

SUPREME COURT OF NIGERIA
TUESDAY 23RD NOVEMBER, 2012. SC. 33/2005
**CORAM:- W. S. N. ONNOGHEN, C. M. CHUKWUMA-
ENEH, B. RHODES-VIVOUR, M. D. MUHAMMAD,
C. B. OGUNBIYI, JJSC**

LOVLEEN TOYS INDUSTRIES LTD APPELLANT
AND
FEMI ADEWALE KOMOLAFE RESPONDENT

APPEALS - Ground of law - Determination - Nwadike v. Ibekwe - Ground is of law when inter alia - If Tribunal took into account - Some wrong criteria in reaching its conclusion (H1)

APPEALS - Grounds of law - Since the nature of the grounds are jurisdictional - And raises issue of fair hearing - 1999 Constitution s. 241(1) is applicable - Hence leave is not required (H2)

APPEALS - Extension of time - Application - Court of Appeal Act s. 25(2) provides for 14 days limit - Within which to file the application - From the nature of the decision complained against (H3)

APPEALS - Extension of time - Reasons for - Applicant must advance good and substantial reasons - And must show that his grounds of appeal are arguable (H4)

FACTS

Plaintiff/respondent who was an employee of defendant/appellant filed this action in the Federal High Court Abeokuta, claiming inter alia, various compensation ranging from injuries sustained while working in appellant's factory. Upon being served the originating process, appellant raised an objection challenging the jurisdiction of the court to hear the suit. Respondent on the other hand filed objection to the hearing of appellant's objection and also filed motion praying the court to transfer the suit to an appropriate division of the Ogun State High Court. At the trial, the court without hearing arguments on respondent's application for transfer, struck out the suit and directed that respondent go to the appropriate court.

Following the ruling, respondent filed motion praying the court to set aside the ruling and for a further order re-listing the suit and all pending applications. The prayers were granted on the 23rd March 2003. Dissatisfied, appellant filed appeal on the 30th May 2003 in the Court of Appeal Ibadan Division, praying for an order enlarging the time within which to file notice of appeal from the decision of the Federal High Court and for an order staying proceedings in the Federal High Court, pending the determination of the appeal. The Court of Appeal in its ruling struck out the appeal on the basis that the grounds of appeal are of mixed law and facts and that appellant failed to obtain leave before filing the appeal. Aggrieved, appellant appealed to Supreme Court.

HELD (Unanimously allowing the appeal per
OGUNBIYI JSC)

APPEALS - Ground of law - Determination

1. In the case of Nwadike & Ors. V. Ibekwe & Ors. (1987) 2 N.S.C.C. page 1219 at 1235 - 1234 Nnaemeka-Agu JSC laid down the following proposition as a general guide when a ground of appeal is that of law:-

“when then is a ground of appeal that of law? I shall deal with five particular classes although by its very nature the categories of errors of law are not closed.

i. It is an error of law if the adjudicating tribunal took into account some wrong criteria in reaching its conclusion or applied some wrong standard of proof or, if although applying the correct criteria, it gave wrong weight to one or more of the relevant actors;

ii. Several issues that can be raised on legal interpretation of deeds, documents, terms of act, words or phrases, and inferences drawn from there from are grounds of law;

iii. Where a ground deals merely with a matter of inference, even if it be an inference of fact, a ground framed on it is a ground of law; provided it is limited to admitted or proved and accepted facts... For many years, it has been recognized that inferences to be drawn

from a set of proved facts or undisputed facts, as distinct from primary facts, are matters upon which an appellate court is as competent as the court of trial.

iv. Where a tribunal states the law on a point wrongly, it commits an error in law.

v. Lastly, I should mention one class of ground of law which have the deceptive appearance of ground of fact where the complaint is that there was no evidence or an admissible evidence upon which a finding or decision was based. This is regarded as a ground of law, on the premises that in a jury trial there would have been no evidence to go to the jury.”

(p. 3404 H)

APPEALS - Grounds of law

2. The two proposed grounds of appeal centred the complaints on absence of jurisdiction and denial of fair hearing. The question is, can it be said that the foregoing complains border on mixed law and facts? In other words, by the appellant using the phrase “misdirected himself on the facts,” did it operate to alter the nature of the ground of appeal which in fact is a question of fair hearing? This, I will answer in the negative and certainly hold a misconception by the learned respondent’s counsel.

