

COURT OF APPEAL
CALABAR DIVISION
14TH APRIL, 2005. CA/C/03/2004
CORAM:- C. M. CHUKWUMA-ENEH, I. THOMAS,
J. OMOKRI, JJCA

FIRST BANK OF NIGERIA PLC APPELLANT
AND
1. AKPARABONG COMMUNITY
BANK LTD RESPONDENTS
2. UNITED BANK FOR AFRICA LTD

APPEALS - Issues - Fresh issue on appeal - What constitutes - A preliminary objection - Is not synonymous with raising a new issue on appeal (H1)

APPEALS - Grounds of appeal - Validity of - A ground by an appellant - That complains against a decision which does not affect him or his interest - Is incompetent and so are any issues formulated therefrom (H2)

INTERLOCUTORY PROCEEDINGS - Issues - Touching on substantive suit - Treatment by the Court - It is wrong for a court to decide in limine - At interlocutory stage issues for determination in the substantive suit (H3)

PLEADINGS - Averments - Legal status - They are matters to be proved or disproved in the substantive hearing - They do not constitute evidence in themselves - Trial judge was therefore wrong to have relied on pleadings in making the interlocutory order (H4)

ACTIONS - Claims - Grant of relief not claimed - Propriety of - It is wrong for a court to grant an order - Which is not claimed by the party in whose favour the order is made (H5)

FACTS

The plaintiff/1st respondent had sued the defendant/appellant at the Federal High Court holden in Calabar. 1st respondent's claim

was for the transfer of a certain sum collected on its behalf by the appellant, as well as damages for breach of contract and loss of reputation. Subsequently, the 1st respondent brought a motion praying for an interlocutory order compelling the appellant to credit its account with the appellant with the alleged sum collected. Before the motion could be heard, the 2nd respondent filed a motion to be joined as a codefendant with the appellant.

The two motions were consolidated and heard. In its ruling the trial court refused the application for joinder of the 2nd respondent. It also refused to order that the account of the 1st respondent be credited as prayed. Instead, it ordered the appellant to deposit the said sum in Savannah Bank Plc, in the joint names of the appellant and the 1st respondent. Aggrieved, the appellant has brought this appeal challenging the rulings on the two motions.

ISSUE FOR DETERMINATION

"Whether the trial Federal High Court was right when he made the order that the cheque of N9,020,000.00 be paid into an interest yielding account with Savannah Bank Plc., Calabar."

HELD (Allowing the appeal per **THOMAS JCA**, Chukwuma-Eneh JCA dissenting)

Fresh issue on appeal - What constitutes

1. A preliminary objection is not synonymous with raising a new issue on appeal and I believe they are clearly distinguishable that one cannot be mistaken for the other. More importantly, the preliminary objection is directed at the competence of ground 6 of the grounds of appeal. The 2nd respondent has complied fully with the provisions of Order 3 Rule 15(1) of the Court of Appeal Rules. Viewed from this backdrop I do not agree with Chief Ironbar that the 2nd respondent's preliminary objection amounts to raising fresh issue on appeal through the back door.

The grounds of the preliminary objection do not constitute fresh issues being introduced whether through the front or back door. (p. 157 B/E)

Grounds of appeal - Validity of

2. A cursory glance at the ground 6 show clearly that the court's

refusal to join the interested party has not nothing whatsoever to do with the present appellant. I agree with Mr. Neji that the order of refusal did not in anyway refer to any act to be done or carried out by the appellant. No order whatsoever was made against it with respect to the refusal to join the interested party.

It is hereby firmly established that ground 6 of the grounds of appeal filed by the appellant from which issue 3 is formulated in his brief of argument dated and filed on 17th July, 2002 is incompetent, because any issue or issues formulated for determination based on incompetent grounds of appeal, go to no issue and ought to be struck out.

Therefore, the preliminary objection of 1st respondent as moved by its counsel, Neji Esq.; is upheld. (pp. 158 H/159 E)

Issues - Touching on substantive suit

3. Since it is very wrong for a court to decide in limine, at the interlocutory stage issues to be determined in the substantive suit, the trial court Judge in this appeal was clearly wrong when, he made the order that the defendant/appellant, had to pay within 14 days, the sum of N9, 020,000.00 into interest yielding bank - Savannah bank Plc. in the joint name of the parties.

I clearly stated earlier, that the trial court was much aware, that it was premature to grant the plaintiff/respondent to credit his account with the cheque in dispute at interlocutory state, but it is understandable why the trial court order crediting the sum of nine million twenty thousand naira (N9,020,000.00) into another account in a strange bank that was never applied by any of the parties. (pp. 165 D/166 A)

PLEADINGS - Averments - Legal status

4. By considering pleadings in the statement of claim, while the issues before the court was strictly interlocutory matter, was grievous because pleadings in a statement of claim or defence are matter to be proved or disproved in the substantive matter. Therefore the decision of the trial Judge ordering the appellant to pay the cheque within 14 days into another bank relying not on the motion papers and its affidavit evidence but considering one party's pleadings, was a nullity

being prejudging the substantive issues in the case. (p. 168 B)

Grant of relief not claimed - Propriety of

5. I am not unaware of the main plank of the 1st respondent when he applied on motion to compel the appellant to pay the alleged value of the cheque into his account at Ikom branch. The relief was not part of payment into another bank for interest yielding basis. Then how did the trial Federal High Court make itself a Santa Clause or Father Christmas? Courts of law are not created as charitable institutions engratia. There must be issues raised by parties whether or not they are charitable organization.

Akinboni v. D Akinboni (2002) 5 NWLR (pt. 761) 564 578-9 was stated thus:-

“It is wrong or erroneous for a court to grant an order or relief which is not claimed or brought by the party in whose favour the order was made. In the same vein, the court which is not a “father Christmas” or a social welfare institution should not grant to a party an order, or relief or declaration in excess of or outside what he claimed or sought for. The rationale of the rule, which forbids award by the court contrary to the rule of practice and pleadings, is to avoid surprises during proceedings and to ensure fair hearing to the parties without showing favour to one or the other.” (p. 168 D/F)

**NOTABLE POINTS OF INTEREST
THOMAS JCA**

1. As parties were not heard before the order was made it is a breach of their right to fair hearing

The order of payment into an interest yielding Bank amounts; to resolving that value had been given to the cheque and was in custody of the appellant bank. That order has violated the right of fair hearing of the appellant bank because they were not given their right under section 36(1) of the Constitution of Nigeria. 1999.

The trial court Judge did not allow the appellant to show whether the cheque was forged or not or whether or not value of the disputed cheque ought to be given or whether the 1st respondent's customer and the 2nd respondent and the appellant is illegal or not. Failure to allow the parties to constitutional right to fair hearing in arguing the

issues, grossly affected the appellant bank in that frivolous accusation of:-

“... Receive value for the same fraudulent cheque, retain it in their custody and making use of it.. benefit from his own mistake.”

That decision at its interlocutory stage, was not only prejudging the substantive issues in the case before the court, but the trial court had veered off target by its refusal to grant fair hearing to the appellant. (p. 166 B/D) B

2. Submissions however brilliant can never metamorphose to evidence C

The other faulty conduct of the trial Judge was, his decision to order the appellant to pay the alleged forged cheque into a strange bank. No doubt his decision was wrongly influenced by the tacit request of Chief Ndoma-Egba who by then was the learned counsel for the 1st respondent. D

The trial court had completely ignored the applications before it and on volition of himself and the unsupportable issues based on the ipse dixit or 1st respondent's counsel whose own submission could be regarded as on a voyage of his own discovery. See *Chukujekwu v. Olalere & Anr.* (1992) 2 NWLR (pt.221) at 86 where this court stated:- E

“It is now trite law that no matter how brilliant and persuasive counsel's submission may be, it can never metamorphose to evidence.” (p. 169 A/F) F

OMOKRI JCA

3. An appeal presupposes a judicial decision against appellant

Looking carefully at ground 6 reproduced above and relating same to the application for joinder made by the interested party/ respondent before the lower court, I cannot see the locus standi of the appellant in appealing against the order of the lower court particularly when no decision was made against it. An appeal is not an inception of a new case but the continuation of the original one appealed against. It presupposes the existence of some decision appealed against and in the absence of such a decision on a point there cannot be an appeal against what had not been decided against a party. The right of appeal conferred by section 243(1) of the 1999 G
H

Constitution is in favour of a person against whom a decision has been pronounced which has wrongfully refused him something or wrongfully affected his title to something. (p. 170 H)

CHUKWUMA-ENEH JCA (DISSENTING)

B *4. Issues already decided in another appeal cannot be reopened*

The implication of the foregoing reasoning is that the decision of this court as per the unreported judgment in the appeal No. CA/ C/79/2001; delivered on 22/3/2005 is final and binding on the court and the interested party i.e. the UBA Plc. It remains competent until set
C aside on appeal. This means that the two issues for determination raised by the interested party as regards to wit, the non-joinder of the interested party as a party to the suit and the order as to the preservation of the res in the said appeal No. CA/C/79/2001 having
D been decided and pronounced upon in the said unreported decision cannot be reopened for relitigation in the instant appeal. And as I have stated above the court has become functus officio and it is bound by its decision on the issue as per estoppel per rem judicatam.
(p. 188 F)

E *5. Argument not based on any ground of appeal goes to no issue*

The appellant has clearly relied on two separate notices of appeal - one filed by it and other not filed by it but by the interested party in
F raising its issues and in arguing its appeal. This it cannot do; it is trite that the court will not countenance or entertain argument on any ground of appeal which does not form part of the notice of appeal filed by an appellant. This principle applies mutatis mutandis to this
G case even moreso on any issue formulated from such ground of appeal. These distortions have great implication on the status of the brief and the appeal itself. That is to say, that where a court as this court is faced with a situation in which two persons appeal a ruling on two consolidated applications as here and where one of the appellants as here raises issues for determination in the appeal from the
H grounds of appeal as contained in two separate notices of appeal filed by the different persons as appellants (as in this case by the instant appellant and the interested party) and again, where one of the two persons (i.e. appellant) is held not to have the locus standi in

the appeal and that person's notice of appeal is not otherwise defective as in this case, it is my view speaking in the context of this case that the proper step to take in dealing with the issue is to discountenance the grounds of appeal not forming part of the instant appellant's notice of appeal i.e. grounds 1,2,3, and 4 of the interested party's notice of appeal as well as any arguments on the said grounds of appeal as not forming part of grounds of appeal as per the notice of appeal filed by the appellant here. And I so hold in regard to this case. (p. 190 B)

6. An uncontroverted evidence is taken to be true

The first question for consideration is whether value has been given to the said cheque in the sum of N9,020,000.00. From all the processes filed by the appellant in this case to which the court is obliged to look at as decided in *Texaco (Nig.) Plc. v. Lukoko* (1997) 6 NWLR D (Pt.51O) 781. There is nowhere the appellant has denied that it is in possession of the said amount.

There can be no doubt that if the cheque has cleared the proceeds would be in the appellant's possession. The appellant unfortunately has been very evasive on the issue. The essence of the relationship between the First Bank of Nigeria Plc. (appellant) and the respondent in this transaction is for the appellant to collect value and credit the respondent's account. The collection is solely for the respondent and not the appellant or both. Let me venture to recall here my portion in CA/C/79/2001 to the effect that the appellant has the proceeds of the cheque. I have not seen any reason to deviate from that conclusion. (pp. 191 G/192 F)

REPRESENTATION

Chief Orok Ironbar, Esq. for the Appellant
George Neji, Esq. for the 1st Respondent
U. H. Azikiwe, Esq. for 2nd Respondent

CASES REFERRED TO

Abaye v. Ofili & Anor. (1986) 1 S.C. 231
Ante v. University of Calabar (2001) 3 NWLR (Pt.700) 239
Alhaji v. Maji (2002) 4 NWLR (pt.756) 46 at 58

- Auto Import Export v. Adebayo (2002) 18 NWLR (pt. 799) 554
 A.C.B. Ltd. v. Apugo (1995) 6 NWLR (pt.399) 65
 Onyali v. Okpala (2001) 1 NWLR (Pt. 694) 282
 Goji v. Ewete (2001) 15 NWLR (Pt.736) 273. 280
 Okene v. Orianwo (1998) 9 NWLR (Pt.566) 408
 B Ogunbiyi v. Ishola (1996) 6 NWLR (Pt.452) 12
 N.D.I.C v. Oranu (2001) 18 NWLR (pt.744) 183
 Obijuru v. Anokwuru (2001) 17 NWLR (pt. 743) 685
 NPASF v. Fasel Services Ltd. (2001) 17 NWLR (pt. 742) 261
 C WEPA v. ANGO (2001) 15 NWLR (pt. 737) 627
 John Holt Ventures Ltd. v. Oputa (1996) 9 NWLR (pt.470) 101
 Sadiku v. Attorney General, Lagos State (1994) 7 NWLR (Pt, 355) 235

D **STATUTES & RULES REFERRED TO**

- Constitution of the Federal Republic of Nigeria, 1999, s. 36 (1)
 Evidence Act, 1990, s. 149 (d)
 Court of Appeal Rules, O. 3 r. 15 (1)
 Federal High Court Rules 2000, O. 12 r. 5 (1)
 E

LEAD JUDGMENT BY THOMAS JCA

- This interlocutory appeal is against the ruling of the trial Federal High Court Judge, Calabar in suit No. FHC/C/CS/34/98 delivered on 6/7/ 1999. The parties before the trial court initially, were
 F Akparabong Community Bank Ltd. as the plaintiff, now as the 1st respondent in this appeal; First Bank of Nigeria Plc. was the defendant but now, the appellant in this appeal.

