

**SUPREME COURT OF NIGERIA**  
FRIDAY 14TH JUNE, 2013. SC. 318/2006  
**CORAM:- W. S. N. ONNOGHEN, M. S. MUNTAKA-  
COOMASSIE, N. S. NGWUTA, M. U. PETER-ODILI,  
M. D. MUHAMMAD, JJSC**

HALILCO NIGERIA LTD ..... APPELLANT  
AND  
EQUITY BANK OF NIGERIA LTD ..... RESPONDENT

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APPEALS - Issue - Basis - Issue must emerge from appellant's valid grounds of appeal - And any issue framed outside such grounds - Is incompetent and liable to be struck out (H1)

APPEALS - Issue - Formulation - Respondent's notice - Respondent can raise and argue issues in the notice - But cannot raise issue from the notice - Along with issues drawn from the grounds of appeal (H2)

APPEALS - Issue - Suo motu raising - CA rightly raised the issue of competence or otherwise of the writ of summons - But erred for not inviting counsel for parties to address it on the issue (H3)

APPEALS - Action - Jurisdiction - Pursuant to SC Act s. 22 - Suit No. K/750/2000 is struck out for being incompetent - As the process leading to the judgment therein was flawed - Hence the HC had no jurisdiction to entertain it (H4)

***FACTS***

Before the High Court of Kaduna State, plaintiff/appellant commenced this action by writ of summons against defendant/respondent. Appellant attached a supporting affidavit to the writ. Appellant sought for an order listing the matter under the undefended list procedure of the court. Pursuant to the said writ, the court issued civil summons and upon being served, respondent filed notice of intention to defend with a supporting affidavit. It is appellant's contention that it made two lodgments of N500,000.00 each between 30/12/98 and 07/01/99 into its account domiciled with respondent's

bank. Respondent however averred that appellant only made one lodgment of N500,000.00. Respondent went on to state that appellant's account was later credited with the said amount of money. Two years after the transaction, appellant made a claim for an additional N500,000.00.

The court heard the contentions of the parties and held that respondent has not disclosed a defence on merit. The court therefore ordered respondent to pay N500,000.00 with 21% interest rate to appellant. Aggrieved, respondent appealed to the Court of Appeal Kaduna Division. The appeal was against the decision of the trial court that respondent did not raise a defence on merit. Respondent also challenged the jurisdiction of the trial court to award 21% bank interest rate which was not stated in appellant's claim. The court noted that the principal claim of N500,000.00 and the interest were not endorsed on the writ. The court formulated two issues of its own motion and went ahead without hearing the parties to hold that the writ of summons was incompetent based on those issues. It allowed the appeal and declared the judgment of the trial court a nullity. Being dissatisfied, appellant filed appeal in Supreme Court.

### **ISSUES FOR DETERMINATION**

*"1. Whether the Court of Appeal was not in error which occasioned a miscarriage of justice when it raised the issue of the competence of Suit No. K/750/2000 suo motu and decided some without giving the parties a hearing.*

*2. Whether the Court of Appeal was not in error which occasioned a miscarriage of justice when it formulated two (2) issues for determination outside the seven (7) grounds of appeal filed before it in Appeal No. CA/K/148/2001 and went ahead to determine the appeal on those two issues without giving the parties a hearing.*

**HELD** (Unanimously allowing the appeal per

**NGWUTA JSC)**

*APPEALS - Issue - Basis*

**1. An issue for determination, whether framed by the appellant or the Respondent, must emerge from the appellant's grounds of appeal.**

**From the above observations, it is clear that none of the Respondent's two issues is framed from any or all of the grounds of appeal. Issue one is incompetent and liable to be struck out.**

**In an appeal, an issue for determination must be derived, framed or distilled from a valid ground of appeal or a combination of grounds of appeal. Any issue framed outside the grounds of appeal is incompetent and liable to be struck out.** (pp. 2943 G/H/2945 E)

