

**SUPREME COURT OF NIGERIA**

24TH JUNE, 2011. SC. 3/2011

**CORAM:- D. MUSDAPHER, C. M. CHUKWUMA-ENEH, O.  
O. ADEKEYE, S. GALADIMA, B. RHODES-VIVOUR, JJSC**

1. HON. ZAKAWANUI. GARUBA

& 8 Ors.

..... APPELLANTS

AND

1. HON. EHI BRIGHT OMOKHODION

& 12 Ors.

..... RESPONDENTS

14. THE CLERK, EDO STATE HOUSE  
OF ASSEMBLY

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APPEALS - Issues - Point of law not raised in lower court - Determination - Attitude of appellate Court - It is not to decide on it - Except when satisfied that it has all the facts - As if same had been raised in the lower court (H1)

APPEALS - Issues - Basis - Issues must be distilled from the grounds of appeal and not from abstract legal issues - Which have no reference to the facts of the case as herein (H2)

APPEALS - Grounds of appeal - Must correlate with as well as arise from the decision appealed against - And should attack the ratio of the decision - Otherwise it is baseless and liable to be struck out (H3)

APPEALS - Issues - Fresh issue on appeal - Competence - Appellant must seek and obtain leave of court - In order to raise fresh issue on appeal - Failure to do so will lead to striking out (H4)

COURTS - Judicial notice - Court before whom a proceeding is pending or completed - Is to take judicial notice of all processes filed in the proceeding - As well as the proceeding itself and the judgment (H5)

APPEALS - Record of appeal - Amendment - Procedure - It is done by way of filing an affidavit - Followed by a formal application to court - Which has discretion to grant or refuse the amendment (H6)

COURTS - Appeals - Record of appeal - Binding effect - Court and parties as well as their counsel are bound by the record - No Court has jurisdiction to draw conclusions - Not supported by the record (H7)

APPEALS - Right of appeal - Under ss. 241(1) and 242 of the Constitution - Appeal could be as of right or with leave of court - But failure to obtain leave where necessary - Will render such appeal incompetent (H8)

APPEALS - Grounds - Nature of - Is determined by examination - The three grounds are of mixed law and fact - They are questions of resolving conflict in evidence and exercise of jurisdiction (H9)

CONSTITUTIONAL LAW - Constitution - Interpretation - Of the word “decision” - Under s. 318(1) of the Constitution - Court is to employ a liberal principle in the interpretation (H10)

### **FACTS**

Following the pandemonium that broke out in Edo State House of Assembly on 22nd February, 2010, over the purported removal and/or suspension of the speaker and Deputy speaker, plaintiffs/appellants filed an Originating Summons supported by an affidavit of twenty six paragraphs with accompanying exhibits at High Court of Edo State Holden at Benin. They claimed against defendants/respondents, inter alia: A declaration that not less than two-thirds majority of the 24 members of Edo State House of Assembly is constitutionally required under Section 92(2)(c) of Constitution of Federal Republic of Nigeria 1999 for the purpose of the removal of the Speaker and Deputy Speaker; that is 16 members. In consequence thereof, respondents (i.e. four sets thereof) have filed their respective counter- affidavits to the Originating Summons, etc. and also at the same time various applications and preliminary objections challenging the jurisdictional competence of the Court to hear the matter. The Court called for the parties’ opinion on the procedure to be adopted on the way forward in determining the substantive matter vis-à-vis the various pending applications and preliminary objections.

After having heard argument and submissions of counsel for

the parties on the procedure to be followed, the Court then ruled to take and determine the various preliminary objections and applications first before dealing with the substantive matter on the merits. The foregoing innocuous directive of the Court which has accorded priority of hearing to the preliminary objections, vis-à-vis the substantive matter it appears, has set the cat among the pigeons as appellants immediately lodged an appeal at Court of Appeal Benin Division, against the decision; that is the interlocutory order herein. Appellants' contention is that the said directive is a decision within the context of Section 318(1) Constitution of Federal Republic of Nigeria 1999 as amended and therefore an appealable decision. Respondents have argued to the contrary. Appellants further contended that it is imprudent in the circumstances for the High Court not to have heard the arguments on jurisdiction and the merits of the substantive case together. 1st - 4th, 8th - 11th and 12th - 14th i.e. the 3 sets of respondents hereof have raised their preliminary objections to the appeal and have expatiated on the same in their briefs. The appellants on their part have replied to these preliminary objections in their various reply briefs filed in this matter. The Court ruled that the appeal constituted questions of law and facts. As such, appellants ought to have obtained the leave of the High Court pursuant to Section 242 (1) Constitution of Federal Republic of Nigeria 1999 as amended. The appeal was thus dismissed. Appellants were aggrieved by the decision and they have now appealed to Supreme Court. 1st - 4th, 8th - 11th and 12th - 14th respondents have also cross appealed.

**HELD** (Unanimously dismissing the appeal and cross-appeal per **CHUKWUMA-ENEH JSC**)

***APPEALS - Issues - Point of law not raised in lower court***

1. Meaning in effect from the foregoing abstract that whether or not issues 1, 2 and even 4 have been premised on the above grounds of appeal in this matter is beyond argument, in that the proceeding of the trial Court of 26/4/2010 has been effectively so amended. This misapprehension as I will show later has no basis. There can be no doubt even from the way issue 4 is couched that it does not stem from the lower court's decision. No application has been made to the lower court to invoke its powers under Section 16 of the Court of

Appeal Act to hear the case, as the trial Court otherwise would and there is no pronouncement on that question one way or the other to warrant filing the said ground of appeal. The invocation of Section 16 or Section 22 of the Supreme Court Act should have come by a separate and independent application to the court to invoke that jurisdiction. This issue is clearly untenable and unsustainable and should be struck out.

In the light of the foregoing, I must state as settled law that where a point of law has not been taken in the lower court and it is put forward by an appellant for the first time in an appellate court, that court is not to decide the point unless it is satisfied that it has before it all the facts bearing on the new contention as completely as if it had been raised in the lower court (i.e. of first instance) and on satisfactory explanation that could have been given in the lower court if it had been so raised. That is to say, in regard to this case that the points being canvassed as per issues 1, 2 and 4 on the supposition that they have constituted legal issues cannot be raised without the benefit of additional evidence, otherwise they become otiose. It is clear that to sustain these grounds and the issues raised therefrom there must be additional evidence. Hence the appellants have filed an affidavit in order to place on record for consideration the said two cited cases of this court. (p. 1730 G)

### ***APPEALS - Issues - Basis***

2. Also it is settled that issues as the instant ones here formulated as arising for determination in an appeal must relate and arise from the grounds of appeal and must be consistent with and within the scope and confines of the grounds relied upon. Thus postulating that issues for determination ought not to be formulated in abstract legal issues with no concrete reference to the facts of the case as in this matter. With regard to issues 1, 2 and 4, I have no difficulty in holding that they are not germane for the resolution of this appeal and have been introduced as red herrings to divert attention from the main issues in this appeal and so they are liable to be struck out.

In an attempt to garner additional facts to support these issues, and prop them up, the appellants have resorted to amending the record/proceedings of 26/4/2010 by way of an affidavit challenging the record. This is a non-starter as I will show anon. (p. 1731 F)

***APPEALS - Grounds must arise from decision of court***

3. Again, it is also settled that where a ground of appeal does not arise from the judgment appealed against (in this case as regards grounds 3, 4 and 6) then the validity of the issues raised therefrom for determination cannot be said to have arisen from incompetent grounds of appeal. It is equally settled that a ground of appeal must correlate with as well as arise from the decision appealed against and should frontally attack the ratio of the decision otherwise it is baseless and liable to be struck out being incompetent. B

And so whether or not in this instant case the trial Court subtracted or read out of the record with regard to issues 1, 2 and 4 has no definite bearing as to whether or not the cases cited in grounds 3, 4 and 6 hereof have formed part of the record/proceedings of 26/4/2010 so as to be judicially noticed so as to be considered. It is settled that where an appeal has been successfully challenged as is the case of the foregoing grounds, it is liable to be struck out where there are no other grounds to sustain the appeal. C D

Coming particularly to grounds 3, 4 and 6 as challenged by 8th to 11th respondents in their preliminary objection, I have examined ground 3 of the notice of appeal alongside its particulars which clearly is not questioning the trial Court's sole deciding factor in this matter to the effect that the appellants have neither sought nor obtained leave of court before filing the instant notice of appeal as the grounds are questioning the exercise of the trial Court's discretion and so have raised questions of mixed law and facts and also that the lower court's observation as per ground 3 is obiter and not an appealable point and I agree entirely. Ground 4 which is questioning the lower court's judgment for failing to take judicial notice of the said 2 cited cases of this court as well as for not considering them by the trial Court on the other hand, has no bearing whatsoever with the judgment appealed against and it is settled law that a ground of appeal challenging the judgment of a court (trial or appellate court) cannot be founded on what the court has never decided. The lower court has no duty deciding on the failure to take judicial notice of the said two cited cases as that issue has not arisen from the decision of the trial Court. This ground of appeal clearly does not arise from the lower court's judgment and should be struck out. E F G H

As regards ground 6 - which has complained of failure to judi-

cially take notice of the two Supreme Court cases and for not considering them; again, this ground does not arise from the decision of the lower court. And all that I have said with regard to grounds 3 and 4 above applies with equal force to this ground and being incompetent it should also be struck out. (p. 1732 B)

***Issues - Fresh issue on appeal - Competence***

4. Even more fundamental to this case is that grounds 3, 4 and 6 of the appeal are equally baseless in the sense that the appellants have not sought nor obtained leave of the lower court to raise fresh issues not pronounced on or decided by the trial Court. The appellants have without leave of court attempted to widen the ambit of their case in the lower court and this court by introducing the question of the said two cited cases and its implications, improperly without leave of court. This is a fresh issue as no reference has been made to the two cited cases by the trial Court in its judgment; their citation has not formed part of the record/proceeding of 26/4/2010. They cannot be allowed to do so at this stage in this matter, as an appeal is a continuation of the original suit. The appellants' leave to raise a new issue in this regard in this case is very fundamental otherwise the new issue being foisted on the court will be totally discountenanced. The appellants must be seen in this matter to maintain a consistent case at all the stages of the case otherwise the matter may be struck out.

