

**SUPREME COURT OF NIGERIA**  
11TH JUNE, 2010. SC. 311/2002  
**CORAM:- D. MUSDAPHER, W. S. N. ONNOGHEN, F.**  
**TABAI, I. T. MUHAMMAD, O. O. ADEKEYE, JJSC**

1. SAMBA PETROLEUM LTD.  
2. INTERNATIONAL ..... PLAINTIFFS  
MERCHANTS BANK PLC.  
AND  
1. UNITED BANK FOR  
AFRICA PLC. .... DEFENDANT/  
CROSS-APPELLANT  
  
2. ALH. LAWAL ALIYU ..... DEFENDANT  
  
3. ALH. MOHAMMED TANKO ..... DEFENDANT/  
CROSS-RESPONDENT  
  
4. MR. JOSEPH DODU KATUL ..... DEFENDANT
- 

APPEALS - Preliminary objection - Propriety - Where issue in consideration is purely on law - Objection based on failure to obtain leave to appeal - Will fail (H1)

JUDGMENTS - Appeals - Issues - Raising two issues - On cross appeal - Failure to determine one of the issues raised - Will affect competence of counter claim (H2)

COURTS - Trial - Fair hearing - Denial - Cross appellant was not given opportunity - To be heard in the normal course of trial (H3)

APPEALS - Issues raised - Duty of court to consider - Courts must consider all issues before it - Except the Supreme Court - Which can resolve an appeal - Based only on issues it deems fit (H4)

COURTS - Statutory duty - To consider all issues raised - Failure to do same - Will lead to denial of fair hearing - Capable of nullifying the proceedings (H5)

### **FACTS**

Plaintiffs sued 1st - 4th defendants at High Court of Kaduna State holden at Kafanchan. The trial court in its proceedings took evidence on counterclaim, when same was not ripe for hearing and without allowing 1st defendant/respondent/cross appellant an opportunity to defend the counterclaim. The trial court continued to hear evidence on the case of plaintiffs during the time allowed for defendants to file defence to the said action, and eventually entered judgment in favour of the appellant. At the Court of Appeal, cross appellant posited that the learned justice in delivering judgment took note of two issues raised by cross appellant but however considered one of the issues leaving the other. The issue not considered was vital as it was basically the complaint against proceedings of trial court which it argued was vitiated. Consequently, the Court of Appeal struck out cross respondent's claims.

Aggrieved, cross respondent appealed to the Supreme Court while cross appellant cross appealed. Cross respondent in the main appeal alleged that Court of Appeal decision was based on a particular ground of cross appellant's notice of appeal which was neither canvassed by parties at trial court nor did trial court make any decision thereon. It was his position that Appeal Court was wrong to have struck out his claim, cross appellant having consciously and actively participated at the trial without objecting thereto or proof of prejudicial justice. He however alleged among other things that the judgment was delivered per incuriam. At cross appeal, cross appellant posited that it was only the Supreme Court that can afford not to consider a material issue placed before it for determination, not the lower court being an inter mediate court.

### **ISSUES FOR DETERMINATION**

#### **MAIN APPEAL**

*"1. Whether it was right for the Court of Appeal to have entertained and considered ground 4 of the Respondent's Notice of Appeal filed on the 25/1/2000 when the said ground of appeal, raised an issue, which was neither canvassed by the parties at the trial court nor did the trial court make any decision or pronouncement thereon?"*

*2. Whether it was right for the Court of Appeal to have struck out the Appellant's claim against the Respondent, on the sole ground, that, the Appellant adopted an irregular procedure, in initiating his*

*claim against the Respondent, when the Respondent consciously and actively participated in the trial, until judgment was given against it by the trial court, without objecting to the alleged irregular procedure, but only raised the complaint for the first time before the court below and without also alleging or proving any injustice or prejudice suffered by it, as a result of the alleged irregular procedure?"*

(Etc. see p. 3294 )