*APPEALS - Issue - Formulation - Respondent's notice*

**2. A Respondent's notice is a separate process from the grounds of appeal and while the respondent can raise and argue issues in his respondent's notice, he cannot raise issue from the notice along with issues drawn from the grounds of appeal.** (p. 2943 G)

*APPEALS - Issue - Suo motu raising*

**3. Appellant's learned Counsel conceded a Writ of Summons bereft of claims is incompetent and further that a Court can raise an issue suo motu. In my view, these concessions are rightly made by learned Counsel. But as he rightly argued, the Court below went beyond bounds by determining the appeal on the issues it raised suo motu without calling on learned Counsel for the parties to be heard on the issues. This is more so since the outcome of the appeal turned solely on the issues so raised and resolved.**

**In PDP v. Okorocha (2012) 3 KLR (Pt. 308) 1155 at 1159, para. D, this Court held that a Court could raise an issue suo motu but that the Court is bound to give the parties the opportunity to be heard on the issues, particularly where the decision turns on the issues.**

**The issue of competence, vel non, of the Writ of Summons was a critical factor in the case. It was properly raised by the Court but the Court should have invited the Counsel for the parties to address it on the issue especially the appellant who stood to lose, before resolving them. I resolve the issue in favour of the appellant.**

***And it goes without saying that on no account should a Court decide a matter on an issue it raised suo motu, even when the issue is properly raised, without giving the parties the opportunity to be heard on same. (pp. 2944 G/2945 F)***

**B** *Action - Jurisdiction*

***4. What is the proper order to be made? The Court of Appeal declared null and void the judgment of the trial High Court in Suit No. K/750/2000. That decision has been declared a nullity since the process leading to it was completely flawed.***

**C** *Before this Court, appellant simply prayed for an order to declare the judgment of the Court below null and void. The mere declaration sought by the appellant would leave the proceeding and judgment of the trial Court subsisting and binding even though the Court below had determined rightly that the process leading to the judgment was incompetent because the Writ of Summons bereft of any claims endorsed on it is incompetent.*

**E** *If the Court below had followed proper procedure in declaring the judgment of the trial Court a nullity, it should have struck out the incompetent suit pursuant to Section 16 of the Court of Appeal Act. Therefore, pursuant to Section 22 of the Supreme Court Act, I strike out the suit No. K/750/2000 as incompetent and that the Kaduna State High Court*

**F** *had no jurisdiction to entertain it. (p. 2945 H)*

**REPRESENTATION**

D. N. Onietan Esq. with Nelson Uzuegbu Esq., for the Appellant

**G** Ngozi Okafor (Miss), for the Respondent

**CASES REFERRED TO**

- Osinupebi v. Saliu (1982) 7 SC 104
- Ugo v. Obiekwe (1989) 1 NWLR (pt. 99) 566
- H** Garba v. State (2000) 4 SCNJ 415
- Madukolu v. Nkemdilim (1962) All NLR 581
- Fabiyi v. Adeniyi (2000) 6 NWLR (pt. 662) 532
- Kuti v. Balogun (1978) All NLR 6
- Aja v. Okoro (1991) 7 NWLR (pt. 203) 260

Asalu v. Dakan (2006) FWLR (pt. 325) 90

PDP v. Okorocha (2012) 3 KLR (pt. 308) 1155

Macfoy v. United Africa Co. Ltd (1962) AC 152

Kraus Thompson Org. Ltd. v University of Calabar (2004) 4 SCNJ 121

A-G Lagos State v. Eko Hotels Ltd. (2006) 9 SCNJ 104

Erhahon v. Erhahon (1997) 6 NWLR (pt. 510) 667

Labiya v Anretiola (1992) 8 NWLR (pt. 258) 139

Ilona v. Idakwo (2003) FWLR (pt. 171) 1715

### **STATUTES & RULES REFERRED TO**

Supreme Court Act, s. 22

Court of Appeal Act, s. 16

Court of Appeal Rules 2002, O. 3 r. 2(6)

### **LEAD JUDGMENT BY NGWUTA JSC**

This appeal is against the judgment of Kaduna Division of the Court of Appeal delivered on 21/2/2006.

