

SUPREME COURT OF NIGERIA
MONDAY 15TH, JANUARY, 2016. SC. 93/2004
CORAM:- S. GALADIMA, M. U. PETER-ODILI,
O. ARIWOOLA, K. M. O. KEKERE-EKUN,
A. SANUSI, JJSC

1. CHIEF B. A. ALLANAH
2. DR. N. G. ALLANAH APPELLANTS
3. MR. ANDREW O. UDEH
AND
1. MR. KANAYO KPOLOKWU
2. MR. CHIKE ALLANAH RESPONDENTS
3. MR. JIDEUCHE ALLANAH

APPEALS - Preliminary objection - Incorporated in brief - Validity - Failure to file formal notice of objection - Will not render the objection incompetent - As it may be included in respondent's brief (H1)

APPEALS - Court processes - Abuse of - Common feature of abuse of process that centres on improper use of process by party - To interfere with justice - Is not applicable to facts of present appeal (H2)

APPEALS - Interlocutory appeal - Filing time - SC Rules O. 7 rr. 6 & 7 - Appellants are to file their notice within 14 days - And as there is no evidence of their compliance - Objection on the point is sustained (H3)

APPEALS - Rights - Appellants cannot be said to have abandoned the suit by failing to file statement of claim - For they rightly pursued their appeal to SC since lower courts ruled against their motion (H4)

APPEALS - Grounds - Determination - Principle - Court must give regard to the particulars and consider them together - So as to ascertain the category to which they fit into (H5)

APPEALS - Ground - Mixed law & facts - Leave - Failure of appellants to seek leave to file the ground renders it incompetent - And

being the only ground - The appeal is also rendered incompetent (H6)

APPEALS - Filing - Extension of time - Where there is failure to file appeal within period stipulated by the Rules - And extension of time was not obtained - Appellate Court has no jurisdiction over the appeal (H7)

FACTS

Before the High Court of Delta State sitting in Asaba, plaintiffs/appellants commenced this action against defendants/respondents, claiming inter alia, for a declaration that respondents are not entitled to alienate the land in dispute without the consent of the family head. Appellants immediately followed the suit up with an application for interlocutory injunction, seeking to restrain respondents from entering the disputed land, pending the final determination of the action.

Upon being served with the motion for interlocutory injunction, respondents filed a counter affidavit. The court heard arguments of both parties on the application. At the end of the hearing, the court granted the relief sought by appellants in the interlocutory application. Dissatisfied, respondents appealed to the Court of Appeal Benin Division. The appeal was heard and eventually allowed by the court. Thus, the decision of the trial court was set aside. Aggrieved, appellants have come before the Supreme Court on appeal.

HELD (Unanimously striking out the appeal per

SANUSI JSC)

APPEALS - Preliminary objection - Incorporated in brief - Validity

1. Looking at the wording of the provisions of Order 2 Rule 9(2) of the Supreme Court Rules even where a respondent fails to comply with the rule, a court MAY (i.e. not “SHALL”) refuse to entertain the objection or it MAY adjourn hearing thereof at the cost of the respondent. In other words, it is not mandatory that where there is non-compliance with the rule, the court must or shall refuse to entertain the objection, as being submitted by the learned appellants’ counsel in his Ap-

pellants' Reply Brief. In fact, it has for long been settled or decided by this court in multiplicity of decided authorities that failure to file a formal "Notice" of Preliminary Objection would not be fatal or render the preliminary objection incompetent because it may be included in the respondent's brief by filing a separate notice or written objection or both, but there is the need for the respondent or his counsel to, with leave of the court move the objection before the hearing of the substantive appeal. I must however stress here that failure on the part of respondents to bring a formal notice in accordance with Order 2 Rule 9(1) of the Supreme Court Rules does not render the objection ineffective. Thus, the resultant effect of all that I have stated supra, is that the preliminary objection contained in the respondents' amended brief is competently raised and as such I decline to refuse to consider it on the merit.

(p. 291 F)

Court processes - Abuse of

2. With due deference to the learned counsel for the Respondents, the concept of abuse of court process is not precise as such. It involves peculiar or various conditions. But in a nutshell, the common feature of abuse of process of court centres on improper use of judicial process by a party in litigation aimed or targeting on interference with the administration of justice. To my mind, some of the features of abuse of court process include the under mentioned features, even though they are by no means exhaustive. These features are:-

(i) Filing of multiplicity of actions on the same subject matter against the same opponents on the same issues or numerous actions on the same matter between the same parties even where there is in existence, a right to commence the action.

(ii) Instituting different actions between the same parties simultaneously in different courts even though on different grounds.

(iii) Where two or more similar processes are used in respect of the exercise of the same right, for instance, a cross appeal and a respondents notice.

(iv) Where two actions are instituted in court, the second one asking for relief which may however be obtained in the first, the second action is, prima facie vexatious and an abuse of court process.

Relating or applying the above features to the fact and circumstances of the present appeal, I must say that none of them fits into the facts or antecedents of the present case. I do not share the sentiments of the learned counsel for the respondents, that this appeal or case was an abuse of court process. I therefore hold that the preliminary objection is not well taken on that point or ground and I accordingly overrule same in that regard. (p. 293 G)

APPEALS - Interlocutory appeal - Filing time

3. It would seem to me that the learned counsel for the appellants misunderstood the complaint of the respondents' counsel as regards the third ground of the latter's preliminary objection. The learned respondents counsel's grouse on this leg of the preliminary objection relates only to the period of filing of notice of appeal after the court below delivered its judgment on the interlocutory objection and NOT on the period of compilation and transmission of record of appeal to this court. There is nowhere in that leg of preliminary objection that the respondents' counsel mentioned compilation of record of appeal proceedings to this court. His submission on that point is therefore misplaced and untenable. By the provisions of Order 7 Rules 6 & 7 of this Court's Rules, the appellants are requested to file their notice of appeal within 14 days, same being an interlocutory appeal. There is no evidence to show that in this instant appeal, the notice of appeal was filed by the Appellants within fourteen days as stipulated by law. Also there is no evidence from the record showing that the appellants had sought and obtained extension of time to file this instant appeal, either from this court or from the court below. The preliminary objection is therefore well taken on this leg too, and it is accordingly sustained. (p. 295 B)

APPEALS - Rights

4. I really do not see the need to dissipate energy in treating this ground of preliminary objection. I do not regard the complaint of the respondents' counsel on this ground as cogent, genuine or tenable. It is not true to say that the plaintiffs/ap-^B
pellants have abandoned their suit at the lower court simply because they engaged themselves pursuing the interlocutory injunction which later metamorphosed into this appeal. It should be noted that when filing the interlocutory application before the trial court, they attached the Writ of Summons. Had it been they succeeded in the motion, they could have filed^C
their statement of claim and have pursued their suit vigorously and same would have by now been a matter of history. But because they did not succeed in their motion or the motion was refused, they chose to pursue it to the last judicial port of^D
call, which is this apex court. I do not see anything wrong in that as they have unfettered right of appeal up to this court when the two courts below did not decide in their favour. It is their right of appeal and they chose to pursue it to the final destination which is this court. This ground is therefore of no^E
moment and I accordingly refuse to sustain the preliminary objection based on that flimsy excuse or ground which I consider to be lacking in substance and is also without merit.
 (p. 296 A)

F

APPEALS - Grounds - Determination - Principle

5. To resolve the issue posed by the respondents as to whether the sole ground framed and raised in the ground of appeal is a ground of law or of facts or mixed law and facts, it is well^G
settled law, that a court when faced with the task of determining whether a ground or grounds contained in the notice of appeal is or are one of law alone or mixed law and facts, it does not really depend on the label appellation or tag given to it/them. The court must consider or give regard to the par-^H
ticulars and consider them together, so as to ascertain the category to which it/they slot or fit into.
However, in recent times, this court had expatiated or expanded the principles guiding the court in determining whether

a ground of appeal is one of law alone or of fact even though these guidelines which I will list below may not be exhaustive. These guiding principles include:-

- (i) Where the court is being invited to investigate the existence or otherwise of certain facts upon which the award of damages to the respondent was based; such a ground is of mixed law and fact.**
- (ii) A ground which challenges the finding of fact made by the trial court or involves issues of law and fact can only be argued with leave of the appellate court.**
- (iii) Where the evaluation of facts established by the trial court before the law in respect thereof as applied is under attack or question; the ground of appeal is one of mixed law and facts.**
- (iv) Where the evaluation of evidence considered at the trial is exclusively questioned, it is a ground of fact.**
- (v) A ground of law arises where the ground of appeal shows that the court of trial or appellate court misunderstood the law or misconceived the law to the proved or admitted facts. (pp. 299 E/300 D)**

APPEALS - Ground - Mixed law & facts - Leave

6. Having said so, I must emphasise here, that a ground of law is appealable to this court without leave. However, if it is a ground of fact or mixed law and fact, an appeal against such ground of mixed law and fact must be with the leave of this court.

Now, I have closely considered the sole ground of appeal filed by the appellants, which is now being attacked by the respondents for being one of mixed law and fact and also for being raised without prior leave sought and obtained by the appellants' learned counsel in the notice of appeal. A calm and dispassionate perusal of it leaves me with no iota of doubt, that it is really a ground of fact or at best of mixed law and fact. With the due deference to the learned counsel for the appellants, after a close and careful perusal of the sole ground of appeal, especially its particulars, I have no hesitation in holding that it is a ground of mixed law and fact which as I

posited *supra*, is NOT appealable to this court as of right and therefore, leave of either of this court or the court below required by virtue of Section 233(1), (2) and (3) of the 1999 Constitution. For example, one of the particulars of the said ground is talking about proof of identity of the Land which in my view, can only be done by leading evidence which is also an issue of fact. Another complaint from the particulars has to do with the description of the identity of the land as well as proof of boundaries of the land in dispute which are similarly questions or facts which could only be accomplished through adducing of evidence.

