

CO-Ok
COURT OF APPEAL ABUJA DIVISION
18TH MAY, 2011. CA/A/40/2009
CORAM:- M. L. GARBA, P. A. GALINJE, R. O. NWODO, JJCA

L.M. ERICSSON NIG. LTD APPELLANT
AND
AQUA OIL NIG. LTD RESPONDENT

APPEALS - Preliminary objection - Seeks to terminate an appeal - Hence it should be determined first - Before further steps are taken (H1)

JURISDICTION - Fundamental nature - Courts - Absence of jurisdiction - Will render any proceedings null and void - And it will amount to exercise in futility (H2)

APPEALS - Right of appeal - Sources of - It is not a common right - Because it is vested by either the Constitution or other relevant statutes - 1999 Constitution s.241(2)(a) did not confer such right (H3)

APPEALS - Leave - Grounds of mixed law and facts - By s.14(1) of Court of Appeal Act - Leave of either High Court or Court of Appeal is required to file such grounds (H4)

COURTS - Joinder of parties - Correctness of - Court is empowered to order joinder of parties in a case - If such parties are to be essentially affected by the outcome of the case (H5)

APPEALS - Leave - Ground of law - By s. 241(1)(b) of Constitution - Leave of court is not required to file the ground - Since Ground 2 is of law (H6)

APPEALS - Competence - Grounds must relate and attack the ratio of decision of court - Ground 1 herein is competent as it relates to the ratio (H7)

COURTS - Issues - Determination of - It is binding on court to consider issues properly submitted by parties before it - Except where

such issues are incompetent (H8)

COURTS - Issues - Determination - Interlocutory stage - Court should refrain from determining at interlocutory stage - Any issue that will be decided at substantive suit (H9)

COURTS - Jurisdiction - Court retains inherent jurisdiction to decide on a matter - Until such a time it rules that it lacks same (H10)

FACTS

Respondent commenced this action at the High court of Federal Capital Territory, Abuja via writ of summons. The writ contained an endorsement of claims for money owed and due payable by appellant. The suit was later placed under the undefended list and the processes served on appellant accordingly. Appellant reacted by filing a notice of preliminary objection as well as a notice of intention to defend the suit. The grounds of the preliminary objection were that: (i) The Appellant acted to the knowledge of the Respondent as an agent to NITEL (ii) It is a settled principle of law that an agent of a disclosed principal incurred no liability and cannot be sued.

At the end of hearing, the court overruled the preliminary objection raised by appellant and also ordered the joinder of NITEL as a necessary party to the suit pursuant to Order 10 Rule 5(1) of the High Court of Federal Capital Territory, Abuja (Civil Procedure) Rules. Dissatisfied, appellant filed a notice of appeal against the ruling at the Court of Appeal, Abuja Division.

ISSUES FOR DETERMINATION

1. Whether the learned trial Judge was not right to have refrained at the preliminary stage from pronouncing on the status of the Appellant having regard to the materials before him?

2. Whether the learned trial Judge was not right to have joined NITEL as the 2nd Defendant to this suit having regard to the materials before him?

HELD (Unanimously dismissing the appeal per **GARBA JCA**)

APPEALS - Preliminary objection

1. Since the primary object of the preliminary objection raised by the learned SAN for the Respondent in the appeal is to terminate the proceedings in the appeal at its stage, it is expedient and indeed a requirement of the principles of judicial practice, that it should be determined first before a consideration of the issues raised in the appeal. This is because in the event of its success, there would no longer be live issues for decision since the appeal would have been adjudged incompetent. In other words, once a preliminary objection on the competence of an appeal succeeds, the proceedings in the appeal would become aborted and the need to consider the issues raised therein would automatically abate.

I should also say that the decision to transfer the Respondent's case from the undefended list to the general cause list of the High Court for determination resulted from its decision not to decide the merit of the Appellant's objection to its jurisdiction but to simply overrule it. At the stage the objection of the Appellant was argued, the High Court had the duty to decide its merit before proceeding with any other step that may be necessary in the action, including a consideration of whether or not the notice of intention to defend filed by the Appellant disclosed a defence on the merit to the action. This is because as I have pointed out before now, the purport or aim of an preliminary objection to the competence of an action/the court, is to abort, terminate or determine the proceedings at the stage it was raised. For that reason, the law requires that the objection should be determined first before further steps are taken in the proceedings.

General restatement of a few established and relevant principles of law on the issue would provide the foundation for the consideration and decision of the issue. Before that however, I should perhaps point out that the law is now settled as indicated earlier while dealing with the preliminary objection by the learned SAN for the Respondent that where a preliminary objection was raised in a suit before a court challenging the jurisdiction of that court to entertain the suit on any ground, the court had the duty to determine the challenge to its juris-

diction first before taking further steps in the proceedings in the case. (pp. 2900 E/2907 D/2916 G)

JURISDICTION - Fundamental nature

2. The decision by the court that an appeal is incompetent as
B **a matter of course deprives or robs the court of the requisite**
competence or jurisdiction to entertain and determine the is-
ssues canvassed in the appeal. The law is trite that in the ab-
C **sence of or defect in the competence or jurisdiction of a court**
to determine a case, matter or appeal would render any pro-
ceedings conducted therein null, void and legally of no use
from the beginning, no matter how otherwise well they were
conducted. Such proceedings would completely be an exer-
D **cise in futility; sheer waste of valuable time and resources by**
both the court and the parties.

However, for the provisions to apply, the decision of the High
Court granting the unconditional leave to defend an action
must have been made by the High Court in the exercise of the
requisite jurisdiction or the case or action in which the grant
E **was made. In other words, the High Court must have the com-**
petence to adjudicate or entertain the action in question be-
fore the provisions of Section 241(2)(a) would apply to its
decision granting the unconditional leave to defend the said
F **action. All the prerequisites for the assumption of the juris-**
isdiction by the High Court over the action must be met or sat-
isfied before the provisions of the Constitution would apply to
a decision by the High Court to grant unconditional leave to
defend. Any defect in the jurisdiction of the High Court would
G **deprive it of the necessary vires or power or/and authority to**
make any valid order or decision in the action. So as a condi-
tion precedent to the validity of the order granting an uncon-
ditional leave to defend an action, the High Court as well as
the parties thereto must be in no doubt about the jurisdiction
H **of that Court to entertain or adjudicate over the action. This**
is because of the intrinsic and fundamental nature of the issue
of the jurisdiction of a court of law in judicial proceedings and
the legal consequences on any proceedings by a court con-
ducted in the absence of or defect in its jurisdiction to enter-

tain an action or matter. Since the consequence as demonstrated in the cases cited earlier on the point is that the proceedings would be null, void and no value ab initio, every decision or order therein would automatically be of no legal effect whatsoever. Nothing can derive from nothing.

It is a requirement of the law and also prudence that the question of jurisdiction whenever it is raised or arises in a case at whatever stage, should be determined first before any other or further steps are taken in the case by the court. The cases I have referred to earlier on the point have stated profoundly sound reasons for that position of the law in view of crucial nature of jurisdiction in judicial proceedings. The position of the law is so elementary that I do not need to repeat or cite more judicial authorities on it. (pp. 2900 H/2906 A/2917 A)

Right of appeal - Sources of

3. I would start a consideration of the Respondent's first ground of objection by saying that under the clear and unambiguous provisions of section 241(2)(a) of the 1999 Constitution, no right of appeal exists (because it was not conferred or vested) from a decision by a High Court granting a defendant in a suit before it, unconditional leave to defend an action against him. The provisions of the subsection are as follows:-

241.-(2) "Nothing in this section shall confer any right of appeal:-

(a) from a decision of the Federal High court or any High Court granting unconditional leave to defend an action."

The manifest intention of the above plain wordings of the constitution is to deprive the right and prevent an appeal by a party aggrieved by the grant of an unconditional leave to defend by a High Court from appealing to this Court against such a decision by the High Court. Because the right of appeal is non-existent, against the decision by the High Court, no party can properly claim it and is incapable of being exercised in law.