The appellant, as plaintiff, filed a Summons ex-parte, before the Kaduna Judicial Division of the High Court of Justice, Kaduna State, on 15/12/2000 in which he prayed the trial Court for:

*“An order listing under the Undefended List the Writ of Summons to be issued against the defendant.”*

The respondent was the defendant in the trial High Court. On 26/2/2001, the trial Court, having considered the summons ex-parte and the accompanying affidavit ordered that:

*“The suit is marked under Undefended List.”*

Upon service on it of the Writ of Summons filed on 15/12/2000, the Respondent, as defendant, filed a Notice of Intention to G Defend with Supporting Affidavit raising defences to the action. The trial Court took learned Counsel’s submissions and considered the affidavit evidence and held thus:

*“As there is no defence on the merit discharged by the defendant, judgment is entered for the plaintiff against the defendant in the liquidated sum of N500,000.00 (Five Hundred Thousand Naira only) being deposited money due and payable by the defendant to the plaintiff on demand. The defendant is to pay the plaintiff 21% interest per annum being the Bank’s rate of interest from the 1st of*

*January, 1999 to date of judgment.”*

Dissatisfied with the judgment, the defendant (now respondent), appealed to the Kaduna Division of the Court of Appeal. In its judgment dated 21/2/2006, the lower Court concluded:

B *“In conclusion, the judgment of the lower Court delivered on 2nd April, 2001 in Suit No. K/750/2000 by Yusuf Hassan, J. when there was no Writ of Summons with claim is a nullity. Accordingly, it is hereby so declared.”*

C Aggrieved by the judgment, appellant who was the plaintiff in the trial Court, appealed to this Court on three grounds in a Notice of Appeal filed on the 5th of May, 2006.

Learned Counsel for the parties filed and exchanged briefs of argument. Learned Counsel for the appellant distilled the following two issues from his three grounds of appeal:

D *“1. Whether the Court of Appeal was not in error which occasioned a miscarriage of justice when it raised the issue of the competence of Suit No. K/750/2000 suo motu and decided some without giving the parties a hearing. (Distilled from Grounds 1 & 2 of the Grounds of Appeal).*

E *2. Whether the Court of Appeal was not in error which occasioned a miscarriage of justice when it formulated two (2) issues for determination outside the seven (7) grounds of appeal filed before it in Appeal No. CA/K/148/2001 and went ahead to determine the appeal on those two issues without giving the parties a hearing. (Distilled from Ground three (3) of the Grounds of Appeal).”*

F On his part, learned Counsel for the Respondent presented two issues for determination:

G *“1. Whether upon finding that there was no claim for the principal or interest endorsed on the Appellant’s Writ of Summons, the Court of Appeal was right in raising and deciding suo motu the issue of the competence of Suit No. K/750/2000. (This issue arises from the Appellant’s three grounds of Appeal).*

H *2. Whether the Respondent’s Notice of Intention to Defend and the Supporting Affidavit thereof in Suit No. K/750/2000 did not disclose a defence on the merit. (This issue arises from the Respondent’s Notice dated 22/03/2007).”*

In addition, learned Counsel for the Respondent filed a “Notice of Intention to contend that Ruling should be affirmed on grounds

*other than those relied on by the Court below. Order 6 Rule 6(2)."*

Before I proceed further, it is necessary to take another look at the two issues for determination presented by learned Counsel for the Respondent.

Issue 1 on the lower Court's decision on the competence of Suit No. K/750/2000 is said to have arisen from the appellant's three grounds of appeal. Appellant's grounds of appeal can be found on pages 109 to 112 of the record of proceedings. The essence of grounds 1 and 2 of the grounds of appeal is that the Court below erred by deciding the appeal on the issue it raised suo motu without affording the parties the opportunity to be heard on the said issue.

