

SUPREME COURT OF NIGERIA
FRIDAY 8TH FEBRUARY, 2012. SC. 113/2003
CORAM:- I. T. MUHAMMAD, M. U. PETER-ODILI,
O. ARIWOOLA, C. B. OGUNBIYI, K. B. AKA'AH, JJSC

CONTRACT RESOURCES NIG. LTD APPELLANT
AND
STANDARD TRUST BANK LTD RESPONDENT

APPEALS - Preliminary objection - Determination - Objection must first be determined - As it is capable of disposing the entire appeal - Without necessarily delving into the merit thereof (H1)

APPEALS - Words & phrases - Judgment - Ruling - Use of judgment or ruling connotes a decision of court - And should not therefore be a reason for controversy (H2)

APPEALS - Issue - Formulation - An issue is competent only if it arises from ground of appeal - And appeal must be based on ratio decidendi - From which issues must be formulated (H3)

APPEALS - Court of Appeal - Powers - By C.A. Act s. 18 - The court can make equitable order(s) - In the interest of justice administration - So as to preserve the subject matter of dispute between parties (H4)

FACTS

Before the High Court of Enugu State, plaintiff/appellant obtained judgment under the undefended list against defendant/respondent. Subsequently, respondent filed a motion for stay of execution of the judgment. In his ruling, the learned trial Chief Judge J. C. N. Ugwu granted respondent a conditional stay of execution. Following the order for conditional stay of execution, respondent filed a motion on notice before the Court of Appeal, Enugu Division, seeking for a variation of the conditional stay granted by the High Court.

It is upon this application for variation that the ruling of the court had its foundation. Thus, in exercise of its powers under section 18 of the Court of Appeal Act, the court varied the conditional

stay. Appellant was aggrieved and it appealed to Supreme Court after leave was granted to it extending time to appeal on issue of mixed law and facts. Respondent on its part raised preliminary objection to the hearing of the appeal on the basis inter alia, that the entire appeal is a fraud.

ISSUE FOR DETERMINATION

Whether the Court of Appeal was right when it ordered a stay of execution of the judgment of a High Court entered to wit: “the sum of N45, 178,570.03 being the value of the bank draft, with 20% interest on the sum with effect from 20/8/99 till payment is fully liquidated” on the only condition to wit: “that a Bank guarantee in the sum of N46, 495,605.00 shall be lodged with the Deputy Chief Registrar, to facilitate due payment to the Respondent if per chance, the appeal fails.” And if a Bank guarantee without incorporating the 20% interest, with effect from 20/8/99 till payment is liquidated is the same with depositing judgment sum in an interest yielding account, whereas the stay of bank guarantee of an abstract sum of N46, 495,605.00 favoured only the Applicant/Respondent?

HELD (Unanimously dismissing the appeal per OGUNBIYI JSC)

APPEALS - Preliminary objection - Determination

1. As a pre-requisite to this appeal the practice is well established and settled that any objection raised must first be determined and disposed of at the onset before any step is taken on the merit of the appeal if any. The reasoning behind this measure is of course obvious in the sense that certain objections operate to dispose of the entire appeal at the stage of the objection without necessarily having to dwell (sic, delve) into the merit thereof. (p. 922 D)

Words & phrases - Judgment - Ruling

2. I would want to believe that the respondent’s objection has to do with the use of the word judgment instead of ruling in the course of the application for extension of time within which to apply for leave to appeal. Without having to belabor the

issue, the law is well established and therefore held as trite that the use of the words judgment or ruling both connote a decision of a court. This should not therefore be a reason for controversy. Suffice it to say that an order was sought and obtained to appeal a dissatisfaction of a court's decision. The finality or interlocutory nature of the order should not be a relevant point of contention. The notice of appeal in question as an originating process is, prima facie competent. The objection raised by the learned respondent's counsel in that behalf is in my view, unfounded as it is not substantiated. It is grossly misconceived and therefore overruled. (p. 923 C)

APPEALS - Issue - Formulation

3. The 1st question raised for determination relates to the legal personality and the existence of the respondent Bank. The law is well established that an issue would be competent for determination only if it relates to and/or arises from any of the grounds of appeal. The failure to relate otherwise is to render the issue incompetent and liable to be struck out.

An appeal must also be based on the decision or ratio decidendi of the lower court and from which issues must directly flow and be formulated.

From the totality of the entire affidavit evidence before the lower court, I hasten to state that there was no evidence on the question of legal personality and the proof of existence of the Respondent Bank as alleged by the appellant. The record of appeal will bear evidence as rightly submitted on behalf of the respondent that the issue formulated did not either arise from ground one of the ground of appeal or from any of the other three grounds of appeal. There is therefore no nexus or correlation between question/issue one as formulated and the grounds of appeal filed.

The issue no 1 having not arisen from any of the grounds of appeal should and is accordingly struck out for incompetence. (p. 925 H)

Court of Appeal - Powers

4. As a matter for observation, both counsel representing the

parties have, rightly in my view, submitted on the combined effect of the provisions of Section 18 of the Court of Appeal Act and order 1 Rule 20 sub-rules (4) and (5) of the Court of Appeal Rules whereby the lower court is empowered to make just and equitable order or orders in the best interest of the
B administration of justice with a view to preserving the subject matter of dispute between the parties. On an analytical frontloading exercise and perusal of the Ruling by the lower court, the resume thereof is a product of the trial court whereof
C it granted a conditional stay of its judgment. It is this order, that the Court of Appeal, pursuant to Section 18 of the Act, varied by imposing conditions which it considers proper in the exercise of its discretion with respect to contending issues between the parties. Putting it succinctly, the power of
D the Court of Appeal under Section 18 of the Act is circumscribed within the context wherein the earlier order was varied on more favourable terms; this was what the ruling appealed against had set out to do.

E On a corporate reading of Section 18 of the Court of Appeal Act, the power endowed in the Court is discretionary and its exercise must be judicious and judicial having regard to due consideration of all circumstances and taking into account available materials placed before the court. The exercise must be with great caution and not whimsical or lackadaisical.

