle of our law that pleadings must not be evasive; it must be cogent and pungent. One of the objects of pleadings is to settle the issues to be tried and it must be taken as established law that parties are bound by their pleadings and the court should not allow evidence to be given in respect of facts not pleaded or not clearly pleaded.

Can it be said that a Power of Attorney, going by the averments in paragraphs 1 and 3 of the Statement of Claim, was pleaded? My answer to this question is in the negative. The highest or the most benevolent interpretation or construction that can be given to these averments particularly in paragraph 3 is that an advice was given that a Power of Attorney be donated to the defendant/appellant. There is no averment that it was so donated. (p. 2677 D/G)

DOCUMENTS - Power of Attorney relating to land

3. In law, Power of Attorney as it relates to land, is an instrument, going by the definition of section of Land Registration Laws of Niger State, Cap 67, Section 2 thereof. Section 15 of the same law provides:-

"No instrument shall be pleaded or given in evidence in any court as affecting any land unless the same shall have been registered in the proper office as specified in Section 3."

See also the decision of this court in *Ossai v. Nwajide & Anor.* (1975) 4 S.C 207; (1975) 4 S.C. (Reprint) 144 where it was held that since the instrument was not registered when the plaintiffs' claim was instituted and since it was not averred as such in the Statement of Claim, then the claim was incompetent and the pleading ought to have been struck out.

Given the judicial authorities that I have referred to above, this action is not maintainable in law, against the defendant/appellant. The court below was therefore wrong in law in entering judgment in favour of the plaintiffs/respondents. (p. 2678 A/G)

B NOTABLE POINTS OF INTEREST
TOBI JSC

1. Oral evidence is not allowed in proof of a document
It is elementary law that, where a party leads evidence as to the existence of a document in proof of his case, that document should be tendered. The original of the document should be tendered. In the absence of the original, a copy could be tendered in appropriate cases by way of secondary evidence. The law does not generally allow oral evidence to be lead in proof of a document. (p. 2685 H)

D *2. Judgment is not a matter of course in every undefended suit*
The Court of Appeal held that where there is no defence to the plaintiff’s claim, the plaintiff is entitled to judgment. It is not in all cases where a defendant does not defend an action that the plaintiff is entitled to judgment. It depends on the peculiar facts of the case, as in this case where the respondents relied heavily on a document and failed to tender it in court. It is the law that, a plaintiff cannot rely on the weakness of the case of the defendant but must prove his case as presented in court. (p. 2686 E)

3. Evidence concealed is presumed unfavourable
In an effort to prove paragraph 4 of the Statement of Claim, P.W.1 gave evidence on the Power of Attorney but failed to tender it in court. I am inclined to invoke Section 149(d) of the Evidence Act, 1990 and I hereby invoke it against the respondents. (p. 2686 G)

REPRESENTATION
Y. Ustaz Usman, SAN., (with him; L . Okere, Chief U.M. Nweke and M.I. Tola), for the Appellant.
M.N. Ibrahim, (with him; ME. Agulonu), for the Respondents.

CASES REFERRED TO

- Aja & Anor. v. Okoro & Ors. (1991) 9-10 S.C. 27; (1991) 7 NWLR (Pt.203) 260
- Comptor Ltd, v. Ogun State Water Corporation (2002) 4 S.C. (Pt.II) 86; (2002) 4 SCNJ. 342, (2)
- Aduku v. Aiyelabola (1942) 8 WACA 43 and (3) 35
- Egesimba v. Onuzuruike (1992) 15 NWLR (Pt. 791) 466 B
- Atanda & Ors. v. Ajani & Ors. (1989) 3 NWLR (Pt. 111) 555
- Vulcan Gases Ltd, v. G . E. Ind. A.G. (2001) 5 S.C. (Pt. I) 1
- Ossai v. Nwajide & Anor. (1975) 4 S.C 207
- Chime v. Chime (2001) 1 S.C. (Pt. II) 1
- Igbinovia v. University of Benin Teaching Hospital (2000) 8 NWLR (Pt.667) 55 C
- U.B.A. v. GMBH (1989) 6 S.C. (Pt.I) 22; (1989) 3 NWLR (Pt.I10) 374
- Nisirim v. Nsirim (1990) 5 S.C. (Pt.II) 94; (1990) 2 NSCC 302 D
- CSS Bookshops Ltd, v. RTMCRS (2006) 4 S.C. (Pt.II) 142; (2006) 11 NWLR (Pt.992) 530
- Okoebor v. Police Council (2003) 5 S.C. 11 ; (2003) 12 NWLR (Pt.834) 444
- Asafa Food Factor v. Alrairie (Nig.) Ltd. (2002) 5 S.C. (Pt.I) 1 E
- Udengwu v. Uzuegbu (2003) 7 S.C. 64

STATUTES & RULES REFERRED TO

- Constitution of the Federal Republic of Nigeria, 1999, s. 233 (2)&(3) F
- Conveyancing Laws of Property Act, 1881, ss. 47 & 48
- Evidence Act, Cap 112, LFN 1990, s. 149 (d)
- Court of Appeal Act, LFN, 1960 s. 16
- Land Instrument Registration Law, Cap 111, vol 5 Laws of Lagos State, s. 2 G
- Land Registration Laws of Niger State, Cap 67, ss. 2 & 15
- Registration of Titles Law, Cap. 166, vol, 7 Laws of Lagos State, s. 85
- High Court of Niger State (Civil Procedure) Rules, O. 27 r. 8 (1)
- Supreme Court Rules, as amended in 1999, O. 2 r. 9 (1)

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BOOKS REFERRED TO

- Black's Law Dictionary, 6th Edn. page 1171
- Bowstead and Reynolds on Agency, 17th Edn, Article 10, para 2041,

LEAD JUDGMENT BY ADEREMI JSC

This is an appeal against the judgment of the Court of Appeal (Abuja Judicial Division) delivered on the 16th day of September, 2004. The said court (hereinafter referred to as the court below) heard the matter on appeal from the judgment of the High Court of Niger State sitting in Minna, Niger State which judgment itself was delivered on the 16th of October, 2002.

The respondents herein as plaintiffs before the trial court had claimed from the appellant herein as the defendant before the High Court, the following reliefs: -

"(1) An order on the defendant to give a satisfactory account of the assets of the Late Alhaji A.B. Waziri who died on the 3rd of May, 1995.

(2) An order that the defendant should disengage from the administration of the estate of the said deceased; and

(3) An order that the defendant should surrender all assets of the said deceased in his possession to the plaintiffs."

The plaintiffs filed their pleadings but the defendant who failed to file any pleading brought two applications before the trial commenced. The first which was to join a Limited Liability Company by name Arewa Construction Company Limited as 2nd defendant was dismissed by the trial court. The second application was by way of Preliminary Objection contending that the Power of Attorney was donated to the Board of Directors of Arewa Construction Company Limited and not to the defendant and consequently praying that the suit be struck out for what he termed as failure to sue a proper party was equally overruled. Thereafter, the plaintiffs as respondents here called a witness in the person of the 4th plaintiff/respondent. The appellant as defendant in that court did not file any defence, also did not call any evidence. The trial Judge, in a reserved judgment delivered on the 16th October, 2002, dismissed the suit in toto, in so doing he held inter alia:-

"In the instant case apart from the averments of the plaintiffs I can find no evidence to support their claim that they donated the defendant with the Power of Attorney to deal with the property of

their father on their behalf. Throughout the pleadings ;the word “assets” is used - assets of Late Alhaji A.B. Waziri. The evidence of P.W.1 shows they are all landed property in respect of which there is no Power of Attorney vested in the defendant.