- Later at the trial court, United Bank for Africa (UBA Plc.) applied by motion on notice, prayed, the court to be allowed to be
 G joined as an interested party in the above suit; UBA Plc. will be referred to in this appeal as 2nd respondent.

- The relevant brief facts as contained in the record of appeal and the parties briefs of argument filed and exchanged, are that the
 H 1st respondent's customer named Cultural Centre (Afridance Project) paid in a UBA Plc. (2nd respondent) cheque for the sum of N9,020,000.00 into its account with appellant (First Bank Plc.) for clearance, but that the 1st respondent's account had not been cred-

ited with the cheque and hence filing of the writ against the appellant in its paragraph 16 - statement of claim, four reliefs were endorsed as follows:-

“The sum of N9,020,000.00 (Nine million and twenty thousand naira) being value of United Bank for Africa Plc. Lagos East Branch Cheque No. 000291771 paid by the plaintiff into her account No. 0140200013400 held at the defendant’s Ikom Branch within jurisdiction of this Honourable Court. B

An account of the interest and other earnings accruing on the said sum of N9,020,000. 00 (Nine million twenty thousand naira) C from 24th March, 1998 till date.

N100,000,000.00 (One hundred million naira) being general damages for breach of contract.

N50,000,000 (Fifty million naira) being damages for loss of reputation arising from the plaintiff’s inability to meet her obligations consequent upon the defendant’s wrongful conversion of the said sum of N9,020, 000. 00 (Nine million and twenty thousand Naira),” D

Before proper commencement of the substantive mailer between the two initial parties, the 1st respondent filed a motion on notice praying for:- E

“An Order compelling the defendant/respondent to immediately credit the plaintiff/applicant’s account No.0140200013400 held at the defendant/respondent’s Ikom branch within jurisdiction of this Honourable Court with the sum of N9,020,000.00 (Nine Million F twenty thousand naira) being value of United Bank for Africa Plc. Lagos East Branch cheque No.000291771 paid by the plaintiff /applicant into her aforesaid account since 24th March, 1998.”

Before the above motion on notice could be heard, the 2nd respondent filed his own motion on notice praying leave to be joined G as tin interested party in the suit before the trial court. With leave of all parties, the two motions were consolidated and the trial Judge in his ruling at page 77 ruled against the 2nd respondent where he said thus:-

“In the result therefore, the application of UBA Plc. to be joined H as a co- defendant in this suit fails and is accordingly refused.”

In respect of the first motion by the 1st respondent urging the trial court to compel the appellant to credit its account with the cheque,

the ruling came out at page 80 of the record of appeal as follows:-

"It is hereby ordered that the defendant shall within 14 days of making this order cause to be transferred the said sum of N9,020,000.00 the subject matter of this suit now in their custody to Savannah Bank Plc. Calabar in an interest yielding account in the joint name of the plaintiff and the defendant such that none of the parties shall have access to draw on the account pending the hearing and determination of the substantive suit or until the court otherwise orders."

Aggrieved by the two aspects of the ruling against the bank, the appellant appealed to this court on 6 grounds from which he distilled three issues for determination as follows:-

"1. Whether in the face of the evidence that the cheque for the sum of N9,020,000.00 was spurious/forged, the trial court was justified to order that value be given to it even if it was only for depositing in an interest yielding account till the end of trial.

2. Whether giving value to the cheque at any stage of proceedings will not prejudice the case of the defendant/appellant.

3. Whether the trial court was justified in its refusal to join UBA Plc. The interested party and owner of the cheque in dispute in this suit."

Before hearing the appeal matter, the 1st respondent bank through its counsel Victor Ndoma Egba Esq.; as he then was, filed a notice of an intention to reply upon a preliminary objection in accordance with Order 3 Rule 15 of the Rules of this Court, 2002. The basis of its preliminary objection as stated by 1st respondent are as follows:-

"1. The ground of appeal is not related to the issues canvassed by the parties at the lower court.

2. The application for joinder having not been made by the defendant/appellant, it cannot appeal against the ruling refusing to join UBA Plc. as a party to the action."

In addition to its preliminary objection, 1st respondent filed their brief of argument dated 23/8/2002 and filed 30/8/2002 and formulated two issues for determination of the appeal as follows:-,,

1. Whether having regard to the peculiar circumstance of this case, learned trial Judge was justified in ordering that the amount in

dispute be deposited in an interest yielding account in the joint names of the parties before it.

2. Whether the learned trial Judge rightly exercised his discretion, in refusing to join UBA as a party to the action.

The 2nd respondent in its reply brief filed on 23/12/2002 by Uzoma Azikiwe Esq.; formulated two issues for determination of the appeal as follows:-

"1. Whether the learned trial Judge was right when he ordered that the defendant/appellant should within 14 days, pay the sum of N9,020,000.00 (Nine million and twenty thousand naira) into an interest yielding account in Savannah Bank Plc. Calabar branch in the joint names of the plaintiff/respondent and defendant/appellant."

2. Whether the learned Judge was right when he refused to join the interested party/respondent as an intervener in the plaintiff's/respondent's action on the grounds stated in the ruling dated 6th day of July, 1999."

The argument proffered on preliminary objection ought to be considered because the two grounds of the objection are:-

(i) that a ground of appeal is incompetent being not related to issues canvassed by the parties at the lower trial court;

(ii) that the application to be joined as a party to the suit was not made by the appellant, it can not appeal. If the preliminary objection is sustained it means the grounds of appeal No. 6 and issue 3 distilled there from, will be struck out, thus saving the time of the court and the parties. Moreover, when a preliminary objection is raised as to the competence of an appeal, this court is directed to determine it first. See Order 3 Rule 15(1) of the Rules of this court. 2002; the case of Onyali v. Okpala (2001) 1 NWLR (Pt. 694) 282; Goji v. Ewete (2001) 15 NWLR (Pt. 736) 273. 280.

The 1st respondent in his reply brief argued that the appellant did not make any application to the lower court seeking the joinder of the 2nd respondent, UBA Plc., therefore, it cannot appeal against the refusal of the lower court to join UBA as a party. Mr. Neji pointed out that the appellant is not in anyway prejudicially affected by the decision of the court refusing to join the 2nd respondent, UBA Plc., as a party to the action before it. He relied on Okene v. Orianwo

156 First Bank v. Akparabong Comm. Bank (2009) 1 KLR Thomas JCA
(1998) 9 NWLR (Pt.566) 408; Ogunbiyi v. Ishola (1996) 6 NWLR
(Pt.452) 12; In Re: Ijelu (1992) 9 NWLR (Pt. 266) 414.

Learned counsel for the 2nd respondent, Mr. Azikiwe did not
join issues with the 1st respondent on the preliminary objection. He
neither canvassed the issue in the brief nor make any submission in
B that respect before the court at the hearing of the appeal. His sub-
missions were confined to the main issue on the appeal. Responding
to the arguments of Mr. Neji for the respondent, learned counsel for
the appellant, Chief Orok Ironbar submitted in its brief at page 2 that
C by consent of counsel the application of respondent seeking the or-
der of the court to compel the appellant to credit the account of the
respondent filed on 25/6/98 and the application of the 2nd respon-
dent, UBA, seeking to be joined as an interested party to the suit
were consolidated for the purposes of hearing the application in one
D trial. He submitted that the 1st respondent having failed to complain
at the lower court on the appellant's reliance on the papers filed by
the 2nd respondent, it cannot be heard to complain now on appeal.
He relied on Societe Generale Favourise v. Societe General Bank
(1997) 4 NWLR (Pt.497) 8; (1997) SCNJ 60. Chief Ironbar pointed
E out that the preliminary objection is neither on jurisdiction nor does it
make any substantial point of law or procedure and unrelated to the
ruling of the court appealed against therefore it is a fresh issue being
introduced through the back door which cannot be allowed without
seeking the leave of the court first. He relied on Abaye v. Ofili &
F Anor. (1986) 1 S.C. 231; (1986) 1 NWLR (Pt.15) 134

There are plethora of cases where the raising of fresh issue on
appeal has been defined, examined and considered so as to leave no
one in doubt as to what it means. For instance in Kano Textile Print-
G ers Plc. v. Gloede & Hoff Nig. Ltd. (2002) 2 NWLR (Pt.751) 420 at
448, this court stated that:-

*"A fresh issue on appeal is an issue which was not canvassed at
the trial and pronounced upon by the trial court."*

See also Obioha v. Duru (1994) 8 NWLR (Pt.365) 631; (1994) 10
H SCNJ 48.

By the clear and unambiguous provisions of Order 3 Rule 15(1)
of the Court of Appeal Rules raising of preliminary objection is clearly,
expressly and specifically provided for. The Rule provides:-

"A respondent intending to rely upon a preliminary objection to the hearing of the appeal shall give the appellant three clear days notice thereof before the hearing, setting out the grounds of objection, and shall file such notice together with twenty copies thereof with the registrar within the same time."

A preliminary objection is not synonymous with raising a new issue on appeal and I believe they are clearly distinguishable that one cannot be mistaken for the other. More importantly, the preliminary objection is directed at the competence of ground 6 of the grounds of appeal. In *Madumma v. Jambo* (2001) 15 NWLR (Pt.736) 461. It was held that the correct approach where a respondent seeks to raise a preliminary objection to the grounds of appeal (as in this appeal) is to give notice of his preliminary objection. In this appeal, the 2nd respondent did not only give notice of its intention to reply on a preliminary objection. It has proffered arguments relating to it in its brief and he has also made his submissions in support of it at the hearing of this appeal as it is required to do.

See *Ante v. University of Calabar* (2001) 3 NWLR (Pt.700) 239; *N.D.I.C v. Oranu* (2001) 18 NWLR (pt.744) 183; *Obijuru v. Anokwuru* (2001) 17 NWLR (pt. 743) 685. **The 2nd respondent has complied fully with the provisions of Order 3 Rule 15(1) of the Court of Appeal Rules. Viewed from this backdrop I do not agree with Chief Ironbar that the 2nd respondent's preliminary objection amounts to raising fresh issue on appeal through the back door.**

The grounds of the preliminary objection do not constitute fresh issues being introduced whether through the front or back door. Therefore, the case of *Abaye v. Ofili & anor.* (supra) G is clearly distinguishable and inapplicable to the facts of this appeal see *NPASF v. Fasel Services Ltd.* (2001) 17 NWLR (pt. 742) 261; *WEPA v. ANGO* (2001) 15 NWLR (pt. 737) 627.

Chief Orok Ironbar submitted at page 3 paragraph A6 (I) -(iii) that:- H

"(i) The preliminary objection does not make substantial point of law or procedure and is not on jurisdiction.

(ii) The preliminary objection has not pointed out any miscar-

riage of justice by ground 6 of the defendant's appeal.

(iii) The preliminary objection is unrelated to the ruling of court appealed against."