It is therefore my considered view that this lone ground of appeal is one of mixed law and fact and such ground can only be filed with leave. It is settled law, that failure to seek and obtain leave in respect of a ground of appeal of mixed law and facts renders such ground incompetent and in this instant case, where it is the only ground of appeal, the entire appeal is rendered incompetent. That being so, this court lacks jurisdiction to hear and determine the appeal, in view of the provisions of Section 233 of the 1999 constitution.

Apropos of the above, I hold that the sole ground of appeal is incompetent and the appeal itself is equally incompetent and therefore liable to be struck out. The preliminary objection is hereby sustained and allowed but only on this leg of the first ground of preliminary objection. (p. 301 A)

APPEALS - Filing - Extension of time

7. The wordings of the above provisions are plain and unambiguous. Subsection (2)(a) of the Section 27 of the Supreme Court Act simply provides a period of fourteen days within which person desirous of appealing against interlocutory decision, may seek and obtain leave to appeal against such decision from the court below. By subsection (4) of the Act, this court however has power to extend such time upon an application in that regard. As I said above, I have been unable to see anywhere from the record where the appellants sought and obtained leave to appeal either from the lower court or this court. Similarly, there is also no evidence to show that he

actually sought and obtained extension of time from this court to seek leave to appeal against such decision of the court below. The appellants' learned counsel did not help matters by failing to address this point in his Reply brief for reason best known to him, after all, the Respondents' Amended Brief
B containing that leg of the preliminary objection was duly served on him which said service perhaps might have led him to file his Reply brief. In the result, I will also uphold the preliminary objection on this second leg of the first ground of the objec-
C tion and as well, I hold that it is well taken and meritorious too. I accordingly allow or sustain it too, for the reasons I advanced above.

The law is clear and beyond peradventure, that where there is failure to file an appeal within the period stipulated by
D the rules of court, Act or Constitution without obtaining an extension of time within which to appeal or to comply with the statutory requirements of the law which is also a condition precedent to the filing of a valid appeal constitutes an incurable defect which deprive the appellate court of jurisdic-
E tion to entertain the appeal. To put it in another way, where an appeal against an interlocutory decision (such as this) is filed outside the stipulated time, without the leave of court, or extension of time given, the appeal will be struck out for being incompetent. Thus, in this instant appeal in which the appel-
F lants' appeal was filed without leave more than fourteen days after the order striking same out was made, the appeal is rendered incompetent. (p. 303 D)

G NOTABLE POINT OF INTEREST

SANUSI JSC

1. Preliminary objection – To be heard before appeal

I will now proceed to consider the preliminary objection raised in the respondents' amended brief of argument in its merit or for whatever
H it is worth before considering the main appeal as it has already been settled law, that preliminary objection must first of all be considered and decided/determined before treating the substantive appeal, if need be. This is because, it is settled law that where a preliminary

objection is raised against the hearing of an appeal it must be taken first before proceeding to hear the appeal.(p. 292 E)

REPRESENTATION

Chief Ikenna Egbuna for the Appellant
Ikhide Ehigizua for Respondent with him E. F. Odosor and C. A. B Michael

CASES REFERRED TO

- Agbaje v. Amadi (1998) 11 NWLR (pt. 572) 16
Auto Import Export v. Adebayo (2002) 18 NWLR (pt. 799) 554 C
Nsirim v. Nsirim (1990) 5 SCNJ 74
Okolo v. Union bank of Nigeria Ltd. (1998) 2 NWLR (pt. 539) 618
Arewa Textile Plc. v. Abdullahi (1998) 6 NWLR (pt. 554) 508
Ajide v. Kelani (1985) 3 NWLR (pt. 12) 248 D
Fawehinmi v. NBA (No. 1) (1989) 2 NWLR (pt. 105) 494
Tiza v. Begha (2005) 15 NWLR (pt. 949) 616
Mangoro v. Garba (1999) 10 NWLR (pt. 624) 555
Aregbesola v. Oyinlola (2011) 9 NWLR (pt. 1253) 488
Obasanjo-Bello v. FRN (2011) 10 NWLR (pt. 1256) E
Ette v. Edo (2009) 8 NWLR (pt. 1144) 601
Okorochoa v. PDP (2014) 7 NWLR (pt. 4406) 213
Saraki v. Kotoye (1962) 9 NWLR (pt. 204) 156
Ogoejiiofor v. Ogoejiiofor (2006) 3 NWLR (pt. 996) 206 F

STATUTES & RULES REFERRED TO

- Constitution of the Federal Republic of Nigeria 1999, s. 233(1)(2)
Supreme Court Act Cap S15 LFN 2004, s. 27(1)(2)
Supreme Court Rules 2004, O. 2 r. 9(1), O. 7 r. 4(1) G

LEAD JUDGMENT BY SANUSI JSC

This is an appeal against the judgment of court of appeal (hereinafter referred to as “The Lower Court” delivered on 19th day of December 2003. The facts of the case as could be gleaned from the record are summarized as follows:-

The appellants herein, as plaintiffs, instituted an action at the High Court of Delta State, Asaba Judicial Division in the year 2000. At the time, Delta State High Court was applying Bendel State High

Court (Civil Procedure) Rules of 1988 and the suit filed at the Asaba Judicial Division of Delta State High Court (“the Trial Court” for short) was given No. A/170/2000. In the said suit the plaintiffs/applicants claimed the following declaratory and injunctive reliefs against the defendants who are respondents herein. The reliefs sought are:-

B 1. A declaration that under Asaba Native Law and Custom, the defendants, their servants and/or agents are not entitled to sell, assigns, allocate, transfer, mortgage or lease any interest on Obi Okonya family land (layout) situate at Umuekwo Village, Umuaji Quarters Asaba without the knowledge, consent and approval of the
C Diokpa (Head of family) and the principal members of Obi Okonya Family of Umuekwo Village, Umuaji Quarters, Asaba.

2. A declaration that any purported sale, assignment, alienation mortgage or lease without the knowledge consent and approval
D of Diokpa (Head of family) and the principal members is irregular, improper, invalid, null and void and of no effect whatsoever.

3. A perpetual injunction restraining the defendants, their servants and/or Agents from taking possession, dealing with the said property or doing any acts inconsistent with the ownership rights of Obi
E Okonya family Land (layout) situate at Umuekwo Village, Umuaji Quarters, Asaba.

At the same time, while filing the suit, the plaintiffs/appellants followed it up with a motion on notice seeking interlocutory injunction, dated 7th December, 2000 but filed on 8th day of December,
F 2000. In the said motion the plaintiffs/appellants, now appellants, sought one relief as reproduced below:-

“interlocutory injunction restraining the Defendants/Respondents” whether by themselves, their servants and/or Agents from entering” tampering and/or dealing with the Obi Okonya family Land situate at Umuekwo Village, Umuaji Quarters, Asaba pending the final determination of this action “.
G

The motion for interlocutory injunction was supported by an eight paragraph supporting affidavit. Upon being served with the
H motion for interlocutory injunction which was also accompanied by writ of summons, albeit; without Statement of claim, the defendants (now respondents) filed a counter affidavit. The trial court took arguments of both parties on the application and afterwards delivered its ruling granting the relief sought in the motion for interlocutory in-

junction.

Aggrieved by the decision of the trial court granting the application of the plaintiffs, the defendants now respondents) appealed to the Court of Appeal, Benin Division (the lower court). At the lower court, parties filed and exchanged their briefs of argument in keeping with the rules and practice in that court. The lower court heard the appeal and later delivered its considered judgment on 19th November 2003, wherein, it set aside the decision of the trial court. B

Naturally the appellants herein, became dissatisfied with the decision of the lower court, hence they jointly appealed to this court against the decision of the lower court by filing a Notice of Appeal dated 3rd December 2003 containing lone ground of appeal. C

Briefs of argument were filed by both parties, while the Respondents later amended their joint brief with leave of this court, Parties briefs were finally exchanged by the parties. The appellants' learned counsel Chief Ikenna Egbuna, at the hearing of this appeal before us, adopted and relied on his brief which he filed on 16/7/2013, which said brief of argument was deemed filed on 4/12/2013. On the other hand, the learned counsel for the Respondents adopted and relied on his Amended Respondents Brief of Argument which was settled by in E.F. Odojor Esq., and was filed on 10/3/2004. It is also note worthy that the Appellants' learned counsel also filed Appellants' Reply Brief on 2/4/2014 upon being served with the Respondents' Amended brief of Argument. D E

As I said supra, the appellants' learned counsel only filed one ground of appeal in his Notice of Appeal. Therefore, in the brief of Argument filed on behalf of the appellants, only one issue was distilled from the said sole ground of appeal, for the determination of the appeal. The sole issue for determination proposed by the appellants reads thus:- F G

"Whether or not the learned justices of the court below were right when they held that the Appellants did not introduce enough facts to entitle them to an order of interlocutory injunction in the absence of a survey plan." H

On their part, the Respondents, in their joint Amended Respondents' Brief of Argument, also decoded one issue for the determination of this appeal and the said issue is also reproduced below:

"Whether the learned Justices of the Court below were right in

reversing the interlocutory decision of the trial court on the basis that no reference was made to the extent and boundaries of the land and boundary neighbours, with the result that a surveyor can not produce a plan of Obi Okonya family land."