Consequently, none of the reliefs can be granted against the defendant. In the final analysis, the suit, should be dismissed as a result the case is hereby dismissed.”

Being dissatisfied with the judgment, the plaintiffs who are the present respondents, appealed to the court below. The court below after taking arguments of counsel, in a reserved judgment delivered on the 16th of July, 2004, allowed the appeal and consequently granted all the reliefs sought by the plaintiffs/respondents against the defendant/appellant. In so finding, the court below after referring to the provisions of Order 27 Rule 8 (1) of the Niger State Civil Procedure Rules, reasoned *inter alia*: -

“In effect the above provision provides for a situation where a defendant who has been served with a Writ of Summons and a Statement of Claim fails to file a Reply, that is, a Statement of Defence in answer to the claim labelled against him within the time stipulated by the court rules as in the instant case in such a situation, the plaintiff is, on an application to the court, entitled to judgment as per the reliefs claimed. It is trite that where there is no defence to the plaintiff’s claim, the plaintiff is entitled to judgment. In the circumstances, this appeal succeeds and is hereby allowed. I set aside the decision of the trial court delivered on the 16/10/2002 and invoke our powers under Section 16 of the Court of Appeal Act, Cap LFN 1960, and substitute it with an order entering judgment for the plaintiff in the following terms:-

‘(1) It is hereby ordered that the respondent/defendant gives a satisfactory account to the plaintiffs/appellants of the assets of Late Alhaji A.B. Waziri who died on the 3/5/95.

(2) It is hereby ordered that the defendant/respondent disengages from the administration of the estate of Late Alhaji A.B. Waziri.

(3) It is hereby ordered that the defendant/respondent surrenders all assets of Late Alhaji A.B. Waziri in his possession to the plaintiffs/appellants.”

Being dissatisfied with this judgment, the respondent before

that court who is now the appellant, has appealed to this court by a Notice of Appeal filed on 23rd August, 2004, with four grounds of appeal.

Distilled from the said grounds of appeal for determination by this court are two issues which, as set out in his Brief of Argument
B filed on 17th March, 2005, are in the following terms:

“(1) Whether the Court of Appeal was right in holding that the trial court should not have gone into the issue of Power of Attorney?”

C *“(2) Whether the plaintiffs had proved their case upon a preponderance of evidence?”*

For their part, the respondents raised only one issue for determination in this appeal; as set out in their Brief of Argument, it is as follows: -

D *“Whether the lower court was right in holding that plaintiffs had proved their case?”*

By a Notice of Preliminary Objection pursuant to Order 2 Rule 9 (1) of the Supreme Court Rules as amended in 1999, the respondents are urging that this appeal be struck out on the ground that
E same was not filed with the prior leave of the court, since, according to them, grounds 1, 2, 3 and 4 raise issues of mixed law and fact. ***It is basic constitutional principle that, where grounds of appeal are of mixed law and facts or facts alone, it is imperative that leave of court must first be sought and obtained otherwise the Notice of Appeal carrying such grounds on that leave of court is incompetent and it is as good as an appeal not having been filed and if such grounds are additional grounds and no leave is sought and obtained in respect of them, an issue arising therefrom will be regarded as incompetent and will be struck out.*** See *Aja & Anor. v. Okoro & Ors.* (1991) 9-10 S.C. 27; (1991) 7 NWLR (Pt.203) 260 and Section 233 (3) of 1999
F Constitution of the Federal Republic of Nigeria. ***However, an appeal shall lie from decisions of the Court of Appeal to the Supreme Court as of right where the ground of appeal involves question of law alone in any civil or criminal proceedings. See Section 233 (2) (a) of the aforesaid Constitution.***
G The respondents/applicants to the Notice of Preliminary Objection have submit-
H

ted that grounds 1,2,3 and 4 raise issues of mixed law and facts and consequently, the Notice of Appeal filed on 23rd of August, 2004, is incompetent. In Reply, Mr. Usman, learned senior counsel for the appellant argued that grounds 1 - 4 do question the interpretation the court below gave to the evidence to the effect that there was a Power of Attorney and yet none was tendered. The four grounds, to him, are grounds of law and they do sustain the appeal. I must not fail to say that the determination of what ground of appeal is pure law, mixed law and facts or facts alone is loaded with difficulty. Indeed it is a terrain not easy to traverse in our civil jurisprudence. **I have had a very careful study of the four grounds and it seems to me that ground 2 is purely a ground of law and it therefore sustains the Notice of Appeal.** Ground 2 reads:-

Ground 2

“The Honourable learned Justices of the Court of Appeal erred in law in setting aside the judgment of the trial court when the evidence of the plaintiffs’ sole witness was contrary to the pleadings.”

This ground, when read objectively, does not call for perception or evaluation of evidence led. All it is saying is just an invitation to read the averments in the pleading and consider the issue therein raised by the appellant and the only issue identified by the respondents; the two sets of issues dovetail into each other. I shall therefore take them together.

When this appeal came before us for argument on the 1st of April, 2008, Mr. Usman, learned senior counsel for the appellant referred to, adopted and relied on the appellant’s Brief of Argument filed on 17th March, 2005; he referred to pages 59 - 63 of the Records of Proceedings which contains the judgment of the court below and pointed out that even though the court below found that Power of Attorney was donated yet none was tendered in evidence - this, he further submitted was fatal to the case of the plaintiffs/respondents. He urged that the appeal be allowed and the judgment of the court below be set aside and the judgment of the trial court dismissing the suit in toto be restored.

Mr. Ibrahim, learned counsel for the respondent referred to, adopted and relied on the respondents’ Brief and urged that the appeal be dismissed.