With the greatest respect, the above submissions are clearly inconsequential and misconceived. A challenge to the competence of a ground of appeal is a fundamental point of law. If the ground of appeal is incompetent then the court has no jurisdiction to entertain it and such ground will be struck out. In the circumstances, it is quite unnecessary for the respondent to point out any miscarriage of justice when in the first place its contention is that the ground of appeal is incompetent. Simply put, the substance of the preliminary objection is that not having filed any application for joinder, the appellant has no right of appeal against the decision of the lower court refusing to join the 2nd respondent. That being the case it is not easy to understand, appreciate or digest the submissions that the preliminary objection is unrelated to the ruling of the lower court appealed against. Chief Ironbar submitted also that the preliminary objection is belated and is entirely an exploratory venture. It is clear from the record of the court that the 1st respondent filed its notice of intention to rely on preliminary objection on 26/7/2002 long before this appeal was heard on 18/1/2005. By the provisions of Order 3 Rule 15(1) of the Court of Appeal Rules, 2002, a respondent intending to rely upon a preliminary objection to the hearing of the appeal is only obliged to give the appellant three clear days notice thereof before the hearing. That being the case it is incomprehensible and ridiculous to argue that the preliminary objection is belated and entirely an exploratory venture. The preliminary objection was filed timeously in accordance with the rule and certainly it is not an exploratory venture. See *Auto Import Export v. Adebayo* (2002) 18 NWLR (pt. 799) 554; *A.C.B. Ltd. v. Apugo* (1995) 6 NWLR (pt.399) 65; *Alhaji v. Maji* (2002) 4 NWLR (pt.756) 46 at 58.

Presently, let me reproduce ground 6 of the grounds of appeal shorn of its particulars. It reads:-

"The learned trial Judge erred in law when he refused to order the joinder of the applicant/party interested."

A cursory glance at the ground 6 show clearly that the court's refusal to join the interested party has not nothing what-

soever to do

with the present appellant. I agree with Mr. Neji that the order of refusal did not in anyway refer to any act to be done or carried out by the appellant. No order whatsoever was made against it with respect to the refusal to join the interested party.

It is hereby firmly established that ground 6 of the grounds of appeal filed by the appellant from which issue 3 is formulated in his brief of argument dated and filed on 17th July, 2002 is incompetent, because any issue or issues formulated for determination based on incompetent grounds of appeal, go to no issue and ought to be struck out. See John Holt Ventures Ltd. v. Oputa (1996) 9 NWLR (pt.470) 101; Sadiku v. Attorney General, Lagos State (1994) 7 NWLR (Pt, 355) 235.

Therefore, issue No. 3 as it was formulated from ground 6 at page 108 of the record of appeal as well as grounds 1, 2 and 3 of the notice of appeal from page 113-116 of the record of appeal and the arguments proffered thereupon in appellant's brief at paragraphs D1-D12 at pages 6-8 are entirely discountenanced as of no value, and same applies to 1st and 2nd respondents' identical issues No. 2 each. **Therefore, the preliminary objection of 1st respondent as moved by its counsel, Neji Esq.; is upheld.**

Since the preliminary objection is resolved, what is left to be considered for determination are, remaining single issues. During the hearing of this issue, both parties adopted and relied on their respective briefs. Issues 1 and 2 of the appellant at page 3 paragraph C-C17 at page 6, are similar to issue I of the 1st respondent at pages 4-9 of its brief of argument.

2nd respondent's briefs of argument filed on 23/12/02, formulated its own issue 1 and proffered, argument at page 2 paragraph 2.0 to paragraph 4.06. There is no doubt that the appellant's issues 1 and 2 are aiming at the same point namely the ruling of the trial court in which the appellant was ordered to deposit the res, (N9.020,000.00) into an interest yielding account in the joint names of the parties. I am satisfied that the appellant's issues 1 and 2 can conveniently be subsumed into one issue as formulated by each of the other respondents. In fact, the appellant's counsel, Chief Orok Ironbar stated at page 3 paragraphs C that "issues 1 and 2 would be

argued together” and this is what I will do in my determination since it covers the relevant issue of all parties.

In his submission, appellant’s counsel stated that the matter between the parties was fought entirely on affidavit evidence and exhibits at the trial court, and he referred to page 76 of the record in which the trial Judge formulated his issue 2 which was as follows:-

“Whether the plaintiff/applicant has established a case to warrant the court to make an order to compel the defendant/respondent to credit her account with the sum of N9,020,000.00 being the money in dispute (The subject matter)”

and that from the above issue, the same learned trial Judge at page 79 rightly refused to order that the plaintiff’s/applicant’s account be credited. Appellant’s counsel submitted that by that ruling the trial court admitted that it was premature at that stage to make an order when it was not yet known whether the cheque was forged or not. Learned counsel further submitted that it was clear to the trial court that

- (1) It formulated the issue without allowance for payment into any other account but that of the plaintiffs;
- (2) That the trial court thought it unwise to credit the plaintiff’s account without full trial on merit;
- (3) That the trial court understood the defendant’s allegation that the cheque was spurious or forged;
- (4) That on whether or not value should be given to the cheque at all, the trial court reserved its decision till final full trial and determination on merit and
- (5) That the trial court knew that giving value to the cheque was determining in limine at the interlocutory stage, issues meant for determination after full trial.

Learned counsel for the appellant, was therefore, very surprised that despite the above stated facts as being known to the trial Judge, he still later on his own volition, formulated his issue 3 by ordering the payment of the unresolved cheque to be paid into an interest yielding account with Savannah Bank Plc., Calabar. Counsel for the appellant further contended that it was the saving grace of the Central Bank of Nigeria who at the material time withdrew the licence of Savannah Bank Plc., as widely published in some National

Dailies and Magazines. Counsel further submitted that the trial court had failed to apply the provisions of section 149(a) of the Evidence Act, which would have made it clear that hearing on merit was very necessary before making the order in respect of the cheque in question.

In his further submissions, the appellant referred to page 62 of the record of appeal where the trial court was made to be aware, that the plaintiff in his prayer in his motion papers, did not include the payment of money or value of the cheque into any other account but its own. That the trial court suo moto, had made an order to pay the cheque into interest yielding account with Savannah Bank Plc., and thus the trial court had deliberately favoured the plaintiff with an order which was never solicited by the plaintiff. In other words, the trial court acted as father Christmas in favour of the plaintiff/ respondent. The appellant still further relied on the evidence on record at pages 28-30 of the record in which the plaintiff/respondent customer, namely Cultural Centre Board had renounced all claim and association to the spurious/forged cheque and was not interested in obtaining value for the cheque, and that therefore, it was wrong for the plaintiff bank/ respondent to cry more than the bereaved.

In conclusion, the appellant's counsel submitted that the trial court did not care to consider the issue of whether the plaintiff had a legal right to the cheque in dispute and that it means a clear intention by the trial court to promote illegality between the plaintiff and its customer - relied on the case of *Amizu v. Nzeribe* (1989) 4 NWLR (pt.118) 755,770; *Oil Field Supply Centre Ltd. v. Johnson* (1987) 2 NWLR (pt. 58) 625.

Counsel urged that his issues 1 and 2 submitted into one, be resolved in their favour.

The 1st respondent's brief is dated 23/8/2002 but filed on 30/8/2002 by Victor Ndoma-Egba Esq., as he then was but argued by Neji Esq., The single issue formulated as stated earlier above, is:-

"Whether having regard to the peculiar circumstances of this case, the learned trial Judge was justified in ordering that the amount in dispute be deposited in an interest yielding account in the joint names of the parties before it."

In arguing this issue, 1st respondent conceded that the matter

before the trial court was contested wholly on affidavit evidence, and referred to page 5 of the record in which the plaintiff/applicant thus Akparabong Community Bank (Nig.) Ltd. deposed in its paragraph 7 that it:-

B *“Reasonably believes that the defendant/respondent has received value (and) has withheld the proceeds without reason or justification.”*

C And that this averment was not specifically challenged or howsoever controverted in all the 20 paragraphs of the counter-affidavit of the defendant/appellant.

Learned counsel for the 1st respondent. Mr. Neji also relied on their paragraph 8 of the affidavit evidence in support of the application where it was deposed that the money was in the coffers of the defendant/appellant, which says:-

D *“8. ... it was assumed under the clearing house Procedure that the cheque had cleared and the account of the applicant with the Central Bank of Nigeria was debited in favour of the defendant/respondent.”*

E Counsel then contended that the defendant now appellant did not oppose the application of the U.B.A. Plc., thus it was the facts as contained above that the 2nd respondent (U.B.A. Plc.) had admitted that the cheque had been cleared and therefore the account of the 2nd respondent with the Central Bank was debited in favour of the -
F appellant. Mr. Neji counsel for the 1st respondent referred to pages 54 and 61 of the record of appeal in which Mr. Gbenga Ojo who was then counsel for the applicant (at the trial court) applied to transfer the money to another bank, and submitted that:-

G *“First bank is a strong bank, and that the money is safe in that bank. That at best he will suggest that the money be kept with the First bank, but in an interest yielding account.”*

H Mr. Neji, learned counsel for the 1st respondent then concluded that since the appellant bank (First bank Plc.) have failed to challenge the allegation that value for the cheque had been given as far back at the trial court, same trial court was fairly justified in its decision that the then defendant now appellant, was trading with the cheque proceed and ordered the appellant to deposit the money of N9,020,000.00 in the joint names of the parties at Savannah Bank

pending the determination of the substantive matter.

In his brief argument of the same identical issue for determination in this appeal, learned counsel for the 2nd respondent at page 3 of their brief, associated themselves with the argument of the learned counsel for the appellant at page 2- 8 of the brief dated 21/6/2002, but learned counsel Azikiwe submitted his own additional submissions in four stages, but before then learned counsel contended that, at page 80 of the record of appeal, the trial Judge had prejudged at an interlocutory stage, the substantive issues for trial when he ordered the appellant to transfer the sum of N9,020,000.00 within 14 days from the date of the making of the order to Savannah Bank Plc., Calabar, into an interest yielding account in the joint names of the plaintiff and the defendant. Learned counsel then submitted that firstly, the trial Judge had veered off mark by not only prejudging the substantive issues at the trial but also suo motu, introduced evidence not on facts and issues submitted by parties; nor were parties called upon to answer those evidence or facts and issues submitted by parties, nor were parties called upon to answer those evidence or facts or issues raised or manufactured by the trial court itself. That there was no shred of evidence by the then plaintiff now 1st respondent in all of its affidavit, that keeping the money with the First Bank, would overreach it or, how the interest of the community bank would be prejudiced.

Secondly, learned counsel submitted that the trial court at page 80 of the record found that “the defendant no doubt is a reliable and strong bank,” but went ahead and made the order to deposit the money to a different bank namely Savannah Bank Plc. whose credibility financial strength was not reliable. That therefore the order was arbitrary and without any reasonable ground.

Learned counsel for the 2nd respondent thirdly submitted that the trial Judge had misconceived the 1st respondent’s application dated and filed 25/6/98 when he stated that “the court is duty bound to ensure that the subject matter of a suit before it does not evaporate or pass from hand to hand to the detriment of any party who maybe successful at the end of the trial.” That the 1st respondent at the trial in his application was not for the preservation of the “res” pending determination of the substantive claim. I am of the view that

the fourth submission of learned counsel for the 2nd respondent is similar to the 2nd and 3rd submissions and need not restate it. In its final analysis, learned counsel contended that since the trial Judge had violated the right of the appellant to fair hearing when the court suo motu raised the issues that the 1st respondent would be over-
 B reached, the trial court manufactured evidence that the appellant was charging higher interest and trading with the money, it was wrong for the trial Judge to make that order for depositing the sum into an interest yielding account because there was no formal application by
 C the 1st respondent to that effect. Counsel urged this court to allow the appeal of the appellant.

I have carefully considered the brief argument of all parties. There is no doubt that the relevant issue for determination in this appeal is *whether the trial Federal High Court was right when he*
 D *made the order that the cheque of N9,020,000.00 be paid into an interest yielding account with Savannah Bank Plc., Calabar.* It is to be noted that this order was made at the interlocutory stage of the matter whereas the substantive suit initiated by the 1st respondent (Community bank) was yet to be heard. The claim of the Akparabong
 E Community Bank Ltd. is found at pages 3 and 14-17 of the record which states as follows:-

“1. The sum of N9,020,000.00 (Nine million and twenty thousand naira being value of United Bank for Africa Plc., Lagos East
 F branch cheque No. 00029 1771 paid by the plaintiff into her account No.01402000 -12400 held at the defendant’s Ikom branch within the jurisdiction of this Honourable Court.

2. An account of the interest and other earnings accruing on the said sum of N9,020,000.00 (Nine million, twenty Thousand naira)
 G from 24th March, 1998 till date.”