F I have emphasized in strong terms that contrary to the argument advanced on behalf of the appellant, it is not correct as submitted by his counsel that the lower court gave due consideration to extraneous issue in the determination of the ap-
G plication that varied the terms of the conditional stay. A cursory examination of the ruling appealed against will bear out that the lower court in its consideration paid due attention to the facts of the case, the materials placed before it and all the circumstances of the case as revealed on the record. It is not
H therefore borne out that the court acted arbitrarily or capriciously, as alleged, but judicially and judiciously. Consequently the said question No 3 is hereby resolved against the appellant. (pp. 930 F/932 B)

NOTABLE POINT OF INTEREST

PETER-ODILI JSC

1. Fresh issue in Supreme Court – Conditions for

For the appellant was contended that the point being now sought to be brought in was not raised in the court below, the application should be discountenanced, but that it meets the requirements for such points to be allowed in respondent's view point is that the issue should not be allowed to be introduced having not been an issue in the court below. On this matter therefore resort for guidance would be placed on this court's decision in *Abaye v. Ofili* (1986) 1 NWLR (pt. 15) 134 where it was stated as follows:

"It is settled that the Supreme Court will allow a fresh point of law to be raised before it even if such point was not taken in the court below on the following conditions.

(a) There is before the Supreme Court all the evidence which is needed to completely support the new contention.

(b) The point of law if argued in the court below would have been decisive." (p. 937 C)

REPRESENTATION

Appellant not in court also not represented

O. U. Inneh Esq. with Oluwatosin Adisa Esq., for the Respondents

CASES REFERRED TO

Kokoro-Owo v. Lagos State Govt. (2001) 5 SC (pt. 11) 50

Achiakpa v. Nduka (2001) 7 SC (pt. 111) 125

A-G Bendel State v. Aideyan (1989) 4 NWLR (pt. 118) 646

Buraimoh v. Bamgbose (1989) 3 NWLR (pt. 109) 352

A.B.U. v. Molokwu (2003) 9 NWLR (pt. 825) 265

Osinupebi v. Saibu (1982) 7 SC 104

Kari v. Ganaram (1997) 2 NWLR (pt. 488) 380

Araka v. Ejeagwu (2000) 12 SC (pt. 7) 99

Ehigbe v. Omokhafa (2004) 18 NWLR (pt. 905) 319

Okeke v. Oruh (1999) 4 SC (pt. 11) 37

R.E.A.N. v. Aswani Textile Industries Ltd (1992) 3 NWLR (pt. 227) 1

Erogoro v. Govt. of Cross River State (1991) 4 NWLR (pt. 185) 322

UBN Plc. v. Ntuk (2003) 16 NWLR (pt. 845) 183

Re Adetona (1994) 3 NWLR (pt. 333) 481

Obiakor v. The State (2002) 10 NWLR (pt. 776) 612

STATUTE & RULES REFERRED TO

Court of Appeal Act Cap. 75 LFN 1990, s. 18

B Court of Appeal Rules 2002, O. 1 r. 20 sub-rr. 4, 5

LEAD JUDGMENT BY OGUNBIYI JSC

C This appeal stems from the interlocutory Ruling by the Court of Appeal, Enugu Division dated 25th April, 2001 wherein the conditions for the stay of execution of judgment of the High Court Enugu State delivered on 11th October, 1999 were varied. The said judgment at pages 96 and 97 of the record of appeal is in the following terms:-

D *“The court hereby entered judgment in favour of the plaintiff as follows:-*

(1) The defendant is to pay to the plaintiff the sum of N45, 178,570.03 being the value of Bank Draft No. 48356 dated 18/8/99 due to the Plaintiff.

E *(2) The Defendant is also to pay to the plaintiff 20% interest on the sum with effect from 20th August, 1999, till payment is fully liquidated.*

F *(3) The Defendant is also to pay the plaintiff the sum of N5, 000.00 costs inclusive of out of pocket expenses.”*

G It is pertinent to recast that the judgment resulting this appeal was obtained by the appellant as the plaintiff against the respondent under the undefended list. For purpose of avoidance of confusion, I wish to state that the original respondent in this matter was the Standard Trust Bank Ltd. By order of this court made on 3rd day of November, 2010, the said respondent was substituted by United Bank for Africa.

H The Respondent on 12th October, 1999 therefore filed a motion for stay of execution of the judgment delivered on 11/10/99. The learned Chief Judge J.C.N. Ugwu in his ruling delivered on 19th January, 2000, granted the Respondent a conditional stay of execution which covered both the principal judgment sum and interest thereon in the following terms:-

“the order for stay of execution hereby granted is subject to

the following conditions:

(1) The judgment award of N46, 495,605.00 be deposited with the Chief Registrar, High Court, Enugu within seven (7) days by the Applicant, the condition being that whoever wins on appeal shall be entitled to the amount deposited.

(2) That upon compliance with condition (1) above the Plaintiff/Respondent shall lodge with the Chief Registrar High Court, Enugu, within 48 hours thereon, a bank guarantee from a reputable commercial Bank in the sum of N46, 495,605.00 to pay to the Applicant/Defendant herein through the Chief Registrar, High Court, Enugu the deposited sum of N46, 495,605.00 should the appeal lodged succeed.

(3) That the Respondent's solicitor namely Obi Okwusogu & Co. be paid the cost awarded against the Applicant/Defendant:

(a) N5,000 awarded on 11th October, 1999.

(b) N2,500 awarded on 27th October, 1999.

Totaling N7,500 and the same to enter into undertaking with the Chief Registrar, High Court, Enugu immediately to refund the sum of N7,500 if the appeal succeeds.

(4) That upon fulfillment of conditions (1) and (2) above, execution as to the judgment award be stayed, and on fulfillment of condition (3) above, execution as to costs be stayed or both stay of execution, as the case may be, pending the determination of the appeal against the aforesaid judgment."

