

SUPREME COURT OF NIGERIA
10TH DECEMBER, 2010. SC. 337/2008
CORAM:- M. MOHAMMED, C. M. CHUKWUMA-ENEH,
J. A. FABIYI, O. O. ADEKEYE, B. RHODES-VIVOUR, JJSC

GENERAL ELECTRIC COMPANY APPELLANT/
RESPONDENT

AND

1. HARRY AYOADE AKANDE
2. LAWRENCE ADEMOLA OKUNOLA RESPONDENTS
3. NEW AFRICAN DEVELOPMENT
COMPANY LIMITED.
4. NEW AFRICAN TECHNICAL AND RESPONDENT/
ELECTRICAL COMPANY LIMITED OBJECTOR
5. POWER HOLDING COMPANY OF
NIGERIA PLC. RESPONDENT

APPEALS - Notice of appeal - Purpose - It is a statutory initiating process - Encapsulating complaints of appellant - Raised on valid grounds - Against the decision appealed (H1)

APPEALS - Right of appeal - Under s. 233 of 1999 Constitution - Propriety - Appeal could be as of right - Or with leave of Court - But failure to obtain leave where necessary - Will render such appeal incompetent (H2)

APPEALS - Leave - Grounds - Whether of law or fact - The grounds in issue being of law - Leave is not required - Thus the Notice of Appeal is valid and competent (H3)

APPEALS - Competency - Where Notice and grounds of appeal - Are held to be competent - The records and brief of argument - Are deemed to be duly filed (H4)

JUDGMENTS - Appeals - Finality - Basis - Where appeal has been dismissed with cost - Which decision terminated the appeal - Such decision was final and not interlocutory (H5)

JUDGMENTS - Appeals - Time to appeal - Validity - The period within which to appeal - For final decision is 90 days - And not 14 days meant for interlocutory appeals (H6)

APPEALS - Parties - Misjoinder - Effect - The defect of misjoinder or nonjoinder of parties - Does not vitiate an appeal - When there are living parties - Willing to prosecute the case (H7)

FACTS

Plaintiff/1st respondent sued defendant/appellant at the Federal High Court in 1990. Appellant in his defence raised the issue of incompetency of the suit as 1st respondent failed to obtain leave of court to institute a minority shareholders action brought on behalf of and for the benefit of a company, the 4th respondent, in consonance with the companies and Allied Matters Act, 1990. Appellant also posited that the suit was statute barred as it was commenced 14 - 17 years after the alleged cause of action accrued. Appellant filed a motion before the trial court for hearing of these points of law. The learned trial judge struck out the motion on notice for reason that the issues had previously been litigated. Trial Court did not address the issue of failure of 1st respondent to obtain leave of court to institute minority shareholders action and also did not determine the merit of the issue on 1st respondent's action being statute barred.

Consequently, appellant went on appeal to Court of Appeal against the decision of trial court. The Court of Appeal struck out the motion for amendment of notice of appeal, appellant's brief of argument, reply brief and even the substantive appeal which was not before it for hearing on that date. This led to the instant appeal to the Supreme Court. However, 4th respondent pursuant to Order 2 Rule 4 and 20 of Supreme Court Rules, raised preliminary objection as follows: that appellant's notice of appeal is incompetent having failed to obtain leave of court as required by S. 233 (2) and (3) of 1999 Constitution of Federal Republic of Nigeria; that appeal was not filed within time; that parties in appellant's brief and other processes are not same with parties in court and that the appeal is an abuse of court process.

ISSUES FOR DETERMINATION

“3.01: Whether appellant’s non compliance with the Constitution of the Federal Republic of Nigeria 1999 and the Supreme Court Rules for the proper exercise of its right of appeal and due presentation thereof render this appeal incompetent?”

3.02 Whether this appeal is an abuse of court process.”

HELD (Unanimously dismissing the preliminary objection per **CHUKWUMA-ENEH JSC**)

APPEALS - Notice of appeal - Purpose

1. Firstly, notice of appeal as a court process is, where the right of appeal is given by statute an initiating process. It encapsulates the complaints of the appellant against the decision appealed from. It must be noted that an appeal is incompetent where the Notice of Appeal is defective in the sense that there is no valid ground of appeal raised therein. (p. 3079 H)

Right of appeal - Under s. 233 of 1999 Constitution

2. Also it is trite that under Section 233 of the 1999 Constitution appeals could be as of right or with leave of court. See Section 233(2) and (3). Where, however, no such leave as required to file a ground of appeal under Section 233(3) supra of the 1999 Constitution has been obtained, the ground of appeal is incompetent where filed without leave of court. (p. 3080 A)

APPEALS - Leave - Grounds - Whether of law or fact

3. From the foregoing resume, the above grounds of appeal as I have carefully traversed and reviewed herein, leave no one in any doubt that all the grounds are grounds of law.

I, therefore, agree with the appellant that the nine grounds of appeal contained in the notice of appeal dated 15/10/2008 being grounds of law they do not require leave of court as prescribed by section 233(3) of the 1999 Constitution; and so the provisions are inapplicable in the circumstances. It also follows that the notice of appeal dated 15/10/2008 is valid and competent as well as extant. (p. 3081 D)

APPEALS - Competency

4. The other side of the coin in my conclusion is that the instant Notice of Appeal and the grounds of appeal therein are competent and so the instant record of appeal and the appellant's brief of argument have been duly filed within the time as allowed by the rules.

