

**SUPREME COURT OF NIGERIA**  
19TH JUNE, 2009 SC. 205/2002  
**CORAM:- D. MUSDAPHER, P. O. ADEREMI,**  
**C. M. CHUKWUMA-ENEH, J. A. FABIYI,**  
**O. O. ADEKEYE, JJSC**

1. JUMANG SHELIM  
2. YOHANA JUMANG ..... APPELLANTS  
AND  
FWENDIM GOBANG ..... RESPONDENT

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APPEALS - Jurisdiction - Of Customary Courts of Appeal - Issue of - Cognizance of before Court of Appeal - It is cognisable because jurisdiction is the life wire of any adjudication (H1)

COURTS - Customary Courts of Appeal - Composition - Propriety - It should consist of not less than three judges - For anything done under the Constitution - Including determination of existing customary law - Else it is incompetent (H2)

CONSTITUTIONAL LAW - Interpretation - Principles of - There should be a liberal approach - An earlier section should not be interpreted - To make a later section moribund (H3)

JUDICIAL PRECEDENTS - Distinguishing - Coram of Customary Courts of Appeal - Decision in Golok v. Diyalpwan based on s. 224 of 1979 Constitution - Remains intact - As it was made when the coram of the court was fluid (H4)

**FACTS**

The Plaintiff/respondent sued defendants/appellants before the Area Court in Plateau State. Respondent's claim was for title to the land in dispute. After hearing, the process of which also involved a visit to the locus in quo, the trial court found for the respondent and gave judgment accordingly. Aggrieved, appellants appealed to the Customary Court of Appeal. Subsequently, appellants filed an application seeking leave to argue additional grounds of appeal, which application was heard and granted by only two judges of the court

instead of three. The appeal was eventually heard, whereupon the decision of the trial court was reversed.

Dissatisfied, respondent appealed to the Court of Appeal, contending, inter alia, that the decision of the Customary Court of Appeal was a nullity by reason of improper constitution of the court when it heard the application for leave to argue additional grounds. Respondent's appeal was allowed on this ground. Dissatisfied, appellants have brought this appeal to the Supreme Court contending that respondent's ground of appeal before the Court of Appeal complaining of irregular composition of the Customary Court of Appeal was not a question on customary law and as such was not cognisable before the Court of Appeal.

### **ISSUES FOR DETERMINATION**

*"(i) Whether the grounds of appeal filed by the respondent then appellant at Court of Appeal raised issue(s) of customary law and are therefore competent grounds.*

*(ii) If the grounds of appeal especially ground 5 of the amended Notice and grounds of Appeal do not raise customary issue(s) does the Court of Appeal have the jurisdiction to hear the appeal and on the strength of ground 5 reverse the decision of the Customary Court of Appeal in view of Section 224 (1) of the 1979 Constitution and Section 282 (1) of the 1999 Constitution?"*

**HELD** (Unanimously dismissing the appeal per **FABIYI JSC**)  
***Jurisdiction - Of Customary Courts of Appeal - Issue of***

1. I need to state it here that it is no longer a moot point that question of jurisdiction is of absolute importance in adjudicatory process. It is the life wire in any adjudication. Where there is no jurisdiction to hear and determine a matter, everything done in such want of jurisdiction is a nullity. With the above in view, I am of the considered opinion that an appeal against the decision of a Customary Court of Appeal on the ground that it lacked jurisdiction for reason of inadequate coram is cognisable before the court below. (pp. 1726 H/1727 B)

### ***Customary Courts of Appeal - Composition - Propriety***

2. The grundnorm mandates the Coram for the Customary Court of Appeal to be not less than three judges of that court for anything

done under the constitution including determination of existing customary law. If it is otherwise, same is incompetent. It is clear that due composition of the court or appropriate Coram as mandated by section 248 of the 1979 Constitution as amended by Decree 107 of 1993 is a condition precedent to determination of customary law under section 224 (1) of the 1979 Constitution. (p. 1727 G)

### ***CONSTITUTIONAL LAW - Interpretation - Principles of***

3. When relevant sections of the constitution are being interpreted, there should be a liberal approach. It is sometimes referred to as broad interpretation or a global view. Such an approach often leads to a harmonious interpretation which will tally with reason.