It is now clear that the main claim was yet to be determined, but the plaintiff now 1st respondent, filed a motion on notice asking the trial court to compel the defendant, now appellant to credit his account with the money into its Ikom branch. The motion paper
 H dated 25/6/1998 reads:-

“An order compelling the defendant/respondent to immediately credit the plaintiff’s/applicant’s account No. 014020001340 held at the defendant/respondent’s Ikom branch within the jurisdiction of

this Honourable Court with the sum of N9,020,000.00 being value of United Bank for Africa Plc. Lagos East branch cheque No.. 000291771 paid by the plaintiff/applicant into her aforesaid account since 24th March, 1998."

From the above quoted motion, the application of the 1st respondent was thus intended to obtain at an early interlocutory state, the main relief set out above in the main claim. The trial court was no doubt aware of that trap and rightly stated at page 78 that it will be premature at this stage to make an order compelling the defendant to credit the account of the plaintiff.

If the trial court had granted the prayer in the motion, the 1st respondent would have been happily satisfied with disposing of the substantive claims, and what would have been left to be considered, was the 2nd claim relief, thus asking for accrual of interest and damages. Law requires the parties to call their witnesses to prove evidence and dispose relevant issues in the main substantive claims - See Ojukwu v. Government of Lagos State (1986) 3 NWLR (pt. 26) 39.

Since it is very wrong for a court to decide in limine, at the interlocutory stage issues to be determined in the substantive suit, the trial court Judge in this appeal was clearly wrong when, he made the order that the defendant/appellant, had to pay within 14 days, the sum of N9, 020,000.00 into interest yielding bank - Savannah bank Plc. in the joint name of the parties. See Kotoye v. Saraki (1994) 1 NWLR (pt. 357) 414 at 428 where the Supreme Court authoritatively stated thus:-

"In an interlocutory application or appeal, the Court must avoid making any observation in the ruling or judgment which might appear to prejudge the main issues in the proceedings relative to the interlocutory application and which may have the effect of affecting the merits of the substantive case or remove the substratum thereof. (Italics mine).

See also the authoritative direction of this Court in Pharmatek Ind. Ltd. v. Ojo (1994) 7 NWLR (Pt.359) 751; where it is stated that:-

"Judges while making interlocutory rulings must desist from making any findings which may prejudice the substantive case."

I clearly stated earlier, that the trial court was much aware, that it was premature to grant the plaintiff/respondent to credit his account with the cheque in dispute at interlocutory state, but it is understandable why the trial court order crediting the sum of nine million twenty thousand naira (N9,020,000.00) into another account in a strange bank that was never applied by any of the parties. The order of payment into an interest yielding Bank amounts; to resolving that value had been given to the cheque and was in custody of the appellant bank. That order has violated the right of fair hearing of the appellant bank because they were not given their right under section 36(1) of the Constitution of Nigeria. 1999. Therefore, the observation of the trial judge in which he stated:-

"The defendant can not claim that they can not honour a false cheque but at the same time went ahead to receive value for the same fraudulent cheque, retain it in their custody and making use of it. No man is allowed benefit from his own mistake."

Shows that the trial court Judge did not allow the appellant to show whether the cheque was forged or not or whether or not value of the disputed cheque ought to be given or whether the 1st respondent's customer and the 2nd respondent and the appellant is illegal or not. Failure to allow the parties to constitutional right to fair hearing in arguing the issues, grossly affected the appellant bank in that frivolous accusation of:-

"... Receive value for the same fraudulent cheque, retain it in their custody and making use of it.. benefit from his own mistake."

That decision at its interlocutory stage, was not only prejudging the substantive issues in the case before the court, but the trial court had veered off target by its refusal to grant fair hearing to the appellant, see *Otapo v. Sunmonu* (1987) 2 NWLR (pt. 58) 587; *Olumesan v. Ogundepo* (1996) 2 NWLR (pt. 433) 628.

Now, coming to the second aspect of the order of the trial court compelling the appellant to pay within 14 days, the sum into an interest-yielding bank, there is still need, to know why the trial court on its own wrongly made the order. The trial court believed that the 'res' that is the N9,020,000.00 was in danger of being dissipated, evaporated or wasted, See page 79 lines 23-26, where it

stated:-

“The court is duty bound to ensure that the subject matter of a suit before it does not evaporate or pass from hand to hand to the detriment of any party who may be successful at the end of trial.”

That observation of the trial court was based on the authority of the case of Chief Shodeinde v. The Registered Trustees of Ahmadiya Movement in Islam (1980) 1-2 S.C. 163, 201. But the case of Shodeinde v. Registered Trustees of Islam (supra) was based on the reliefs sought and the evidence on record. In the appeal at hand, there was no shred of evidence by the then plaintiff that the res were in danger of being dissipated or wanted. I have carefully read and reviewed the affidavit evidence used by the parties and in respect of the motion of the plaintiff/respondent at page 6 paragraph 12 of its affidavit in support of application, said:-

“12. That the plaintiff/applicant is advised by her solicitors afore-said, and verily believed ... That the defendant/ respondent was her agent and has no claims whatsoever and howsoever to the cheque and her conduct is unjustified, illegal, oppressive and fraudulent in the extreme.” (Italics is mine).

Using the above quoted but underlined affidavit, the trial court wrongly and baselessly believed that the defendant now appellant was, despite the police investigation contained at page 12 of the record of appeal, that First Bank Plc., was conducting unjustified behaviour being oppressive, and was making profit from the res. Since there was police investigation in respect of the cheque which was found to be forged, it was wrong to imagine that the res was being wasted or being used by the appellant's bank.

I believe that other wrong decision of the trial Judge which was not in consideration at the interlocutory stage, was that the res was in danger of being destroyed. A careful observation in the statement of claim filed by the plaintiff/respondent at the trial court at pages 15 and 16 paragraphs 13(i) and 15 stated as follows:-

“13. At the trial the plaintiff shall further contend and prove that:-

(i) The conduct of the defendant is Wanton, Brazen, oppressive, unjustifiable, illegal and designed to profit The defendant.

15. The defendant is not the subject howsoever of any inves-

tigation by the police or any one else for that matter in relation to the cultural center (Afridance Project) account and is not motivated in her conduct of by zeal or punctiliousness but rather a calculated oppressive motive to profit herself using the aforesaid Police investigations as cover for her unjustified conduct."

B (Italics are mine)

By considering pleadings in the statement of claim, while the issues before the court was strictly interlocutory matter, was grievous because pleadings in a statement of claim or defence are matter to be proved or disproved in the substantive matter. Therefore the decision of the trial Judge ordering the appellant to pay the cheque within 14 days into another bunk relying not on the motion papers and its affidavit evidence but considering one party's pleadings, was a nullity being prejudging the substantive issues in the case.

I am not unaware of the main plank of the 1st respondent when he applied on motion to compel the appellant to pay the alleged value of the cheque into his account at Ikom branch. The relief was not part of payment into another bank for interest yielding basis. Then how did the trial Federal High Court make itself a Santa Clause or Father Christmas? Courts of law are not created as charitable institutions engratia. There must be issues raised by parties whether or not they are charitable organization.

F See. Ekpenyong v. Nyong (1975) 2 S.C. 71; Imam v. A.B.U. (1970) NNLR 39; Adefulu v. Okulaja (1996) 9 NWLR (pt.475) 668; Omotunde v. Omotunde (2001) 9 NWLR (pt.718) 252; **Akinboni v. D Akinboni (2002) 5 NWLR (pt. 761) 564 578-9** was stated thus:-

"It is wrong or erroneous for a court to grant an order or relief which is not claimed or brought by the party in whose favour the order was made. In the same vein, the court which is not a "father Christmas" or a social welfare institution should not grant to a party an order, or relief or declaration in excess of or outside what he claimed or sought for. The rationale of the rule, which forbids award by the court contrary to the rule of practice and pleadings, is to avoid surprises during

proceedings and to ensure fair hearing to the parties without showing favour to one or the other.

Finally, the other faulty conduct of the trial Judge was, his decision to order the appellant to pay the alleged forged cheque into a strange bank. No doubt his decision was wrongly influenced by the tacit request of Chief Ndoma-Egba who by then was the learned counsel for the 1st respondent and on 9/6/99, while submitting on issues of jurisdiction of the trial court, stated at page 60 lines 22-29 and 29-32 as follows:-

“... Secondly even if in regard in the particular transaction the UBA i.e. 2nd defendant came into the picture it divested itself of any interest whatsoever when he the UBA gave value to the 1st bank on the cheque. See. That the application by U.B.A. to join should fail, that the justice of this matter will be met if the money is kept and deposited with another bank in an interest yielding account, preferably, the Savannah bank Plc. That 1st bank has just appropriated the money to itself, without any interest being recorded ...”

From the above submission of learned counsel, there was no iota of evidence to support the affidavit in the motion nor was there relief to that effect. Therefore that submissions go to no issue, as it was not the relief sought. As can be seen from the submission, three things happened - (1) refusal to join UBA Plc; as an intervener or interested party was refused; (2) relief not sought thus order to pay into an applied strange bank was gratuitously granted based on ‘ipse dixit’ was made; (3) false accusation of profiteering and oppression was declared.

From the above, the trial court had completely ignored the applications before it and on volition of himself and the unsupportable issues based on the ipse dixit or 1st respondent’s counsel whose own submission could be regarded as on a voyage of his own discovery. See Chukujekwu v. Olalere & Anr. (1992) 2 NWLR (pt.221) at 86 where this court stated:-

“It is now trite law that no matter how brilliant and persuasive counsel’s submission may be, it can never metamorphose to evidence.”

From the totality of my findings and the submissions of the appellant and the 2nd respondent’s counsel namely - First Bank and United

Bank for Africa Plc; respectively, I am satisfied that the trial court wrongly made an order for which the 1st respondent (Akparabong Community Bank Ltd.), never sought. The order was not based on evidence on record. It was wrongly made without due regard to the ‘rule of fair hearing to the parties and it seriously affected the appellant. The appeal is therefore allowed, the ruling of the trial Federal High Court, Calabar, delivered on 6/7/99 in suit No. FHC/ CA/CS/ 34/98 between the parties in which the appellant was ordered to pay within 14 days the sum in respect of the cheque in dispute with Savannah bank Plc; Calabar, in an interest yielding account in the joint names of 1st respondent and the appellant is hereby set aside being a nullity.

The case in its substantive suit is to be sent back to another Judge of the Federal High Court, Calabar.

The appellant and the 2nd respondent are entitled to costs of N5,000.00 each against the 1st respondent. I so order.

OMOKRI JCA

I have read in advance the Lead judgment written by my learned brother, Istifanus Thomas, JCA, and I totally agree with the reasoning and conclusion in the judgment. By way of emphasis I would like to make my contributions. The grounds of objection raised by Mr. Neji for the 1st respondent are:-

*“(1) that a ground of appeal is incompetent being not related to issues canvassed by the parties at the lower trial court,
(2) that the application to be joined as a party to the suit was not made by the appellant, it cannot appeal.”*

The preliminary objection relates only to ground 6 of the grounds of appeal filed by the appellant. It behoves me therefore to examine the ground critically. Ground 6 shorn its particulars read:-

“The learned trial Judge erred in law when he refused to order the joinder of the applicant/party interested.”

Looking carefully at ground 6 reproduced above and relating same to the application for joinder made by the interested party/respondent before the lower court, I cannot see the locus standi of the appellant in appealing against the order of the lower court par-

ticularly when no decision was made against it. An appeal is not an inception of a new case but the continuation of the original one appealed against. It presupposes the existence of some decision appealed against and in the absence of such a decision on a point there cannot be an appeal against what had not been decided against a party. The right of appeal conferred by section 243(1) of the 1999 Constitution is in favour of a person against whom a decision has been pronounced which has wrongfully refused him something or wrongfully affected his title to something. See *In Re: Ijelu* (1992) 9 NWLR (Pt.266) 414; in *Saude v. Abdullahi* (1989) 4 NWLR (R 116) 387 at 429; the Supreme Court stated clearly that:-

“A ground of appeal should represent the complaint of an appellant against a decision taken against him in the trial court or the Court of Appeal which he thinks was wrongly taken.”

In *Babalola v. Stare* (1989) 4 NWLR (Pt. 115) 264 at 294; the Supreme Court held inter alia that:-

“An appeal presupposes the existence of some decisions appealed against. In the absence of such a decision on a point, there cannot possibly be an appeal against what has not been decided against a party.”

See also *Oredoyin v. Arowolo* (1989) 4 NWLR (Pt. 114) 172.