The Respondent herein by a motion on notice brought pursuant to Section 18 of the Court of Appeal Act chapter 75 Laws of the Federation of Nigeria sought and obtained from the lower court a variation of the terms of the conditional stay of execution granted by the trial court on the 19th January, 2000. It is upon the application for variation that the ruling of the Court of Appeal dated 25th April, 2001 had its foundation. In otherwords the lower court in the exercise of its powers under Section 18 of the Court of Appeal Act, supra, varied the conditional stay granted by the trial court. The ruling of the Court of Appeal, Enugu Division dated 25th April, 2001 is contained in pages 143 - 153 of the Record of Appeal.

It is worthy of note that the Appellant herein sought and obtained from this court an extension of time within which to apply for leave to appeal, leave to file the Notice of Appeal and Grounds of

Appeal, and also leave to appeal on issue of mixed law and facts. The Notice and Grounds of Appeal containing four grounds dated and filed 25th February, 2005 is contained in pages 158 - 161 of the Record of appeal.

In compliance with the practice of this court briefs were filed and exchanged by parties. While the appellant's brief settled by Chief Obi D. E. Onukwuli was dated 16th May, 2005 and filed on the 8th June, 2005 that of the respondent also settled by Dr. Joseph Nwobike, SAN was dated 12th December, 2010 and filed on the 16th December, 2010. There was no reply brief filed by the appellant.

On the 12th November, 2012 the learned appellant's counsel was not in court. Sequel to his letter dated 2nd February, 2012 he intimated this court that his appeal be deemed argued and same was so ordered by the court. The learned counsel O. U. Inneh, Esq representing the respondent introduced the preliminary objection raised in his brief of argument and urged that the court should sustain same and strike out the entire appeal.

As a pre-requisite to this appeal the practice is well established and settled that any objection raised must first be determined and disposed of at the onset before any step is taken on the merit of the appeal if any. The reasoning behind this measure is of course obvious in the sense that certain objections operate to dispose of the entire appeal at the stage of the objection without necessarily having to dwell into the merit thereof.

The objection raised by the respondent questions the competence of the appeal which counsel submitted should be struck out in limine. The predicated ground of objection is that the entire appeal is a fraud. This, counsel alleged because the relief which was sought and obtained from this court was for an order for extension of time within which to apply for leave to appeal against the judgment of the Court of Appeal Enugu Division delivered on 25th April, 2001.

Counsel further argued that no judgment was delivered on April 25, 2001 by the Court of Appeal Enugu Division as evidenced by the Record; that the appeal filed by the appellant is not in respect of any judgment of the Court of Appeal Enugu Division delivered on April 25, 2001 or at any other date at all.

The other leg of objection relates to grounds B, C, and D of

the grounds of appeal which learned counsel informed the court did not arise from the ruling of the Court of Appeal in question. He contended further that no leave was either sought or obtained to raise the said grounds; that questions nos. 1, 3 and 4 distilled by the appellant from grounds A, C or D of the grounds of appeal bear no nexus to the said grounds of appeal filed. B

The determination of the 1st leg of objection raised requires that recourse be had to the notice of appeal and also the subject matter thereof. In other words, with reference to the said notice at pages 158 - 161 of the record, the reason for the appeal is as a result of dissatisfaction “with the ruling of the Court of Appeal Enugu Division dated 25th day of April, 2001.” C

I would want to believe that the respondent’s objection has to do with the use of the word judgment instead of ruling in the course of the application for extension of time within which to apply for leave to appeal. Without having to belabor the issue, the law is well established and therefore held as trite that the use of the words judgment or ruling both con- note a decision of a court. This should not therefore be a rea- son for controversy. Suffice it to say that an order was sought and obtained to appeal a dissatisfaction of a court’s decision. The finality or interlocutory nature of the order should not be a relevant point of contention. The notice of appeal in ques- tion as an originating process is, prima facie competent. The objection raised by the learned respondent’s counsel in that behalf is in my view, unfounded as it is not substantiated. It is grossly misconceived and therefore overruled. D E F

The second leg of objection further questions the competence of grounds B, C and D of the grounds of Appeal. In other words that they neither arose from the Ruling of the lower court sought to be appealed nor was leave of this Court to appeal on the grounds sought and obtained. The reproduction of all the grounds A, B, C and D as well as questions 1, 2, 3 and 4 would be apt and pertinent for purpose of determining whether or not they in fact have any bearing and relationship one with the other. Grounds of Appeal A, B, C and D without their particulars state as follows:- G H

GROUND A: ERROR IN LAW.

“The learned Justices of the Court of Appeal misdirected them-

selves in law when they granted a stay of execution of a monetary judgment in favour of a Bank and held that:

“The sum of N46, 495,505.00 which is the judgment sum is quite a big chunk. To order the Applicant to pay such into another bank in the prevailing circumstance of this matter will be inequitable.

B I strongly feel that there are special circumstances to warrant the grant of the application for stay with no nebulous conditions attached to same. The condition to be attached shall be clear and unambiguous. The application is hereby granted the Deputy Chief Registrar of this court a Bank guarantee in the sum of N46, 495,605.00 by a reputable bank (not U.B.A. Ltd) Respondent if, per chance, the appeal fails.”

“Despite their earlier findings, haven opined thus:

D “The trial C. J, in his considered view, felt that the defendant had no defence to the plaintiff’s action. He entered judgment against the defendant in the sum of N45, 178,570.03 being the value of the bank draft with 20% interest on the sum, with effect from 20/8/99 till payment is fully liquidated occasioning thereby a miscarriage of justice.

*E **GROUND B: ERROR IN LAW.***

F The Learned Justices of the Court of Appeal erred in law when they failed to discharge the duty cast upon them not to grant a stay of execution of monetary judgment based on Notice of Appeal signed in the name of a firm of Legal Practitioners, and not in the name of a Legal Practitioner, an incompetent Notice of Appeal, thereby came to a perverse decision occasioning a miscarriage of justice.

GROUND C: ERROR IN LAW.

G The learned Justices of the Court of Appeal erred in law by admitting and considering Exhibits ‘E 5’ and ‘E 6’ which admission was contrary to the combined effect of Sections 93, 94 and 95 of the Evidence Act 1990, occasioning thereby a miscarriage of justice.

