

SUPREME COURT OF NIGERIA
FRIDAY 22ND APRIL, 2016. SC. 228/2013
CORAM:- I. T. MUHAMMAD, M. U. PETER-ODILI,
M. D. MUHAMMAD, J. I. OKORO, A. SANUSI, JJSC

BODE THOMAS APPELLANT/RESPONDENT
AND
FEDERAL JUDICIAL
SERVICE COMMISSION RESPONDENT/APPLICANT

JUDICIAL PRECEDENTS - Stare decisis - Application of - Is in respect of where issue determined by court in an earlier case - Is the same to issue the court is subsequently approached to determine (H1)

APPEALS - Objection - Condition - SC Rules O. 2 r. 9 - The objection having been made in writing and on notice - Has satisfied the requirement of the Rules - Although it was wrongly brought (H2)

JURISDICTION - Fundamentality of - Respondent's notice of motion raises jurisdictional issue - Which must be resolved in order to avoid working in vain (H3)

ACTIONS - Relief - Rules of court - Stating the rules by which parties assert their relief is technical - As once remedy is properly claimed - The same cannot be denied merely because the rule was wrongly stated (H4)

APPEALS - Motions - Competence of - Merit or otherwise of the application is different from its competence - And must draw from submission of parties for and against competence of the grounds (H5)

FACTS

This application was brought before the Supreme Court of Nigeria pursuant to Order 2 rule 28(1) of the Rules of the Court. By the application, respondent (applicant) seeks for an order striking out grounds 1, 4, 5, 6 and 7 of the grounds of Appeal in the Notice

of Appeal as being incompetent and an order striking out issues 1, 3, and 4 formulated and argued in the appellant's brief of Argument for being incompetent. The grounds of the application are inter alia that the grounds 1, 4, 5, 6 and 7 of the grounds of appeal in the Notice of Appeal in the Appeal are either of mixed law and facts or of facts alone for which the prior leave of the Court of Appeal or of the Supreme Court ought to have been sought and obtained.

All the thirteen paragraphs in the supporting affidavit which respondent relies upon have not been challenged by appellant. Mr. J.B. Dauda, learned senior counsel for appellant chose to respond to the application on grounds of law alone. Respondent's counsel contends that grounds 1, 4, 5, 6 and 7 in appellant's Notice not being grounds of law alone require leave of the Court of Appeal or the Supreme Court for their competence. Leave not having been sought and obtained in respect of the grounds, no legitimate issue can therefore arise from the incompetent grounds. Respondent prays the Court to discountenance the incompetent grounds of appeal as well as the issues purportedly distilled from the grounds. Appellant argued otherwise and urged the Court to discountenance respondent's application.

HELD (Unanimously ordering applicant to argue his objection per **M. D. MUHAMMAD**)

JUDICIAL PRECEDENTS - Stare decisis - Application of

1. Learned senior counsel for the appellant/respondent cannot be faulted that a case is only authority for what it decided. The doctrine of stare-decisis or precedent which provides for this principle operates where the issue determined by the court in an earlier case is the same or similar to the issue the court is subsequently approached to determine. Where, therefore, an issue had not been previously raised at and determined by the court, a decision arrived by the court cannot rule a subsequent one on totally different fact(s) and or law(s) from those in the earlier case.

In the instant case parties have not made out the fact that this Court has overruled itself by departing from its foregoing de-

cision. Being on the same facts and law as presently agitated, the decision must rule the fortunes of parties herein. By this very decision, Mr. Daudu learned senior counsel for the Appellant/respondent is certainly right that Order 2 rule 9 of the Supreme Court rules provides for any objection whether to the competence of some or all the grounds in a Notice of appeal. It does not matter whether the objection, if upheld, would stop the hearing of the appeal in part or in its entirety.

(pp. 2555 F/2557 B)

APPEALS - Objection - Condition

2. It is not in doubt that the instant application is in writing and on notice. It has, therefore, met the most overriding condition Order 2 rule 9 requires any objection whether to the competence of some or all the grounds in the notice of appeal should satisfy. Learned senior counsel for the respondent/appellant insists that because the objection is wrongly brought under Order 2 rule 28(1) of the rules of court, rather than Order 2 rule 9 of the same rules, the application is incompetent and has to be discountenanced. I am unable to agree with the learned silk for that is not the position of the law. (p. 2557 D)

JURISDICTION - Fundamentality of

3. By his very notice of motion, the respondent is raising a jurisdictional issue, the resolution of which saves both the parties and the court waste of their precious time. To proceed without resolving the fundamental issue the respondent raises one way or another is to risk working in vain. Courts do not work in vain. (p. 2557 G)