B I have reached the foregoing findings notwithstanding the 4th respondent's contention that the appeal before this court is interlocutory in nature that is, if I have gotten its submission right and so that the instant appeal before this court is founded upon a decision/
C order which has been reached in that regard. (p. 3081 H)

JUDGMENTS - Appeals - Finality - Basis

5. The 4th respondent has respectfully misconceived the instant appeal from the Court of Appeal which has arisen from the dismissal of
D the appeal before it hence the appeal to this court has been initiated by the instant notice of appeal dated 15/10/2008. Again, also the 4th respondent has completely misconceived the essence of final or interlocutory judgment or order although distinguishing the two situations could be very tricky.

E A decision is final where the dispute between parties has been completely brought to an end or where the decision has finally disposed of the rights of the parties in a matter otherwise it would be interlocutory. The instant appeal before the lower court has been dismissed
F with costs which decision has terminated the appeal and so, as far as the rights of the parties are concerned with regard to the subject matter of the appeal, they have been finally determined whether rightly or wrongly is out of the question. And so, the decision in this instance is final not interlocutory. (p. 3082 C/E)

G
JUDGMENTS - Appeals - Time to appeal - Validity

6. The period within which to appeal the decision should be 90 days being a final judgment and not 14 days as applicable to interlocutory appeals and it also subject to the provisions of order 7 rules 6 and 7
H of the rules of the Supreme Court and 90 days to file a notice of appeal. In the circumstances, I find the notice of appeal and the grounds of appeal competently so filed and it follows that the record of Appeal and the appellants brief of argument as per grounds 2 and 3 of the grounds for the objection having no basis are totally miscon-

ceived. Equally, the insinuation that the appeal is an abuse of process is also misconceived. (p. 3082 H)

APPEALS - Parties - Misjoinder - Effect

7. I do not see this defect if at all as so fundamental as to vitiate the appeal. Also I see omitting of the parties as in the trial court as a curable defect to be rectified at the trial court. Besides, it is trite law and well founded that misjoinder or non-joinder of parties (unless otherwise of necessary or desirable parties) does not vitiate an action when there are still living parties willing to prosecute the case on both sides of the matter. Having found that the notice of appeal and the grounds contained therein have been properly initiated by due process, I find the other grounds for the objection as unsustainable and totally misconceived. (p. 3083 C)

NOTABLE POINTS OF INTEREST

CHUKWUMA-ENEH JSC

1. Amendment will not cure any incompetent appeal

It is trite law that where all the grounds of appeal, as contained in a notice of appeal are incompetent, no question of amendment would otherwise had been contemplated, as the notice of appeal is fundamentally defective and the appeal is incompetent, nor in that case would the appellant's record of appeal and brief of argument already filed thereby be of any consequence, as there would have been no valid appeal before this court upon which the processes could be predicated. (p. 3081 G)

ADEKEYE JSC

2. Notice of appeal - Ground must be of law - As described

It is trite law that a ground of appeal does not become a ground of law merely because it is so described in the notice of appeal. The ground itself and its particulars of error must show that the ground is that of law. (p. 3090 A)

3. What may constitute ground of law

Any ground of appeal alleging misunderstanding of the lower court of the law or misapplication of the law to the facts already proved, undisputed or admitted, or a misdirection, is a ground of law. Simi-

larly, where the lower court reaches a conclusion which cannot reasonably be drawn from the facts as found, and the appeal court will assume that there has been a misconception of the law - it is a ground of law. (p. 3090 F)

B **REPRESENTATION**

Mr. U. H. Azikiwe with him, Mr. Festus Onyia for the appellant/applicant.

Prof. A. B. Kasunmu, SAN with him, Mr. A. B. Kasunmu for the 1st respondent.

C Mr. A. J. Owonikoko with him Mr. Felix Eki and Olushola Kesinro (Miss) for the 4th respondent/applicant.

CASES REFERRED TO

D Ogidi v Egba 1999 10 NWLR pt. 621 p. 42

Saraki v. Kotoye (1992) 9 NWLR (Pt. 256) 188

Ajayi v. Omoragbe (1993) 6 NWLR (Pt. 301) 512

Akinloye v. Adelakun (2000) 5 NWLR (Pt. 657) 530 at 535

Ogbechie v. Onochie (No. 1) (1986) 2 NWLR (pt. 23) pg. 484

E Nwadike v. Ibekwe (1987) 4 NWLR (Pt. 67) 718 at 744 - 746

Owonikoko v. Arowosaiye (1997) 10 NWLR (Pt 523) 61 at 78

Onucha v. Nwabueze (2000) 2 NWLR (Pt. 750) 172 at 182-183

Dawodu v. Ologundudu (1986) 4 NWLR (Pt. 33) 104 at 110-112

F Government of Kwara State v. Gafar (1997) 7 NWLR (Pt. 511) 51 at 59

Comex Ltd. V. Nigeria Arab Bank (1997) 3 NWLR (Pt. 496) 643 at 654

Metal Construction (West Africa) Ltd. v. Migliore (1990) 1 NWLR (pt. 126) pg. 299

G Wing Commander A. Adamu v. Donatus F. Akukalia (2007) 4 NWLR (pt. 1023) pg. 64 at pages 81-82

STATUTES & RULES REFERRED TO

H Constitution of Federal Republic of Nigeria 1999, ss. 36 (1), 233 (2) & (3)

Court of Appeal Rules, O. 6 r. 6

Court of Appeal Act, s. 25 (1)

Supreme Court Rules, O. 2 rr. 8, 4 & 20, O. 7 r 2 (b), rr. 6 & 7

LEAD JUDGMENT BY CHUKWUMA-ENEH JSC

The notice of preliminary objection filed on 27/10/2009, by the 4th respondent in this matter, has been raised against hearing of this appeal pursuant to Order 2 Rules 9 and 20 of the Supreme Court Rules and under the inherent jurisdiction, on the following grounds: B

“1. The Notice of Appeal is incompetent for failure to obtain necessary leave of court as required by Section 233 (2) and (3) of the Constitution of the Federal Republic of Nigeria 1999.