GROUND D: ERROR IN LAW

H The learned Justices of the Court of Appeal failed to discharge the duty cast upon them when they failed to dismiss the application for stay of execution having become aware that the Respondent herein failed to establish its standing and existence, and came to a wrong decision occasioning a miscarriage of justice.

The four questions 1, 2, 3 and 4 raised by the appellant from

grounds A, B, C and D will respectively also be reproduced as follows:-

Question No. 1 is formulated from Ground 'A'

"Whether in all the affidavit evidence before the Court of Appeal there was evidence stating the legal personality and the proof of existence of the Respondent BANK, as enunciated by the Supreme Court in the case of A.C.B. Plc V. Emostrate Ltd. (2002) 8 NWLR (Part 770) 501?"

Question No. 2 is formulated from Ground 'B'

Whether in (sic) the exercise of the powers of the Court of Appeal under Section 18 of the Court of Appeal Act, extends to ordering stay of execution of monetary judgment despite the fact that the Notice of Appeal was signed in the name of a firm of Legal Practitioners, and not in the name of a legal practitioner, thereby rendering the Notice of Appeal invalid and incompetent?"

QUESTION No. 3 is formulated from Ground 'C'

Whether the Court of Appeal was right when it ordered a stay of execution of the judgment of a High Court entered to wit: "the sum of N45, 178,570.03 being the value of the bank draft, with 20% interest on the sum with effect from 20/8/99 till payment is fully liquidated" on the only condition to wit: "that a Bank guarantee in the sum of N46, 495,605.00 shall be lodged with the Deputy Chief Registrar, to facilitate due payment to the Respondent if per chance, the appeal fails." And if a Bank guarantee without incorporating the 20% interest, with effect from 20/8/99 till payment is liquidated is the same with depositing judgment sum in an interest yielding account, whereas the stay of bank guarantee of an abstract sum of N46, 495,605.00 favoured only the Applicant/Respondent?"

QUESTION No. 4 is formulated from Ground 'D'

Whether the exercise of discretion by the Court of Appeal based on wrongly admitted inadmissible evidence viz-a-viz the un-certified certificate of increase of shares, and the un-certified Bank's current audited statement of accounts, public documents inadmissible as secondary evidence, did not render the discretion exercised by the court perverse?"

The 1st question raised for determination relates to the legal personality and the existence of the respondent Bank. The law is well established that an issue would be competent

for determination only if it relates to and/or arises from any of the grounds of appeal. The failure to relate otherwise is to render the issue incompetent and liable to be struck out. See the views held by this court in the cases of Kokoro-Owo V. Lagos State Government (2001) 5 SC Part 11 page 50, and Achiakpa V. B Nduka (2001) 7 SC Part 111 page 125. **An appeal must also be based on the decision or ratio decidendi of the lower court and from which issues must directly flow and be formulated.** See also the cases of A-G Bendel State V. Aideyan (1989) 4 NWLR part (118) page 646; Buraimoh V. Bamgbose (1989) 3 NWLR (Pt. 109) page 352 and Biocon Agrochemicals Nigeria Limited V. Kudu Holding (PTY) Limited (2000) 12 SC part 1 page 139.

From the totality of the entire affidavit evidence before the lower court, I hasten to state that there was no evidence on the question of legal personality and the proof of existence of the Respondent Bank as alleged by the appellant. The record of appeal will bear evidence as rightly submitted on behalf of the respondent that the issue formulated did not either arise from ground one of the ground of appeal or from any of the other three grounds of appeal. There is therefore no nexus or correlation between question/issue one as formulated and the grounds of appeal filed. On the authorities of Osinupebi V. Saibu (1982) 7 SC page 104, Kari V. Ganaram (1997) 2 NWLR Part 488 page 380 and Araka V. Ejeagwu (2000) 12 SC Part 7 page 99 at 107. **The issue no 1 having not arisen from any of the grounds of appeal should and is accordingly struck out for incompetence.**

This is more so even on the confirmation by the appellant himself at page 7 paragraph 4.1.01 of its brief wherein his learned counsel conceded that the issue was not raised at the court below but for the first time before this court. The question of proof of juristic personality is a matter of fact and evidence. The issue was neither raised at the court of first instance, nor canvassed at the Court of Appeal. With same not being jurisdictional, the leave of either the lower court or this court ought first to have been sought and obtained before the appellant could argue same as a competent ground of appeal. See the case of Ehigbe V. Omokhafa (2004) 18 NWLR (pt. 905) page 319 at 334. Issue No. 1 as formulated by the appellant is in the cir-

cumstance inconsistent with ground A of the grounds of appeal. The submission predicated thereon the issue is also of no consequence and is discountenanced. The objection raised by the respondent in that behalf is therefore sustained.

Issue No. 2 which arose from ground B also questions the competence of the notice of Appeal which was alleged to have been signed in the name of a firm of legal practitioners, and not by a legal practitioner, thereby rendering the notice invalid and incompetent. It is pertinent to restate the position of the law emphatically that both the ground of appeal as well as the issue formulated therefrom must arise from the decision appealed against. Where it is however otherwise or converse is the case, the court is enjoined to discountenance both the ground of appeal and the issue formulated therefrom as inconsequential and liable to be struck out. See again the view held in the case of *Biocon Agrochemical Nigeria Limited V. Kudu Holding (PTY) Limited* supra. As rightly submitted by the respondent's counsel, therefore, the issue of competence or otherwise of the appeal was not a matter for determination by the lower court in the application for a variation of the terms of a conditional stay. The heavy weather exasperated by the appellant's counsel in his submission on this issue has no relevance. In the result, the objection raised by the respondent against issue No 2 is also hereby sustained. In other words, the issue never arose from the decision of the lower court which is now on appeal.

The next objection by the respondent further relates to issue 3 which counsel argued did not arise from ground C of the grounds of appeal and therefore should also be struck out. The ground of appeal as well as the issue formulated in that behalf have both been reproduced earlier in the course of this judgment.