The reality of ground two of the proposed ground of appeal therefore is that it is complaining of lack of fair hearing, which is a cardinal principle of natural justice, which is well enshrined in section 36 part IV of our Constitution of the Federal Republic of Nigeria 1999. The use of the phrase “misdirected himself on the facts” cannot therefore operate to alter the nature of the ground of appeal from being ground of law. It is the content that is the overriding factor and not the use of language especially when it is misapplied.

I have earlier held in this judgment that with the nature of the two proposed grounds of appeal being jurisdictional and raising question of fair hearing, the governing provision is section 241(1) of the Constitution. In other words the nature of the appeal is of right and no leave was required as it did not come within section 242 (1) of the Constitution. What was however

required was an order for extension of time within which to file the notice of appeal from the decision complained of.
(pp. 3406 G/3407 D/H)

APPEALS - Extension of time - Application

B 3. The constitutional right of appeal has been stated earlier in the judgment as provided under section 241(1). Relevant although elementary to also restate is to say that section 25 (2) of the Court of Appeal Act under which the application was brought before the lower court provides for 14 days limit within which to file an ‘ application from the nature of the decision complained against. In other words with the decision complained of made on the 25th March 2003, the 14 days allowed by law within which to file the notice of appeal had expired on the 8th April, 2003. Order 3 rule 4(1) of the Court of Appeal Rules 2002 applicable and governing the application permits the lower court to enlarge the time within which appeal may be brought. (p. 3407 F)

E APPEALS - Extension of time - Reasons for

4. The application and the relief (i) sought as stated on the face of the motion paper at page 15 of the record of appeal could not have been more precise and appropriate. All that was required of the applicant/appellant was to have satisfied the court as to why he had failed to file his notice and grounds of appeal within the time permitted by the law. He must in other words advance good and substantial reasons for coming outside the time and also show by his proposed notice and grounds of appeal that they are arguable. This did not however require that he stood the likelihood of success on the appeal. In the case at hand, it is very informative and revealing on the facts deposed to that an earlier notice of appeal was attempted but same turned out to be incompetent. The evidence of indolence in the prosecution of his appeal cannot therefore be imputed on the applicant appellant.

The second consideration in the exercise of discretion, whether to grant the application or not, is the requirement that the grounds of appeal must be arguable. The two proposed

grounds of appeal, I have resolved are arguable with same raising questions of jurisdiction and the absence of fair hearing. Justice will in the circumstance demand that the applicant/appellant be given time to file his notice of appeal with the ultimate purpose of being heard. Shutting him out at this stage by refusing the application would not uphold the tenant of fair play and justice. The application I hold ought to have been granted. In the result I therefore hereby grant same and extend the time within which the applicant/appellant is to file its notice and grounds of appeal from the decision of the Federal High Court holden at Abeokuta per the Ruling of Hon. Justice (Mrs.) R. O. Olomojobi, given on the 25th of March 2003.
(p. 3408 B)

REPRESENTATION

O. T. Akinbiyi for the Appellant

U. V. Obi with A. M. Sanusi for the Respondent

Akeredolu v. Akinremi (1986) 1 NSCC 581

Nwadike v. Ibekwe (1987) 2 N.S.C.C. 1219

Kashadadi v. Noma (2007) 13 NWLR (pt. 1052) 570

NNPC v. FAMFA Oil Ltd (2012) All FWLR (pt. 635) 204

Ajuwa v. S.P.D.C. (2011) 12 SC (Pt. IV) 118

STATUTES & RULES REFERRED TO

Court of Appeal Act, s. 25(2)

Constitution of Federal Republic of Nigeria 1999, ss. 36, 241(1), 242

Court of Appeal Rules 2002, O. 3 r. 4(1)

LEAD JUDGMENT BY OGUNBIYI JSC

The appeal before us is against the refusal of the Court of Appeal Ibadan Division herein after referred to as “the court below,” to grant extension of time within which to file Notice of Appeal on the decision of the Federal High Court, Abeokuta, Ogun State which is hereafter referred to as “the trial court.”