I have therefore come to the inevitable conclusion that issues 1, 2 and 4 not having arisen from the decision of lower court are incompetent talk less of their not having attacked the ratio of the lower court's decision and so should be struck out. The same fate goes for grounds i.e. 3, 4 and 6 being groundless are incompetent for the reasons given above and should also be struck out. (p. 1733 E)

***COURTS - Judicial notice***

5. I must however say that it is trite that the court before whom a proceeding is pending or has been completed takes judicial notice of all the processes filed in the proceeding as well as the proceeding itself including the judgment as the case may be. And so flowing from this proposition of law, all the processes to be relied upon in any application made before that court in the proceeding are judicially noticed.

The record/proceeding of 26/4/2010 of the trial Court as affirmed by the lower court has been challenged by the appellants who have filed an affidavit to that effect contending that the citation of the two cases viz: Diapalong v. Dariye and Inakoju v. Adeleke as well as their submission thereon has been left out of the record/proceeding of the trial Court on 26/4/2010 and that the same be made part of the record of appeal/proceeding of 26/4/2010 in this matter particularly as the said affidavit has not been countered by the other parties. The said affidavit has been served on the parties and the court and not having been countered, the appellants have contended that the record of appeal/proceeding of 26/4/2010 has ipso facto been accordingly amended without more. (p. 1734 G)

### ***Record of appeal - Amendment - Procedure***

6. With the greatest respect, I must say that to amend the record of appeal in any proceeding including the instant one is much more than simply filing an affidavit challenging the record/proceeding as here without more. All the parties to this suit although served the affidavit challenging the record, it must be followed by a formal application to court to amend the record for the court to sanction the amendment as the whole essence of filing an affidavit in that respect is to bring about an amendment of the record of appeal/proceeding of 26/4/2010. A record of appeal therefore cannot be amended without the court's approval in exercise of its discretionary power to grant or refuse to sanction an amendment of the record of appeal. (p. 1735 C)

### ***COURTS - Appeals - Record of appeal - Binding effect***

7. Their misconception with respect is profound. It is settled law that courts, the parties and their counsel are bound by the record of appeal. And so no court has the jurisdiction to go outside the record to draw conclusions which are not supported by the record. I find that the four issues and grounds 3, 4, 6, 8, 9 and 10 also have been raised on the basis that the said record of appeal/proceeding of 26/4/2010 has been duly amended by the affidavit challenging the record of appeal to include the proceedings of 26/4/2010. This is not so as per my findings above. In the result having pulled the rug as it were from underneath the appellants' submissions as to the competency

with regard to the four issues raised for resolution here and the said grounds above mentioned, they become baseless and utterly without foundation and therefore incompetent and should be struck out. It is trite that you cannot stand something on nothing and expect it to stand and in the same way issues for determination must spring from grounds of appeal which in turn must have arisen from the court's decision. (p. 1737 B)

***Right of appeal - Ss. 241(1)&242 of Constitution***

8. Finally, it has been argued in this matter that this appeal has been struck out by the lower court for failing to seek and obtain leave of court before filing the appeal as prescribed by Section 242 of the 1999 Constitution as amended having raised grounds of mixed law and facts therein. It is also common ground that the trial Court's directive to deal first with the preliminary objections amounts to an interlocutory order based on the exercise of its discretion. It is trite law that an appeal against an interlocutory decision other than on grounds of law requires leave of court. The provisions of Sections 241(1) and 242 (supra) have clearly set out when appeals will be presented as of right or with leave respectively of the Federal High Court or State High Court or the Court of Appeal as the case may be. And so it is settled law that right to appeal is statutory. Whether the instant exercise by the appellants of their right to appeal is properly founded in law has been challenged by the respondents based on the nature of the instant 3 grounds raised against the trial Court's decision in this matter. This has formed the basis of grounds 1, 2 and 5 to this court.

From my reasoning above I am in entire agreement with the finding in the above cited case. So that the 3 grounds of appeal in this matter having raised a question of mixed law and facts require leave of court; The appellants have filed this appeal without first having obtained leave of court and they will take the consequences. It is trite that without leave of court having been first sought and obtained before filing the appeal, the appeal will be incompetent and liable to be struck out pursuant to Section 233(3) of the 1999 Constitution and I so hold. Having so concluded I see no justification examining any other issues raised here as this finding goes to the root of the appeal vis-a-vis the notice of appeal not having any competent ground on



which to sustain it and the appeal therefore being incompetent, it is hereby struck out. (p. 1737 F/1739 D)

### ***APPEALS - Grounds - Determination***

9. The question to be resolved in this respect is whether or not the 3 (three) grounds of appeal raised before the lower court require leave of court to be competent having been raised against the trial Court's decision in exercise of its discretionary power. This depends on whether or not the grounds raised are questions of law. The point therefore must be made that the distinction between a ground of law and a ground of fact or mixed law and facts though very thin, is fundamental to resolving the instant question, which is difficult and blurred to define and apply. B  
C

To determine whether a ground of appeal is one of law or fact requires examining the main ground in the context of its particulars so as to determine the nature of the question the ground has raised or complaining about. The appropriate approach to determining the issue put simply in the circumstances is whether the 3 grounds irrespective of how couched have challenged i.e. questioned the discretionary exercise of the power of the trial Court to hear the preliminary objections of the 3 sets of defendants/respondents first before dealing with substantive matter on the merits or to deal with the originating summons and the preliminary objections together. D  
E

The trial Court opted to hear the preliminary objections first in exercise of its discretionary power. It is beyond argument that the appellants have questioned the trial Court's discretion in making the interlocutory order. In other words, thus questioning the evaluation of the facts. I find that by examining the said 3 grounds of appeal will lead to further examining of the facts and circumstances on which the trial Court's exercise of its discretion in the matter of the directive it has given is premised and I have no doubt that the 3 grounds are a product of exercise of discretion and so a composite of mixed law and facts. (p. 1738 C) F  
G

H

### ***Constitution - Interpretation of the word "decision"***

10. The question to be resolved upon the said definition vis-a-vis this matter is whether the instant words "Ruling" and "Order" constitute a determination of a court as in this case and so a decision in Section

318(1) (supra). In interpreting the word “decision” in the context of the entire section, the court is to be guided by the liberal principle i.e. the wide interpretation of the word “decision” as enunciated in the case of Nafiu Rabi v. the State (1981) 2 NCLR 293 at 332 wherein this court held as follows:

B “...term decision - in my view, would cover all forms of conclusion involving decision making.”

C Meaning in this regard that the instant ruling having been arrived at after the arguments and submissions of the learned counsel for the parties and having thereby involved the processes of decision making is a decision under Section 318(1) supra. In other words the definition is wide enough to encompass the word “Ruling” and “Order” as have been used by the trial Court in making the interlocutory order in this matter as both words represent key processes involved D in decision making.

I hold therefore that the instant ruling as made by the trial Court in this matter is a decision and therefore appealable as provided pursuant to Sections 240 and 242 of 1999 Constitution as amended. I am rather fortified in so holding by the decisions of this court in N.P.A. v. Eyamba, Awuse v. Odili and Abdulkarim v. Incar (Nig) Ltd. I further E hold that the word “decision” has to be construed liberally as guided by the principle decided in Nafiu Rabi v. The State (supra) on constitutional interpretation and it is wide enough to cover determination by a “Ruling” as in this matter. There is therefore no doubt that F a “Ruling” is a determination and so a decision pursuant to the Section 318(1) (supra). The instant ruling stands out vis-à-vis the directives in the above cited cases relied on by the respondents/cross-appellants in that counsel for the parties on both sides have made G their submissions for and against the procedure to be followed in hearing the instant matter and the said applications as I have adumbrated above before the handing down of the said Ruling by the trial Court. The procedure followed at the hearing in this instance has been one of due process to reach a determination in the matter, H thus, ruling out any doubt that the determination as has been constituted has not been heard under administrative procedure which invariably is inquisitorial in nature. The trial Court again in conformity with due process has heard both sides to the cause before arriving at the ruling and order. There can be no doubt that the instant process

of adjudication has all the trappings of a judicial process. Even more so the trial Court has made an order as I have referred to above and thus has characterized the procedure in reaching the instant directive beyond argument that it is a determination of a court. Besides, the consequential order is competent and I hold that where a ruling has been reached in the circumstances as per the foregoing there can be no basis for saying that it is not a “decision” that is competent and so appealable under Sections 241, 242 and 243 of this 1999 Constitution as amended. The decision in United Agro Ventures Ltd. V. F.C.M.B. is distinguishable from the instant case on the facts here, as no arguments have been advanced in the cited case.