The right of appeal is not a matter of common right but one which is vested or conferred by either the Constitution or

other relevant Statutes and if not so vested or conferred, would not exist in any person. (p. 2905 C)

APPEALS - Leave - Grounds of mixed law and facts

4. The next ground of the objection was that ground 2 on the Appellant's notice of appeal requires leave of court because it challenges the exercise of the High Court's discretion to order the joining of NITEL as a defendant to the action before it. At the onset, I would like to say that the learned Senior Counsel for the Respondent is right that the law is that a ground of appeal which attacks or complains against the exercise by a lower court of its judicial discretion in a case is a ground of mixed law and facts. In addition to the case of AMADASUN v. UME (supra) this Court had held in the case of MADUABUCHUKWU v. MADUABUCHUKWU (2006) ALL FWLR (318) 695 at 712 that:-

"A ground of appeal which questions the exercise of the discretion by a lower court is undoubtedly not a ground of law but, at best, a ground of mixed law and facts."

Being a ground of mixed law and facts, such a ground, particularly in respect of an interlocutory decision, by the operation of Section 14(1) of the Court of Appeal Act, 1976, can only be validly filed with the leave of either the High Court or this Court. In other words, for such a ground of appeal to be valid and competent in an appeal, prior leave of court must first be obtained by an Appellant. Leave of court is in the circumstances, a condition precedent to the competence or validity of such a ground of appeal. It is a statutory requirement which if not met or satisfied would render a ground of appeal incompetent in law and liable to be struck out by the court. (p. 2908 B)

COURTS - Joinder of parties - Correctness of

5. The question that arises here is whether ground 2 really questions the exercise of the discretion by the High Court to join NITEL in the suit before it as a defendant. As a general statement of the law, a court has the power to order the joinder of parties to a case before it if such party/parties are likely

to be aggrieved by the result of the case to the extent that he/they will be directly, legally or financially affected by the result of the litigation so as to enable the court to fully, completely, effectually and finally decide the case to avoid multiplicity of suits arising from the same subject matter.

Undoubtedly, these provisions in the Rules of the High Court provide it with the option, choice or discretion to on its own motion, order for the joinder of all persons who are possibly interested but who were not made parties to a suit before it either as plaintiffs or defendants as it may decide. Since its rules of practice and procedure have vested it with the requisite discretionary power, the exercise of such power is clearly an exercise of the discretion conferred by the Rules. A decision resulting from such an exercise of the power by the High Court in the circumstance would be a discretionary decision. (pp. 2908 H/2910 A)

APPEALS - Leave - Ground of law

6. A ground of appeal which questions or challenges the said decision is clearly one which questions the exercise of the discretionary power by the High Court. It is one which attacks the exercise of discretion by the High Court. Looking carefully at the terms of ground 2, along with the particulars set out in support thereof I would say that though it appears it questions the exercise by the High Court of the discretionary power vested by Order 10 Rule 5(1) to order joinder of NITEL, it is not one of mixed law and facts, but of law.

This is because there are no facts set out by the High Court in its decision to order for the joinder of NITEL which were used or relied on for the decision. The High Court merely as can easily be seen in the decision quoted above, used and relied on the provisions of its Rules to order the joinder because “I also find that this suit cannot be properly determined in the absence of NITEL, that is to say, that NITEL is a necessary party to this action”. No facts were stated which informed the finding that the suit cannot be properly determined in the absence of NITEL or that NITEL is a necessary party to the action.

So the ground of appeal 2 challenges the misunderstanding and application of the provisions of the Rules of court in the suit when an objection to the jurisdiction of the High Court to entertain the suit had not been pronounced upon by that court. Ground 2 therefore in effect questions the power and authority of the High Court to use and rely on the provisions of Order 10 Rule 5(1) in the suit and not whether or not the High Court could make the order for joinder under its Rules. In that sense, the ground is one of law alone and not of mixed law and facts and though it is one in respect of an interlocutory decision by the High Court, it does not require leave of court to be competent and valid in this appeal.

In the above circumstances, ground 2 being one of law alone does not require leave of court to be a valid and competent ground of appeal. It is a competent ground in this appeal and so the ground of objection to it fails for being wanting in merit.

(p. 2910 C)

APPEALS - Competence

7. The 3rd ground of the objection by the learned SAN for the Respondent is that ground 1 does not arise from the ratio decidendi of the ruling by the High Court and so is incompetent. On the authorities of NGIGE v. OBI and ADELEKAN v. ECU-LINE N.V. both cited by the learned SAN supra, it is the law that a ground of an appeal against the decision of a lower court is always required to be directed at and should arise from the ratio decidendi of the decision in question.

A calm reading of ground 1 of the Appellant's notice of appeal would reveal that it is a direct attack on the reasons given by the High Court for the decision not to determine the preliminary objection to its jurisdiction at the stage it was raised and argued by the parties.

The decisions or orders were made after that decision and also after the decision to overrule an objection which had not been considered and determined on the merit of the arguments canvassed by the parties thereon. I am in no doubt and so find that the ground 1 is a challenge or attack against the ratio decidendi of the High Court ruling with which the Appel-

lant was dissatisfied. On that reason, I find no merit in the ground of objection and it fails. (pp. 2911 E/2912 A)

COURTS - Issues - Determination of

8. It is also a general and known principle of law that a court whether trial or appellate before whom issues were properly submitted by the parties in a case before it has the legal and binding duty to make pronouncements on or decide such issues.

The exceptions made to the principle include where an issue is subsumed in another issue decided by the court or where an issue is irrelevant or incompetent for not arising from the grounds of appeal or for issues being deliberately proliferated. (p. 2917 C)

COURTS - Issues - Determination of - Interlocutory stage

9. The law is similarly now common knowledge that a court is required to avoid making pronouncements or deciding issues at the preliminary stage which would touch or decide on the issues to be decided in the substantive suit. The cases cited by the learned SAN on the principle of law and more have clearly established the position such that there is no need for me to cite more at this point. All the authorities are to the effect that a court should refrain from, avoid and should not decide or determine the substantive matter while considering or dealing with issues at the preliminary or interlocutory stage of the case.

That is what the authorities cited on the principle of law admonish courts to refrain from. That the issue raised in the preliminary objection challenges or questions the jurisdiction of the High Court does not change its nature or character in the substantive suit as the High Court would still determine it at the trial. The principle of law that the issue of jurisdiction where it was raised or arose should be decided first should be understood in the context of the peculiar facts and circumstances of a case. The issue can only be properly determined first in line with the facts of a case because even though it may be an issue of law, it is the facts of a case that give it live and

make it applicable. Without facts, the principles of law on jurisdiction cannot effectively be applied by the courts. Once again, because the same issue arises for decision in both the preliminary objection and the notice of intention to defend the action filed by the Appellant, it is one which is best decided as a defence at the trial and the outcome would then determine whether the High Court had jurisdiction over the suit. In the circumstances, the High Court was right to have deferred the determination of the issue at the preliminary or interlocutory stage. (pp. 2917 F/2919 C)

COURTS - Jurisdiction

10. What can easily be deciphered from the submissions by the learned Counsel for the Appellant is that the reason for saying that the High Court lacked the jurisdiction to make the order was that the Appellant was an agent of a disclosed principal and therefore not a proper party to the suit. However the issue of the status of the Appellant which will, depending on the outcome, go to the jurisdiction of the High Court is the same in both the preliminary objection and the defence of the Appellant to the suit. To assume that merely because the Appellant asserts that it is not a proper party in the case the High Court would automatically lose its jurisdiction over the case would be simplistic and a clear misconception of the principles of jurisdiction of a court over a matter. Until a court after a consideration of all the relevant materials available in a case comes to the conclusion that it lacks the requisite competence or jurisdiction to entertain the case for any of the recognized reasons in law, it retains the competence and jurisdiction to conduct proceedings in the case, take steps therein which it considers necessary and make consequential orders accordingly.