Having found that the Notice of Appeal is competent, I shall now proceed to consider the merit or otherwise of the appeal. In his Brief of Argument, the appellant after reviewing the evidence of P.W.1 to the effect that the case of the respondents hinged on the fact that Power of Attorney was donated to the appellant to give the legal authority to deal with the landed property of the deceased. And having admitted that the Power of Attorney was in writing, the plaintiffs/respondents were under a duty to tender them in evidence and failure to so do was fatal to the case of the plaintiffs/respondents. That the defendant/appellant did not file any Statement of Defence and failure to call evidence would not amount to an admission of the plaintiffs/respondents' case; while relying on same judicial decisions the like of (1) Comptor Ltd. v. Ogun State Water Corporation (2002) 4 S.C. (Pt.II) 86; (2002) 4 SCNJ. 342, (2) Aduku v. Aiyelabola (1942) 8 WACA 43 and (3) 35 Egesimba v. Onuzuruike (1992) 15 NWLR (Pt. 791) 466, he urged that the appeal be allowed, the decision of the court below be set aside while the decision of the trial court be affirmed. On their part, the respondents submitted that paragraphs 1 and 3 of the Statement of Claim constitute the foundation of their case. The averments on the two aforesaid paragraphs of Statement of Claim is that two persons (the Etsu Nupe and the elders) intervened in the matter of administration of the estate of the deceased. And since nothing in the averments suggests that the appointment said to have been made by the Etsu Nupe was in writing and/or that the advice of the elders was heeded and a Power of Attorney executed as a follow up; it was therefore submitted that evidence led in support thereof would not be admissible; thus, evidence of purported donation and existence of a Power of Attorney would be inadmissible in law. They further went on to submit that since no Statement of Defence was filed, issues were never joined on the averments in paragraphs 1 and 3 of the Statement of Claim. They finally submitted that no issue as to donation of Power of Attorney to the appellant by the respondents or the execution of same was pleaded and so they did not constitute issues arising from the pleadings. They finally urged that the appeal be dismissed.

As pointed out by the parties in their respective Briefs, the fundamental issue throwing itself up for determination in this case is

whether there is evidence, admissible in law, supporting the existence of Power of Attorney and more importantly, whether Power of Attorney was pleaded. The only pleadings before the trial court is the Statement of Claim filed on behalf of the plaintiffs/respondents. That the property of Late Alhaji A.B. Waziri included landed property is not in dispute. Paragraphs 1 and 3 of the Statement of Claim which raise this crucial issue read:-

Paragraph 1

“The plaintiffs are the surviving children of Late Alhaji A.B. Waziri Nupe who die (sic) on 3/6/95, suffering from with hypertension as primary cause of death. The defendant was at the instance of His Royal Highness the Etsu Nupe appointed to take charge and oversee the affairs of the said deceased on behalf of the plaintiffs.”

Paragraph 3

“The plaintiffs were by the intervention of elders advised to donate the defendant with Power of Attorney to deal with the assets of their father.”

It has been a long standing principle of our law that pleadings must not be evasive; it must be cogent and pungent. One of the objects of pleadings is to settle the issues to be tried and it must be taken as established law that parties are bound by their pleadings and the court should not allow evidence to be given in respect of facts not pleaded or not clearly pleaded. See *Atanda & Ors. v. Ajani & Ors.* (1989) 6 S.C. (Pt. II) 87; (1989) 3 NWLR (Pt. 111) 555. P.W.I - Alhaji Mohammed Yauri Waziri who is the 4th plaintiff/respondent while testifying in proof of the averments in their pleadings, said inter alia:-

“By virtue of the Power of Attorney thus donated to the defendant he was expected to render account to us, but he did not.”

Can it be said that a Power of Attorney, going by the averments in paragraphs 1 and 3 of the Statement of Claim, was pleaded? My answer to this question is in the negative. The highest or the most benevolent interpretation or construction that can be given to these averments particularly in paragraph 3 is that an advice was given that a Power of Attorney be donated to the defendant/appellant. There is no averment that it was so donated. As I have pointed out above, the estate

involved landed property. ***In law, Power of Attorney as it relates to land, is an instrument, going by the definition of section 2 of Land Registration Laws of Niger State, Cap 67, Section 9 thereof. Section 15 of the same law provides: -***

“No instrument shall be pleaded or given in evidence in any court as affecting any land unless the same shall have been registered in the proper office as specified in Section 3”

The importance of Power of Attorney and its being registered particularly when it relates to landed property is underscored by the following comment in Bowstead and Reynolds On Agency 17th Edition. Article 10, para. 2041 on page 51 which reads thus:-

“Certain acts must by law be performed by deed, notably conveyances and many leases. In these cases authority to an agent to execute such a deed must itself be given by deed, usually called Power of Attorney.”

To reinforce the contention that Power of Attorney as it relates to land or landed property must be registered was emphasised by this court in the case of Vulcan Gases Ltd, v. G. E. Ind. A.G. (2001) 5 S.C. (Pt. I) 1; (2001) 9 NWLR (Pt. 719) 610 where at page 664, it was reasoned:-

“But these are specific circumstances requiring a Power of Attorney such as Section 85 of the Registration of Titles Law, (Cap 166), Vol. 7, Laws of Lagos State or as contemplated by the definition in Section 2 of the Land Instrument Registration Law, (Cap. 111), Vol. 5, Laws of Lagos State or as provided under Sections 46 - 48 of the Conveyancing Laws of Property Act, 1881, of England.....

G These circumstances invariably concern dealing in land.”

See also the decision of this court in Ossai v. Nwajide & Anor. (1975) 4 S.C 207; (1975) 4 S.C. (Reprint) 144 where it was held that since the instrument was not registered when the plaintiffs’ claim was instituted and since it was not averred as such in the Statement of Claim, then the claim was incompetent and the pleading ought to have been struck out.

H Given the judicial authorities that I have referred to above, this action is not maintainable in law, against the de-

fendant/appellant. The court below was therefore wrong in law in entering judgment in favour of the plaintiffs/respondents. It will be a travesty of justice to allow the judgement of the court below to stand.

Accordingly, this appeal succeeds, and it is allowed. The judgment of the court below is hereby set aside. In its place, I hereby restore the judgment of the trial court delivered on 16th of October, 2002, dismissing the claims of the plaintiffs/ respondents. The appellant is entitled to the cost of this appeal which I assess at N50,000.00 (Fifty Thousand Naira) and same is hereby awarded in his favour but against the plaintiffs/respondents.

TOBI JSC

Late Alhaji A. B. Waziri was the father of the appellant. He died intestate on 3rd May, 1995. He died of cardlanyopathy with hypertension as primary cause of death. He left some landed property in Kano and Kaduna. The respondents said that on the advice of the Etsu Nupe they donated a Power of Attorney to the appellant to manage the property on their behalf. The respondents filed a Statement of Claim but the appellant did not file a defence. The appellant filed a motion to strike out his name from the suit on the ground that the Power of Attorney was donated to the Board of Directors of Arewa Construction Company Limited and not to him. The appellant annexed to his affidavit in support of the motion a copy of a Power of Attorney which vested the administration of the property complained of by the respondents in the Board. It was annexed to the affidavit as Exhibit 1. On 9th October, 2000, the Arewa Construction Company Limited filed a motion praying to be joined in the suit as a defendant. The respondents, in their reliefs, sought an order from the court directing the appellant “*to satisfactorily render to the plaintiffs an account of all the assets of the deceased.*” Although the respondents gave evidence at the trial, through the 4th respondent, they did not tender a copy of the Power of Attorney.

