

SUPREME COURT OF NIGERIA
13TH MAY, 2011. SC.88/2004
CORAM:- D. MUSDAPHER, M. S. MUNTAKA-
COOMASSIE, J. A. FABIYI, B. RHODES-VIVOUR, JJSC

1. PRINCE (DR.) B. A. ONAFOWOKAN
2. MR. A. O. ONAFOWOKAN APPELLANTS
3. MRS. V. A. ONAFOWOKAN
AND
1. WEMA BANK PLC.
2. LADGROUP LIMITED
(in Receivership) RESPONDENTS
3. PRINCE ABDULRASHEED
ADESUPO ADETONA
(Receiver/Manager Ladgroup Limited)

APPEALS - Grounds of appeal - Validity - It must be against a decision being appealed - And should constitute a challenge to the ratio of the decision - And not obiter dictum (H1)

ACTIONS - Dismissal - Application for on grounds of law - Applicant is deemed to base his argument on facts as stated by plaintiff in the statement of claim - For which purpose such application is deemed accepted (H2)

COMPANY LAW - Actions - Commencement - Leave - By virtue of s.393 (3) CAMA - 3rd respondent requires no leave - To institute an action against appellants - To recover the loan granted to 2nd respondent (H3)

FACTS

This suit was instituted at Federal High Court, Lagos by a Writ of Summons and a Statement of Claim filed on 11th April, 2000 by respondents as plaintiffs against appellants as defendants claiming declaratory and injunctive reliefs. On being served with the Writ of Summons and the statement of claim, appellants, without filing a statement of defence, reacted by filing a Notice of preliminary objection to the competence of the action dated 1st July, 2000

contending that the Court lacked jurisdiction to adjudicate over the matter because respondents had no locus standi to institute the action and urged the Court to strike out the action.

In its Ruling delivered on 9th February, 2001, the Court upheld the preliminary objection of appellants and struck out the action. Dissatisfied with this ruling, respondents appealed to Court of Appeal, Lagos which after hearing the appeal, allowed it, set aside the ruling of the High Court and remitted the case to the High Court for hearing the action on the merit by another Judge. Not satisfied, appellants are now on appeal to Supreme Court.

ISSUE FOR DETERMINATION

(i) Whether the Court of Appeal was right when it allowed the appeal of the Respondents when it held that the 3rd Respondent (a Receiver appointed for just one property) did not need leave of Court to bring or defend any action or other legal proceedings in the name and on behalf of the Company under Section 393(3) of the Companies and Allied Matters Act, 1990, when the Respondents did not plead the material facts to enable them enlist in aid the provisions of the said Section 393(3) of the Companies and Allied Matters Act, 1990 and when the said Section was interpreted in vacuo by the Court without relating it to the facts of the case.

HELD (Unanimously dismissing the appeal per **MOHAMMED JSC**) ***APPEALS - Grounds of appeal - Validity***

1. Indeed, that is the whole purpose of a ground of appeal. The Appellants' ground 1 therefore as quoted earlier in this judgment is a good ground of law even without the particulars. The Preliminary Objection to the ground is therefore over ruled because a ground of appeal is simply supposed to represent an Appellant's complaint against the decision he is not satisfied with and which he has grouse against and wants an appellate Court to correct and remedy.

The law is trite that a ground of appeal must be against a decision being appealed against and should constitute a challenge to the ratio of the decision.

“(i) whether the 3rd Plaintiff/Appellant as Receiver of the property of the 2nd Plaintiff/Appellant must obtain leave of Court to institute or defend an action in the name of the 2nd Plaintiff/Appellant having regard to Section 393(3) and Clause 5 of Schedule 11 of the

Companies and Allied Matters Act CAP 59 laws of the Federation of Nigeria 1990 (Grounds 1 & 2 of the Notice of Appeal).”

This issue was resolved by the Court below after quoting and considering the provisions of Section 393 of the Companies and Allied Matter Act before arriving at the decision that -

“From the provisions above it is clear that where the Receiver or Manager is appointed for the whole of the Property the powers conferred on him by the debentures by virtue of which he was appointed shall (sic) deemed to include the Powers specified in Schedule 11 of CAMA to bring or defend any or other legal proceedings in the name and on behalf of the Company.”

This is the main decision of the Court below in allowing the Plaintiffs’/Appellants’ appeal. In other words it is the ratio decidendi of the decision. Any remarks or observation of that Court outside the determination of the power of the Receiver/Manager under Section 393(3) of the Companies and Allied Matters Act is not part of that decision and is therefore an obiter dictum. Thus, as ground 2 of the Appellants’ grounds of appeal is NOT a complaint against the decision of the Court of Appeal being appealed against, it is indeed incompetent as urged by the 2nd and 3rd Respondents and is accordingly hereby struck out. (p. 1406 B)

ACTIONS - Arguments to be based on statement of claim

2. Taking into consideration that this appeal arose from the Ruling of the Federal High Court on the Preliminary Objection raised by the Defendants/Appellants to the competence of the action filed against them by the Plaintiffs/Respondents, resulting in the upholding of the objection and termination of the action in-limine, the law on the procedure taken in the case is well settled. An application to dismiss an action on grounds of law may attack the jurisdiction of the Court simpliciter or raise the issue that the Plaintiff has not made out in the writ of summons and statement of claim a cause of action. In either case the Applicant is deemed to rely for his argument on the facts as stated by the Plaintiff in the statement of claim for which purpose, such applications are deemed accepted.

In the instant case, the Defendants/Appellants acted in accordance with the law when on being served with the Writ of Summons and the Statement of Claim, without waiting to file a

Statement of Defence, brought their application to terminate the action on the main ground of law that the Plaintiffs/Respondents lacked the locus standi to institute the action. In taking this course therefore, the Appellants are deemed to have accepted and agreed with all the averments contained in the Statement of Claim.(p.1409 G)

B

COMPANY LAW - Actions - Commencement - Leave

3. The only complaint of the Appellants in the instant case is that the Plaintiffs/Respondents in their statement of claim, did not plead the fact that the 3rd Respondent was appointed Receiver/Manager for the whole or substantially the whole property of the 2nd Respondent Company to qualify him to enjoy the powers of a Receiver/Manager under Section 393(3) of the Companies and Allied Matters Act and the 11th Schedule to the Act. The contents of paragraphs 1 to 13 of the statement of claim earlier quoted in this judgment particularly paragraph 8 thereof have shown that the Debenture Trust Deed had created a first charge over all and not only one as claimed by the Appellants, of the properties of the 2nd Respondent at 24 Abimbola Street, Ilasamaja Isolo, Lagos over which the 3rd Respondent was appointed a receiver/manager. This to me clearly shows compliance with the provisions of Section 393(3) of the Companies and Allied Matters Act as found by the Court below. Thus, the Plaintiffs/Respondents having pleaded that the appointment of the 3rd Respondent as Receiver/Manager was over all the properties of the 2nd Respondent Company, the fact that the exact words of “the whole” or “substantially the whole” property of the Company was not used in the pleading, will not affect the fact that the appointment was made over all the property of the company at 24, Abimbola Street Ilasamaja Isolo Lagos. It is therefore not correct as claimed by the Appellants that the Court below merely interpreted the provisions of the Act in ‘vacuo.’