This is different from the Respondent's issue 1 which rests on the competence of the Court to raise and decide an issue suo motu. The issue is short of the appellant's complaint in grounds 1 and 2 that the issues raised suo motu by the Court below was decided without giving the parties the opportunity to be heard.

Respondent's issue 1 cannot be said to have been framed from appellant's grounds 1 and 2 or either of them. The complaint in ground 3 is that the Court below formulated two issues for determination of the appeal outside the seven (7) grounds of appeal filed by the appellant. Again, the appellant complained that the lower Court resolved the issues so formulated without giving the parties the opportunity to be heard. Issue 1 purportedly framed from the appellant's three grounds of appeal does not relate to, or flow from, any or a combination of the three grounds of appeal.

Of Issue 2, learned Counsel for the Respondent said:

*"This issue arises from the Respondent's Notice dated 22/03/2007."*

***An issue for determination, whether framed by the appellant or the Respondent, must emerge from the appellant's grounds of appeal. A Respondent's notice is a separate process from the grounds of appeal and while the respondent can raise and argue issues in his respondent's notice, he cannot raise issue from the notice along with issues drawn from the grounds of appeal.***

***From the above observations, it is clear that none of the Respondent's two issues is framed from any or all of the grounds of appeal. Issue one is incompetent and liable to be***

**struck out.** See *Taiwo Osinupebi v. Quadri Saka Salu* (1982) 7 SC 104; *Ugo v. Obiekwe* (1989) 1 NWLR (Pt.99) 566; *Mohammed Garba v. The State* (2000) 4 SCNJ 415.

The Respondent's issue one, along with the argument based on it is hereby struck out as incompetent.

B However if, in resolving the issues in the appellant's brief need to deal with the Respondent's notice arises, I will consider Respondent's argument on issue 2 in relation to the Notice.

C In Issue 1 in his brief, learned Counsel for the appellant referred to *Madukolu & Ors v. Nkemdilim* (1962) All NLR page 581 and conceded that the action from which this appeal arose was incompetent, not having been commenced properly. However, he contended that the Court below erred by raising the issue of competence of the Suit suo motu and resolving the issue without giving the D parties an opportunity to be heard on same.

He relied on a number of cases, among which are *Fabiya v. Adeniyi & Ors.* (2000) 6 NWLR (Pt. 662) 532 at 534, 546 paras B-C; *Kuti & Anor. v. Mrs. S. Balogun* (1978) All NLR p.6 at 12. He urged the Court to resolve Issue 1 in favour of the appellant.

E In Issue 2, learned Counsel complained that the Court below formulated two issues outside the seven (7) grounds of appeal in the appellant's notice of appeal. Relying on a number of decided cases including *Aja & Anor v. Okoro & Ors* (1991) 7 NWLR (Pt. 203) 260 at 272-273 paras H-A; *Asalu & Ors v. Dakan & Ors* (2006) F FWLR (Pt. 325) 90 at 98-99, paras H-A, he impugned the procedure adopted by the Court below. He urged the court to allow the appeal and declare as null and void the decision of the Court of Appeal in Appeal No. CA/K/148/2001 of 21/2/2006.

G Since the Respondent's issue one has been struck out, the only process left to be considered on the side of the Respondent along with the appellant's brief, is the argument on the Respondent's notice, if the need arises.

H ***Appellant's learned Counsel conceded a Writ of Summons bereft of claims is incompetent and further that a Court can raise an issue suo motu. In my view, these concessions are rightly made by learned Counsel. But as he rightly argued, the Court below went beyond bounds by determining the appeal on the issues it raised suo motu without calling on learned***

***Counsel for the parties to be heard on the issues. This is more so since the outcome of the appeal turned solely on the issues so raised and resolved.***

***In PDP v. Okorocha (2012) 3 KLR (Pt. 308) 1155 at 1159, para. D, this Court held that a Court could raise an issue suo motu but that the Court is bound to give the parties the opportunity to be heard on the issues, particularly where the decision turns on the issues.***