The learned trial Judge dismissed the suit. He did not agree with the case of the respondents that a Power of Attorney was donated to the appellant. He said on the final paragraph of the judg-

ment at page 35 of the record:-

B *"In the instant case, apart from the averments of the plaintiffs, I can find no evidence to support their claim that they donated the defendant with the Power of Attorney to deal with the property of their father on their behalf. Throughout the pleadings the word "assets" is used - assets of Late Alhaji A. B. Waziri. The evidence of P.W.I shows they are all landed property in respect of which there is no Power of Attorney vested in defendant. Consequently, none of the reliefs can be granted against the defendant. In the final analysis,*
C *the suit should be dismissed. This is the only option as failure to lead evidence on facts pleaded renders the pleadings inconsequential. See Chime v. Chime (2001) 1 S.C. (Pt. II) 1; (2001) 3 NWLR (Pt. 701) 527, at page 556. As a result the case is hereby dismissed."*

D On appeal, the Court of Appeal allowed the appeal. The court said at page 65 of the record:-

E *"in the circumstances this appeal succeeds and is hereby allowed. I set aside the decision of the trial court delivered on the 16/10/2003 and invoke our powers under Section 16 of the Court of Appeal Act, Cap. LFN 1990 and substitute it with an order of judgment for the plaintiff in the following terms:-*

'1. It is hereby ordered that the respondent/defendant give a satisfactory account, to the plaintiffs/appellants, of the assets of Late Alhaji A. B. Waziri who died on the 3/5/95.

F *2. It is hereby ordered that the defendant/respondent disengages from the administration of the estate of Late Alhaji A. B. Waziri.*

3. It is hereby ordered that the defendant/respondent surrenders all assets of Late Alhaji A. B. Waziri in his possession to the plaintiffs/appellants."

G Dissatisfied, the appellant has come to this court. Briefs were filed and exchanged. The appellant formulated two issues for determination :-

H *"(1) Whether the Court of Appeal was right in holding that the trial court should not have gone into the issue of Power of Attorney?*

(2) Whether the plaintiffs had proved their case upon all preponderance of evidence?"

The respondent formulated one issue for determination :-

"Whether the lower court was right in holding that plaintiffs

had proved their case?”

Learned counsel for the appellant, Mr. Yunus Usman, SAN., submitted on issue No. 1 that since the Power of Attorney was admitted by the respondents to be in writing, they ought to have produced a copy and that failure to do so, the respondents have not proved their case upon a preponderance of evidence. He relied on Comptoir Ltd. v. Ogun State Water Corporation (2002) 4 S.C. (Pt. II) 86; (2002) 4 SCNJ. 342, Aduku v Aiyelabola (1942) 8 WACA 43, Oduola v. Coker (1981) 5 S.C. 197; (1981) 5 S.C. (Reprint) 120, Ofomaja v. Commissioner for Education (1995) 8 NWLR (Pt.411) 69 and Vulcan gases Ltd. v. G. F. Indo A. G. (2001) 5 S.C. (Pt. I) 1; (2001) 9 NWLR (Pt.719) 610 at 663. Also relying on Section 149 (d) of the Evidence Act, Cap 112, Laws of the Federation of Nigeria, 1990, learned Senior Advocate cited Bello v. Eweka (1981) 1 S.C. 101; (1981) 1 S.C. (Reprint) 63, Igbinovia v. University of Benin Teaching Hospital (2000) 8 NWLR (Pt.667) 55. B
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On issue No. 2, learned Senior Advocate submitted that the ipsi dixit of only one of the respondents without any corroboration in the pleadings, either by documentary or oral evidence, is not sufficient to prove their case which is declaratory in nature. He relied on Egesimba v Onuzuruike (2002) 15 NWLR (Pt.791) 466. Even if the ipsi dixit as of P.W.1 was sufficient to prove their case, witness failed to lead evidence to prove a donation of the Power of Attorney to the appellant, and he also failed to prove any demand to render account to the appellant and he refused to do so, learned Senior Advocate argued. He urged the court to allow the appeal. E
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Learned counsel for the respondents raised a Preliminary Objection in the following terms:-

“An order that the appeal No. SC/41/2005, be struck out on the ground that same was not filed with prior leave of the court.

Particulars

‘(a) Grounds 1, 2, 3 and 4 at pp 69-71 of the records raise issues of mixed law and fact.

(b) No prior leave preceded the filing of the Notice of Appeal. H

(c) Leave is required by virtue of the provision of section 233(3) 1999 Constitution of the Federal Republic of Nigeria.

(d) No particulars of error in respect of grounds 2 and 4 are

stated."

He relied on U.B.A. v. GMBH (1989) 6 S.C. (Pt.I) 22; (1989) 3 NWLR (Pt.110) 374, Nisirim v. Nsirim (1990) 5 S.C. (Pt.II) 94; (1990) 2 NSCC 302 and CSS Bookshops Ltd, v. RTMCRS (2006) 4 S.C. (Pt.II) 142; (2006) 11 NWLR (Pt.992) 530.

B Learned counsel for the respondents, Mr. M. N. Ibrahim, submitted on the merits of the appeal that as the Statement of Claim did not entail the averment that the appointment made by the Etsu Nupe was in writing and/or that the advice by the elders was heeded and a
C Power of Attorney was executed, no such evidence can be led, and, if introduced, will not be admissible. Therefore, evidence on the purported donation and evidence of a Power of Attorney, even if adduced, will not be admissible, counsel contended. He relied on Iwuoha v. Nipost Ltd. (2003) 4 S.C. (Pt.II) 37; (2003) 8 NWLR (Pt.822)
D 308. He submitted that as no Statement of Defence was filed, issues were not joined on the averments in paragraphs 1 and 3, as same were not denied, they are admitted. He relied on Okoebor v. Police Council (2003) 5 S.C. 11 ; (2003) 12 NWLR (Pt.834) 444 and Asafa Food Factor v. Alraine (Nig.) Ltd. (2002) 5 S.C. (Pt.I) 1; (2002) 12
E NWLR (Pt.786) 353 at 380. He argued that as the evidence of P.W.1 did not say that a Power of Attorney was infact executed in favour of the appellant or that the appointment was in writing, the evidence did not create a Power of Attorney. Relying on Udengwu v. Uzuegbu
F (2003) 7 S.C. 64; (2003) 13 NWLR (Pt.836) 136, learned counsel submitted that a court must confine itself to issues arising from the pleadings.

Learned counsel in a Reply to the argument of learned Senior Advocate for the appellant on the declaratory nature of the order,
G submitted that the relief was for an order of account and not a declaratory order. He urged the court to dismiss the appeal.

Let me take the Preliminary Objection first. I should produce the grounds of appeal verbatim et literatim for ease of reference. I will do so along with their particulars.

H 1. Error in Law

The Honourable learned Justices of the Court of Appeal erred in law in holding that the plaintiffs had proved their case.

Particulars of Error

‘(i) Contrary to paragraph 13 of the Statement of Claim, no evidence was led by the plaintiff’s linking the defendant with any Power of Attorney.

(ii) No Power of Attorney was tendered.