Consequently, as the appointment of the 3rd Respondent by 1st Respondent as Receiver/Manager over all the properties of the 2nd Respondent Company charged under the Debenture Trust Deeds was made in substantial compliance with Section 393(3) of the Companies and Allied Matters Act and Schedule 11 of that Act, the 3rd Respondent required no leave of Court to institute the action against the Appellants to recover the loan granted to the 2nd Respondent

which is still awaiting liquidation. The cases of Intercontractors Nigeria Limited v. N.P.F.M.B, Intercontractors Nigeria Limited v. U.A.C., Adegboyega v. Awu and Unibiz (Nigeria) Limited v. C.B.C.L. Limited in which the provisions of Section 393(3) of the Companies and Allied Matters Act and Schedule 11 of that Act did not arise for consideration, are not relevant. (p. 1413 H) B

NOTABLE POINTS OF INTEREST

MOHAMMED JSC

1. 1st respondent's main basis for attacking ground 1 of appeal C

Although Order 8 Rule 2(2), (3) and (4) of the Rules of this Court have made provisions on how grounds of appeal contained in the Notice of Appeal should be framed by making sure that where a ground alleges misdirection or error in law, the particular and the nature of the misdirection or error shall be clearly stated, that the ground shall be without any argument or narrative and that the ground shall not be vague or general in nature. These important guides are not the main basis on which ground 1 of the Appellants' ground of appeal is being attacked by the 1st Respondent. The main complaint of the 1st Respondent on ground 1 is that the Appellants did not raise the issue of a perceived inadequacy in the Respondents' pleadings in relation to Section 393(3) and Clause 5 of Schedule 11 of the Companies and Allied Matters Act at the Court of trial and therefore the trial Court did not make any pronouncement on the issue. However, the record of appeal at pages 94, 95 and 97 shows quite clearly that the issue was indeed raised and canvassed at the trial Court. (p. 1405 E) D E F

2. Clause 5 of 11 Schedule of CAMA – Powers of a receiver G

The provisions are quite plain that where a receiver or manager is appointed for the whole or substantially the whole of a Company's property, the powers conferred on him by the debentures by virtue of which he was appointed, shall be deemed to include, except in so far as they are inconsistent with any of the provisions of those debentures, the powers specified in the Eleventh Schedule to the Act. Since the Appellants in this case are not saying that there is any inconsistency in contents of the Debenture Trust Deeds on the powers to appoint a receiver/manager, the 3rd Respondent appointed by H

the powers expressed under paragraph 15 of the Debenture Trust Deed is deemed to have all powers specified in Schedule 11 of the Act including the power in Clause 5 to bring or defend any action or other legal proceedings in the name and on behalf of the 2nd Respondent Company. (p. 1413 F)

MUNTAKA-COOMASSIE JSC

3. Unchallenged findings of lower Courts are valid and subsisting

It is trite that the finding and Order of lower court not appealed against remains valid and subsisting, and without a ground of appeal challenging the finding and Order of the lower court this court would lack the jurisdiction to interfere with the said finding or Order.

It is significant to state here that none of the grounds of appeal contained in the Notice of Appeal challenged the above stated finding and Order of the lower court. It is trite that a finding not challenged by an appellant in any of the grounds of appeal remains, rightly or wrongly, the settlement of that issue as between the parties to the appeal. It follows that in the absence of any appeal against the finding and Order of the lower court this court would have declined jurisdiction to consider and determine such an issue. (p. 1421 F)

4. Obiter dictum - Meaning and purpose

The main issue in this appeal had been determined before the learned Justice Ogebe JCA (as he then was) expressed his opinion of what “appeared” to be premature in the preliminary objection filed by the appellants at the trial court. This opinion did not in any way affect the decision already reached by the court. It is my view that issue of the “premature” of the preliminary objection as expressed by the lower court was not an issue between the parties and that opinion did not in any way affect the decision of the lower court that the trial court was wrong in its decision to strike out the respondents’ claim before it. With tremendous respect, the opinion as expressed by Ogebe JCA, as he then was in his lead judgment does not embody the resolution of the court. In my view it is an opinion expressed by him after the issues between the parties have been decided and I have no hesitation in holding that the said opinion is a mere obiter dictum. What is then an obiter dictum?

This question has been answered by my learned brother Edozie

JSC in the case of AIC Ltd v. NNPC (2005) 11 NWLR (pt. 937) 563 at 589, when his Lordship held as follows:-

“obiter dicta reflect, inter alia, the opinion of the judgment of the Judge which does not embody the resolution of the court. The expression of judge in a judgment must be taken with reference to the facts of the case which he is deciding the issues calling for decision and answers to those issues.” B

Where an opinion is expressed obiter, such an opinion is not appealable. An appeal is fought on the basis of the decision of the court and is not taken against mere obiter. It is not every pronouncement made by a judge that can be made the subject of an appeal. C Where an opinion is expressed obiter, such an opinion, remarks or observation is baseless and a mere obiter dicta which is not appealable. This court per Uwaifo JSC in Abacha v. Fawehinmi (2000) 6 NWLR (pt. 660) p 228 at 351 stated the legal position clearly as D follows:-

“This observation, no doubt, is an obiter dictum of the learned justice of the court of Appeal, it was not part of the argument before the Court. The learned Justice adverted to the point on his own in the cause of his judgment. It played no part whatsoever in the decision reached either by the lower Court or even by the maker himself. It is not a fit subject for appeal as appeal is fought on the basis of the decision of the court and is not taken against mere obiter”. E (p. 1424 A) F

FABIYI JSC

5. Substantive issues are not to be decided at preliminary stage

One word more and I shall be done. Preliminary objection should not be hastily taken. The question of whether or not the Receiver is G appointed for the whole or substantially the whole of the company's property can wait till latter in the proceedings when evidence is adduced. A trial court should always avoid determination of issues which require tested evidence at the preliminary stage. This will obviate the adage of 'much haste less speed' (p. 1426 F) H

REPRESENTATION

Taiwo O. Taiwo with Ijeoma Okeke (Miss); for the Appellant
Babatunde A. Sodipo with Olamide O. Omaleja for 1st Respondent;

Olatunde Adejuyigbe with Soji Toki; for the 2nd and 3rd Respondents.

CASES REFERRED TO

- Ojeme v. Momodu 11 (1983) 1 S.C.N.L.R. 188
Adegboyega v. Awu (1992) 7 N.W.L.R. (Pt. 255) 576
B Egbe v. Alhaji (1990) 1 N.W.L.R. (Pt. 128) 545 at 590
Nsirim v. Nsirim (1990) 3 N.W.L.R. (Pt. 138) 285 at 297
Saraki v. Kotoye (1992) 9 N.W.L.R. (Pt.264) 155 at 184
M.B.N. Plc. v. Nwobodo (2005) 14 N.W.L.R. (Pt. 945) 379
C Benue State & Ors. v. Ulegede (2001) 17 N.W.L.R. (Pt.741) 194
Intercontractors Nigeria Ltd. v. U.A.C. (1988) 2N.W.L.R. (Pt. 76) 303

STATUTE & RULES REFERRED TO

- Companies and Allied Matters Act Cap. 220 Laws of Federation of
D Nigeria 1990, s. 393 (3), Clause 5 of 11 Schedule
Supreme Court Rules, O. 8 rr. 2 (2), (3), (4)

LEAD JUDGMENT BY MOHAMMED JSC

- This appeal is against the decision of the Court of Appeal, Lagos
E Division in its judgment delivered on 25th March, 2004 wherein that
Court set aside the decision of the Federal High Court Lagos, striking
out suit No. FHC/L/CS/346/2001. The suit was instituted by a Writ of
Summons and a Statement of Claim filed on 11th April, 2000 by the
Respondents as Plaintiffs against the Appellants as Defendants claim-
F ing Declaratory and injunctive relief. On being served with the Writ
of Summons and the Statement of Claim, the Defendants, without
filing a statement of Defence, reacted by filing a Notice of Preliminary
Objection to the competence of the action dated 1st July, 2000, con-
G tending that the trial Court lacked jurisdiction to adjudicate over the
matter because the Plaintiffs had no locus standi to institute the ac-
tion and urged the Court to strike out the action.

- In its Ruling delivered on 9th February, 2001, the trial Court
upheld the Preliminary Objection of the Defendants and struck out
H the action.

Dissatisfied with this Ruling, the Plaintiffs appealed against it to
the Court of Appeal which after hearing the appeal, allowed it, set
aside the Ruling of the trial Court and remitted the case to the trial
Court for hearing the action on the merit by another Judge. The

Defendants who were the Respondents at the Court of Appeal who lost in that Court, are now on appeal to this Court on a Notice of Appeal containing two grounds of appeal from which the following two issues were raised in the Appellants' brief of argument.

(i) Whether the Court of Appeal was right when it allowed the appeal of the Respondent when it held that the 3rd Respondent (a Receiver appointed for just one property) did not need leave of Court to bring or defend any action or other legal proceedings in the name and on behalf of the Company under Section 393(3) of the Companies and Allied Matters Act, 1990 when the Respondents did not plead the material facts to enable them enlist in aid the provisions of the said Section 393(3) of the Companies and Allied Act, 1990 and when the said Section was interpreted in vacuo by the Court without relating it to the facts of the case.