### CROSS-APPEAL

*"Whether the Court of Appeal, not being the final Appellate Court could opt not to consider a material issue placed before it for determination on the ground that a resolution of the issue was unnecessary because it had resolved a jurisdictional point as was done in the instance."*

**HELD** (Unanimously allowing the cross appeal and striking out the main appeal per **MUHAMMAD JSC**)

### **APPEALS - Preliminary objection - Propriety**

1. I think it is mandatory to treat the Cross-Appeal first in view of the importance of the issue raised therein.

I have however noted a preliminary objection raised by the learned counsel for the Cross-Respondent for failure to obtain leave to Cross-Appeal and I think that the preliminary objection will fail because the issue under consideration is purely an issue of law which does not require any leave of court. The preliminary objection is misconceived. It is hereby overruled and dismissed. (p. 3295 D)

### **JUDGMENTS - Appeals - Issues - Raising two issues**

2. After having studied the judgment of the court below, especially as it relates to the cross-appeal, it is clear that the learned justice of the court below, Salami, JCA., (as he then was), who delivered the leading judgment, took note of the two issues by the Cross-appellant. He however, considered only the issue raised in 2.1. He did not consider the issue under 2.2.

Issue 2.2 as seen above is a complaint against the proceedings of the trial court whether it was not a nullity vitiated by the fact that the learned trial judge took evidence on the counter-claim when same was not ripe for hearing and without allowing the 1st defen-

dant/Cross-appellant an opportunity to defend the counter-claim before the hearing. This is a big challenge to the competence of the counter-claim. (p. 3296 F)

**COURTS - Trial - Fair hearing - Denial**

- B 3. A proper look at the trial court's proceedings of 25/10/99, reveals that the case was adjourned to 26/10/99 for defence. The 3rd defendant/Cross-respondent testified. He was Cross-examined and re-examined on 10/1/2000. D.W. 2 testified in favour of the 3rd defendant/Cross-respondent. He was Cross-examined and re-examined on 11/1/2000. That appeared to be the end of evidence for the defence. On same 11/1/2000 learned counsel for the Cross-Respondent addressed the trial court. Final address was concluded by J. B. Daudu, SAN, for the 1st defendant/Cross-appellant on 20/06/2000 and reply on points of law was made by the learned counsel for the Cross-respondent on 31/7/2000. Judgment was delivered by the learned trial judge on the 25/1/2001.

E It can be observed clearly that the 1st defendant/ Cross-appellant was not afforded an opportunity to be heard in the normal way of hearing suits filed at a court of trial. This is the complaint of the Cross-appellant before the court below and that court did not consider it at all. (p. 3297 A)

**F APPEALS - Issues raised - Duty of court to consider**

4. The position of the law is very clear that the Court of Appeal has primary duty to consider all issues brought to it for consideration especially this fundamental issue which borders on Fair Hearing.

G This applies with equal force to all courts of law. Perhaps the only exception to that general rule is the Supreme Court which may decline to consider all issues placed before it by an Appellant once it is satisfied that the just resolution of the appeal can turn on the only issue(s) decided by it.

H This is because of the unique nature of the Supreme Court as a final Appellate Court. (p. 3297 E)

**COURTS - Statutory duty - To consider all issues raised**

5. It is thus, a statutory responsibility of all courts to consider adequately and properly all issues placed before them. Failure to do so

will lead to denial of fair hearing which is, capable of rendering any proceedings a nullity.