(p. 1741 H/ 1742 F)

### **NOTABLE POINTS OF INTEREST** **CHUKWUMA-ENEH JSC**

#### *1. Record of appeal must be duly prepared*

At this juncture, I have to observe that the importance of record of appeal/proceeding in our appeal system cannot be overestimated as cases have to be decided based on the record of appeal and without it, hearing of appeals will be difficult to undertake. A record of appeal/proceeding has to be duly and properly compiled to guarantee as to its correctness; and it must be meticulously checked and compared with vis-a-vis the original processes/documents filed in the matter as well as the proceedings of court. A record of appeal/proceeding having been duly compiled has to be authenticated and certified as prescribed by law. It is settled law that the record of appeal is binding on the court, the parties and their counsel. The instant purported amendment of the record of appeal/proceeding of 26/4/2010 as the appellants have undertaken by filing the said affidavit has recognized of the fact that to raise and discuss the questions on the citation of the said two cases in the lower court and this court in the context of their not having formed part of record of appeal/proceeding of 26/4/2010 at the trial Court, the said citation and their consideration thereof of the said two cases must be placed on record of appeal/proceeding of 26/4/2010 by amending the same before they will be considered and relied on in any legal argument in this matter in this court.

(p. 1735 F)

*2. Definition of "Decision"*

Even then the word "decision" according to Black's Law Dictionary (5th Edition) at P366 has defined the word "decision" as follows:

"...a determination arrived at - after considering of fact and in legal context, law."

B This definition is coterminous with the one as per Section 318(1) (supra) and which as I have found herein has covered 'Ruling' and 'Order' as in this case. It follows that the word "Ruling" has the same meaning as the word "determination". (p. 1742 D)

C **REPRESENTATION**

Ighodalo Imedegbelo SAN with U. Egbon; Ighedoso Imedegbelo and N. T. Ashamu, for the Appellants

D Chief Adeniyi A. Akintola SAN with Rickey Tarfa SAN, F.A. Aofalaju, C.O.C. Emeka-Izomo, Nnamonso Ekanem, Ngozi Okechukwu (Mrs), R. Oguneso, Adenlere Babawale (Mrs), M.B. Kundu-Olayiwola, Sale Sali, J. O. Odubela, Uche Obi and F. Ahmed, for the Respondents

**CASES REFERRED TO**

- E Chami v. UBA (2010) 3 SCM.59 at 71
- Egbe v. Alhaji (1990) 1 NWLR (pt.128) 590
- Coker v. UBA (1997) 2 NWLR (pt.490) 641 at 604
- Owie v. Ighiwi (2005) 5 NWLR (Pt.917) 184 at 217
- F Fadiora v. Gbadebo (1978) NSSC (Vol.1) 121 at 131
- F Osuji v. Ekeocha (2009) 16 NWLR (Pt.116) 81 at 122
- Saude v. Abdullahi (1989) 4 NWLR (Pt.116) 387 at 431
- Aina v. U.B.A. (1997) 4 NWLR (Pt.498) 181 at 187 - 188
- Federal Ministry of Health v. Gomet (2009) 6 SCM 63 at para. B
- G Dalek Nig. Ltd. V. OMPADEC (2007) 7 NWLR (Pt.1033) 402 at 430
- Olaruntaba & Ors. v. Abdul-Raheem & Ors. (2009) 13 NWLR (Pt.1157) 87
- G. Cappa v Abmine & Sons (Nig) Ltd. (2002) 1 NWLR (Pt.777) 32
- A. Oladeji Nig Ltd v. N.B. Plc. (2007) 5 NWLR (pt. 1027) 415 at 436
- H Oloruntoba-Oju v. Abdul-Raheem (2009) 13 NWLR (Pt.1157) 83

**STATUTE REFERRED TO**

Constitution of Federal Republic of Nigeria 1999, ss. 233 (3), 240, 241 (1), 242, 318 (1)

**BOOK REFERRED TO**

Blacks Law Dictionary 5th Edition at p.366

**LEAD JUDGMENT BY CHUKWUMA-ENEH JSC**

Following the pandemonium that broke out in the Edo State House of Assembly on 22/2/2010 over the purported removal and/or suspension of the speaker and Deputy speaker, the plaintiffs (appellants herein) by way of originating Summons supported by an affidavit of twenty six paragraphs with accompanying exhibits have claimed against the (defendants/respondents herein) at the trial Court the following relief, viz;

*“i. A declaration that not less than two-thirds majority of the 24 members of the Edo State House of Assembly is constitutionally required under Section 92(2)(c) of the constitution of Federal Republic of Nigeria, 1999 for the purpose of the removal of the Speaker and Deputy Speaker; that is 16 members.*

*ii. A declaration that the purported removal of the 1st and 2nd plaintiffs as Speaker and Deputy Speaker by the 1st - 13th defendants is unconstitutional, null and void, with no resolution of the Edo State House of Assembly and votes of not less than two-thirds majority of the members of the House as mandatorily required under Section 92(2)(c) of the Constitution of Federal Republic of Nigeria, 1999.*

*iii. A declaration that the purported Motion used by the 1st - 14th defendants in purportedly removing the 1st and 2nd Plaintiffs as speaker and Deputy Speaker respectively is unconstitutional, null and void and in breach of Section 92(2)(c) of the constitution of the Federal Republic of Nigeria, 1999.*

*iv. A declaration that the right of Fair Hearing of the 1st and 2nd plaintiffs as guaranteed by Section 36 of the Constitution of Federal Republic of Nigeria, 1999 was breached by the failure of the 1st - 13th defendants to serve a Notice of impeachment on the 1st and 2nd plaintiffs before their purported removal.*

*v. A declaration that the purported appointment of 1st and 3rd defendants as the speaker and Deputy Speaker Respectively of the Edo State House of Assembly is null and void and of no effect whatsoever.*

*vi. A declaration that the purported appointment of the 2nd defendant as the Speaker Pro tempore on the 22nd day of February,*

*2010 is unconstitutional, null and void and of no effect whatsoever.*

*vii. An Order nullifying the purported removal of the 1st and 2nd plaintiffs as the Speaker and Deputy Speaker of the Edo State House of Assembly by the 1st - 13th Defendants on the 22nd day of February, 2010.*

B *viii. An Order nullifying all purported acts, orders and steps taken by the 1st - 13th Defendants from the 22nd day of February 2010 till the date of judgment.*

C *ix. An Order that the purported swearing in of the 1st and 3rd Defendants as Speaker and Deputy Speaker of the Edo State House of Assembly by the 14th Defendant is unconstitutional, null and void.*

*x. An order that the 1st and 2nd Plaintiffs remain the Speaker and Deputy Speaker of the Edo State House of Assembly, with all Rights and privileges.*

D *xi. An Order of injunction restraining the 1st and 3rd Defendants from parading themselves as Speaker and Deputy Speaker respectively of the Edo State House of Assembly.”*

In consequence thereof the defendants (i.e. four sets thereof) have filed their respective counter-affidavits to the Originating Summons etc and also at the same time various applications and preliminary objections challenging the jurisdictional competence of the trial Court to hear the matter. At the hearing of the matter on 26/4/2010 the trial Court has called for the parties’ opinion on the procedure to be adopted on the way forward to determining of the substantive matter vis-a-vis the various pending applications and preliminary objections. After having heard argument and submissions of the counsel for the parties on the procedure to be followed the trial Court then ruled to take and determine the various preliminary objections and applications first before dealing with the substantive matter on the merits in the following terms:

H *“I have carefully listened to the submission of both senior counsel, and other counsel in this case by way of observation and suggestion. I want to quickly say that most of the observations tend to commence argument on the issues even before the start of hearing. I shall as much as possible restrain from commenting on those issues.*

*Upon a calm consideration of the observations and the issues raised in the main suit and the preliminary objection, it is my view that greater justice will be done to this case and the parties concerned*

*to hear and determine the preliminary objection filed given the fundamental nature of the issues raised in the main suit. One of the issues raised is that this suit is an abuse of court process. If indeed it is and which fact will be determined only after argument, it will be a fruitless exercise going into the main case. What is more I am inclined to agree with Mr. Oveyipo learned senior counsel that taking the preliminary objection along with the main suit will amount to overruling the preliminary objection even before argument. I do not intend to do that. Consequently, it is hereby ordered that the preliminary objection filed by the respective sets of defendants shall and be heard and determined before the substantive suit. However, the tight schedule of court notwithstanding in view of the sitting arrangement of courts, I shall endeavour to give this case accelerated hearing, with the cooperative of the senior counsel and other counsel involved.”*

The foregoing innocuous directive of the trial Court which has accorded priority of hearing to the preliminary objections, vis-a-vis the substantive matter it appears, has set the cat among the pigeons as the plaintiffs/appellants have wasted no time to lodge an appeal against it that is the interlocutory order herein by a notice of appeal containing 3 grounds of appeal dated 7/5/2010. The main plank of the plaintiffs'/appellants' contention in the appeal is that the said directive is a decision within the context of Section 318(1) of the 1999 Constitution as amended and therefore an appealable decision. The defendants/respondents have argued to the contrary. Furthermore, that it is imprudent in the circumstances for the trial Court not to have heard the arguments on jurisdiction and the merits of the substantive case together. The 1st - 4th, 8th - 11th and 12th - 14th i.e. the 3 sets of respondents hereof have raised their preliminary objections to the appeal and have expatiated on the same in their briefs. The appellants on their part have replied to these preliminary objections in their various reply briefs filed in this matter. The lower court in its Ruling on the said preliminary objections per Gumel JCA, found that:

*“...it is total misconception to characterize the grounds of appeal in this appeal as grounds of law alone. I am more inclined to agree with learned counsel to the 12th-14th respondents that this appeal as presently constituted involved questions of mixed law and facts only. So it is an interlocutory appeal upon question of mixed*

*law and facts and to that extent it could only be brought after the requisite leave had been sought for and obtained from either the lower court or this court as circumstances may necessitate. Pursuant to S.242 (1) of the 1999 constitution. Without this leave this appeal remains incompetent and this court lacks jurisdiction to entertain it. I hereby so hold. The preliminary objections filed on behalf of the 8th - 11th respondents on the one hand and that of the 12th - 14th respondents are hereby upheld.”*