(ii) Whether the Court of Appeal was right in holding that the preliminary objection taken at the Federal High Court appeared to be premature even though it was clear from the onset that none of the Respondents pleaded any fact which would have allowed the Receiver to sue without the leave of Court i.e that he was appointed Receiver for the whole or substantially the whole of the Company's property under Section 393(3) and schedule 11 of the Companies and Allied Matters Act, 1990 or which could have made the Court to so infer.

In the 1st Respondent's brief of argument, in addition to the Notice of Preliminary Objection raised on the alleged incompetence of ground 1 of the Appellants' ground of appeal together with its three particulars and issue 1 arising from that ground, two issues were also identified from the two grounds of appeal. Although the issues are differently worded from those framed in the Appellants' brief of argument, in substance the issues are the same. In what appears to be a spirit of sharing of responsibilities between the Respondents in dealing with the Appellants appeal, the 2nd and 3rd Respondents in their joint Respondents brief of argument, also decided to attack the second ground of appeal which was not included in the 1st Respondent's Preliminary Objection, in their own Preliminary Objection to ground 2 of the Appellants' ground of appeal and issue 2 arising from it as being incompetent. Subject to the ruling on their Preliminary Objection, the 2nd and 3rd Respondents also formu-

lated two issues substantially the same as those in the Appellants' brief earlier quoted in this judgment.

Starting with the Preliminary Objection of the 1st Respondent to ground 1 of the grounds of appeal, that ground at pages 288 - 289 of the record of appeal reads -

- B “(1.) The Court below erred in law when it allowed the appeal of the Plaintiffs/Respondents as regards the 3rd Plaintiff/Respondent's non requirement of leave of the Court to institute or defend an action in the name of the Company (2nd Plaintiff/Respondent) having regard to Section 393(3) and Clause 5 of Schedule 11 of the Companies and Allied Matters Act CAP 59 Laws of the Federation of Nigeria 1990.

C
PARTICULARS

- (a.) Before the Receiver can be (sic) enlist in aid the provisions D of Section 393(3) and Clause 5 of Schedule 11 of the Companies and Allied Matters Act CAP 59 Laws of the Federation of Nigeria 1990 he must specifically plead and state in the Statement of Claim that he was appointed for the whole or substantially the whole of a Company's property.

- E (b.) In the absence of such material pleading, the lower Court cannot infer that he was so appointed for the whole or substantially the whole of the Company's property so as to make the requirement of leave of the High Court unnecessary.

- F (c.) Where it is thus (sic) not shown clearly that he was so appointed for the whole or substantially the whole of a Company's property it would be wrong to enlist in aid the provisions of Section 393(3) and Clause 5 of Schedule 11 of the Companies and Allied Matters Act CAP 59 Laws of the Federation of Nigeria 1990 to circumvent the need for the leave of the Court.

- G In support of the objection, learned Counsel to the 1st Respondent argued that the Appellants did not raise the issue of a perceived inadequacy in the Respondents pleadings in relation to Section 393(3) and Clause 5 of Schedule 11 of the Companies and Allied Matters Act at the Court of trial and therefore the learned trial Judge made no pronouncement on this issue and that the attempt by the Appellants, as Respondents at the Court below, to raise the issue in their brief, was resisted and turned down by that Court when the issue was struck out.

In their response to the 1st Respondent's Objection, the Appellants have pointed out that the Preliminary objection not having been filed by Notice as required by Order 2 Rule 9 (1) and (2) of the Rules of this Court, merely raising it in the brief of argument, relying on the case of *Nsirim v. Nsirim* (1990) 3 N.W.L.R. (Pt. 138) 285 at 297, the Preliminary Objection is incompetent and should be struck out. On the substance of the objection, learned Counsel argued that the issue of the perceived inadequacy of the Plaintiffs' pleadings in relation to Section 393(3) and Clause 5 of Schedule 11 of the Companies and Allied Matters Act, was clearly raised at the trial Court by the parties and therefore urged this Court to over rule the Preliminary Objection.

On the alleged failure of the 1st Respondent to comply with the provisions of Order 2 Rule 9(1) and (2) of the Rules of this Court in raising the Preliminary Objection, I observe that when this appeal was heard on 22nd February, 2011, this Court granted leave to the 1st Respondent to argue the Preliminary Objection already contained in the Respondents' brief of argument. The Objection is not therefore deemed abandoned because it was filed and raised in the Respondent's brief of argument. The Preliminary Objection is therefore quite in order and what remains now is to determine whether or not it can be sustained.

Although Order 8 Rule 2(2), (3) and (4) of the Rules of this Court have made provisions on how grounds of appeal contained in the Notice of Appeal should be framed by making sure that where a ground alleges misdirection or error in law, the particular and the nature of the misdirection or error shall be clearly stated, that the ground shall be without any argument or narrative and that the ground shall not be vague or general in nature, these important guides are not the main basis on which ground 1 of the Appellant's ground of appeal is being attacked by the 1st Respondent. The main complaint of the 1st Respondent on ground 1 is that the Appellant did not raise the issue of a perceived inadequacy in the Respondents' pleadings in relation to Section 393(3) and Clause 5 of Schedule 11 of the Companies and Allied Matters Act at the Court of trial and therefore the trial Court did not make any pronouncement on the issue. However, the record of appeal at pages 94, 95 and 97 show quite clearly that the issue was indeed raised and canvassed at the trial Court.] In any

case, the learned Counsel to the 1st Respondent himself has indicated in paragraph 3.04 of the 1st Respondents' brief that -

"Particulars (a.), (b.), (c.) of Ground 1 quoted above, reflect the main complaint of the Appellants before this Honourable Court against the decision of the Court below."

B Indeed, that is the whole purpose of a ground of appeal. The Appellant's ground 1 therefore as quoted earlier in this judgment is a good ground of law even without the particulars. The Preliminary Objection to the ground is therefore over ruled because a ground of appeal is simply supposed to represent an Appellant's complaint against the decision he is not satisfied with and which he has grouse against and wants an appellate Court to correct and remedy. (See *Ojeme v. Momodu* 11 (1983) 1 S.C.N.L.R. 188.)

D Going to the Notice of Preliminary Objection by the 2nd and 3rd Respondents to ground 2 of the Appellants' grounds of appeal, their main complaint against the ground is that it does not constitute an appeal against the decision or ratio decidendi of the Court of Appeal of 25th May, 2004 now on appeal; that the ground is merely attacking an obiter dictum of the Court below which by virtue of many decisions of this Court, such as *Saraki v. Kotoye* (1992) 9 N.W.L.R. (Pt.264) 155 at 184 and *Egbe v. Alhaji* (1990) 1 N.W.L.R. (Pt. 128) 545 at 590, is not appealable.

F What the Appellants are saying on their ground 2 in their Appellants' Reply brief is that the remarks of the Court below that the preliminary Objection taken at the trial Court was premature, relates to the other reason why the judgment of the trial Court was set aside and therefore urged this Court to rely on the case of *Military Administrator of Benue State & Ors. v. Ulegede* (2001) 17 N.W.L.R. (Pt.741) 194, to dismiss the Preliminary Objection.

G The law is trite that a ground of appeal must be against a decision being appealed against and should constitute a challenge to the ratio of the decision. (See *M.B.N. Plc. v. Nwobodo* H (2005) 14 N.W.L.R. (Pt. 945) 379 and *Egbe v. Alhaji* (1990) 1 N.W.L.R. (Pt. 128) 546 at 590.)

It is quite clear from the record of this appeal at pages 278 - 279 that although the Plaintiffs/Appellants before the Court of Appeal had raised as many as 4 issues in the Appellants' brief for the

determination of their appeal at the Court below, that Court determined the appeal on the 1st issue alone which reads -

“(i) whether the 3rd Plaintiff/Appellant as Receiver of the property of the 2nd Plaintiff/Appellant must obtain leave of Court to institute or defend an action in the name of the 2nd Plaintiff/Appellant having regard to Section 393(3) and Clause 5 of Schedule 11 of the Companies and Allied Matters Act CAP 59 laws of the Federation of Nigeria 1990 (Grounds 1 & 2 of the Notice of Appeal).”