(iii) No evidence was led to prove that the defendant was appointed to take charge or administer the plaintiffs’ father’s estate. B

2. Error in Law

The Honourable learned Justices of the Court of Appeal erred in law in setting aside the judgment of the trial court when the evidence of the plaintiffs’ sole witness was contrary to their pleadings. C

3. Error in Law

The Honourable learned Justices of the Court of Appeal misdirected themselves in law and therefore came to a wrong decision, when having found as a fact at page 5 of their judgment that:

“the 1st plaintiff testified before the lower court as PW.1... but D did not tender the Power of Attorney.” Yet their Lordships held at pages 6-7 of the judgment that..... The trial court should have found on that and not gone into another issue -the issue of Power of Attorney - for a court is only confined to issues as joined by the parties. Uwengwu v. Uzuegbu (2003) 7 S.C. 64; E (2003) 3 NWLR (Pt. 836), 136.”

Particulars Of Error

(i) The issue of grant of Power of Attorney to enable defendant administer the “assets” of the plaintiffs’ late father was the core issue F as pleaded in paragraphs 1 and 3 of the Statement of Claim.

(ii) Having not tendered the pleaded Power of Attorney, the plaintiff’s evidence as regards appointment of the defendant via a Power of Attorney stands unproved.

(iii) Plaintiffs failed to prove that the Power of Attorney was G donated to the defendant or...

(iv) No evidence apart from the mere ipsi dixit of the 1st plaintiff was led to prove that the defendant was at the instance of Etsu Nupe appointed to take charge and oversee the affairs of the deceased on behalf of the plaintiff. H

(v) The mere ipsi dixit of 1st plaintiff is not sufficient to prove a case of declaratory nature such as this.

Error in law:

Having regard to the pleading (Statement of Claim) vis-a-vis the 1st plaintiff's evidence, the plaintiffs had failed to prove their case as required by law."

In the determination of whether a ground of appeal is mixed law and fact or facts simpliciter, the ground of appeal and the particulars must be considered and taken together. They cannot be considered or taken separately. There are instances where a ground of appeal does not contain particulars of error. Such instances, genuinely arise where there is no need for particulars. In such instances, the court has no choice than to consider only the ground of appeal. There are however instances where some trick is played to give the impression that it is a ground of law when in reality, it is a ground of mixed law and fact. And this is done by not stating the particulars of error to give the adverse party and the court the semblance that the ground of appeal is one of law. An appellate court has a duty to apply their eyes of an eagle or a make-shift or make do instrument of a microscope to examine scrupulously and intimately the ground of appeal with a view to finding out the element of fact in the ground of appeal.

Let me now examine the grounds of appeal. The first ground contains two particulars. Both particulars complain that no evidence was led by the plaintiff. As evidence can only be led as to facts, the ground of appeal cannot be one of law only but one of mixed law and fact.

Ground 2 has no particulars. It complains about the Court of Appeal setting aside the judgment of the trial court when the evidence of the plaintiffs' sole witness was contrary to their pleadings. I agree with the appellant that this is a clear error of law and not one of mixed law and fact. Unlike ground 1, ground 2 does not deal with proof of evidence. It rather deals with the content or totality of evidence led by the plaintiffs which has nothing to do with proof. It is therefore a ground of law.

Ground 3 is a ground of mixed law and fact. Although counsel named it as one of law, it is clearly one of mixed law and fact. Particulars (iii), (iv) and (v) are clear that the ground is one of mixed law and fact. Particular (iii) complains that the plaintiffs failed to prove that the Power of Attorney was donated to the defendant. Particular (iv) com-

plaintiffs that “no evidence apart from the mere ipsi dixit of the 1st plaintiff was led to prove that the defendant was at the instance of Etsu Nupe appointed to take charge and oversee the affairs of the deceased on behalf of the plaintiff.” Particular (v) complains that the mere ipsi dixit of the 1st plaintiff is not sufficient proof of a case of a declaratory nature. As the proof that the Power of Attorney was donated to the defendant can only be done by facts, the ground is one of mixed law and fact. B

Ground 4, like ground 2, has no particulars. But unlike ground 2, ground 4 is a ground of mixed law and fact. As ground 4 complains of failure by the plaintiffs to prove their case in accordance with their pleadings, it is a ground of mixed law and fact. C

As it is, of the four grounds of appeal one is of law and it is ground 2. It is trite law that, one valid ground can sustain an appeal. I therefore hold that ground 2 sustains this appeal and I will therefore not strike out this appeal as urged by counsel for the respondent. I will take the merits of the appeal. D

P.W.1, Alhaji Muhammadu Yauri, the 4th respondent, in his evidence-in-chief said at page 31 of the record that, Power of Attorney was donated to the appellant and demanded that he should render account to the respondents. After the evidence of P.W.1, counsel for the appellant closed the appellant’s case. The appellant did not lead any evidence. The learned trial Judge dismissed the case of the respondents. E

Power of Attorney is an instrument in writing whereby one person as principal appoints another as his agent and confers authority to perform certain specified acts or kinds of acts on behalf of the principal. See Blacks Law Dictionary (6th edition) page 1171. The crux of the case of the respondents is the Power of Attorney. They averred to it in paragraph 4 of their Statement of Claim:- F

“That upon his death and by intervention of elders, we donated the said Alhaji A B. Abubakar with Power of Attorney to deal with our Late father’s affairs for our benefit.”

The 4th respondent, as P.W.1, gave evidence in proof of paragraph 4 of the Statement of Claim. In the light of the pleadings and the evidence of the respondents, the respondents are bound to tender the Power of Attorney. It is elementary law that, where a party H

leads evidence as to the existence of a document in proof of his case, that document should be tendered. The original of the document should be tendered. In the absence of the original, a copy could be tendered in appropriate cases by way of secondary evidence. The law does not generally allow oral evidence to be lead in proof of a document.

I am unable to go along with the submission of learned counsel for the appellant that there was no evidence of the existence of a Power of Attorney which was in writing. The evidence of P.W.1 and paragraph 4 of the Statement of Claim clearly justify the position that a Power of Attorney was donated. It is also clear from the definition of a Power of Attorney that it is usually in writing.

The Court of Appeal described the decision of the learned trial Judge on the Power of Attorney as an issue which was not joined by the parties. The court citing Udeligwu v. Uzuegbu (2003) 7 S.C. 64; (2003) 3, NWLR (Pt.336) 136, held that the issue of Power of Attorney was not relevant. With respect, the issue is most relevant. It is the most central issue. As the appellant relied heavily on the Power of Attorney, he had a duty to produce it in evidence.

Learned counsel for the respondents made so much heavy weather of the fact that the appellant did not defend the action. The Court of Appeal held that where there is no defence to the plaintiff's claim, the plaintiff is entitled to judgment. It is not in all cases where a defendant does not defend an action that the plaintiff is entitled to judgment. It depends on the peculiar facts of the case, as in this case where the respondents relied heavily on a document and failed to tender it in court. It is the law that, a plaintiff cannot rely on the weakness of the case of the defendant but must prove his case as presented in court. In an effort to prove paragraph 4 of the Statement of Claim, P.W.1 gave evidence on the Power of Attorney but failed to tender it in court. I am inclined to invoke Section 149(d) of the Evidence Act, 1990 and I hereby invoke it against the respondents.

It is for the above reasons and the fuller reasons given by my learned brother, Aderemi, JSC., in his judgment that I too allow the appeal. I abide by his order as to costs.