At pages 143 -153 of the record of appeal in reference, the Court of Appeal Enugu Division vide its Ruling delivered on April 25th, 2007 varied the terms of the earlier grant of stay of execution by the trial court. The critical issues for consideration before the lower court in the application were the terms upon which the grant was sought and granted by the trial court and hence the necessity for further application seeking for favourable and better terms. This was the determinant premise upon which the lower court had to decide. The issue at hand questions the propriety of the Court of Appeal

when it ordered a stay of execution of the judgment of the trial court. The ground of appeal on its part alludes to the exhibits which were alleged as inadmissible at the lower court. On a critical and global analysis of the objection, I do not with all respect subscribe to the argument by the respondent's counsel.

B In otherwords, it is my considered view that issue No. 3 had arisen from ground C of the grounds of appeal. The objection in that respect I hold, is overruled while the issue is well sustained, and will be considered on its merit in the course of this judgment.

C The 4th and last objection raised by the respondent's counsel relates to question 4 which was presumably formulated from ground D of the grounds of Appeal. On perusal of ground D, the complaint is centered on the respondent's failure to establish its standing and existence. This is more pronounced when regard is had to particular

D (ii) supporting the said ground wherein the Evidence Act imposes a duty on artificial persons to establish their existence. In my own deduction and contrary to the said ground of appeal, the question No 4 to my understanding alleges that the lower court wrongly received inadmissible evidence and therefore was perverse in the exercise of
E its discretion. While the learned counsel for the appellant in his submission urged that the court has a duty to reject wrongly received inadmissible evidence when giving its judgment, the learned respondent's counsel on the same issue submitted at variance with
F the ground of appeal.

As rightly submitted by the respondent's counsel, it is obvious that question No 4 formulated by the appellant on his brief of argument has no correlation whatsoever with ground D of the grounds of appeal but is completely at variance. The authority of the case of
G *Okeke V. Oruh* (1999) 4 SC part 11 page 37 is applicable wherein the arguments by the appellant's counsel is hereby discountenanced. It is also pertinent to restate that on the totality of the ruling appealed against, ground D never arose from the decision of the Court of Appeal which is the subject of appeal. Again, I will restate even at the
H risk of repeating myself that the law is well established and enunciated in plethora of authorities that issues for determination of an appeal must be formulated from the grounds of appeal filed against the judgment or ruling sought to appeal. See the case of *A. G. Bendel State V. Aideyan* (1989) 4 NWLR (Pt. 118) page 646. In the circum-

stance and taking into account the conclusion arrived at, I hold the firm view that the said question No 4 and ground D of the grounds of appeal are hereby struck out.

On the totality of the four questions raised, while questions 1, 2 and 4 are discountenanced and therefore struck out, only question No 3 is sustained and its survival will be considered on its merit. B

Issue No 3 questions the order made by the lower court sequel to the motion on notice dated 26th January, 2000 wherein the applicant prayed for:-

“An order staying the execution of the judgment delivered by Honourable Justice J.C.N. Ugwu on 11th day of October, 1999 in suit No. E/429/99 on terms fairer and better than that imposed by lower court pending the hearing and determination of the appeal in this case” C

The application was filed pursuant to the provision of Section D 18 of the Court of Appeal Act, Cap. 75, Laws of the Federation of Nigeria 1990. In the order made by the lower court vide its ruling dated 25th April, 2001, the terms of the conditional stay granted by the trial court was varied. The appellant's grouse is whether the lower court exercised its discretion judicially and judiciously when it ordered E a stay of execution of the judgment of the High Court in question.

In his submission to substantiate the error alleged, the appellant's counsel argued that except upon a ground of law, an appellate court will not reverse a discretionary order of a trial court; F that in the instant case, there was a wrongful exercise of judicial discretion by the learned justices of the Court of Appeal in the judgment now appealed against dated 25th April, 2001. Learned counsel further submitted that there was a duty on the Court of Appeal on the 25th April, 2001, when it was faced with the application of respondent G for stay of execution pending an appeal not to do anything or express an opinion as to whether or not the finding that the judgment of the trial court was correct, but it ought to presume the judgment as correct until set aside on appeal. The learned counsel further argued that this duty, the Honourable Justices failed to uphold when H they proceeded without jurisdiction to alter the judgment of the High Court delivered on 11th day of October, 1999; that is to say, counsel argued, when they ordered a conditional stay of the execution in a strange sum of N46, 495,605.00 notwithstanding the obvious fact

that they left out the 20% interest awarded on the actual judgment sum of N45, 178,570.03 with effect from 20th August, 1999 till payment is fully liquidated.

In further submission, counsel also re-iterated that the lower court on 25th day of April, 2001 exercised its discretion in an arbitrary or illegal manner, or without due regards to the law and relying upon wrong principles.

Submitting also in response, the respondent's counsel vehemently argued the contrary and emphasized that the terms of the conditional stay granted by the trial court never contained any order on payment of interest; that it is the conditional grant of the stay by way of an order by the trial court for deposit of the judgment award of N46, 495,605.00 that the Court of Appeal Enugu Division vide its Ruling delivered on April 25, 2001 varied the terms of the earlier grant of stay of execution by the trial court.

Counsel in further submission urged us to hold that the terms of the conditional stay as made out by the Ruling of the trial court at pages 25 - 29 of the record were exactly what was varied by the Ruling of the Court of Appeal delivered on April 25, 2001. He contends also that the Court of Appeal never delivered any judgment on April 25, 2001 and no order varying the judgment of Hon. Justice J. C. N. Ugwu delivered at the trial court was ever made by the Court of Appeal. The learned counsel on the totality therefore urged for the dismissal of the appellant's appeal and uphold the decision contained in the Ruling of the Court of Appeal delivered on April 25, 2001. The foregoing are the submissions advanced on the surviving issue No 3.