This issue was resolved by the Court below after quoting and considering the provisions of Section 393 of the Companies and Allied Matter Act before arriving at the decision that -

“From the provisions above it is clear that where the Receiver or Manager is appointed for the whole of the Property. the powers conferred on him by the debentures by virtue of which he was appointed shall (sic) deemed to include the Powers specified in Schedule 11 of CAMA to bring or defend any or other legal proceedings in the name and on behalf of the Company.”

This is the main decision of the Court below in allowing the Plaintiffs'/Appellants' appeal. In other words it is the ratio decidendi of the decision. Any remarks or observation of that Court outside the determination of the power of the Receiver/Manager under Section 393(3) of the Companies and Allied Matters Act, is not part of that decision and is therefore an obiter dictum. Thus, as ground 2 of the Appellants' grounds of appeal is NOT a complaint against the decision of the Court of Appeal being appealed against, is indeed incompetent as urged by the 2nd and 3rd Respondents and is accordingly hereby struck out. Consequently the 2nd issue in the Appellants' brief of argument which was formulated from that ground of appeal now struck out, shall have no legs to stand upon in the consideration and determination of the appeal. I shall now proceed to determine this appeal on the remaining issue 1 in the Appellants' brief of argument.

The crux of the appeal according to the Appellants is whether the Receiver/Manager appointed over the property of the Company

by virtue of a Debenture Trust Deed, can invoke the provisions of Section 393(3) and Schedule 11 of the Companies and Allied Matters Act, 1990 without addressing the main contest between the parties which was whether the 3rd Respondent herein can enlist in aid the provisions of Section 393(3) and Schedule 11 of the Companies and Allied Matters Act, 1990 when neither he nor his appointee the 1st Respondent aver in their pleading, that is statement of claim, that the 3rd Respondent was appointed for the whole or substantially the whole of the 2nd Respondent's property. Learned Counsel after quoting in full the provisions of the Act and the relevant Schedule 11, argued that the Court below merely interpreted the provisions of the Act in vacuo without basing the interpretation on the relevant facts relating to the property of the 2nd Respondent charged in the Debenture Trust Deed executed between the parties. Learned Counsel pointed out that only one single property was charged by the 2nd Respondent in favour of the 1st Respondent and as such the requirement of sub-section (3) of Section 393 of Companies and Allied Matters Act and Schedule 11 of the Act which required the appointment of Receiver/Manager for the whole or substantially the whole property of the Company, before the provisions could apply, was not addressed by the Court below in coming to the conclusion in the interpretation of the provisions. Citing and relying on several cases on the interpretation of statutes based on the facts in issue between parties to the dispute, learned Counsel to the Appellants submitted that the Plaintiffs/Respondents not having pleaded the material fact that the 3rd Respondent was appointed for the whole or substantially the whole of the property of the Company, then the Respondents, particularly the 1st and 3rd Respondents, cannot enlist in aid or seek cover under Section 393(3) of the Companies and Allied Matters Act when objection was raised to the competency of their action at the trial Court without seeking leave of trial Court before instituting the action as was the position in *Intercontractors Nigeria Ltd. v. N.P.F.M.B. (1988) 2 N.W.L.R. (Pt. 76) 280*; *Intercontractors Nigeria Ltd. v. U.A.C. (1988) 2 N.W.L.R. (Pt. 76) 303*; *Adegboyega v. Awu (1992) 7 N.W.L.R. (Pt. 255) 576* and *Unibiz (Nigeria) Ltd. v. C.B.C.L. Ltd. (2003) 6 N.W.L.R. (Pt. 816) 402* at 427.

On this lone issue that remains for determination in this appeal, it is contended by the 1st Respondent that having regard to the

pleadings of the Respondents, the Court below was right in holding that the 3rd Respondent did not require leave of Court to sue in the name and on behalf of the 2nd Respondent; that contrary to the submission of the Appellants, the Respondents' statement of claim at pages 5 - 7 of the Record, contains sufficient material averments from which the Court of trial could have inferred or deduced that the 3rd Respondent was appointed by the 1st Respondent for the whole or substantially the whole of the property of the 2nd Respondent. Learned Counsel to the 1st Respondent referred to and quoted paragraphs 2, 3, 13, 14 and 15 of the Plaintiffs/Respondents' Statement of Claim as providing such material to support the fact that 3rd Respondent was appointed Receiver/Manager for the whole or substantially the whole of the property of the 2nd Respondent without necessarily pleading the exact words used in the statute. With regard to the cases cited and relied upon by the Appellants on the requirement of leave of Court before the present action was instituted, learned Counsel argued that the cases are not relevant to the present case because Section 393(3) of CAMA was not in issue in the decisions in those cases and therefore urged this Court to dismiss the appeal.

The 2nd and 3rd Respondents' stand on the lone issue for determination in this appeal is virtually the same as that of the 1st Respondent. Their learned Counsel relying on the decisions of this Court in several cases on pleadings, maintained that it is elementary rule of pleadings that facts must be pleaded but not law. Such cases include *Obizuru v. Ozims* (1985) 2 N.W.L.R. (Pt. 60) 167 at 179 and *Anyawu v. Mbara* (1992) 5 N.W.L.R. (Pt. 242) 386 at 398. In the instant case therefore, learned Counsel urged this Court to hold that there are enough facts in the Statement of Claim of the Plaintiffs/Respondents to support the interpretation of the provisions of Section 393 of the Companies and Allied Matters Act as found by the Court below to justify dismissing this appeal.

Taking into consideration that, this appeal arose from the Ruling of the Federal High Court on the Preliminary Objection raised by the Defendants/Appellants to the competence of the action field against them by the Plaintiffs/Respondents resulting in the upholding of the objection and termination of the action in-limine, the law on the procedure taken in the case is well settled. An application to dismiss an action on grounds

of law may attack the jurisdiction of the Court simpliciter or raise the issue that the Plaintiff has not made out on the writ of summons and statement of claim a cause of action. In either case the Applicant is deemed to rely for his argument on the facts as stated by the Plaintiff in the statement of claim which for the purpose of such application are deemed accepted. (See *Ayanboye v. Balogun* (1990) 5 N.W.L.R. (Pt. 151) 392 and *Ege Shipping & Trading Industry Inc. & Ors. v. Tigris International Corporation* (1999) 14 N.W.L.R. (Pt. 637) 70 at 88 - 89.)

In the instant case, the Defendants/Appellants acted in accordance with the law when on being served with the Writ of Summons and the Statement of Claim, without waiting to file a Statement of Defence, brought their application to terminate the action on the main ground of law that the Plaintiffs/Respondent lacked the locus standi to institute the action. In taking this course therefore, the Appellants are deemed to have accepted and agreed with all the averments contained in the Statement of Claim. What calls for determination now is whether on the facts pleaded in the Statement of Claim, there are facts supporting the Plaintiffs'/Respondents' stand that the 3rd Respondent was appointed Receiver/Manager on the whole or substantially the whole property of the 2nd Respondent within the requirement of Section 393(3) of the Companies and Allied Matters Act 1990 as found by the Court below. For the avoidance of any doubt I quote below the relevant paragraphs 1 - 13 of the Statement of Claim dated 7th April, 2000 and filed at the trial Court on 11th April, 2000 which the Defendants/Appellants are deemed to have agreed with without any dispute as laid down by the law.

“1. The 1st Plaintiff is a Commercial Bank duly incorporated and licensed in Nigeria and has its Head Office at 54, Marina, Lagos.

2. The 2nd Plaintiff is a Company incorporated in Nigeria having its registered office at Abimbola House, 24, Abimbola Street, Ilasamaja, Isolo, Lagos and has been in Receivership since the 14th day of March, 2000.

3. The 3rd Plaintiff, a Chartered Accountant, is the Receiver/Manager of the 2nd Plaintiff and has his office at No.4, Bunmi Joseph Close, Gbagada Phase II, Lagos.

4. The 1st, 2nd and 3rd Defendants are Directors and Officers

of the 2nd Plaintiff and their last known address is at Abimbola House, 24, Abimbola Street, Ilasamaja, Isolo, Lagos.