Parties are bound by the case they put forward to the court. Therefore, in an appeal, parties are normally confined to their case as pleaded in the court of first instance. See *Horizon Fibres (Nig.) Plc. v. M.V. Baco Liner 1* (2002) 8 NWLR (Pt, 769) 466; *Jumbo v. Bryanko International Ltd.* (1995) 6 NWLR (Pt. 403) 545.

Apparently, the appellant is gratuitously fighting the battle of the interested party respondent and in its sudden assumed role of an unsolicited sympathizer, it is now crying more than the bereaved. The appellant impress me as an errant knight in shining armour looking for skirmishes all over the place. The appeal of the present appellant must necessarily be limited to the order of transfer of the sum of N9,020,000.00 to Savannah Bank. Plc. in the joint names of the appellant and the 1st respondent.

It is important that I mention that the interested party/respondent has already separately appealed against the refusal of the lower court to join it as a party in the substantive suit in Appeal No. CA/C/

79/2001, which was in fact heard on the same 18/1/05 as this present appeal. It is therefore undesirable to have two separate and different appeals on the same issue involving the same parties in the same court. From the foregoing, I am satisfied that ground 6 of the grounds of appeal filed by the appellant is incompetent and the preliminary objection must be upheld. An issue for determination, which is based on an incompetent ground of appeal is at large and goes to no issue and ought to be struck out as worthless. It is the grounds of appeal that provide the legal basis for an attack made on the judgment or ruling of a trial court. It is the grounds of appeal that give life, meaning and content to the issues raised in the appeal for determination. See *John Holt Ventures Ltd. v. Oputa* (1996) 9 NWLR (Pt. 470) 101 at 113; *Ononiwu v. RCC Ltd.* (1995) 7 NWLR (Pt. 406) 214; *Sadiku v. A-G, Lagos State* (1994) 7 NWLR (Pt. 355) 235; *Egbe v. Alhaji D* (1990) 1 NWLR (Pt. 128) 546. So, where the ground of appeal is incompetent it follows that the issues for determination formulated therefrom cannot stand.

The main issue for determination in this appeal as set out in the lead judgment is clear, simple and straightforward. The question is, was the trial Judge right when he made the order that the appellant should pay the sum of N9,020,000.00 (Nine million, twenty thousand naira) into an interest yielding account with the Savannah Bank Plc., Calabar? The order in question was made at an interlocutory stage of the proceedings while the substantive suit was still pending. It is necessary to relate the order made by the trial Judge to the claim of the 1st respondent before the trial court. These have been reproduced in the lead judgment so I need not repeat them. The gist of the claim is that the 1st respondent paid in a UBA cheque for the sum of N9,020,000.00 in the appellant's bank but it refused to credit the proceeds of the cheque to it or return the cheque unpaid to it. I have reflected on the 1st respondent's claim before the lower court and the motion it filed on the 24/6/98 praying for order compelling the appellant to immediately credit the 1st respondent's account,

A dispassionate consideration of the claim and the said application clearly reveal that they are both one and the same. The granting of the application of the 1st respondent will automatically dispose of the substantive suit. What will be left before the court will be the

claims on interest and damages. Where a court finds itself in such a situation the interest of justice demands that it should proceed to hear evidence of witnesses and determine the issues in the substantive suit. See *Ojukwu v. Govt. of Lagos State*, (1986) 3 NWLR (Pt. 26) 39 at 41.

It is clearly wrong for a court to decide in limine, at the interlocutory stage, issues meant to be determined at the trial of the substantive suit. In *Kotoye v. Saraki* (1994) 7 NWLR (Pt. 357) 414 at 428, the Supreme Court held that:-

"In an interlocutory application or appeal, the court must avoid making any observation in the ruling or judgment which might appear to prejudge the main issues in the proceedings relative to the interlocutory application and Which may have the effect of affecting the merits of the substantive case or remove the substratum thereof." Also in *Pharmatek Ind. Ltd. v. Ojo* (1994) 7 NWLR (Pt. 359) 751 at 760, this court held that:-

"Judges while making interlocutory rulings must desist from making any findings which may prejudice the substantive case. The grant of all the reliefs sought by the applicant in this case will indirectly amount to deciding the main issues in the substantive appeal at the interlocutory stage thereby knocking the bottom out of the substantive appeal."

The learned trial Judge said at page 78 lines 23 - 29 and page 79 lines 1-3 of the record that:-

"I have carefully considered the above arguments put forward by counsel on the issue and I am of the opinion that it will be premature at this stage to make an order compelling of the defendant to credit the account of the plaintiff with the said sum ..."

Now, if the court thought it wise to wait until the full trial, one wonders why it made the order transferring the money as it did. By so doing the lower court inadvertently resolved that the value had been given to the cheque and that the money was with the appellant. It was the very trial Judge who held that it was premature to make an order compelling the appellant to credit the account of the 1st respondent. If that is the case it was also premature to order the appellant to transfer the value of the same cheque to any other account. Indeed, the learned trial Judge held at page 78 lines 23 - 36

of the record that:-

B *“...It will be premature at this stage to make an order compelling of the defendant to credit the account of the plaintiff with the sum when it is not yet certain whether the cheque is forged or not, whether or not value ought to be given to the cheque at all; whether by giving value to the cheque, the defendant (appellant) is estopped from raising issue of any defect on the face of the cheque. Whether the entire transaction is illegal. All the above are issues that the court will determine at the trial of the substantive suit after taking full evidence.”*

C Based on the above findings of the trial Judge, the only reasonable legal option open to him was to dismiss the 1st respondent’s application and proceed to hear the substantive suit and resolve the issues, which he correctly identified in his ruling. That would have D been the end of the matter.

Curiously enough the learned trial Judge proceeded to say at page 80 that:-

E *“The defendant cannot claim that they cannot honour a false cheque but at the same time went ahead to receive value for the same fraudulent cheque, retain in their custody and making use of it. No man is allowed to “benefit from his own mistake.”*

F That conclusion is a triple somersault from his findings at page 78 lines 23 to 29 and page 79 lines 1 - 3 of the record. The two findings are mutually contradictory, mutually repugnant and totally irreconcilable. By making the order for the transfer as it did, the trial Judge inadvertently resolved that value had been given to the cheque, and that the proceeds of the cheque was with the appellant without resolving whether or not the cheque is a forgery.

G Mr. Neji argued that the interested party/respondent admitted in paragraph 8 of the further and better affidavit in support of its application for joinder that the cheque in question had been cleared and the money was in the coffers of the appellant. He reproduced the averment in the said paragraph as follows:-

H *“... It was assumed under the clearing house procedure that the cheque had cleared and the amount of the appellant with the Centra! Bank of Nigeria was debited in favour of the defendant/respondent.”*

No doubt Mr. Neji's submission is founded on a wrong and shaky premise because it was based on an assumption and not a fact. An assumption is not a fact. For undisclosed reasons, Mr. Neji chose not to reproduce the whole of paragraph 8 and he also conveniently avoided the averments in paragraph 9 of the same further and better affidavit, which is at page 33 of the record of proceedings. For clarity and avoidance of doubt, I have chosen to reproduce both paragraphs fully herein below. B

8. That as the fake cheque was not returned unpaid within the stipulated time owing to the fact that it got missing it was assumed, under the clearing house procedure that the cheque has cleared and the account of the applicant with the Central Bank of Nigeria was debited in favour of the defendant/respondent. C

9. That I know for a fact that the forged/fake cheque could not have cleared as it was never issued by GOF & Associates in the first place and GOF & Associates never had up to N500,000.00 in its account with the Lagos east branch of the applicant." D

A communal reading of the above paragraphs which were unchallenged, unequivocally show that the interested party/respondent never admitted that the said cheque had been cleared or that the proceeds of the cheque was in the coffers of the appellant. The appellant itself in paragraphs 5 - 18 of its statement of defence and paragraphs 12-14 of its counter affidavit denied that the cheque was cleared or that the proceeds of the cheque was with it. It went further to say that if the lower court makes any order on the appellant to pay any sum, it will be compelling it to pay such money from its own fund because the cheque in dispute has not been cleared and the proceeds have not been paid to it. E
F

Another point to note is that there was no application by any of the parties for the order of transfer of the money to another bank. There was also no evidence before the court that the Res (N9,020,000.00) was in danger of being dissipated especially when it has not been resolved whether the cheque is forged or not. The duty of the court is to confine itself to the case presented to it by the parties. See *Comm. of Works Benue State v. Devcon Ltd.* (supra). G
H

There being no application for the preservation of the res, the subject matter of the suit, the lower court had no power to grant the

order compelling the appellant to pay the value of the cheque in dispute when its nature had not been ascertained or determined. After all, a court is not a charitable institution and so will not grant a relief not sought. See *Ekpenyong v. Nyong* (1975) 2 S.C. 81; In *Re: Mbamalu* (2001) 18 NWLR (Pt. 744) 143 at 159 and *Imam v. A. B. U.* (1970) NNLR 39. It is not the duty of a trial court to consider and decide issues not raised by the parties. In *Akinboni v. Akinboni* (2002) 5 NWLR (Pt. 761) 564, this court held at pages 578-579 and 586 of the report that:-

C *“It is wrong or erroneous for a court to grant an order or relief which is not claimed or brought by the party in whose favour the order was made. In the same vein, the court which is not a “father Christmas” or a social welfare institution should not grant to a party an order, relief or declaration in excess of or outside what he claimed*
D *or sought for. The rationale of the rule, which forbids gratuitous award by the court contrary to the rule of practice and pleadings, is to avoid surprises during proceedings and to ensure fair hearing to the parties without showing favour to one or the other... The rule against unsolicited or gratuitous awards by courts is of general application to all*
E *cases as it affects or robs the court of jurisdiction to make such awards.”* See also *Adefulu v. Okuloja* (1996) 9 NWLR (Pt. 475) 668; *Omotunde A v. Omotunde* (2001) 9 NWLR (Pt. 718) 252.

Also, in *Simton (Nig.) Lid. v. Pamil Ind. Ltd.* (2001) 8 NWLR
F (Pt. 714) 49 at 59, it was held that:-

“A court ought not to play the role of Father Christmas which can go around granting to parties relief which they have not asked for; see Nwanya v. Nwanya (1987) 3 NWLR (Pt.62) 697. In the adversary system, a court makes orders on the lis or issues raised by the
G *parties. Where a court grants to a party a relief which it did not seek it has made the order on a lis not raised by the party. This will be an order made without jurisdiction and therefore a nullity; See Umenweluaku v. Ezeani (1972) 5 S.C. 343; Western Steel Works Ltd. v. Iron & Steel Worker Union (1986)3 NWLR (Pt.30) 617 at*
H *618. Where the court in the exercise of its jurisdiction makes a largesse of a relief not claimed, the appellate courts have been consistent in their rejection of the exercise of such power.”*

It is also wrong for a court to ignore the application before it

and decide issues based on the mere submission of counsel particularly when there is no evidence whatsoever to support it. It is clear that the foundation for the trial Judge's order came from the submission of Chief Ndoma-Egba, counsel for the 1st respondent at the lower court recorded at page 60 lines 31 - 36. It reads:-

"...That the justice of this matter will be met if the money is kept and deposited with another bank in an interest yielding account preferably, the Savannah Bank Plc.

That 1st Bank has just appropriated the money to itself without any interest being recorded."

The above statement is not supported by any evidence whatsoever in the record. It will be recalled that the application was fought at the lower court on affidavit evidence and nowhere in the affidavits and counter affidavits was there any averment made in support of the said statement. It is surprising that a court would ignore the application, prayers and affidavit evidence before it and make an order based on the mere submission of counsel to one of the parties. The submissions of counsel however, brilliant cannot be a substitute for evidence. In Chukwujekwu v. Olalere & Anor. (1992) 2 NWLR (Pt. 221) 86, this court held at page 93 that:-

"It is now trite law that no matter how brilliant and persuasive counsel's submission may be, it can never metamorphose to evidence."

See Obasuyi v. Business Ventures Ltd. (2000) 5 NWLR (Pt. 658) 668 at 690.

Also in Aro v. Aro (2000) 3 NWLR (Pt. 649) 443 at 457, this Court held that:-

"The argument of counsel to a party, however brilliant cannot form or be valued as evidence in favour of a party or take the place of evidence which is lacking in his case."

It should be pointed out and noted that the "res" in this case on appeal is the proceeds from the cheque which the lower court held was premature to give value to or to order payment to be made to the respondent because it has not been determined if it was forged or not. So if this is the case can it be said that there is a "res"? Where it is ascertained that there is a "res" a court is duty bound to protect it but where the "res" uncertain or does not exist it will be

wrong for a court to proceed to make an order to protect an imaginary “res”.