It is pertinent at this stage, to state that the learned counsel for the respondents in his Amended Respondents' Brief raised Preliminary Objection which he also argued on pages 4 to 6 of the said Amended Brief of Argument. The respondents did not however, formally file a Notice of Preliminary Objection but he merely raised and argued it in his Amended Respondents' brief. Perhaps it was the procedure adopted by the respondents counsel by simply incorporating the preliminary objection and arguing same therein, that triggered the learned counsel for the appellants to file his Appellant Reply Brief and responded to the objection therein, even though he insisted or opined that such procedure offends the provisions of Order 2 Rule 9(1) of the Supreme Court Rules, as amended and argued that the alleged non-compliance with that rule rendered the preliminary objection incompetent and liable to be struck out and he urge us to do same. I shall therefore consider this appellants' learned counsel grouse before deciding whether or not to strike out the Objection on that appellants' counsel compliant.

Now before dealing with the preliminary objection proper, I will first of all deal with the above complaint touching on the propriety and competence of the Preliminary Objection vis-à-vis the provisions of Order 2 Rule 9(1) of the Supreme Court Rules, relied on page 2 of the Appellants' Reply Brief which also revolves on the provisions of Order 2 Rule 9(1) of the Supreme Court Rules which the learned appellants counsel cited and relied on.

Order 2 Rule 9(1) of the Supreme Court Rules reads as below:-

"A respondent intending to rely upon a preliminary objection to the hearing of the appeal shall give the appellant three clear days notice thereof before the hearing setting out the grounds of objection/and shall file such notice together with ten copies thereof, with the Registrar within the same time.

2. If the respondent fails to comply with this rule, the court may refuse to entertain the objection or may adjourn the hearing thereof at the cost of the respondent or may make such other order

as it thinks fit” (emphasis mine),”

It is on record and as I stated supra, the respondents’ learned counsel herein, did not file a formal Notice of preliminary Objection, but he simply raised same in his Amended Respondents’ Brief of Argument and argued it on pages 4 to 7 of the said amended brief of argument and on page 4 he conspicuously captioned it “PRELIMINARY OBJECTION”. The said Respondents’ Amended Brief was duly served on the appellants’ learned counsel and it was upon same being served on him that made him respond to it by filing the Appellants’ Reply Brief on 2/4/2014, wherein he, inter alia, conspicuously replied to the said preliminary objection argued in the Respondents’ Amended Brief of Argument. It should be noted that this appeal was heard by us on 19th October 2015 after all the briefs were duly filed and exchanged. To my mind, the purpose of filing a notice of preliminary objection is simply to safeguard against taking an appellant by surprise thereby causing some embarrassment to him. See Chief Agbaje & 3 ors vs Chief Amadi & Anor (1998) 11 NWLR (pt. 572) 16 at 25; Auto Import Export vs Adebayo & 2 ors (2002) 18 NWLR (pt. 799) 554. In this instant case the respondents did argue the preliminary objection in the Amended Respondents’ Brief, and served on the learned Appellants’ counsel, which service of same was an advanced notice on him and it made him to be fully aware of the objection before he filed the Reply brief of argument, wherein he met the objection by replying to it. The appellants’ learned counsel can therefore not be heard complaining that he was embarrassed or taken by surprise at all.

Looking at the wording of the provisions of Order 2 Rule 9(2) of the Supreme Court Rules even where a respondent fails to comply with the rule, a court MAY (i.e. not “SHALL”) refuse to entertain the objection or it MAY adjourn hearing thereof at the cost of the respondent. In other words, it is not mandatory that where there is non-compliance with the rule, the court must or shall refuse to entertain the objection, as being submitted by the learned appellants’ counsel in his Appellants’ Reply Brief. In fact, it has for long been settled or decided by this court in multiplicity of decided authorities that failure to file a formal “Notice” of Preliminary Objection would not be fatal or render the preliminary objection incompetent

because it may be included in the respondent's brief by filing a separate notice or written objection or both, but there is the need for the respondent or his counsel to, with leave of the court move the objection before the hearing of the substantive appeal. See the case of Chief Nsirim vs Nsirim (1990) 5 SCNJ 74; Okolo vs Union bank of Nigeria Ltd. (1998) 2 NWLR (pt 539) 618; Arewa Textile Plc vs Abdullahi & Anor (1998) 6 NWLR (pt. 554) 508; Ajide vs Kelani (1985) 3 NWLR (pt 12) 248 at 257/258, Fawehinmi vs NBA (No.1) (1989) 2 NWLR (pt 105) 494; Tiza & Anor s Begha (2005) 15 NWLR (pt 949) 616. ***I must however stress here that failure on the part of respondents to bring a formal notice in accordance with Order 2 Rule 9(1) of the Supreme Court Rules does not render the objection ineffective.*** See Chief Agbaka vs Chief Amadi & Anor (supra); Alhaji Mangoro vs Chief Garba (1999) 10 NWLR (pt 624) 555. ***Thus, the resultant effect of all that I have stated supra, is that the preliminary objection contained in the respondents' amended brief is competently raised and as such I decline to refuse to consider it on the merit.***

I will now proceed to consider the preliminary objection raised in the respondents' amended brief of argument in its merit or for whatever it is worth before considering the main appeal as it has already been settled law, that preliminary objection must first of all be considered and decided/determined before treating the substantive appeal, if need be. See Ravih Abdul vs Union Bank of Nigeria Plc (2011) All NWLR (pt 505) 203. This is because, it is settled law that where a preliminary objection is raised against the hearing of an appeal it must be taken first before proceeding to hear the appeal. See Aregbesola vs Oyinlola (2011) 9 NWLR (pt 1253) 488, Obasanjo-Bello vs FRN (2011) 10 NWLR (pt. 1256).

Suffice it to say, that the learned respondents' counsel hinged his preliminary objection that he argued in his amended respondents' brief, on four grounds which are listed below:-

(1) That the Notice of Appeal is incompetent in that the only ground of appeal in the notice of appeal is one of mixed law and fact which require that leave of this court or of court below must be sought and obtained before raising it, in view of Section 233 (1) of the Constitution of the Federal Republic of Nigeria 1999 and such leave was

not ought and obtained before raising it; hence the appeal is incompetent and must be struck out.

(2) That the appellants/plaintiffs failed to pursue the substantive suit by filing their statement of claim since the year 2000 hence they abandoned their substantive suit.

(3) That Appeal is incompetent due to appellants' failure to file it in this court within 14 days from the date the lower court delivered its judgement as prescribed in the Rules of this court, hence should be struck out, and

(4) That the appeal is a complete abuse of court process in view of above listed three grounds of preliminary objection.

I intend to consider these grounds of preliminary objection in reverse order and in doing so; I will first of all treat the last three grounds mentioned above seriatim.

The learned respondents' counsel in his amended brief of argument submitted that this appeal is a complete abuse of court process based on the three grounds of objection listed above. He did not however expatiate on what made the appeal filed by the appellants an abuse of court process. To meet the above submission of the learned respondents' counsel on the issue of the Appeal being abuse of court process, the learned counsel for the appellants in his reply brief argued that a case can be regarded as abuse of court process only when the court process had not been used bona fide and properly or when the proceeding is frivolous, vexatious and oppressive, and that legal procedure or the legal process was improperly used. He referred to the authorities of *Ette Akpan Ette vs Akpan Amos Harry Edoh & Anor* (2009) 8 NWLR (pt 1144) 601 para D-G; *African Reinsurance Corporation vs JDP Construction (Nig) Ltd.* (2003) 13 NWLR (pt 838) 609; *Unifam Ind. Ltd. vs Oceanic Bank (Nig) Ltd* (2005) 3 NWLR (pt 911). The learned appellants' counsel stressed that the respondents' counsel failed to advance any reason why the appeal became an abuse of court process.

With due deference to the learned counsel for the Respondents, the concept of abuse of court process is not precise as such. It involves peculiar or various conditions. But in a nutshell, the common feature of abuse of process of court centres on improper use of judicial process by a party in litigation aimed or targeting on interference with the administra-

tion of justice. To my mind, some of the features of abuse of court process include the under mentioned features, even though they are by no means exhaustive. These features are:-

(i) Filing of multiplicity of actions on the same subject matter against the same opponents on the same issues or numerous actions on the same matter between the same parties even where there is in existence, a right to commence the action.

(ii) Instituting different actions between the same parties simultaneously in different courts even though on different grounds.

(iii) Where two or more similar processes are used in respect of the exercise of the same right, for instance, a cross appeal and a respondents notice.

(iv) Where two actions are instituted in court, the second one asking for relief which may however be obtained in the first, the second action is, prima facie vexatious and an abuse of court process. See cases Okorocha vs PDP (2014) 7 NWLR (pt 4406) 213; Saraki vs Kotoye (1962) 9 NWLR (pt 204) 156; Ogoejiofor vs Ogoejiofor (2006) 3 NWLR (pt 996) 206.

Relating or applying the above features to the fact and circumstances of the present appeal, I must say that none of them fits into the facts or antecedents of the present case. I do not share the sentiments of the learned counsel for the respondents, that this appeal or case was an abuse of court process. I therefore hold that the preliminary objection is not well taken on that point or ground and I accordingly overrule same in that regard.

The third ground of the preliminary objection queries the competence of the appeal in view of the appellant's failure to file the Notice of Appeal within fourteen days from the date the lower court delivered its judgment as prescribed in the Rules of this court and thereby asked that this appeal should be struck out for being incompetent. In his response, the learned counsel for the appellants submitted that the respondents' counsel submission on that point is misrepresentation and misconception of the law. To buttress his submission the learned counsel referred to Order 7 Rule 4(1) of the Supreme Court Rules 2004, which relates to or deals with time within

which record of appeal should be transmitted to this court by an appellant which said Order by its Rule 4(1) prescribes a period of not more than six months within which an appellant is required to compile and transmit record of appeal to this court from the date the Court of Appeal delivers its judgment.

