

SUPREME COURT OF NIGERIA
16TH DECEMBER, 2011. SC. 30/2005
CORAM: - W. S. N. ONNOGHEN, J. A. FABIYI, O. O.
ADEKEYE, B. RHODES-VIVOUR, M.U. PETER-ODILI, JJSC

1. ALHAJI SAKA OPOBIYI
(Representing Alhaji Alabi Opobiyi-Deceased)
2. MALLAM NASIR GARBA APPELLANTS
OPOBIYI (Representing Alhaji
Garba Opobiyi - Deceased)
AND
LAYIWOLA MUNIRU
(Representing Zainab Abebi - Deceased) RESPONDENT

APPEALS - Objection - Notice of - Manner of raising - Respondent must give appellant three clear days before the hearing - And must file twenty copies of same with the registrar (H1)

ACTIONS - Locus standi - Meaning - It is the legal capacity to institute an action in court - But where a party lacks same - Court is denied jurisdiction to determine the action (H2)

JURISDICTION - Fundamentality of - It is a radical question of competence - And court is competent when a case comes by due process of law - And upon fulfilment of any condition precedent to exercise of jurisdiction (H3)

APPEALS - Issues - Fresh issue on jurisdiction - Propriety - Raising an issue of jurisdiction does not require leave of court - And such can be raised at any stage of the proceedings (H4)

ACTIONS - Locus standi - Islamic law - The present parties who have substituted the original parties - Must continue to keep the suit alive (H5)

FACTS

Members of the family of one Tukur Gogo Olowo of Ile Panu, Masingba, Ilorin who died in 1924 approached the court as far back

as 1979 for the distribution of his estate in accordance with Islamic Law of inheritance. Tukur was reported to have landed properties and shares. This action actually commenced following an order of retrial *de novo* made by the Kwara State Shariah Court of Appeal, Ilorin in its appeal session on 22nd August 1990. Consequently, plaintiffs/appellants commenced this action on 12th October 1994 at the Upper Area Court No. 2, Oloje, Ilorin. The action is on the same subject matter. The present parties came into the action by way of substitution for the grandsons of Tukur from his daughter Saratu as at 1994 and granddaughter of Tukur from his only son, Abudusalami. The current parties are in effect great grandsons of Tukur as appellants and great, great grandson of late Tukur as respondent; as all the original parties died in the course of litigation. It was in evidence that Tukur died in 1924 leaving daughters. There is additional evidence that he had a second wife one Awero who had a son (Usman) for him. It is however not certain whether Tukur gave his second wife and her only son their inheritance before he died. The first female child of Tukur, Saratu died in 1923. She predeceased her father. Her death deprived her of having any share of Tukur's property. Aishat, another daughter died in 1938, followed by Salamat who died in 1943. The son of Tukur, Abdulsalami died in 1960. Amina, the first wife of Tukur died in 1943.

In its judgment, the Upper Area Court dismissed the claims of appellants. Being dissatisfied, appellants appealed to the Shariah Court of Appeal, Ilorin. The court held that the appeal succeeded substantially and thereupon sent the case back to the trial court for retrial. Appellants were still dissatisfied with the portion of the judgment of the Shariah Court of Appeal, in respect of the Estate of Tukur in dispute excluding what had been given to Zainab. They lodged a further appeal at the Court of Appeal, Ilorin. Respondent prior to the hearing of the appeal filed a motion on 29th of January 2001 seeking for extension of time within which to file respondent's brief of argument. The brief also contained notice of preliminary objection challenging the competency of both parties to sue and be sued respectively on the Estate of Tukur. The motion was granted as prayed and the appellants filed a reply brief thereafter, in reaction to the objection. In its judgment, the court found in favour of respondent. It upheld the preliminary objection on the ground of lack of jurisdic-

tion and struck out the appeal. Aggrieved further, appellants have filed this appeal to Supreme Court.

ISSUE FOR DETERMINATION

Whether the Court of Appeal, Ilorin was right or wrong in striking out the appellants' appeal on a Preliminary Objection embedded in the respondent's brief of argument challenging the competency of both Appellants and respondents to sue and be sued respectively on the estate of late Tukur?

HELD (Unanimously allowing the appeal per **ADEKEYE JSC**)

Notice of objection - Manner of raising

1. I shall consider the form and procedure of how an objection can be raised. Order 3 Rule 15 (1) of the Court of Appeal rules 2007 enjoins a respondent intending to rely on a preliminary objection to the hearing of the appeal to give the appellant three clear days notice before the hearing, setting out the grounds of the objection and shall file twenty copies of the notice with the Registrar. The respondent served the Notice on the appellants' counsel by attaching same as Exhibit A to the motion papers filed by the respondent on the 29th of January, 2001. By this same application, the respondent prayed for extension of time and leave to file the respondent's brief of argument. According to the court proceedings of 15/10/01, the court granted the motion as prayed and allowed for seven days to file the respondent's brief. The appellants filed the appellants' reply brief on 14/11/01. When the appeal was heard on 20/5/02, the appellants' counsel relied on the appellants' brief and the reply brief filed on 14/11/01. It is the practice of this court to allow the respondent to argue any objection raised in the respondent's brief. The court always ensure that the appellant has adequate time after receiving the respondent's brief to file a reply brief. In the instant appeal, the appellant had more than the three days statutory notice required for filing a preliminary objection. (p. 3016 G)