OGUNTADE JSC

I have had the advantage of reading in draft the leading judgment by my learned brother, Aderemi, JSC. I entirely agree with him that the court below was in error to have allowed the appeal against the judgment of the trial court. The plaintiffs/respondents had clearly failed to plead the Power of Attorney on which their claim hinged; and not having pleaded the said Power of Attorney, it is difficult to see how the plaintiffs could have hoped to succeed in their claim.

I would also allow the appeal and dismiss plaintiffs'/respondents' suit. I abide by the order on costs made in the leading judgment by my learned brother, Aderemi, JSC.

TABAI JSC

I had a preview of the leading judgment prepared by Aderemi, JSC., and I agree entirely with the reasoning and conclusion therein. Although the defendant did not defend, the plaintiffs/respondents have to prove their case in order to get the reliefs claimed.

The plaintiffs/respondents pleaded a Power of Attorney. No particulars were pleaded. It was not pleaded whether it was registered. And at the trial the said Power of Attorney was not produced in evidence. It is doubtful if there is a Power of Attorney properly so called. The failure to tender same in evidence should, by virtue of the provisions of Section 149(d) of the Evidence Act, operate against the plaintiffs/respondents.

On the whole, I shall also allow the appeal. I abide by the consequential orders contained in the leading judgment.

CHUKWUMA-ENEH JSC (DISSENTING)

This appeal filed by the defendant (appellant in this court) is against the unanimous decision of the Court of Appeal of the Abuja Judicial Division sitting in Abuja given on 16/9/2004, to the effect as held at p.65 LL.7-24 of the record as follows:

“The appellant being entitled to judgment on the averment as

contained in their Statement of Claim and as adduced in evidence, there being nothing on the other side of the scale, the trial Judge was wrong to have dismissed their claim.

In the circumstances this appeal succeeds and is hereby allowed, I set aside the decision of the trial court delivered on the 16/10/2003 and invoke the powers under Section 16 of the Court of Appeal Act. Cap. - LFN: 960 (sic) and substitute it with an order entering judgment for the plaintiff in the following terms:-

‘1. It is hereby ordered that the respondent/defendant gives a satisfactory account, to the plaintiffs/appellants, of the assets of Late Alhaji A.B. Waziri who died on the 3/5/95.

2. It is hereby ordered that the defendant/respondent disengages from the administration of the estate of Late Alhaji A.B. Waziri.

3. It is hereby ordered that the defendant/respondent surrenders all assets of Late Alhaji A.B. Waziri in his possession to the plaintiffs/appellants.

Costs assessed at N 10,000.00 is hereby awarded to the appellants.”

The defendant being totally dissatisfied with the decision of the court below has appealed the decision by filing a Notice of Appeal on 23/8/2004, containing four grounds which I have set out in extenso hereinafter.

Parties have in compliance with the rules of this court filed and exchanged their respective Briefs of Argument. The appellant (i.e. the defendant in the trial court) in his Brief of Argument filed on 17/3/05 and adopted and relied upon before the court on 1/4/2008, has identified the issues for determination as follows:

“1. Whether the Court of Appeal was right in holding that the trial court should not have gone into the issue of Power of Attorney? (Ground 3 of the appeal).

2. Whether the plaintiffs had proved their case upon a preponderance of evidence? (Grounds 1, 2 and 4 of the appeal).”

It is noteworthy that issue one has been raised from ground three on the one hand while, on the other hand, issue two is tied to grounds 1, 2 and 4. With respect, let me cut in here in the matter of the Power of Attorney clearly in the eye of the storm in this case to contend that it has been discussed by the appellant as arising from

ground 3 (struck out as incompetent) and not ground 2 the only live issue as per the said Notice of Appeal. By the appellant's own showing issue two has been distilled from grounds 1, 2 and 4 and it deals with the question of preponderance of evidence. It is important to make these points early enough here as it cannot therefore be right to discuss the matter of the Power of Attorney, (Exhibit 2) under issue two which as per the appellant's Brief of Argument has dealt specifically with the preponderance of the plaintiffs' case upon the evidence before the trial court. B

The respondents (i.e. the plaintiffs in the trial court) have also filed a joint respondents' Brief of Argument and therein have identified a lone issue for determination as follows:- C

"Whether the lower court was right in holding that plaintiffs had proved their case?"

In view of the prism from which I discuss this matter, the peculiar facts of this matter are not particularly crucial to dealing with this aspect of the appeal i.e. in issue here; this will become clearer hereinafter. All the same, in a Resume, the case for the plaintiffs (respondents) as per their pleading and evidence (the defendant i.e. appellant here having filed no pleading in Reply nor otherwise as per the record has he taken any part in the proceeding before the trial court even though put on due notice of the proceeding) is that the respondents, the children of the Late Alhaji A.B. Waziri who died intestate on 3/9/95, have charged the appellant as the administrator of their late father's estate (Alhaji Waziri) with the mis-management of the said estate of their late father - that is, the Crux of this matter. The respondents (as plaintiffs) have sued the appellant (as defendant) for an account having entrusted him with the management of the said estate including the landed properties situate at Kano and Kaduna pursuant to a Power of Attorney as per Exhibit 2 donated by the children of the Late Alhaji Waziri. Suffice it as stated above being the critical facts of this matter. D E F G

At the oral hearing of the appeal on 1/4/08, the respondents have raised the issue of their Notice of Preliminary Objection filed on 13/2/2007, contending that the instant appeal be struck out on the basis that it has been filed without the prior leave of the court or the court below as provided by Section 233(3) of the 1999 Constitution H

in that the four grounds of appeal filed as per the Notice of Appeal by the instant defendant/appellant have raised issues of mixed law and fact and even moreso, for want of particulars of error as regards grounds 2 and 4 as required by the law. In firming up their opposition to the said four grounds they have submitted that the four grounds are therefore incompetent having been raised in breach of the afore-said constitutional requirement and that, in the circumstances, the court ought to decline jurisdiction to hear the appeal and strike out the same. It is further argued that this has to be so as the Notice of Appeal is as much as incompetent as the appeal itself and they rely on U.B.A. v. GMBH (1989) 6 S.C. (Pt. I) 22; (1989) 3 NWLR (Pt.109) 374, Nsirim v. Nsirim (1990) 5 S.C. (Pt.II) 94; (1990) 2 NSCC 302 and CSS Bookshop Ltd, v. RTMCRS (2006) 4 S.C. (Pt.II) 142; (2006) 1 NWLR (Pt.992) 530, for so submitting. The court is finally urged to strike out the appeal pre-emptorily for want of jurisdiction.

The appellant in Reply has examined each of the four grounds of appeal seriatim to urge that in all, the four grounds of appeal being grounds of law do not require any leave of the court or the court below; besides, that grounds 2 and 4 do not need particularisation of their respective errors in law as the errors are more or less inherent in the said grounds. Therefore, the court is urged to dismiss the Preliminary Objection as baseless and to hear the appeal on its merits.

Nothing could be more appropriate at this stage than to set forth the four controversial grounds of appeal and they are as follows:-

“Error in Law

The Honourable learned Justices of the Court of Appeal erred in law in holding that the plaintiffs had proved their case.