2. The Record of Appeal was not prepared by the Appellant and was not transmitted to this Honourable Court within 14 days from the date of judgment of the Court of Appeal. C

3. The Appellant's brief was not filed within time.

4. The parties on the Appellant's Brief and other processes filed are not the same as the parties in the court. D

5. The Appeal is an abuse of Court-Process.”

The preliminary objection is supported by an affidavit of 27 paragraphs sworn to by one Felix Aki of counsel. Also filed along with the aforesaid processes is the 4th respondent/objector's brief in support of the preliminary objection. Before coming to the appellant's case, Prof. Kasunmu, SAN, for the 1st respondent has filed no process. He has however, associated himself with the submission of the 4th respondent in this matter. There is proof of service on the respondents 2nd - 5th with the instant processes but none of them has found it convenient to react to them nor appear in court in argument for the same. F

The appellant has filed a Counter-Affidavit on 2/3/2010 of 25 paragraphs in answer to the 4th respondent's supporting affidavit to the preliminary objection, also filed is its brief in the matter. I will revert to them anon. G

The facts of this matter are not in issue and are as contained in the body of this Ruling.

Meanwhile, as I conceive it from an overview of this matter, H that the fate of the instant preliminary objection whatever may have informed the propriety of taking it at this stage of this proceeding hangs on resolving ground one above positively being the main ground for determination as per the 4th respondent's brief of argument in this

matter, that is, in regard to the competency of the instant Notice of Appeal dated 15/10/2008 as well as the nine grounds of appeal contained therein. The other grounds for the objection will take their cue from upholding ground one. In that vein, I should go straight to deal with that ground without much embellishments of the surrounding grounds. What I am otherwise trying to say here is that upon finding the instant Notice of Appeal and the nine Grounds of Appeal therein to be competent and duly filed then grounds 2, 3, and 4 of the grounds for raising the preliminary objection as set out above become otiose and utterly of no moment; in which case the record of appeal as prepared by the Registrar and remitted to this court and the appellant's brief of argument filed pursuant to the entry of the appeal in this court would have procedurally fallen into proper place and thus render the question of abuse of process a non-issue as a ground for the instant objection.

However, the two issues for determination as raised by the 4th respondent in its brief in this respect read as follows:

"3.01: Whether appellant's non compliance with the Constitution of the Federal Republic of Nigeria 1999 and the Supreme Court Rules for the proper exercise of its right of appeal and due presentation thereof render this appeal incompetent?"

3.02 Whether this appeal is an abuse of court process."

Having raised these issues the 4th respondent with regard to the notice of appeal dated 20.10/2008 has submitted that the grounds of appeal contained therein are not grounds of law otherwise at best of mixed law and fact, which mandatorily require leave of court under Section 233 (3) of the 1999 Constitution and that having failed to obtain leave of court as required under the said section the instant Notice of Appeal as well as the grounds of appeal contained therein has not been initiated by due process of law and upon fulfillment of the pre-condition to the exercise of the court's jurisdiction. See: *Madukolu v. Nkemdilim* (1962) 2 NSCC (vol. 2) 374 and so they are incompetent and should be struck out. To compound the issue under this ground the 4th respondent has posited that the decision of the lower court dismissing the appeal for want of diligent prosecution and being an abuse of the court process cannot be properly impugned without, firstly advertent to the facts upon which the decision is founded and that in the circumstances leave of court is required to

render the instant appeal before this court being interlocutory in nature competent. In support of the foregoing submission it has relied on *Comex Ltd. V. Nigeria Arab Bank* (1997) 3 NWLR (Pt. 496) 643 at 654 and *Ajayi v. Omoragbe* (1993) 6 NWLR (Pt. 301) 512, Let me vouch here respectfully that there is a misconception of the clear distinction between interlocutory and final decision/order in this matter as perceived by the 4th respondent. Thus raising the question whether the decision has completely disposed of the appeal, this is as to the rights of the parties to the appeal. I shall to deal with it in the course of this judgment.

On the 2nd leg of the objection as espoused in ground 2 above, it is submitted that the record of appeal of the proceedings of the lower court has been compiled outside the time so limited for such exercise – thus characterizing the decision as interlocutory and subject to the provisions of order 7 rule (2) (b) and order 7 rules 6 and 7 which allow only 14 days from the date of delivery of the decision to compile and transmit the record of appeal with the brief on it to this court. It is further submitted that the appellant contrary to the provisions of the said Rules has gotten the Registrar of the lower court though on depositing N3000.00 to compile the record of appeal even then belatedly and outside the time so limited for the same; it is also contended that following from the foregoing the appellant's brief of argument has been filed outside 10 weeks as limited by the rules i.e. after service of the record of appeal on the appellant. And so it is urged that the record of appeal as well as the appellant's brief of argument in the appeal before this court being in the circumstance incompetent should be struck out as well as the appeal itself.

On the third leg of the objection it is contended that the title of processes filed here do not bear the same names of the parties as in the lower court, and clearly that the appellant has not complied with Order 2 Rule 8 of the Rules of this court. The processes so filed in this proceeding have also been challenged as to their competency for unilaterally omitting the 1st defendant Michael Omisade/Yinka Omisade as at the trial court, and who has not so far been substituted since his demise and for substituting Power Holding Company of Nigeria Plc. as the 5 respondent in this proceeding for National Electric Power Authority (NEPA) the 6th respondent in lower court, all these acts have been done, it is contended improperly without leave of court.

The court is urged to discountenance the processes.