For that reason, the High Court at the time it made the order joining NITEL in the suit before it, had the requisite jurisdiction over the suit and so to make the order in the exercise of the discretion conferred on it by the provisions of Order 10 Rule 5(1) of its Rules which I have set out elsewhere before now. (p. 2921 A)

NOTABLE POINT OF INTEREST

GARBA JCA

1. Meaning of Latin maxim “ratio decidendi”

In the case of A.I.C. LTD. v. NNPC (2005) 5 SC (Pt. 11) 60 72, the Supreme Court had described what the ratio decidendi of a case is in the following words:-

“The ratio decidendi of a case represent the reasoning or principle or ground upon which a case is decided”

Put in simple English language, the ratio decidendi; which is a Latin expression, of a case, means the reasons or reasoning used by the court in deciding the issue/s before it which required decision one way or the other. The ratio decidendi of a decision is therefore the reasons proffered, used and relied on by a court in arriving at the particular decision in a judgment or ruling in a case. It is not the decision itself but the reasoning which forms the basis of the decision. (p. 2911 F)

REPRESENTATION

Funke Agbor (Mrs.) with Kayode Omole, for the Appellant
Chief Duro Adeyele, SAN with Theophilus Okulete and Ayodele Babalola, for the Respondent

CASES REFERRED TO

Oduola v. Coker (1981) 5 SC 197
Abbey v. Alex (1991) 6 NWLR (Pt. 198) 459
Cookey v. Fombo (2005) 5 SC (Pt. 11) 102
Ngige v. Obi (2006) 14 NWLR (Pt. 999) 1
Coker v. UBA Plc (1997) 2 NWLR (490) 643
Titiloye v. Olupo (1991) 7 NWLR (Pt. 205) 519
Ojoh v. Kamalu (2006) All FWLR (Pt. 297) 978
Igbokwe v. Igbokwe (1993) 2 NWLR (Pt. 273) 29
Olagunju v. Yahaya (1998) 3 NWLR (542) 501
Ikweki v. Ebele (2005) 11 NWLR (Pt. 936) 397
Daagir v. Kwaghkar (2006) All FWLR (Pt. 306) 959
Amadasun v. UMB (2007) 13 NWLR (Pt. 1051) 214
UTC v. Pamotei (1989) 3 SC 79

Iweka v. A-G Federation (1996) 4 NWLR (Pt. 442) 362

Maduabuchukwu v. Maduabuchukwu (2006) ALL FWLR (Pt. 318)

STATUTE & RULES REFERRED TO

Constitution of Federal Republic of Nigeria 1999, s. 241(1)(b), (2)(a)

B High Court of F.C.T. (Civil procedure) Rules, O.10 r.5 (1)

LEAD JUDGMENT BY GARBA JCA

The Respondent had taken out a writ of summons dated 31/7/07 on which were endorsed claims for money owed and due payable by the Appellant out of the Registry of the Federal Capital Territory High Court. The suit was later placed under the undefended list and the processes served on the Appellant accordingly, who in reaction filed a notice of preliminary objection dated 22/2/08 as well as a notice of intention to defend the suit. The grounds of the preliminary objection were that:-

“(i) The Appellant acted to the knowledge of the Respondent as an agent to NITEL; and

(ii) It is a settled principle of law that an agent of a disclosed principal incurred no liability and cannot be sued”

After hearing addresses by the learned Counsel for the parties on the preliminary objection, the Federal Capital Territory High Court (to be called simply as the High Court hereafter) in a ruling delivered on the 31/10/08 held inter alia that:

“I have some facts before me but I do not have all the facts, as yet. Is this a matter one on which I can do justice with the facts now before me (SIC). In my humble view, I do not think so. I think the issues in this preliminary objection are best ventilated in the course of full trial so that justice of the case will be best served. I have therefore refrained from pronouncing on any of the issues raised in this preliminary objection so as not to prejudge the case as I am certain that these issues will come up for consideration in the course of full trial, when all the facts will be before the court. It is for this reason that I overrule the preliminary objection.”

The learned trial Judge further held that:-

“I also find that this matter cannot be properly determined in the absence of NITEL, that is to say that NITEL is a necessary party to this action. I therefore direct that the Plaintiff do join NITEL as 2nd

Defendant in this suit pursuant to Order 10 Rule 5(1) of the rules of this court”

Being dissatisfied with the above decisions, the Appellant filed a notice of appeal on the 12/11/08 against same. There are two (2) grounds contained on the notice of appeal and because of the challenge to their competence in the preliminary objection by the Respondent, it is expedient to set them out as they appear on the notice of appeal. They are as follows:-

‘GROUND OF APPEAL

A- The learned trial Judge erred in law when he refrained from pronouncing on the preliminary jurisdictional point of law that the Appellant being an agent of a disclosed principal should not have been sued and held that the issue could only be determined after a full trial.

Particulars of error

i. The documentary evidence attached as exhibits to the Plaintiff/Respondent’s affidavit in support of Writ of Summons which are taken as true are more than sufficient to determine the point raised in the Appellant’s preliminary objection.

ii. The affidavit evidence filed by the Plaintiff/Respondent clearly admitted that the Plaintiff/Respondent was engaged by NITEL to carry out the clearing service contract and it is undisputed that Exhibit “A” attached thereto was issued in this regard.

iii. It is a common ground that Exhibits “C”, “D”, and “E” which are approvals from NITEL, forms the basis of the Plaintiff/Respondent’s Claim.

iv. The Judge’s failure to determine the preliminary point of law raised is a breach of the constitutional right of the Appellant for fair hearing which will occasion undue expenses on the Appellant.

B. The learned trial Judge erred in law when he directed that NITEL should be joined as 2nd Defendant in this suit pursuant to Order 10 Rule 5(1) of the Federal Capital Territory Rules.

Particulars of error

i. It is a settled principle of law that the jurisdiction of the court to make any order can only be invoked when proper parties are before the court.

ii. The issue of jurisdiction raised by the Appellant regarding the sole Defendant not being a proper party to clothe the court with

jurisdiction should have been resolved first before the court could properly make order joining another party.

iii. The order to join NITEL was a nullity.”

When the appeal was called for oral hearing on the 17/3/11, Funke Agbor (Mrs.) Esq. leading Kayode Omale, Esq. for the Appellant adopted the Appellant’s brief settled by her and filed on the 2/4/09 as well as the Appellant’s Reply brief filed on the 19/4/10. She urged us to allow the appeal, decide the preliminary objection pursuant to Order 16 of the Court of Appeal Act and strike out the Respondent’s suit on the ground that as an agent of a disclosed principal, the Appellant cannot be sued. Chief Duro Adeyele, SAN led Dr. L. Azubike Esq., Theophilus Okulete Esq. and Ayodele Babalola Esq. for the Respondent at the hearing. The learned silk referred to and adopted the Respondent’s brief filed on 26/5/09 but deemed filed on 13/4/10 in which a preliminary objection was raised and argued. The objection was moved and we were urged to uphold it and in consequence, strike out the appeal for incompetence.

In the alternative, we were urged to resolve the issues raised in the appeal in favour of the Respondent and to dismiss the appeal.

Since the primary object of the preliminary objection raised by the learned SAN for the Respondent in the appeal is to terminate the proceedings in the appeal at its stage, it is expedient and indeed a requirement of the principles of judicial practice, that it should be determined first before a consideration of the issues raised in the appeal. This is because in the event of its success, there would no longer be live issues for decision since the appeal would have been adjudged incompetent. In other words, once a preliminary objection on the competence of an appeal succeeds, the proceedings in the appeal would become aborted and the need to consider the issues raised therein would automatically abate. See: AHANEKU v. EKERUO (2002) 1 NWLR (748) 301 at 30, NPA v. EYAMBA (2005) 12 NWLR (939) 409, UBN v. SOGUNRO (2006) 16 NWLR (1006) 504 at 521-

The decision by the court that an appeal is incompetent as a matter of course, deprives or robs the court of the requisite competence or jurisdiction to entertain and determine the issues canvassed in the appeal. The law is trite that in the

absence of or defect in the competence or jurisdiction of a court to determine a case, matter or appeal would render any proceedings conducted therein null, void and legally of no use from the beginning, no matter how otherwise well they were conducted. Such proceedings would completely be an exercise in futility; sheer waste of valuable time and resources by both the court and the parties. See: UZOUKWU v. EZEONU II (1991) 6 NWLR (200) 708, MADUKOLU v. NKEMDILIM (1962) 1 ALL NLR. 587, JIMOH v. OYINLOYE (2000 ALL FWLR (322) 1556.

