

**SUPREME COURT OF NIGERIA**  
26TH FEBRUARY, 2010 SC. 187/2003  
**CORAM:- A. I. KATSINA-ALU, G. A. OGUNTADE,**  
**A. M. MUKHTAR, W. S. N. ONNOGHEN,**  
**C. M. CHUKWUMA-ENEH, JJSC**

1. BARNABAS OKONOBOR
2. MRS. COMFORT EVEABOR  
(Nee Okonobor)
3. PHILIP OKONOBOR
4. FRIDAY OKONOBOR
5. BEAUTY OKONOBOR ..... APPELLANTS
6. OSAGIE OKONOBOR
7. JULIET OKONOBOR
8. UWAIFO OKONOBOR
9. ODION OKONOBOR
10. AMADIN AGHE  
AND
1. D. EDEGBE & SONS TRANSPORT  
COMPANY LIMITED ..... RESPONDENTS
2. MR. I. D. EDEGBE

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APPEALS - Issues - Proliferation - Attitude of court - While counsel is permitted to formulate one issue out of one or more grounds of appeal - He cannot formulate more than one issue out of one ground of appeal (H1)

APPEALS - Decision on points - Not appealed against - Binding effect - By operation of law such decision - As far as it relates to that point - Remains binding on the parties to the action (H2)

APPEALS - Grounds - Not related to decision appealed - Competence - Such ground of appeal - Like the sole ground herein - Being unrelated to the decision appealed against - Is incompetent and should be struck out (H3)

**FACTS**

The plaintiffs/appellants sued defendants/respondents before

the High Court of the then Bendel State, holden at Benin City. Appellants claim was for the sum of N511,960.00 (Five hundred and eleven thousand, nine hundred and sixty naira) jointly and severally against respondents, as damages suffered by appellants in consequence of the death of one Mrs. Helen Okonobor allegedly due to the negligence of respondents' driver. In the course of the proceedings, respondents raised an objection as to the competence of the action in that appellants lacked the requisite *locus standi* to bring the action. Accordingly the court was urged to strike out the suit.

In its ruling, though the court found that appellants did not aver to all the facts required of them in their particulars of claim, such as would have given them the required *locus standi*, it went on to hold that it was not in the interest of justice to strike out the suit. So it *suo motu* ordered appellants to amend their pleadings to save the suit. Aggrieved, respondents appealed to Court of Appeal contending that the proper order open to the court to make was an order striking out the suit. The Court of Appeal upheld this contention and struck out the suit accordingly. Dissatisfied, appellants have brought this appeal against the judgment of Court of Appeal. Though appellants filed only a ground of appeal they formulated two issues for determination. Moreover the ground was based on the decision of trial court and not on that of Court of Appeal.

### **ISSUES FOR DETERMINATION**

#### **"ISSUE ONE**

*Whether the court below properly considered the provisions of the Proviso to Section 4 of the Torts Law of Bendel State 1976 when it held that the action of the appellants before the trial court was incompetent.*

#### **ISSUE TWO**

*If the answer to ISSUE ONE is in the negative, whether the court below was in error by not looking into the issue of damages awarded by the trial court and against which a cross-Appeal was lodged at the court below and therefore whether the court below having failed to consider the cross-Appeal, this honourable court is competent to consider the cross-Appeal and make or determine the appropriate award of damages".*

**HELD** (Unanimously striking out the appeal per **ONNOGHEN JSC**)  
***APPEALS - Issues - Proliferation - Attitude of court***

1. It is not in dispute that appellants filed a single ground of appeal out of which their counsel formulated two issues for determination. It is settled law that proliferation of issues is unacceptable in our appellate courts. While counsel is permitted to formulate an issue out of a ground or grounds of appeal, he cannot formulate two issues out of a ground of appeal as in the instant appeal. The issues are therefore incompetent and liable to be struck out. (p. 730 F)

***Decisions on points - Not appealed against - Binding effect***

2. It is very clear that it was the trial court that considered and ruled on the provisions of section 4 of the Torts Law of Bendel State, not the lower court. It is also clear from the record that the decision of the trial court on the matter was never appealed against by either party. It follows therefore that by operation of law the said decision as far as it relates to that issue remains binding on both parties to the action. (p. 731 A)

***Grounds - Not related to decision appealed - Competence***

3. As I had earlier stated in this judgment, the lower court, in its judgment held clearly that the trial court was in error in not striking out the suit of the present appellants after holding that the suit was incompetent and that the order by the trial court amending the pleadings was made without jurisdiction and proceeded to strike out the suit.