5. *The 2nd Plaintiff maintains a current account with the 1st Plaintiff and a consortium of Banks namely First Bank of Nigeria Plc; Diamond Bank Limited; Afribank Nigeria Plc, Eko International Bank Plc, Rims Merchant Bank Limited and Citizen International Bank Limited hereinafter called "the Consortium of Lenders.*

6. *The 2nd Plaintiff applied to the 1st Plaintiff and the Consortium of Lenders for credit facilities and same was granted by the 1st Plaintiff and the Consortium of Lenders.*

7. *The credit facility granted to the 2nd Plaintiff by 1st Plaintiff and the Consortium of lenders was secured by a Debenture Trust Deed dated 14th June, 1994 and a supplementary Debenture Trust Deed dated 19th September, 1996. The said Debenture Trust Deed and Supplementary Debenture Trust Deed were executed by the Consortium of Lenders. The Plaintiff shall rely on the said Debenture Trust Deed which is registered as 30/30/1958 and the Supplementary Debenture Trust Deed which is registered as 80/80/1987 at the Land Registry in the office at Lagos as well as the Certificate of Registration of a Debenture Trust Deed issued by the Corporate Affairs Commission dated 17th August, 1994 and 24th September, 1996 respectively (at) the trial of this action.*

8. *By virtue of the Debenture Trust Deed referred to in paragraph 7 above, the 2nd Plaintiff created a first Charge in favour of the 1st Plaintiff over all the hereditaments buildings and property of the 2nd Plaintiff including Plants Machinery Equipment, Warehouse, Office Block and other real property lying situate and being at 24, Abimbola Street, Ilasamaja, Isolo, Lagos.*

9. *The 2nd Plaintiff failed to liquidate its debt to the 1st Plaintiff and the Consortium of lenders by virtue of the credit facilities.*

10. *The 2nd Plaintiff's indebtedness to the 1st Plaintiff and the Consortium of Lenders on the credit facilities stood at N311,000,000 as at March 14, 2000.*

11. *The Plaintiff and Consortium of Lenders agreed with the 2nd Plaintiff to grant a memorandum on interest element on the sum due in December, 1997 with a view to encouraging the 2nd Plaintiff to pay its debt by way of a quarterly installment of N30 Million, but the 2nd Plaintiff defaulted in the agreed installment pay-*

ment. The Plaintiffs will rely on the Memorandum of Understanding dated 15th December, 1997 executed by the 2nd Plaintiff as well as all the letters written by the 2nd Plaintiff on its inability to meet installment payments at the trial of this action.

B 12. *The 1st Plaintiff made several demands on the 2nd Plaintiff and when the 2nd Plaintiff refused to meet its obligation to the 1st Plaintiff and the Consortium of Lenders, the 1st Plaintiff by its letter dated 11th November, 1998 foreclosed the security provided by the 2nd Plaintiff.*

C 13. *The 2nd Plaintiff failed to liquidate the debt to the 1st Plaintiff and the Consortium of Lenders and consequent upon its default the 1st Plaintiff in the due exercise of its Power under Clause 15 of the Debenture Trust Deed appointed the 3rd Plaintiff on the 14th day of March, 2000 as the Receiver/Manager of the 2nd Plaintiff. The Deed D of Appointment and Notice of Appointment of the 3rd Plaintiff as the Receiver/Manager of the 2nd Plaintiff will be relied upon at the trial of the suit."*

It is quite clear from the facts averred in these paragraphs that the 2nd Respondent Company is indebted to the 1st Respondent E Bank and other Consortium of Lender Banks to the tune of N311,000,000.00 as at 14th March, 2000. It is also clear that by two separate Debentures Trust Deeds executed on 14th June, 1994 and 19th September, 1996, the 2nd Respondent Company created a first charge in favour of the 1st Respondent and other Consortium of F Lending Banks over all the hereditaments Buildings and property of the 2nd Respondent Company including Plants, Machinery, Equipment, Warehouse, Office Block and Real Property at No. 24 Abimbola Street Ilasamaja Isolo Lagos.

G It is also plain from the undisputed facts averred, that the 2nd Respondent was in default in paying back the loan which led to the exercise of the powers of the lenders under Clause 15 of the Debenture Trust Deed to appoint the 3rd Respondent a Receiver/Manager over all the properties of the 2nd Respondent charged under the H Debenture Trust Deeds. There is no doubt whatsoever that the appointment of the 3rd Respondent as a Receiver/Manager covers all the assets and property of the 2nd Respondent charged in the Debenture Trust Deeds to secure the loan granted to the 2nd Respondent. In the circumstances therefore, the appointment of the 3rd

Respondent is completely within Section 393(3) of the Companies and Allied Matter Act for the whole or substantially the whole of the property of the 2nd Respondent to qualify him to enjoy the rights specified under Clause 5 of Schedule 11 of the Companies and Allied Matters Act, as rightly found by the Court below. Section 393(1), (2) and (3) of the Companies and Allied Matters Act in question state B

“393(1) A person appointed a receiver of any property of a Company shall subject to the rights of prior encumbrances take possession of and protect the property, receive the rents and profits and discharge all out-goings in respect thereof and realize the security for the benefit of those on whose behalf he is appointed, but unless appointed manager he shall not have power to carry on any business or undertaking. C

(2) A person appointed manager of the whole or any part of the undertaking of a Company shall manage the same with a view to the beneficial realization of the security of those on whose behalf he is appointed. D

(3) Without prejudice to subsection (1) or (2) of this section, where a receiver or manager is appointed for the whole or substantially the whole of a Company’s property, the powers conferred on him by the debentures by virtue of which he was appointed shall be deemed to include (except in so far as they are inconsistent with any of the provisions of those debentures) the powers specified in the Eleventh Schedule to this Act.” E

The provisions are quite plain that where a receiver or manager is appointed for the whole or substantially the whole of a Company’s property, the powers conferred on him by the debentures by virtue of which he was appointed, shall be deemed to include, except in so far as they are inconsistent with any of the provisions of those debentures, the powers specified in the Eleventh Schedule to the Act. Since the Appellants in this case are not saying that there is any inconsistency in contents of the Debenture Trust Deeds on the powers to appoint a receiver/manager, the 3rd Respondent appointed by the powers expressed under paragraph 15 of the Debenture Trust Deed is deemed to have all powers specified in Schedule 11 of the Act including the power in Clause 5 to bring or defend any action or other legal proceedings in the name and on behalf of the 2nd Respondent Company. **The only complaint of the Appellants in F**
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the instant case is that the Plaintiffs/Respondents in their statement of claim, did not plead the fact that the 3rd Respondent was appointed Receiver/Manager for the whole or substantially the whole property of the 2nd Respondent Company to qualify him to enjoy the powers of a Receiver/Manager under
B *Section 393(3) of the Companies and Allied Matters Act and the 11th Schedule to the Act. The contents of paragraphs 1 to 13 of the statement of claim earlier quoted in this judgment particularly paragraph 8 thereof have shown that the Deben-*
C *ture Trust Deed had created a first charge over all and not only one as claimed by the Appellants, of the properties of the 2nd Respondent at 24 Abimbola Street, Ilasamaja Isolo, Lagos over which the 3rd Respondent was appointed a receiver/manager. This to me clearly shows compliance with the*
D *provisions of Section 393(3) of the Companies and Allied Mattes Act as found by the Court below. Thus, the Plaintiffs/Respondents having pleaded that the appointment of the 3rd Respondent as Receiver/Manager was over all the properties of the 2nd Respondent Company, the fact that the exact words*
E *of “the whole” or “substantially the whole” property of the Company was not used in the pleading, will not affect the fact that the appointment was made over all the property of the company at 24, Abimbola Street Ilasamaja Isolo Lagos. It is*
F *therefore not correct as claimed by the Appellants that the Court below merely interpreted the provisions of the Act in ‘vacuo.’*

Consequently, as the appointment of the 3rd Respondent by 1st Respondent as Receiver/Manager over all the properties
G *of the 2nd Respondent Company charged under the Deben-*
ture Trust Deeds was made in substantial compliance with Section 393(3) of the Companies and Allied Matters Act and Schedule 11 of that Act, the 3rd Respondent required no leave
of Court to institute the action against the Appellants to re-
H *cover the loan granted to the 2nd Respondent which is still awaiting liquidation. The cases of Intercontractors Nigeria Limited v. N.P.F.M.B. (supra) Intercontractors Nigeria Limited v. U.A.C. (supra), Adegboyega v. Awu (supra) and Unibiz (Nigeria) Limited v. C.B.C.L. Limited (supra) in which the provi-*

sions of Section 393(3) of the Companies and Allied Matters Act and Schedule 11 of that Act did not arise for consideration, are not relevant.