Thus by the foregoing order, the lower court has disposed of the preliminary objections of the 8th - 11th respondents and that of 12th - 14th respondents. The whole purpose of the objection is to terminate the appeal. The lower court has no difficulty in dismissing the plaintiffs'/appellants' appeal in this matter as the appeal is one predicated on grounds of mixed law and facts requiring leave of court pursuant to Section 242(1) and Section 242 of the 1999 Constitution as amended to be competent. The appellants are aggrieved by the decision and they have now appealed to this court as per a Notice of Appeal dated and filed on 24/12/2010. The parties as prescribed by the Rules of this court have filed and exchanged their respective briefs of argument in respect of the matter. In the appellants' brief of argument filed in this court, they have submitted the following issues for resolution, viz:

*“1. Whether or not the lower court has the jurisdiction to subtract or read out of the record of appeal, what is there (Grounds 6, 8 and 9)*

*2. Whether or not the Court of Appeal ought to take judicial notice of judgment of the Supreme Court of Nigeria cited in ground 1 of the Notice of Appeal (Grounds 3 and 4).*

*3. Whether or not the Court of Appeal was right in holding that the three (3) grounds of appeal filed are grounds of mixed law and facts (grounds 1, 2, 5 and 7).*

*4. Whether or not the Court of Appeal should have considered the merits of the substantive appeal in the alternative despite declining jurisdiction to hear the appeal (Ground 10).”*

The foregoing issues for determination in the appeal have also been challenged by the respondents. Excepting 5th - 7th respondents (otherwise know as the 2nd sets of respondents) the rest of the respondents (otherwise comprising 1st, 3rd and 4th sets of respond-



ents) have severally filed in this court their notices of preliminary objections to the appeal. The 1st - 4th respondents in their brief of argument have challenged issues 1, 2 and 4 of the appellants' issues for determination as contained and argued in the Appellants' Brief of Argument on the grounds of appeal firstly, that the ratio decidendi or basis of the decision of the lower court appealed against herein is clear enough being strictly that the appeal filed by the appellants has required leave of court to be competent because the same has disclosed or involved questions of mixed law and facts. To buttress this point they have cited and relied on *Chami v. UBA* (2010) 3 SCM.59 at 71 paragraph C and *Federal Ministry of Health v. Gomet* (2009) 6 SCM 63 at paragraph B; and, secondly that issues 1, 2 and 4 of the appellants' brief of argument are clearly extraneous to the decision of the lower court as they do not relate to or bear any relevance to the ratio decidendi or basis of the lower court's decision and even then that a point not directly decided upon by court cannot constitute the basis of an issue for determination in an appeal. See: *Olufeagba & Ors. v. Abdul-Raheem & Anor.* (2009) 11-12 (pt.1) SCM 125 at 153. However in the event of overruling their preliminary objection, they have in the alternative raised the following issues for determination, viz:

(1) *Whether the lower court has in the circumstance subtracted or read out of the record of Appeal what is there (Grounds 6, 8 & 9).*

(2) *Whether the three grounds of appeal filed by the appellants before the lower court did not disclose or involve questions of mixed law and facts and therefore do not require leave to be competent (Grounds 1, 2, 5 and 7).*

(3) *Whether the court below ought to have considered the merits of the substantive appeal in the alternative having declined jurisdiction to hear the appeal (Ground 10)."*

In the 5th - 7th the 2nd set of respondents' brief of argument they have raised no objections to the appeal, they have otherwise raised two issues for determination in the appeal as follows:

"1. *Whether the Court of Appeal was right in holding that the grounds of appeal were grounds of mixed law and facts.*

2. *Whether the Court of Appeal having found that the appeal was incompetent should have considered the merits of the appeal, its contentious and disputed nature notwithstanding.*" The 5th - 7th re-

spondents have not taken any objection.

The 8th - 11th (i.e. 3rd set) respondents have filed a brief of argument and in it have argued their notice of preliminary objection by contending that grounds 3, 4 and 6 of the Notice of Appeal have severally not arisen from the lower court's judgment. In particular  
 B that ground 3 represents a comment and so an obiter dictum and not an appealable point. In sum it is submitted that ground 4 has questioned the failure of the lower court to take judicial notice of the said two cases cited to it and which it is submitted has no nexus with  
 C the failure to seek leave of court to file the instant appeal and that ground 6 has complained of omitting the said cited cases in the record of appeal/proceeding of 26/4/2010 and the failure to take judicial notice of the said cases; and furthermore that the ground has no nexus with the decision appealed against. The lower court has been  
 D urged to strike out the appellants' appeal because the appeal is an interlocutory appeal and is questioning the trial Court's exercise of its discretion requiring leave of court to be competent and which has neither been sought nor obtained for the instant appeal to be properly constituted as per Section 242(1) of the 1999 Constitution as  
 E amended. They have submitted relying on Saude v. Abdullahi (1989) 4 NWLR (Pt.116) 387 at 431, Aina v. U.B.A. (1997) 4 NWLR (Pt.498) 181 at 187 - 188 and Coker v. UBA (1997) 2 NWLR (pt.490) 641 at 604 to contend that an appeal in essence has to attack the ratio decidendi i.e. the reason for the decision appealed against to be sustain-  
 F able. And that the failure of the lower court to take judicial notice of this court's decisions in Diapalong v. Dariye (2007) 8 NWLR (A.1036) 32 and Inakoju v. Adeleke (2007) 4 NWLR (Pt.1025) 423 has no bearing to the decision appealed against. They have urged the court  
 G to uphold the objection. In the alternative i.e. of being overruled they have raised two issues for determination in the appeal viz:

*"1. Whether the court below was right when it held that the appeal of the appellants is incompetent and struck same out Grounds 1, 2, 5 and 7.*

H *2. Whether this matter in which the court below could have properly considered of the merits of the suit and whether this Honourable court can invoke its powers under section 22 of the Supreme Court Act and treat the matter as if it were a trial Court Ground 10."*

I will come to discuss the foregoing issues as identified above

later on, that is, in the event of overruling the preliminary objections otherwise they become defunct and of non-live issues.

The 12th - 14th respondents have also filed their brief of argument and notice of preliminary objection and it has been argued in their brief of argument to the effect that ground 4 of the appellants' grounds of appeal and issues 1 and 2 formulated in the appellants' brief do not arise nor flow from the decision of the lower court in this matter and therefore, should be struck out. In the event of being overruled they have adopted the four issues as raised by the appellants. They have also cross-appealed in this matter and have also filed their respondents'/cross-appellants' brief of argument; I will come to it later on.

On the 12th - 14th respondents' preliminary objection I may further add firstly, they have argued that an appeal cannot properly be based on what the court never decided. They rely on *Osuji v. D Ekeocha* (2009) 16 NWLR (Pt.116) 81 at 122 paragraphs C-D, *Owie v. Igghiwi* (2005) 5 NWLR (Pt.917) 184 at 217 paragraphs A-B, *Dalek Nig. Ltd. V. OMPADEC* (2007) 7 NWLR (Pt.1033) 402 at 430 and *Oloruntoba-Oju v. Abdul-Raheem* (2009) 13 NWLR (Pt.1157) 83 at 121 paragraph B-C. Secondly, they have submitted also that issues 1 and 2 as formulated by the appellants have not emanated from the grounds of appeal which in turn do not flow from the said judgment of the lower court and have cited and relied on *Akinduro v. Alaya* (2007) 15 NWLR (Pt.1057) 312 at 326 paragraphs C-D. Finally, they have urged the court to uphold the preliminary objection and strike out the appeal for want of competence.

The appellants have responded to the various submissions made by the above 3 sets of respondents severally by filing a reply brief to each of the 3 sets of respondents' brief of argument they have, if I may repeat, in this regard filed 3 appellants' reply briefs firstly to 1 - 4 appellants' brief, secondly 8th - 11th respondents' brief and thirdly to 12th - 14th respondents' brief. The appellants in their reply briefs filed in this matter have developed a common point in response to the effect that the preliminary objections are totally misconceived in that it is wrong to hold that there is only one Ratio in the instant appeal as against examining of the whole judgment in that regard and that issues 1, 2 and 4 of the appellants' brief of argument have relationship with the decision of the lower court that is as to whether

or not the said decisions of the Supreme Court have been cited to the trial Court as the appellants have contended even as the said cases have been set out in the particulars to ground one of their notice of appeal in this matter and so should have been judicially noticed. On the question of grounds 3, 4 and 6, they have submitted  
 B they are competent grounds. And they have relied on *Adetomi Oladeji (Nig.) Ltd v. N.B. Plc.* (2007) 5 NWLR (pt. 1027) 415 at 436 and 437. *Egbe v. Alhaji* (1990) 1 NWLR (pt.128) 590 and *G. Cappa Plc. Abmine & Sons (Nig) Ltd.* (2002) 1 NWLR (Pt.777) 32 at 49 and  
 C *Olaruntaba & Ors. v. Abdul-Raheem & Ors.* (2009) 13 NWLR (Pt.1157) 87, in expatiation of their submissions in this matter. They have urged the court to overrule the preliminary objections. They have also filed their appellants/cross-respondents brief of argument to the cross-appeal filed by the 12th - 14th respondents/cross-appel-  
 D lants in this matter.

I have carefully perused the notices of preliminary objections of the three sets of respondents severally filed in this matter. For convenience sake of giving a joint short ruling on the preliminary objections I hereby consolidate them not only because these applications  
 E have a common substratum as borne out from the foregoing review of the parties' cases, the preliminary objections filed by 8th - 11th and 12th - 14th respondents are coterminous and have raised similar questions challenging severally the appellants' issues 1, 2, 3 and 4  
 F for determination as set out herein and grounds 3, 4 and 6 of the appellants' ground of appeal. I have also gone through the respondents' submissions in their respective briefs of argument on these causes and the reply briefs filed by the appellants thereto and also their submissions at the oral hearing of this appeal. I have given them due  
 G consideration and I find merit in these preliminary objections. I now go on to expatiate on the same.