In the above premises, I would decide the preliminary objection first before taking further steps in the determination of this appeal. The preliminary objection raised at page 4 of the Respondent's brief was premised on the 4 grounds set out therein. They are:-

"1. There is no right of Appeal against the Ruling of 31st October, 2009 having regard to Section 241(2)(a) of the 1999 Constitution.

2. Ground 2 of the Notice of Appeal is incompetent having been filed without prior leave of Court.

3. Ground 1 of the Notice of Appeal is equally incompetent having not arisen from the ratio decidendi of the Ruling of 31st October, 2008.

4. Issues 1 & 2 argued in the Appellant's Brief of Arguments are incompetent having arisen from incompetent Grounds of Appeal."

The objection was argued on these grounds.

On the ground (1) the learned SAN who settled the Respondent's brief had argued that in the main, the decision appealed against, granted leave to the Appellant to defend the action against it on the merit. He referred to and set out a portion of the ruling by the High court at page 85, lines 4-15 of the record of appeal, the notice of appeal and section 241(2)(a) of the 1999 Constitution which he said forbid any right of appeal against the decision of a High court transferring a suit from the undefended list to the general cause list.

The case of A.T.M. PLC. V. B.V.T. LTD. (2007) 1 NWLR (1015) 259 - 280 - 1 was cited and it was submitted that the appeal is against the decision transferring the suit from the undefended list to the general cause list and so incompetent. We were urged to strike out the

appeal.

The learned SAN then said that ground 2 of the notice of appeal challenges or attacks the order by the High Court to join NITEL as the 2nd Defendant to the suit. He referred to the order by the High Court and argued that that court invoked its discretionary powers under Order 10, Rule 5(1) of Federal Capital Territory High Court (Civil Procedure) Rules in joining NITEL. It was his contention that the order joining NITEL was an exercise of a discretion by the High Court and that a ground of appeal which questions the exercise of discretion by a trial court, is a ground of mixed law and facts which requires prior leave of court to be competent. Reliance was placed for the submission on the case of *AMADASUN v. UMB* (2007) 13 NWLR (1051) 214 at 235-6 and it was submitted that it is the fate of ground 2 which was filed without prior leave of court. The Court was urged to strike out ground 2.

On ground 1 of the notice of appeal, it was the submission by Mr. Adeyele, SAN that it is incompetent because it did not arise from the ratio decidendi of the decision appealed against. He contended that the ground is an attack on the pronouncement by the High Court refraining from pronouncing on issues that would be determined in the substantive appeal at the preliminary stage.

Further, that the purports of the decision by the High Court were that the Appellant has disclosed a defence on the merit to warrant the transfer of the suit to the general cause list and that NITEL was joined as a defendant to the suit for proper determination. According to the learned silk, these were the ratio decidendi of the decision by the High Court which can be attacked, relying on *NGIGE v. OBI* (2006) 14 NWLR (999) 1 at 120 and *ADELEKAN v. ECU-LINE N.V.* (2006) 12 NWLR (993) 48-9. He urged us to hold that ground 1 does not arise from the ratio decidendi of the decision by the High court and to strike out the ground.

Turning to issues 1 and 2, it was submitted that any issue which derives from incompetent grounds of appeal is liable to be struck out on the authority of *AWUSE v. ODILI* (2005) 16 NWLR (952) 416 at 462 and *SARAKI v. KOTOYE* (1992) 9 NWLR (264) 156 at 184. The learned SAN then urged us to strike out the issues formulated and argued in the Appellant's brief and to strike out the appeal.

On her part, learned Counsel for the Appellant had responded

in the Appellant's Reply brief on the 1st ground of the objection that though there is no right of appeal against the decision of a High Court granting unconditional leave to defend an action, the ruling of the High Court was based on the preliminary objection raised by the Appellant to the jurisdiction of that court on the ground of the absence of a proper party. That the ruling was not based on the notice of intention to defend. Pages 74 - 77 of the record of appeal were referred to by the learned Counsel who argued that it was the decision by the High Court that there were no sufficient materials to determine the question of jurisdiction that forms the basis or ratio decidendi of the ruling appealed against. It was the further argument of the learned Counsel that the notice of appeal in ground 1 shows that the Appellant's challenge was on the reason by the High Court that there were no facts sufficient for the determination of the preliminary objection and not on the transfer of the suit to the general cause list or granting of leave to defend. In addition, learned Counsel said the decision granting leave to defend the suit was in favour of the Appellant and the Appellant is precluded in law from appealing against such decision on the authority of *EZENNAH v. ATTAH* (2004) 17 WRN 1 at 24. It was submitted that there is no ground on the notice of appeal which challenges the granting of leave to the Appellant to defend the suit and so the case of *A.T.M. PLC. v. B.V.T. LTD.* (supra) cited for the Respondent was inapplicable since the sole issue decided in the case was whether there was an admission upon which judgment could be entered for the Appellant in the case. We were urged to discountenance the ground of objection for lacking in merit.

On the requirement for leave in respect of ground of appeal 2, the learned Counsel citing Section 241(1) of the Constitution said that appeals lie as of right from decisions of High Courts to this Court where the ground of appeal alleges question or error of law alone. The case of *NWABUEZE v. NIPOST* (2006) 8 NWLR (983) 480 at 571 was relied on for the submission as well as for the definition of what a ground of law or error of law is for the purpose of determining whether leave of court was required. Other cases that include *IDAKULA v. ADAMU* (2001) 1 NWLR (694) 322 at 341 and *NWAKIKE v. IBEKWE* (1987) 4 NWLR (67) 718 at 729 were cited on the classification of a ground whether as of law alone or mix facts and law.

Learned Counsel then set out ground of appeal 2 as contained in the notice of appeal and argued that it challenges the order joining NITEL on the basis that it could only have been made if there was no challenge to the jurisdiction of the High Court for lack of proper parties in the case. According to learned Counsel, the ground taken
 B along the particulars set out under it challenges the jurisdiction of the High Court and not the exercise of the discretion. Once again relying on IDAKULA v. ADAMU (supra) it was submitted that a ground of appeal which challenges or attacks the jurisdiction of a lower court is
 C a ground of law which does not require leave of court. In any case, it was further argued by learned Counsel that even if the ground challenges the exercise of the judicial discretion of the High Court, particular (iii) to the ground which says that “the order is a nullity” shows that the order was made without the requisite jurisdiction in the ab-
 D sence of which there could be no discretion. For support on the submission, the cases of IKWEKI v. EBELE (2005) 11 NWLR (936) 397 at 439 and UMANA v. ATTAH (2006) 17 NWLR (1009) 503 at 518 referred to and we were urged to discountenance the ground of the objection for lacking any legal basis.

E Next, the learned Counsel for the Respondent had argued that ground 1 of the notice of appeal is on the decision by the High Court not to determine the preliminary objection raised by the Appellant to its jurisdiction and competence to adjudicate on the suit before it.
 F She pointed out the ratio decidendi of a decision by a court is the reason for the decision as stated by the court and not the decision itself. Accordingly, it was submitted that the orders for transfer of the suit to general cause list and joining NITEL as a defendant in the suit were not the ratio decidendi but the decision by the High Court. In
 G further argument, learned Counsel said that the decision by the High Court not to pronounce or decide the preliminary objection to its jurisdiction was its decision on the preliminary objection while the reason given for so deciding, was the ratio decidendi for the decision. Learned Counsel said the ground attacks the reason given by the
 H High Court on why it did not determine the preliminary objection which was the main issue before it and on which it heard arguments from the parties. The decision to transfer the suit to the general cause list was said to be a consequence of the decision by the High Court to overrule the objection and so the ground I is challenging the ratio

decidendi of the decision by the High court. The cases of NGIGE v. OBI and ADELEKAN v. ECU-LINE N.V. (both supra) cited for the Respondent were said to support the Appellant's position that a ground of appeal must attack the validity of the ratio of the decision. The court was urged to hold that the ground of the objection lacks merit.

On the last ground of the objection, the learned Counsel for the Appellant had submitted that it can only succeed if the court decides that the grounds of appeal are incompetent as was stated in the AWUSE v. ODILI case supra. With arguments canvassed in support of the validity of the grounds of appeal, we were urged by the learned counsel to discountenance the ground of the objection.