It is therefore very clear that the single ground of appeal filed in the instant appeal has no relationship whatsoever with the decision of the lower court and is consequently incompetent. It relates to the decision of the trial court. It is accordingly struck out. (p.731 C)

**REPRESENTATION**

E. T. A. Macfoy Esq. for the appellants

H. S. Tumba for the respondent

**CASES REFERRED TO**

Ogoyi vs Umagba (1995) 9 NWLR (Pt.419) 283 at 297

Sanusi vs Ayoola (1992) 9 NWLR (Pt. 265) 275 at 291

**RULES REFERRED TO**

High Court of Bendel State Civil Procedure Rules 1988, as applicable to Edo State, O. 47 r. 1

**LEAD JUDGMENT BY ONNOGHEN JSC**

This is an appeal against the judgment of the Court of Appeal, Holden at Benin City in appeal NO.CA/B/43/98 delivered on the 6<sup>th</sup> day of January, 2003 in which the court allowed the appeal of the present respondents, set aside the decision of the trial court and struck out the suit of the present appellants for being incompetent.

The appellants, as plaintiffs instituted an action at the High Court of the then Bendel State of Nigeria, Holden at Benin City against the defendants/respondents claiming jointly and severally the sum of five hundred and eleven thousand, nine hundred and sixty naira (N511,960.00)

damages suffered by them resulting from the death of one Mrs. Helen Okonobor as a result of the alleged negligence of the driver of the defendants/respondents.

In the course of the proceedings the defendants/respondents raised an objection as to the competence of the action as the plaintiffs/appellants are said not to have the requisite locus standi to constitute the action and urged the court to strike out the suit.

Though the trial court found that...

*“There is nothing to show that the person (sic) representative, if any, had failed to act within six months of the death of the deceased. All that the plaintiffs are required to do is to aver in their particulars of claim on the writ of summons or in the statement of claim in that no personal representatives have been appointed or if appointed that six months have elapsed without any action being instituted by the personal representatives”.*

the court went further to hold that...

*“it will not be in the interest of justice to strike out the case”* and proceeded to apply the provisions of Order 47(1) of the High Court of Bendel State Civil Procedure Rules 1988, as applicable to Edo State, to order that the appropriate amendment be made by the plaintiffs/appellants.

The present respondents were not satisfied with the ruling and appealed to the Court of Appeal, Holden at Benin City, which allowed the appeal as earlier stated in this judgment. The lower court is of the view that the appropriate order the trial court ought to have made after finding that the action was incompetent was to have struck out the suit and proceeded to do so. It is against that decision that the appellants have appealed to this court on a single ground of appeal at pages 415 - 416 of the record. B

The ground reads as follows:-

*“(1) The lower court erred in law by holding that the action of the plaintiffs/appellants was incompetent.”* C

#### PARTICULARS OF ERROR

*By the provisions of the proviso to section 4 of the Torts Law (cap 164 of the Laws of Bendel State of Nigeria, 1976) on which the plaintiffs/appellants founded their action and on decided authorities, and contrary to the decision of the lower court and of the trial court, the onus is on the defendants/respondents and not on the plaintiffs/appellants to state in their pleadings whether or not executors or administrators had been appointed in respect of the estate of late Mrs. Helen Okonobor.* D E

*(2) Further grounds of appeal will be filed on the receipt of the record of proceedings”.*

In the appellants brief filed on 12<sup>th</sup> January, 2005 by Chief G. B. Nkemnacho the following two issues have been formulated out of the single ground of appeal for determination. The issues are as follows:- F

#### “ISSUE ONE

*Whether the court below properly considered the provisions of the Proviso to Section 4 of the Torts Law of Bendel State 1976 when it held that the action of the appellants before the trial court was incompetent.* G

#### ISSUE TWO

*If the answer to ISSUE ONE is in the negative, whether the court below was in error by not looking into the issue of damages awarded by the trial court and against which a cross-Appeal was lodged at the court below and therefore whether the court below having failed to consider the cross-Appeal, this honourable court is competent to consider the cross-Appeal and make or determine the appro-* H

*priate award of damages”.*

In the respondent’s brief filed on 27<sup>th</sup> February, 2006 by Chief A. O. Ogbodu, learned counsel for the respondents contends that it is wrong in law for learned counsel for the appellants to have formulated two issues out of a ground of appeal contrary to the decision in *Ogoyi vs Umagba (1995) 9 NWLR (Pt.419) 283 at 297*; that an issue for determination must arise from the grounds of appeal filed as decided in the case of *Sanusi vs Ayoola (1992) 9 NWLR (Pt. 265) 275 at 291*; that in the instant case issue two, as formulated by the learned counsel for the appellants, does not arise from the single ground of appeal filed, and therefore incompetent.