Briefly, the rundown facts of this case are that the Respondent who was an employee of the appellant had caused the action to be filed at the trial court in August, 2003 wherein he claimed various

compensations ranging from injuries sustained while working in the appellant's factory at Ota, Ogun State, some alleged debts arrears of salary and damages for negligence. The fourfold reliefs sought by the Respondent at the trial court which are spelt out at page 9 of the record of appeal per the particulars of claim are as follows:-

B i. The sum of N195,403.75 being outstanding balance due from the defendant (now appellant) to the Plaintiff (now Respondent) plus interest on the said sum at the rate of 45% per annum from 1/6/2001 to date of judgment and final liquidation.

C ii. The sum of N51,844.00 being arrears of salary from August 2001 to August 2003, and a further sum of N3,988.00 per month until judgment and full liquidation being the arrears of salary due to plaintiff from the defendant plus interest on the said sum at the rate of 45% per annum from August 2002 till date of D judgment and final liquidation thereof.

iii. The sum of N500,000.00 being the total cost payable by the defendant for the two (2) Endoskeletal Right W.D. Prosthesis recommended for the management of the plaintiff's condition by the Defendant's appointed medical centre which the Defendant had E neglected and/or defaulted to pay.

iv. The sum of N10,000.00 (Ten thousand naira) as special and/or general damages and/or compensation for the Defendant's negligence.

F v. Cost of the action.

Upon service of the originating process on the Defendant (now it raised an objection against the suit by challenging the competence of the trial court to determine same. The plaintiff (now Respondent before us) also filed a notice of preliminary objection against the hearing of the said defendant's objection and also filed a motion praying G the trial court for a transfer of the suit before an appropriate Division of the High Court of Ogun State. When the matter came up before the trial court on the 23rd January, 2003 for hearing of all pending applications, the said court, without hearing arguments on the plaintiff's application for transfer, struck out the suit and directed that the H plaintiff go to the appropriate court. The said proceedings are all evidenced at page 23 of the record of appeal.

Sequel to the trial court's ruling aforesaid, the Respondent now before us filed a motion on notice before the trial court and prayed

for an order setting aside the ruling striking out the suit and for a further order relisting the suit and all pending applications. The prayers were on the 23rd March 2003 granted as evidenced at page 26 of the record of appeal. Being dissatisfied with the decision, the appellant/applicant pursuant to an application before the Court of Appeal Ibadan Division (the lower court) vide a motion on notice dated the 30th B May, 2003 and filed on the 24th September, 2003 prayed the court for the following two reliefs:-

“(i) An order enlarging the time within which to file a Notice of Appeal from the decision of the Federal High Court holden at Abeokuta (as per the Ruling of Hon. Justice (Mrs.) R.O. Olomojobi) given on the 25th of March, 2003). C

(ii) An order staying further proceedings in this suit in the Federal High Court or any other High Court pending the determination of this motion and the Appeal to this appellate court from the said decision of Hon. Justice (Mrs.) R.O. Olomojobi and for such further or other order(s) as the court may deem fit to make in the circumstances in the interest of justice.” D

The four grounds predicated the application are hereby reproduced as follows:- E

(a) The right of the Appellant to appeal from the decision complained about without leave is guaranteed under section 241(1) of the constitution of the Federal Republic of Nigeria 1999.

(b) Section 25(2) of the Court of Appeal Act limits the time within which to file an Appeal from the decision complained about to 14 (fourteen) days. F

(c) With the decision complained about having been given on the 25th of March, 2003, the normal time allowed within which to file the Notice of Appeal, had expired since the 8th of April, 2003. G

(d) Order 3 Rule 4 (1) of the Court of Appeal Rules 2002 permits this court to enlarge the time within which an appeal may be brought.

The applicant in support of the application deposed to an affidavit of 29 paragraphs stating the facts which would aid the court below in the exercise of its discretion in the determination of the application. By its ruling delivered on the 17th day of February, 2005, the lower court unanimously adjudged the application as incompetent and therefore struck out same. This was sequel to the reason H

that the grounds of appeal contained in the notice of Appeal were held as grounds of mixed law and facts which in the absence of the applicant failing to first seek and obtain leave of court before filing, the notice, was held incompetent.