Accordingly, the proceedings including judgment of the court below on this Cross-appeal is a nullity and is hereby set aside.  
(p. 3298 E)

B

### **REPRESENTATION**

A. M. Aliyu, (with him; C. Ubogu, Audu Sani, Salisu Umar, S. O. Alhassan), for the Appellants.

C

### **CASES REFERRED TO**

Adah v. NYSC (2004) 7 SC (Pt. II) 139; (2004) 7 SCNJ 374  
Kotoye v. C.B.N. (1989) 2 S.C. (Pt I) 1; (1989) 1 NWLR (Pt. 98) 419  
Military Governor Imo State v. Nwauwa (1997) 2 NWLR (Pt. 490) D 675  
Obisi v. Chief of Naval Staff (2004) 5 SC (Pt. 1) 136; (2004) 5 SCNJ 99  
Katto v. C.B.N (1991) 11-12 S.C. 176; (1991) 9 NWLR (Pt. 214) 126 at 149 E  
Okotie Eboh v. Chief J. E. Manager & Ors. (2004) 11-12 S.C. 174; (2004) 12 SCNJ 139  
Bamgboye v. University of Ilorin (1999) 6 S.C. (Pt. II) 72; (1999) 10 NWLR (Pt. 622) 270  
Kraus Thompson Org. Ltd. v. University of Calabar (2004) 4 S.C. F (Pt. 1) 65; (2004) 4 SCNJ 121

### **STATUTE & RULES REFERRED TO**

Kaduna State High Court (Civil Procedure) Rules, 1987, O. 2 Kaduna G  
State High Court (Civil Procedure) Edict 1987, s. 5

### **LEAD JUDGMENT BY MUHAMMAD JSC**

There are two Appeals in this matter: main Appeal and a Cross-Appeal. The main Appeal was filed by the 3rd Defendant against the 1st Defendant. The Cross-Appeal was filed by the 1st Defendant/ Respondent/Cross-Appellant against the 3rd Defendant/Appellant/ Cross-Respondent. In the main Appeal the following issues were raised by the Learned Counsel for the Appellant:

H

"1. Whether it was right for the Court of Appeal to have entertained and considered Ground 4 of the Respondent's Notice of Appeal filed on the 25/1/2000 when the said Ground of Appeal, raised an issue, which was neither canvassed by the parties at the Trial Court nor did the Trial Court make any decision or pronouncement thereon?"

2. Whether it was right for the Court of Appeal to have struck out the Appellant's Claim against the Respondent, on the sole ground, that, the Appellant adopted an irregular procedure, in initiating his Claim against the Respondent, when the Respondent consciously and actively participated in the Trial, until Judgment was given against it by the Trial Court, without objecting to the alleged irregular procedure, but only raised the complaint for the first time before the Court below and without also alleging or proving any injustice or prejudice suffered by it, as a result of the alleged irregular procedure?

3. Was the Court below right when it held that the appropriate time to raise objection to the competence of the Grounds of Appeal filed before it, is when the Motion to file the Amended Notice of Appeal containing the said grounds was moved and granted and not by way of Motion of Notice before the hearing of the Appeal?

4. Whether the Appellant in this Appeal was not denied Fair Hearing by the Court below, when the Court failed or neglected to consider his argument against the argument of the Respondent, on the sole issue, considered by the Court before the Appellant's Claim against the Respondent was struck out?

5. Whether the Judgment of the Court below delivered on the 9/7/2002 and as it relates to the Respondent and the Appellant, not given *per incuriam*, since the Court failed or neglected to consider the express provisions of Section 5 of the Kaduna State High Court (Civil Procedure) Edict, 1987 and Order 2 of the Kaduna State High Court (Civil Procedure) Rules, 1987 before reaching its decision to strike out the Appellant's Claim against the Respondent, despite the profuse references made to the said provisions by the Appellant?

6. Whether the Court of Appeal was right in holding that Ground 4 of the Respondent's Notice of Appeal, dated the 24/1/2000 (and from which the Respondent's Issue No. 2.1 in the Court below, was distilled) arose from the "Rulings" of the Trial Court?."