It is the further contention of learned counsel that even the ground of appeal filed in the instant appeal does not relate to the judgment of the lower court as the judgment of the Torts Law supra but that of the trial court which decision was never appealed against by the appellants or the parties; that since the ground of appeal does not relate to the decision of the lower court, it is incompetent and ought to be struck out.

It is important to note that learned counsel for the appellants filed no reply brief in answer to the above submissions. In fact when his attention was drawn to the absence of a reply brief by the court during the oral hearing of the appeal on the 1<sup>st</sup> day of December, 2009, his answer was that he does not consider it necessary to file a reply brief.

***It is not in dispute that appellants filed a single ground of appeal out of which their counsel formulated two issues for determination. It is settled law that proliferation of issues is unacceptable in our appellate courts. While counsel is permitted to formulate an issue out of a ground or grounds of appeal, he cannot formulate two issues out of a ground of appeal as in the instant appeal - See Ogoyi vs Umagba (1995) 9 NWLR (Pt.419) 283 at 297. The issues are therefore incompetent and liable to be struck out.***

That apart, it is settled law that an issue raised in an appeal must relate to the ground(s) of appeal filed. No issue is allowed to be raised outside the ground(s) of appeal. In the instant appeal, it is clear that Issue 2 does not relate to the single ground filed. It is therefore incompetent and liable to be struck out.

I had earlier in this judgment reproduced the portion of the Ruling of the trial court that gave rise to the appeal to the lower court. I have also gone through the record. ***It is very clear that it was the trial court that considered and ruled on the provisions of section 4 of the Torts Law of Bendel State, not the lower court. It is also clear from the record that the decision of the trial court on the matter was never appealed against by either party. It follows therefore that by operation of law the said decision as far as it relates to that issue remains binding on both parties to the action*** – see *Olarenwaju vs The Governor of Oyo State* (1992)11–12 SCJN 92. B  
C

This court has jurisdiction to hear appeals from the decision of the Court of Appeal not that of the High Court.

***As I had earlier stated in this judgment, the lower court, in its judgment held clearly that the trial court was in error in not striking out the suit of the present appellants after holding that the suit was incompetent and that the order by the trial court amending the pleadings was made without jurisdiction and proceeded to strike out the suit.*** D

***It is therefore very clear that the single ground of appeal filed in the instant appeal has no relationship whatsoever with the decision of the lower court and consequently incompetent. It relates to the decision of the trial court. It is accordingly struck out.*** E

The issues in the appeal being incompetent are Consequently struck out and the appeal not being supported by any ground of appeal is incompetent and is hereby struck out with N50,000.00 costs to the respondents. F

Appeal stuck out. G

### KATSINA-ALU JSC

I have had the advantage of reading in draft the judgment of my learned brother Onnoghen, JSC in this appeal. I agree entirely with it and, for the reasons given therein I too, strike out the appeal with N50,000.00 costs in favour of the Respondent. H

**OGUNTADE JSC**

I have had the advantage of reading in draft a copy of the lead judgment by my learned brother Onnoghen J.S.C. I agree with the reasoning and conclusion. I would also strike out this appeal with costs as assessed in the lead judgment.

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C

**CHUKWUMA-ENEH JSC**

I have read before now the judgment of my learned brother Onnoghen, JSC just delivered and I agree that the appeal not being supported by a competent ground of appeal should be struck out. I hereby strike out the appeal and abide by the order as to cost contained in the said judgement.

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E

**MUKHTAR JSC**

I have had the opportunity of reading in advance the lead judgment delivered by my learned brother Onnoghen JSC, and I am in complete agreement with him that the appeal deserves to be struck out. In this vein, I strike out the appeal, and abide by the consequential orders made in the lead judgment.

G

H