It would seem to me that the learned counsel for the appellants misunderstood the complaint of the respondents' counsel as regards the third ground of the latter's preliminary objection. The learned respondents counsel's grouse on this leg of the preliminary objection relates only to the period of filing of notice of appeal after the court below delivered its judgment on the interlocutory objection and NOT on the period of compilation and transmission of record of appeal to this court. There is nowhere in that leg of preliminary objection that the respondents' counsel mentioned compilation of record of appeal proceedings to this court. His submission on that point is therefore misplaced and untenable. By the provisions of Order 7 Rules 6 & 7 of this Court's Rules, the appellants are requested to file their notice of appeal within 14 days, same being an interlocutory appeal. There is no evidence to show that in this instant appeal, the notice of appeal was filed by the Appellants within fourteen days as stipulated by law. Also there is no evidence from the record showing that the appellants had sought and obtained extension of time to file this instant appeal, either from this court or from the court below. The preliminary objection is therefore well taken on this leg too, and it is accordingly sustained.

The second ground of the objection has to do with the alleged failure by the plaintiffs/appellants to file their joint statement of claim at the trial court since the year 2000 and therefore are deemed to have abandoned the suit. Here, the learned respondents' counsel argued that by failing to pursue the substantive suit by filing statement of claim since the year 2000 and by abandoning the substantive suit that has clearly shown indolence on their (appellants'/plaintiffs') part, he said the interlocutory appeal had been academic. He then urged this court refuse to resuscitate the suit. Reacting to the above submissions of the learned respondents' counsel, learned counsel for the appellants submitted that the respondents' counsel's sub-

mission on this ground is incorrect, especially if one considers the record of appeal which is binding on the parties and the court as well.

I really do not see the need to dissipate energy in treating this ground of preliminary objection. I do not regard the complaint of the respondents' counsel on this ground as cogent, genuine or tenable. It is not true to say that the plaintiffs/appellants have abandoned their suit at the lower court simply because they engaged themselves pursuing the interlocutory injunction which later metamorphosed into this appeal. It should be noted that when filing the interlocutory application before the trial court, they attached the Writ of Summons. Had it been they succeeded in the motion, they could have filed their statement of claim and have pursued their suit vigorously and same would have by now been a matter of history. But because they did not succeed in their motion or the motion was refused, they chose to pursue it to the last judicial port of call, which is this apex court. I do not see anything wrong in that as they have unfettered right of appeal up to this court when the two courts below did not decide in their favour. It is their right of appeal and they chose to pursue it to the final destination which is this court. This ground is therefore of no moment and I accordingly refuse to sustain the preliminary objection based on that flimsy excuse or ground which I consider to be lacking in substance and is also without merit.

I will now come to the first ground of objection which queries the competence of the lone ground of appeal filed by the appellants. The substance of the preliminary objection of the learned respondents' counsel is a challenge to the competence of the sole ground of appeal because it is not a ground of law which does not require leave to be sought and obtained before being raised. According to the learned respondents' counsel, the lone ground of appeal is one of fact or at best of mixed law and facts which requires leave to be sought and obtained and regrettably such leave of either the lower court or this court, had not been sought and obtained before it was raised. The failure to obtain such leave according to the learned counsel for the respondents, runs riot and violent to the provisions of Section 233(1)(2) of the Constitution of the Federal Republic of Nigeria 1999, as amended. Therefore, added the learned respondents'

counsel such flaw rendered the appeal incompetent and liable to be struck out since there is no other ground of appeal that can sustain the appellants' appeal. Learned respondents' counsel on this submission referred to the cases of *Nwaolisah vs Nwabufor* (2011) All FWLR (pt 591, 1438 at 1454 F - H; *Amuda v Adelodun & Anor* (1994) 21 LRCN 25 at 27/28. The learned respondents' counsel while buttressing his point to justify that the ground of appeal is one of mixed law and facts stated that it questions whether there was sufficiency or otherwise, affidavit evidence of identity of the land in dispute, adding that, that is purely and clearly an issue of fact or at best mixed law and fact. He said that being the case, leave was required to raise it but such leave was never sought and obtained by the appellants. See also *Ukat v State* (1995) 33 LRCN 564 at 565, ratio 1; *Opiniyo v Omoiwari* (2007) All FWLR (Pt 378) 1093 at 1102 Paras E - G.

In further submission, the learned respondents' counsel submitted that the appellant also requires leave of either the court below or of this court within 14 days, for them to appeal to this court (Supreme Court) against the decision of the court below (Court of Appeal) by virtue of the provisions of (the supreme Court) Section 27(1) and (2) of the Supreme Court Act. See the case of *Asogwa vs Peoples Democratic Party* (2013) All FWLR (pt 1689) 214 at 240. He stressed that in an interlocutory decision, as in this instant appeal, it is required that leave of the court below or this court must be sought and obtained within 14 days from the date of the decision of the court below appealed against and failure to seek and obtain such leave renders the appeal filed incompetent as no jurisdiction can be conferred in the appellate court. See *Nwaolisah vs Nwabufor* (supra). He finally argued that failure to obtain the leave is fatal as it completely renders the appeal filed incompetent and liable to be struck out and he urged us to so hold and to strike out the present appeal on that ground.

In his reaction, the learned counsel for the appellants submitted that the respondent misconceived and misapprehended the import of mixed law and fact. He said the distinction between ground of law and fact is very thin adding that it is not the labelling of a ground as one of law or of mixed law and fact that matters. Rather, according to the learned counsel, the court has to examine the ground

along with its particulars in order to ascertain whether such is one of law simpliciter, or of mixed law and fact. He stated that where the ground raises an issue of law based on accepted, undisputed or admitted facts as found by the court, such ground is a ground of law. But where it is based on facts in dispute or unascertained, it is one of mixed law and facts. He cited the cases of Nigeria National Supply Company Ltd vs Establishment Sime of Vaduz (1990) 7 NWLR (pt 194) 526; Ogbede vs Onochie (1986) 2 NWLR (pt 23) 484; ACB Plc vs obliami Brick Stone Nigeria Ltd (1993) 5 NWLR (pt 294) 399.

C Learned appellants' counsel also submitted that where facts are admitted or settled, the ground of appeal is one of law. See Ikem vs Nezieanya (2002) FWLR (pt 99) 1088 at 1098/1099. He stated also that even where a ground of appeal reveals a misunderstanding by the lower court of facts admitted or proved, it is a ground of law.

D See Ukachukwu & Sons Ltd vs Okeke & Anor (2007) FWLR (Pt 71) 179/a/1802. The learned respondents' counsel further submitted that facts relating to the identity or description of the land in dispute as contained in the counter affidavit supported his submission that the lone ground he filed was one of law and not of mixed law and facts.

E He urged us to hold that the lone ground raised in his notice of appeal is purely a ground of law alone and therefore he needs not seek and obtain leave before raising same. He finally prayed this court to dismiss the preliminary Objection raised by the respondents in its entirety and to ultimately hear the appeal and determine it on the merit.

F

Perhaps, it will be apt to kick-start the consideration of this portion of the preliminary objection by reproducing below, the lone ground of appeal since it is focal point on which the preliminary objection revolves and also on which the parties learned counsel exerted efforts to see that the preliminary Objection succeeds or fails depending on which side the party stands. Setting out the ground of appeal below will in my view, serve the purpose of ease of reference as well as the purpose of clarity. The said sole ground of appeal in the notice of appeal filed by the appellants reads as below:-

H

"The Court of Appeal erred in law when it held as follows:-

The Respondents failed to exhibit survey plan of the Land in dispute or to describe its boundaries.

PARTICULARS OF ERROR

1. *The appellants described the land in dispute in paragraph (sic) 8, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 26, and 29 of the counter affidavit admitted knowing the names, location and the portion of land the injunction was to operate upon.*

2. *A survey plan of a land in dispute is not a necessity where it is clear from the affidavit evidence before the court that the identity of the portion of Land is not in doubt or known to the parties and can otherwise be ascertained to the satisfaction of the court”.*

It is noted by me that this portion of the ground of the respondent’s preliminary objection is two folds or has two prongs, namely the alleged failure of the appellants to seek/and obtain leave of this court or the lower court before raising the sole ground of appeal same, according to their learned counsel, being a ground of mixed law and fact contrary to Section 233 of the 1999 Constitution and secondly that the appellant also failed to obtain leave of this court within 14 days on an interlocutory matter contrary to Section 27(1) & (2) of the Supreme Court Act. I will firstly deal with the first leg of this portion of the respondents’ preliminary objection dealing with the nature of the sole ground of objection before addressing the second leg of this ground pertaining to seeking leave to appeal in an interlocutory matter within 14 days.

To resolve the issue posed by the respondents as to whether the sole ground framed and raised in the ground of appeal is a ground of law or of facts or mixed law and facts, it is well settled law, that a court when faced with the task of determining whether a ground or grounds contained in the notice of appeal is or are one of law alone or mixed law and facts, it does not really depend on the label appellation or tag given to it/them. The court must consider or give regard to the particulars and consider them together, so as to ascertain the category to which it/they slot or fit into. There is no doubt that the question of determining whether a complaint in an appeal raises question of law alone or mixed law and facts is a difficult one. This court in plethora of decided authorities laid down guidelines or guiding principles on how to determine which ground of appeal is of law alone or which one is of mixed law and facts. For instance, the test put forward by Esho JSC (as he then was of blessed memory) in the case of Ogbechie vs Onochie (1986) 2 NWLR (pt. 23)484 had given

an insight on How to determine it, when the learned jurist stated thus:-

“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 ground reveal a misunderstanding by the lower tribunal of the law or misapplication of the law to the facts already proved or admitted in which case, it would be question of law, or one that would require questioning the evaluation of facts by the lower tribunal before the application of the law in which case it would amount to question of mixed law and fact. The issue of pure facts is easier to determine”.