I would start a consideration of the Respondent's first ground of objection by saying that under the clear and unambiguous provisions of section 241(2)(a) of the 1999 Constitution, no right of appeal exists (because it was not conferred or vested) from a decision by a High Court granting a defendant in a suit before it, unconditional leave to defend an action against him. The provisions of the subsection are as follows:-

241.-(2) "Nothing in this section shall confer any right of appeal:-

(a) from a decision of the Federal High court or any High Court granting unconditional leave to defend an action."

The manifest intention of the above plain wordings of the constitution is to deprive the right and prevent an appeal by a party aggrieved by the grant of an unconditional leave to defend by a High Court from appealing to this Court against such a decision by the High Court. Because the right of appeal is non-existent, against the decision by the High Court, no party can properly claim it and is incapable of being exercised in law.

The right of appeal is not a matter of common right but one which is vested or conferred by either the Constitution or other relevant Statutes and if not so vested or conferred, would not exist in any person.

Learned Counsel in this appeal are one that pursuant to the provisions of Section 241(2)(a) no right of appeal exists against a decision by the High Court granting unconditional leave to defend an action or transferring a case from the undefended list to the gen-

eral cause list for determination as consequence of the grant of the leave to defend an action filed under the undefended list procedure.

However, for the provisions to apply, the decision of the High Court granting the unconditional leave to defend an action must have been made by the High Court in the exercise of the requisite jurisdiction or the case or action in which the grant was made. In other words, the High Court must have the competence to adjudicate or entertain the action in question before the provisions of Section 241(2)(a) would apply to its decision granting the unconditional leave to defend the said action. All the prerequisites for the assumption of the jurisdiction by the High Court over the action must be met or satisfied before the provisions of the Constitution would apply to a decision by the High Court to grant unconditional leave to defend. Any defect in the jurisdiction of the High Court would deprive it of the necessary vires or power or/and authority to make any valid order or decision in the action. So as a condition precedent to the validity of the order granting an unconditional leave to defend an action, the High Court as well as the parties thereto must be in no doubt about the jurisdiction of that Court to entertain or adjudicate over the action. This is because of the intrinsic and fundamental nature of the issue of the jurisdiction of a court of law in judicial proceedings and the legal consequence on any proceedings by a court conducted in the absence of or defect in its jurisdiction to entertain an action or matter. Since the consequence as demonstrated in the cases cited earlier on the point is that the proceedings would be null, void and no value ab initio, every decision or order therein would automatically be of no legal effect whatsoever. Nothing can derive from nothing. See *N.E.C. v. NZERIBE* (1991) 5 NWLR (192) 458, *OKIKE v. L.P.D.C.* (No. 2) (2005) 7 SC (Pt. III) 75.

In the present appeal, there was a challenge by way of an objection to the jurisdiction of the High Court to entertain the action before it which was not decided before the grant of leave to defend the action. In the circumstances there was doubt on the part of both the High Court and the Appellant as to whether that court had the necessary competence to adjudicate on the action which needed to

be cleared by a specific decision of that court. By declining to decide on the objection to its jurisdiction to entertain the action before it, provisions of Section 241(2)(a) were thereby rendered inapplicable to its decision to transfer the action or case from the undefended list to the general cause list by the grant of leave to defend.

In addition, the learned Counsel for the Appellant is right and I agree with her that none of the two grounds of appeal complained of or is against the decision by the High court to transfer the case to the general cause list from the undefended list.

The grounds which have been set out earlier speak for themselves and in no uncertain terms. In the absence of a ground of appeal attacking that decision by the High court in the Appellant's notice of appeal, the ground of the objection with due respect to the learned Senior Counsel for the Respondent, is clearly misconceived and the case of A.T.M. PLC. v. B.V.T. LTD. cited on the ground is inapplicable.

I should also say that the decision to transfer the Respondent's case from the undefended list to the general cause list of the High Court for determination resulted from its decision not to decide the merit of the Appellant's objection to its jurisdiction but to simply overrule it. At the stage the objection of the Appellant was argued, the High Court had the duty to decide its merit before proceeding with any other step that may be necessary in the action, including a consideration of whether or not the notice of intention to defend filed by the Appellant disclosed a defence on the merit to the action. This is because as I have pointed out before now, the purport or aim of an preliminary objection to the competence of an action/the court, is to abort, terminate or determine the proceedings at the stage it was raised. For that reason, the law requires that the objection should be determined first before further steps are taken in the proceedings. See:-
OKO v. IBIAG (2002) 10 NWLR (776) 455 at 468, UBA PLC. v. ACB (2005) 12 NWLR (939) 232, NGIGE v. OBI (supra) at 212, GOJI v. EWETE (2001) 15 NWLR (736) 273 at 280.

Furthermore, I am in agreement with the learned Counsel for the Appellant that the decision to transfer the case from the undefended list to the general cause list by the High Court was in favour of

the Appellant and so the Appellant could not be seen in law to be aggrieved or dissatisfied with the grant of the leave to it to defend the action which was based on the affidavit evidence that accompanied its notice of intention to defend. See EZENNAH v. ATTAH (supra), section 241(2)(a) of the 1999 Constitution.

B For the above reasons, I find no merit in the ground of the objection and it fails.

The next ground of the objection was that ground 2 on the Appellant's notice of appeal requires leave of court because it challenges the exercise of the High Court's discretion to order the joining of NITEL as a defendant to the action before it. At the onset, I would like to say that the learned Senior Counsel for the Respondent is right that the law is that a ground of appeal which attacks or complains against the exercise by a lower court of its judicial discretion in a case is a ground of mixed law and facts. In addition to the case of AMADASUN v. UME (supra) this Court had held in the case of MADUABUCHUKWU v. MADUABUCHUKWU (2006) ALL FWLR (318) 695 at 712 that:-

E ***"A ground of appeal which questions the exercise of the discretion by a lower court is undoubtedly not a ground of law but, at best, a ground of mixed law and facts."*** See also ABBEY v. ALEX (1991) 6 NWLR (198) 459, COKER v. UBA PLC (1997) 2 NWLR (490) 643. ***Being a ground of mixed law and facts, such***

F ***a ground, particularly in respect of an interlocutory decision, by the operation of Section 14(1) of the Court of Appeal Act, 1976, can only be validly filed with the leave of either the High Court or this Court. In other words, for such a ground of ap-***

G ***peal to be valid and competent in an appeal, prior leave of court must first be obtained by an Appellant. Leave of court is in the circumstances, a condition precedent to the competence or validity of such a ground of appeal. It is a statutory requirement which if not met or satisfied would render a ground***

H ***of appeal incompetent in law and liable to be struck out by the court*** WILLIAMS v. MOKWE (2005) 7 SC. (Pt. 11) 153, NEPA v. EZE (2001) 3 NWLR (701) 606.

The question that arises here is whether ground 2 really questions the exercise of the discretion by the High Court to

join NITEL in the suit before it as a defendant. As a general statement of the law, a court has the power to order the joinder of parties to a case before it if such party/parties are likely to be aggrieved by the result of the case to the extent that he/they will be directly, legally or financially affected by the result of the litigation so as to enable the court to fully, completely, effectually and finally decide the case to avoid multiplicity of suits arising from the same subject matter. See ODUOLA v. COKER (1981) 5 SC. 197, IGBOKWE v. IGBOKWE (1993) 2 NWLR (273) 29, IWEKA v. A.G. FEDERATION (1996) 4 NWLR (442) 362 at 370, OLAGUNJU v. YAHAYA (1998) 3 NWLR (542) 501. In the recent case of BELLO v. INEC (2010) 8 NWLR (1196) 340 at 416-7, the Supreme Court had enunciated the principle as follows:-

“Rules of court give the courts the discretionary power, on its own motion, order that a person be added as a party to a suit where it considers that such a person ought to be a party to the proceedings.

The rules put the burden on the court to order the joinder of a party where the joinder of such party will enable the court effectually and completely adjudicate upon and settle all questions before the court”

Part of the ruling by the High Court against which ground 2 complains is at page 85, lines 17 - 20 of the record of the appeal. It is as follows:-

“I also find that this matter cannot be properly determined in the absence of NITEL, that is to say, that NITEL is a necessary party to this action. I therefore direct that the plaintiff do join NITEL as the 2nd Defendant in this suit pursuant to Order 10, Rule 5(1) of the Rules of this Court”

The above decision was made suo motu by the High Court after the orders transferring the suit from the undefended list to the general cause list and for filing of pleadings accordingly.