ACTIONS - Relief - Rules of court

4. Under Order 2 rule 9 an appellant competence of whose ground(s) of appeal is being objected to must be put on notice and in writing at least three days before the hearing of the appeal. Order 2 rule 28, on the other hand, requires that all applications in this Court whether for the relief provided for by Order 2 rule 9 or otherwise shall be by notice of motion

supported by affidavit. The application shall also state the rule under which it is brought. If anything, the applicant herein can only be said to have omitted specifically stating that his application is being urged pursuant to Order 2 rule 9. The requirement that parties state the rules of court by virtue of which they assert a relief is technical and merely prescribes procedural steps for the guidance of the parties and the court. Our essence as a court is to do substantial justice. Once a remedy is provided for by any written law and it is properly claimed by a party, the remedy cannot be denied the party simply because he has wrongly stated the rule of court under which the relief is sought. It is for this reason that I am unable to agree with Mr. Daudu S.A.N that this application is incompetent. To the contrary, it is competent and I hereby so hold. (p. 2557 H)

APPEALS - Motions - Competence of
5. However, the merit or otherwise of the application is different from its competence and must draw from the submissions of parties for and against the competence of the grounds of appeal being challenged. Counsel on both sides did not come this far in their submissions before us. It is thus impracticable to give a decision one way or another on the merit of the application itself. The application challenges the jurisdiction of the court to hear and determine the appeal as constituted. A decision on the application is necessary as the court can only proceed when it is competent to do so. To facilitate the imperative and in keeping with the practice that has evolved over time in this Court, the applicant is hereby ordered to argue the objection in its brief as the respondent in the appeal for the appellant to respond to same in his reply brief. (p. 2558 E)

REPRESENTATION

J. B. Daudu, SAN with H. M. Usman Esq, Adebayo Adedeji Esq., I. C. Okon Esq, J. A. Obaraeze Esq. C. E. Ogbzor Esq. and F. Almustapha Esq for the Appellant/Respondent
Wole Agunbiade Esq with Pius Agbo Joseph Esq., for the Respondent

CASES REFERRED TO

- S.P.D.C. Ltd v. Amadi (2011) 14 NWLR (pt. 1266) 157
Odunukwe v. Ofomota (2010) 18 NWLR (pt. 1225) 417
Auto Import/Export v. Adebayo (2002) 18 NWLR (pt. 799) 554
Ameen v. Amao (2013) LPELR- 2008 6 (SC) B
Zenith Bank Plc. v. John (2015) LPELR -24315 (SC)
Wassah V. Kara (2014) LPELR 24212 (SC)
Clement v. Iwuanyanwu (1989) 3 NWLR (pt. 107) 39
Ajide v. Kelani (1985) 2 NSCC (Vol. 16 pt. II) 1298 C
Ogigie v. Obiyan {1997} 10 NWLR (pt. 524) 179
Odua Invest. Ltd v. Talabi {1997} 10 NWLR (pt. 523) 1
Falobi v. Falobi {1976} 1 NMLR 169
Edewor v. Uwegba {1987} 1 NWLR (pt. 50) 313
Tukur v. Govt. of Taraba State (1997) 6 NWLR (pt. 510) 549 D
Obiora v. Osele (1989) 1 NWLR (pt. 97) 279
Odunukwe v. Ofomota (2010) 18 NWLR (pt. 1225)

RULES REFERRED TO

- Supreme Court Rules, O. 2 rr. 9, 28(1) E

LEAD JUDGMENT BY M. D. MUHAMMAD JSC

By its motion on notice dated and filed on 6th July 2015, the respondent/applicant seeks the following:-

1. An order striking out Grounds 1, 4, 5, 6 and 7 of the Grounds of Appeal in the Notice of Appeal in this Appeal being incompetent. F

2. An order striking out issues 1, 3, and 4 formulated and argued in the Appellant's Brief of Argument for being incompetent. G

The Applicant also seeks such further or other orders as this Honourable Court may deem fit to make in the circumstances of its application. The application which is brought pursuant to Order 2 rule 28(1) of the Supreme Court rules and under the inherent jurisdiction of the court has the following grounds:- H

"1. Grounds 1, 4, 5, 6 and 7 of the Grounds of Appeal in the Notice of Appeal in this Appeal are either of mixed law and facts or of facts alone for which the prior leave of the court below or of this Honourable Court ought to have been sought and obtained.