As a matter for observation, both counsel representing the parties have, rightly in my view, submitted on the combined effect of the provisions of Section 18 of the Court of Appeal Act and order 1 Rule 20 sub-rules (4) and (5) of the Court of Appeal Rules whereby the lower court is empowered to make just and equitable order or orders in the best interest of the administration of justice with a view to preserving the subject matter of dispute between the parties. On an analytical frontloading exercise and perusal of the Ruling by the lower court, the resume thereof is a product of the trial court whereof it granted a conditional stay of its judgment. It

is this order, that the Court of Appeal, pursuant to Section 18 of the Act, varied by imposing conditions which it considers proper in the exercise of its discretion with respect to contending issues between the parties. Putting it succinctly, the power of the Court of Appeal under Section 18 of the Act is circumscribed within the context wherein the earlier order was varied on more favourable terms; this was what the ruling appealed against had set out to do. The authority in the case of R.E.A.N. V. Aswani Textile Industries Limited (1992) 3 NWLR Pt. 227 page 1 is relevant in reference, and in support of what the lower court did in the circumstance.

As rightly submitted by the learned counsel for the respondent, it is strictly the terms of the grant by the trial court on its orders made on 19th January, 2000 that was varied by the lower court vide its ruling dated 25th April, 2001 on a more favourable terms in keeping with Section 18 of the Court of Appeal Act. This fact cannot be over emphasized. The court did not in otherwords alter the said judgment of the trial court as wrongly perceived by the appellant's learned counsel. It is pertinent to re-echo that even the appellant himself on his brief of argument conceded the fact that the Court of Appeal has power in an application of this nature to impose *"fairer and better conditions more favourable than that imposed by the High Court..."* However and that notwithstanding, learned counsel opined further that the court in the circumstance is not bound to exercise its discretion in conformity with the applicant's requests for a specific condition to be attached to a stay of execution.

On a corporate reading of Section 18 of the Court of Appeal Act, the power endowed in the Court is discretionary and its exercise must be judicious and judicial having regard to due consideration of all circumstances and taking into account available materials placed before the court. The exercise must be with great caution and not whimsical or lackadaisical.

The numerous authorities cited by the appellant's counsel, although material in their appropriate situational circumstances where applicable, they are not however relevant in the context used in the case at hand. This is because the appellant had not shown where the lower court deviated from the laid down principles of law or failed in

its compliance thereof. The heavy weather raised by the appellant is sequel, to “much ado about nothing”. The record of appeal especially the ruling by the lower court is a clear confirmation.

At this juncture, I wish to state as unfortunate the use of language by the appellant’s counsel wherein he submitted that the lower court in the exercise of its discretion did so “in an arbitrary or illegal manner, or without due regards to the law and relying upon wrong principles.” Suffice it to say that the learned counsel ought to have known better and not castigating in his approach.

I have emphasized in strong terms that contrary to the argument advanced on behalf of the appellant, it is not correct as submitted by his counsel that the lower court gave due consideration to extraneous issue in the determination of the application that varied the terms of the conditional stay. A cursory examination of the ruling appealed against will bear out that the lower court in its consideration paid due attention to the facts of the case, the materials placed before it and all the circumstances of the case as revealed on the record. It is not therefore borne out that the court acted arbitrarily or capriciously, as alleged, but judicially and judiciously. Consequently the said question No 3 is hereby resolved against the appellant.

On the totality of this appeal, with Questions 1, 2 and 4 as well as their corresponding grounds of Appeal A, B and D all having been struck out, the question no. 3 was also found as lacking in merit and according dismissed.

The appeal is hereby dismissed while the ruling of the Court of Appeal dated 25th day of April, 2001 is affirmed. There shall also be costs of N50,000.00 awarded in favour of the respondent against the appellant.

MUHAMMAD JSC

I had the opportunity of reading the judgment of my learned brother, Ogunbiyi, JSC, just delivered. I am in agreement with my lord that the appeal lacks merit and it should be dismissed. I dismiss the appeal and abide by all consequential orders made in the lead judgment.

PETER-ODILI JSC

I am at one with the judgment just delivered by my learned brother, Clara Bata Ogunbiyi, JSC and the reasoning therein properly stated. I shall show my support by a few comments.

This is an appeal by the plaintiff/respondent/appellant which arose from the interlocutory Ruling of the Court of Appeal Enugu Division delivered by Thompson Akpabio, Sule Aremu Olagunju and John Afolabi Fabiyi, JJCA dated 25th April, 2001 whereof the conditions for the stay of execution of the judgment of Hon. Justice J. C. N. Ugwu (as he then was) delivered on 11th October, 1999 were varied. The appellant in the Court of Appeal had sought a stay of execution of the judgment delivered by the High Court aforesaid on terms fairer and better than that imposed by the High Court pending the hearing and determination of the substantive appeal.

The High Court in its ruling on application for stay of execution had granted a conditional stay as follows:

"1. The judgment award of N46, 495,605.00 be deposited with the Chief Registrar, High Court, Enugu within Seven (7) days by the applicant, the condition being that whoever wins on appeal shall be entitled to the amount deposited.

2. That upon compliance with condition (1) above the plaintiff/respondent shall lodge with the Chief Registrar High Court, Enugu within 48 hours thereon, a bank guarantee from a reputable commercial bank in the sum of N46, 495,605.00 to repay to the applicant/defendant herein through the Chief Registrar, High Court, Enugu the deposited sum of N46, 495,605.00 should the appeal lodged succeed.

3. That the respondent's solicitor namely Obi Okwusogu & Co. be paid the cost awarded against the applicant/defendant

(a) N5, 000 awarded on 11th October, 1999.

(b) N2, 500 awarded on 27th October, 1999, totaling N7, 500 and the same to enter into undertaking with the Chief Registrar, High Court, Enugu immediately to refund the sum of N7,500 if the appeal succeeds.

4. That upon fulfillment of conditions (1) and (2) above, execution as to the judgment award be stayed, and on fulfillment of condition (3) above, execution as to costs be stayed or both stay of

execution as to costs be stayed or both stay of execution as the case may be, pending the determination of the appeal against the afore-said judgment."