In the Cross-Appeal, the Learned SAN., for the Cross-Appel-

lant formulated the following issues:

*“Whether the Court of Appeal, not being the final Appellate Court could opt not to consider a material issue placed before it for determination on the ground that a resolution of the issue was unnecessary because it had resolved a jurisdictional point as was done in the instance.”* B

The Learned Counsel for the Cross-Respondent formulated the following Issue for Determination:

*“Having regard to the circumstance of this Appeal, was it necessary for the Court below to have gone ahead to determine the Cross-Appellant’s Issue No. 2.2 after determining its Issue No. 2.1 in its favour? And if it was so necessary, has the failure of the lower Court to so do, resulted in any prejudice or Miscarriage of Justice against the Cross-Appellant?”* C

From the manner the issue on the Cross-Appeal is couched by D Mr. Daudu, SAN., it appears to me that the complaint against the Court below is that it did not consider a material issue placed before if for determination.

***I think it is mandatory to treat the Cross-Appeal first in view of the importance of the issue raised therein.*** E

***I have however noted a Preliminary Objection raised by the Learned Counsel for the Cross-Respondent for failure to obtain leave to Cross-Appeal and I think that the Preliminary Objection will fail because the issue under consideration is purely an issue of law which does not require any leave of Court. The Preliminary Objection is misconceived. It is hereby overruled and dismissed.*** F

The Learned SAN., for the Cross-Appellant in his submissions on the Cross-Appeal stated that it is only the Supreme Court that can decline to consider all issues placed before it by an Appellant. He urged this Court to resolve the issue in the Cross-Appellant’s favour. G

In his submission, the Learned Counsel for the Cross-Respondent stated that the Learned SAN., for the Cross-Respondent argued both Issues 2.1 and 2.2 together and that he did not argue them in the alternative and did not urge the Court below to resolve the two issues in its favour by striking out the Cross-Respondent’s Counter-Claim against it. Learned Counsel urged this Court to dismiss the Cross-Appeal. H

Now, it is to be noted that at the Court below, the Learned SAN., for the Cross-Appellant formulated two Issues for the Determination of the Cross-Appeal. These are as follows:

B “2.1 Whether it is appropriate to commence an action against a co-defendant by way of a Counter-Claim as was done in this case by the 2nd Defendant against the 1st Defendant?

C 2.2 Whether the entire proceedings (Counter-Claim and the main Claim) were not a nullity, vitiated by the fact that the Learned Trial Judge took evidence in the Counter-claim in contravention of the rules of Court when same was not ripe for hearing and without allowing the 1st Defendant an opportunity to defend the Counter-Claim?”

The Cross-Respondent, too, formulated two Issues for the Determination of the Court below. They are as follows:

D “1. Having regard to the special circumstances of this case and the steps taken by the parties in the Court below, is it not too late at the end of the day, for the Appellant to challenge the procedure adopted by the 2nd Respondent in asserting his Claim against the Appellant?

E 2. Having regard to the state of the pleadings, the Evidence adduced and the entire circumstances of this case, can it be said that the Appellant was denied its Right to Fair Hearing, when the Appellant consciously and fully participated in the entire proceedings until Judgment was delivered by the lower Court?”

F **After having studied the Judgment of the Court below, especially as it relates to the Cross-Appeal, it is clear that the Learned Justice of the Court below, Salami, JCA., (as he then was), who delivered the Leading Judgment, took note of the two issues by the Cross-Appellant. He however, considered only the issue raised in 2.1. He did not consider the issue under 2.2.**

H **Issue 2.2 as seen above is a complaint against the proceedings of the Trial Court whether it was not a nullity vitiated by the fact that the Learned Trial Judge took Evidence on the Counter-Claim when same was not ripe for hearing and without allowing the 1st Defendant/Cross-Appellant an opportunity to defend the Counter-Claim before the hearing. This is a big challenge to the competence of the Counter-Claim.**