2. *The leave of the Court below or that of this Honourable court was neither sought nor obtained before Grounds 1, 4, 5, 6 and 7 of the Grounds of Appeal in the Notice of Appeal were filed.*

3. *Grounds 1, 4, 5, 6 and 7 of the Grounds of Appeal in the Notice of Appeal are, therefore, incompetent.*

B 4. *Issue 1 formulated and argued in the Appellant's Brief of Argument is based on Grounds 1 (one of the grounds complained of herein) and 2.*

C 5. *Issue 3 formulated and argued in the Appellant's Brief of Argument is based on Grounds 4 and 5 while issue 4 thereof is based on Grounds 6 and 7.*

6. *Issues 1, 3 and 4 formulated and argued in the Appellant's Brief of Argument, being distilled from or related to Grounds 1, 4, 5, 6 and 7, which are incompetent, are incompetent.*

D 7. *This Honourable Court has the jurisdiction to strike out the five (5) incompetent Grounds of Appeal and Issues 1, 3, and 4 in the Appellant's Brief of Argument, which relate to the five incompetent Grounds of Appeal."*

E All the thirteen paragraphs in the supporting affidavit which the applicant relies upon have not been challenged by the appellant/respondent. Mr. J.B. Dauda, learned senior counsel for the appellant/respondent, chose to respond to the application on grounds of law alone. Wole Agunbiade learned applicant's counsel contends very tersely that grounds I, 4, 5, 6 and 7 in the appellant's Notice not
F being grounds of law alone require leave of the lower court or this Court for their competence. Leave not having been sought and obtained in respect of the grounds, it is submitted, no legitimate issue can evolve from the incompetent grounds. Relying on the decisions
G in *S.P.D.C. Ltd V. Amadi* (2011) 14 NWLR (Pt 1266) 157 *Odunukwe V. Ofomota* (2010) 18 NWLR (Pt 1225) pages 417 and 418, learned counsel urges that we so hold and discountenance the incompetent grounds of appeal as well as the issues purportedly distilled from the grounds.

H Learned senior counsel for the appellant/respondent submits that respondent's application is not only a strange and unknown procedure but that same is incompetent. The applicant, it is argued, is only entitled to challenge the competence of the grounds by way of preliminary objection as provided for under Order 2 rule 9 of the

Supreme Court Rules. Having not complied with the said provision, learned senior counsel submits, the application is incompetent and same be discountenanced.

The two authorities S.P.D.C. Ltd V. Amadi (supra) and Odunukwe V. Ofomata (supra), it is further submitted, are unavailing to the applicant. Cases, it is argued, are only authorities for what they decided. This Court in the two cases never decided that objection to the competence of some and not all the grounds in a Notice of Appeal are to be raised by a motion on notice and outside the procedure provided for by order 2 rule 9 of the Supreme Court Rules. Indeed, it is submitted, the propriety or otherwise of challenging the competence of some and not all the grounds of appeal in the appellant's Notice as the applicant has done was never in issue in the two cases. In the case at hand, learned senior counsel insists, applicant should have proceeded on the basis of the objection already argued in its brief in response to the arguments in the appellant's brief. Learned senior counsel supports his arguments with the decisions of this Court in Auto Import/Export V. Adebayo (2002) 18 NWLR (Pt 799) 554, Alhaji Sadit Ameen & ors V. Amos Amao & ors (2013) LPELR- 2008 6 SC, Zenith Bank Plc V. Chief Arthur John & ors (2015) LPELR -24315 (sc) and Wassah & ors V. Kara & ors (2014) LPELR 24212 (sc) and concludes that in endorsing the procedure the applicant asserts this Court would work hardship on the litigants. Applicant's incompetent motion, it is urged, be dismissed.

Learned senior counsel for the appellant/respondent cannot be faulted that a case is only authority for what it decided. The doctrine of stare-decisis or precedent which provides for this principle operates where the issue determined by the court in an earlier case is the same or similar to the issue the court is subsequently approached to determine. Where, therefore, an issue had not been previously raised at and determined by the court, a decision arrived by the court cannot rule a subsequent one on totally different fact(s) and or law(s) from those in the earlier case. See Clement v. Iwuanyanwu (1989) 3 NWLR (Pt 107) 39.

The issue the instant application raises is whether the provision of Order 2 rule 9 of the Supreme Court Rules 1985 (as amended) applies to any preliminary objection to the hearing of an appeal

whether in whole or in part. Whereas learned applicant's counsel opines it does not and that since their objection attacks only some and not the entirety of appellant's grounds of appeal, the objection must be raised by way of motion on Notice and outside of what Order 2 rule 9 provides. Theirs, it is urged, necessarily comes under
 B the more general provision of Order 2 rule 28 (1) of the rules of this Court.

Learned senior counsel to the appellant/respondent has tenaciously argued to the contrary. He is right in my view. My reading
 C of the authorities learned applicant counsel purports to rely on leave me in no doubt that the issue raised by the instant application had neither been agitated before nor were same determined by the court in the cited cases. The views expressed by the court in the cases being orbiter cannot, therefore, determine the issue in contention herein.