It is upon an application for a variation of the above stated conditional stay granted by Hon. Justice J. C. N. Ugwu that the Ruling of the Court of Appeal Enugu Division had its foundation and that appellate court varied the conditional stay granted by the trial court. The Court of Appeal per Fabiyi, JCA (as he then was) held as follows:

"I strongly feel that there are special circumstances to warrant the grant of the application for stay with no nebulous conditions attached to same. The condition to be attached shall be clear and unambiguous. The application is hereby granted subject to the only condition that the applicant shall lodge with the Deputy Chief Registrar of this court a bank guarantee in the sum of N46, 495,605.00 by a reputable bank (not UBA Ltd) within ten days from today to facilitate due payment to the 1st respondent if, per chance, the appeal fails."

It is on this variation of the stay of execution of judgment that this appeal to the Supreme Court has emanated.

At the hearing on 12th November, 2012 learned counsel for the appellant adopted the brief of the appellant settled by Chief I. E. Onukwulu and filed on 8/6/05. In the brief were couched four issues for determination as follows:

1. Whether in all the affidavit evidence before the Court of Appeal there was evidence stating the legal personality and the proof of existence of the respondent bank as enunciated by the Supreme Court in the case of A.C.B. Plc v. Emostrate Ltd. (2002) 8 NWLR (pt.770) 501

2. Whether in the exercise of the powers of the Court of Appeal under Section 18 of the Court of Appeal Act, extends to ordering stay of execution of monetary judgment despite the fact that the notice of appeal was signed in the name of a firm of Legal practitioners, and not in the name of a Legal practitioners, thereby rendering the Notice of appeal invalid and incompetent?

3. Whether the Court of Appeal was right when it ordered a stay of execution of the judgment of a High Court entered to wit: "the sum of N45, 178,570.03 being the value of the bank draft, with

20% interest on the sum with effect from 20/8/99 till payment is fully liquidated” on the only condition to wit: “that a Bank Guarantee in the sum of N46, 495,605.00 shall be lodged with the Deputy Chief Registrar, to facilitate due payment to the respondent if, per chance, the appeal fails.” And if a Bank guarantee without incorporating the 20% interest, with effect from 20/8/99 till payment is liquidated, is the same with depositing judgment sum in an interest yielding account, whereas the stay of bank guarantee of an abstract sum of N46, 495,605.00 favoured only the applicant/respondent?

4. Whether the exercise of discretion by the Court of Appeal based on wrongly admitted inadmissible evidence viz-a-viz the uncertified certificate of increase of shares, and the uncertified bank’s current audited statement of accounts, public documents inadmissible as secondary evidence, did not render the discretion exercised by the court perverse?

The learned counsel for the respondent adopted the brief settled by Dr. Joseph Nwobike SAN. He adopted the issues as couched by the appellant but called the court’s attention to respondent’s preliminary objection incorporated in respondent’s brief to the effect that the appeal is incompetent and should be struck out.

The easy route to take in the circumstance is to utilize the issues as framed by the appellant.

ISSUE ONE

This issue is a question as to whether in all the affidavit evidence before the Court of Appeal there was evidence stating the legal personality and the proof of existence of the respondent as enunciated by this court in *ACB Plc v. Emostrate Ltd.* (supra).

Learned counsel for the appellant submitted that even though they concede that the matter of the legal personality and proof of the existence of the respondent Banks now being raised in this court for the first time was not raised before the court below. He cited *Abaye v. Ofili* (1986) 1 NWLR (Pt. 15) 134.

That in none of the affidavits in the course of the hearing of the motion for stay of execution was there a reference to the status/legal existence of the respondent and no certificate of incorporation of the respondent made an exhibit in the application. That there is a burden on a party claiming the status of a juristic person to so establish or prove.

He said there is a duty on a plaintiff and defendant to indicate on the writ the capacity in which a suit is commenced or defended. He referred to the cases of *Exquisite Ind. Ltd. v. Owners of MV Bacoliners 1-3* (1998) 5 NWLR (Pt. 549) 335; *Erokoro v. Govt. of Cross River State* (1991) 4 NWLR (Pt. 185) 322 at 337, *UBN Plc. v. Ntuk* (2003) 16 NWLR (Pt. 845) 183 at 207; *In Re Adetona* (1994) 3 NWLR (Pt. 333) 481 at 489.

For the appellant was further contended that it is trite law that a point of law or statutory provision must be considered even though the parties have not joined issues on the point in their pleadings. Also, that if the issue of jurisdiction is manifestly *ex-facie*, on the record the point issue can be properly raised and argued in this court even if for the first time. This is so since the competence of the respondent in the court below has been thrown up. He relied on: *A.B.U. v. Molokwu* (2003) 9 NWLR (Pt. 825) 265 at 254; *Witt & Busch Ltd v. Good-Will & Trust Inv. Ltd* (2004) 8 NWLR (Pt. 874) 179; *Obiakor v The State* (2002) 10 NWLR (pt. 776) 612 at 627, *Aqua Ltd. v. Ondo State Sports Council* (1988) 4 NWLR (Pt.91) 622; *Gaji v. Daye* (2003) FWLR (pt. 163) 1 at 13.

Learned counsel went on to say that the respondent failed to satisfy the mandatory requirement of proof of its legal existence as decreed by the combined provisions of Sections 135 and 137 (1) & (2) of the Evidence Act, Cap 112 Laws of the Federation of Nigeria 1990, *Abdullahi v. MILAD* (2004) 5 NWLR (pt. 866) 232 at 245.

That the court below having not established a *prima facie* proof of its status and legal existence is not entitled to the relief granted it on the 25th April, 2001 and the Court of appeal ought to have raised it since it was a point of jurisdiction. He cited *Oloriode v. Oyebi* (1984) 1 SCNLR 390; *Ezomo v. Oyakahire* (1985) 1 NWLR (pt.2) 195; *Bronik Motors v. Wema Bank* (1993) 1 SCNLR 296; *Odiase v. Agbo* (1972) 9 ALL NLR (Pt. 1) 170; *Ndoma - Egba v. Chukwuogor* (2004) 2 SC (pt. 1) 107 a 136; Sections 37 and 38 (1) of the Companies and Allied Matters Act, 1990.