In the light of the foregoing, I find no merit at all in this appeal which is hereby dismissed. The judgment of the Court of Appeal including the order remitting the case to the trial Court for hearing the action on merit by another Judge of the trial Court is affirmed. I am not making any order on costs.

MUSDAPHER JSC

I have had the honour to read in advance the judgment of my lord Mohammed, JSC just delivered with which I entirely agree. In the aforesaid judgment, his lordship has adequately dealt with all the relevant issues submitted for the determination of the appeal. I, with respect, adopt his arguments and reasoning as mine, and I accordingly find no merit in this appeal, and I dismiss it. The decision of the Court below is affirmed and the matter is remitted to the Federal High Court of Lagos Judicial Division for hearing on the merits by another judge of that Court. I also make no order as to costs.

MUNTAKA-COOMASSIE JSC

I had the opportunity of reading in draft the lead judgment of my learned brother, Mohammed JSC, just delivered. For the reasons well set out therein, which I respectfully adopt as mine, I agree with it, in support of my learned brother I wish to chip in some points of my own as follows:-

The 2nd respondents, a limited liability company with a registered office at no 24, Abimbola Street, Ilasamaja Isolo, Lagos, applied for and obtained facilities from a consortium of Nigerian Banks including the 1st respondent. A legal mortgage was created in favour of the banks on its property situate at No 24 Abimbola Street, Ilasamaja, Isolo Lagos. In addition, a Trust Deed dated June 14, 1994 was created between the 2nd respondent and the 1st respondent as Trustees for the Consortium of Lenders by which the 2nd respondent provided security for the sum of N110,000,000.00 (One Hundred and Ten Million Naira) granted by the consortium of banks to

the 2nd respondent sub-demised its property situate at No. 24 Abimbola Street, Ilasamaya, Isolo Lagos together with all the building and machinery affixed thereto and refer to in the Trust Deed as “the specifically mortgage premises” A supplementary debenture Trust Deed dated September 16, 1996 was subsequently executed by the
 B 1st and 2nd respondents, securing additional sum of N260,000,000. (Two Hundred and Sixty Million Naira) as credit facilities to the 2nd respondent by the consortium of banks. The 2nd respondent defaulted in repaying the credit facilities to the consortium of lenders
 C when it became due. As a result of the default, the 1st respondent as trustee of the consortium of lenders appointed the 3rd respondent as a receiver/manager over the 2nd respondent by a deed of appointment dated 14th day of March, 2000.

On April 11, 2000 the 1st - 3rd respondents instituted an action
 D at the Federal High Court, Lagos against the 1st - 3rd Appellants all of whom are directors of the 2nd respondent company concerning the appointment of “the 3rd respondent” as receiver of the 2nd respondent.

The respondents also filed a motion ex parte for orders of interim injunction restraining the appellants from interfering with obstructing or frustrating the 3rd respondents from exercising the powers as receivers. This application was granted on May, 2000. Upon the service of the enrolled order and the originating processes on the respondents they entered a conditional appearance and filed a Notice of preliminary objection. The grounds of the preliminary objection are as follows:-
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“1. The plaintiffs’ reliefs are un-maintainable in their absolute discretion even when there is cause of action to that effect.
 G 2. None of the plaintiffs can maintain or seek any of the relief’s being claimed as presently constituted without the leave of this Honourable court first had and obtained.

3. That even if the plaintiffs have any claim against the defendants as per the debenture Trust Deed jointly - executed by the parties such cannot be founded on their suit as presently constituted.
 H

4. The 3rd plaintiff having been appointed under the debenture Trust Deed and the Deed of Appointment of a receiver as the agent of the 2nd plaintiff has power to take and defend action in the name of the 2nd plaintiff cannot, in view of the express provisions of

the instruments sue in his own name as the properties are not his own.

5. In view of the restricted nature of the powers of the 3rd plaintiff under the Debenture Trust Deed he has no instruction over the uncharged assets of the 2nd plaintiff and he cannot misrepresent this fact to the court and members of the public”. B

The trial court had the submissions of both counsel to the parties on this preliminary objection and in its considered ruling upheld the preliminary objection and consequently struck out the suit. In its ruling delivered on 9/2/2001 the trial court on page 99 of the record C held as follows:-

“It is clear from the Debenture Trust Deed that only a specific property of the 2nd plaintiff was mortgage so the 2nd plaintiff in its entirety cannot be under receivership. Even if the 2nd plaintiff is in receivership, which it is not, it is only the receiver that can sue in the name of the 2nd plaintiff and not the 2nd plaintiff itself. Having held that the 2nd plaintiff is not in receivership, the 2nd plaintiff can only, institute or defend an action on the authority of its board of directors in a general meeting of the shareholders. There is no evidence before the court that either the board of directors or general meeting of the shareholders of the 2nd plaintiff authorised the commencement of this action in the name of the 2nd plaintiff. The 2nd plaintiff therefore has nothing to do with this suit as its name was improperly used. D E

It is trite that a debenture holder, like the 1st plaintiff, can maintain an action seeking relief to its benefit. A look at the writ of summons and the statement of claim does not (sic) show any relief that will inure to the benefit of the 1st plaintiff directly. Having held that the 2nd and 3rd plaintiffs have no locus standi to institute the action their names are accordingly struck out”. F G

The plaintiff suit is hereby struck out with costs of N10,000.00 in favour of the Defendants/Applicants against the plaintiffs/Respondents...” Per Okeke J.

The above is the exposition of the law by the trial court vis-a-vis the motion. H

The plaintiffs were not happy with the decision of the trial Court as such they successfully appealed to the Court of Appeal Lagos Division, herein after called the lower Court. The later in its own judgment dated 25/3/2004 allowed the appeal and remitted the case to

the Chief Judge of the Federal High Court for the case to be tried denovo by another judge. The defendants were dissatisfied with the judgment of the lower court, and consequently appealed to this court.

In this court both parties through their respective counsel, filed and exchange their respective briefs of argument. The Appellants
B also filed a reply to the respondents' brief of argument dated 2/9/2004 and filed on 22/9/04 formulated two issues for determination as follows:-

i. Whether the Court of Appeal was right when it allowed the
C appeal of the Respondents when it held that the 3rd Respondent (a receiver appointed for just one property) did not need leave of court to bring or defend any action or other legal proceedings in the name and on behalf of the Company under Section 393 (3) of the Companies and Allied Matters Act, 1990 and when the respondents did
D not plead the material facts to enable them enlist in aid the provisions of the said Section 393 (3) of the Companies and Allied Act, 1990 and when the said section was interpreted in vacuo by the court without relating it to the facts of the case.

ii. Whether the Court of Appeal was right in holding that the
E preliminary objection taken at the Federal High Court appeared to be premature even though it was clear from the onset that none of the Respondents pleaded any fact which would have allowed the Receiver to sue without the leave of court i.e. that he was appointed
F Receiver for the whole or substantially the whole of the company's property under Section 393 (3) and schedule 11 of the Companies and Allied Matters Act, 1990 or which could have made the court to so infer.

The 1st Respondent in its brief filed on 19/10/04 also formulated two
G issues for determination thus:-

i. Whether having regard to the pleadings of the Respondent, the Court below was right in holding pursuant to S. 393 (3) of the Companies and Allied Matters Act, 1990 and paragraph 5 of schedule 11 thereto that the 3rd Respondent did not require leave of court
H to institute the action at the court of first instance in the name and on behalf of the 2nd Respondent? (This issue arises from ground 1).

ii. Whether having regard to the pleadings of the Respondents, the court below was right in holding that the preliminary objection at the court of first instance was premature and that the question as to

whether or not the 3rd Respondent was appointed for the whole or substantially the whole of the 2nd Respondent's property could only be determined by evidence? (This issue arises from ground 2).

The 2nd and 3rd respondents in their joint brief of argument dated and filed on 8/12/09 also formulated two (2) issues for determination as follows:-

i. Whether the Court below was right when it held that by virtue of Section 393 (3) of the Companies and Allied Matters Act (CAMA) and paragraph 5 of schedule 11 thereto the 3rd respondent did not require leave of court to institute the action in the name and on behalf of the 2nd respondent.

ii. Whether the court below was right when it held that the appellants' preliminary objection appeared to be premature and that evidence is required to determine whether or not the 3rd respondent was appointed as Receiver for the whole or substantially the whole of the 2nd respondent's property.