On the conduct of the appellant it is submitted that it has not acted in any way in good faith as in the instances above-stated as well as in regard to other numerous vexatious applications amounting to abuse of process that have been filed in this proceeding clearly with a view to stalling the hearing of this appeal expeditiously on the merits even then that the substantive suit is still pending at the trial court after decades of deliberate wrangling over irrelevances as delay tactics.

On issue two, that is, on abuse of process proper, it is submitted in this instance that the appellant has upon the foregoing antecedent factors resorted to all manner of improper use of judicial processes particularly when the real question the subject matter of the appeal has already been decided upon by the lower court and has relied on *Saraki v. Kotoye* (1992) 9 NWLR (Pt. 256) 188 and *Owonikoko v. Arowosaiye* (1997) 10 NWLR (Pt 523) 61 at 78 paragraph C for so contending and that appeal should thereby be dismissed. The court is urged to uphold the preliminary objection and to dismiss the appeal for being incompetent and for being an abuse of court process.

The appellant has in its brief in response to this matter has firstly examined all the grounds of appeal that is 9 (nine) in all, as per the notice of appeal dated 15/10/2008 (filed in this proceeding) and rightly in my respectful view has showed them to be grounds of law. The nine grounds of appeal without their particulars of errors read as follows:

“(1) Error in law:

The Learned Justices of the Court of Appeal erred in law when they dismissed the substantive appeal No. CA/15/27/2003 without hearing the said appeal.

(2) Error in law:

The Learned Justice of the Court of Appeal erred in law and violated the provisions of Section 36(1) of the Constitution of the Federal Republic of Nigeria when they dismissed appeal No. CA/L/27/2003. -

(3) Misdirection of Law:

The Learned Justices of the Court of Appeal misdirected themselves in law when they relied on Order 8 Rule 6 of the Court of

Appeal Rules 2007 to dismiss the substantive appeal No. CA/L/27/2003.

(4) *Error of Law:*

The Learned Justices of the Court of Appeal erred in law when they dismissed appeal No. CA/L/27/2003. without hearing on the ground that ‘the motive behind the interlocutory appeal is to stall the trial and proceedings at the lower court (the Federal High Court).

(5) *Error of Law:*

The Learned Justices of the Court of Appeal erred in law when they struck out the Motion dated 25th September, 2008 and dismissed the Appellant’s appeal No. CA/L/27/2008.

(6) *Error of Law:*

The Learned Justices of the Court of Appeal erred in law when they struck out the Appellant’s Motion dated 25th September, 2008 without hearing the Motion.

(7) *Error of Law:*

The Learned Justices of the Court of Appeal erred in law when by striking out the Motion dated 25th September, 2008 without hearing, they violated the provisions of Section 36(1) of the Constitution of the Federal Republic of Nigeria 1999.

(8) *Error of Law:*

The Learned Justices of the Court of Appeal erred in law when they proceeded to consider and decide on the oral application, made by the Appellant’s Counsel, for adjournment which had been withdrawn.

(9) *Error of Law:*

The Learned Justices of the Court of Appeal erred in law when they held that the Motion dated 25th September, 2008 was incompetent.”

The appellant has joined issues with the 4th respondent in all the above grounds for the objection and I shall go on to deal with them seriatim. I have therefore gone through all the processes filed by the parties in this matter particularly their respective affidavits and submissions as per their briefs and I think, I should firstly examine the contention that the instant Notice of Appeal and the grounds contained therein are incompetent and should be struck out.

Firstly, Notice of Appeal as a court process is, where the right of appeal is given by statute an initiating process. It

encapsulates the complaints of the appellant against the decision appealed from. It must be noted that an appeal is incompetent where the Notice of Appeal is defective in the sense that there is no valid ground of appeal raised therein. Also it is trite that under Section 233 of the 1999 Constitution appeals could be as of right or with leave of court. See Section 233(2) and (3). Where, however, no such leave as required to file a ground of appeal under Section 233(3) supra of the 1999 Constitution has been obtained, the ground of appeal is incompetent where filed without leave of court. See: Atuyeye & Ors. V. Ashanu (1987) 1 NSCC (Vol. 18)117.

Against the foregoing background I examine the Nine Grounds of Appeal raised in the instant Notice of Appeal:

ON GROUNDS 1 & 2: Reading them with their respective particulars of error have showed they hinge their complaints on denial of fair hearing by the lower court resulting in dismissing the appeal even when not listed for hearing on that day's cause list. They are clearly grounds of law. See: Onucha v. Nwabueze (2000) 2 NWLR (Pt. 750) 172 at 182-183 N-B and Nwadike v. Ibekwe (1987) 4 NWLR (Pt. 67) 718 at 744 - 746.

GROUND 3: Reading it with its particulars it clearly has complained of the lower court misdirecting itself by relying on Order 6 Rule 6 of the Court of Appeal Rules as otherwise empowering it to "*strike out a notice of appeal when an appeal is not competent*" and so the lower court has improperly dismissed the appellant's substantive appeal not listed for hearing, without hearing the appellant. This has raised an issue of law and so, a ground of law. See: Nwadike v. Ibekwe (supra).

GROUND 4: This ground has complained of not hearing the appellant which is a ground of law. In a situation where the appellant is complaining of dismissing the appeal suo motu on the ground that the motive behind the interlocutory appeal is to stall the trial and the proceedings of the lower court without hearing the appellant on the issue is clearly a question of law and cannot arise from an exercise of discretion.

GROUND 5: This ground without more has questioned the power for striking out specifically the application filed on 25/9/2008 and the dismissal of the substantive appeal in this matter in other

words it questions the jurisdiction for dealing with the matter. This court in *Nwaigwe v. Okere* (2008) 13 NWLR (Pt. 1105) 445 at 475 BC has held that challenging the jurisdiction of a court as has been done here is a ground of law, so ground 5 is a ground of law.