B It is the foregoing ruling delivered on the 17th February, 2005 that forms the reason of this appeal now before us wherein the appellant by notice of Appeal dated and filed on the 1st March, 2005 raised three grounds of Appeal. The grounds without their particulars are as follows:-

C **GROUND 1**
The learned justices of the Court of Appeal erred in law when they held that the 1st ground of Appeal in the proposed Notice of Appeal (Exh. TOY 3 before them) was a ground of Mixed law and fact and therefore incompetent because leave was not sought to file
D the Appeal.

Particulars of Error a, b and c are supplied

E **GROUND 2**
The learned justices of the Court of Appeal erred in law when they held that the 2nd ground of Appeal in the proposed Notice of Appeal (Exhibit TOYS 3 before them) was incompetent for being a ground of mixed law and fact when the ground of appeal has to do with application of a part of Constitution of the Federal Republic of Nigeria 1999.

F Particulars of Error a, b and c are supplied

GROUND 3
The learned justices of the Court of Appeal erred in law when they did not grant the application for extension of time within which to appeal before them on the grand that the grounds of appeal are
G grounds of mixed law and fact, when at least one of the grounds of appeal proposed is a ground of law.

Particulars of Error a and b are supplied

The appellant in the circumstance is therefore seeking for the following relief from this court:-

H An order setting aside the decision of the Court of Appeal by striking out the application and hence to restore the application before the Supreme Court, conduct and grant the same by assuming the powers of the Court of Appeal. From the three grounds of appeal the appellant distilled a lone issue for determination which same

was also adopted by the respondent and reproduced as follows:-

“Whether leave was required to file the Notice of Appeal or to appeal on the Grounds of Appeal contained in the Notice of Appeal for which extension of time was sought before the Court of Appeal.”

The appellant in substantiating his appeal and grounding firm his position urged this court to uphold his argument especially having regard in particular to grounds one and two advanced in the proposed Notice of appeal. Submitting on the first ground of appeal, the learned appellant’s counsel argued that it is a pure ground of law having to do with the jurisdiction of the Federal High Court to sit over its own previous decision on appeal and setting the same aside. This learned counsel submitted is a matter of understanding or misunderstanding of the law whether substantive or procedural. The authority in the case of *Ogbechie & ors. V. Onochie & ors (1986) 1 NSCC 443* at page 445-446 was cited in support.

Also on the second ground of appeal the learned appellant’s counsel further re-iterated that the ground is based on an allegation of the absence of fair hearing and hence raises a question that the provision (section 36 of chapter IV) of the Constitution has been contravened in relation to the appellant. That the nature of couching a ground of appeal as to misdirection of facts did not ipso facto make it a ground of mixed law and fact as wrongly interpreted by the lower court. In otherwords that a ground of law would not cease to be thus simply because it has been pronounced as ground of fact. Cited also in support of the proposition is the case of *Akeredolu V. Akinremi (1986) 1 NSCC 581* at 600. Learned counsel therefore urged this court to set aside the ruling of the lower court the subject of appeal on the premise that the application was incompetent since leave was not sought and obtained before filing the ground of appeal contained in the proposed Notice of Appeal.

On his part and in urging for the dismissal of this appeal as lacking in merit, the learned respondent’s counsel submitted in favour of upholding the ruling of the lower court. This, counsel predicated because the grounds of the appellant’s notice of appeal are at best mixed law and fact and that the appellant ought to have first sought for and obtained the leave of the trial court or that of the lower court to appeal against the decision of the trial court.

In further submission, the learned counsel opined that the failure by

the appellant to obtain the requisite leave to appeal was fatal to its case and that the consequential effect was to render the appeal incompetent. That the lower court was therefore within reason and right in dismissing the appellant's application on the ground that it was incompetent.

B The determination of this appeal calls for a careful and calculated consideration of sections 241 and 242 of the Constitution of the Federal Republic of Nigeria 1999. On the one hand, the provision of Section 241(1) which relates to appeal as of right states thus:-

C *"An appeal shall lie from 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, decision in any civil or criminal proceedings;

D *(d) decisions in any civil or criminal proceedings on questions as to whether any of the provisions of chapter IV of this constitution has been, is being or is likely to be contravened in relation to any person."*

E On the other hand, section 242 (1) of the same Constitution which provides for appeals with leave states thus:-

"242 (1)

Subject to the provisions of Section 241 of this constitution, an appeal shall lie from decisions of the Federal High Court or a High Court to the Court of Appeal with the leave of the Federal High Court or that Court or the Court of Appeal."