Locus standi - Meaning

2. Locus standi is the legal capacity to institute an action in a court of law. Where a plaintiff is held to lack the locus standi to maintain an action, the finding goes to the issue of jurisdiction - as it denies the court jurisdiction to determine the action. (p. 3018 A)

JURISDICTION - Fundamentality of

3. Jurisdiction is in other words, a radical question of competence - a court can only be competent when the case comes by due process of law and upon fulfilment of any condition precedent to the exercise of jurisdiction. (p. 3018 A)

B

Fresh issue on jurisdiction - Propriety

4. Generally speaking, a fresh issue cannot be raised on appeal without leave of that court sought and obtained. An exception to this general rule is where the issue raised is that of jurisdiction. An issue of jurisdiction being fundamental to the case does not require leave to be raised. Furthermore, it can be raised at any stage of the proceedings. The respondent in the instant appeal did not require leave to raise the issue of locus in the preliminary objection filed afresh and

D argued before the court below. (p. 3018 C)

Locus standi - Islamic law

5. On the issue of the locus of both parties to institute this action, it is not in dispute that the appellants are great grandsons of late Tukur whose estate is subject to litigation and the respondents are his great great grandsons. The original parties in the suit are no longer alive. The original parties were offspring of the direct children of Tukur. It is apparent from the record that Tukur and all his direct descendants are no longer alive. They were not even alive at the time of the commencement of this suit in 1994, as a result of which there was no direct descendant of Tukur to initiate the suit for the distribution of his estate. As at the time the Court of Appeal struck out this appeal there was all order of retrial made by the Shariah Court or Appeal on the Upper Area Court to determine when Tukur and some of his heirs, Saratu and Abdulsalami died. The appellants before this court are the grandsons of Saratu while the respondent is the great great grandson of Abdulsalami.

Further in the principle of Islam - a relative of the second grade e.g. a grandparent of the deceased does not inherit if there is among the survivors another relative of the first grade, such as a parent, nor does a grandchild inherit with son. When in this circumstance, all the original parties are dead and the issue of the distribution of the estate is yet to be settled, the present parties who came into the matter by

way of substitution granted by court must continue to keep the suit alive.

In the prevailing circumstance of this case, it is apparent that the original suit is no longer alive. The court had ordered a re-trial twice all over and in the last one gave specific guidelines as to what the trial court must investigate. It will therefore be inequitable if the present parties abandon the current suit to commence this suit de novo as suggested by the lower court. (p. 3018 F)

REPRESENTATION

Akin Akintoye, Josiah Adebayo for the Appellants
Ismael Saka Ismael for the Respondent

CASES REFERRED TO

Hope v. Smurift (2007) 6 SCNJ 269
Eze v. A-G Rivers State (2001) 8 NSCQR pg. 537
Chief of Air Staff v. Iyew (2005) 6 NWLR (pt.22) pg. 496
Yusuf v. Union Bank (1996) 6 SCNJ 203.
Emezi v. Osuagwu (2005) 2 SC 128
Oloriode v. Oyebe (1984) 1 SCNLR 390
Nuhu v. Ogele (2003) 12 SC (pt.1) pg. 32
Agbaka v. Amadi (1998) 7 SCNJ 367,
Maigoro v. Garba (1999) 7 SCNJ pg.270.
Oshatoba v. Olujitan (2000) 5 NWLR (pt. 655) pg. 159
Fadiora v. Gbadebo (1978) 3 SC 219
Beecham Group v. Essdee Foods Ltd. (1985) 3 NWLR (pt.11) pg.112
Odemilekun v. Hassan (1997) 12 NWLR (pt.531) pg.56.
Oforkiri v. Maduiké (2003) 1 SCNJ 440
Tiza v. Begha (2005) 5 SCNJ 168.
Madukolu v. Nkemdilim (1962) 2 SCNLR pg. 342
Anambra State v. A-G Federation (1993) 6 NWLR (pt.302) pg.692
Thomas v. Olufusoye (1986) 1 NWLR (pt.18) pg.669
A-G Lagos State v. Dosunmu (1989) 3 NWLR (pt.111) pg.552.

RULES REFERRED TO

Court of Appeal Rules 2007, O. 3 r. 15 (1)
Supreme Court Rules, O. 3 r 3(1)

LEAD JUDGMENT BY ADEKEYE JSC

This appeal is against the judgment of the Court of Appeal; Ilorin delivered on the 11th day of July, 2002.

The background facts of this case which appears to have a remarkable history are that members of the family of one Tukur Gogo Olowo of Ile Panu, Masingba, Ilorin who died in 1924 approached the court as far back as 1979 for the distribution of his estate in accordance with Islamic Law of inheritance. There is no record of this case again until the plaintiffs, now appellants before this court, commenced an action on the 12th of October 1994 at the Upper Area Court No. 2 Oloje, Ilorin on this same subject matter. The action followed an order of retrial de novo made by the Kwara State Shariah Court of Appeal, Ilorin in its appeal session on the 22nd of August 1990.