FOUNDATIONS 6 & 7: The grounds have complained of the striking out of the appellant's notice of motion (dated 25/9/2008) without hearing the appellant and in contravention of Section 36(1) of the 1999 Constitution, there cannot be any iota of doubt that the grounds have raised questions of law. B

GROUND 8: This ground questions the jurisdiction of the lower court to consider an oral application for adjournment when there is no proper application for the same at the time before the court as it has been withdrawn. This ground clearly has raised questions of law and so a ground of law. C

Ground 9: This ground of appeal has challenged the competency of the lower court to hold an application of 25/9/2010 incompetent, the ground clearly has raised a question of law. D

From the foregoing resume, the above grounds of appeal as I have carefully traversed and reviewed herein, leave no one in any doubt that all the grounds are grounds of law. E

I, therefore, agree with the appellant that the nine grounds of appeal contained in the notice of appeal dated 15/10/2008 being grounds of law they do not require leave of court as prescribed by section 233(3) of the 1999 Constitution; and so the provisions are inapplicable in the circumstances. It also follows that the notice of appeal dated 15/10/2008 is valid and competent as well as extant. See: *Akinloye v. Adelakun* (2000) 5 NWLR (Pt. 657) 530 at 535 paragraph C - I; and also that the instant appeal is properly and competently pending in this court having been initiated by due process. See *Madukolu v. Nkemdilim* (supra). It is trite law that where all the grounds of appeal as contained in a notice of appeal are incompetent, no question of amendment would otherwise had been contemplated as the notice of appeal is fundamentally defective and the appeal is incompetent, nor in that case would the appellant's record of appeal and brief of argument already filed thereby be of any consequence as there would have been no valid appeal before this court upon which the processes could be predicated. ***The other side of the coin in my con-*** F G H

clusion is that the instant Notice of Appeal and the grounds of appeal therein are competent and so the instant record of appeal and the appellant's brief of argument have been duly filed within the time as allowed by the Rules.

I have reached the foregoing findings notwithstanding the 4th respondent's contention that the appeal before this court is interlocutory in nature that is, if I have gotten its submission right and so that the instant appeal before this court is founded upon a decision/order which has been reached in that regard.

The 4th respondent has respectfully misconceived the instant appeal from the Court of Appeal which has arisen from the dismissal of the appeal before it hence the appeal to this court has been initiated by the instant notice of appeal dated 15/10/2008. Again, also the 4th respondent has completely misconceived the essence of final or interlocutory judgment or order although distinguishing the two situations could be very tricky. The test however has been expounded in a number of decisions including the case of Dawodu v. Ologundudu (1986) 4 NWLR (Pt. 33) 104 at 110-112 per Nnaemeka-Agu JSC, Omonuwa v. Oshodin & Anor. (1985) 2 SC. 1 at page 31 per Karibi-Whyte in which he has followed the decisions in Salaman v. Warner (1891) 1 KB. 577 and Afuwape & Ors. V. Shodipe & Ors. (1957) 2 FSC 62 at 68. **A decision is final where the dispute between parties has been completely brought to an end or where the decision has finally disposed of the rights of the parties in a matter otherwise it would be interlocutory. The instant appeal before the lower court has been dismissed with costs which decision has terminated the appeal and so, as far as the rights of the parties are concerned with regard to the subject matter of the appeal, they have been finally determined whether rightly or wrongly is out of the question. And so, the decision in this instance is final not interlocutory.** See Omonuwa v. Oshodin & Anor. (supra). Meaning that no leave of court is required under Section 233 of the 1999 Constitution and Section 25 (1) of the Court of Appeal Act, is inapplicable. **The period within which to appeal the decision should be 90 days being a final judgment and not 14 days as applicable to interlocutory appeals and it also sub-**

ject to the provisions of Order 7 Rules 6 and 7 of the Rules of the Supreme Court and 90 days to file a Notice of Appeal. In the circumstances, I find the Notice of Appeal and the grounds of appeal competently so filed and it follows that the Record of Appeal and the appellants brief of argument as per grounds 2 and 3 of the grounds for the objection having no basis are totally misconceived. Equally, the insinuation that the appeal is an abuse of process is also misconceived. B

The only issue left is the issue of title of the processes filed by the appellant in this matter particularly in a case as the instant case where on both sides of the divide there are still living parties to sustain the appeal. **I do not see this defect if at all as so fundamental as to vitiate the appeal. Also I see omitting of the parties as in the trial court as a curable defect to be rectified at the trial court. Besides, it is trite law and well founded that mis-joinder or non-joinder of parties (unless otherwise of necessary or desirable parties) does not vitiate an action when there are still living parties willing to prosecute the case on both sides of the matter. Having found that the notice of appeal and the grounds contained therein have been properly initiated by due process, I find the other grounds for the objection as unsustainable and totally misconceived.** C D E

However, the parties are directed to file all outstanding briefs of argument in this matter for expeditious hearing of the appeal soonest.

In sum, I see no merit in the preliminary objection, it is accordingly overruled with no order as to costs. F

MOHAMMED JSC

I have had the privilege before today of reading in draft the Ruling just delivered by my learned brother Chukwuma-Eneh JSC. I completely agree with him that the Preliminary Objection brought against the hearing of this appeal on the ground that the appeal is incompetent cannot be sustained and therefore ought to be dismissed. The Preliminary Objection was brought by the 4th Respondent before the appeal was fixed for hearing. The objection is against the hearing of the appeal on the ground that the appeal is incompetent for the following reasons - G H

1. That the Notice of Appeal is incompetent for failure of the Appellant to obtain the necessary leave of Court as required by Section 233(2) and (3) of the Constitution of the Federal Republic of Nigeria 1999.