F The phrase "subject to the provisions of section 241" presupposes and affirms the authoritative nature of section 241(1) wherein appeals falling there within the preview needed no leave but are of right. Various judicial pronouncements avail and have laid down certain settled principles of law or conditions that will qualify situational circumstances for appeal to lie either as of right or with leave as the case may be. The availing nature which will distinguish the foregoing compartmentalizing components is whether the question is of law, G fact or mixed law and facts to qualify respectively.

H ***In the case of Nwadike & Ors. V. Ibekwe & Ors. (1987) 2 N.S.C.C. page 1219 at 1235 - 1234 Nnaemeka-Agu JSC laid down the following proposition as a general guide when a ground of appeal is that of law:-***

“when then is a ground of appeal that of law? I shall deal with five particular classes although by its very nature the categories of errors of law are not closed.

i. It is an error of law if the adjudicating tribunal took into account some wrong criteria in reaching its conclusion or applied some wrong standard of proof or, if although applying the correct criteria, it gave wrong weight to one or more of the relevant actors; B

ii. Several issues that can be raised on legal interpretation of deeds, documents, terms of act, words or phrases, and inferences drawn from there from are grounds of law; C

iii. Where a ground deals merely with a matter of inference, even if it be an inference of fact, a ground framed on it is a ground of law; provided it is limited to admitted or proved and accepted facts... For many years, it has been recognized that inferences to be drawn from a set of proved facts or undisputed facts, as distinct from primary facts, are matters upon which an appellate court is as competent as the court of trial. D

iv. Where a tribunal states the law on a point wrongly, it commits an error in law. E

v. Lastly, I should mention one class of ground of law which have the deceptive appearance of ground of fact where the complaint is that there was no evidence or an admissible evidence upon which a finding or decision was based. This is regarded as a ground of law, on the premises that in a jury trial there would have been no evidence to go to the jury.” F

On the same principle, Eso JSC in the case of Ogbechie & Ors. V. Onochie & Ors. (1986) 1 N.S.C.C. 443 at pages 445 - 446 also had this to say:- G

“There is no doubt that it is always difficult to distinguish a ground of law from a ground of fact but what is required is to examine thoroughly the grounds of appeal in the case concerned to see whether the grounds reveal a misunderstanding by the lower tribunal of the law, or a misapplication of the law to the facts already proved or admitted, in which case it would be question of law. Where however the grounds are such that would reveal or are grounds that would question the evaluation of facts by the lower tribunal before H

the application of the law, that would amount to question of mixed law and fact. The issue of pure fact is easier to determine.”

The learned respondent’s counsel copiously relied on the authority in the case of *Kashadadi Vs Noma* (2007) 13 NWLR (pt. 1052) p. 570 at pages 522 and 530 wherein this court re-emphasized that:-

B *“it is the total package of the ground of appeal and the particulars therein that complete the exercise leading to the conclusion whether a ground of appeal is one of law or one of mixed law and fact, or one of facts simpliciter”.*

C In other words and from all deductions, the said authority is not contradictory to but is in strict congruent or consonance with the case of *Abidoye V. Alawode* supra.

On a careful perusal of the notice of Appeal subject of contention which was deposed to at paragraph 18 of the affidavit in support D of the motion, the same was struck out as incompetent by the lower court. The supplementary record at pages 42-46 is in reference. The exhibited notice of appeal to the affidavit was marked Exhibit TOYS 4 and contains two grounds of appeal, which reproduction without the particulars read thus:-

E *“1. The learned trial judge erred in law by setting aside His Lordship’s decision made on the 23^d of January, 2003 (to strike out the suit) when decision was made without jurisdiction of His Lordship; and*

F *2. The learned Trial judge erred in law or otherwise misdirected himself on the facts when his Lordship failed to give fair hearing to the Defendant/Appellant on the 11th of March, 2003 when the application to relist the case was heard.”*

While particular (a) to the 1st ground of appeal alleges that the G case was outside the jurisdiction of the Federal High Court, particular (c) to ground two alleges that the appellant was not given an opportunity to explain his absence in the court when the application to re-list was eventually heard and in his absence.