At the hearing of the appeal before us, both parties relied and adopted their respective briefs of argument. The Respondents in their respective briefs of argument raised preliminary objection to the appeal. The 1st respondent in its brief of argument couched the preliminary objection in the following terms:-

"i. Ground 1 and particulars (a) (b) and (c) of ground 1 raise issue which have been settled between the parties by a finding of fact of the court below and the appellants' have not challenged that finding of fact in the Notice of Appeal filed before this Honourable court.

ii. Ground 1 (without the particulars) does not disclose the particulars and nature of the error of law complained of by the appellants.

iii. Issue 1 of the appellants' brief of argument is predicated upon ground 1 of the Notice of Appeal which is defective and incompetent".

Whilst the 2nd and 3rd respondents challenged the competence of ground 2 of the Notice of Appeal in the following terms:-

"(a) Ground 2 of the Notice of Appeal dated the 25th day of March, 2004 and issue II in the Appellants' 'brief of argument dated the 20th day of September, 2004 are incompetent and ought to be struck out.

The grounds on which this objection is brought are as follows:-

1. Ground 2 of the Notice of appeal does not relate to the decision of the Court of Appeal in CA/L/303/2001 in that the pronouncement of Ogebe JCA being challenged by the appellants is an obiter dictum and not the ratio decidendi of the decision contained
B in the judgment of the Court of Appeal delivered on the 25th day of March, 2004.

2. A ground of appeal which does not relate to the decision appealed against is incompetent.

C The two preliminary objections would be taken together in this judgment of mine. The 1st respondent in his brief of argument referred this court to the ground 1 and its particulars and submitted that the appellants' complaint is that the lower court was wrong to have held that the receiver did not require leave to institute the action
D pursuant to Section 393 (3) of CAMA and clause 5 of schedule II of CAMA when the Receiver failed to specifically plead in the statement of claim that he had been appointed for the whole or substantially the whole of the company's property. Learned counsel to the 1st respondent pointed out that at the trial the appellant did
E not raise the issue of a perceived inadequacy in the respondents' pleading in relation to Section 393 (3) and clause 5 schedule II of CAMA, and as such, the trial court did not make any pronouncement on it. At the court below, the appellants sought to raise the issue by
F formulating it as a sole issue for determination. The lower court having found that the issue did not arise from any of the grounds of appeal struck it out for being incompetent. The Appellant did not appeal against this findings and orders striking out the issue for determination. Learned counsel therefore submits that the appellants cannot therefore
G raise the issue before this court having failed to appeal against the finding of the lower court which in law is still valid and subsisting. Learned counsel referred to the following authorities:-

1. Zacheous Koya V. United Bank for Africa Ltd (1997) 1 NWLR (pt. 481) 251 at 266;

H 2. Udoma v. E. Micheletti & sons Ltd (1997) 8 NWLR (pt. 506) 187 at 200; and

3. Udoh Trading Co. Ltd v. Abere (2001) 11 NWLR (pt.723) 114/146.

Learned counsel further submitted that in the absence of a specific

ground of appeal challenging the foregoing finding of fact of the court below, this honourable court lacks jurisdiction to reopen, consider and determine the issue of pleadings formulated on ground 1.

Learned counsel to the appellants on the 1st respondents' preliminary objection submitted that the issue of insufficiency or inadequacy of the pleadings was raised at the trial court. He referred to the submission of counsel at the hearing of the preliminary objection at the trial court. He further contended that there was an appeal against the finding of the lower court and this was as contained in ground 1 of the notice of Appeal.

With tremendous respect to the learned counsel to the appellant, I have carefully perused the decision of the trial court and unable to see where the learned trial judge made any pronouncement on the insufficiency or inadequacy of the pleadings of the appellant. It is therefore not surprising that the appellants too were unable to point to any paragraph of the decision of the trial High Court on that point. The point was raised at the lower court, and in considering the issue the lower court held as follows:-

"The issue formulated by the respondent in respect of the 1st appellant's appeal does not arise from any of the grounds of appeal especially as it relates (sic) an issue of pleadings which was not raised in any of the grounds of appeal. It is therefore incompetent and I hereby strike it out".

Can the appellants raise the same issue of pleadings against this findings and Order of the lower court?

It is trite that the finding and Order of lower court not appealed against remains valid and subsisting, and without a ground of appeal challenging the finding and Order of the lower court this court would lack the jurisdiction to interfere with the said findings or Order. See the following cases.

- a). Koya v. U.B.A Ltd (1997) 1 NWLR (pt 481) 251 at 266.
- b). Udom v. E. M. Chelletti & sons Ltd (1997) 8 NWLR (pt 516) 187 at 200.

It is significant to state here that none of the grounds of appeal contained in the Notice of Appeal challenged the above stated findings and Order of the lower court. It is trite that a finding not challenged by an appellant in any of the grounds of appeal remains, rightly or wrongly, the settlement of that issue as between the parties to the

appeal. It follows that in the absence of any appeal against the finding and Order of the lower court this court would have declined jurisdiction to consider and determine such an issue.

Though the appellants raised the issue of sufficiency of the pleadings in ground 1 of the Notice of appeal, the proper things for the appellants to do is to first appeal or file a ground of appeal challenging the findings as to the competency of that issue. The lower court had found the issue to be incompetent, this court could not hold otherwise unless and until there is a ground of appeal challenging the lower court's finding. It is for those reasons that I agree with the submissions of the 1st respondent that the ground 1 of the Notice of appeal is incompetent, and same is consequently struck out. In addition, the issue 1 formulated by the appellant based on ground No. 1 of the Notice of appeal is contaminated by the incompetency of the ground of appeal. Consequently I hold that issue No. 1 formulated by the appellant is also incompetent and is hereby respectfully struck out.

Turning to the 2nd and 3rd respondents' preliminary objection which challenged the competence of ground No 2 of the Notice of appeal, the learned counsel to the 2nd and 3rd respondents submitted that the pronouncement of Ogebe JCA as he then was in the leading judgment which formed the basis of the second ground of appeal is not related to any of the issues joined by the parties, it is an unsolicited remark by the court. Learned counsel submitted that grounds of appeal must relate to the decision and should constitute a challenge to the ratio of the decision. See *Saraki V. Kotoye* (1992) 9 NWLR (pt.264) 156 at 184. *Egbe V. Alhaji* (1990) 1 NWLR (pt. 128) 546 at 590. *Kalu V. Odili* (1992) 5 NWLR (pt. 240) 130 at 180. It is the submission of counsel that the opinion expressed by the learned justice of the Court of Appeal were a mere obiter dicta and since the second ground of appeal did not challenge the decision of the court but a mere obiter. It is therefore incompetent, consequently, the second issue for determination based on it is liable to be struck out.

The appellants in response contended that that aspect of the lead judgment arose from the contention of the parties at the lower court on the requirement of Section 393 (3) of CAMA and the issue to obtain leave of court. It was further contended that ground 2 in the Notice of Appeal relates to the other reason why the judgment of

the first instance was set aside, it therefore behoves on the appellant to appeal against it.

For the full appreciation of this issue, it is necessary to reproduce the decision of the lower court which is the subject of the controversy in this case. In its judgment the lower court on pages 283 - 284 held as follows after quoting Section 393 (1) from the provisions above it is clear that where the receiver or Manager is appointed for the whole or substantially the whole of the property the powers conferred on him by the debentures by virtue of which he was appointed shall be deemed to include the powers specified in schedule II of CAMA to bring or defend any action or other legal proceedings in the name and on behalf of the company. In my view this power is not limited and does not require confirmation of Receiver's appointment by the court nor leave of the court to sue. It is quite clear from Sections 390 and 391 of CAMA that a Receiver or Manager of any property or undertaking of a company may be appointed out of court under the power contained in any instrument and may apply to the court for direction in relation to any particular matter arising in connection with the performance of his function. If the trial court had adverted its mind to these provisions of CAMA it would not have hastily struck out the appellants' claim.

"One other point I wish to make is that the preliminary objection in the court below appeared to be premature, for example the question of whether or not the Receiver is appointed for the whole or substantially the whole company's property can only be determined by evidence. A trial court should by and large avoid determining issues are (sic) require tested evidence at the preliminary stage in the proceedings..."