B 2. That the Appellant did not prepare the record of appeal and transmitted the same to this Court within 14 days from the judgment of the Court of Appeal as prescribed by the rules of this Court.

3. That the Appellant's brief was not filed within time.

C 4. That the parties in the Appellant's brief are different from the parties in the trial Court and

5. That the appeal is an abuse of Court process.

From the undisputed facts of this case, it is quite clear that the Appellant's appeal arose from the decision of the Court of Appeal dismissing its appeal on a date fixed for the hearing of its motion to D amend the Notice of Appeal etc. without affording the Appellant a hearing. At least that is the substance of its complaint in some of the grounds of appeal contained in its Notice of Appeal now being attacked as incompetent. The grounds are therefore grounds of law the filing of which requires no leave under 233(1) of the 1999 Constitution. E

It is for the above and fuller reasons given in the lead Ruling that I also dismiss the Preliminary Objection and abide by the consequential orders therein including the order on costs.

F _____

FABIYI JSC

I have had a preview of the Ruling just delivered by my learned brother - Chukwuma-Eneh, JSC. I agree that the preliminary objection raised by the 4th respondent to the competence of G the appeal lacks substance and deserves to be dismissed.

The first ground of objection raised by the 4th respondent reads as follows:-

H *"1. That the Notice of Appeal is incompetent for failure of the appellant to obtain the necessary leave of court as required by section 233 (2) and (3) of the Constitution of the Federal Republic of Nigeria, 1999."*

From what transpired at the Court of Appeal, Lagos Division on 6th October, 2008 as extant in Exhibit B annexed to the affidavit

in support of the preliminary objection, the appellant's appeal was dismissed on a date fixed for hearing of its motion to amend the Notice of Appeal without affording the appellant a hearing.

In real substance, grounds 1 and 2 of the grounds of appeal complain that the Court of Appeal violated the appellant's right of fair hearing for dismissing its appeal on a date it was not fixed for hearing without hearing argument on the substantive appeal. B

It is settled that a ground of appeal which complains of a breach of the right to fair hearing vide section 36(1) of the 1999 Constitution is a ground of law alone. Same does not require any leave of court to file it under section 233 (1) of the Constitution. See: Nwadike v. Ibekwe (1987) 4 NWLR (Pt. 67) 718 at 744 -745; Government of Kwara State v. Gafar (1997) 7 NWLR (Pt. 511)51 at 59. C

Most of the other proliferated grounds of appeal touch on jurisdiction and competence of the court. It goes without saying that they are grounds of law which require no leave. The Preliminary Objection taken was unwarranted in my considered opinion. D

For the above and the reasons adumbrated in the Ruling of my learned brother, I too, hereby dismiss the Preliminary Objection. I endorse all consequential orders therein contained; that relating to costs inclusive. E

ADEKEYE JSC

In the appeal now before this court, the 4th respondent/objector, New African Technical & Electrical Company Limited, raised a preliminary objection to the hearing of the appeal on the ground that the appeal is incompetent. It gave reasons for the objection as follows: F

(1) That the Notice of Appeal is incompetent for failure of the appellant to obtain necessary leave of court as required by Section 233 (2) and (3) of the Constitution of Federal Republic of Nigeria 1999. G

(2) The appellant did not prepare a record of appeal - hence it was not possible to transmit same to this court within 14 days from the date of the judgment of the Court of Appeal. H

(3) The appellant's brief was not filed within time.

(4) The parties in the appellant's brief are different from the

parties in the trial court.

(5) The appeal is an abuse of court process.

The preliminary objection was brought pursuant to Order 2 Rule 9 of the Supreme Court Rules 1999 as amended, the Constitution of the Federal Republic of Nigeria 1999 and the inherent jurisdiction of this court. The objector submitted by way of brief, background facts of the case - that this matter was commenced on the 8th of March 1990 before the Federal High Court Lagos. It suffered several amendments to the pleadings -while the relevant pleadings are now: -

- (a) Amended statement of claim.
- (b) Amended statement of defence of the 4th defendant.
- (c) Defendant's statement of defence and counterclaim.
- (d) The 4th defendant's/appellant's statement of defence to the 5th defendant's counterclaim dated 16th of October 2007.

There were several applications filed between 1999 to 2008 and appeals emanating from them to the Court of Appeal. The appellant/applicant always had a stay of proceedings pending either at the trial court or Court of Appeal. The appellant raised challenging under different guises each time the matter proceeded to trial and the same subject-matter raised in the applications was against the competence of the action. It was not difficult for the lower court to observe, regardless of the decision of the trial court, that the matter must proceed for fair and just determination to full trial. The appellant went on appeal thereafter; the objector observed that the main motive of the applicant in his interlocutory appeal was to stall the proceedings.

The objector contended further that the appellant filed its notice of appeal on the 15th of October 2002 without obtaining leave of court. The appeal which was dismissed by the Court of Appeal, was from an interlocutory decision of the trial court delivered on the 20th of March 2002. The appellant failed to compile Records and file same within 14 days from the date the Ruling of the Court of Appeal was delivered as stipulated in the Supreme Court Rules 1999 as amended. The appellant went ahead to file an appellant's brief and exhibited therein evidence that Records were compiled by the Registrar of the Court of Appeal. The respondent/objector submitted further that the Registrar of the Court of Appeal did not invite parties for settlement

of records till date and a copy of the Record had not been served on the respondent/objector. The appellant's brief was filed on the 30th of March 2008 - ten weeks after he was supposed to have done so as required by the Supreme Court Rules - and leave for extension of time was not sought and obtained. The appellant removed the names of Michael Omisade and Yinka Omisade from the suit and no application was filed for the joinder of Power Holding Company of Nigeria Plc as the 5th respondent in this appeal. B