Responding, learned counsel for the respondent said this issue one did not arise from any of the grounds of appeal and so the issue is incompetent and should be struck out. He cited *Kokoro - Owo v. Lagos State Government* (2001) 5 SC (pt. II) 50; *Achiakpa v. Nduka* (2001) 7 SC (Pt. III) 125.

He further submitted that the issue of legal personality of the respondent did not relate to any of the four grounds of appeal and so is incompetent. That the issue did not arise in any of the two courts below. That the legal personality of the respondent as presently canvassed by the appellant in this court is not a jurisdictional issue and the leave of this court was neither sought nor obtained to enable the appellant argue same before this court. He relied on *Osinupebi v Saibu* (1982) 7 SC 104, *Kari v. Ganaram* (1997) 2 NWLR (pt. 488) 380; *Araka v. Ejeaewu* (2000) 12 SC (Pt. 1) 99 at 107; *A. G. Bendel State v. Aideyan* (1989) 4 NWLR (Pt. 118) 646 etc.

For the appellant was contended that the point being now sought to be brought in was not raised in the court below, the application should be discountenanced, but that it meets the requirements for such points to be allowed in respondent's view point is that the issue should not be allowed to be introduced having not been an issue in the court below. On this matter therefore resort for guidance would be placed on this court's decision in *Abaye v. Ofili* (1986) 1 NWLR (pt. 15) 134 where it was stated as follows:

"It is settled that the Supreme Court will allow a fresh point of law to be raised before it even if such point was not taken in the court below on the following conditions.

(a) There is before the Supreme Court all the evidence which is needed to completely support the new contention.

(b) The point of law if argued in the court below would have been decisive."

Having that guide in mind, it is to be stated that the matter of the legal personality which is now sought to be tackled as a fresh issue indeed is a delicate one of solid law. It is such as would be properly explored to fully understand if there is legal personality in the person who makes an assertion that he has such personality, it certainly borders on locus standi or capacity to sue or be sued.

Again to be noted is that the inquiry into the capacity or legal personality of the respondent/appellant/applicant is crucial and has the possible effect of changing the decision if it had been raised at the court of Appeal. On that I would say definitely that the conditions enunciated by the Supreme Court in *Abaye v. Ofili* (supra) have been met.

It needs no saying that since this issue of jurisdiction though

being raised for the first time can be made here being a matter that cannot be ignored. It can even be raised by the court itself. Also, there is no necessity for firstly obtaining the leave of this court to be raised and handled. See *Obiakor v. The State* (2002) 10 NWLR (pt. 776) 612 at 627, *Aqua Ltd. v. Ondo State Sports Council* (1988) 4 NWLR (pt. 91) 622; *Gaji v. Daye* (2003) FWLR (Pt. 163) 1 at 13, *Oloriode v. Oyebe* (1984) 1 SC NLR 390; *Bronik Motors v. Wema Bank* (1993) 1 SC NLR 296.

ISSUE TWO

In respect to this issue which has to do with the powers of the Court of Appeal under Section 18 of the Court Appeal Act, extended to ordering stay of execution of monetary judgment despite the fact that the notice of appeal was signed in the name of a firm of Legal practitioners and not in the name of a Legal Practitioner in which case the notice of appeal is rendered invalid and incompetent. Learned counsel for the appellant in answer said the general powers of the Court of Appeal both under Section 18 of the Court of Appeal Act and Order 1, Rule 20 (5) of the Court of Appeal Rules, 2002 is to ensure the determination on the merits of the real question in controversy and designed to enable the court clear whatever technical mistake or obstacles that may be in the way of a fair determination of the appeal on its merits or of determining the real question in controversy in the appeal. That in this instance the notice of appeal filed on 26/10/99 by the respondent Bank and signed in the name of a firm of Legal Practitioners M/S M. E. Esonanor & Co. was afflicted by a fundamental vice which rendered that notice of appeal defective and incurable, incompetent and the result being that the proceedings are a nullity. He referred to *Fagun Ajayi v. Oladele* (1999) 7 NWLR (Pt.612) 567 at 575 - 576; *Onyeali v Okpala* (2000) FWLR (Pt.3) 495 at 515; *Gen & Aviation Services Ltd v. Thahl* (2004) 10 NWLR (Pt. 880) 50 at 77; *Enabulele v. Agbonloahor* (1994) 5 NWLR (Pt.342) 122 at 177.

Responding, it was canvassed for the respondent that the question of the competence or otherwise of the notice of appeal was not brought out at the Court of Appeal and did not arise from the decision of the Court of Appeal being appealed from and so cannot be a matter for determination here now. He relied on *BIOCON Agro-chemical (Nig) Ltd. v. Kudu Holding Property Limited* (2000) 12 SC

(Pt. 1) 139.

The point raised here is really potent since it also questions with authority the Notice of appeal before the court below having been signed in the name of the firm of legal Practitioners M/S M. E. Esonajor & Co instead of being signed by the human person, appellant or by a legal practitioner, again a human person. Failure of this fundamental condition threw up a fundamental defect incurable and produces the effect of an incompetent appeal which brings about no other option but a striking out. I place reliance on *Maigoro v. Garba* (1999) 10 NWLR (Pt. 624) 555 SC; *Odojin v. Agu* (1992) 3 NWLR (pt. 229) 350; *Nwaeze v. Eze* (1999) 3 NWLR (pt. 594) 410. B
C

Also the recently decided cases by this court of *First Bank Nigeria Limited & Anor. V. Maiwada; Fraphino Pharmaceutical Ltd. v. Jawa International Ltd.* (consolidated) in SC.204/2002, SC.269/2005 (unreported) which followed the case of *Okafor v. Nweke* (2007) 10 NWLR (Pt. 1043) 521. D

The two issues above considered make it moot to enter into issues 3 & 4 since there is no competence in the appeal, the notice of appeal thereof having been defectively initiated making it a null and void process. Also this and the earlier matter of the legal personality of the respondent needed to be cleared, again bringing to the fore the lack of jurisdiction in this court to adjudicate, therefore, the only thing I see in sight is an incompetent process. E

For the above and the fuller reasons in the lead judgment, I too dismiss the appeal and abide by the consequential orders made. F

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