A narrow interpretation of an earlier section of the constitution should not be made in isolation in such a manner that will make a later section moribund. (p. 1728 A/C)

### ***JUDICIAL PRECEDENTS - Distinguishing***

4. The decision of this court in *Golok v. Diyalpwan* (supra), based solely on the application of the provision of section 224 (1) of the 1979 Constitution remains intact. For an appeal from the Customary Court of Appeal to be competent in law, it must relate to question of customary law and/or such other matters as may be prescribed by an Act of the National Assembly. As at 1990 when this court made its pronouncement, the Coram of the Customary Court of Appeal was fluid. But as at 18th February, 1994, the Coram of the Customary Court of Appeal with two judges became deficient and incompetent sequel to the amendment of section 248 of the 1979 Constitution by Decree 107 of 1993. (p. 1728 E)

### ***REPRESENTATION***

Mr. Solomon Umoh for the appellant, with him C. C. Otusowie.

Mrs. S. S. Obende with him Gladys Joel (Mrs.) for the Respondents.

### ***CASES REFERRED TO***

*Golok v. Diyalpwan* (1990) 3 NWLR (Pt. 139) 411 at 417

*Usman v. Umaru* (1992) 7 NWLR (Pt. 24) 377

*Obatoyinbo v. Oshatoba* (1996) 5 NWLR (Pt. 450) 531

*Maigoro v. Garba* (1999) 10 NWLR (Pt. 624) 555

- Koden v. Shidon (1998) 10 NWLR (Pt. 571) 662  
 Pam v. Gwon (1998) 2 NWLR (Pt. 538) 470 at 475  
 Dambuk v. Manding (1998) 2 NWLR (Pt. 539) 700 at 702  
 David v. Zabia (1998) 7 NWLR (Pt. 556) at 112-113  
 S.G.B (Nig.) Ltd., v. S.G.F (1995) 3 NWLR (Pt. 324) 497 at 511  
 B Akegbejo v. Ataja (1998) 1 NWLR (Pt. 534) 459 at 468 - 469  
 Mustapha v. Governor of Lagos State (1987) 2 NWLR (Pt. 58) 539  
 Utih v. Onoyivwe (1991) 1 NWLR (Pt. 166) at 206  
 State v. Onagoruwa (1992) 2 NWLR (Pt. 221) 33 at 54  
 C Westminster Bank Ltd. V. Edwards (1942) 1 All ER 470 at 474

### **STATUTES REFERRED TO**

- Constitution of the Federal Republic of Nigeria, 1979, as amended by Decree 107 of 1993, ss. 224 & 233 (1)  
 D Constitution of the Federal Republic of Nigeria, 1999, s. 282

### **LEAD JUDGMENT BY FABIYI JSC**

- Proceedings in the matter culminating in the appeal herein were first instituted at the Grade I Area Court, Pankshin in Plateau State, of  
 E Nigeria. The respondent who was the plaintiff at the trial court claimed against the defendants who are appellants in this court as follows:

- "I have sued the defendants because they entered my land. The land is situated at Tasuk. I got the (sic) from my father Goban who inherited it from Tongkhit. There are pawpaw tree, gung tree  
 F and olive tree at the boundary. I reported the defendant to our ward head over the land and it was given to me ————— I want the court to get me the land from the defendant"*

- The trial court asked for the reaction of each defendant to the  
 G plaintiffs claim. Each of them replied that he heard but disagreed with the plaintiff. The trial court gathered the evidence adduced on both sides of the divide and visited the *locus in quo*. In it's judgment handed out on 27th January, 1993, the trial court ultimately found at page 11 of the transcript record of appeal as follows:

- H *"In weighing the evidence from both sides therefore, the court is of the opinion that the evidence on the side of the plaintiff is heavier than that of the defendants. This suggests that the plaintiff has discharged the burden of proof that lies on him for his claim. In the light of that, title to the disputed land is hereby declared (sic) to the plain-*

tiff.”

The defendants who felt unhappy with the stance posed by the trial area court, appealed to the Plateau State Customary Court of Appeal. On their behalf, an application was filed seeking leave to argue additional grounds of appeal. On 18th February, 1994, the application was heard and granted by only two Judges to wit: Yakubu, PPCA and Goften, JCCA. The propriety of same, as will be discussed latter in this judgment, is the bed-rock of this appeal. The Customary Court of Appeal later heard the appeal. In its judgment, the decision of the trial area court was reversed. Judgment was entered for the appellants thereat.