The present parties both as plaintiffs/appellants and defendant/respondent came into the action by way of substitution for the grandsons of Tukur from his daughter Saratu as at 1994 and granddaughter of Tukur from his only son, Abudu-Salami. The current parties are in effect great grandsons of Tukur as appellants and great, great grandson of late Tukur as respondent; as all the original parties died in the course of litigation. It was in evidence that Tukur died in 1924 leaving daughters. There is additional evidence that he had a second wife one Awero who had a son, Usman for him. It is however not certain whether Tukur gave his second wife and her only son their inheritance before he died. The first female child of Tukur, Saratu died in 1923 - she predeceased her father Aishat, another daughter died in 1938, followed by Salamat who died in 1943. The son of Tukur, Abdulsalami died in 1960. Vide page 8 of the Record. Amina I, the wife of Tukur died in 1943. Vide page 9 of the Record Saratu's death before her father deprived her of having any share in her father's property. Tukur was reported to have landed properties and shares. In the considered judgment of the Upper Area Court it was held that -

1. As the 1st and 2nd plaintiffs in this case are not sure when Saratu died and her father Tukur, both the deceased cannot inherit each other. See Siraju Salik Vol. 11 page 238 last line. It is not certain who died first.

2. The plaintiff failed to fulfil the remaining two guidelines pre-

scribed by Sharia Court of Appeal, Kwara State, Ilorin i.e. (a) Certainty of the estate and (b) The date(s) of any heir who died before or after the deceased Tukur.

3. That plaintiffs were within the categories who can inherit directly from Tukur's property except Saratu but when Sarat and Tukur died was not known. B

4. That plaintiffs could not succeed in this case unless one Garuba is joined as Magaji of Ile Panu Masingba, Ilorin and as sons of Tukur in male side of Tukur's children.

That plaintiff failed totally to establish his case as prescribed by law of inheritance also that Hadith say he who assert must prove plaintiff's claim was dismissed based on the principle of the Golden Rule of Sharia. That plaintiffs/appellants being aggrieved by the judgment, appealed to the Shariah Court of Appeal, Ilorin. C

The appeal was heard and in the Judgment delivered on the 3rd of October 1996, the court held as follows:- D

"We did not remit the matter to the trial court as an investigative panel which we therefore await its reply. The trial court is competent by the law establishing it to take a full decision which could be contested. The trial court is to narrow the guideline to the following:- E

a. Determine Abdulsalami, the son of Tukur acquired the title over the period of land claimed by the appellants to be the estate of Tukur in dispute excluding what had been given to Zainab.

b. Determine whether Sarah: predeceased or survived her father whose estate is in dispute with a view to determining whether she qualified or not as Tukur's heir. F

c. Make a sketch of whatever is resolved to be the estate of Tukur.

d. Distribute the estate accordingly following the principles of estate distribution in Islamic Law. G

Appeal succeeds substantially."

The appellants were still dissatisfied with that portion of the judgment of the Shariah Court of Appeal, in respect of the Estate of Tukur in dispute excluding what had been given to Zainab, lodged a further appeal at the Court of Appeal, Ilorin. H

The respondent prior to the hearing of the appeal by a motion filed on the 29th of January 2001 sought and obtained extension of time and leave to file Respondent's Brief of Argument which also

contained Notice and Argument of preliminary objection challenging the competency of both parties to sue and be sued respectively on the Estate of Tukur. The motion was granted as prayed and the appellant filed a Reply Brief thereafter, in reaction to the objection. The appeal came up for hearing on the 20th of May 2002. In the judgment delivered on the 11th of July 2002, the Court of Appeal, Ilorin found in favour of the respondent upholding the preliminary objection on the ground of lack of jurisdiction and struck out the appeal.

The appellants, disappointed by this judgment, approached this court for redress. They filed three grounds of appeal and settled three issues for determination as follows in the Appellants' Brief filed on 28/3/08.

(a) Whether the lower court was not in error when it held without any concrete evidence that it appears that the incompetence in this suit relates to the time of the initiation of this action which had been conceded to by the learned counsel to the appellants, hence at the time of initiation when the grandchildren initiated action (sic) when their parents were alive; thereby encouraging howbeit, inadvertently, proliferation and/or repetition of action and/or abuse of court's process.

(b) Whether the lower court had not erroneously granted the respondent a relief that was never sought nor supported by evidence.

(c) Whether the lower court was in error by failing, refusing and/or neglecting to consider the appeal on its merit, despite its decision on the preliminary objection in the event its judgment was in error.

In the Respondents' brief filed on 9/2/09, the respondent formulated one single issue for determination which reads: -

"Whether the Court of Appeal, Ilorin was right or wrong in striking out the appellants' appeal on a preliminary objection embedded in respondent's brief of argument challenging the competency-of both appellants and respondent to sue and be sued respectively on the estate of late Tukur?"

In my view, the three issues raised by the appellants are not only clumsy; they also revolve round the same subject matter. They can readily be compressed into one issue. Since the issues raised by both parties are identical in content, I find it convenient to adopt the issue raised by the respondent in the determination of this appeal.