In the circumstances, having given serious consideration to the totality of this matter I agree with the submissions of the respondents that whether or not the trial Court subtracted or read out of the  
 H record has no definite bearing as to whether or not the cases cited in grounds 3, 4 and 6 of the appellants' grounds of appeal have formed part of the record of appeal/proceeding of 26/4/2010 and so should be judicially noticed. These issues and the said grounds 3, 4 and 6 definitely do not arise from the said decision of the lower court. Again,

as regards issues 1 and 2 of the appellants, in particular, I agree with the respondents that they are abstract in nature and have been raised on non-existing premise, and have not attacked any findings of the lower court.

It is the nature of the appellants' issues for determination as raised from their grounds of appeal in this matter vis-a-vis the lower court's decision given on 10/4/2010 that have sparked off these chains of preliminary objections filed by the said 3 sets of respondents. I have set out above an abstract of the concluding part of that decision. In short, the lower court has struck out the appeal on the sole ground that the appellants have failed to seek and obtain leave of court before filing the appeal having regard to the fact that the three grounds of appeal filed in the matter before it have involved questions of mixed law and facts, requiring leave of court as provided by Sections 241(1) and 242 of the 1999 Constitution to be competent. The appellants have in their Notice of Appeal dated 24/12/2010 raised 10 grounds of appeal as errors in law against the lower court's decision. Three out of the four sets of defendants/respondents have opposed the appeal by raising preliminary objections. In respect of the preliminary objections the relevant grounds of appeal formally challenged in this matter are grounds 3, 4 and 6 and issues 1, 2 and 4 raised for determination by the appellants and I have set out below the main grounds of appeal (10 of them) without their particulars for ease of reference viz:

#### GROUPS OF APPEAL

1. The learned Justices of the Court of Appeal erred in law in failing to consider the three (3) grounds of appeal separately, in determining whether the grounds of appeal filed are grounds of law or mixed law and facts.

2. The learned Justices of the Court of Appeal approbated by holding that the three (3) grounds of appeal are grounds of law in one breadth and in another breadth that the grounds of appeal are of mixed law and fact.

3. The learned Justices of the Court of Appeal erred in law when they held that:

"The record of appeal as compiled and transmitted is deemed to be correct and complete. The proceedings of the lower court of 26/4/2010 are reflected on pages 269-270 of the record of appeal.

From this record, there is no where during the material period where any cases were referred to or cited. How then did this question of errors of law arise?

4. The learned Justices of the Court of Appeal erred in law in failing to take Judicial Notice of the Supreme Court authorities of: B Diapalong v. Dariye (2007) 8 NWLR (part 1036) Page 32 and Inakoju v. Adeleke (2007) 4 NWLR (Part 1025) Page 423 cited in Ground (1) of the Notice of Appeal on the subject matter of the appeal.

5. The learned Justices of the Court of Appeal erred in law C when they held that the three (3) Grounds of Appeal are predicated on mixed law and fact.

6. The learned Justices of the Court of Appeal failed to dispassionately consider the appeal of the Appellants when it held that the cases cited by the learned Senior Counsel to the Appellants were not D in the Record of Appeal thereby breaching the Appellants' right to fair hearing as guaranteed in Section 36 of the Constitution of the Federal Republic of Nigeria 1999.

7. The learned Justices of the Court of Appeal erred in law, when they held that:

E *"From the foregoing, I am further of the view that because the learned trial Judge on the 26/4/2010 adjourned the matter before him to 9/6/2010, his earlier decision to take preliminary objections before originating summons was an interlocutory decision in the course of the exercise of the power of judicial discretion based on the facts* F *and circumstances of the matter before him.*

*Against this background, it is a total misconception to characterize the grounds of appeal in this appeal as grounds of law alone".*

8. The learned Justices of the Court of Appeal erred in law and G breached the Appellants' right to fair hearing as guaranteed by section 36 of the constitution of the Federal Republic of Nigeria 1999 by failing to consider the entire Record of Appeal before holding that no provision of the Constitution or decided cases were referred to by the Appellants.

H 9. The learned Justices of the Court of Appeal erred in law when they held as follows:

*"It is quite apparent that in the course of this whole exercise no provisions of the Constitution, Statutes, Rules of Court, Regulations or Decided Cases etc were referred to or resorted to by both Counsel*

*and/or the court. I am fully satisfied that the decision leading to this appeal could only have been predicated on questions of fact or because of the reference to the subject matter of the case being Sui Generis a question of mixed law and fact being involved”.*

10. The learned Justices of the Court of Appeal erred in law when they held as follows: B

*“The preliminary objections filed on behalf of the 8th - 11th respondents on the one hand and that of the 12th - 14th respondents are hereby upheld. Because they relate to the issue of competence and jurisdiction and had sufficiently disposed of this appeal, I do not see any need to consider the preliminary objection of the 1st - 4th Respondents or to go further into the merits of the main appeal”.* C

The questions raised in the above grounds have focused on the distinction between questions of law and questions of mixed law and facts and questions of facts simpliciter. Save to say that this depends not on the tag given to the ground or how it is couched; it is a difficult question to be determined by construing the main ground on the backdrop of its particulars read together. I will revert to this matter later on. E

The appellants’ issues for determination being most crucial, I have also set them out in extensor above. I see no need repeating them here. I have also set out briefly the arguments on both sides of the matter. I have now come to examine the said four issues raised for determination of the appeal by the appellants; firstly I have no doubt in my mind that apart from issue 3 (three) to which I will come to discuss anon, issues 1, 2 and 4 have been raised in vacuo and are at large in the sense that there are no grounds of appeal vis-a-vis the appellants’ notice of appeal from which any of them could legitimately have been distilled as there is no iota of nexus between any of the three issues with the ratio decidendi of the lower court’s decision in this matter. Issues 1 and 2 after close scrutiny look extremely too technical as well as abstract in nature; and are raised from non-existing premise as I have said above. Clearly without more none of the two issues have questioned any part of the decision of the lower court; much more so they are not targeted against the ratio decidendi of the lower court as I have spelt out above. Respectfully, they go to no issue in the decision so appealed against. The appellants H

have appealed to suggest by their argument that issues one and two are premised on the grounds of appeal as they have questioned the prudence of the lower court for not having heard arguments on jurisdiction and the merit of the substantive case together; even more so on the basis of the said two Supreme Court cases cited in the said ground one and despite after the said cases have even then been brought to the notice of the lower court by an affidavit challenging the record of appeal in this matter. These submissions with respect are misplaced and misconceived as they have been founded on the false premise that the instant record of appeal has thus been amended in accordance with the affidavit challenging the record thus making the said two cited cases part of the record of appeal/proceeding of 26/4/2010 in this matter. The 2 cited cases never formed part of the record of proceeding of 26/4/2010. I will come to the non-effect of the affidavit challenging the record of appeal anon. Suffice it to say here that the instant record cannot be so amended and has never been amended. It is clear however that the appellants have proceeded on the false notion that the record of appeal/proceeding of 26/4/2010 has been otherwise amended as borne out by their misconceived assertion in paragraph 4.05 p.13 of their brief of argument and I quote:

*“The lower court... was in grave error when it stated that no case was cited or referred to in the record of appeal. The court did not advert its mind to the Affidavit challenging the record of court dated 26/4/2010 on the omission of cited authority of the Supreme Court... We respectfully submit that the conclusion of the Court of Appeal at page 547 of the record of appeal that cases were not cited or referred to in the proceedings of the trial Court for 26/4/2010 is not borne out of the record”.*

**Meaning in effect from the foregoing abstract that whether or not issues 1, 2 and even 4 have been premised on the above grounds of appeal in this matter is beyond argument in that the proceeding of the trial Court of 26/4/2010 has been effectively so amended. This misapprehension as I will show later has no basis. There can be no doubt even from the way issue 4 is couched that it does not stem from the lower court’s decision. No application has been made to the lower court to invoke its powers under Section 16 of the Court of Appeal Act**



**to hear the case, as the trial Court otherwise would and there is no pronouncement on that question one way or the other to warrant filing the said ground of appeal. The invocation of Section 16 or Section 22 of the Supreme Court Act should have come by a separate and independent application to the court to invoke that jurisdiction. This issue is clearly untenable and unsustainable and should be struck out.** B

**In the light of the foregoing, I must state as settled law that where a point of law has not been taken in the lower court and it is put forward by an appellant for the first time in an appellate court that court is not to decide the point unless it is satisfied that it has before it all the facts bearing on the new contention as completely as if it had been raised in the lower court (i.e. of first instance) and on satisfactory explanation that could have been given in the lower court if it had been so raised. (See: Fadiora v. Gbadebo (1978) NSSC (Vol.1) 121 at 131 per Idigbe JSC) - That is to say, in regard to this case that the points being canvassed as per issues 1, 2 and 4 on the supposition that they have constituted legal issues cannot be raised without the benefit of additional evidence otherwise they become otiose. See: Oredoyin v. Arowolo (1989) 4 NWLR (Pt.114) 172 and Orogan v. Soromekun (1986) 5 NWLR (Pt.44) 688 and Akpan v. Barclays Bank of Nigeria (1977) 1 SC.47. It is clear that to sustain these grounds and the issues raised therefrom there must be additional evidence. Hence the appellants have filed an affidavit in order to place on record for consideration the said two cited cases of this court.** C D E F