The plaintiff who was aggrieved with the decision of the Customary Court of Appeal, appealed to the Court of Appeal. In its real essence, the court below treated the appeal based on the issue whether the decision of the Customary Court of Appeal is a nullity. The Court of Appeal considered in detail arguments canvassed in respect of the issue by both sides and concluded thus:-

*“It is clear that there was no valid Notice of Appeal before the lower court. It is, also clear that there was no proper constitution of the lower court. Accordingly, I declare the proceedings of the lower court including the judgments, a nullity. The net result is that this appeal succeeds on this issue alone and it is hereby allowed. There is no need for me to consider the other issues.”*

The appellants felt irked by the judgment of the court below as handed out on 27th March, 2002. A Notice of Appeal which contains two grounds of appeal was filed on their behalf on 15th May, 2002.

On 24th March, 2009 when the appeal before this court fell due for hearing, both sides had cause to amend their respective briefs of argument. Learned counsel for the appellant adopted and relied on the amended appellants’ brief. He thereafter urged that the appeal be allowed. Learned counsel for the respondent, in the same fashion, adopted the respondent’s amended brief of argument and after making certain oral submissions, he urged that the appeal be dismissed.

On page 2 of the appellants’ amended brief of argument, two issues distilled for determination of the appeal read as follows:-

*“(i) Whether the grounds of appeal filed by the respondent*

then appellant at Court of Appeal raised issue(s) of customary law and are therefore competent grounds.

(ii) If the grounds of appeal especially ground 5 of the amended Notice and grounds of Appeal do not raise customary issues (s) does the Court of Appeal have the jurisdiction to hear the appeal and on the strength of ground 5 reverse the decision of the Customary Court of Appeal in view of Section 224 (1) of the 1979 Constitution and Section 282 (1) of the 1999 Constitution?"

On page 3 of the respondent's amended brief of argument, it can be seen that the respondent decided to adopt the two issues decoded by the appellants as set out above.

On behalf of the appellants, learned counsel submitted that a right of appeal only lies from the Customary Court of Appeal of a State to the Court of Appeal on grounds of customary law alone. He cited the case of *Hirnor v. Yongo* (2003) 9 NWLR (Pt. 824) 71 at 87.

Learned counsel further submitted that a ground of appeal touching on weight of evidence is clearly outside the precincts of customary law as it turns on the evaluation of evidence and nothing more. He cited the cases of *Golok v. Diyalpwan* (1990) 3 NWLR (Pt. 139) 411 at 417; *Usman v. Umaru* (1992) 7 NWLR (Pt. 24) 377; *Obatoyinbo v. Oshatoba* (1996) 5 NWLR (Pt. 450) 531; *Maigoro v. Garba* (1999) 10 NWLR (Pt. 624) 555.

Learned counsel for the appellants dealt with ground 5 of the amended Notice and Grounds of Appeal. This relates to the crux and indeed the kernel of this appeal. He felt that the gist of the ground of appeal is that the Customary Court of Appeal lacked jurisdiction and the judgment of that court, given without jurisdiction, is a nullity. He pointed it out that according to the respondent, the Customary Court of Appeal lacked jurisdiction because it was not properly constituted in accordance with Decree 107 of 1993 when it granted the appellants' application for additional grounds on 18th February, 1994. The Court of Appeal held the additional grounds as being incompetent and since the only original ground in the Notice of Appeal was abandoned during argument and was accordingly struck out, there was no valid Notice of Appeal.

Learned counsel for the appellant, in essence, strenuously argued that a complaint in respect of jurisdiction touching on the *Coram* of the Customary Court of Appeal is not a ground of customary

law. He felt that the Court of Appeal had no jurisdiction to entertain the complaint in respect of that ground. *He cited that cases of Kodon v. Shidon (1998) 10 NWLR (Pt. 571) 662; Pam v. Gwon (1998) 2 NWLR (Pt. 538) 470 at 475; Dambuk v. Manding (1998) 2 NWLR (Pt. 539) 700 at 702; and David v. Zabia (1998) 7 NWLR (Pt. 556) at 112-113.* B

Learned counsel finally reiterated that by virtue of section 224 (1) of the 1979 Constitution as amended by Decree 107 of 1993 and section 282 (1) of the 1999 Constitution, an appeal only lies from the decisions of a Customary Court of Appeal to the Court of Appeal with respect to only questions of customary law. He urged us to hold that ground 5 of the amended notice and grounds of appeal which the Court of Appeal relied on to nullify the decision of the Customary Court of Appeal is incompetent and same should be set aside. He felt that the judgment of the court below should also be set aside. D