Particulars of Error

‘(i) Contrary to paragraph 13 of the Statement of Claim, no evidence was led by the plaintiffs linking the defendant with any Power of Attorney.

(ii) No Power of Attorney was tendered

(iii) No evidence was led to prove that the defendant was appointed to take charge, or administer the plaintiffs’ late father’s estate.’

Error in Law

2. The Honourable learned Justice of the Court of Appeal erred in law in setting aside the judgment of the trial court when the evidence of the plaintiffs' sole witness was contrary to their pleading.

Error in Law

3. The Honourable learned Justice of the Court of Appeal misdirected themselves in law and therefore came to a wrong decision when having found as fact p. 5 of their judgment that-

"the 1st plaintiff testified before the lower court as P. W. I but did not tender the Power of Attorney," yet their Lordships held at pages 6-7 of the judgment that

The trial court should have found on that and not gone into another issue - the issue of Power of Attorney - for a court is only confined to issues as joined by the parties - Udengwu v. Uzuegbu (2003) 7 S.C. 64; (2003) 3 NWLR (Pt. 836) 136.

Particulars of Error-

The issue of grant of Power of Attorney to enable defendant administer the 'assets' of the plaintiffs' late father was the core issue as pleaded in paragraphs 1 and 3 of the Statement of Claim.

Having not tendered the pleaded Power of Attorney, the plaintiff's evidence as regards appointment of the defendant via a Power of Attorney stands unproved.

Plaintiffs failed to prove that the Power of Attorney was donated to the defendant or at all.

No evidence apart from the mere ipsi dixit of the 1st plaintiff was led to prove that the defendant was at the instance of Etsu Nupe appointed to take charge and oversee the affairs of the deceased on behalf of the plaintiff.

The mere ipsi dixit of the 1st plaintiff is not sufficient to prove a case of declaratory nature such as this.

Error in Law

Having regard to the pleading (Statement of Claim) vis-a-vis the 1st plaintiff's evidence the plaintiffs had failed to prove their case as required by law?"

The foregoing represents the two sides of the argument in the Preliminary Objection whose essence ordinarily is, if sustained, to preempt the appeal and lead to its being thrown out rather summarily. At this point, I am obliged to advert to a few settled and related

principles in this regard that need to be highlighted as it is the duty of the court, firstly, to make sure it is seized of the competence to entertain any appeal before it vis-a-vis the grounds of appeal filed by an appellant as here. Basically, a ground of appeal consists of an error in law or fact as alleged by the appellant being as he sees it the defect in the decision he has appealed and he relies upon such defect to urge the court to set aside the decision. See: Metal Construction (W.A.) Ltd, v. Migliore (1990) 2 S.C 33; (1990) 1 NWLR (Pt.126) 299. ‘To complement the above principle of law it is also well settled by numerous authorities that the mere fact that an appellant (as here) has described a ground of appeal as one of law does not *ipso facto* render it to be so. It has to be so in substance, that is, in content.

Meaning that it is not truly the labelling of a ground of appeal as a ground of law (again as here) that ultimately determines whether it is one of law, of mixed law and fact or fact alone. The implication of these surmises in the context of the above applicable principles is that the distinction between particularly grounds of law vis-a-vis grounds of mixed law and fact can be that thin and so it makes the exercise of categorising grounds of appeal into grounds of law or mixed law and fact that problematic and tasking of the courts. In this regard, the instant ground 2 couldn’t be more different.

I think that I should zero in on the remaining ground two in discussing the fate of this appeal upon the respondents’ Preliminary Objection since I am at one with the leading judgment as regards its stance on grounds 1, 3 and 4 being at best grounds of mixed law and fact requiring the constitutional condition of a prior leave of the court below or the court. And that having failed in this regard to comply with the constitutional requirement as provided under Section 233(3) of the 1999 Constitution, grounds 1, 3 and 4 are incompetent being bad at law. And I so hold.

In pursuance of this conclusion, I also strike out grounds 1, 3 and 4 of the said Notice of Appeal as incompetent leaving only ground 2.

The instant ground 2 labelled as a ground of law has no particulars of error annexed to it in expatiation of the said errors; that much is evident. It is trite law that, if a ground of appeal alleges misdirection or error in law the particulars and the nature of the misdi-

rection or error shall be clearly stated. See: Order 8 Rule 2(2) of the Rules of this court. I have read the said ground over and over again and it can hardly be contended by the appellant to be self explanatory not by any stretch of imagination in the sense of indicating clearly within its ambit whereupon the evidence of the plaintiffs' sole witness runs contrary to their pleading. The particulars of errors in law here are required to be stated clearly vis-a-vis the pleaded facts and the evidence of the plaintiffs' sole witness at the trial. Surely, it is not the duty of the court to traverse the length and breadth of the averments contained in the plaintiffs' pleading to ascertain wherefore the areas of their conflict with the evidence as given by the plaintiffs' sole witness. This is clearly the duty of the appellant.

There can be no doubt that where as here as has been contended by the appellant the evidence of the plaintiff is completely at variance with or contrary to the facts averred and relied upon in the pleading albeit on material and relevant points, the claim will obviously fail and stand to be dismissed. This is so particularly because it is settled that parties are bound by their pleading and evidence which is at variance with or contrary to the averments in the pleading, goes to no issue and should be disregarded by the court. See Emegokwue v. Okadigbo (1973) 4 S.C. 113; (1973) 4 S.C. (Reprint) 78, Kalu Njoku & Ors. v. Nkwu Erne & Ors. (1973) 5 S.C. 293; (1973) 5 S.C. (Reprint) 211, Mogaji & Ors. v. Cadbury (Nigeria) Ltd. & Ors. (1985) 2 NWLR (Pt. 7) 393 & Rihawi v. Aromashodun (1952) 14 WACA 204. One can see from the foregoing proposition of the law the urgency of the appellant as per his complaint as encompassed in ground 2 against the contention of being a ground of law to give the particulars of error in law otherwise the ground is vague.

And so, it goes without much argument that having failed to clearly state the particulars of error in this regard, the said ground as well as the issue derived from it is at large as it has not therefore fixed relatively the particulars of the error in controversy with the decision being challenged by the appellant as per the complaint alleged in ground 2 and this is fatal to it. See: Mba v. Agu (1999) 9 S.C. 73. The ground, to say the least, is therefore, as can be seen, vague and leaves one to speculate and courts, it is settled, do not speculate. There can be no doubt that ground 2 stands flawed on this basis

alone, the appellant having totally misconceived the ground as self explanatory. See Atuyeye v. Ashamu (1987) 1 NWLR (Pt. 49) 267 and Orakosim v. Menkiti (2001) 5 S.C. (Pt. I) 72; (2001) 9 NWLR (Pt. 711) 529 at 535.