**Also it is settled that issues as the instant ones here formulated as arising for determination in an appeal must relate and arise from the grounds of appeal; and must be consistent with and within the scope and confines of the grounds relied upon, thus postulating that issues for determination ought not to be formulated in abstract legal issues with no concrete reference to the facts of the case as in this matter. With regard to issues 1, 2 and 4, I have no difficulty in holding that they are not germane for the resolution of this appeal and have been introduced as red herrings to divert attention from the main issues in this appeal and so they are liable to be struck out. (See: Anie** G H

v. Chief Uzorka (1993) 8 NWLR (Pt.309) 1 at 16, Attorney-General of Bendel state v. Aideyan (1989) 4 NWLR (pt.118) 646, Ugo v. Obiekwe & Anor. (1989) 1 NWLR (Pt.99) 566 Adelaja v. Fanoiki (1990) 2 NWLR (Pt.131) 137, Niger Construction Ltd. v. Okugbe (1987) 4 NWLR (pt.67) 787.) **In an attempt to garner additional facts to support these issues, and prop them up the appellants have resorted to amending the record/proceedings of 26/4/2010 by way of an affidavit challenging the record. This is a non-starter as I will show anon.**

**Again, it is also settled that where a ground of appeal does not arise from the judgment appealed against (in this case as regards grounds 3, 4 and 6) then the validity of the issues raised therefrom for determination cannot be said to have arisen from incompetent grounds of appeal(sic). It is equally settled that a ground of appeal must correlate with as well as arise from the decision appealed against and should frontally attack the ratio of the decision otherwise it is baseless and liable to be struck out being incompetent. See: Anie v. Uzorka (supra). And so whether or not in this instant case the trial Court subtracted or read out of the record with regard to issues 1, 2 and 4 has no definite bearing as to whether or not the cases cited in grounds 3, 4 and 6 hereof have formed part of the record/proceedings of 26/4/2010 so as to be judicially noticed so as to be considered. It is settled that where an appeal has been successfully challenged as is the case of the foregoing grounds, it is liable to be struck out where there are no other grounds to sustain the appeal.**

**Coming particularly to grounds 3, 4 and 6 as challenged by 8th to 11th respondents in their preliminary objection I have examined ground 3 of the notice of appeal alongside its particulars which clearly is not questioning the trial Court's sole deciding factor in this matter to the effect that the appellants have neither sought nor obtained leave of court before filing the instant notice of appeal as the grounds are questioning the exercise of the trial Court's discretion and so have raised questions of mixed law and facts and also that the lower court's observation as per ground 3 is obiter and not an appealable point and I agree entirely. Ground 4 which is ques-**

**tioning the lower court's judgment for failing to take judicial notice of the said 2 cited cases of this court as well as for not considering them by the trial Court on the other hand, has no bearing whatsoever with the judgment appealed against and it is settled law that a ground of appeal challenging the judgment of a court (trial or appellate court) cannot be founded on what the court has never decided; the lower court has no duty deciding on the failure to take judicial notice of the said two cited cases as that issue has not arisen from the decision of the trial Court; this ground of appeal clearly does not arise from the lower court's judgment and should be struck out.**

**As regards ground 6 - which has complained of failure to judicially (sic) notice of the two Supreme Court cases and for not considering them, again, this ground does not arise from the decision of the lower court. And all that I have said with regard to grounds 3 and 4 above applies with equal force to this ground and being incompetent it should also be struck out.** See: Osuji v. Ekeocha (supra), Owie v. Ighiwi (supra), Dalek v. OMPADEC (supra) and Oruntoba-Oju v. Abdul-Raheem (supra). See: Osuji v. Ekeocha (supra) and Owie v. Ighiwi (supra).

**Even more fundamental to this case is that grounds 3, 4 and 6 of the appeal are equally baseless in the sense that the appellants have not sought nor obtained leave of the lower court to raise fresh issues not pronounced on or decided by the trial Court. The appellants have without leave of court attempted to widen the ambit of their case in the lower court and this court by introducing the question of the said two cited cases and its implications, improperly without leave of court. This is a fresh issue as no reference has been made to the two cited cases by the trial Court in its judgment; their citation has not formed part of the record/proceeding of 26/4/2010. They cannot be allowed to do so at this stage in this matter as an appeal is a continuation of the original suit. The appellants' leave to raise a new issue in this regard in this case is very fundamental otherwise the new issue being foisted on the court will be totally discountenanced. The appellants must be seen in this matter to maintain a consistent case at all the stages of the case otherwise the matter may be struck out.**

(See: *Jumbo v. Briyanko Internal Ltd.* (1995) 6 NWLR (Pt.403) 545 at 555-6, *Horizon Fibres Nig. Plc. v. M. v. Baco Liner & Ors.* (2002) 8 NWLR (769) 466 at 489 and *Ajide v. Kelani* (1985) 2 NWLR (Pt.12) 248.) ***I have therefore come to the inevitable conclusion that issues 1, 2 and 4 not having arisen from the decision of lower court are incompetent talk less of their not having attacked the ratio of the lower court's decision and so should be struck out. The same fate goes for grounds i.e. 3, 4 and 6 being groundless are incompetent for the reasons given above and should also be struck out.***

In this regard I now come to the crucial point of which in my view the appeal vis-a-vis all the grounds including grounds 1, 2, 5, 6, 7, 8, 9 and 10 is premised. The question simply put is whether or not the citation of the said two Supreme Court cases to wit: *Diapalong v. Dariye* (supra) and *Inakoju v. Adeleke* (supra) have formed part of the record of appeal/proceeding of 26/4/2010 vis-a-vis the respondents' contention that the purported amendment of the record by the appellants by way of an affidavit challenging the record is a non-starter. The appellants in this matter relying on the settled decisions of this court in *Diapalong v. Dariye* (supra) and *Inakoju v. Adeleke* (supra) have submitted that where an objection to jurisdiction is raised in an action commenced by Originating Summons it is prudent to hear arguments on jurisdiction and the substantive case together. It must be stated that such procedures are not of general application as the primary purpose of raising such objections is to terminate the proceeding at that stage. For an example where the grounds and the issue raised therefrom are bad in law and will lead to rendering the notice of appeal and the appeal itself incompetent as herein, it will be a fruitless effort to proceed to full scale trial of the matter no matter how well the case is conducted will save the situation.

***I must however say that it is trite that the court before whom a proceeding is pending or has been completed takes judicial notice of all the processes filed in the proceeding as well as the proceeding itself including the judgment as the case may be and so following from this proposition of law all the processes to be relied upon in any application made before that court in the proceeding are judicially noticed.***

***The record/proceeding of 26/4/2010 of the trial Court***

**as affirmed by the lower court has been challenged by the appellants who have filed an affidavit to that effect contending that the citation of the two cases viz: *Diapalong v. Dariye* (supra) and *Inakoju v. Adeleke* (supra) as well as their submission thereon has been left out of the record/proceeding of the trial Court on 26/4/2010 and that the same be made part of the record of appeal/proceeding of 26/4/2010 in this matter particularly as the said affidavit has not been countered by the other parties. The said affidavit has been served on the parties and the court and not having been countered the appellants have contended that the record of appeal/proceeding of 26/4/2010 has ipso facto been accordingly amended without more. With the greatest respect, I must say that to amend the record of appeal in any proceeding including the instant one is much more than simply filing an affidavit challenging the record/proceeding as here without more. All the parties to this suit although served the affidavit challenging the record it must be followed by a formal application to court to amend the record for the court to sanction the amendment as the whole essence of filing an affidavit in that respect is to bring about an amendment of the record of appeal/proceeding of 26/4/2010. A record of appeal therefore cannot be amended without the court's approval in exercise of its discretionary power to grant or refuse to sanction an amendment of the record of appeal.**

(See: *Thynne Thynne* (1955) 2 WLR 272 as approved by this court in the case of *Akinyede v. Opere* (1967) 5 NSCC 299 at 301, also see *Blay v. Pollard* (1930 1 KB.628 and *London Pass. Transport Bd. V. Aboscrop* (1942) 1 KB. 347.)

At this juncture, I have to observe that the importance of record of appeal/proceeding in our appeal system cannot be overestimated as cases have to be decided based on the record of appeal and without it hearing of appeals will be difficult to undertake. A record of appeal/proceeding has to be duly and properly compiled to guarantee as to its correctness; and it must be meticulously checked and compared with vis-a-vis the original processes/documents filed in the matter as well as the proceedings of court. A record of appeal/proceeding having been duly compiled has to be authenticated and certified as prescribed by law. It is settled law that the record of appeal is binding on

the court, the parties and their counsel. The instant purported amendment of the record of appeal/proceeding of 26/4/2010 as the appellants have undertaken by filing the said affidavit has recognized of the fact that to raise and discuss the questions on the citation of the said two cases in the lower court and this court in the context of their not having formed part of record of appeal/proceeding of 26/4/2010 at the trial Court the said citation and their consideration thereof of the said two cases must be placed on record of appeal/proceeding of 26/4/2010 by amending the same before they will be considered and relied on in any legal argument in this matter in this court.

The purported amendment of the record of appeal/proceeding as claimed by the appellants has no sanction of the court either by granting or refusing the amendment and so it is a non-starter. Meaning that the mere filing of an affidavit challenging the instant record/proceeding of 26/4/2010 without more cannot by that fact alone (i.e. without more) effectively and effectually amend the record of appeal. And I so hold.