Order 10, Rule 5(1) relied on by the High court in making the decision provides thus:-

“Where it appears to a court, at or before hearing, that all the persons possibly interested in the suit have not been made parties, the court may adjourn, and direct that those persons be made either plaintiffs or defendants in the suit,”

Undoubtedly, these provisions in the Rules of the High Court provide it with the option, choice or discretion to on its own motion, order for the joinder of all persons who are possibly interested but who were not made parties to a suit before it either as plaintiffs or defendants as it may decide. Since
B its rules of practice and procedure have vested it with the requisite discretionary power, the exercise of such power is clearly an exercise of the discretion conferred by the Rules. A decision resulting from such an exercise of the power by the
C High Court in the circumstance would be a discretionary decision.

A ground of appeal which questions or challenges the said decision is clearly one which questions the exercise of the discretionary power by the High Court. It is one which
D attacks the exercise of discretion by the High Court. Looking carefully at the terms of ground 2, along with the particulars set out in support thereof I would say that though it appears it questions the exercise by the High Court of the discretionary power vested by Order 10 Rule 5(1) to order joinder of NITEL,
E it is not one of mixed law and facts, but of law.

This is because there are no facts set out by the High Court in its decision to order for the joinder of NITEL which were used or relied on for the decision. The High Court merely
F as can easily be seen in the decision quoted above, used and relied on the provisions of its Rules to order the joinder because “I also find that this suit cannot be properly determined in the absence of NITEL, that is to say, that NITEL is a necessary party to this action”. No facts were stated which informed
G the finding that the suit cannot be properly determined in the absence of NITEL or that NITEL is a necessary party to the action.

So the ground of appeal 2 challenges the misunderstanding and application of the provisions of the Rules of court in
H the suit when an objection to the jurisdiction of the High Court to entertain the suit had not been pronounced upon by that court. Ground 2 therefore in effect questions the power and authority of the High Court to use and rely on the provisions of Order 10 Rule 5(1) in the suit and not whether or not the

High Court could make the order for joinder under its Rules. In that sense, the ground is one of law alone and not of mixed law and facts and though it is one in respect of an interlocutory decision by the High Court, it does not require leave of court to be competent and valid in this appeal. See Section 241(1)(b) of the 1999 Constitution which provides thus:- B

“241.-(1) An appeal shall lie from the decisions of the Federal High Court or a High Court to the Court of Appeal as of right in the following cases-

(b) where the ground of appeal involves questions of law alone, decisions in any civil or criminal proceedings; See also C
ACB LTD. v. CRESTLINE SERVICES (NIG.) LTD. (1991) 6 NWLR (194 301, NWABUEZE v. NIPOST (supra), ONYEAMA v. OPUTA (1987) 3 NWLR (60) 259.

In the above circumstances, ground 2 being one of law alone does not require leave of court to be a valid and competent ground of appeal. It is a competent ground in this appeal and so the ground of objection to it fails for being wanting in merit.

The 3rd ground of the objection by the learned SAN for the Respondent is that ground 1 does not arise from the ratio decidendi of the ruling by the High Court and so is incompetent. On the authorities of NGIGE v. OBI and ADELEKAN v. ECU-LINE N.V. both cited by the learned SAN supra, it is the law that a ground of an appeal against the decision of a lower court is always required to be directed at and should arise from the ratio decidendi of the decision in question. E
F

In the case of A.I.C. LTD. v. NNPC (2005) 5 SC (Pt. 11) 60 72, the Supreme Court had described what the ratio decidendi of a case is in the following words:- G

“The ratio decidendi of a case represent the reasoning or principle or ground upon which a case is decided”

Put in simple English language, the ratio decidendi; which is a Latin expression, of a case, means the reasons or reasoning used by the court in deciding the issue/s before it which required decision one way or the other. The ratio decidendi of a decision is therefore the reasons proffered, used and relied on by a court in arriving at the particular decision in a judgment or ruling in a case. It is not the H

decision itself but the reasoning which forms the basis of the decision. See UTC v. PAMOTEI (1989) 3 SC. (Pt. 1) 79, (1989) 2 NWLR (343) 244.

A calm reading of ground 1 of the Appellant's notice of appeal would reveal that it is a direct attack on the reasons given by the High Court for the decision not to determine the preliminary objection to its jurisdiction at the stage it was raised and argued by the parties.

It must be realized that the primary grievance of the Appellant against the ruling of the High Court was that the preliminary objection argued was not to decide first before the further steps in the proceedings which culminated in the transfer of the suit to the general cause list and the order for joinder of NITEL. In its substance, the ground 1 is a complaint directed at the reasons offered and relied on by the High Court for the decision not to decide the preliminary objection and the particulars (i), (ii) and (iii) provided in support of the ground amply demonstrate that position. With respect to the learned SAN, the orders made by the High Court transferring the suit to the general cause list and joining NITEL as a defendant in the suit are the decisions made by the High Court in consequence of its decision not to decide the primary issue argued before it which was the preliminary objection.

The decisions or orders were made after that decision and also after the decision to overrule an objection which had not been considered and determined on the merit of the arguments canvassed by the parties thereon. I am in no doubt and so find that the ground 1 is a challenge or attack against the ratio decidendi of the High Court ruling with which the Appellant was dissatisfied. On that reason, I find no merit in the ground of objection and it fails.

The last of the grounds of objection is the one which posits that because grounds of appeal 1 and 2 are incompetent, the issues formulated therefrom are also incompetent.

The ground is entirely predicated on the assumption, which in view of the findings I have made above has turned out to be wrong, that grounds 1 and 2 were incompetent. My findings on grounds 2 and 3 of the objection have effectively taken the wind out of this

ground of objection leaving it barren and empty. Without a foundation, the ground automatically collapses and fails.

In the result, with my findings on all the grounds of the objection, it has no legs on which to stand and I dismiss it for being devoid of merit.

With the objection out of the way, I now turn to the issues raised in the appeal for determination. From the two grounds of appeal on the Appellant's notice of appeal, two issues were formulated by the learned Counsel for the Appellant at page 7 of the Applicant's brief. They are:-

"4.7 Is there sufficient evidence to determine if the Appellant acted as an agent to NITEL regarding the clearing services performed by the Respondent and the consequence of suing the Appellant alone? If the answer is in the affirmative, whether the failure to decide the issue does not constitute a breach of fair hearing. (Ground 1 of the Notice of Appeal).

4.2 whether the court was competent to make the order joining NITEL in the circumstance rather than striking out the case for want of jurisdiction. (Ground 2 of the Notice of Appeal)."

On his part, the learned SAN for the Respondent had submitted the following issues for decision in the appeal:-

"1. Whether the learned trial Judge was not right to have refrained at the preliminary stage from pronouncing on the status of the Appellant having regard to the materials before him? (Ground 1).

2. Whether the learned trial Judge was not right to have joined NITEL as the 2nd Defendant to this suit having regard to the materials before him? (Ground 2)."

By the terms of the grounds of appeal, the issues formulated by the learned Senior Counsel are more precise in defining the real complaints in the grounds and so are germane in the appeal.

I would determine the appeal on the basis of those issues which are in substance similar to the ones raised by the learned Counsel for the Appellant.

Issue 1

The submissions by the learned Counsel for Appellant on his Issue I are that the crux of the Appellant's preliminary objection at the High Court was that because the Appellant was an agent of a

disclosed principal, it ought not to be sued and since it was only defendant in the suit, the High Court had no jurisdiction to entertain it for absence of a necessary party.

According to the learned Counsel, the Respondent had shown that it was aware at all material time that the Appellant acted for and on behalf of NITEL in respect of the services rendered by it. She said the law is that the agent of a disclosed principal incurs no liability and cannot be sued in respect of the contract in which he acted as an agent, relying on judicial authorities that include: *CARLEN (NIG.) LTD. v. UNIJOS* (1994) 1 NWLR (323) 63 at 659 and *NIGER PROGRESS LTD. v. NORTH EAST LINE CORP.* (1989) 3 NWLR (107) 68 at 84.