It is the later part of the decision that the 2nd and 3rd respondents submitted that are mere obiter dicta, as the issue of premature of the action was not raised by either of the parties is "premature", an issue between the parties in this case? In my view an issue is the question in dispute between the parties, usually raised by way of question to be determined by the court. This honourable court in *Nwaogwugwu v. President of Federal Republic of Nigeria* (2007) 6 NWLR (pt 1053) 237 at 259 have stated what an "issue" is thus:-

"There was need to emphasise on what constitutes an issue in

a case. An issue is the question in dispute between the parties. It is usually a proposition of the law or fact in dispute between the parties necessary for determination by the court, such determination will normally (sic) after the result of the appeal."

B The main issue in this appeal had been determined before the learned Justice Ogebe JCA (as he then was) expressed his opinion of what "appeared" to be premature in the preliminary objection filed by the appellant at the trial court. This opinion did not in any way affect the decision already reached by the court. It is my view that issue of the C "premature" of the preliminary objection as expressed by the lower court was not an issue between the parties and that opinion did not in any way affect the decision of the lower court that the trial court was wrong in its decision to strike out the respondents' claim before it. With tremendous respect, the opinion as expressed by Ogebe JCA, D as he then was in his lead judgment does not embody the resolution of the court in my view it is an opinion expressed by him after the issues between the parties have been decided and I have no hesitation in holding that the said opinion is a mere obiter dictum. What is then an obiter dictum?

E This question has been answered by my learned brother Edozie JSC in the case of AIC Ltd v. NNPC (2005) 11 NWLR (pt. 937) 563 at 589, when his Lordship held as follows:-

F *"obiter dicta reflect, inter alia, the opinion of the judgment of the Judge which does not embody the resolution of the court. The expression of judge in a judgment must be taken with reference to the facts of the case which he is deciding the issues calling for decision and answers to those issues."*

G Where an opinion is expressed obiter, such an opinion is not appealable. An appeal is fought on the basis of the decision of the court and is not taken against mere obiter. It is not every pronouncement made by a judge that can be made the subject of an appeal. Where an opinion is expressed obiter, such an opinion, H remarks or observation is baseless and a mere obiter dicta which is not appealable. This court per Uwaifo JSC in Abacha v. Fawehinmi (2000) 6 NWLR (pt. 660) p 228 at 351 stated the legal position clearly as follows:-

"This observation, no doubt, is an obiter dictum of the learned justice of the court of Appeal, it was not part of the argument before

the Court. The learned Justice adverted to the point on his own in the cause of his judgment. It played no part whatsoever in the decision reached either by the lower Court or even by the maker himself. It is not a fit subject for appeal as appeal is fought on the basis of the decision of the court and is not taken against mere obiter”.

I quite agree with this view of his Lordship Uwaifo JSC. Having held that the opinion expressed by the learned Justice of the Court of Appeal in the lead judgment is a mere obiter dictum, the ground 2 of the Notice of Appeal challenging same is therefore incompetent as the opinion expressed is not a fit subject for appeal, consequently the said ground of appeal is hereby struck out. The issue No 2 for determination framed by the Appellant and which was based on the incompetent ground 2 of the Notice of Appeal is hereby struck out.

Finally, the two grounds of appeal in the Notice of appeal have been found to be incompetent in law and consequently struck out; there is nothing left on which this appeal can be based. The whole appeal is therefore incompetent and it is consequently struck out.

It is for the above little contribution of mine and the more articulate and comprehensive reasons given by my learned brother, Mohammed JSC, that I too dismiss the appeal and affirm the judgment of the court of Appeal. I abide by the consequential orders made by my learned brother Mohammed JSC in the lead judgment. No order as to costs.

FABIYI JSC

I have had a preview of the judgment just delivered by my learned brother- Mahmud Mohammed, JSC. I agree with the reasons therein advanced to arrive at the conclusion that the appeal lacks G merit and deserves to be dismissed.

I only desire to chip in a few words of my own. In paragraph 8 of the Statement of Claim, the plaintiffs pleaded, inter alia, as follows:-

“8. By virtue of the Debenture Trust Deed referred to in paragraph 7 above, the 2nd plaintiff created a first charge in favour of the 1st plaintiff over all the hereditaments buildings and property of the 2nd plaintiff including plant, Machinery, Equipment, Warehouse, Office Block and other real property lying situate and being at 24, Abimbola Street, Ilasamaja, Isolo, Lagos.”

From the above, it is clear that the 3rd respondent was appointed by the 1st respondent as Receiver over the whole or substantially the whole of the property of the 2nd respondent. With the use of the word 'ALL' in paragraph 8 of the statement of claim reproduced above, the complaint of the appellants borders on technicality.

By virtue of section 393 (3) of the Companies and Allied Matters Acts, 1990 and paragraph 5 of Schedule 11 thereto, the 3rd respondent did not require leave of court to institute the action at the court of first instance in the name and on behalf of the 2nd respondent. The appellants attempted to place reliance on provisions of the repealed Companies Act, 1968. That has the semblance of living in the past. The cases of *Intercontractors Nigeria Limited v. National Provident Fund Management Board* (1988) 2 NWLR (Pt. 76) 280; *Intercontractors Nigeria limited v. UAC Nigeria Limited* (1988) 2 NWLR (Pt. 76) 303 and *Adegboyega v. Awu* (1992) 7 NWLR (Pt. 255) 376 cited on behalf of the appellants are clearly not apposite.

The court of Appeal was right in the stance taken by it. Since the 3rd respondent was appointed as Receiver over the whole or substantially the whole property of the 2nd respondent, the powers conferred on him by the Debenture Trust Deed shall be deemed to include the powers specified in schedule 11 of CAMA to bring or defend any action or other legal proceedings in the name and on behalf of the company.

One word more and I shall be done. Preliminary objection should not be hastily taken. The question of whether or not the Receiver is appointed for the whole or substantially the whole of the company's property can wait till latter in the proceedings when evidence is adduced. A trial court should always avoid determination of issues which require tested evidence at the preliminary stage. This will obviate the adage of 'much haste; less speed.'

For the above observations and the reasons carefully set out in the judgment of my learned brother, I too, feel that the appeal is devoid of merit and should be dismissed. I order accordingly. I make no order on costs.

RHODES-VIVOUR JSC

I had the privilege of reading in draft the leading judgment prepared by my learned brother Mohammed JSC. I am in full agreement with his lordships reasoning and conclusions, I would dismiss the appeal and remit the case to be tried by another judge of the Federal High Court. B

The facts have been so well stated in the leading judgment, so there would be no need me restating them.

The learned trial Judge fell into the painful error of deciding that the receiver needs leave before he can bring the action. Reliance was placed on *Intercontractors v. National Provident Fund Management Board* 1985 2 NWLR pt. 76 p.280. C

His lordship was apparently oblivious of the provisions of section 393 (1) - (3) and schedule 11 of CAMA which states that:

“393 (1) A person appointed a receiver of any property of a company shall subject to the rights of prior encumbrancers, take possession of and protect the property, receive the rents and profits and discharge all outgoings in respect thereof and realize the security for the benefit of those on whose behalf he is appointed but unless appointed manager he shall not have power to carry on any business or undertaking.” E

(2) A person appointed manager of the whole or any part of the undertaking of a company shall manage the same with a view to the beneficial realization of the security of those on whose behalf he is appointed.” F

(3) Without prejudice to subsection (1) or (2) of this section, where a receiver or manager is appointed for the whole or substantially the whole of a company’s property, the powers conferred on him by the debentures by virtue of which he was appointed shall be deemed to include (except in so far as they are inconsistent with any of the provisions of those debentures) the powers specified in the Eleventh Schedule to this Act.” G

Schedule 11 paragraph 5 gives the Receiver the power to bring an action or defend an action in the name and on behalf of the company. The clear interpretation of the above is that the Receiver or Manager is appointed for the whole or substantially the whole of the property, and the powers conferred on him by the Receiver shall include the powers specified in Schedule 11 of CAMA to maintain or H

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defend an action in the name of the company. These powers to my mind are clear. Confirmation of the Receiver's appointment by the court is not necessary, neither is leave of the court to sue.

Once again, I agree entirely with the reasoning in the leading judgment.

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