See the cases *Opuiyo & Ors vs Omonwari & Anor* (2007) 16 NWLR (pt 1060) 415; or (2007) 6 SC (Pt. 1) 35, *ACB Plc vs Obimiami Brick Stone* (1993) 5 NWLR (pt. 294) 399 or (1993) 6 SCNJ 98; *Ajayi & Anor vs Omorogbe* (1993)7 SCNJ 168.

However, in recent times, this court had expatiated or expanded the principles guiding the court in determining whether a ground of appeal is one of law alone or of fact even though these guidelines which I will list below may not be exhaustive. These guiding principles include:-

(i) Where the court is being invited to investigate the existence or otherwise of certain facts upon which the award of damages to the respondent was based; such a ground is of mixed law and fact.

(ii) A ground which challenges the finding of fact made by the trial court or involves issues of law and fact can only be argued with leave of the appellate court.

(iii) Where the evaluation of facts established by the trial court before the law in respect thereof as applied is under attack or question; the ground of appeal is one of mixed law and facts.

(iv) Where the evaluation of evidence considered at the trial is exclusively questioned, it is a ground of fact.

(v) A ground of law arises where the ground of appeal shows that the court of trial or appellate court misunderstood the law or misconceived the law to the proved or admitted facts.

See Senator Hosea Ehinlanwo vs Chief Olusola Oke & Ors (2008) 6 – 7 SC (pt 11)123 or (2008)16 NWLR (pt 1113) 357. See also Nwadike & Ors vs Ibekwe & Ors (1987) 4 NWLR (pt 67) 718 at 733.

Having said so, I must emphasise here, that a ground of law is appealable to this court without leave. However, if it is a ground of fact or mixed law and fact, an appeal against such ground of mixed law and fact must be with the leave of this court. See the cases of Chief Obatoyinbo & Anor vs Oshatoba & Anor (1996) 55 SCNJ 1 at 16 or at (1996) 5 NWLR (pt 450) 531.

Now, I have closely considered the sole ground of appeal filed by the appellants, which is now being attacked by the respondents for being one of mixed law and fact and also for being raised without prior leave sought and obtained by the appellants' learned counsel in the notice of appeal. A calm and dispassionate perusal of it leaves me with no iota of doubt, that it is really a ground of fact or at best of mixed law and fact. With the due deference to the learned counsel for the appellants, after a close and careful perusal of the sole ground of appeal, especially its particulars, I have no hesitation in holding that it is a ground of mixed law and fact which as I posited supra, is NOT appealable to this court as of right and therefore, leave of either of this court or the court below required by virtue of Section 233(1), (2) and (3) of the 1999 Constitution. For example, one of the particulars of the said ground is talking about proof of identity of the Land which in my view, can only be done by leading evidence which is also an issue of fact. Another complaint from the particulars has to do with the description of the identity of the land as well as proof of boundaries of the land in dispute which are similarly questions or facts which could only be accomplished through adducing of evidence.

It is therefore my considered view that this lone ground of appeal is one of mixed law and fact and such ground can only be filed with leave. It is settled law, that failure to seek and obtain leave in respect of a ground of appeal of mixed law and facts renders such ground incompetent and in this instant case, where it is the only ground of appeal, the entire appeal

is rendered incompetent. That being so, this court lacks jurisdiction to hear and determine the appeal, in view of the provisions of Section 233 of the 1999 constitution.

Apropos of the above, I hold that the sole ground of appeal is incompetent and the appeal itself is equally incompetent and therefore liable to be struck out. The preliminary objection is hereby sustained and allowed but only on this leg of the first ground of preliminary objection.

The second leg of the preliminary objection on this first ground of objection raised in the respondents' amended brief of argument pertains to the alleged failure of the appellants' learned counsel to apply for leave to appeal against interlocutory ruling of the lower court on this interlocutory appeal, from either this court or the court below within 14 days which according to him, is an infringement of the provisions of Section 27(1) and (2) of Supreme Court Act Cap S15, Laws of Federation of Nigeria (LFN) 2004.

I have rummaged through the record of appeal and also closely perused the Appellants' Reply Brief filed by their learned counsel on 19/11/2015 and am unable to see any evidence to show that the appellants' learned counsel sought and obtained leave to appeal against the interlocutory appeal which this instant appeal surely is. Also, in the said Appellants' Reply there is nowhere where the latter reacted or addressed or proffered arguments on this second leg of the respondents' first ground of the preliminary objection as mentioned above. The learned appellants' counsel's Reply Brief merely addressed the issue of the nature or category of ground of appeal, which he vigorously argued or submitted, was NOT of fact or mixed law and fact but purely of law, which did not require him to seek and obtain leave before raising same.

At any rate, there is no gain saying that the judgment by the lower court stemmed out from a ruling of the trial court on a motion filed before it (the trial court). The core point in this second leg of the preliminary objection revolves or centres on the provisions of Section 27(1) & (2) of the Supreme Court Act 2004 Cap S15 which reads as below:-

“(1) Where a person desires to appeal to the Supreme Court, he shall give notice of appeal or notice of his application for leave to appeal in such manner as may be directed by rules of court within

the period prescribed by subsection (2) of this section that is applicable to the case.

(2) The period prescribed for the giving of notice of appeal or notice of application for leave to appeal are:-

(a) In an appeal in a civil case, fourteen days in an appeal against an interlocutory decision and three months in an appeal against a final decision.

(3) Where an application for leave to appeal is made in the first instance in the court below, a person making such application shall in addition to the period prescribed by subsection (2) of this section, be allowed a further period of fifteen days, from the date of the hearing of the application by the court below, to make an application to the Supreme Court.

(4) The Supreme Court may extend the periods prescribed in subsection (2) of the section."

The wordings of the above provisions are plain and unambiguous. Subsection (2)(a) of the Section 27 of the Supreme Court Act simply provides a period of fourteen days within which person desirous of appealing against interlocutory decision, may seek and obtain leave to appeal against such decision from the court below. By subsection (4) of the Act, this court however has power to extend such time upon an application in that regard. As I said above, I have been unable to see anywhere from the record where the appellants sought and obtained leave to appeal either from the lower court or this court. Similarly, there is also no evidence to show that he actually sought and obtained extension of time from this court to seek leave to appeal against such decision of the court below. The appellants' learned counsel did not help matters by failing to address this point in his Reply brief for reason best known to him, after all, the Respondents' Amended Brief containing that leg of the preliminary objection was duly served on him which said service perhaps might have led him to file his Reply brief. In the result, I will also uphold the preliminary objection on this second leg of the first ground of the objection and as well, I hold that it is well taken and meritorious too. I accordingly allow or sustain it too, for the reasons I advanced above.

The law is clear and beyond peradventure, that where there is failure to file an appeal within the period stipulated by the rules of court, Act or Constitution without obtaining an extension of time within which to appeal or to comply with the statutory requirements of the law which is also a condition precedent to the filing of a valid appeal constitutes an incurable defect which deprive the appellate court of jurisdiction to entertain the appeal. To put it in another way, where an appeal against an interlocutory decision (such as this) is filed outside the stipulated time, without the leave of court, or extension of time given, the appeal will be struck out for being incompetent. Thus, in this instant appeal in which the appellants' appeal was filed without leave more than fourteen days after the order striking same out was made, the appeal is rendered incompetent. See *Garuba vs KIC Ltd* (2005) 5 NWLR (pt 917)160; *Akanbi v Salawa* (2003) 13 NWLR (pt 838) 637.

Permit me, My lords, to further stress here even at the risk of being repetitive, that in any situation where leave is required in filing an appeal and an appellant out rightly refuses or fails to seek and obtain such leave, he runs the risk of getting his appeal being rendered incompetent and ultimately thrown out See *UBN Plc vs Songuro* (2006) 16 NWLR (pt 1006) 504; *Anaechebe v Ijeoma* (2014) 14 NWLR (pt 1426) 168. The consequence of failure to seek and obtain leave where the law requires an appellant to do so before filing his appeal, renders his appeal incompetent and such also, deprives the appellate court of jurisdiction to hear it and the court must therefore strike out that appeal for being incompetent. This therefore squarely applies to this instant appeal. The preliminary objection therefore succeeds on the first ground of the preliminary objection. Thus, while sustaining the preliminary objection on that first ground of the objection, I accordingly for the reasons I advanced above, hereby adjudge this appeal incompetent and it is accordingly struck out by me.

It is worthy of note and I have stated that earlier, that there is one or a sole ground of appeal contained in the notice of appeal filed by the appellants and the said lone ground of appeal has been adjudged incompetent for want of leave required to be sought and obtained before raising it, same being a ground of mixed law and fact as required by the provisions of Section 233(1) of the 1999

constitution. Since the sole ground of appeal has been declared by me as incompetent following the success of the preliminary objection in the first ground, the appeal cannot therefore stand on any pedestal or by any existing ground of appeal. The appeal is therefore incompetent and liable to be struck out. It is hereby accordingly struck out by me for being incompetent. The aim of preliminary objection is invariably to terminate the lifetime of the appeal/suit in limine. See *Uwazurike vs AG of Federation (supra)*; *BASF (Nig) Ltd v Faith (supra)*. Now having upheld the objection with regard, inter alia, to the incompetence of the sole ground of appeal and by extension the appeal itself, I do not deem it expedient or useful to embark on treating the alone issue raised in the appellants brief as it will merely serve academic purpose. The court lacks the luxury of time to do so.

In the result, for reasons marshalled above by me, I adjudge this appeal as incompetent and it is hereby accordingly struck out.

I will not make any order on costs, so both parties should bear their respective costs.

GALADIMA JSC

I have been obliged a copy of the lead judgment in this appeal just delivered by my learned brother SANUSI, JSC. I agree that this appeal succeeds on the preliminary objections raised by the Respondents herein.