Learned counsel for the respondent at the on-set pointed it out that the essence of ground 5 and issue 2 distilled from it is that by virtue of section 233 (1) of the 1979 Constitution as amended by Decree No. 107 of 1993, the Customary Court of Appeal lacks jurisdiction to hear and grant a motion to file additional grounds of appeal by two justices as it did on 18th February, 1994. E

Learned counsel submitted that the respondent is entitled to raise the issue touching on statutory constitutional provision in an appeal as he did. He felt that the applicability of a statutory provision to a case can be raised in an appeal for the first time even if it was not raised at the trial court. He cited *S.G.B (Nig.) Ltd., v. S.G.F (1995) 3 NWLR (Pt. 324) 497 at 511; Heyting v. Duport (1961) 1 WLR 1192; Asante v. Taawia (1949) 65 TLR 105; Wong v. Beaumont Property Trust Ltd. (1965) 1 QB 173*. He opined that a question as to whether the court from which an appeal lies has jurisdiction will be considered by the court to which an appeal lies even where both parties are reluctant to, or agree not to raise it; or even where the point is not raised in the notice of appeal. F H

Learned counsel pointed it out that the issue raised a constitutional provision and all courts of record are enjoined to give effect to same as they derive their jurisdiction from the Constitution. He submitted that issue of jurisdiction can be raised for the first time at any

stage of the proceedings including in the Supreme Court, *viva voce* or *suo motu* and without procedural hindrances. He referred to the case of *Akegbejo v. Ataja (1998) INWLR (Pt. 534) 459 at 468- 469*.

Learned counsel further submitted that it would not be in accordance with good reason to say that the action taken by the two judges of the Customary Court of Appeal cannot be challenged. He opined that to overlook the fact that the Customary Court of Appeal lacked jurisdiction to entertain the appeal on the amended grounds granted by two judges, is to make the decisions of that court on matters outside customary law final and absolute. He maintained that the issue of jurisdiction was properly raised and that the judgment of the court below should be upheld. Learned counsel for the respondent finally stressed the point that the Customary Court of Appeal lacked competence as the steps taken on 18th February, 1994 and thereafter went contrary to the provision of the Constitution.

I expected the appellants to file a reply brief in answer to the salient points of law relating to the issue of jurisdiction as seriously canvassed in the respondent's argument. To my dismay, none was filed.

At this point, it is apt to quote the provision of section 244 (1) of the 1979 Constitution for ease of reference as follows:

*"224 (1) - An appeal shall lie from decisions of the Customary Court of Appeal of a State to the Court of Appeal as of right in any civil proceedings before the Customary Court of Appeal with respect to any question of customary law and such other matters as may be prescribed by an Act of the National Assembly."*

As a follow up to the above, it is also desirable to quote the provision of section 248 of the 1979 Constitution as amended by Decree 107 of 1993. It is as captured in section 283 of 1999 Constitution. It goes as follows:

*"283-For the purpose of exercising any jurisdiction conferred upon it by this Constitution or any law, a Customary Court of Appeal of a State shall be duly constituted if it consists of at least three judges of that court."*

***I need to state it here that it is no longer a moot point that question of jurisdiction is of absolute importance in adjudicatory process. It is the life wire in any adjudication. Where there is no jurisdiction to hear and determine a matter, every***



**thing done in such want of jurisdiction is a nullity.** See *Mustapha v. Governor of Lagos State* (1987) 2 NWLR (Pt. 58) 539; *Utih v. Onoyivwe* (1991) 1 NWLR (Pt. 166) at 206.

Issue of jurisdiction is very paramount and crucial. It can be raised at any stage of the proceedings and even on appeal before this court. See *State v. Onagoruwa* (1992) 2 NWLR (Pt. 221) 33 at 54; *National Bank v. Shoyoye* (1977) 5 SC 181. Issue of jurisdiction can be raised in any form by any of the parties or *suo motu* by the court. See *Westminster Bank Ltd. v. Ewards* (1942) 1 All ER 470 at 474.