Furthermore, **a proper look at the Trial Court's proceedings of 25/10/99, reveals that the case was adjourned to 26/10/99 for defence. The 3rd Defendant/Cross-Respondent testified. He was Cross-examined and re-examined on 10/1/2000. D.W2 testified in favour of the 3rd Defendant/Cross-Respondent. He was Cross-examined and re-examined on 11/1/2000. That appeared to be the end of Evidence for the defence. On same 11/1/2000 Learned Counsel for the Cross-Respondent addressed the Trial Court. Final address was concluded by J.B. Daudu, SAN., for the 1st Defendant/Cross-Appellant on 20/06/2000 and Reply on points of law was made by the Learned Counsel for the Cross-Respondent on 31/7/2000. Judgment was delivered by the Learned Trial Judge on the 25/1/2001.**

**It can be observed clearly that the 1st Defendant/Cross-Appellant was not afforded an opportunity to be heard in the normal way of hearing suits filed at a Court of Trial. This is the complaint of the Cross-Appellant before the Court below and that Court did not consider it at all.**

**The position of the law is very clear that the Court of Appeal has primary duty to consider all issues brought to it for consideration especially this fundamental issue which borders on Fair Hearing.** See: Adah v. NYSC (2004) 7 S.C. (Pt. II) 139; (2004) 7 SCNJ 374; Obisi v. Chief of Naval Staff (2004) 5 S.C. (Pt. 1) 136; (2004) 5 SCNJ 99; Kraus Thompson Org. Ltd. v. University of Calabar (2004) 4 S.C. (Pt. 1) 65; (2004) 4 SCNJ 121; Okotie Eboh v. Chief J.E. Manager & Ors. (2004) 11-12 S.C. 174; (2004) 12 SCNJ 139.

**This applies with equal force to all Courts of Law. Perhaps the only exception to that general rule is the Supreme Court which may decline to consider all issues placed before it by an Appellant once it is satisfied that the just resolution of the Appeal can turn on the only issue(s) decided by it.** See: Katto v. C.B.N (1991) 11-12 S.C. 176; (1991) 9 NWLR (Pt. 214) 126 at 149. **This is because of the unique nature of the Supreme Court as a final Appellate Court.** The Court of Appeal itself made a vital pronouncement in that regard, with which I agree and adopt. It runs as follows:

"it is my view that the Learned Trial Judge was right to proceed and determine the case on issues joined by the parties on the merit. My view is strengthened by the Supreme Court decision in the case of *Katto v. C.B.N.* (1991) 11-12 S.C. 176; (1991) 9 NWLR (Pt 214) 126 at 149, where Akpata, JSC., (as he then was) stated the law as follows:

As rightly submitted by Mr. Aluko-Olokun, the Court of Appeal ought to have proceeded in the alternative, on the basis that the Trial Court could have been right, to give its views and decision on the issues raised in the Grounds of Appeal. Where a Trial Court after holding that it had Jurisdiction proceeded to determine the matter before it and an intermediate Court of Appeal thinks the Trial Court lacked Jurisdiction, the said intermediate Court should in the alternative resolve the complaints in the Appeal unless both Counsel, particularly Respondent's Counsel, concedes that the Trial Court lacked Jurisdiction in the matter. While the Supreme Court, being the final Court of Appeal, can afford not to pronounce on other issues placed before it where it finds that the Trial Court lacked Jurisdiction, the Court of Appeal whose stance on Jurisdiction may be faulted by the Supreme Court should not ignore (sic) other issues raised in the Appeal. It should pronounce on them."

**It is thus, a statutory responsibility of all Courts to consider adequately and properly all issues placed before them. Failure to do so will lead to denial of Fair Hearing which is, capable of rendering any proceedings a nullity.**

**Accordingly, the proceedings including Judgment of the Court below on this Cross-Appeal is a nullity and is hereby set aside.** I remit this matter to the Trial Court for proper consideration of the Counter-Claim filed by the 1st Defendant/Cross-Appellant.