Issue for Determination

Whether the Court of Appeal, Ilorin was right or wrong in striking out the appellants' appeal on a Preliminary Objection embedded in the respondent's brief of argument challenging the competency of both Appellants and respondents to sue and be sued respectively on the estate of late Tukur?

The appellants in their submission agreed that the issue of jurisdiction is equally important and fundamental but it cannot be raised in vacuo without supportive evidence. The party raising it has to give cogent evidence to show how the issue in question affects the jurisdictional competence of that given court, more so when the issue is being raised for the first time on appeal. The respondent failed to adduce cogent evidence on the legal capacity of the appellants to sue and be sued on the estate of late Tukur. The respondent also failed to obtain the requisite leave of court to raise the issue of jurisdiction as a fresh issue. The respondent's motion attached to Preliminary Objection had no supporting affidavit and the motion itself was not moved throughout the proceedings before the lower court. The lower court should have specifically ordered counsel to the parties to address it on the issue of jurisdiction instead of relying on the appellants' reply brief. This court is urged to discountenance all the arguments and authorities cited by the respondent in his brief. The appellants cited cases in support of the foregoing submission - like *Hope v. Smurift* (2007) 6 SCNJ 269, *Eze v. A-G Rivers State* (2001) 8 NSCQR pg. 537, *Chief of Air Staff v. Iyew* (2005) 6 NWLR (pt.22) pg. 496, *Mobil Producing Nig. Unlimited v. Monokpo* (2003) 18 NWLR (pt.852) pg.346, *Yusuf v. Union Bank* (1996) 6 SCNJ 203.

The respondent submitted that contrary to the impression of the appellants about the filing of notice of preliminary objection, the respondent filed a motion before the Court of Appeal on 29/1/01 for extension to time and leave to file respondent's brief of argument with the notice of argument of preliminary objection challenging the competency of both parties to sue and be sued on the estate of Tukur. The motion was moved and granted as prayed on the 15th of October, 2001. Vide page 129 of the Record. The appellants filed a reply brief on the 14th of November, 2001 where the issue raised in the notice of preliminary objection was properly argued.

The respondent argued and submitted further that the issue of the competence of a party to sue or be sued is determined by exami-

nation of the plaintiff's claim before the court. The core issue which the parties approached the court for intervention is the sharing of the landed property of Tukur. According to Islamic Law, the appellants and the respondent fall within the class of heirs referred to in Islamic Law as Distant kindred; Dhul Arham. By this, they lack locus stand to
 B sue or be sued respectively on the estate of Tukur whether as at the time the suit was initiated, the legally recognized heirs of Tukur were alive or not. The lower court was right to strike out the appeal before it having discovered on the preliminary objection that both parties -
 C the appellants and the respondent - lack the legal capacity to sue and be sued on the estate of Tukur. Where the issue of competency to sue and be sued is raised at any level of court, such issue must be determined first before proceeding to the substantive matter. The issue of jurisdiction being a fundamental issue can be raised at any
 D state of the proceedings in the court of first instance, or in the appeal court for the first time and even in this court. In view of the fundamental nature of the issue of jurisdiction, it can be raised as a fresh issue without obtaining leave and this is applicable to this appeal. The respondent complied with the form, nature or procedure for raising
 E a preliminary objection in an appeal. The respondent cited cases to buttress the foregoing submission on the issues raised. Emezi v. Osuagwu (2005) 2 SC 128, Oloriode v. Oyebe (1984) 1 SCNLR 390, Nuhu v. Ogele (2003) 12 SC (pt.1) pg. 32, Yusuf v. Union Bank (1996) 6 SCNJ 203, Agbaka v. Amadi (1998) 7 SCNJ 367, Maigoro
 F v. Garba (1999) 7 SCNJ pg.270.

The appellants challenged the notice of preliminary objection filed before the lower court. It was their contention that objection
 G being that touching the fundamental issue of jurisdiction of the parties to sue and be sued and that of the court to entertain the suit was not properly raised before the court.

***I shall consider the form and procedure of how an objection can be raised. Order 3 Rule 15 (1) of the Court of Appeal rules 2007 enjoins a respondent intending to rely on
 H a preliminary objection to the hearing of the appeal to give the appellant three clear days notice before the hearing, setting out the grounds of the objection and shall file twenty copies of the notice with the Registrar. The respondent served the Notice on the appellants' counsel by attaching same as Ex-***

hibit A to the motion papers filed by the respondent on the 29th of January, 2001. By this same application, the respondent prayed for extension of time and leave to file the respondent's brief of argument. According to the court proceedings of 15/10/01, the court granted the motion as prayed and allowed for seven days to file the respondent's brief. The appellants filed the appellants' reply brief on 14/11/01. When the appeal was heard on 20/5/02, the appellants' counsel relied on the appellants' brief and the reply brief filed on 14/11/01. It is the practice of this court to allow the respondent to argue any objection raised in the respondent's brief. The court always ensure that the appellant has adequate time after receiving the respondent's brief to file a reply brief. In the instant appeal, the appellant had more than the three days statutory notice required for filing a preliminary objection.