**With the above in view, I am of the considered opinion that an appeal against the decision of a Customary Court of Appeal on the ground that it lacked jurisdiction for reason of inadequate coram is cognisable before the court below.** After all, this court pronounced with force in *Madukolu v. Nkemdilim* (1962) SCNLR 341; (1962) ANLR 581 that a court is only competent when:- D

“(a) it is properly constituted with respect to the number and qualification of its members;

(b) the subject matter of the action is within its jurisdiction;

(c) the action is initiated by due process of law and

(d) any condition precedent to the exercise of its jurisdiction has been fulfilled.” E

The above criteria for determining competence of a court have been restated by this court several times. See *Sken Consult (Nig.) Ltd. v. Anor v. Godwin Ukey* (1981) 1 S.C. 6; *Leedo Presidential Motel v. BON Ltd.* (1998) 10 NWLR (Pt. 570) 353. See also *Timitimi v. Amabebe* 14 WACA 370. F

I wish to make a point here. It is that jurisdiction of a court is derived from its enabling statute. It is the statute which creates the court that defines its jurisdiction. As it pertains to the Customary Court of Appeal, its jurisdiction is imbued by the provision of section 248 of the 1979 Constitution as amended by Decree No. 107 of 1993 and finally captured by section 283 of the 1999 Constitution. Therein **the grundnorm mandates the Coram for the Customary Court of Appeal to be not less than three judges of that court for anything done under the Constitution including determination of existing customary law. If it is otherwise, same is incompetent. It is clear that due composition of the court or appropriate Coram as mandated by section 248 of the 1979 Constitu-** G H

**tion as amended by Decree 107 of 1993 is a condition precedent to determination of customary law under section 224 (1) of the 1979 Constitution.**

Perhaps I need to further reiterate the fact here that **when relevant sections of the Constitution are being interpreted, there should be a liberal approach. It is sometimes referred to as broad interpretation or a global view. Such an approach often leads to a harmonious interpretation which will tally with reason.** Refer to *Rabiu v. The State* (1980) 8-11 SC 130 at 151, 195. Related section of the Constitution ought to be interpreted together. See *Senator Abraham Adesanya v. The President of the Federal Republic and Anor* (1981) 5 SC 112 at 131, 321.

**A narrow interpretation of an earlier section of the Constitution should not be made in isolation in such a manner that will make a later section moribund.** This is the ploy the appellants are trying to create. They must be told that the intention of the makers of the Constitution is that issue of Coram of the Customary Court of Appeal must be intact before one talks of the decision of that court touching upon customary law.

**The decision of this court in *Golok v. Diyalpwan* (supra), based solely on the application of the provision of section 224 (1) of the 1979 Constitution remains intact. For an appeal from the Customary Court of Appeal to be competent in law, it must relate to question of customary law and/or such other matters as may be prescribed by an Act of the National Assembly. As at 1990 when this court made its pronouncement, the Coram of the Customary Court of Appeal was fluid. But as at 18th February, 1994, the Coram of the Customary Court of Appeal with two judges became deficient and incompetent sequel to the amendment of section 248 of the 1979 Constitution by Decree 107 of 1993.** Also, in *Hirnor v. Yongo* (supra), issue in respect of Coram was not in point.

From what happened on 18th February, 1994 it is manifest in the transcript record of appeal that there was no proper constitution of the Customary Court of Appeal on that day. Two judges of that court granted leave to file the additional grounds upon which the appeal thereat solely rested. There was no valid Notice of Appeal before that court. Every step taken thereafter remains null and void.

Lord Denning pronounced in *Macfoy v. U.B.A Ltd.* (1962) AC 152 at 160 as follow:-

*“If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”* B

The court below was right in declaring the proceeding of the Customary Court of Appeal including its judgment a nullity. In conclusion, this appeal has no merit and it is hereby dismissed. The judgment of the court below is affirmed. The appellants shall pay N50,000.00 costs to the respondent. C

D

### **MUSDAPHER JSC**

I have read before now the judgment of my Lord Fabiyi JSC, just delivered. His Lordship has adequately discussed the two issues submitted for the determination of the appeal. With respect, I adopt his reasonings as mine I also find that the appeal has no merit and I dismiss it. The Court below was right in declaring the proceedings before the Customary Court of Appeal including its judgment a nullity. I affirm the judgment of the Court of Appeal and abide by the order for costs proposed in the lead judgment. E F

### **ADEREMI JSC**

I have had the privilege of reading, in draft, the judgment of my learned brother, Fabiyi JSC. I agree with his reasoning and conclusion. I wish to add a few words if only for the purpose of amplification. G