Normal hearing of the matter should be conducted in a way which allows the 1st Defendant/Cross-Appellant ventilate his grievances on the Cross-Appeal, and I so order while allowing the Cross-Appeal. As the main and the Cross-Appeal are intertwined, I don't consider it necessary to delve into the main Appeal which is hereby struck out. I make no order as to costs.

**MUSDAPHER JSC**

I have read before now the Judgment of my Lord, Muhammad, JSC., with which I entirely agree. I remit the matter back to the Trial Court for the Trial of the Counter-claim on the merit, I abide by the order for costs proposed in the aforesaid Judgment. B

**ONNOGHEN JSC**

There are two Appeals in this Appeal, namely, the main Appeal and a Cross-Appeal, both of which are directed at the Judgment of the Court of Appeal, Holden at Kaduna, in Appeal No. CA/K/120/2001 delivered on the 9th day of July, 2002 in which the Court partly allowed the Appeal of the present Respondent/ Cross-Appellant against the Judgment of the High Court of Kaduna State, holden, D at Kafanchan in Suit No. KDH/KAF/38/94 delivered by that Court on the 25th day of January, 2001. C

The Issues for Determination in the main Appeal as identified by Learned Counsel for the Appellant in the Amended Appellant's Brief deemed filed on 2nd May, 2006, are as follows:- E

***"ISSUES FOR DETERMINATION***

*In the Appellant's view, the following issues have been identified for determination by this Honourable Court in this Appeal.*

*2.01 Whether it was right for the Court of Appeal to have entertained and considered Ground 4 of the Respondent's Notice of Appeal filed on the 25/1/2000 when the said Ground of Appeal, raised an issue, which was neither canvassed by the parties at the Trial Court nor did the Trial Court make any decision or pronouncement thereon?* F

*2.02 Whether it was right for the Court of Appeal to have struck out the Appellant's Claim against the Respondent, on the sole ground, that, the Appellant adopted an irregular procedure, in initiating his Claim against the Respondent, when the Respondent consciously and actively participated in the Trial, until Judgment was given against it by the Trial Court, without objecting to the alleged irregular procedure, but only raised the complaint for the first time before the Court below and without also alleging or proving any injustice or prejudice suffered by it, as a result of the alleged irregular procedure?* G H

*2.03 Was the Court below right when it held that the appropriate time to raise objection to the-competence of the Grounds of Appeal filed before it, is when the Motion to file the Amended Notice of Appeal containing the said grounds was moved and granted and not by way of Motion on Notice before the hearing of the Appeal?*

B *2.04 Whether the Appellant in this Appeal, not denied fair hearing by the Court below, when the Court failed or neglected or consider his argument against the argument of the Respondent, on the sole issue, considered by the Court before the Appellant's Claim against the Respondent was struck out?*

C *2.05 Whether the Judgment of the Court below delivered on the 9/7/2002 and as it relates to the Respondent and the Appellant, not given per incuriam, since the Court failed or neglected to consider the express provisions of Section 5 of the Kaduna State High Court (Civil Procedure) Edict, 1987 and Order 2 of the Kaduna State High Court (Civil Procedure) Rules, 1987 before reaching its decision to strike out the Appellant's Claim against the Respondent, despite the profuse references made to the said provisions by the Appellant?*

E *2.06 Whether the Court of Appeal was right in holding that, Ground 4 of the Respondent's Notice of Appeal, dated the 24/1/2000 (and from which the Respondent's Issue No. 2. 1 in the Court below, was distilled) arose from the "Rulings" of the Trial Court?"*

F On the other hand, the issue raised by Learned Senior Counsel for the Respondent/Cross- Appellant in the Respondent's Brief deemed filed on 10th May, 2005 is as follows:-

G *"Whether the Court of Appeal, not being the final Appellate Court could opt not to consider a material issue placed before it for determination on the ground that a resolution of the issue was unnecessary because it had resolved a jurisdictional point as was done in the instance?"*

H Looking at the issues reproduced supra and going through the Briefs of Argument in support of the respective contentions, it is clear the issue raised in the Cross-Appeal should be determined first before proceeding to determine those in the main Appeal, if need be, though the usual practice is to determine the main Appeal before the Cross-Appeal.