It was the submission by learned Counsel that the High court's reason for declining to decide the preliminary objection was that there was no sufficient materials or acts to enable it do so citing a portion of the ruling appealed against at page 84 of the record of appeal. However, she contended that there was ample evidence from the affidavits and exhibits attached thereto before the High court which constituted sufficient materials to enable the High Court to decide the preliminary objection challenging its jurisdiction to entertain the suit. Exhibits A, C, D and E attached to the affidavit filed by the Respondent were referred to by learned Counsel which are said to show that the Respondent was appointed as clearing agent by NITEL for handling of customs clearance of goods imported for NITEL project and that payments due to the Respondent were to be made by NITEL only with no mention of the Appellant's name. It was her further submission that the Respondent had by the paragraph 12 of its affidavit admitted that all payments for its services were to be made by NITEL and that the role of the Appellant was that of mere conduit between Respondent and NITEL. She said what is admitted in affidavit requires no further proof and reliance was placed on *AMADI v. ACHO* (2005) 12 NWLR (939) 386 at 402. It was also submitted that there was abundant material placed before the make a finding that the Appellant acted as an clearing services rendered by the Respondent so hold. Since the High court had failed to determine the preliminary objection raised by the Appellant in spite of the available materials to enable it do so, this Court was invited by the learned Counsel to invoke the provisions of Section 16 of the Court of Ap-

peal Act to decide it. Further that there is no need to send back the matter to the High Court since all necessary materials are before the court to enable it to do so.

The cases of OBEM v. ASHUK (2005) 6 NWLR (922) 594 at 623 and DIAPALONG v. DARIYE (2007) 8 NWLR (1036) 332 at 404 were cited on the submission. Learned Counsel then referred to:- AMADIUME v. IBOK (2006) 6 NWLR (975) 158 at 173, LEVENTIS TECH. LTD. v. PETROJESSICA ENT. LTD. (1992) 2 NWLR (224) 459 at 468, and NIGER PROGRESS LTD. v. N.E.L. CORP. (supra) on the effect of identifying a proper party in a matter and she urged us to hold that the Appellant being an agent of NITEL in respect of the services rendered by the Respondent incurred no liability and should not have been sued. Also, that the consequence of suing the Appellant alone, robbed the High Court of jurisdiction to entertain the Respondent's suit which for that reason, is liable to be struck out.

In further argument, he said that the High Court had the duty to pronounce of all issues submitted to it for adjudication and failure to do so could occasion a miscarriage of justice, citing:- ATTORNEY GENERAL OF THE FEDERATION v. A.I.C. LTD. (2000) 10 NWLR (675) 293 at 308, OKWARA v. OKWARA (1997) 11 NWLR (527) 160 at 170 and OKONJI v. NJOKANMA (1991) 7 NWLR (202) 131 at 150. We were urged to resolve the issue in favour of the Appellant. The learned SAN for the Respondent had submitted on his Issue 1 that the Respondent's case before the High court was that the Appellant had refused to pay for the services rendered to it by the Respondent. That the Respondent had attached documents to its affidavit in support of its claim particularly Exhibit 'B' a letter from the Appellant and in reaction to which the Appellant filed a preliminary objection as well as a notice of intention to defend the suit. He pointed out that the sole ground of the objection by the Appellant was that it acted as an agent of NITEL and ought not to be liable for the Respondent's claim which was the same defence raised in the affidavit in support of the Appellant's notice of intention to defend the suit as borne out at pages 38 and 41-2 of the record of appeal. It was the contention of the senior counsel that the Appellant had thereby made it abundantly clear that the issue of whether it acted as an agent of NITEL would have to be determined on the merit if leave to defend was

granted to it. For that reason, he argued that the decision by the High court to decline to make a pronouncement on the preliminary objection before hearing of the suit on the merit cannot be faulted since it is settled law that a court must refrain from delving into the substantive suit at a preliminary stage of its proceedings. The cases of
 B ORJI v. ZARIA INDUSTRIES LTD. (1992) 1 NWLR (216) 124, UNIVERSITY PRESS LTD. V. I.K. MARTINS (NIG.) LTD. (2000) 4 NWLR (654) 584 at 595 and G.T.B. PLC. V. FADCO INDUSTRIES LTD. (2007) 7 NWLR (1033) 307 were cited in support of the position.

C It was the contention of the learned SAN that all that the High Court did in the case before it was to refrain from determining an issue which was the thrust of the Appellant's case as presented in the notice of intention to defend the suit and that it is the right approach to be adopted in the case. He said it was simply impossible for the
 D High Court to determine the status of the Appellant at the preliminary stage without calling evidence and that all the cases cited by the learned Counsel for the Appellant on the issue have no bearing with the case, because in all of them, agency of a disclosed principal had been established. To that extent, the cases were said to be inapplicable. In the alternative, it was argued by the learned silk that even if
 E it was shown that the Applicant was an agent of NITEL, it could still be sued and jointly liable to the Respondent, relying on BALOGUN v. PANALPINA WTC NIG. LTD. (1999) 1 NWLR (585) 66 at 83,
 F ALAN BOJOK BROS v. GREEK W.A. LINE (1970) N.C.L.R. 136 at 140 and HALBURY'S LAW OF ENGLAND, 3RD EDITION at Page 230. The Court was then urged to resolve the issue in favour of Respondent and hold that the High Court was right to have refrained from the pronouncement on the status of Appellant at the preliminary stage. I would decide this issue before considering the 2nd issue.

***General restatement of a few established and relevant principles of law on the issue would provide the foundation for the consideration and decision of the issue. Before that however, I should perhaps point out that the law is now settled
 H as indicated earlier while dealing with the preliminary objection by the learned SAN for the Respondent that where a preliminary objection was raised in a suit before a court challenging the jurisdiction of that court to entertain the suit on any ground, the court had the duty to determine the challenge***

to its jurisdiction first before taking further steps in the proceedings in the case.

It is a requirement of the law and also prudence that the question of jurisdiction whenever it is raised or arises in a case at whatever stage, should be determined first before any other or further steps are taken in the case by the court. The cases I have referred to earlier on the point have stated profoundly sound reasons for that position of the law in view of crucial nature of jurisdiction in judicial proceedings. The position of the law is so elementary that I do not need to repeat or cite more judicial authorities on it.

It is also a general and known principle of law that a court whether trial or appellate before whom issues were properly submitted by the parties in a case before it has the legal and binding duty to make pronouncements on or decide such issues. In addition to the cases cited supra by learned Counsel, see TITIOYE v. OLUPO (1991) 7 NWLR (205) 519, COOKEY v. FOMBO (2005) 5 SC (Pt.11) 102, DAAGIR v. KWAGHKAR (2006) ALL FWLR (306) 959, OJOH v. KAMALU (2006) ALL FWLR (297) 978. **The exceptions made to the principle include where an issue is subsumed in another issue decided by the court or where an issue is irrelevant or incompetent for not arising from the grounds of appeal or for issues being deliberately proliferated.** See COOKEY v. FOMBO (supra), ADEBAYO v. ATTORNEY GENERAL OGUN STATE (2008) 4 MJSC 80, ONOCHIE v. ODOGWU (2006) ALL FWLR (317) 544, EDEM v. CANNON BALLS LTD. (2005) 6 SC, (Pt. II) 16

The law is similarly now common knowledge that a court is required to avoid making pronouncements or deciding issues at the preliminary stage which would touch or decide on the issues to be decided in the substantive suit. The cases cited by the learned SAN on the principle of law and more have clearly established the position such that there is no need for me to cite more at this point. All the authorities are to the effect that a court should refrain from, avoid and should not decide or determine the substantive matter while considering or dealing with issues at the preliminary or interlocutory stage of the case.

I am tempted to cite the cases of NNPC v. FAMFA OIL LTD. (2009) 6 MJSC (Pt. II) 30, OKAFOR v. BENDEL NEWSPAPERS CORPORATION (1991) 7 NWLR (206) 651.

Bearing the above principles of law in mind, I now look at the preliminary objection filed by the Appellant in the High Court and on which it declined to decide at the stage it was raised. A copy of the notice of the preliminary objection dated the 22/2/08 but filed for the Appellant on 25/2/08 is at pages 338-9 of the record of the appeal.