The crucial issue in this appeal is the grant by two judges of the Customary Court of Appeal of an application filed on 2nd November 1993 before the Customary Appellate Court praying for an order to file and argue additional grounds of appeal. The order granting the application was heard and granted on the 18th of February 1994 by only the President of the Court and another judge directing H

that the said additional grounds be filed within 14 days from the date the order was made. In the legal objection that attended this matter, an objection having been taken against the act of only two judges of the Customary Court of Appeal instead of three judges, which legal objection came before the court below, in upholding the objection

B the court below reasoned thus:

*“From the record, when application for leave to file additional grounds of appeal was considered, two judges of the Plateau State Customary Court of appeal sat.....This was on the 18/2/94. They granted the application and ordered the appellant to file the additional grounds within 14 days.....”*

*Clearly therefore, where two judges sat to exercise jurisdiction on any matter, that exercise of jurisdiction was futile as it offended the said provision as amended.”*

D The relevant provisions of the laws are Section 224 (1) of the 1979 Constitution and Section 248 of the 1979 Constitution as amended by Decree No 107 of 1993 which find expression in Section 283 of the 1999 Constitution. The aforesaid provisions are in the following terms: Section 224 (1) of the 1979 Constitution:

E *“An appeal shall lie from decisions of the Customary Court of appeal of a State to the Court of Appeal as of right in any civil proceedings before the Customary Court of Appeal with respect to any question of customary law and such other matters as may be prescribed by any Act of the National Assembly.”*

F Section 248 of the 1979 Constitution as amended by Decree No 107 of 1993

*“For the purpose of exercising any jurisdiction conferred upon it by this Constitution or any law a Customary Court of Appeal of a State shall be duly constituted if it consists of at least three judges of that court.”*

H As I have pointed out above, it is only two judges as opposed to at least three judges dictated by the provisions of Section 248 of the 1979 Constitution as amended that granted the application to file and argue the additional grounds of appeal. To the extent to which the Customary Court of Appeal that entertained the application filed on 2nd November 1993 was not properly constituted it lacked the jurisdiction to grant the application. The said application for the additional grounds of appeal granted on the 18th of February

1994 is therefore null and void and devoid of any legal efficacy. SEE PEENOK INVESTMENT LTD VS. HOTEL PRESIDENTIAL LTD (1982) 12 S. C. 1. The Notice of Appeal containing the said additional grounds of appeal does not exist in the eye of the law.

For this little contribution but most especially for the fuller reasons in the lead judgment of my learned brother, Fabiyi JSC, I agree with the conclusion reached. I also abide by all other orders contained in the lead judgment including the order as to costs.

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### CHUKWUMA-ENEH JSC

This an appeal by the defendants at the trial Court against the decision of the Jos Judicial Division of the Court of Appeal (Court below) allowing the appeal filed by the plaintiff against the decision of the Plateau State Customary Court of Appeal which in its decision has reversed the decision of the Trial Court. The Court below has accordingly set aside the decision of the Plateau State Customary Court of Appeal as a nullity. The defendants are aggrieved and have appealed the decision to this Court upon a Notice of appeal containing two grounds of appeal from which two issues for determination have been distilled.

The parties in this appeal in their respective briefs of argument have agreed on the issues for determination to wit:

(i) *Whether the grounds of appeal filed by the respondent the appellant at Court of Appeal raised issue(s) of customary law and are therefore competent grounds.*

(ii) *If the grounds of appeal especially ground 5 of the Amended Notice and grounds of Appeal do not raise customary issue(s) does the Court of Appeal have the jurisdiction to hear the appeal and on the strength of grounds 5 reverse the decision of the Customary Court of Appeal in view of section 224(1) of the 1979 Constitution and Section 282(1) of the 1999 Constitution.*

The salient facts to enable me chip in a few words in this matter have arisen from the fallouts surrounding the application filed by the defendants at the Plateau State Customary Court of Appeal seeking leave of that Court to argue the additional grounds of appeal as contained in the amended notice of grounds of appeal in this matter. The said application has been heard and granted by only two as

against three of the Judges of that Court albeit against as clearly provided in section 248 of the 1979 Constitution as amended by Decree 107 of 1993 which has specified the unspecified number of Judges to perform all Judicial functions to 3 Judges; that is to say in *pari materia* with section 283 of the 1999 Constitution. Rather unfortunately, the appellants have abandoned the original grounds of appeal in the course of the proceedings. In sum, the question is whether in the circumstances the said amended notice containing only the additional grounds of appeal is otherwise competent and whether from them any competent issues for determination can be raised. To provide an answer to this question, firstly, I have to advert to section 283 and it reads thus:

*“For the purpose of exercising any jurisdiction conferred upon it by this Constitution or any law, a Customary Court of Appeal of a State shall be duly constituted if it consists of at least three Judges of that Court”*

*For completeness, I recite section 224(1) of the 1979 Constitution upon which issue one for determination in this appeal is predicated and it reads as follows:*

*“224 (1) An appeal shall be from the decision of the Customary Court of Appeal of a State to the Federal Court of Appeal as of right in any Civil proceedings before the Customary Court of Appeal with respect to any question of Customary law and such other matters as may be prescribed by an Act of National Assembly”*

From all indications in this appeal, the competency of the said amended notice of appeal containing the additional grounds of appeal argued before the Plateau State Customary Court of Appeal as well as the decision of that Court in reversing the trial Court’s decision in this matter has been put in issue. This is so as the leave of Court to take the said additional grounds of appeal in the appeal has been granted by 2 only as against 3 Judges of that Court as prescribed by Section 248 of the 1979 Constitution as amended by Decree 107. I think that the answer to this question disposes of this appeal if sustained having raised a fundamental issue as to the jurisdiction of that Court to deal with the matter in the circumstances. And so, I go on to examine that issue only.

The provisions of section 248 as amended in *pari materia* with section 283 of the 1999 Constitution are clear and unequivocal and

construed literally have prescribed that for the purposes of exercising its judicial functions, a Customary Court of Appeal of any State as the instant Plateau State Customary Court of Appeal must be performed by at least 3 Judges of that Court. It is conceded on both sides that in granting leave to argue the additional grounds of Appeal filed by the defendants undoubtedly a judicial function, 2 only of the Judges of that Court have heard and granted the application; for this reason alone, the said grounds are incompetent, as that Court has not been properly constituted as to number of its members to hear the application as provided by the 1979 Constitution as amended. There can be no doubt therefore, that a decision founded on the null grounds of appeal is also a nullity. I have no hesitation in so declaring the decision with regard to the instant case, as a nullity

Besides, the appeal is also flawed for want of due process as borne out from the foregoing facts. This is yet another ground that has flawed the decision of the Plateau State Customary Court of Appeal. The cumulative effect of these findings in the circumstances, is quite obvious as the entire proceedings in the appeal have been rendered a nullity. And the Court below has rightly so declared. See MADUKOLUM NKEMDILIM (1962) ANLR 581 and TIMITIMI V AMABEBE 14 WACA 370. In the circumstances, it serves no useful purpose dealing with any other issues raised for determination in the appeal when the appeal has thus collapsed on the ground of want of competency of the instant grounds of appeal thus robbing the Court of the enabling power to entertain the appeal. The appeal to this Court is therefore a non-starter.

With this short contribution and a much fuller discussion of the issues raised in this appeal in the lead judgment of my learned brother, Fabiyi, JSC, I see no merit in the appeal. I too dismiss it and endorse all the orders in the lead judgment.

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### **ADEKEYE JSC**

I had the privilege of reading in draft the judgment just delivered by my learned brother J. A. Fabiyi, JSC. The core issue in the appeal was meticulously addressed by my brother. I shall only add a few words by way of emphasis. The learned counsel for the appellant canvassed that the complaint in respect of jurisdiction touching on

the quorum of the Customary Court of Appeal to sit on an application to amend Notice of Appeal is not a ground of customary law. The Court of Appeal had no jurisdiction to entertain the complaint by virtue of section 224 (1) of the 1979 Constitution as amended by Decree 107 of 1993, now in *pari materia*, with section 282(1) of the 1999 Constitution. Ground 5 of the Amended Notice and Grounds of Appeal and Issue 2 formulated from it are incompetent and should be set aside and same order should be extended to the judgment of the Court of Appeal.

The scenario at the hearing of the appeal from the Customary Court of Appeal, to the Court of Appeal exposed the Amended Notice and Grounds of Appeal as being incompetent having been granted by two Judges rather three of the Customary Court of Appeal in line with the provisions of section 248 of the 1979 Constitution as amended by Decree 107 of 1993 and now *pari materia* with section 283 of the 1999 Constitution. The section reads: -

“For the purpose of exercising any jurisdiction conferred upon it by this Constitution or any law, a Customary Court of Appeal of a State shall be duly constituted if it consists of at least three Judges of that court.”