***The issue of competence, vel non, of the Writ of Summons was a critical factor in the case. It was properly raised by the Court but the Court should have invited the Counsel for the parties to address it on the issue especially the appellant who stood to lose, before resolving them. I resolve the issue in favour of the appellant.***

In Issue 2, Appellant's notice of appeal contained seven grounds of appeal from which four issues were distilled for determination. The Court below not only jettisoned the four issues but went ahead and framed two issues from nothing or nowhere. The two issues upon which the appeal was determined did not relate to, or derived from the grounds of appeal. Framing an issue for determination in an appeal outside the grounds of appeal is tantamount to putting something on nothing. It cannot stand. See *Macfoy v. United Africa Co. Ltd* (1962) AC 152.

***In an appeal, an issue for determination must be derived, framed or distilled from a valid ground of appeal or a combination of grounds of appeal. Any issue framed outside the grounds of appeal is incompetent and liable to be struck out. And it goes without saying that on no account should a Court decide a matter on an issue it raised suo motu, even when the issue is properly raised, without giving the parties the opportunity to be heard on same.***

The entire judgment of the Court below is null and void. There is therefore no need to consider the issue raised in the Respondent's notice which relates to the merit of the case in the trial Court. In conclusion, I allow the appeal and declare the judgment of the Court below null and void.

***What is the proper order to be made? The Court of Appeal declared null and void the judgment of the trial High***

***Court in Suit No. K/750/2000. That decision has been declared a nullity since the process leading to it was completely flawed.***

***Before this Court, appellant simply prayed for an order to declare the judgment of the Court below null and void. The mere declaration sought by the appellant would leave the proceeding and judgment of the trial Court subsisting and binding even though the Court below had determined rightly that the process leading to the judgment was incompetent because the Writ of Summons bereft of any claims endorsed on it is incompetent.***

***If the Court below had followed proper procedure in declaring the judgment of the trial Court a nullity, it should have struck out the incompetent Suit pursuant to Section 16 of the Court of Appeal Act. Therefore, pursuant to Section 22 of the Supreme Court Act, I strike out the suit No. K/750/2000 as incompetent and that the Kaduna State High Court had no jurisdiction to entertain it.*** See *Madukolu & Ors v. Nkemdilim* (supra).

Appeal is allowed. Judgment of the Court of Appeal which nullified the judgment of the trial Court is, itself declared null and void, and Suit No. K/750/2000 in the High Court, Kaduna State, is struck out for being incompetent and for want of jurisdiction in the High Court to hear and determine it. Parties herein shall bear their respective costs.

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### **ONNOGHEN JSC**

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

I agree with his reasoning and conclusion that the appeal has merit and should be allowed.

It is settled law that though a court is at liberty to formulate an issue(s) out of the grounds of appeal filed, it must ensure that the issue(s) so formulated arise from the said grounds of appeal and must hear the parties on the said issue(s) if it has to base its decision on the matter on the said issue(s) so raised suo motu.

In the instant appeal the issues formulated by the lower court and on which the court based its decision in the appeal did not arise

from the grounds of appeal filed neither were counsel for both parties given opportunity to make submissions on the said issues before the lower court proceeded to base its decision thereon

It is for the above reasons and the more detailed reasons contained in the lead judgment of my learned brother that I too allow the appeal, set aside the decision of the lower court and remit the appeal to the Court of Appeal holden at Kaduna Division to be heard and determined de novo. B

I abide by other consequential orders made in the said lead judgment including the order as to costs. C

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### **MUNTAKA-COOMASSIE JSC**

I have had the opportunity of reading before now the lead judgment of my learned brother Ngwuta, JSC just rendered. I entirely agree with the reasons and conclusion reached by his lordship in holding that the appeal is meritorious and should be allowed. D