B The more critical question in regard to this ground of appeal
albeit the appeal itself is the respondents' contention that being
ground of mixed law and fact it requires prior leave of the court
below or the court as per Section 233(3) of the 1999 Constitution
and not having obtained the same that the ground is incompetent. A
C valid Notice of Appeal, I must doubly emphasis, is a condition of sine
qua non in appeal. See Anadi v. Okoli (1977) 3 S.C. 57; (1977) 3
S.C. (Reprint) 112. If, as is the case in this appeal, the only ground of
appeal is incompetent, there would have been no valid appeal be-
fore the court and this scenario renders incompetent any Briefs filed
D by the parties. See Akinloye v. Adelakun (2000) 5 NWLR (Pt. 627)
530.

All the hoopla (if I may so put it) surrounding the instant ground
of appeal lies in the requirement that a ground of appeal that raises a
E question of mixed law and fact or fact alone for that matter (in other
words does not come within ambit of Section 233(2) of the 1999
Constitution) leave of the court below or this court is required to
confer jurisdiction on the court to entertain it. This constitutional re-
quirement is a major jurisdictional hurdle and so any failure to seek
F and obtain the necessary leave renders such grounds incompetent as
per the provisions of Section 233(3) of the 1999 Constitution and so
liable to be struck out. The appellate jurisdiction of this court is in-
voked by the appellant filing a valid Notice of Appeal which must
contain competent grounds of appeal. See Odutola v. Kayode (1994)
G 2 NWLR (Pt.324) 1, per Olatawura, JSC. In this matter it becomes
very critical to the survival of this appeal as a whole whether there is
contained thereof as per the instant Notice of Appeal at least a com-
petent ground of law (i.e. as the three of the four grounds of appeal
H filed in the matter have already been struck out) to sustain this ap-
peal as an appellant (as here) has no automatic right to appeal on
questions of mixed law and fact or fact alone. This is so as an ag-
grieved party can appeal as of right from a final decision of High
Court at first instance to the Court of Appeal. See: Section 233(2) of

the 1999 Constitution; as regards further appeal from the Court of Appeal to the court, leave to appeal is required as per Section 233(3) of the 1999 Constitution that is for grounds of appeal on mixed law and fact or fact alone.

It is submitted that the filing of this ground offends Section 233(1) and (3) of the 1999 Constitution as regards leave to appeal. B
Section 233(3) provides that:-

“Subject to the provisions of subsection 233(2) of this section, an appeal shall lie from the decisions of the Court of Appeal to the Supreme Court with leave of the Court of Appeal or the Supreme Court.” C

The forgoing subsection has been judicially considered by the Supreme Court in Thor Ltd, v. First City Merchant Bank Ltd. (2002) 2 S.C. (Pt. I) 9; (2002) FWLR (Pt.95) 276 and the court held *inter alia* that “*where the ground or grounds of appeal are not of law alone but of mixed law and fact simpliciter, the right of appeal from the Court of Appeal or to the Supreme Court can only be exercised where the aggrieved party has first sought and obtained the leave of either the Court of Appeal or the Supreme Court.*” I think it is timely to observe that there is no evidence on the face of the record nor is it E
the case of the appellant here that leave of either the Court of Appeal or the court has been sought or obtained as prescribed by the afore-said provisions of the 1999 Constitution. Without mincing words, therefore grounds 1, 3 and 4 filed in this matter are at best, grounds F
of mixed law and fact. I have already made conclusive finding here with regard to grounds 1, 3 and 4 as incompetent at law and must be struck out.

This takes me to the crucial question of determining firstly, whether the instant ground two is otherwise a ground of mixed law G
and fact or fact alone and not a ground of law as contended by the respondents. In this regard, it seems to me having closely scrutinised ground 2 that in regard to the said ground, cognisance has to be had of the pleaded facts as per the plaintiffs’ pleading vis-a-vis the evidence of the plaintiffs’ sole witness in order to ascertain the areas of H
their conflict.

To determine a ground of law the point has to be made, which is more or less settled that this arises where a ground of appeal alleges

that the court has come upon a conclusion on proved or undisputed facts which no reasonable tribunal would otherwise have come to; again it arises where the appellant is complaining of the failure of the court to apply the correct principles of law to established or undisputed facts. Quite clearly the instant ground 2 does not come within the embrace of any of the errors in law as I have defined here. However, where the error in law is founded on disputed facts which call into question the correctness of the facts determined, as here, then it is a question of mixed law and fact. See: A.C.B. Plc. v. Obmiami Brick and Stone (Nig.) Limited (1993)5 NWLR (Pt. 294) 399.

I must emphasise in this vein that the plaintiffs' pleading itself having been predicated upon allegations of facts that to determine whether or not the evidence of the plaintiffs' sole witness is contrary to the plaintiffs' pleading, the court must necessarily fall back upon the said allegations of facts contained in the plaintiffs' pleading, that is to say, that it has to advert to the disputed facts in order to so resolve the question; it follows willy-nilly, that the said ground two is at best one of mixed law and fact and not of law alone. See: Welli v. Okechukwu (1985) 6 S.C. 132, or (1985) 2 NWLR (Pt.3) 63. The above cited case is very pertinent to the instant case that I have to advert to its facts and circumstances. The report shows that the crucial issue in the cited case was whether a ground of appeal which has complained that the lower court has failed to consider a matter of the joinder of issues before it has thereupon raised an issue of law simpliciter or mixed law and fact or fact alone upon the provisions of Section 213 (3) of the 1979 Constitution in pari materia with the instant Section 233(3) of the 1999 Constitution. The court in a majority decision held that the joinder of issues simpliciter although prima facie a question of law has to be considered on the backdrop of the pleading which in turn is predicated on allegations of facts; and so, rightly in my view, has come to the conclusion that the said ground of appeal is one of mixed law and fact requiring leave of court. And I agree with the reasoning and conclusion. Worthy of note in this regard is the fact that the court in the cited case referred to and applied the principle in the case of Ojemen v. Momudu (1983) 3 S.C. 173, where as per the report, the issue of "res judicata" has been raised in a ground of appeal, this court held that it has raised a question of

mixed law and fact again, rightly in my view as in the earlier cited case that the ground of appeal is incompetent for non-compliance with the provisions of Section 213 (3) supra. See also *Igidi v. Igba* (1999) 6 S.C. (Pt.I) 114. It is my view respectfully, that the principles that decided the two above cited cases apply *mutatis mutandis* to this case; and as there is no competent ground of appeal (howbeit the appeal itself) as contained as per the instant Notice of Appeal, the same is also incompetent and is hereby struck out. And the appeal itself having been aborted, the Preliminary Objection is upheld. B

In so far as the whole essence of taking the instant Preliminary Objection is none other than to oppose or to abort the instant appeal as per the Notice of Appeal which I have duly struck out as incompetent, there is no question of going into the merits or demerits of the appeal itself. The appeal is a non-starter. One would have crossed that bridge, vis-a-vis of determining the main appeal if one had gotten to it but for upholding the instant Preliminary Objection. D

It is for all this that I beg to disagree with the leading judgment vis-a-vis its upholding ground 2 as one of law and for proceeding to hear the appeal in the main to its conclusion on the merits.

Finally and for the avoidance of doubt, I strike out this appeal with N50,000.00 to the respondent. E

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