This to my mind is an issue of applicability of a constitutional provision to a particular case. All courts of record are creatures of the Constitution, as their jurisdiction is confined, limited and circumscribed by the Constitution - they must give effect to the constitutional provisions from which they derive their jurisdiction. The Customary Court of Appeal sitting with two Judges instead of three lacked the competence to grant a motion for Amended Notice of Appeal on the 18th of February 1994. The Amended Notice of Appeal equally lacked competence. The issue of competence of a court created by the Constitution to my mind is a jurisdictional issue. At the hearing of that appeal the lower court must have jurisdiction to entertain the appeal before it can exercise any judicial power to invoke the relevant customary law. In compliance with the procedural steps in adjudication, filing of a Notice of Appeal is a condition precedent to the hearing of an appeal. A condition precedent is something that must be done or must happen in a particular case before one is entitled to institute an action. It is not of the essence of such a cause of action but it has been made essential by law.



Lawal v. Oke 2001 7 NWLR Pt. 711 page 88

Adigun v. Osaka 2003 5 NWLR Pt. 812 page 95

Once a party raises objection as to the non-compliance with a condition precedent to the exercise of the courts jurisdiction it is for the court seised of the proceedings to examine the objection and determine whether it can adjudicate on the matter. The lower court had rightly decided to treat the determination of whether the Amended Notice of Appeal had satisfied a condition precedent as a preliminary issue before delving into the substance of the appeal. B

First and foremost, a notice of appeal is the basis, foundation and backbone of every appeal, and where it is found to be defective or incompetent the Court of Appeal has the power to strike it out or to discountenance any purported appeal for which there is no notice of appeal filed. C

Aboaba v. Adeyemi 1976 12 SC 51 D

Moses v. Oguntobi (1975) 4 SC 81

Surakatu v. N.W.D.S 1981 4 SC 26

Section 283 must be complied with by the Customary Court of Appeal for the purpose of exercising its jurisdiction. The long standing decision of this court in the case of Madukolu v. Nkemdilim 1962 2 SCNLR page 341 held that a court is competent when: - E

1. It is properly constituted as regards numbers and qualifications of its members of the bench and no member is disqualified for one reason or another.

2. The subject-matter of the case is within its jurisdiction and there is no feature in the case which prevents the court from exercising its jurisdiction. F

3. The case comes before the court initiated by due process of law and upon condition precedent to the exercise of jurisdiction. G

A.G Lagos state v. Dosunmu 1989 3 NWLR Pt. 111 page 552

Sofolahan v. fowler 2002 13 WRN 1

Amadi v. FRN 36 NSCR 1127

Non-compliance with any of the foregoing particularly condition one is a defect in competence which is extrinsic to adjudication. Where there is a challenge to the jurisdiction of a court, that court must first determine whether it has jurisdiction before it can proceed on adjudication. The lower court took the proper step to determine whether it had or lacked jurisdiction to entertain the appeal before it H

at an early stage in the proceedings.

Barclays Bank v. CBN 1976 1 All NLR Pt.1 page 409 at page 421

Funduk Engineering Ltd v. Mc Arthur 1995 4 NWLR Pt.392 page 640

Agwuna v. A.G Federation 1995 5 NWLR Pt. 396 page 418

B Osadebey v. A.G Bendel State 1991 1 NWLR Pt.169 page 525

Nwosu v. Imo State Environmental Agency Sanitation (1990) 2 NWLR Pt.135 page 688

Oloriode v. Oyebe 1984 1 SCNLR 390

C The issue of the competence of the Amended Notice of Appeal before the lower court involved a question of substantial point of law, procedural which did not require further evidence to be adduced which would affect the decision. The lower court allowed the question to be raised so as to prevent any miscarriage of justice. The  
D move of the court to raise the issue of its jurisdiction based on an incompetent Amended Notice of Appeal was a matter crucial and fundamental to the hearing of the appeal itself which was not raised too early or premature. The lower court lacked the judicial power to look into the customary law issues involved in the appeal at that stage.  
E Jurisdiction therefore being fundamental and essential to adjudication, the lower court was right to have declined to hear the appeal predicated on an incompetent Amended Notice of Appeal in order not to embark on an exercise in vain glory and futility.

F With fuller reasons given in the leading judgment, I also agree that the appeal lacks merit and it is hereby dismissed. I abide the consequential orders including the order as to costs.

G

H