In arguing the Cross-Appeal, learned Senior Counsel for the

Cross-Appellant submitted that it is only the Supreme Court that can afford not to consider all issues raised before it, not the lower Court, being an intermediate Court; relying on *Amoo v. Iyanda* (1997) 11 NWLR (Pt. 528)298 at 307, a Court of Appeal decision.

Learned Counsel for the Appellant/Cross-Respondent stated that since the Cross-Appellant argued issues 2.1 and 2.2 together, the lower Court was right in only considering Issue 2.1 which was resolved in favour of the Appellant therein while Issue 2.2 was struck out; that the Cross-Appellant has suffered no Miscarriage of Justice or prejudice in the striking out of Issue 2:2; that it was unnecessary for the lower Court to have proceeded to consider Issue 2.2 after resolving Issue 2.1 in favour of the Cross-Appellant, that the refusal of the lower Court to consider Issue 2.2 does not amount to denial of Fair Hearing as an Appellate Court can refuse to decide an issue if a decision on another issue would dispose of the Appeal, relying on *7up Bottling Co. Ltd. v. Abiola & Sons Bottling Co. Ltd.* (2001) 6 S.C. 73; (2001) FWLR (pt. 70) 1611 at 1631- 1632; *F.C.D.A. v. Sule* (1994) 3 SCNJ 71 at 94 etc.

Now, issue 2. 1 and 2.2 before the lower Court are as follows:-

*“2. 1 Whether it is appropriate to commence an action against a co-defendant by way of a Counter-Claim as was done in this case by the 2nd Defendant against the 1st Defendant?”*

*2. 2 Whether the entire proceedings (Counter-Claim and the main Claim) were not a nullity, vitiated by the fact that the Learned Trial Judge took Evidence in the Counter-Claim in contravention of the rules of Court when same was not ripe for hearing and without allowing the 1st Defendant an opportunity to defend the Counter-Claim?”*

It is clear that both issues attacked the competence of the Counter-Claim from different angles. While Issue 2.1 attacked it from the angle of the proper parties to a Counter-Claim, Issue 2.2 attacked the proceeding and Judgment arising from the alleged incompetent Counter-claim by way of denial of the right of Fair Hearing. Though the result of the two issues, if resolved in favour of the Appellant therein, would be the nullity of the proceedings, that does not excuse the lower Court from determining both issues.

In the instant case, the lower Court did not consider Issue 2.2 in its Judgment when the said issue is very fundamental in the

Appeal before it. The decisions cited by Counsel for the Cross-Respondent are not relevant to the facts of this case as far as the case of the Cross-Respondent is concerned. There is no dispute that cross-Appellant did not file a defence to the Counter-Claim before the court proceeded to take evidence on the Counter-claim and decided  
 B same against the cross-Appellant. There was, therefore, an obvious fundamental error committed by the Trial Court against which an Appeal was filed and an issue raised before the lower court, which was not determined by that court.

C It has been argued by Learned counsel for the Respondent to the cross-Appeal that the non-consideration of the said issue has not occasioned a Miscarriage of justice but I do not agree with that. How can you say that a party, like the Cross-Appellant in this case, who has a right to file a defence to an action but is prevented from doing  
 D so by the Court continuing with the hearing of Evidence on the case of the Plaintiff during the time allowed the Defendant to file a defence to the said action and eventually entering judgment against the Defendant, has not been denied his right to Fair Hearing or that the proceeding so conducted has not resulted in a Miscarriage of justice.  
 E I hold the view that it has done just that. It Should be remembered that even after the time allowed a Defendant to file his defence to an action has expired, the Defendant is still entitled to present an application to the Court for enlargement of time within which to do so.  
 F The intention of the law is to give parties the opportunity to present their case/defence to enable the Court determine the matter in controversy between them on the merit.