The reasons and conclusion tally with my understanding of the law on the issue. So I do not think it is wise to go over it again here. Because of the detailed reasons adumbrated in the lead judgment that I too allow the appeal and set aside the decision of the lower court. I abide by the consequential order of remittal of the appeal to the lower court to be heard and determined afresh. I endorse the orders as to costs made in the said lead judgment. E F

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### **PETER-ODILI JSC**

I agree with the judgment just delivered by my learned brother, Nwali Sylvester Ngwuta JSC, and to support the reasoning I shall make some comments. G

This is an appeal against the judgment of the Court of Appeal, Kaduna Division Coram: Abdulkadir Jega, Kudirat M. O. Kekere-Ekun, Olukayode Ariwoola JJCA.

FACTS: The appellant as plaintiff in the trial court took out a writ of summons against the respondent and attached to the writ was an affidavit in support. Pursuant to the said writ of summons, the Kaduna High Court issued a Civil Summons and on being served the respondent as defendant filed a Notice of Intention to defend with a H

supporting affidavit.

The appellant alleged that he made two lodgments of N500,000.00 each between 30/12/98 and 07/01/99, the respondent averred that there was in fact only one lodgment of N500,000.00. That the N500,000.00 was brought to its bank on 30/12/98 but could not be counted on that day; a teller was raised and the money was boxed. That on or about 07/10/99, the box was opened, the money was counted, another teller was raised and the appellant's account was credited. The transaction was thus couched.

After about two years, in December, 2000 the appellant made a claim for an additional N500,000.00. After hearing arguments from counsel the learned trial judge delivered a judgment on 20/04/01 ordering the respondent to pay N500,000.00 with 21% of bank rate interest to the appellant on the ground that the respondent did not disclose a defence on the merit.

Respondent dissatisfied appealed to the Court of Appeal on the basis that the trial court held that the Notice to defend did not raise a good defence and on the challenge of jurisdiction of the trial court to award 21% bank rate interest which was not stated in the claim.

The Court of Appeal noted that not only the claim for interest but also the claim for the principal sum of N500,000.00 was not endorsed on the writ. The appellate court then formulated two issues of its own and held that the Writ of Summons was incompetent. It allowed the appeal and declared the judgment of the trial court a nullity.

The appellant being dissatisfied has come before this court on appeal. On the 19th March 2013 date of hearing, learned counsel for the appellant adopted their Brief of Argument settled by D. D. Onietan Esq. and filed on the 16/1/07. In the Brief were raised two questions for determination, viz:

1. Whether the Court of Appeal was not in error which occasioned a miscarriage of justice when it raised the issue of competence of Suit No, K/750/2000 suo motu giving the parties a hearing grounds 1 & 2.

2. Whether the Court of Appeal was not in error which occasioned a miscarriage of justice when it formulated two issues for determination outside the seven grounds of appeal filed before it in

appeal NO. CA/K/148/2001 and went ahead to determine the appeal on those two issues without giving the parties a hearing. (GROUND 3)

Learned counsel for the appellant also adopted their reply brief filed on 6/10/08.

For the respondent was adopted a brief of argument settled by Nelson Uzuegbu Esq., filed on 25/7/07 and deemed filed on 24/9/08. In the brief were framed as follows:

1. Whether upon finding that there was no claim for the principal or interest endorsed on the appellant's writ of summons, the Court of Appeal was right in raising and deciding suo motu the issue of the competence of Suit No K/750/2000.

2. Whether the respondent's notice of intention to defend and the supporting affidavit thereof in Suit No, K/750/2000 did not disclose a defence on the merit.