The parties named as respondents in the Notice of Appeal and the appellant's brief are different from the respondent's before the Court of Appeal. The appellant opposed the substitution of the deceased 1st defendant, Michael Omisade with his son. The court observed in 2004 that the appeal filed against a dead party was incompetent. The appellant failed to regularize it. Consequently, the name of the dead 1st defendant appeared as a party before the Court of Appeal, whereas it had been substituted at the trial court, and now before this court, the name of the deceased was deleted without the substituted person being made a party to the suit. In effect, different processes of court in the same suit bear different names of parties. This court had to grudgingly adjourn the matter because of the application at the trial court by the applicant's counsel to allow the matter be tried under the new Rules of the Federal High Court which make provision for front loading for hearing of the suit without delay. The court is urged to sustain the objection in view of the attitude of the appellant to delay hearing in the substantive suit. The 4th respondent/objector relied on all the four cases on the additional list of authorities filed on 12/10/10. C D E F

By way of reply, Prof. Kasunmu, SAN associated himself with the submission of the 4th respondent/objector that there is no proper party or appeal before this court. The suit had been in court for twenty years without commencement of the substantive trial. G

Mr. Azikiwe, learned counsel for the appellant/respondent in his response to the preliminary objection, urged upon this court to dismiss the objection as being frivolous and baseless. He relied on the counter affidavit filed on 2/3/10 and the appellant's brief in response to the 4th respondent's preliminary objection. H

The appellant raised a preliminary point that the 4th respondent/objector, being a co-defendant in the substantive suit at the Fed-

eral High Court there being no claim or remedy sought against it in this appeal, and having not also filed a respondent's notice - has no standing to object to this appeal. The appellant supported this preliminary point with the case of *Wing Commander A. Adamu v. Donatus F. Akukalia* (2007) 4 NWLR (pt. 1023) pg. 64 at pages 81-82.

^B The appellant's counsel submitted that the lower court dismissed the appellant's appeal without hearing same though the parties had filed their respective briefs of argument and the substantive appeal was not before the lower court for hearing on that date. The lower court also struck out the appellant's motion for leave to amend its Notice of Appeal, appellant's brief of argument and Reply brief. The appellant had six months to compile and transmit the Record. The appellant paid for compilation of Record of appeal and attached evidence of payment as Exhibit "F03". The appellant received the Record of appeal and evidence that the appellant's counsel acknowledged receipt of the Record was attached to the counter-affidavit in answer to the 4th respondent's objection as Exhibit "F05". The appellant filed its Brief of argument on 30th of March 2009 which was within ten weeks of the receipt of the Record of appeal. The period would have lapsed on the 9th of April 2009. The learned counsel further submitted that appellant had by a motion on Notice filed on 11/2/10 applied to regularize the compilation of record and transmission of same to this court which the lower court did on the 15th of December 2008. A copy of the motion on notice dated 11/2/10 was attached to the counter-affidavit as Exhibit "F06". The appellant contended that the parties in appeal CA/L/27/03 before the Court of Appeal are same as the parties in the appeal SC/337/08 before this court.

^F Mr. Michael Omisade is only one of the six respondents in this action and his non-inclusion cannot vitiate the action. The action before the Federal High Court in Suit No. FHC/L/22/90 is stillborn as the 1st respondent failed to obtain the requisite leave under the Companies and Allied Matters Act to pursue a derivative action brought on behalf of the 4th respondent, a company in which the 1st respondent is a minority shareholder. The appellant attached as Exhibit "F012" to his counter-affidavit, a copy of the civil Form 18 dated the 13th November 2008 by which the registry of the lower court notified the 4th respondent's counsel of the availability of the Record of appeal. The 4th respondent has failed to file its brief. The grounds raised in

the appeal are grounds of law, which do not require leave of court before they can be filed.

The appellant argued that the depositions in paragraphs 14-23 of the affidavit in support of the preliminary objection are calculated to prejudice the mind of this court against the appellant in the exercise of its right of appeal. As the preliminary objection was brought in bad faith - the appellant urged this court to dismiss it. B

I have carefully examined the submission of both sides in respect of the preliminary objection raised by the 4th respondent in this appeal. In order to get a clear picture of the appeal itself, the court cannot but advert its mind to the substantive issues before the trial court. The appellant before this court in its amended statement of defence filed on 26/2/01, raised preliminary points of law which clearly are defences as to - C

(1) The incompetency of the suit as the 1st respondent who was the plaintiff in the suit filed as FHC/L/22/90 in 1990, failed to obtain leave of court to institute a minority shareholders action brought on behalf of and for the benefit of a company, the 4th respondent. The Company and Allied Matters Act stipulates that before pursuing a derivative action leave of court must be sought and obtained. D

(2) That the suit is statute-barred in that it was commenced 14-17 years after the alleged cause of action accrued. E

The appellant filed a motion before the trial court for the hearing of these points of law on 2/4/01. The learned trial judge struck out the motion on notice for reason that the issues had already been previously litigated. However, the issues of failure of the plaintiff now 1st respondent to have obtained leave of the trial court to institute a minority shareholders action was not placed before the court. The court did not also determine the merit of the issue of the 1st respondent's action being statute-barred. The appellant went to the Court of Appeal against the decision of the trial court - the lower court also struck out the motion for amendment of the Notice of appeal, appellant's brief of argument, the Reply brief - and even the substantive appeal which was not before the lower court for hearing on that date. The instant appeal emanated from the grief caused by that decision to the appellant. The preliminary issues raised in this objection are adequately answered by the appellant who went to the extent of exhibiting documents as evidence in their support. The two F
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points raised before the trial court are clearly and without mincing words, questions of law and any appeal on them can only be grounds of law.