On the face of the notice, the following primary relief or order was sought:-

“AN ORDER dismissing this suit for lack of jurisdiction as the Defendant/Applicant is not a proper party to this suit”

The grounds upon which the objection was predicated were that:-

“1. The Defendant/Applicant acted to the knowledge of the Plaintiff/Respondent as agent of Nigerian Telecommunications Limited

2. It is settled principle of our law that an agent to a disclosed principal incurred no liability in contract and can therefore not be sued.”

The above notice of preliminary objection was filed on the same day with a notice of intention to defend the suit along with an affidavit in support by the same learned Counsel for the Appellant and it appears at pages 40-42 of the record of appeal. At paragraphs 5 and 6 of the affidavit disclosing a defence on the merit filed by the Appellant in support of the notice of intention to defend the suit, the following averments were made:-

“5.” That at all time material to the transaction between the Plaintiff and the Defendant, the Defendant acted as an agent to Nigeria Telecommunication Limited (NITEL) for the following reasons:-

(i) The Plaintiff was appointed by NITEL to be a clearing and forwarding agent of its goods. In this regard, I refer to and rely on the Plaintiff’s letter of appointment attached to the affidavit and marked Exhibit A.

(ii) The equipments cleared by the Plaintiff were owned by NITEL.

(iii) The Plaintiff merely routed its invoice through the Defendant while NITEL would pay on verified invoices. Refer to and rely

on Exhibits C, D and E attached to the affidavit.

6. In view of the facts stated in paragraph 5 above, I know that the Defendant does not owe the Plaintiff the amount claimed or any sum at all and that the Defendant incurred no liability in respect of the transaction between the Plaintiff and NITEL/ Defendant, ”

These averments in clear language are saying that the Appellant was not liable to the Respondent because it was merely used by the latter to route its invoices to NITEL who appointed the Respondent as a clearing agent, for payment. That the Appellant acted as agent of NITEL in the transaction between it and the Respondent.

It cannot therefore be seriously disputed that both in the grounds on which the Appellant’s objection was predicated and the above averments in the affidavit filed in support of and along with the notice of intention to defend, the case of the Appellant is that it was an agent of NITEL in the subject of the Respondent’s suit and so not liable to the Respondent. Undoubtedly the crucial issue raised by the Appellant in both processes and submitted to the High Court for decision was whether the Appellant was in fact and law, the agent of NITEL in the transaction leading to the suit of the Respondent. The issue of whether the Appellant was an agent of NITEL in the transaction can only be properly determined when and if all the relevant evidence was made available to the High Court. Because the case of the Respondent was filed under the undefended list, the preliminary objection raised by the Appellant on the issue of being an agent of NITEL cannot be effectually and judiciously decided on the affidavit evidence filed by the parties in the suit. Since the issue is the same as in the substantive suit, it is diligent to deal and decide it once and for all after the parties had fully produced the evidence of the material facts at the trial of the suit. Before then, the High Court would clearly decide the issue which is central in the substantive suit at the interlocutory preliminary stage if it was to go ahead and pronounce either that the Appellant was an agent of NITEL or not.

That is what the authorities cited on the principle of law admonish courts to refrain from. That the issue raised in the preliminary objection challenges or questions the jurisdiction

of the High Court does not change its nature or character in the substantive suit as the High Court would still determine it at the trial. The principle of law that the issue of jurisdiction where it was raised or arose should be decided first should be understood in the context of the peculiar facts and circumstances of a case. The issue can only be properly determined first in line with the facts of a case because even though it may be an issue of law, it is the facts of a case that give it live and make it applicable. Without facts, the principles of law on jurisdiction cannot effectively be applied by the courts. Once again, because the same issue arises for decision in both the preliminary objection and the notice of intention to defend the action filed by the Appellant, it is one which is best decided as a defence at the trial and the outcome would then determine whether the High Court had jurisdiction over the suit. In the circumstances, the High Court was right to have deferred the determination of the issue at the preliminary or interlocutory stage. I find no merit in this issue and resolve same against the Appellant and in favour of the Respondent.

The 2nd issue for determination is whether the High Court was competent to make the order joining NITEL in the circumstances of the case or whether it was right to have joined NITEL in the suit.

The learned Counsel for the Appellant had submitted on the issue that the High Court could only make the order if it was competent or had the jurisdiction to do so. She said there is a feature in the case before the High Court which prevented it from exercising jurisdiction over the case, i.e. absence of proper parties. Cases on when a court is competent, effect of defect in jurisdiction and absence of proper parties were cited by the learned Counsel who urged us to hold that the order made by the High Court for joining NITEL in the suit was without jurisdiction and set it aside. Relying on Order 10 Rule 5(1) of the High Court Rules and cases in which similar rules were applied, the learned SAN for the Respondent submitted that the High Court had the discretion to order the joinder of NITEL as a party in the suit. Further that from the notice of intention to defend filed by the Appellant it was necessary to make the order and the High Court was right to have made the order. He urged us to so hold and resolve the issue in favour of the Respondent.

What can easily be deciphered from the submissions by the learned Counsel for the Appellant is that the reason for saying that the High Court lacked the jurisdiction to make the order was that the Appellant was an agent of a disclosed principal and therefore not a proper party to the suit. However the issue of the status of the Appellant which will, depending on the outcome, go to the jurisdiction of the High Court is the same in both the preliminary objection and the defence of the Appellant to the suit. To assume that merely because the Appellant asserts that it is not a proper party in the case the High Court would automatically lose its jurisdiction over the case would be simplistic and a clear misconception of the principles of jurisdiction of a court over a matter. Until a court after a consideration of all the relevant materials available in a case comes to the conclusion that it lacks the requisite competence or jurisdiction to entertain the case for any of the recognized reasons in law, it retains the competence and jurisdiction to conduct proceedings in the case, take steps therein which it considers necessary and make consequential orders accordingly.

I have noted that the Appellant here is not saying that the High Court cannot make an order for joinder of parties in a case before it pursuant to its Rules, but simply that it could not do so because the Appellant had asserted that it is not a proper party in the Respondent's suit. That position is not viable in law and cannot take away the jurisdiction of the High Court over the case until it decided the status of the Appellant in the transaction that led the case.

For that reason, the High Court at the time it made the order joining NITEL in the suit before it, had the requisite jurisdiction over the suit and so to make the order in the exercise of the discretion conferred on it by the provisions of Order 10 Rule 5(1) of its Rules which I have set out elsewhere before now. In consequence, I find no merit in the issue and resolve same against the Appellant and in favour of the Respondent.

In the final result, for lacking in merit, the appeal fails and is dismissed by me. The decision by the FCT High Court contained in

the ruling delivered on the 31/10/08 is hereby affirmed. Costs assessed at N50,000 are awarded in favour of the Respondent to be paid by the Appellant.

B

GALINJE JCA

I read in advance the judgment just delivered by my learned brother Garba, JCA and I agree with the reasoning contained therein and the conclusion arrived thereat. My learned brother has satisfactorily treated the two issues submitted for consideration with great admiration that I do not need to embark on repetition. For the same reasons ably articulated in the lead judgment which I adopt as mine, I too dismiss the appeal and endorse all the consequential orders made therein, including order as to cost.

D

NWODO JCA

I have had the privilege to read in draft the judgment of my learned brother GARBA JCA, just delivered now. I agree with the reasoning contained therein and the conclusion arrived thereat. The learned trial judge was right when he deferred a decision on the notice of objection till all the facts are presented. A trial judge has a duty to control the conduct of proceedings in his court for attainment of justice. Where an interlocutory application can only be determined properly after all facts have been presented before the court or where the determination of the interlocutory application will effectively result in the pronouncement of issues relating to the substantive claim, the court will refrain from making any pronouncement until the substantive claim is heard on merit and determined.

Furthermore, order 10 rule 5(1) of the High Court rules confers on the trial court the power to order a joinder of a party in a suit. Therefore, the court below had the requisite jurisdiction to order the joinder of NITEL at the stage of the proceedings. I also agree that the appeal lacks merit and for the fuller reasons in the lead judgment, I hereby dismiss this appeal and abide by the consequential orders made in the lead judgment.