In the circumstance of this case, the justice of the situation demands that the Cross-Appeal be allowed and the Counter-Claim  
 G remitted to the Trial Court for hearing de novo. The judgment of the lower court is hereby set aside. The situation being as it is, it is not necessary to go into the merit or otherwise of the main Appeal which is consequently struck out.

It is for the above reasons and the more detailed reasons in the  
 H Leading Judgment of my Learned Brother, Muhammad, JSC., that I too allow the Cross-Appeal and abide by the consequential orders made in the said Leading Judgment including the order as to costs.

**TABAI JSC**

I was privileged to read in draft, the Leading Judgment of my Learned Brother Muhammad, JSC., and I agree that the Cross-Appeal has merit.

It is clear from the record of proceedings that at the Trial Court, the 1st Defendant/Cross-Appellant was denied the opportunity of filing a defence to the Counter-Claim and this was a fundamental error committed by the Trial Court. This was an issue raised before the Court below and which it failed to consider. Justice must not only be done. It must manifestly be seen to be done. The result is that I also allow the Cross-Appeal and abide by all the consequential orders contained in the Leading Judgment.

**ADEKEYE JSC**

I had read in draft the Judgment just delivered by my Learned Brother, I. T. Muhammad, JSC. My Lord had painstakingly considered all the issues settled for determination in this Appeal. He was in a position to spot the fundamental and sensitive issue of law raised by the Appellant in the Appeal before the lower Court. The Court of Appeal had unwittingly omitted to consider the issue of lack of Fair Hearing which came up as Issue No. 2 in the Appellant's Brief of Argument. It reads thus:-

*"Whether the entire proceedings (Counter-Claim and main Claim were a nullity, vitiated by the fact that the Learned Trial Judge took Evidence in the Counter-Claim in contravention of the rules of Court when same was not ripe for hearing and without allowing the 1st Defendant an opportunity to defend the Counter-Claim. This omission is confirmed by the procedure before the Trial Court. The basic criteria and attribute of Fair Hearing includes-*

*(a) That the Court or tribunal hear both sides not only in the case but also on all material issues in the case before reaching a decision which may be prejudicial to any party in the case."*

The Right to Fair Hearing is a fundamental constitutional right guaranteed by the Constitution of the Federal Republic of Nigeria, 1999 and a breach of it particularly in trials, vitiates such proceedings rendering same null and void. A hearing cannot be said to be fair if any of the parties is refused a hearing or denied the opportunity to

be heard, present his case or call witnesses.

Military Governor Imo State v. Nwauwa (1997) 2 NWLR (Pt .490) 675.

Saleh v. Monguno (2003) 1 NWLR (Pt. 801) 221.

B (1999) 10 NWLR (Pt. 622) 270.

Kotoye v. C.B.N. (1989) 2 S.C. (Pt I) 1; (1989) 1 NWLR (Pt. 98) 419.

C This is also a Jurisdictional issue in that before a Court can exercise Jurisdiction in respect of any matter, it must come by due process of law and upon fulfillment of any condition precedent to the exercise of Jurisdiction.

D Jurisdiction is a radical and crucial question of competence. Once there is defect in competence, it is fatal and the proceedings are a nullity however well conducted and decided.

E The Court of Appeal and this Court both has no jurisdiction to entertain the Counter-Claim and cross-Appeal. The Cross-Appeal is allowed. Hearing in the Cross-Appeal - on the issue of the Further Statement of Defence and Counter-Claim is hereby remitted to the Trial Court for re-hearing before another judge of the Court. Hearing in the main Appeal is struck out so as to avoid a situation of locking the stable after the horse has bolted out. Issues in the main Appeal and Cross-Appeal are interwoven.

F I abide by the consequential orders made in the Leading judgment including the order as to costs.

G

H