It is trite law that a ground of appeal does not become a ground of law merely because it is so described in the notice of appeal. The ground itself and its particulars of error must show that the ground is that of law.

Tilbury Construction Co. Ltd. v. Ogunbiyi (1988) 2 NWLR (pt. 74) pg. 64. Erisi v. Idika (1987) 4 NWLR (pt. 66) pg. 503.

The Supreme Court in their numerous decisions laid down the general principles for determining whether a ground of appeal is that of law, fact or mixed law and facts. A question of law is given three distinct meanings as follows-

(1) A question the court is bound to answer in accordance with a rule of law. The question is already determined and answered by the laws.

(2) That which explains what the law is.

An appeal on a question of law in this sense means an appeal in which the question for argument and determination is what the true law is on a certain matter; for example, a question relating to the construction of a statutory provision.

(3) All questions within the judicial powers of a judge to determine and not that of a jury for instance, the interpretation of documents.

Any ground of appeal alleging misunderstanding of the lower court of the law or misapplication of the law to the facts already proved, undisputed or admitted, or a misdirection, is a ground of law. Similarly, where the lower court reaches a conclusion which cannot reasonably be drawn from the facts as found, and the appeal court will assume that there has been a misconception of the law-it is a ground of law.

Board of Customs and Excise v. Barau (1982) 10 SC pg. 48.

Ogbechie v. Onochie (No. 1) (1986) 2 NWLR (pt. 23) pg. 484.

Nwadike v. Ibekwe (1987) 4 NWLR (pt. 67) pg. 718.

Metal Construction (West Africa) Ltd. v. Migliore (1990) 1 NWLR (pt. 126) pg. 299.

A. C. B Plc. v. Obimiami Brick & Stone (1993) 5 NWLR (pt.

294) pg. 399.

It is a basic constitutional requirement as provided in Section 233 (3) of the 1999 Constitution, that where grounds of appeal are of mixed law and facts or of facts alone, it is imperative that leave of court must first be sought and obtained, hence the notice of appeal incorporating such grounds without leave is incompetent. Any issue arising therefrom will be regarded as incompetent and will be struck out. The grounds of appeal here in the instant appeal are grounds of law and hence they do not require leave of the Court of Appeal or this court.

The other grounds of the preliminary objection that -

(a) That the Record of Appeal was not prepared by the appellant and was not transmitted to this honourable court within 14 days from the date of judgment of the Court of Appeal.

(b) That the appellant's brief was not filed within time.

(c) That the parties on the appellant's brief and other processes filed are not the same as the parties in the trial court.

(d) That the appeal is an abuse of process cannot be sustained in view of the facts before the court and the annexure to the counter-affidavit of the appellant in response to the preliminary objection particularly, Exhibits F02, F03, F04, F06 and F012.

With fuller reasons given in the lead Ruling of my Lord, C. M. Chukwuma-Eneh, JSC, I also concur that the preliminary objection filed by the 4th respondent cannot be sustained. It is hereby dismissed. Parties are directed to file their respective brief of arguments for the hearing of this appeal. I abide by the consequential orders in the lead Ruling including the order as to costs.

RHODES-VIVOUR JSC

Before us is a Preliminary objection filed by the 4th Respondent. The objection is against the hearing of the appeal by this court, and the grounds of objection are:

1. That the Notice of Appeal is incompetent for failure of the Appellant to obtain the necessary leave of court as required by Section 233(2) and (3) of the Constitution of Nigeria.

2. That the Appellant did not prepare the read of appeal and transmit same to this court with 14 days from the judgment of the

Court of Appeal as prescribed by the rules of this court.

3. That the Appellant brief was not filed within time.

4. That the parties in the Appellant's brief are different from the parties in the trial court, and

5. That the appeal is an abuse of Court process.

B Order 2 Rule 9 of the Supreme Court Rules allows a respondent to rely on a preliminary objection to the hearing of the appeal. The purpose being to bring the hearing of the appeal to an end for being incompetent or fundamentally defective. Consequently a successful Preliminary objection terminates the appeal. On being
C served with a Preliminary objection, the appellant is expected to respond in a reply brief. See Ogidi v Egba 1999 10 NWLR pt. 621 p. 42

D In the Court of Appeal, the appellant's appeal was dismissed on a date fixed for the hearing of its Motion to amend the Notice of Appeal. Consequently the appellant was not heard. The crux of the appellants complaint is that he was not given a fair hearing before his appeal was dismissed. Section 36 (1) of the Constitution provides for "Right to fair hearing". It reads:

E *"36(1) In the determination of his civil rights and obligations including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by Law and constituted in such manner as to secure its independence and impartiality,"*
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In deciding whether a ground of appeal is one of Law or fact or mixed Law and fact the grounds must be examined to see whether it is on a misunderstanding by the court of the Law or a misapplication of the Law to facts already established. So, where the complaint
G in the ground of appeal is one of misunderstanding by the court of the Law or misapplication of the Law to the facts established then the ground of appeal is ground of Law. Where the ground of appeal disputes or questions the evaluation of facts by the court before applying the Law, it is a ground of mixed Law and fact.
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Grounds 1 and 2 complains of denial of fair hearing as provided by section 36(1) of the Constitution. These are ground of Law and leave of court under section 233(2) of the Constitution is unnecessary. The appellant has a right of appeal. Furthermore the other

grounds of appeal are on the competence of the court. This also is/are grounds of Law that do not need leave.

In the light of all that I have been saying the preliminary objection fails and it is hereby dismissed. I agree entirely with the leading judgment of my learned brother, Chukwuma-Eneh, JSC.

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