Thirdly, it is strange how the learned trial Judge came to the conclusion that:-

B *“The defendant cannot claim that they cannot honour a false cheque but at the same time went ahead to receive value for the same fraudulent cheque, retain in their custody and making use of it. No man is allowed to benefit from his own mistake.”*

C Nowhere in the record of proceedings of the lower court presented before this court is there any evidence in support of the trial Judge’s conclusion. It is not the function of the lower court by its own exercise to supply or imagine evidence. See *N.B.C Plc. v. Oboh* (2000) 11 NWLR (Pt. 677) 212 at 216; *UTC v. Nwokoruku* (1993) 3 NWLR (Pt. 281) 295; *Ikenye v. Ofune* (1985) 2 NWLR (Pt. 5) 1 Anyakpele v. D Nigerian Army (2000) 13 NWLR (Pt. 684) 209 at 215; it was held that it is the duty of a court or tribunal or of any adjudicating body to limit itself to the evidence before it and not to go fishing for evidence. In *Transbridge Co. Ltd. v. Survey International Ltd.* (1986) 4 NWLR (Pt. 37) 576 at 597; *Eso, JSC*, had this to say:-

E *“Notwithstanding all these, law should only be applied to facts of a case. It is not for a court to manufacture facts or work from law backwards to facts on the pretext of justice. That could amount to judicial anarchy. It is the establishment of facts that comes first and later the application thereto of the principles of law. Indeed, I consider this as the only legal process by which justice could be arrived at.”*

G In my view, the lower court did not exercise its discretion in the matter judiciously and judicially. A discretion, which is exercised on a misapprehension of facts, disclosed or on extraneous materials cannot be said have been exercised judicially and judiciously. See *Adejumo v. Ayantegbe* (1989) 6 SCNJ 76 at 88 and 91; (1989)3 NWLR (Pt.110) 417. Ordinarily this court will not set aside a discretion exercised by the court below, if it is exercised, that is not arbitrarily or H based on extraneous or irrelevant materials. In the instant appeal the learned trial Judge clearly exercised his discretion on extraneous materials and it cannot be said to have been exercised judicially and judiciously. Where a trial court fails to exercise its discretion judicially

and judiciously, in the interest of justice, an appellate court would correct the error and make the right order that, is just and proper in the circumstances of the case. This is a proper case for this court to intervene. There is merit in this appeal and it succeeds.

Accordingly, the ruling of the Federal High Court delivered on 6/7/99 in Suit No. FHC/CA/CS/34/98 wherein it ordered the appellant to transfer within 14 days the sum of N9,020,000.00, the subject matter of the suit to Savannah Bank Plc., Calabar, in an interest yielding account, in the joint names of the 1st respondent and the appellant is hereby set aside. I abide by the orders in the lead judgment that this case be sent back to be heard by another Judge of the Federal High Court.

Appeal allowed.

CHUKWUMA-ENEH JCA (DISSENTING)

This interlocutory appeal is against the ruling of the Federal High Court, Calabar (CORAM: Nwaogwugwu, J) in which it has declared at p. 77 LL 20 - 22 and at page 80 LL 24-28 to the next Page 81 LL 1 - 3 of the record respectively as follows:-

“(1) That “the application of UBA to be joined as a co-defendant in this suit fails and is accordingly refused;

(2) “... that the defendant shall within 14 days of making this order cause to be transferred the said sum of N9,020,000.00 the subject matter of this suit now in their custody to Savannah Bank Plc., Calabar in an interest yielding account in the joint name of the plaintiff and the defendant such that none of parties shall have access to draw on the account pending the hearing and determination of the substantive suit or until the court otherwise orders.”

Aggrieved by the foregoing decision, the defendant has appealed the same to this court by raising seven grounds as per the notice of appeal at pp. 109 - 111 of the record. From these grounds of appeal the defendant/appellant has distilled three issues for determination as follows:-

“1. whether in the face of the evidence that the cheque for the sum of N9,020,000.00 was spurious/forged the trial court was justified to order that value be given to it even if it was only for depositing

in an interest yielding account till the end of trial.

2. whether giving value to the cheque at any stage of the proceedings will not prejudice the case of the defendant/ appellant.

3. whether the trial court was justified in its refusal to join UBA Plc; the interested party and owner of the cheque in dispute in this suit."

The plaintiff/respondent has in its brief of argument formulated two issues as follows:-

"1. whether having regards to the peculiar circumstances of this case, the learned trial Judge was justified in ordering that the amount in dispute be deposited in an interest yielding account in the joint names of the parties before it.

2. whether the learned trial Judge rightly exercised his discretion in refusing to join UBA as a party to the action."

The latter issue has been argued in the alternative, that is, in the event of the preliminary objection taken in this case as hereinafter outlined being overruled. On 26/7/02 - the plaintiff/respondent filed a notice of preliminary objection to the effect that ground six of the notice of appeal and Issue 3 of the appellant's brief of argument raised therefrom are incompetent and should be struck out. I will come to this question in a trice.

Meantime, the interested party/respondent has also filed a brief of argument in this matter and has raised two similar issues for determination as identified by the plaintiff/respondent I have all the same reproduced them as follows:-

"1. whether the learned trial Judge was right when he ordered that the defendant/appellant should within 14 days, pay the sum of N9,020,000.00 (Nine million and twenty thousand Naira) into an interest yielding account in Savannah Bank Plc., Calabar Branch in the joint names of the plaintiff/respondent and defendant/ appellant.

2. whether the learned Judge was right when he refused to join the interested party/respondent as an intervener in the plaintiff/respondent's action on the grounds slated in the ruling dated 6th day of July 1999."

Before addressing the preliminary objection let me set out some major facts in the context of the peculiar circumstances of the instant appeal.

The respondent (as plaintiff) in the court below, has claimed against the appellant (as defendant) as follows:-

“1. The sum of N9,020,000.00 being value of United Bank for Africa Plc; Lagos East branch cheque No. 000291771 paid by plaintiff into her account No. 0140200012400 held at the defendant’s Ikom Branch...” B

2. Account of the interest and other earnings accruing on the said sum ... from 24th March, 1998 till date.

3. N100,000,000.00 being general damage for breach of contract. C

4. N50,000,000.00 ...being damages for loss of reputation...”

The respondent (as plaintiff) has in addition brought an application seeking that the said sum of N9,020,000.00 (hereinafter called the ‘res’) be credited to its account with the appellant (defendant). The interested party also has brought an application in which it has sought three reliefs to wit, firstly, to be joined as a party to the suit. Secondly, leave to use the affidavit it filed against the respondent’s (as plaintiff) application and, thirdly, an order to restrain the appellant (defendant) from so crediting the respondent’s (plaintiff’s) account with the appellant (defendant) in the amount aforesaid. E

The two applications have been consolidated at the court below for purposes of hearing the two applications together.

In its ruling in regard to the respondent’s (plaintiff’s) application the court below in my view acting within its jurisdiction directed F that the sum of N9,020,000.00 i.e. the Res be paid into an interest yielding account in the Savannah Bank Plc. in the joint names of the appellant (defendant) and the respondent (plaintiff). The interested party being aggrieved by the decision appealed as per the appeal No. CA/C/79/2001 (a sister appeal to the instant one): United Bank for Africa Plc. v. Akparabong Community Bank Ltd. & Anor. This court’s judgment thereof was delivered on 22/3/2005. I respectfully disagreed with my learned brothers, that is, as per the lead judgment of Omokri. JCA, granting the interested party (i.e. UBA Plc.) its first relief to be joined as a party in the suit. The second relief was unanimously refused. To my dissenting judgment as per the cited appeal, I upheld the trial court’s ruling to the effect that the interested party herein, as the appellant in the cited case, not being a necessary party ought not H

to be joined as a party in the suit under Order IV Rule 5(1) of High Court (Civil Procedures) Rules 1976. I also said that for lack of locus standi, the interested party is not so entitled to be so joined in so far as reliefs (B) and (C) of its application (to be reproduced hereinafter) are concerned, moreso, on the ground that it cannot maintain the reliefs not being a “party thereto” in the context of the substantive suit and so not a competent appellant within the meaning of section 243 of the 1999 Constitution and Order 1, Rule 2 of the 2002 Rules of this Court. Specifically, under section 243 (supra) that the interested party cannot come within the definition of either “a party thereto” i.e. entitled to a right of appeal nor “other person having interest in the matter,” for not having obtained leave of this court or the court below. See: *Re Madaki* (1996) 7 NWLR (Pt.459) 153. I also held that it (interested party) had to be so joined before filing its notice of appeal if at all. Thus compounding the position of the interested party vis-a-vis its appeal for non joinder.

Having, as it were, straightened out the complicated background of this matter I now go on to deal with the preliminary objection taken by the respondent against ground six and the Issue three as formulated which in effect has complained that the court below wrongly refused the interested party’s application for joinder as a party in the suit.

In the light of the majority decision in the sister appeal No. CA/C/79/2001 the preliminary objection has in my view appeared to have been over-reached by that decision which has upheld the interested party’s appeal to be joined as a party to the suit. In other words, this question has been successfully terminated in favour of the interested party in the sister appeal No. CA/C/79/2001 unreported. I must subjoin that having upheld the interested party’s appeal this court has become functus officio on that question and it is bound by it as per estoppel per rem judicatam. In case, however, I am wrong I now go the whole hog and deal with the question in extenso.

The proposition as recounted above has raised some interesting legal points. The respondent’s contention as per its brief is that the appellant has suffered no legal grievance which is cognizable and which otherwise should form the basis for appealing the instant decision on the said point. And that as the application for joinder has

been the one filed by the interested party itself and not the appellant in this case the appellant has no right of appeal against the refusal of the application for joinder of the interested party - the application not having been decided against it. See *Okene v. Orianwo* (1998) 9 NWLR (Pt.566) 408 *Ogunbiyi v Ishola* (1996) 6 NWLR (Pt.452) 12 also see: In *Re Ijelu* (1992) 9 NWLR (Pt.266) 414; *Saude v. Abdullahi* (1989) 4 NWLR (Pt.116) 387. B

The appellant in its reply brief has argued that the objection is quite belated as it should have been taken at the consolidation of the two applications even though the consolidation was simply for purposes of hearing them together. It has pointed that as the legal rights of the interested party to the cheque and its proceeds would be affected that it (the interested party) should be joined as the party likely to be affected by the interlocutory or the final decision. Besides, the appellant has submitted that the objection is misconceived as it does not involve question of jurisdiction, substantial point of law and procedure nor has it raised any issue of a miscarriage of justice. In short, it has submitted that the ruling of the court below on the joinder application has affected all the parties to the suit, and so, that it (the appellant) has a right of appeal against the decision. C D E

I think that the instant preliminary objection has to be disposed of with dispatch in that, by the nature of such objection, it is capable, if upheld, of disposing of the matter in question in this instance the competency of the said ground six and issue three rested upon it. It has to be resolved before dealing with the merits of the case. See *Enang & Ors. v. Adu & Ors.* (1981) NSCC (Vol.12) 453 *NNB Plc. v. Imonikhe* (2002) 5 NWLR (Pt.760) 294, *Uba v. Yawe* (2000) 8 NWLR (Pt. 670) 739; *Onyali v. Okpala* (2001) 1 NWLR (Pt.694) 282, also see, Order 3 Rules 5 (1) of the rules of this court 2002. It is hard not to see the merit in the respondent's submission on this question. Firstly, I must emphasize that the respondents to the application for joinder filed by the interested party are the appellant herein (as defendant/ 2nd respondent) and the respondent herein (as plaintiff/1st respondent) that is, the substantive parties in this suit. The crucial question to be answered here in this regard is whether the appellant has suffered any legal grievance as a result of the said ruling refusing the joinder of the interested party to the suit. In other words, has the F G H

decision as pronounced by the trial court affected the appellant's interest prejudicially as to ground the appellant's appeal in this case. To suffer a legal grievance is another way of saying that a person is aggrieved, that is to say, that the decision has wrongly affected his title to something: See *Re Sidebotham* (1580) 14 Ch. D 458 at 465; Buxton v. Minister of Housing & Local Government (1960) 3 AER 408; (1961) 1 QB 278 so that a person is not aggrieved merely because he is annoyed, dissatisfied or frustrated. See: *Eating Borrogh Council v. Jones* (1959) 1 AER 286; (1959) QB. 384 at 392. The appellant as I will show anon is not an aggrieved person no matter its frustration vis-a-vis the order refusing the joinder of the interested person - Nor is it the appellant's case that its title to the res has in any way been wrongly affected. I cannot therefore see any legal grievance suffered by the appellant nor how its title to the res has been prejudiced by the decision. Unquestionably, the onus is on the appellant to show its legal grievance and ultimately the competency of its appeal here. So far, it has not discharged the burden. Besides, the instant application, if I may repeat, is by the interested party not by the appellant. I cannot see how the appellant here can appeal the order based on the application filed by the interested party in regard to its joinder to the suit as a party, without showing his legal grievance or how the order has affected the appellant. Again, it should be pointed out that so far the interested party has remained a non-party to the suit. And so, section 243(a) of the 1999 Constitution cannot assist the instant appellant. Even moreso, it has not been shown that the purpose of this appeal is to correct any error standing in the way of the appellant in prosecuting its appeal. There lies with respect, the frivolity of the appeal. This is crucial when the interested party herein has appealed the ruling based on the refusal to join it (the interested party) as a party.