Although learned Counsel for the Respondents did not formally file Notice of Preliminary Objection, but simply raised same in their Brief of Argument, captioned “*PRELIMINARY OBJECTION*”. It was duly served on the learned Counsel for the Appellant. He promptly copiously responded by filing Appellant’s Reply brief of Argument, wherein he replied to the Preliminary points raised by the Appellants herein. Although failure to file a formal Notice of Preliminary objection would be fatal and render the objection incompetent, it may be included in the respondent’s brief of argument. Preliminary objection as the expression connotes is initiated or commenced at the earliest opportunity but it is necessary for the respondent or his Counsel, with leave of Court to move the objection before the hearing of the substantive appeal. In the case at hand the preliminary objection contained in the respondents’ Amended brief is competently raised and

can be considered on the merit, in the circumstance.

However, in consideration of preliminary objection, hinged on four grounds, my learned brother in his judgment has meticulously considered each and rightly held that except first ground of objection the remaining three are without merit and are not sustainable.

B The first ground of objection which terminates this appeal in limine, has to do with the lone ground of appeal which the appellants queried or challenged for being incompetent because it is not a ground of law which does not require leave of either the Court below or this
C Court, but that on cursory look at the said ground, it is one of fact or at best of mixed law and facts which in effect, requires leave in view of Section 233(1) of the Constitution of the Federal Republic of Nigeria 1999 (as amended).

The Appellants' sole ground of Appeal with their particulars
D read as follows:-

"The Court of Appeal erred in law when it held as follows:-

"The Respondents failed to exhibit survey plan of the Land in dispute or to describe its boundaries.

PARTICULARS OF ERROR

E *The appellants describe the land in dispute in paragraph(sic) 8,10,11,12,13,14,15,16,17,18,19,20,21,22,23, 24,26, and 29 of the counter affidavit admitted knowing the names, location and the portion of land the injunction was to operate upon.*

F *2. A survey plan of a land in dispute is not a necessity where it is clear from the affidavit evidence before the court that the identity of the portion of Land is not in doubt or known to both parties and can otherwise be ascertained to the satisfaction of the court."*

It is settled that a Court faced with the question of determining
G whether or not a ground of appeal contained in the notice of appeal is of law or mixed law and facts, it must consider the particulars of the ground. The guidelines set out in OGBECHIE v. ONOCHIE (1986) 2 NWLR (pt. 23) 84 by ESO JSC (of blessed memory) has now become the acid test: When material evidence, which by statute can
H only be admitted in judicial proceedings under certain conditions was admitted in contravention of statutory provisions, that event clearly raises issues of law. See: SHANU & ANOR v. AFRIBANK NIGERIA PLC (2002) 10 SCM 146. However, where the evaluation of facts established by the trial Court equally involves question of law the

ground of appeal is said to be of mixed law and facts.

I have closely considered the sole ground of appeal filed by the Appellants, which is now being challenged by the respondents. It is a ground of fact or at best of mixed law and fact, therefore requiring leave of either of this Court or the Court below. It is clear as stated in the “particular” of the ground. There is the issue of proof of identity of the land in dispute. This can only be done by leading evidence to establish the fact. There is also the question of not only description of the identity of the land, but as well as its boundaries. This again can be achieved by adducing evidence.

In view of the foregoing, I too will hold the view that the one ground, contained in the Appellants’ Notice of Appeal is one of mixed law and fact and such ground can only be filed with leave of Court. This not having been done renders this appeal incompetent and liable to be struck out. In other words, an issue which has no ground of Appeal is worse than useless. See *LASISI OGBE v. SULE ASADE* (2009) 12 SC (pt. 111) 37. See *GABRIEL IWUOHA & ANOR v. NIGERIA POSTAL SERVICES LTD. & ANOR* (2003) 5 SCM 104. *CSS BOOKSHOPS LTD v. THE REGISTERED TRUSTEES OF MUSLIM COMMUNITY IN RIVERS STATE & 6 ORS.* (2006) 4 SCNJ 310.

The second arm of the Respondents’ preliminary objection pertains to the alleged failure of the Appellants therein to apply for leave to appeal against the interlocutory Ruling of the lower Court. It is needless spilling out argument on this point.

A Notice of Appeal is the spinal cord of an appeal. It is the foundation upon which an appeal is based. It is the originating process which set the ball rolling for the proper, valid and lawful commencement of an appeal. Having held that the Appellant’s Notice is incurably defective, no proper appeal can stand. It has certainly collapsed. In the same vein, wither the interlocutory appeal which in the circumstance lacks backbone? See: *OKEKE ANAD v. OKEKE OKOLIS* (1977) 3 SC 110; *FIRST BANK OF NIGERIA PLC V. T.S.A INDUSTRIES LIMITED* (2010) 4-7 SC (Pt. 1) 242.

On the whole, the preliminary objection by the Respondents herein having been sustained, there is no valid appeal in the circumstance. It is accordingly struck out. I too make no order as to costs.

PETER-ODILI JSC

I am in agreement with the judgment just delivered by my learned brother, Amiru Sanusi, JSC and in support with the reasoning I shall make some remarks.

B This case arose from the High Court of Delta State from the Asaba Judicial Division. At the inception of action, the High Court Rules of Bendel State was applicable, Delta State being a carve out from Bendel State. By the provisions of the said High Court Rules of Bendel State 1976, a person who desires to institute an action in the High court first files a claim and it is for the court to order pleadings in the presence of both parties. The plaintiffs/appellants followed the claim up with a motion for interlocutory injunction and on service of processes the defendants/respondents filed a counter-affidavit in reaction to the motion for interlocutory injunction along with exhibits D “A” and “B” which were rulings delivered in two previous cases.

The learned trial judge heard arguments on both sides and granted the injunction sought. The defendants/respondents being dissatisfied with the decision appealed to the Court of Appeal which appellate court set aside the decision of the trial court hence a re-course of the appellants to the Supreme Court.

FACTS BRIEFLY STATED

The facts relevant for our purpose in this appeal are stated below.

F The plaintiffs/appellants claimed against the defendants/respondents jointly and severally as follows:

1. A declaration that under Asaba Native Law and Custom, the defendants, their servants and/or agents are not entitled to sell, assigns, (sic) allianate, transfer, mortgage or lease any interest on Obi G Okonya family land (layout) situate at Umuekwo Village, Umuaji Quarters Asaba without the knowledge, consent and approval of the Diokpa (Head of family) and the principal members of Obi Okonya Family of Umuekwo Village, Umuaji Quarters, Asaba.

H 2. A declaration that any purported sale, assignment, alienation mortgage or lease without the knowledge consent and approval of Diokpa (Head of family) and the principal members is irregular, improper, invalid, null and void and of no effect whatsoever.

3. A perpetual injunction restraining the defendants, their servants and/or Agents from taking possession, dealing with the said prop-

erty or doing any acts inconsistent with the ownership rights of Obi Okonya family Land (layout) situate at Umuekwo Village, Umuaji Quarters, Asaba.

At the same time, while filing the suit, the plaintiffs/appellants followed it up with a motion on notice seeking interlocutory injunction, dated 7th December, 2000 but filed on 8th day of December, 2000. In the said motion the plaintiffs/appellants, now appellants, sought one relief as reproduced below:-

“interlocutory injunction restraining the Defendants/Respondents” whether by themselves, their servants and/or Agents from entering” tampering and/or dealing with the Obi Okonya family Land situate at Umuekwo Village, Umuaji Quarters, Asaba pending the final determination of this action “.

In the supporting affidavit to the motion for interlocutory injunction the plaintiffs/appellants made two crucial depositions in paragraphs 8 and 13 of their supporting affidavit to wit.

“8. That the members of Obi Okonya Family have been from time immemorial the beneficial owners in possession of that parcel of land known as Abor Obi Okonya at Umuekwo village, Umuaji Quarters, Asaba.

13 That I know as a fact that the defendants/respondents will not stop selling, leasing, mortgaging, transferring, assigning and/or alienating portions of Abor Obi-Okonya Family land in Urnuekwo Village; Urnuaji Quarters, Asaba unless restrained by this Honourable Court”.

The learned trial judge stated thus:

“To my mind, the description of the land as given by the applicants in the writ of summons as well as the motion paper is clear enough and do not create any confusion either to the respondents or to the court.

It is mentioned specifically Obi Okonya family land at Umuekwo village, Umuaji Quarters, Asaba. Moreso, the respondents in their counter-affidavit tacitly agreed with that description having regard to their averments therein.”

The Court of Appeal or the lower court or court below reversed the decision of the learned trial judge which has led to this appeal before the Supreme Court, the appellants being aggrieved. Chief Ikenna Egbuna of counsel for the appellants on the 19th day of

October, 2015 date of hearing adopted the Brief of Argument of the appellants filed on 16/7/2013 and deemed filed on 4/12/13. He adopted a Reply Brief of 2/4/14. He raised a sole Issue for determination which is viz:

Whether or not the learned Justices of the court below were right when they held that the appellants did not introduce enough facts to entitle them to an order of interlocutory injunction in the absence of a survey plan.

Mr. Ikhide Ehighehua, learned counsel for the respondents adopted the Amended. Respondents' Brief of Argument settled by E. F. Edojor, filed on 10/3/2014 and deemed filed on 18/3/14. He identified a single issue which is as follows:

Whether the learned Justices of the court below were right in reversing the interlocutory decision of the trial court on the basis that no reference was made to the extent and boundaries of the land and boundary neighbours with the result that a surveyor cannot produce a plan of Obi Okonya family land.

Learned counsel for the respondents had however raised a preliminary objection argued within their Brief of Argument afore-said.

It needs no saying that the preliminary objection would be taken before anything else.

PRELIMINARY OBJECTION

The respondents in raising the preliminary objection contends that the Notice of Appeal filed by the plaintiffs/appellants is incurably incompetent for failure of the appellants to obtain the necessary leave of the court pursuant to section 233(3) of the constitution of the Federal Republic of Nigeria, 1999 (as Amended) and section 27(2) of the Supreme Court Act.