What are the consequences for so holding as per the foregoing? They are far reaching. I have already set out the grounds of appeal and the four issues particularly issues 1 and 2 raised therefrom for determination in this matter as above. The appellants have made no bones as to the common basis of the said four issues and even the 10 grounds of appeal in this matter. The four issues so also grounds 3, 4, 6, 8, 9 and 10 of the grounds of appeal by the nature of the questions they have raised respectively have to stand or fall based on whether or not the record of appeal/proceeding of 26/4/2010 has been duly amended by the affidavit filed by the appellants challenging the record. These issues and the grounds as argued by the appellants have been premised on the unfounded basis that the record/proceeding of 26/4/2010 has been so amended hence the complaint as per issue one that the lower court has subtracted or read out of the record, "what is there" and on issue two of not having taken judicial notice of the judgments of this court cited in ground one. That the appellants have laboured under a misconception and misapprehension as to the amendment of the record of appeal/proceeding of 26/4/2010 is borne out from their submission as per paragraph 4.05 page 13 of their brief and I quote:

*"The lower court... was in grave error when it stated that no*

*case was cited or referred to in the record of appeal. The court did not advert its mind to the affidavit challenging the record of court dated 26/4/2010 on the omission of the cited authorities... we submit that the conclusion of the Court of Appeal ... that the cases were not cited or referred to in the proceedings of the trial Court for 26/4/2010 is not borne out of the record of appeal at pages 250, 251, 252, 253, 257, 258, 259 260 -263A of the Record of Appeal ... The conclusion of the Court of Appeal ... that no case was cited or referred to is not borne out of the record...*"

***Their misconception with respect is profound. It is settled law that courts, the parties and their counsel are bound by the record of appeal. And so no court has the jurisdiction to go outside the record to draw conclusions which are not supported by the record. I find that the four issues and grounds 3, 4, 6, 8, 9 and 10 also have been raised on the basis that the said record of appeal/proceeding of 26/4/2010 has been duly amended by the affidavit challenging the record of appeal to include the proceedings of 26/4/2010. This is not so as per my findings above.***

***In the result having pulled the rug as it were from underneath the appellants' submissions as to the competency with regard to the four issues raised for resolution here and the said grounds above mentioned they become baseless and utterly without foundation and therefore incompetent and should be struck out. It is trite that you cannot stand something on nothing and expect it to stand and in the same way issues for determination must spring from grounds of appeal which in turn must have arisen from the court's decision.***

***Finally, it has been argued in this matter that this appeal has been struck out by the lower court for failing to seek and obtain leave of court before filing the appeal as prescribed by Section 242 of the 1999 Constitution as amended having raised grounds of mixed law and facts therein. It is also common ground that the trial Court's directive to deal first with the preliminary objections amounts to an interlocutory order based on the exercise of its discretion. It is trite law that an appeal against an interlocutory decision other than on grounds of law requires leave of court. The provisions of Sections***

**241(1) and 242 (supra) have clearly set out when appeals will be presented as of right or with leave respectively of the Federal High Court or State High Court or the Court of Appeal as the case may be. And so it is settled law that right to appeal is statutory. Whether the instant exercise by the appellants of**

**B their right to appeal is properly founded in law has been challenged by the respondents based on the nature of the instant 3 grounds raised against the trial Court's decision in this matter. This has formed the basis of grounds 1, 2 and 5 to this court.**

**C The question to be resolved in this respect is whether or not the 3 (three) grounds of appeal raised before the lower court require leave of court to be competent having been raised against the trial Court's decision in exercise of its discretionary**

**D power. This depends on whether or not the grounds raised are questions of law. The point therefore must be made that the distinction between a ground of law and a ground of fact or mixed law and facts though very thin, is fundamental to resolving the instant question, which is difficult and blurred to**

**E define and apply. (See: Ugboaja v. Akinloye Sowemimo (2008) 16 NWLR (pt.1113) 278 at 293-294. See Nwadike v. Ibekwe (1987) 4 NWLR (pt.67) 718.) To determine whether a ground of appeal is one of law or fact requires examining the main ground in the**

**F context of its particulars so as to determine the nature of the question the ground has raised or complaining about. The appropriate approach to determining the issue put simply in the circumstances is whether the 3 grounds irrespective of how couched have challenged i.e. questioned the discretionary**

**G exercise of the power of the trial Court to hear the preliminary objections of the 3 sets of defendants/respondents first before dealing with substantive matter on the merits or to deal with the originating summons and the preliminary objections together. See Nwadike v. Ibekwe (1987) 4 NWLR (pt.67)**

**H 718, Obi v. Owolabi (1990) 5 NWLR (pt.153) 702, Olaosebikan v. Williams (1996) 5 NWLR (pt.449) 437 at 442. The trial Court opted to hear the preliminary objections first in exercise of its discretionary power. It is beyond argument that the appellants have questioned the trial Court's discretion in making the in-**



**terlocutory order in other words, thus questioning the evaluation of the facts.** See State v. Bassey (1994) 9 NWLR (Pt.367) 130 at 13D. **I find that by examining the said 3 grounds of appeal will lead to further examining of the facts and circumstances on which the trial Court's exercise of its discretion in the matter of the directive it has given is premised and I have no doubt that the 3 grounds are a product of exercise of discretion and so a composite of mixed law and facts.** B

Again, even then reading the main grounds of the 3 grounds of appeal alongside their particulars shows that they are complaining of the trial Court's exercise of its discretionary power. And I so find. This question has been settled by the pronouncement of this court in F.B.N. Ltd. v. Abraham (2008) 18 NWLR (Pt.1118) 172 at 189A-B wherein it held that and I quote: C

*"A ground of appeal questioning the exercise of discretion by a lower court is not a ground of law but a ground of mixed law and facts."* D

**From my reasoning above I am in entire agreement with the finding in the above cited case. So that the 3 grounds of appeal in this matter having raised a question of mixed law and facts require leave of court; The appellants have filed this appeal without first having obtained leave of court and they will take the consequences. It is trite that without leave of court having been first sought and obtained before filing the appeal, the appeal will be incompetent and liable to be struck out pursuant to Section 233(3) of the 1999 Constitution and I so hold. Having so concluded I see no justification examining any other issues raised here as this finding goes to the root of the appeal vis-a-vis the notice of appeal not having any competent ground on which to sustain it and the appeal therefore being incompetent it is hereby struck out.** E F G

For all the reasons I have given above, I find no merit in this appeal and it stands dismissed in its entirety. I hereby affirm the decision of the lower court. I make no order as to costs. H

Cross Appeal

The respondents/cross-appellants in the cross appeal are the 12th - 14th respondents in the main appeal. They have filed a Notice of Appeal dated 3/2/2011 and have filed their brief of argument in

the cross appeal and from it has distilled a sole issue for determination, viz:

*“...whether the Ruling by way of a directive of the learned trial judge on the 26th April 2010 amounted to a decision for which the appellants can appeal.”*

B Arguing the sole issue raised in this matter they have submitted that the directive of 26/4/2010 as per the interlocutory order made by the trial Court on 26/4/2010 has done no more than to have considered the priority of the pending applications before it and so not a decision within the meaning as contemplated in Sections 241, C 242, 243 and 318 of the 1999 Constitution as amended. As a guide to the court to resolving this matter they have cited United Ventures Ltd. V. F.C.M.B. Ltd. (1998) 4 NWLR (Pt.547) 596 at 555 paragraphs B-F and 564 per Musdapher JCA (as he then was), Okeke v. D Uzo Chukwuma Motors (2001) 3 NWLR (Pt.700) 338 at 345 - 355 C/A, 11 NWLR (Pt.724) 341 at 348 paragraphs G-H, Chidozie v. Mosowan (1999) 1 NWLR (Pt.556) at 328 paragraphs C-D, F-H. The court is urged to resolve this issue in favour of the respondents/cross appellants.

E The appellants in the main appeal have filed the appellants/cross-respondents brief of arguments and have raised a sole issue for determination to wit:

F “Whether the ruling of the trial Court dated 26th day of April, 2010 is an appealable decision (grounds 1 and 2).”

They submit that the said directive has been preceded by arguments and submissions of learned counsel for the parties before the trial Court ruled on the procedure to be followed in dealing with the priority of hearing of the issues of jurisdiction vis-a-vis the merits G of the substantive matter either severally or jointly. They have emphasized that the ruling on the question is a determination of a court and under Section 318(1) (supra) and they have referred to and relied on N.P.A. v. Eyamba (2005) 12 NWLR (pt.939) 409 at 435 - 436, Usman v. K.S.H.A. (2007) 11 NWLR (pt.1044) 148 at 190 C/H A, Awuse v. Odili (2003) 18 NWLR (pt.851) 116 at 155 and 164 per Mohammed JSC and Uwaifo JSC respectively, Muhammadu Buhari & Ors. V. Chief Olusegun Obasanjo & Ors. As per S.C.194/2003 delivered on 23/9/2003, Abdulkarim v. Incar (Nig) Ltd. (1992) 7 NWLR (pt.251) 1 at 13 per Uwais JSC (as he then was), Re Madaki

(1990) 4 NWLR (pt.143) 266 at 275 -276 C/A, Ajiboye v. Adeyelu (1997) 9 NWLR (pt.519) 152 at 158 and 159 CA, Diapalong v. Dariye (2007) 8 NWLR (pt.1036) 236 at 320 CA. I must have to express my gratitude to the cross-respondents' counsel for referring the court to the above cases as a guide. The point has to be made at the on set that the record of appeal/proceeding of 26/4/2010 has been headed "Ruling" and has been backed by an "order" binding on the parties and so cannot be a directive ab initio. My initial reaction to the cross appeal is one of skepticism, that is to say, whether or not in the face of my reasoning and finding upholding in the main the preliminary objections in the matter it has not rendered the cross-appeal foreclosed and defunct and being no longer a live issue. All the same, the cross-appeal has raised an important issue whether or not the directive of 26/4/2010 by the trial Court is appealable. It is a legitimate point to take on appeal.