The two questions raised are similar in content and either can be taken and together. Arguing for the appellant learned counsel stated that it is not seriously contended that an appellate court lacks competence to raise an issue suo motu. That what the appellant is protesting against is the competence to raise such an issue, vital and fundamental without the parties being heard and so the decision thereby reached should not be allowed to stand. He cited *Fabiyi v Adeniyi & Ors* (2000) 6 NWLR (Pt. 662) 532; *Kuti & Anor. v Balogun* (1978) ALL NLR 6 at 12; *Warner & Warner International Associates (Nig) Ltd v Federal Housing Authority* (1993) 7 SCNJ (Pt. 1) page 1 at 31; Order 3 Rule 6 of the Court of Appeal Rules 1981 which is now Order 3 Rule 2(6) of the Court of Appeal Rules 2002; *Kraus Thompson Organisation Ltd v University of Calabar* (2004) 4 SCNJ 121 at 133 - 134.

It was contended for the appellant that the issues for determination in any appeal must have a direct bearing on the grounds of appeal. That by the same taken the power of any court to formulate issues on its own is limited to ensuring that such issues so formulated are not outside the grounds of appeal as happened here. He referred to *Aja & Anor. v. Okoro & Ors.* (1991) 7 NWLR (Pt. 203) 260 at 272-273; *Asalu & Ors v. Dakan & Ors* (2006) FWLR (Pt. 325) 90 at 98 - 99; *Attorney-General Lagos State v. Eko Hotels Limited & Anor* (2006) 9 SCNJ 104 at 137 etc.

Learned counsel went on to say that it is clearly a miscarriage of justice as the appellate court did in this case by deciding on the competence of a suit before a trial court which was not raised by either party before that trial court and decided upon on appeal when the plaintiff in the trial court whose suit was held to be incompetent  
 B had no opportunity of advancing any argument to the contrary either before the trial court or before the Court of Appeal. He relied on *Erhahon v. Erhahon* (1997) 6 NWLR (Pt.510) 667; *Federal Republic of Nigeria v. Anache*, In *Re: Chief Olafisoye* (2004)4 NWLR (Pt. 864) 580; *Labiya v Anretiola* (1992) 8 NWLR (Pt. 258) 139.

C Responding, learned counsel submitted for the respondent that the Court of Appeal rightly invoked the exception to the general rule that a Court of law should not raise and resolve issues suo motu without hearing arguments on it from counsel. That the issue raised  
 D by the Court of Appeal was an issue relating to jurisdiction as well as one involving a serious question of the fairness of the proceedings. He cited *Comptoir Commercial & Ind. SPR Ltd v. Ogun State Water Corporation & Anor.* (2002) FWLR (Pt. 105) 839 at 851; *Emmanuel Ilona v. Sunday Idakwo & Anor.* (2003) FWLR (Pt. 171) 1715 at  
 E 1738; *Oba J.A. Aremo II v S.F. Adekanye & 2 Ors* (2004) ALL FWLR (Pt.224) 2113 at 2129 etc.

Going on further learned counsel for the respondent said the Court of Appeal was right to be worried about the award of  
 F interest which had not been claimed for and such should be set aside. He stated that the facts on which the defences were founded had been averred to in the affidavit in support of the notice of intention to defend. That there were raised substantial questions of facts and  
 G law which could only be resolved by oral evidence from persons that actually participated in the whole transaction from the boxing and counting of the money to the issuance of the said tellers. He cited *Ataguba & Co v Gura Nigeria Ltd* (2005) ALL FWLR (Pt. 256) 1219 at 1230 - 1231.

H In reply on points of law, learned counsel for the appellant said the breach of the right to be heard lies not in the correctness of the decision being challenged but in the procedure adopted by the court. He cited *UBA Ltd. v. Achoru* (1990) 6 NWLR (Pt. 156) 254 at 274; *Mohammed v Olawunme* (1990) 2 NWLR (Pt. 133) 454; *UBN Plc v Nwaokolo* (1995) 6 NWLR (Pt.400) 127 etc.