H ***The two proposed grounds of appeal centred the complaints on absence of jurisdiction and denial of fair hearing. The question is, can it be said that the foregoing complains border on mixed law and facts? In other words, by the appellant using the phrase “misdirected himself on the facts,” did it operate to alter the nature of the ground of appeal which in***

fact is a question of fair hearing? This, I will answer in the negative and certainly hold a misconception by the learned respondent's counsel. In the case of Abidoye V. Alawode (2001) 2 M.J.S.C. page 49 at 59 this court per Onu JSC for instance had this to say:-

"What is important in determining whether a ground of appeal involved questions of law or fact or mixed law and fact is not its cognomen or its designation as "Error of Law" it is rather the essence of the ground, the reality of the complaints embedded in that name that determines what any particular ground involves."

It is significant to re-echo that the trial court in its ruling at page 10 of the record of appeal pronounced the *inability* of the court to sit on two previous occasions at which a counsel for the appellant was present but on the 3rd occasion when the counsel was absent, the court sat and the pending applications were heard. **The reality of ground two of the proposed ground of appeal therefore is that it is complaining of lack of fair hearing, which is a cardinal principle of natural justice, which is well enshrined in section 36 part IV of our Constitution of the Federal Republic of Nigeria 1999. The use of the phrase "misdirected himself on the facts" cannot therefore operate to alter the nature of the ground of appeal from being ground of law. It is the content that is the overriding factor and not the use of language especially when it is misapplied.**

The constitutional right of appeal has been stated earlier in the judgment as provided under section 241(I). Relevant although elementary to also restate is to say that section 25 (2) of the Court of Appeal Act under which the application was brought before the lower court provides for 14 days limit within which to file an 'application from the nature of the decision complained against. In other words with the decision complained of made on the 25th March 2003, the 14 days allowed by law within which to file the notice of appeal had expired on the 8th April, 2003. Order 3 rule 4(1) of the Court of Appeal Rules 2002 applicable and governing the application permits the lower court to enlarge the time within which appeal may be brought.

I have earlier held in this judgment that with the nature

of the two proposed grounds of appeal being jurisdictional and raising question of fair hearing, the governing provision is section 241(1) of the Constitution. In other words the nature of the appeal is of right and no leave was required as it did not come within section 242 (1) of the Constitution. What was
 B *however required was an order for extension of time within which to file the notice of appeal from the decision complained of. The application and the relief (i) sought as stated on the face of the motion paper at page 15 of the record of appeal*
 C *could not have been more precise and appropriate. All that was required of the applicant/appellant was to have satisfied the court as to why he had failed to file his notice and grounds of appeal within the time permitted by the law. He must in*
 D *other words advance good and substantial reasons for coming outside the time and also show by his proposed notice and grounds of appeal that they are arguable. This did not however require that he stood the likelihood of success on the appeal. In the case at hand, it is very informative and revealing on the facts deposed to that an earlier notice of appeal*
 E *was attempted but same turned out to be incompetent. The evidence of indolence in the prosecution of his appeal cannot therefore be imputed on the applicant appellant.*

The second consideration in the exercise of discretion, whether to grant the application or not, is the requirement
 F *that the grounds of appeal must be arguable. The two proposed grounds of appeal, I have resolved are arguable with same raising questions of jurisdiction and the absence of fair hearing. Justice will in the circumstance demand that the ap-*
 G *plicant/appellant be given time to file his notice of appeal with the ultimate purpose of being heard. Shutting him out at this stage by refusing the application would not uphold the tenant of fair play and justice. The application I hold ought to have been granted. In the result I therefore hereby grant same and*
 H *extend the time within which the applicant/appellant is to file its notice and grounds of appeal from the decision of the Federal High Court holden at Abeokuta per the Ruling of Hon. Justice (Mrs.) R. O. Olomjobi given on the 25th of March 2003.*