In the case of Maigoro v. Garba (1999) 7 SCNJ pg. 270 at pg. 282, this court emphasized the essence of Order 3 Rule 15 (1) of the Court of Appeal Rule by holding that "the object of the rule is to give an appellant before the hearing of his appeal notice and grounds of any preliminary objection to the hearing of the appeal in order to enable him meet the objection. The rule is a safeguard against embarrassing an appellant and taking him by surprise."

The central issue in the respondent's objection is that in accordance with Islamic Law, the appellants and the respondent fall within the class of heirs referred to in Islamic Law as Dhul Arham meaning distant kindred and that being the position, they lack the locus standi to sue and be sued respectively on the estate of Tukur. Particularly when it is not certain whether as at the time the suit was initiated, the legally recognized heirs of Tukur - Aminat, Abdulsalami, Saratu. Aisha and Salamat were alive or not. Dhul Arham includes distant kindred, sons of daughter, maternal and close relations. Their right to share out of the estate is considered when the residuaries and heirs are not available. The contention of the appellants is that the issue is of jurisdictional competence and it cannot be raised in vacuo without cogent evidence in support.

Furthermore, as the issue was raised before Court of Appeal for first time, the leave of that court must first be sought and granted. Respondent failed to obtain requisite leave of the court below.

***Locus standi* is the legal capacity to institute an action in a court of law. Where a plaintiff is held to lack the locus standi to maintain an action, the finding goes to the issue of jurisdiction - as it denies the court jurisdiction to determine the action. Jurisdiction is in other words, a radical question of competence - a court can only be competent when the case comes by due process of law and upon fulfilment of any condition precedent to the exercise of jurisdiction.** Madukolu v. Nkemdilim (1962) 2 SCNLR pg. 342, Oloriode v. Oyebe (1984) 1 SCNLR pg. 390, Anambra State v. A-G Federation (1993) 6 NWLR (pt.302) 692, Thomas v. Olufusoye (1986) 1 NWLR (pt.18) pg.669, A-G Lagos State v. Dosunmu (1989) 3 NWLR (pt.111) pg.552.

Generally speaking, a fresh issue cannot be raised on appeal without leave of that court sought and obtained. An exception to this general rule is where the issue raised is that of jurisdiction. An issue of jurisdiction being fundamental to the case does not require leave to be raised. Furthermore, it can be raised at any stage of the proceedings. The respondent in the instant appeal did not require leave to raise the issue of locus in the preliminary objection filed afresh and argued before the court below. Oshatoba v. Olujitan (2000) 5 NWLR (pt. 655) pg. 159, Fadiora v. Gbadebo (1978) 3 SC 219, Beecham Group v. Essdee Foods Ltd. (1985) 3 NWLR (pt.11) pg.112, Odemilekun v. Hassan (1997) 12 NWLR (pt.531) pg.56.

On the issue of the locus of both parties to institute this action, it is not in dispute that the appellants are great grandsons of late Tukur whose estate is subject to litigation and the respondents are his great great grandsons. The original parties in the suit are no longer alive. The original parties were offspring of the direct children of Tukur. It is apparent from the record that Tukur and all his direct descendants are no longer alive. They were not even alive at the time of the commencement of this suit in 1994, as a result of which there was no direct descendant of Tukur to initiate the suit for the distribution of his estate. As at the time the Court of Appeal struck out this appeal there was all order of retrial made by the Shariah Court or Appeal on the Upper Area Court to determine when Tukur and some of his heirs, Saratu and Abdulsalami died. The

appellants before this court are the grandsons of Saratu while the respondent is the great great grandson of Abdulsalami.

The lower court referred to the category of heirs mentioned in the book, Muslim Family Law of Nigeria at pg. 284 that: -

“The right of Dhul Arham that is maternal and close relations to the deceased to share out of the estate is considered when the first two categories are not available, residuaries and heirs.” ^B

Further in the principle of Islam - a relative of the second grade e.g. a grandparent of the deceased does not inherit if there is among the survivors another relative or the first grade, such as a parent, nor does a grandchild inherit with son. When in this circumstance, all the original parties are dead and the issue of the distribution of the estate is yet to be settled, the present parties who came into the matter by way of substitution granted by court must continue to keep the suit alive. ^C ^D

In the prevailing circumstance of this case, it is apparent that the original suit is no longer alive. The court had ordered a re-trial twice all over and in the last one gave specific guidelines as to what the trial court must investigate. It will therefore be inequitable if the present parties abandon the current suit to commence this suit de novo as suggested by the lower court. ^E

In sum, this appeal has merit and it is allowed. The order of the court striking out the appeal is set aside. The appeal is to be determined on its merit. No order as to costs. ^F

ONNOGHEN JSC

I have had the benefit of reading in draft, the lead judgment of my learned brother ADEKEYE, JSC just delivered. ^G

I agree with his reasoning and conclusion that the appeal has merit and should be allowed. There is no iota of evidence to support the holding by the lower court that at the time of initiating the action any of the direct descendants of Tukur was still alive particularly when the appellants contend the contrary. ^H

It is settled law that a decision of the court must be supported by evidence and that it is misdirection for a court to give judgment on an issue on which there is no evidence at all, as in the instant case.