Mr. Ehigilua of counsel for the respondents/objector stated that the ground of appeal is one of fact or at the best mixed law and fact for which leave of the lower court or of the Supreme Court is required pursuant to section 233 (3) of the 1999 Constitution of the federal Republic of Nigeria, 1999 (as Amended).

That the appellants failed to obtain the required leave of the court below or this court within 14 days to appeal against the decision of the court below. Also that the plaintiffs/appellants have since failed to file their statement of claim from 4th day of December, 2000

till date and have since abandoned the substantive suit thereby rendering any result in the suit completely moot and an academic exercise.

Learned counsel for the respondents submitted that appellants did not prepare the record of appeal and transmit same to the court within 14 days from the judgment of the Court of Appeal as prescribed by the Rules of the court. That this appeal is an abuse of court process. B

For the objector it was that this preliminary objection being fundamental to the hearing of the main appeal, the objection should be taken first. He cited *Efet v INEC* (2011) ALL FWLR (Pt. 565) 203 at 211 - 212; *Raviah Abdul & Co. Ltd v Union Bank of Nig. Plc.* (2011) ALL FWLR (Pt. 557) 765 at 772. C

He raised four issues for determination. Canvassing for his point of view, learned counsel for the objector submitted that there is no competent ground of appeal before this court since the needed leave was not sought or obtained at the court below and here at the Supreme Court. He cited *Nwaolisah v Nwabufoh* (2011) ALL FWLR (Pt. 591) 143 at 1454; *Amuda v Adelddun & Anor.* (1994) 21 LRCN 25 at 27 etc. D
E

That this failure to obtain the requisite leave is fatal as it renders the appeal incompetent with the effect of being struck out.

Mr. Ehighilua of counsel for the respondents/objector stated that plaintiffs/appellants having failed to pursue the substantive suit by filing their statement of claim since the year 2000 and by abandoning the substantive suit have shown palpable indolence. That this interlocutory appeal has thereby been rendered a moot point and completely idle and academic. F

That the appellants filed the incompetent Notice of Appeal within time but failed to transmit same to the court within 14 days from the day of judgment of the Court of Appeal as prescribed by the Rules of the court. Also, that the appeal is a complete abuse of the court process based on grounds I, 2 and 3 of the preliminary objection and should be struck out. G
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In response along what is contained in the Reply Brief, learned counsel for the appellants referred to the Notice of Appeal paragraph 3 thereof and contended that the division between a ground of law simpliciter and one of mixed law and fact is very thin. That it does not

matter whether the appellants labelled it one of law, fact or mixed law and fact. That what the court ought to examine is the ground of appeal along with the particulars and where that ground raises an issue of law based on accepted, undisputed or admitted facts as found by the court, it is a ground of law but where it is based on facts in dispute or unascertained, it is one of mixed law and facts. He relied on *Nigerian National Supply Co. Ltd v Establishment Sima of Vaduz* (1990) 7 NWLR (Pt. 164) 526; *Ogbechie v Onochie* (1986) 2 NWLR (Pt. 23) 484 etc.

Chief Egbuna of counsel went further to say that where facts are admitted or settled, the ground of appeal is one of law. Also that where a ground of appeal reveals a misunderstanding by the lower court of facts admitted or proved it is an appeal on law. That the respondents had admitted the case presented by the appellants/applicants and supported and confirmed by the trial judge, He cited *Ikem v Neziyanya* (2002) FWLR (Pt. 99) P. 1088 at 1098-9; *Ukachukwu & Sons Ltd v Okeke & Anor.* (2001) FWLR (Pt. 71) 1791 at 1802.

Learned counsel for the appellants said they are at a loss as to where this objection emerged as it is not contained in the record of appeal. He referred to *Veepee Industry Ltd v Coca Industry Ltd* (2008) 4 - 5 SC (Pt. 1) 116.

That where the Objector has not challenged the record of the court they cannot raise an issue not contained in the record and that the 14 days within which appellants were to transmit records is not contained in the relevant rule of court being Order 7 Rule 4(1) of the Supreme Court Rules.

On the issue of abuse of court process which the respondents/objector referred to, learned counsel for the appellants said there is nothing in support of such an abuse of court process. He cited several judicial authorities such as *Ette Akpan Ette v Akpan Arnos Harry Edoh & Anor* (2009) 8 NWLR (Pt. 1144) 601 at 610; *African Reinsurance Corporation v JDP Construction (Nig) Ltd* (2003) 13 NWLR (Pt. 838) 609 etc.

He urged the court to dismiss the objection.

The ground of appeal which the respondents/objector urge the court to consider in this objection as it provoked a need for leave of court first sought and obtained as it is a ground not just of law but

one of mixed facts and law. That sole ground of appeal is hereunder stated thus:

The Court of Appeal erred in law when it held as follows: *“The respondents failed to exhibit Survey Plan of the land in dispute or to describe its exact boundaries.”*

“PARTICULARS OF ERROR

1. The appellant clearly described the land in dispute in paragraph 8, 10 and 13 of the Affidavit in support of the motion for interlocutory injunction.

2. The respondents by paragraphs 4, 8, 9, 10, 11, 12, 13, 14, 15, 16, 18, 19, 20, 21, 23, 24, 26 and 29 of the Counter Affidavit admitted knowing the names, location and the portion of land in injunction was to operate upon.

3. A Survey Plan of a land in dispute is not a necessity where it is clear from the Affidavit evidence before the Court that the identity of the portion of land is not in doubt or known to the parties and can otherwise be ascertained to the satisfaction of the court.

4. Further Grounds of Appeal shall be filed with the leave of Court on the Receipt of the Record of Proceedings.

RELIEF SOUGHT FROM SUPREME COURT

To allow the appeal, set aside the order of the Court of Appeal.”

This objection of the respondents is hinged on the provisions of section 233 of the 1999 Constitution of the Federal Republic of Nigeria and I see myself duty bound to reproduce the said stipulation for a clear view.

“233 (3) The Supreme Court shall have jurisdiction, to the exclusion of any other court of law in Nigeria, to hear and determine appeals from the Court of Appeal.

(2) An appeal shall lie from decisions of the Court of Appeal to the Supreme Court as of right in the following cases:

(a) Where the ground of appeal involves questions of law alone, decisions in any Civil or Criminal proceedings before the Court of Appeal;

(b) Decisions in any Civil or Criminal Proceedings on questions as to the interpretation or application of this constitution.”

Perusing the ground of appeal aforesaid, it needs no saying that it is one of mixed law and fact since the issue of whether there

was a survey plan or even the need for one is an issue calling for evidence thereby throwing up an issue of fact. This therefore throws up the strict compliance for seeking and obtaining leave of the Supreme Court to ensure the validity or competence of the appeal. The situation is so grave that it cannot come within what can be termed
 B an irregularity that could be normalised.

The appellants' reaction to the above position is that since the fact of the Survey Plan not having been produced had been admitted by the respondent, it renders the issue of survey plan one of law
 C needing no leave to appeal. This stance of the appellants certainly begs the question as what has come up on the matter of survey plan is the issue of the identity of the land which clearly is one of fact or at the very best one of mixed law and facts. This failure to obtain the leave to appeal is an infraction both of the Rules of Court which
 D prescribes 14 days to do so after the decision of the trial court, See Section 233 of the 1999 constitution which has excluded such an appeal to come in as of right, I rely on *Nwaolisa v Nwabufoh* (2011) ALL FWLR (Pt. 591) 1438 at 1454; *Amuda v Adelodun & Anor.* (1994) 21 LRCN 25 at 27.

The default in seeking and obtaining the leave required is a condition precedent to the exercise of jurisdiction of the Supreme Court to entertain the appeal and so rendering the appeal filed incompetent with the resultant effect of a loss of jurisdiction on the Supreme Court. See *Asogwa v Peoples Democratic party* (2013) ALL
 F FWLR (Pt. 685) 214 at 240; *Nwaolisah v Nwabufoh* (supra) at 1454.

The situation above stated is fatal and incurable and so along with the better reasoning in the lead judgment, I uphold the Preliminary Objection and strike out the appeal for incompetence.

G I abide by the consequential orders made.

ARIWOOLA JSC

I had the privilege of reading in draft the lead judgment just
 H delivered by my learned brother, Amiru Sanusi, JSC. I am in agreement entirely with the reasoning therein and the conclusion arrived thereat.

In support, I shall chip in a few words, in particular, on the preliminary objection raised by the respondents to the appeal.

The respondents had raised by way of preliminary objection, inter alia, that the appeal before this court is incompetent and should be struck out. It is note worthy that the Notice of Appeal filed by the appellants has only one ground of appeal. It was contended by the respondents counsel that the said sole ground of appeal being one of mixed law and facts requires that, leave of either the court below or this court must be clearly sought and obtained before it can be filed. This, he submitted was pursuant to Section 233 (1) of the 1999 Constitution as amended.

The said lone ground of appeal as contained in the Notice of Appeal reads as follows:-

*“The Court of Appeal erred in law when it held as follows:-
“The respondents failed to exhibit survey plan of the land in dispute or to describe its boundaries.”*

Particulars of Error

1. *The appellants described the land in dispute in paragraph (sic) 8, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 26 and 29 of the counter affidavit admitted knowing the names, location and the portion of land the injunction was to operate upon.*

2. *A survey plan of a land in dispute is not a necessity where it is clear from the affidavit evidence before the court that the identity of the portion of land is not in doubt or known to both parties and can otherwise be ascertained to the satisfaction of the court.”*

Generally, a decision whether a ground of appeal raises question of law alone or of mixed law and fact certainly involves an examination of the ground of appeal as framed together with the particulars thereof. See; Obatoyinbo & Anor Vs. Emmanuel Oshatoba & Anor (1996) 5 NWLR (Pt. 450) 531; (1996) LPELR 215 (SC).