This appeal has arisen because the Court of Appeal did what has been described as embarking on an errand it set for itself outside what was before it. That court stated as follows:

*“In the instant case, the situation that arises is so compelling that I have no other option that to discountenance the issues formulated by the parties and then formulate issues for determination arising from the entire procedure adopted in and the proceedings of the case.*

*The issues for determination therefore are as follows:*

*1. Whether the lower court was competent to entertain the suit when it was apparent on the face of the writ of summons that the plaintiff did not endorse any claim,*

*2. Whether the lower court was correct in giving judgment for the plaintiff when there was no claim before the court.”*

The court below made its decision based on those issues it raised suo motu, jettisoning the issues formulated by the parties and did not call on them to address the court on these newly self framed issues.

The competence of the Court of Appeal to raise an issue suo motu is not debated, what is contested that in a case where the issue being the competence of the court which is so important, vital and fundamental cannot be dealt without hearing the legal representatives of the parties. It is all the more germane where as in this instance the court went outside the grounds of appeal. This evokes the possibility of the court not only entering the arena but virtually taking over the case of the parties in a way reminiscent of crying more than the bereaved or a busy body. The authority of the court, be it trial or appellate, ought not to be demeaned by bringing itself so low or cheap by minding another person's business. I would refer to *Fabiya v. Adeniyi & Ors* (2000) 6 NWLR (Pt. 662) 532 at 534; *Kuti & Anor. V. Balogun* (1978) ALL NLR p.6 at 12.

The situation is very well X-rayed in the case of *Kraus Thompson Organisation Ltd v. University of Calabar* (2004) 4 SCNJ 121 at 133 - 134, this court stated as guiding what should obtain when the temptation arises to raise a point suo motu. This court opined as follows:

*“There can be no doubt that courts of law have power to raise suo motu relevant issue or issues which are not before the court*

*for the determination of the case. In exercising this power, however, the court must adhere strictly to the principles of natural justice and in particular, to the audi alteram partem rule. Accordingly, the law is also well settled that on no account should a court raise a point or issue suo motu no matter how clear it may appear to be and then*  
 B *proceed to resolve it one way or the other without inviting the parties to address it on the point. It does so, it be in flagrant abuse and breach of the aggrieved party's right to fair hearing as entrenched in the constitution. In other word, when a court for any compelling*  
 C *reasons finds it necessary and of justice, to raise a point or issue suo motu, the parties must be given an opportunity to be heard on such point or issue, particularly the party that may be prejudiced as a result of the point raised suo motu. ”*

The rule of court that tallies with the views above is Order 3  
 D Rule 2(6) of the Court of Appeal Rules 2002. The point being underscored is that while a court has the right to redirect issues to bring them more in line to be able to resolve the issues before that court, the court ought not to go outside the case before it or the grounds of  
 E appeal but if it must go outside the case before it, then it is imperative that the parties are invited to address fully on the new development otherwise it would seem as if the court instead of being an impartial  
 F arbiter is in the arena and a main participant operating a script different from what the parties came before court to do. This is unacceptable and would be deprecated once the shadow of such a possibility shows itself. See *Aja & Anor. V. Okoro & Ors* (1991) 7 NWLR (Pt. 203) 260 at 272-273; *Asalu & Ors v Dakan & Ors* (2006) FWLR (Pt. 325) 90 at 98 - 99; *Labiya v Aretiola* (1992) 8 NWLR (Pt. 258) 139.

It is clearly without doubt that the Court of Appeal went beyond its mandate or jurisdiction to take over a case of the parties  
 G completely not in line with the grounds of appeal and go ahead to produce a judgment based on this unrelated issue or ground of appeal' The decision cannot be allowed to stand. See *Attorney- General Lagos State v Eko Hotels Limited & Anor.* (2006) 9 SCNJ 104 at  
 H 137.

From the foregoing and the better articulated reasoning in the lead judgment, this appeal is allowed and the matter sent back to the Court of Appeal to be heard de novo.

I abide by the consequential orders as made by my learned

***MUHAMMAD JSC***

My learned brother Ngwuta JSC, obliged me a preview of his lead judgment just delivered. I agree with his reasoning leading to the conclusion that this appeal is meritorious. I adopt the judgment as mine in allowing the appeal. I abide by the consequential orders therein as well.

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