In respect of the second relief sought on the motion paper for

“an order staying further proceedings,” same was sought for without a subsisting and competent notice of appeal on ground. While the aspect seeking *“an order pending the determination of this motion”* had been overtaken on the granting of the 1st relief, the second leg of prayer seeking for stay *“pending the determination of the appeal”* was pre-emptive upon non existing appeal. The order cannot therefore be made. B

On the totality of this appeal same I hold succeeds as it has merit. The orders made by the Court of Appeal on the 17th day of February, 2005 and striking out the application filed 24/9/2003 is hereby set aside. The applicant/appellant in the circumstance is given 14 days extension of time from today within which to file its notice and grounds of appeal per the Notice of Appeal deposed to at paragraph 18 of the affidavit in support of the motion which same is marked Exhibit “TOYS 4” at pages 17, 27 and 28 of the record of Appeal. I make a further order that parties are each to bear their costs. Appeal succeeds and I make no order as to costs. C D

CHUKWUMA-ENEH JSC

I am privileged to read before now the judgment prepared by my learned brother Ogunbiyi JSC in this appeal. I agree with his reasoning and conclusion that the appeal has merit and should be allowed. E

The appellants have applied for extension of time within which to file Notice of Appeal. The application has been refused as the two grounds of appeal contained in the said Notice of Appeal have been raised without leave of court as required under section 241(l)(f) of the 1999 Constitution (as amended). F G

The two grounds are:

1. The learned trial judge erred in law by setting aside his lordship’s decision made on 23rd of January, 2003 (to strike out the suit) when the decision was made without jurisdiction of his lordship; and H

2. The learned trial judge erred in law or otherwise misdirected himself on the facts when his lordship failed to give fair hearing to the defendant/appellant on the 11th day of March, 2003 when the applications to relist the case was heard.

The lead judgment has closely scrutinized these grounds which substantially are based on want of jurisdiction and fair hearing. The complaint in the first ground is clearly founded on the issue of jurisdiction of the trial judge to entertain the cause. Jurisdiction is a matter of substantive law and to take an issue on jurisdiction is to query the power of the adjudicating tribunal and it goes to the root of the action. This ground is plainly one of law.

The second ground of appeal although clumsily couched is a ground of law as the word “or” used therein is to be construed disjunctively. Once the construction of the said ground is approached from that angle it becomes clearer that the appellants have complained of denial of fair hearing in law and that this is so based on the necessary inferences drawn from accepted facts in the matter. See *Nwadike v. Ibekwe* (1987) 4 NWLR (pt.67) 718.

For all this and fuller reasons in the lead judgment I also find merit in the appeal and allow it. I abide by the orders contained in the lead judgment.

MUNTAKA-COOMASSIE JSC

This is an appeal against the decision of the Court of Appeal Ibadan Division - lower Court for short-which court turned down the request before it to grant extension of time within which the appellant can file its Notice of Appeal against the decision of the trial court that is Federal High Court, Abeokuta, Ogun State.

The Defendant at the trial Court raised an objection against the suit by challenging the competency of the trial court to determine the matter. The defendant now appellant urged the trial Court to decline jurisdiction. The plaintiff now Respondent in turn filed a preliminary objection to the hearing of the objection filed by the defendant. They urged the trial Court to make an order transferring the matter before a competent High Court for hearing.

The trial Court, without hearing arguments on the plaintiffs’ application for transfer, struck out the suit. The respondent herein filed a motion on Notice before the trial court which struck out the suit to rescind its previous decision and directive. In other words he urged the Court to set aside its previous ruling. He also asked that Court to re-list all pending applications. The trial Court succumbed

to the request. Aggrieved by the decision, the appellant/applicant filed a motion before the lower court and prayed for two reliefs.

“1. An order enlarging the time within which to file a Notice of Appeal from the decision of n the Federal High Court holden at Abeokuta (as per the Ruling of Hon. Justice (Mrs.) R. O. Olomajobi) given on the 25th of March, 2003. B

2. An order staying further proceedings in this suit in the Federal High Court or any other High Court pending the determination of this motion and the Appeal to this appellate court from the said decision of Hon. Justice (Mrs.) R.O. Olomajobi and for such further or other order (s) as the court may deem fit to make in the circumstances in the interest of Justice.” C

After considering all the issues the learned Justices of the lower Court unanimously held that the application is incompetent and struck same out. The appellant again came to this Court on a Notice of Appeal containing three grounds of appeal. There is no any visible necessity for me to reproduce same here. The appellant distilled a lone issue for the determination of the appeal thus:-

“Whether leave was required to file the Notice of Appeal or to appeal on the grounds of appeal contained in the Notice of Appeal for which extension of time was sought before the Court of Appeal” E

He then urged this Court to uphold his appeal.