From whatever stance this issue is viewed, the refusal to join the interested party in this case cannot ground a right of appeal in favour of the appellant. I must restate that the consolidation of the two applications has been misconceived as it does not ipso facto confer on either party any benefits outside the convenience of hearing the two applications together. They i.e. the applications still maintain their separate identity and character. The appellant has apparently

read too much into the question of having the two applications consolidated. Hence, the ostensible misperception of the crucial factor of its legal grievance to ground its appeal. Finally, the appellant having failed to discharge the onus on it as regards the competency of its appeal by specifically showing that it is an aggrieved party with a legal grievance it has suffered or that its title has been affected wrongly as a result of the trial court's ruling on the joinder application I have no other option than to uphold the objection. In this regard, the position is that ground 6 of the grounds of appeal is incompetent. That being so, it is trite that issue three founded upon it is also incompetent and is hereby discountenanced, it should be struck out so also all the arguments proffered in elucidation of that issue and I so order; I make no order as to costs.

I now proceed to consider the appeal proper. The appellant has argued issues one and two together and has submitted thereof that the trial court against the abundant available evidence which has shown that the respondent is a strong and reliable bank nonetheless has ordered that the res i.e. the sum of N9,020,000.00 in this case he paid into an interest yielding account with the Savannah Bank Plc. in the joint names of the appellant and the respondent to abide the result of the suit. It has opined that it is a wrong exercise of its discretion. See *A.C.B. Ltd. v. Dominica Builders Co. Ltd.*, (1992) 2 NWLR (Pt. 223) 296. *Adejumo v. Ayanfegbe* (1989) 3 NWLR (Pt. 110) 417 at 445. It also has submitted that the trial court ignored the fact that the said cheque apart from being a stolen cheque has been forged; and also the impact on the said cheque on the provisions of sections 24 and 77 of the Bills of Exchange Act Cap 35 Laws of the Federation of Nigeria. It has maintained that in the circumstances that value should not be given to the said cheque. See *Union Bank of Nigeria Ltd. v. Adediran* (1987) 1 NWLR (Pt.47) 52; *African Petroleum Ltd. v. Owodunmi* (1991) 8 NWLR (Pt. 210) 391. The court's attention has been drawn to the likelihood of the illegality of the transaction and its consequences. See: *Oilfield Supply Centre Ltd. v. Johnson* (1987) 2 NWLR (Pt.58) 625. It is upon the foregoing reasoning that has posited its submission that the trial court should not have exercised its discretion not otherwise judicially and judiciously reached by ordering the preservation of the res as it did. It has urged the court to

allow the appeal.

On the other hand, the respondent has argued in support of the order preserving the res. In regard to its position it submits that the trial court has rightly and properly exercised its discretion. It has also gone on to show that the appellant has in its possession the said
 B sum of N9,020,000.00 i.e. the res in this case. The respondent has relied on the terms of prayer (C) in the application for joinder filed in this case by the interested party and paragraph 8 of its affidavit in support to boost the contention on this issue being beyond dispute
 C that is in regard to the said cheque having been cleared. The respondent has to relied *Edeni v. Akamkpa Local Government* (2000) 4 NWLR (Pt.651) 657; *Agbaje v. Ibru Sea Foods Ltd.* (1972) 5 SC. 50, *Alegbe v. Abimbola* (1978) SC. 39 to submit that in the absence of any contrary deposition, the court ought to regard the question of
 D the appellant being in possession of the res as having been satisfactorily established. It has countered the question of illegality of the entire deal as raised by the appellant as post hoc and that the illegality not being ex facie is a matter of evidence upon which the trial court has to make definitive finding. The point has been taken that so far the
 E appellant has flouted the said order on the preservation of the res; and so it should therefore not be allowed to use the withdrawal of the banking license of Savannah Bank Plc. that happened some years later after the said order as an excuse for its default. The court is
 F urged to dismiss the appeal and to exercise its powers to order that the res be paid into an interest yielding account this time with the Diamond Bank Ltd. or Oceanic Bank International (Nig.) Ltd. in the joint names of the appellant and Akparabong Community Bank Ltd to abide the result of the suit.

G The interested party has virtually replicated in its brief of argument herein its argument in its appeal as per appeal No. CA/C/79/2001 (the sister appeal). I have respectfully dissented from the lead judgment of Omokri, JCA concurred in by Thomas, JCA. The summary of its argument is to the effect that the interested party on a
 H proper evaluation of the facts and materials placed before the trial court should be joined as a party to the suit under Order 4 Rule 5(1) of the Federal High Court (Civil Procedure) Rules 1973 now Order 12 Rule 5(1) of the Federal High Court (Civil Procedure Rules) 2000.

It also has prayed this court to set aside its order in regard to the preservation of the res as the appellant is strong and reliable. The court is urged to allow the appeal and set aside the decision of the trial court.

It seems to me that this is the moment to examine the locus standi of the interested party in the instant appeal viewed from the standpoint of its being the appellant in appeal No. CA/C/79/2001; for purposes of comprehending the emerging facts I have set forth in extenso the interested party's prayers in its application for joinder as follows:-

(A) An order granting leave to the appellant to be joined in this matter as an interested party who may be affected by any interlocutory order that may be made and/or the final outcome of the matter.

(b) An order granting leave to the applicant rely on the affidavit in support of this application in opposing the plaintiff's application dated the 25th day of June, 1998. Or in the alternative to the second prayer above.

(C) An order restraining the defendant/respondent from crediting the plaintiff/respondents account No. 014032000134000 held at the defendant/respondents Ikom branch with the sum of N9,020,000.00 ... or in any way paying the said sum being the purported value of a forged/fake cheque of the appellant's Lagos East branch over to the plaintiff/respondent."

It is to be noted from the onset that the instant appeal is a sister appeal to appeal No. CA/C/79/2001 i.e. on having been deconsolidated by this court (not this panel). It is not important now to go into the reasons. Suffice it to say, that the First Bank of Nigeria Plc. (as defendant) and UBA Plc. (as interested party) both have appealed the trial court's decision on the non-joinder of the interested party and its order as regards the disposition of the res in this case. The court however has delivered its judgment in the sister appeal No. CA/C/79/2001 on 22/3/2005 and by a majority decision the crested party, the appellant in that matter has been joined as a party to the suit. It has to be noted that both the ground of appeal and the issue raised therefrom in Appeal No. CA/C/79/2001 against the order of the trial court on the preservation of the res i.e. in regard to ordering that the sum of N9,020,000.00 be paid into an interest yielding ac-

count with the Savannah Bank Plc. Calabar in the joint names of the parties (i.e. the plaintiff and defendant in the suit) to abide the result of the suit, have to be struck out upon upholding the preliminary objection taken on the point. I agreed with the decision on this question for want of locus standi on the part of interested party in the suit to initiate them. However, I disagreed with the decision on the joinder of the interested party as a party to the suit.

The main plank of my disagreement as alluded to above with the majority decision is founded upon the proposition that only those legally interested in a claim can be made parties to the suit. That is to say, in relation to the said appeal, having examined the four reliefs as per the statement of claim I came to the conclusion that none of the reliefs sought therein had been made or to be resolved between the interested party (as appellant) and the respondent (as the plaintiff) in the substantive suit particularly as the action was founded on contract to which the interested party/appellant was a total stranger. I relied on *Edokpolo, & Co. Ltd. v. Sam-Edo Wire Ind. Ltd.* (1984) NSCC (Vol. 15) 553; *Chief Johnson Olujitan & Anor v. Deacon J. K. Oshatoba* (1992) 5 NWLR (Pt.241) 326 at 329 per Achike, JCA, (as he then was). The two cases have decided that a person (as the interested party in this case) should not be joined as a defendant against whom there is no claim by the plaintiff. I showed that the respondent therein (as plaintiff) had no claim whatsoever against the interested party and so it was not a necessary party for the determination of the suit. And, in the result, I refused the joinder application.

The implication of the foregoing reasoning is that the decision of this court as per the unreported judgment in the appeal No. CA/C/79/2001; delivered on 22/3/2005 is final and binding on the court and the interested party i.e. the UBA Plc. It remains competent until set aside on appeal. This means that the two issues for determination raised by the interested party as regards to wit, the non-joinder of the interested party as a party to the suit and the order as to the preservation of the res in the said appeal No. CA/C/79/2001 having been decided and pronounced upon in the said unreported decision cannot be reopened for relitigation in the instant appeal. And as I have stated above the court has become functus officio and it is bound by its decision on the issue as per estoppel per rem judicatam. See *Blay*

v. Solomon (1947) 12 WACA 175 Ifediorah v. Ume (1988) 2 NWLR (Pt.74) 5. This brings me to the pertinent question of its locus standi i.e. of the interested party in the instant appeal. This court I must observe cannot sit on appeal over its own decision in this instance as per appeal No. CA/C/79/2001 and this is what the interested party has attempted to do by submitting the two issues it has raised in its brief herein similar to the issues it raised in appeal No. CA/C/79/2001 for determination by this court. I have raised this question in that as can be seen, the appellant herein is the First Bank of Nigeria Plc. (i.e. the defendant/1st respondent in appeal No. CA/C/79/2001) and not the interested party. Therefore, the interested party has no locus standi in this appeal; therefore its brief stands discountenanced. In other words no further useful reference howbeit can be had to the said brief for purposes of the instant appeal, so that any reference to it goes to no issue in the instant appeal and has to be totally discarded for purpose of this appeal. Ground 6 is thereby declared as incompetent. At this stage I come to the appellant's appeal. Very critical to this appeal is that the appellant in marrying issues 1 & 2 for determination to the grounds of appeal has at paragraph C of page 2 of its brief stated and I quote:

"Issues 1 and 2 would be argued together as hereunder and are covered by grounds 1,2,3,4, 5 of appeal at Pp. 93 - 95 and ground 4 of the notice of appeal at P. 116."

For raising this matter I recall the dictum in ACB Ltd. v. Losada (1995) that the Judge is not there to trap any party or set in motion what the parties have not before him. Thus for the trial court to have closed its eyes to any irregularities latent or patent on the record without suo motu dealing with it would have amounted to injustice per Onu, JSC. See Ajalyn Shoes Ltd. v. Akinwade (1991) 2 NWLR (Pt.174) 432 and I approach this issue in that manner.

As it has turned out grounds 1, 2, 3, 4, and 5 at Pp. 93 - 95 of the record are contained in the notice of appeal filed by the instant appellant's counsel Chief Orok I. Ironbar. But ground 4 of the notice of appeal at p. 116 of the record is contained in the notice of appeal dated 20/7/99 filed by Messrs. Udo Udoma & Bella Osagiefor U.B.A. Plc. (interested party). The appellant has also married issue 3 at p. 5 paragraph D of its brief and has stated it is covered by ground 6 at p.