When a ground of appeal is based on facts alone or on mixed law and fact, it could not be filed in the court of appeal unless leave is sought and obtained. See; Nigeria National Supply Co. Ltd. Vs. Establishment Sima of Vaduz (1990) NWLR (Pt. 164) 526; (1990) 11-12 SC 209; (1990) LPELR- 2004 (SC).

There is no doubt that the sole ground of appeal stated above when read together with the particulars, clearly shows that it is of ground of mixed law and fact. This court has in plethora of its decisions pronounced on this issue of requirement of leave of court when a ground of appeal is ground of mixed law and fact. In Akpasubi Vs.

Umweni (1982) 11 SC 132 at 139-140; (1982) 13 NSCC 438 at 440, Kayode Eso, JSC observed as follows:-

“Now, it seems to me that the grounds of appeal argued by the appellant’s counsel is one of fact. No leave was given to the appellant either by the Federal court of Appeal or this court to file a ground of fact. The appellate jurisdiction of this court on question of fact only exists where there has been leave of the Federal Court of Appeal or of this court. No appeal on question of fact lies to this court without such leave. In other words, where as it would appear to me in this case, question of fact has been brought before this court without leave, the court has no jurisdiction.” See also; Awa Okorie Uchendu & Ors Vs. Chief Eyo Ogboni & Ors (1999) 5 NWLR (Pt.603) 337; (1999) 4 SC (Pt.11); (1999) LPELR - 3287 (SC) per Uwaifo, JSC.

It is already settled, that where facts are not in doubt, that is, that they have either been proved or are admitted and complaint is as to the application of the law to those facts, then this is a question of law and leave of court will not be required to file such a ground. But where the facts are in dispute and the issue of evaluation by the lower court arises before the application of the law, then this is a matter of mixed law and fact, and leave of court is required to be sought and obtained to file such ground of appeal. See United Bank for Africa Ltd Vs. Stahlban GMBH & Co. KG (1981) NWLR (Pt.110) 374; (1989) LPELR - 3400; Metal Construction (VOA) Ltd Vs. D. A. Migliore & Ors (1990) 1 NWLR (Pt.126) 2991 (1991) 1 All NLR 142; (1990) 2 SC 33; (1990) LPELR – 1869 (SC).

There is no doubt that the appellants herein did not seek and obtain leave of either the court below or this court to file their sole ground of appeal, which, by every standard is a ground of mixed law and fact. This failure to seek and obtain leave has rendered the said ground of appeal incompetent thereby rendering the appeal itself incompetent and liable to being struck out. In other word, the preliminary objection on the competence of the ground of appeal is sustained on that ground. Accordingly, without any further ado, not having sought and obtained leave of court as required to file the sole ground of appeal, the said ground is incompetent and has rendered the entire appeal also incompetent there being no other ground, such as a ground of law that could have sustained the appeal.

For the above reason and the fuller and more detailed reason-

ing of my learned brother in the lead judgment, I also strike out the appeal for being incompetent.

I abide by the consequential orders in the lead judgment including that on costs.

B

KEKERE-EKUN JSC

I have had the benefit of reading in draft the judgment of my learned brother, AMIRU SANUSI, JSC just delivered. I agree with the reasoning and conclusion that there is merit in the preliminary objection raised by the respondent and that it should be sustained.

C

The facts leading to this appeal have been comprehensively set out in the lead judgment. I adopt the summary as mine. The respondent has raised a preliminary objection to the hearing of this appeal on four grounds thus:

D

1. That the Notice of Appeal filed by the Plaintiffs/Appellants is incurably incompetent for failure of the Appellants to obtain the necessary LEAVE of the Court pursuant to Section 233 (3) of the Constitution of the Federal Republic of Nigeria, 1999 (As Amended) and Section 27 (2) of the Supreme Court Act.

E

GROUND FOR THE OBJECTION

a) The ground of Appeal is one of fact or at the best mixed law and fact for which LEAVE of the lower court or of this Honourable court is required pursuant to Section 233 (3) of the 1999 Constitution of the Federal Republic of Nigeria 1999 (As Amended).

F

b) The Appellant failed to obtain the required leave of the Court below or this Honourable Court within 14 days to appeal against the decision of the court below.

2. The Plaintiffs/Appellants have since failed to file their Statement of Claim from 4th day of December, 2000 till date and have since abandoned the substantive suit thereby rendering any result in the suit completely mute and an academic exercise.

3. The Appellants did not prepare the record of the Appeal and transmit same to the Court within 14 days from the Judgment of the Court of Appeal as prescribed by the Rules of the Court.

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4. The appeal is an abuse of Court process.

In support of the lead judgment and for emphasis I make the following comments in respect of the first ground of appeal, which is

sufficient to dispose of the objection. Section 233 of the 1999 Constitution provides:

“233. - (1) The Supreme Court shall have jurisdiction, to the exclusion of any other court of law in Nigeria, to hear and determine appeals from the court of Appeal.

B (2) An appeal shall lie from decisions of the Court of Appeal to the Supreme Court as of right in the following cases –

(a) where the ground of appeal involves questions of law alone, decisions in any civil or criminal proceedings before the Court of Appeal;

C (b) decisions in any civil or criminal proceedings on questions as to the interpretation or application of this constitution;

(c) decisions in any civil or criminal proceedings on questions as to whether any of the provisions of Chapter IV of this constitution D has been/is being or is likely to be, contravened in relation to any person;

(d) decisions in any criminal proceedings in which any person has been sentenced to death by the Court of Appeal or in which the court of Appeal has affirmed a sentence of death imposed by any E other court:

(e) decisions on any question-

(i) whether any person has been validly elected to the office of President or Vice-President under this Constitution;

F (ii) whether the term of office of President or Vice-President has ceased;

(iii) whether the office of President or Vice President has become vacant;

G (iv) whether any person has been validly elected to the office of Governor or Deputy Governor under this Constitution;

(v) whether the term of office of a Governor or Deputy Governor has ceased;

(vi) whether the office of Governor or Deputy Governor has become vacant; and

H (f) such other cases as may be prescribed by an Act of the National Assembly. (Emphasis mine)

Any appeal to the Supreme Court from a decision of the Court of Appeal on questions of fact or of mixed law and fact is outside the purview of Section 233 above. For such an appeal to be competent

therefore, leave to appeal must first be sought and obtained, either at the court below or from this court See: Erisi Vs Idika (1987) 3 NWLR (Pt.66) 503; Nalsa & Team Associates Vs NNPC 1991 10 -12 S 83' 1991 8 NWLR (Pt.212) 652. The reason for this is that the court has a responsibility to ensure that the grounds of appeal are within its constitutional competence. The mere description of a ground of appeal as an error in law is not sufficient to make it so. This court must be so satisfied. See: Yaro Vs Arewa Construction Ltd. 2007 6 SC Pt.II 149; Ojemen & 4 Ors. Vs Momodu II (1983) SC 173. The consequence of failing to seek leave to appeal where a ground of appeal is of mixed law and fact is fatal to the ground. It is rendered incompetent and this court would lack jurisdiction to entertain the appeal in respect of that ground. However, one ground of appeal on a question of law in a notice of appeal is capable of sustaining an appeal. See: Yaro Vs Arewa Construction Ltd. (supra).

In order to determine whether a ground of appeal is of law or of facts or of mixed law and facts, the court must consider the principal complaint and the particulars of error provided thereunder. A ground of appeal challenging a finding of fact or calling for investigation into the existence or otherwise of facts, are grounds of mixed law and facts. See: Ugwu Vs The State (2013) LPELR-SC 274/2009 @ 15 A – B; Dairo Vs Union Bank of Nigeria Plc. & Anor. (2007) 12 SCM (Pt.2) 276; Opuiyo Vs Omoniware (2007) 16 NWLR (Pt.1060) 415.

In the instant appeal, the lone ground of appeal reads as follows:

GROUND OF APPEAL

The Court of Appeal erred in law when it held as follows.

“The Respondents failed to exhibit Survey Plan of the land in dispute or to describe its boundaries.”

PARTICULARS OF ERROR

1. The Appellants clearly described the land in dispute paragraphs 8, 10 and 13 of the Affidavit in support of the Motion for interlocutory injunction.

2. The respondents by paragraphs 4, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 23, 24, 26 and 29 of the Counter Affidavit admitted knowing the names, location and the portion of land an injunction was to operate upon.

3. A survey plan of a land in dispute is not a necessity where it is clear from the Affidavit evidence before the court that the identity of the portion of land is not in doubt or known to the parties and can otherwise be ascertained the satisfaction of the court.

B 4. Further Grounds of Appeal shall be filed with the leave of court on the receipt of the record of proceedings.

C Having carefully examined the ground of appeal in conjunction with its particulars, I agree with my learned brother in the lead judgment and learned counsel for the respondent that the sole ground of appeal relates entirely to the sufficiency or otherwise of the affidavit evidence as regards the identity of the land in dispute, which formed the basis of the interlocutory order of injunction made by the trial court. It is certainly a ground of fact or of mixed law and facts. The appellant failed to seek leave to appeal either from the court below D or from this court. On the authorities cited above, the omission is fatal to the appeal. As there is only one ground of appeal, once the court lacks jurisdiction to entertain it, the entire appeal collapses, as it has no other leg to stand on. The notice of appeal is incompetent. The sole issue for determination predicated upon the incompetent E ground of appeal is also incompetent. Both the notice of appeal dated 3rd December 2003 and the issue for determination distilled from the sole ground of appeal are incompetent and are hereby struck out.

F It is for these and the more detailed reasons lucidly set out in the lead judgment that I also strike out this appeal for being incompetent. I abide by the consequential orders made therein.

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