I therefore allow the appeal and abide by the consequential orders made in the lead judgment including the order as to costs.
Appeal allowed.

FABIYI JSC

B I have read before now the judgment just handed out by my learned brother - Adekeye, JSC. I agree with the reasons and conclusion arrived at therein.

This matter relates to the realm of Islamic personal law.

C The parties were said to be distant kindred (Dhul Arham) of Tukur. A preliminary objection was taken at the Court of Appeal to challenge the competence of the parties. The motion filed had no affidavit in support. As a result, there was virtually no evidence to prop the challenge to the competence of the parties. See: Menakaya D V. Menakaya (2001) FWLR (Pt. 76) 742 at 770; which is in point.

It is apt that every motion must be supported by an affidavit and failure to file such an affidavit renders same bare and without support. Any decision arrived at, in such a circumstance, would have been rendered in vacuo leading to the inescapable end result of arriving at abstract justice. See: Mobil Producing Nig. Unlimited v. Monokpo (2003) 18 NWLR (Pt. 852) 346 and Chief of Air Staff v. Iyen (2005) 6 NWLR (pt. 922) 496 at 546; both cited by the appellants' counsel. To cap it, the motion was not even moved at the hearing of the appeal. The notice of preliminary objection which was not F moved at the hearing of the appeal must be deemed as having been abandoned. Oforkiri v. Maduikie (2003) 1 SCNJ 440; Tiza v. Begha (2005) 5 SCNJ 168. In effect, the court below was not on a firm ground when it struck out the appeal on the erroneous ground that G the appeal was incompetent. As same was not rooted in evidence, the decision was rendered in vacuo. It thus led to abstract justice.

Learned counsel for the appellant observed that the lower court ordered that parties could re-commence the suit de novo as they are presently; whereas the present status of the parties remains the same H as at 1994 when the matter commenced except for slight modifications occasioned by deaths and substitutions. He felt that the order of the court that parties could recommence the suit de novo amounts to an encouragement of abuse of judicial process and undue protraction of litigation. Learned counsel was on a firm ground in his

strongly expressed views. The injunction that parties could commence the suit afresh equates with abuse of process. It was in bad taste as the court below could lay the matter to rest by deciding it once and for all. It is abuse of court process for the court below to advise the parties to commence afresh a case that it could have dealt with to finality. See: *Badejo V. Minister of Education* (1996) 9-10 SCNJ 51 ^B at 70. The short of it is that the appeal deserves to be allowed.

I agree with my learned brother. The decision of the court below is hereby set aside. I order that the appeal be heard afresh by a different panel of Justices. I abide by the order relating to costs in ^C the lead judgment.

RHODES-VIVOUR JSC

The appellants and the respondents are grand and great grand children of Tukur (Deceased). In Islamic Law they are known as Dhul Arham. That is, distant kindred. They are in court to share the property of Tukur. The position in Islamic Law is that these Litigants do not inherit if the deceased's children are alive. For example a grand-child does not inherit with a son of the deceased.

Now, all the original parties are dead and the issue of distribution of the Estate of Tukur remains unresolved. It follows that the present parties who came in by way of substitution granted by the court ought to continue with the case. Striking out the appeal on a preliminary objection by the Court of Appeal cannot in the circumstances be sustained by this court. This case must continue. ^E Accordingly, the appeal before the Court of Appeal shall be heard on its merits. ^F

For this and the elaborate reasoning of my learned brother, Adekeye, JSC I agree that the order striking out the appeal is set ^G aside and the directives proposed complied with.

PETER-ODILI JSC

I have had the preview of the draft Judgment of my learned brother, Adekeye JSC which decision and reasons I agree with. ^H

This a retrial suit that emanated from the upper Area court II, of Oloje, Ilorin in Kwara state sometime in 1994, in which the appellants, then as plaintiffs claimed from the trial court the sharing of the estate of one Tukur, their grandfather, which was said to include the

8 rooms built by one Zainab Abebi, in accordance with the Islamic law. In their effort to establish the claim, plaintiff called 3 witnesses including themselves while in his defence, respondent then as defendant, also called 3 witnesses himself inclusive. In the end, the trial court dismissed the plaintiff's claim.

B Being dissatisfied with the whole of the judgment of the trial court, the appellants, having run out of time sought and obtained leave to and thereafter appealed to the Sharia Court of Appeal, Ilorin, which court held that the appeal succeeded substantially and thereupon sent the case back to the trial court for retrial. Appellants were C still dissatisfied with a part of the Sharia Court of Appeal judgment particularly the part excising a parcel of land from the estate in issue, while sending the case back for retrial.

Then the appellants appealed to the Court of Appeal; (court D below) from the Sharia Court of Appeal, Ilorin and consequently filed their appellants brief of argument. Responding, the respondent filed their brief in which was subsumed a preliminary objection pursuant to an earlier filed motion on notice which effectively gave birth to this substantive appeal. The court below upheld the preliminary E objection and struck out the appeal hence the present appeal to this court.