108 of the record as per the notice of appeal filed by Chief Orok I. Ironbar and also Grounds 1, 2 and 3 of the notice of appeal at pp. 113 -116 of the record filed by counsel to the interested party - Messrs. Udo Udoma & Bello Osagie. The appellant has not in its brief attempted to explain these distortions in its brief nor at the oral hearing of the appeal, and so it is no part of this court's business to do so or to speculate on the matter. The appellant has clearly relied on two separate notices of appeal - one filed by it and other not filed by it but by the interested party in raising its issues and in arguing its appeal. This it cannot do; it is trite that the court will not countenance or entertain argument on any ground of appeal which does not form part of the notice of appeal filed by an appellant. See *Kolawole v. Alberto* (1989) 2 S.C. (Pt. 11) 41; (1989) 1 NWLR (Pt.98) 382 this principle applies mutatis mutandis to this case even moreso on any issue formulated from such ground of appeal. These distortions have great implication on the status of the brief and the appeal itself. That is to say, that where a court as this court is faced with a situation in which two persons appeal a ruling on two consolidated applications as here and where one of the appellants as here raises issues for determination in the appeal from the grounds of appeal as contained in two separate notices of appeal filed by the different persons as appellants (as in this case by the instant appellant and the interested party) and again, where one of the two persons (i.e. appellant) is held not to have the locus standi in the appeal and that person's notice of appeal is not otherwise defective as in this case, it is my view speaking in the context of this case that the proper step to take in dealing with the issue is to discountenance the grounds of appeal not forming part of the instant appellant's notice of appeal i.e. grounds 1,2,3, and 4 of the interested party's notice of appeal as well as any arguments on the said grounds of appeal as not forming part of grounds of appeal as per the notice of appeal filed by the appellant here; See: *Kolawole v. Alberto* (1989) SC. (Pt. 111) 1; (1989) 1 NWLR (Pt.98) 382 *Olumesan v. Ogundepo* (1996) 2 NWLR (Pt 443) 628. And I so hold in regard to this case. The matter does not however end there. Even though the appellant herein has appealed the ruling given on the consolidated applications, and even at that, it is settled, it is no reason for the appellant to have had recourse to the

grounds of appeal as per the notice of appeal filed by the interested party not even in the instant appeal but in Appeal No. CA/C/79/2001 already decided by the court.

More importantly, I have examined the argument proffered or issues 1 and 2 in the appellant's brief and where as here it is not practicable to excise off the argument on the discountenanced grounds of appeal i.e. as regards grounds 1, 2, 3 and 4 as contained in the said notice of appeal filed by the interested party in order to be able to determine the appeal howbeit on the merits then the appellant's argument as a whole on issues 1 and 2 in its brief has to be discarded i.e. thrown overboard, See *Olumesan v. Ogundepo* (1996) 2 NWLR (Pt.443) 628 per Igu, JSC. The said issues 1 and 2 and the argument predicated on them have become on this basis inexorably incompetent.

In the result, this court on having discountenanced issues 1 and 2 and the arguments on them, they are hereby struck out. Before now I have struck out ground 6 and issue 3 for being incompetent. So that the notice of appeal filed by the appellant has no other competent ground of appeal to sustain it. It has itself become also incompetent being a defective notice of appeal. And I hereby set it aside See: *Global Trans Oceanico S. A. & Anor. v. Free Ent. (Nig.) Ltd.* (2001) 5 NWLR (Pt.706) 426 (2001) 2 S.C. 154. *Akinloye v. Adelakun* (2000) 5 NWLR (Pt.657) 530 at 535. This appeal is therefore struck out under Order 3 Rule 2(3) of the Rules 2002. Also see: *Atuyeye v. Ashamu* (1987) 1 NSCC (Vol. 18) 117, *Nsirim v. Nsirim* (1990) 2 NWLR (Pt.138) 285. The implication of the decision is that the judgment of the court below hereby still stands as to the order of preservation of the res in the sum of N9,020,000.00. This order is subject to the final order I have made hereunder in the case.

I have, however, considered the case on the said issues 1 and 2 in the alternative, in case, I am wrong as per the foregoing reasoning and conclusions. The first question for consideration is whether value has been given to the said cheque in the sum of N9,020,000.00. From all the processes filed by the appellant in this case to which the court is obliged to look at as decided in *Texaco (Nig.) Plc. v. Lukoko* (1997) 6 NWLR (Pt.510) 781, *Nwanosike v. Udose* (1993) 4 NWLR (Pt. 290) 684 and *Abraham v. Olorunfunmi* (1991) 1 NWLR (Pt.165)

533 there is nowhere the appellant has denied that it is in possession of the said amount. I think it is belabouring the point over a matter that has been clearly settled in that the interested party in its amended brief of argument filed on 28/2/03 in the appeal No. CA/C/79/2001 at page 14 paragraph 5.03 has posited that one of the issues to be settled in the suit before the trial court between the interested party and the plaintiff/respondent as being who is entitled the sum of N9,020,000.00 warehoused with the appellant herein as stakeholder (Italics for emphasis). And as professed by the interested party, it is the gravamen for seeking to be joined as a party to the suit as it would not otherwise have sought to be joined. Again, it is worthy of note that the appellant here in its brief of argument filed on 5/3/04 in response to the brief of argument filed by the interested party as per the appeal No. CA/C/79/2001 at page I paragraph CI has simply associated itself with the argument of learned counsel for the interested party/appellant covering pages 5 - 18 of its amended brief of argument dated 26/2/2003 which have thus encompassed the stance taken by the interested party as regards the whereabouts of the res - the appellant herein therefore, has not refuted the res being warehoused with the appellant's bank as stakeholder. And I agree with this assertion by interested party in this regard also found as to the fiduciary status of their relationship as well as to their customer and banker relationship based on contract.

Much heavy weather has been made of the question of whether value has been given to the cheque and if so the whereabouts of the proceeds. There can be no doubt that if the cheque has cleared the proceeds would be in the appellant's possession. The appellant unfortunately has been very evasive on the issue. The essence of the relationship between the First Bank of Nigeria Plc. (appellant) and the respondent in this transaction is for the appellant to collect value and credit the respondent's account. The collection is solely for the respondent and not the appellant or both. Let me venture to recall here my portion in CA/C/79/2001 to the effect that the appellant has the proceeds of the cheque. I have not seen any reason to deviate from that conclusion.

In this regard, I refer to the deposition of the appellant and the interested party in their affidavits of 30/2/98 and 6/8/90 respectively

(at pp. 26 - 27 and 33 - 34 of the record).

The appellant in paragraphs 12 and 14 of the said affidavit deposed as follows:-

“12. That the cheque lodged was a United Bank for Africa Plc. cheque and was presented at the Central Bank of Nigeria Clearing House by the defendant/respondent (i.e. the appellant here) who has till date not received the same back” (words in brackets supplied by me). B

“14. That any order of this court in terms of the motion paper would be compelling the defendant/respondent to pay out its own funds on a forged document.” C

In order to consider the foregoing depositions along side the interested party’s stance on the issue, I have to refer to the following deposition as per paragraphs 6, 7 and 8 of its affidavit and I quote:-

“6. That in between the exchange of the forged/fake cheque D between First Bank of Nigeria Plc. and United Bank for Africa Plc. in Calabar and dispatch of the same to the Lagos East branch of the appellant, the said fake cheque got missing in what was apparently part of the whole scheme of fraud. (Italics for emphasis).

7. That as a result of the facts deposed to in paragraph 6 above, E the said cheque did not get to the Lagos East branch of the appellant and as such was not returned to the defendant/respondent unpaid within the time stipulated under the Clearing House Procedure.

8. That as the fake cheque was not returned unpaid within the F stipulated time owing to the fact that it had gotten missing, it was assumed, under the Clearing House Procedure that the cheque had cleared and the account of the applicant with the Central Bank of Nigeria was debited in favour of the defendant/respondent.”

(Italics mine for emphasis). G

The above deposition by the appellant and the interested party in this case speak for themselves. There can be no doubt that the underlined clause in paragraph 8 above is not in sequence. I have read it over and over again with the clause before the word “and” against the backdrop of the said underlined clause. It seems to me H that the clause after the word “and” represents the consequence after the cheque had cleared but as the parties have no opportunity to address the court on the grammatical structure (i.e. syntax) of the

two clauses before and after the word “and” I say no more of that matter. Even at that, in regard to the parties respective cases here one expects some synchrony on the facts as deposed to by the appellant and the interested party on the same subject matter. The appellant has deposed that to collect value of the cheque it presented the cheque direct to the Central Bank of Nigeria Clearing House; it heard nothing of it ever since. The interested party on its part has deposed to the cheque missing between the First Bank of Nigeria Plc. and United Bank for Africa Plc. in Calabar on the dispatch of it to its Lagos East branch. This does not fall in line with the appellant’s presentation of the cheque to the Central Bank for clearance. To put it in banking parlance, while the appellant’s procedure contemplates clearing the cheque through the Central Bank Clearing House system, for the interested party, it is clearance through the banks own internal clearing system (i.e., between the appellant and the interested party), The two procedures are the two systems of clearing in banking operation and mutually exclusive.

I must advert to paragraph 5 of the statement of defence where the appellant has averred thus, “It is not in a position to return the said cheque which was discovered to be forged and had not been returned to it by the United Bank for Africa Plc. who received same at the Central Bank Clearing House”. The question the appellant has not answered is - how then can it be said the cheque is missing? Therefore, as between the appellant and the interested party lies the truth in this case. In the confusion so generated, the cheque is not only alleged to be forged/fake it is now missing. So far, police action in the matter has not yielded up the culprits nor the missing cheque after all these years. The cumulative effect of all these is to frustrate the claim.

I have so far endeavoured to show from the foregoing scenario that the right of the respondent to the sum of N9,020,000.00 is in dispute, that there is urgent need to secure the fund and prevent its dissipation as otherwise the instant claim may be rendered completely nugatory. In the murky atmosphere of non-disclosure of material facts and deliberate misleading presentation of facts, the trial court was bound on the application before it to secure the res as there is vested in the trial court the jurisdiction to preserve the res i.e.

the fund in dispute and in danger of dissipation in the circumstances. It is settled that interlocutory orders to secure that is, protect funds in dispute in a suit, can be taken at the interlocutory stages of the proceeding. The trial court, I have to observe has not made any findings of facts to prejudice the substantive case. In this case all the parameters to enable invoke the court's jurisdiction are in place as set out above including the fact that the relief is sought in a pending action and so, is not being made in vacua and necessarily has to terminate with the determination of the suit and the respondent has shown that greater harm would result if the fund is not taken into court's custody. I have also dwelt at length on the conduct of the appellant. See: *Gombe v. P.W. (Nig.) Ltd.* (1995) 7 SCNJ 19; (1995) 6 NWLR (Pt.402) 402. Therefore, it is baseless to contend that the trial court in making the order has breached any rule by deciding at interlocutory stage questions properly for the substantive suit. There is no basis for so asserting i.e. as no specific instances as against bald assertions to that effect have been shown. The next point is whether it can be contended that the trial court has acted unsolicited. This can't be so; as there is before the trial court a substantive application brought by the plaintiff/respondent praying to have the proceeds of the cheque i.e. the fund in dispute credited to its account. The court is not bound to grant an application in terms as prayed by an applicant as otherwise the discretionary jurisdiction of the court will be fettered. It is in that regard that the trial court has chosen the middle course of ordering payment into court. Therefore it is my view that the trial court had ample power to secure the res by the order preserving it on the application before it coupled with the oral application made by the parties at the hearing for the order. The parties had sufficient opportunity given to them at the proceeding leading to the order made by the trial court as borne out by the record as the whole essence lies in being heard. It will be stretching the principle of fair hearing to a breaking point to otherwise cover the instant situation. It is clearly far fetched.

Like in all monetary matters, the instant question inclusive, the court has always frowned at leaving funds in dispute as here in the hands of a party to the suit no matter how strong and reliable financially although each case has to be considered on its facts. However,

more often than not funds in such circumstances have been appropriated into court's custody to abide the determination of the suit. In this regard I so hold; I therefore resolve issues 1 and 2 against the appellant.

B For all these, I find the appeal against the preserving order of the res made by the trial court in this case unmeritorious and should be dismissed.

C But before I conclude this case, the Court has to take judicial notice as per Section 149(d) of the Evidence Act 1990 of the Savannah Bank of Nigeria Plc. being subject of liquidation, a frustrating aspect that has rendered carrying out the order of the trial court in its original form impracticable. For the avoidance of doubt the said is also set aside ex debito justitiae and its place, it is hereby ordered that the appellant i.e. First Bank of Nigeria Plc. shall pay within 90 days D from today the sum of N9,020,000.00 in dispute in the case into this Court. The Deputy Chief Registrar of this Court is hereby directed to pay the same into an interest yielding account with the main branch of the Union Bank of Nigeria Plc. in Calabar to abide the result of the suit.

E I therefore dismiss the appeal. The case is remitted to the Federal High Court, Calabar to be started de novo before another Judge other than Nwaogwugwu, J. The respondent is entitled to the costs of this appeal in the sum of N10,000.00,

F Appeal allowed.

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