I have had the privilege of reading before now the lead judgment rendered by my learned brother Ogunbiyi JSC. I fancy the reasoning of his Lordship. I have no option but to wholeheartedly agree with his reasons in allowing this appeal. I too allow this appeal as it is pregnant with tremendous merit. The orders made by the lower court cannot therefore stand same are thereby set aside. I abide by the consequential orders made by my learned brother Ogunbiyi JSC. Parties shall bear their own respective costs. F G

RHODES-VIVOUR JSC

This appeal was filed in this court because the Court of Appeal refused to grant the appellant extension of time within which to file Notice of Appeal. H

The reason for the refusal by the Court of Appeal can be seen in the concluding part of the Ruling delivered on the 17th day of

February 2005. It reads:

“...what appears to be the only exception before appeal against courts exercise of its discretion can lie without leave of court are those in section 241 (1) (f) of the Constitution. It is my view therefore that the 1st ground of appeal raises issues of mixed law and fact which requires leave of court. The second ground of appeal which alleges error in law or misdirection on the facts is, on its showing a ground of mixed law and facts. It is self-evidently a ground which involves mixed law and facts for which therefore leave ought to be sought and obtained. On the whole it is my view that in the absence of the leave of court sought and obtained the Notice of Appeal is incompetent and same is accordingly struck out.”

Was the Court of Appeal correct? This can only be answered after an examination of the two grounds of appeal to see if they can be filed with leave or as of right. The two grounds of appeal read:

1. The learned trial judge erred in law by setting aside his lordship’s decision made on 23rd of January, 2003 (to strike out the suit) when decision was made without jurisdiction of his lordships; and

2. The learned trial judge erred in law or otherwise misdirected himself on the facts when his lordship failed to give fair hearing to the defendant/appellant on the 11th day of March, 2003 when the application to relist the case was heard.

The two grounds of appeal complain of absence of jurisdiction and denial of fair hearing. In determining whether a ground of appeal involves questions of law or mixed law and fact or simply fact, what is required is for the grounds and the particulars to be comprehensively examined to identify or appraise oneself with the substance of the complaint. It is a ground of law if the ground complains of a misunderstanding of the law or misapplication of the law to facts already established.

It is a ground of mixed law and fact if the ground complains or questions evaluation of facts before the law was applied. A ground of fact is more straightforward. See *NNPC & Anor v. FAMFA Oil Ltd* (2012) All FWLR (pt. 635) p. 204, *Ajuwa & Anor v. S.P.D.C.* (2011) 12 SC (Pt. IV) p.118, *Ogbechie & ors. V. Onochie & ors.* (1986) 1 NSCC p.443, *Nwadike v. Ibekwe* (1987) 4 NWLR (pt. 67) p.718. On 23/1/2003, the learned trial judge struck out the suit and on 25/3/

2003 set aside his order made on 23/1/2003, and ordered the suit relisted. The complaint in ground one is that the learned trial judge was incompetent to set aside his own decision which according to the appellant was made without jurisdiction. Jurisdiction is a question of law. Ground one is a ground of Law. Ground two is a complaint of denial of fair hearing. B

Fair hearing is provided for by section 36 of the Constitution. Nowhere in the ground or the particulars is there a complaint of evaluation of facts before the law was applied. The ground simply complains of denial of fair hearing. This is also a ground of law, and by the provisions of section 241 (1) of the Constitution the nature of the appeal is as of right. Leave was not required. The Ruling of the Court of Appeal delivered on the 17th day of February 2005 was wrong. C

In conclusion, I am in complete agreement with the comprehensive judgment of my learned brother Ogunbiyi, JSC which I was privileged to read in draft. The appeal succeeds and I make the orders which Hon. Justice C. B. Ogunbiyi proposes. D

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