The cross-appeal has arisen from the ruling of the lower court of 26/4/2010 dismissing the cross-appellants' preliminary objection on whether or not the ruling is a decision or a directive and appealable. I have earlier on quoted the relevant abstract being questioned here in the body of the main judgment in the main appeal and I see no need repeating the same in extenso here. However, the ruling has concluded by an interlocutory order in the following term:

*"Consequently, it is hereby ordered that the preliminary objection filed by the respective sets of defendants shall and be heard and determined before the substantive suit."*

The implication of the said ruling and order is that the preliminary objection and the originating summons together cannot be heard first in the matter. They have to be heard separately the preliminary objections having to come first. It is contended that the ruling is a decision under Section 318(1) (supra) and so appealable; whether this is so is a matter of interpretation. Section 318(1) (supra) defines "decision" thus:

*"...decision means, in relation to a court any determination of that court and includes judgment, decree, order, conviction, sentence or recommendation."*

The crucial phrase in the definition is "any determination".

***The question to be resolved upon the said definition vis-a-vis this matter is whether the instant words "Ruling" and "Order"***

**constitute a determination of a court as in this case and so a decision in Section 318(1) (supra). In interpreting the word “decision” in the context of the entire section, the court is to be guided by the liberal principle i.e. the wide interpretation of the word “decision” as enunciated in the case of *Nafiu Rabi v. the State* (1981) 2 NCLR 293 at 332 wherein this court held as follows:**

**“...term decision - in my view, would cover all forms of conclusion involving decision making.”**

**Meaning in this regard that the instant ruling having been arrived at after the arguments and submissions of the learned counsel for the parties and having thereby involved the processes of decision making is a decision under Section 318(1) supra. In other words the definition is wide enough to encompass the word “Ruling” and “Order” as have been used by the trial Court in making the interlocutory order in this matter as both words represent key processes involved in decision making.**

**Even then the word “decision” according to Black’s Law Dictionary (5th Edition) at P.366 has defined the word “decision” as follows:**

**“...a determination arrived at - after considering of fact and in legal context, law.”**

**This definition is coterminous with the one as per Section 318(1) (supra) and which as I have found herein has covered ‘Ruling’ and ‘Order’ as in this case. It follows that the word “Ruling” has the same meaning as the word “determination”**

**I hold therefore that the instant ruling as made by the trial Court in this matter is a decision and therefore appealable as provided pursuant to Sections 240 and 242 of 1999 Constitution as amended. I am rather fortified in so holding by the decisions of this court in *N.P.A. v. Eyamba* (supra), *Awuse v. Odili* (supra) and *Abdulkarim v. Incar (Nig) Ltd.* (supra). I further hold that the word “decision” has to be construed liberally as guided by the principle decided in *Rafiu Rabi v. The State* (supra) on constitutional interpretation and it is wide enough to cover determination by a “Ruling” as in this matter. There is therefore no doubt that a “Ruling” is a determination**

**and so a decision pursuant to the Section 318(1) (supra). The instant ruling stands out vis-a-vis the directives in the above cited cases relied on by the respondents/cross-appellants in that counsel for the parties on both sides have made their submissions for and against the procedure to be followed in hearing the instant matter and the said applications as I have ad-  
umbrated above before the handing down of the said Ruling by the trial Court. The procedure followed at the hearing in this instance has been one of due process to reach a determination in the matter, thus, ruling out any doubt that the determination as has been constituted has not been heard under administrative procedure which invariably is inquisitorial in nature. The trial Court again in conformity with due process has heard both sides to the cause before arriving at the ruling and order. There can be no doubt that the instant process of adjudication has all the trappings of a judicial process. Even more so the trial Court has made an order as I have referred to above and thus has characterized the procedure in reaching the instant directive beyond argument that it is a determination of a court. Besides, the consequential order is competent and I hold that where a ruling has been reached in the circumstances as per the foregoing there can be no basis for saying that it is not a “decision” that is competent and so appealable under Sections 241, 242 and 243 of this 1999 Constitution as amended. The decision in United Agro Ventures Ltd. V. F.C.M.B. (supra) is a distinguishable from the instant case on the facts here as no arguments have been advanced in the cited case.**

I have therefore no difficulty in holding that the ruling of the lower court of 26/4/2010 constitutes a determination and therefore a decision under Section 318(1) of the 1999 Constitution as amended. The sole issue in this appeal is hereby resolved in favour of appellants/cross-respondents.

Accordingly, there is no merit whatsoever in the cross-appeal of the 12th - 14th respondents/cross-appellants. The cross-appeal is hereby dismissed with no order as to costs.

**MUSDAPHER JSC**

In the High Court of Edo State of Nigeria, the appellants herein by way of Originating Summons claimed against the respondents a number of reliefs. The four sets of defendants, the respondents herein, opposed the claims by filing counter affidavits and also filed various preliminary objections challenging the jurisdiction of the Court and the competence of the suit. The trial Court decided to deal with the various preliminary objections at first and if need be, deciding eventually the matter on the merits of the claims. The plaintiffs appellants felt unhappy with the decision of dealing with the preliminary objections at the first instance, they were of the view that the preliminary objections and the substantive matter should be taken together and decision be made together, and they appealed against the decision to the Court of Appeal. At the Court of Appeal, the respondents also raised preliminary objections on the competence of the appeal. The Court of Appeal upheld the preliminary objections by some of the respondents by holding that the grounds of appeal were at best grounds of mixed law and facts and that by virtue of Section S.242 (1) of the Constitution, an appeal can only be brought in such matters with leave. Since no leave was sought and obtained, the appeal was rendered incompetent.

The appellants again felt aggrieved and have now appealed to this Court as per Notice of appeal filed on 24/12/2010. Four issues for determination have been identified and submitted to this court for the determination of the appeal viz.

- "1. Whether or not the lower court has the jurisdiction to subtract or read out of the record of appeal, what is there (Grounds 6, 8, & 9)*
- 2. Whether or not the Court of Appeal ought to take judicial notice of judgment of the Supreme Court of Nigeria in ground 1 of the Notice of Appeal (Grounds 3 & 4)*
- 3. Whether or not the Court of Appeal was right in holding that three grounds of appeal filed are grounds of mixed law and facts (Grounds 1, 2, 5 and 7).*
- 4. Whether the Court of Appeal should have considered the merits of the substantive appeal in the alternative despite declining jurisdiction to hear the appeal."*

The respondents i.e. the 1st 2nd & 3rd set of respondents

have severally filed notices of preliminary objections challenging among other grounds the competency of issues No. 1, 2, and 4 recited above. In that the decision of the Court of Appeal in declining jurisdiction to hear the appeal was based on the competency of the appeal for which leave was required by Section 242(1) of the Constitution. It is also argued that the above issues are extraneous to the decision appealed against and therefore irrelevant. B

I have examined the Notice of appeal filed vis-a-vis the issues for determination identified by the appellants. The crucial decision of the Court of Appeal was that the grounds of appeal filed were grounds of mixed law and facts in an interlocutory decision for which leave to appeal is necessary. To my mind, that this is the kernel of the decision of the Court of Appeal in upholding the preliminary objections. Every other decision reached by the court was obita dicta and of no moment. It is settled law that it is not every mistake or error made by a court that will be applied to reverse a decision, the mistake or error must be fundamental and affect the crucial decision appealed against. Accordingly, issues No. 1, 2, and 4 which do not clearly arise from the fundamental decision of the Court of Appeal have no relevance to the decision appealed against and are not competent. The issues are not germane for the resolution of the real issue raised in the decision of Court of Appeal to wit whether for the appeal was competent before it, or whether leave was necessary or not. Having agreed with the Court of Appeal on this issue, I am of the view, that the preliminary objections are upheld by me. In the result the appeal is incompetent and is accordingly struck out. C D E F

Having regard to the decision reached, in my view, it will serve no purpose to consider any other matter raised in this matter including the cross-appeal by the 12th - 14th respondents. I accordingly strike out both the appeal and the cross-appeal and make no order as to costs. I have refrained from discussing the facts or the merits of the substantive matter before the trial Court since the matter is yet to be decided one way or the other even the preliminary objections raised by the defendants respondent's herein, has not been decided. That is why I agree with the decision of my learned brother Chukwuma-Eneh J.S.C, which I had the advantage of reading before now. I too, abide by the order for costs proposed in the afore-said judgment. G H

**ADEKEYE JSC**

I was privileged to read in draft the judgment just delivered by my learned brother C. M. Chukwuma-Eneh, JSC. I agree with his reasoning and conclusion. I have nothing to add. I also strike out both the appeal and the cross appeal with no order as to costs.

B

**RHODES-VIVOUR JSC**

All the respondents filed the same Preliminary objection, and their complaint is that the grounds of appeal are of mixed law and fact and no leave was obtained before they were filed, and so the appeal is incompetent.

Section 233 (3) of the Constitution states that:

*“(3) Subject to the provisions of subsection (2) of this section, an appeal shall be from the decisions of the Court of Appeal to the Supreme Court with the leave of the Court of Appeal or the Supreme Court”*

Leave means permission. Before on appeal on grounds of mixed law and fact or on facts can be entertained by this court, the applicant must seek and obtain leave from the Court of Appeal or this court. Failure to obtain leave renders the appeal incompetent and it will be thrown out. See

Oluwole v. LSDPC 1983 5 SC pg.1

Ifediorah v. Ume 1988 2NWLR pt.74 pg.5

An examination of the grounds of appeal reveals that they are of mixed law and fact. Since leave was not obtained as required by the clear provisions of section 233 (3) of the Constitution the appeal is not valid. It is incompetent.

For this and the reasoning in the leading judgment which I read in draft, I would dismiss the appeal.

H