A background view of this case is that what is at the crux of the case is the estate of the grandfather of the plaintiff/appellants named F Tukur, who was also the great- great grandfather of the respondent. The said Tukur had four surviving children at the time of his death namely; Abdulsalami, Saratu, Aishat and Salamat none of whom was alive at the commencement of this suit in 1994. Also established by the plaintiff/appellants in evidence is that the estate of Tukur had not G been shared up till the time the case was brought to court. 1st plaintiff Alhaji Alabi Opobiyi now deceased as head of family had allowed Alhaja Zainab Abebi (daughter of Abdulsalami, the only male child of Tukur, also deceased) to erect on a portion of the land in issue, a block of 8 rooms, wherein she lived till her death. The expectation is H that the said piece of land upon the death of Alhaja Zainab Abebi should revert to the entire estate since it was not a gift or an act of sharing, but a gesture to afford the said Alhaja Zainab Abebi shelter within the area of the estate.

It was at the appeal to the court below the respondent for the

first time questioned and/or impeached the competence of the parties to the entire suit based, on Islamic law.

In accordance with the rules of this court, the appellant filed their brief 28/3/08 in which were couched three issues viz:-

1. Whether the lower court was not in error when it held, without any concrete evidence, that it appears that the incompetency in this suit relates to the time of the initiation of this action which had been conceded to by the learned counsel to the appellants, hence at the time of initiation when the grandchildren initiated action when their parents were alive..; thereby encouraging, howbeit inadvertently, proliferation and/or repetition of action and/or abuse of courts process. (Ground 1 of the grounds of appeal) B C

2. Whether the lower court had not erroneously granted the respondent a relief that was never sought nor supported by evidence. (Ground 1 and 2 of the grounds of appeal.) D

3. Whether the lower court was not in error by failing, refusing and/or neglecting to consider the appeal on its merit, despite its decision on the preliminary objection, in the event its judgment was in error. (Ground 3 of the grounds of appeal).

Respondent also within the same rules of court filed their brief on 9/2/09 and framed a single issue thus: E

Whether the Court of Appeal, Ilorin was right or wrong in striking out the appellant's appeal on a preliminary objection embedded in respondent's brief of argument challenging the competence of both appellant's and respondent to sue and be sued respectively on the estate of late Tukur? F

The sole issue as crafted by the respondent seems adequate in answering the question posed in this appeal, the three issues of the appellant's being in effect a repetition of each other. I shall therefore go with the issue as formulated by the respondent. G

At the hearing the learned counsel for the appellants adopted their brief and also the reply brief. He contended within the contents of the appellant's brief that the court below was in error when it concluded that the appellant fall within the class of heirs called "Distant Kindred" (Dhul Arham) in accordance with the Islamic Law of inheritance may not be wrong in itself; but the context in which it was adopted by the lower court cannot be said to be appropriate. That from the totality of the evidence before the trial court, nowhere is it H

contained that at the time the suit was initiated, any of the direct descendants of Tukur was alive. That the decision was not backed by evidence and not allowable by law. He cited *Menakaya v. Menakaya* (2001) FWLR (Pt.76) 742 at 7720. That the lower court could have upheld the decision of the Sharia Court of Appeal, instead of striking
 B out the appeal before it. That is was an abuse of court process of the court below to have ordered a retrial. He cited *Badejo v. Minister of Education* (1996) 9 - 10 SCNJ 51 at 70.

For the appellants was further submitted that the appeal be-
 C fore the court below was simply against a part of the judgment of the Sharia Court of Appeal and so the respondent should have cross-appealed if he felt aggrieved but failed to do so and therefore the preliminary objection raised by him is incompetent which was in ef-
 D fect raising of a new issue without leave of court first sought for and obtained. He referred to *Bob-Manuel v. Briggs* (2003) 5 NLR (Pt.813) 323; *Eziukwu v. Ukachukwu* (2004) 7 SCNJ 189 at 202 - 203; *Owie v. Ighiwi* (2005) 1 SCNJ 181 at 197 - 198; *Dabo v. Abdullahi* (2005) 2 SCNJ 76 at 89; Order 3 rule 3(1) rules of this court.

Learned counsel for the appellant said that the said issue of
 E competency raised by the respondent was a fresh issue and was not of mere law but mixed law and facts and therefore leave must be sought and obtained before it could be raised at the court below. He cited *Felix Onuorah v. K.R.P.C. Ltd* (2005) 6 NWLR (Pt. 921) 393.

He went on to submit for the appellants that a court of law is
 F not empowered to grant any relief not sought by a litigant or even to grant a relief, though sought but is not supported by evidence. That the lower court lacked the basis to find that a careful perusal of the records showed the parents of the parties were alive and so render-
 G ing the suit incompetent thereby ousting the jurisdiction of the court below. He referred to *Ishola v. UBN Ltd* (2005) 6 NWLR (pt.922) 422 at 438; *Menakaya Menakaya* (2001) FWLR (Pt. 76) 742 at 770; *Felix Onuorah v. K.R.P.C.* (2005) 6 NWLR (pt.921) 393 at 404; *Chief of Air Staff v. Iyen* (2005) 6 NWLR (Pt.922) 496 at 546.

H Learned counsel for the appellants went on to contend that the motion on notice dated 16/10/2001, by which the preliminary objection was raised had no supporting affidavit and so no evidence to push the objection and the objection should have been struck out. He cited *Mobil Oil Producing Nig. Unlimited v. Monokpo* (2003) 18

NWLR (Pt.852) 346 at 433; (2003) 13 NWLR (pt.852) 346 at 433; A. G. Federation v. A.N.P.P. (2003) 18 NWLR (Pt.852) at 182 AT 207; Oshiomhole v. F.G.N. (2005) 1 NWLR (Pt.909) 414; Oforkiri v. Maduiké (2003) 1 SCNJ 440 at 448; Tiza v. Begha (2005) 5 SCNJ 168 at 178.

Responding, learned counsel for the respondent stated that the court below was right in declining jurisdiction since the suit was incompetent on account of the direct children of Tukur Gogo Olowo whose estate was in issue were still alive. That neither the appellants nor the respondent were competent to sue or be sued respectively. He referred to Road Transport Employers Association of Nigeria v. National Union of Road Transport Workers, (1992) 2 SCNJ (Pt.2) 251 at 260; Emezi v. Osuagwu (2005) 2 SC 128 at 141; Oloriode v. Oyebi (1984) 1 SCNLR 390; Thomas v. Olufosoye (1986) 1 NWLR (Pt.18) 669; Momoh & Anor v. Olotu (1970) NSCC 99 at 104; Madukolu v. Nkemdilim (1962) 2 SCNLR 341; Oloba v. Akereja (1998) 7 SC 8 (Pt.1) 1 at 11. He stated further on behalf of the respondent that jurisdiction being of fundamental importance could be raised as a fresh issue without leave even for the first time on appeal. He referred to Gaji v. Paye (2003) 5 SC 53; Dopemu Taiwo Adeyemi & Ors v. Akinbode Okobi & Ors (1997) 6 SCNJ 678.

Learned counsel for the respondent contended that a preliminary objection as contained in the respondent's brief of argument in the court below was proper and there was no necessity for a supporting affidavit. This is because the form, nature or procedure of how it is raised is not strictly material. He referred to Yusuf v. Union Bank (1996) 6 SCNJ 203 at 210; Agbaka v. Amadi (1998) 7 SCNJ 367 at 375 - 376; West Minister Bank Ltd v. Edward (1942) 1 ALL ER 470 at 474; Nuhu v. Ogele (2003) 12 SC (Pt.1) 32 at 53.

That the notice of the preliminary objection to the appellant as contained in the respondent's brief satisfied the requirement of 3 clear days of notice of a preliminary objection and so met the condition in Order 3 Rule 15 (1) of the Court of Appeal Rules 2002. He cited Maigoro v. Garba (1999) 7 SCNJ 270 at 282.

That is summary are the submissions of counsel either way. The gravamen of the contest before this court is in the main whether or not the Court of Appeal was right in striking out the suit based on incompetence on the ground that the parents of some of the parties

were alive at the time the suit was initiated. It is true that under the Islamic law of inheritance, if the parents of the appellants and respondent or those of any of the parties were alive that could situate the parties into the class of heirs called “Distant Kindred” (Dhul Arham) would by that not have the competence to either sue or be sued for inheritance of an ancestor whose estate is in issue. It is therefore an area needing evidence for clarification and would therefore not be easy to bring a preliminary objection contesting jurisdiction of such without adequate notice to the other party and leave of court especially being a fresh issue. This is because, such a decision cannot be easily reached by the court off hand without support of the necessary evidence as to the true status of those suing or being sued. See *Menakaya v. Menakaya* (2001) FWLR (Pt.76) 742 at 770; *Eziukwu v. Ukachukwu* (2004) 7 SCNJ 189 at 202 - 203; *Owie v. Igbiwi* (2005) 1 SCNJ 181 at 197-198; *Felix Onuorah v. K.R.P.C. Ltd* (2005) 6 NWLR (Pt.921) 393; *Dabo v. Abdullahi* (2005) 2 SCNJ 76 at 89. It is easy therefore to see that the court below made a hurried decision stemming from wrong premises thereby ousted its jurisdiction from a matter properly before it.

For emphasis the matter calls to attention the view of this court in *A. G. Federation v. A.N.P.P* (2003) 18 NWLR (Pt.852) 182 at 207, when this court held that where a preliminary objection veers off the exclusive domain of law and flirts with facts of the case as in this instance where it needs verification whether or not the status of the parties or any of them was in question, therefore the objector must justify the objection by supplying the relevant facts in affidavit. The court cannot act on the objection without basis or in vacuo. I refer to *Chief of Air Staff v. Iyen* (2005) 6 NWLR (Pt.922) 496; *Mobil Oil Producing Nig. Unlimited v. Monokpo* (2003) 18 NWLR (Pt.852) 346.

From the forgoing and the more detailed judgment of my learned brother Adekeye JSC, I allow the appeal, set aside the decision of the Court of Appeal which struck out the suit. The matter is therefore sent back to the court below for the hearing and determination of the appeal before it on the merits and before another panel of justices.