D In Ajide V. Kelani (1985) 2 NSCC (Vol. 16 Part II) 1298, this Court contended with the very issue it is now asked again to determine. Therein, the respondent had argued that Order 2 rule 9 provides only for objections which, if successful, dispose of the appeal in its entirety. At page 1305 of the Law report, this Court, inter-alia,
 E dwelt on the kind of procedure Order 2 rule 9 facilitates thus:-

*"The object of the rule is to give an appellant before the hearing of his appeal notice and grounds of any preliminary objection to the hearing of the appeal in order to enable him meet the objection at the hearing of the appeal. The rule is a safeguard against
 F embarrassing an appellant and taking him by surprise. Although no form has been prescribed for taking a preliminary objection under the rule, the fact that the rule requires the notice and the grounds of objection to be filed with the registrar implies that the notice and the
 G grounds of objection must be in writing.*

Now, such interpretation ought to be placed on the rule as will promote its object. I find myself unable to accept the first limb of the submission of Chief Williams that the rule should be interpreted to limit scope to a preliminary objection to the hearing of an appeal
 H in its entirety. In my opinion, such narrow interpretation will not promote the object of the rule in respect of a preliminary objection to the hearing of an appeal in part. This is so because a preliminary objection to the hearing of an appeal in part may turn out to knock down the substance of the appeal and thereby leaves the appellant

to chase the shadow at the hearing of what remains of the appeal. For this reason justice and common sense require a respondent to comply with the rule to enable the appellant to meet the objection to the hearing of the appeal whether in whole or in part. Accordingly, I hold that the rule applies to any preliminary objection to the hearing of an appeal whether in whole or in part." (Underlining supplied for emphasis). B

In the instant case parties have not made out the fact that this Court has overruled itself by departing from its foregoing decision. Being on the same facts and law as presently agitated, the decision must rule the fortunes of parties herein. By this very decision, Mr. Daudu learned senior counsel for the Appellant/respondent is certainly right that Order 2 rule 9 of the Supreme Court rules provides for any objection whether to the competence of some or all the grounds in a Notice of appeal. It does not matter whether the objection, if upheld, would stop the hearing of the appeal in part or in its entirety. C D

It is not in doubt that the instant application is in writing and on notice. It has, therefore, met the most overriding condition Order 2 rule 9 requires any objection whether to the competence of some or all the grounds in the notice of appeal should satisfy. Learned senior counsel for the respondent/appellant insists that because the objection is wrongly brought under Order 2 rule 28(1) of the rules of court, rather than Order 2 rule 9 of the same rules, the application is incompetent and has to be discountenanced. I am unable to agree with the learned silk for that is not the position of the law. E F

By his very notice of motion, the respondent is raising a jurisdictional issue, the resolution of which saves both the parties and the court waste of their precious time. To proceed without resolving the fundamental issue the respondent raises one way or another is to risk working in vain. Courts do not work in vain. See Ogigie V. Obiyan {1997} 10 NWLR (Pt 524) 179 and Odua Invest Ltd V. Talabi {1997} 10 NWLR (Pt 523) 1. G H

Under Order 2 rule 9 an appellant competence of whose ground(s) of appeal is being objected to must be put on notice and in writing at least three days before the hearing

of the appeal. Order 2 rule 28, on the other hand, requires that all applications in this Court whether for the relief provided for by Order 2 rule 9 or otherwise shall be by notice of motion supported by affidavit. The application shall also state the rule under which it is brought. If anything, the applicant

B herein can only be said to have omitted specifically stating that his application is being urged pursuant to Order 2 rule 9. The requirement that parties state the rules of court by virtue of which they assert a relief is technical and merely prescribes procedural steps for the guidance of the parties and the court.

C Our essence as a court is to do substantial justice. Once a remedy is provided for by any written law and it is properly claimed by a party, the remedy cannot be denied the party simply because he has wrongly stated the rule of court under

D which the relief is sought. See Falobi V. Falobi {1976} 1 NMLR 169 and Edewor V. Uwogba {1987} 1 NWLR (Pt 50) 313. It is for this reason that I am unable to agree with Mr. Daudu S.A.N that this application is incompetent. To the contrary, it is competent and I hereby so hold.

E However, the merit or otherwise of the application is different from its competence and must draw from the submissions of parties for and against the competence of the grounds of appeal being challenged. Counsel on both sides did not come

F this far in their submissions before us. It is thus impracticable to give a decision one way or another on the merit of the application itself. The application challenges the jurisdiction of the court to hear and determine the appeal as constituted. A decision on the application is necessary as the court can only

G proceed when it is competent to do so. To facilitate the imperative and in keeping with the practice that has evolved over time in this Court, the applicant is hereby ordered to argue the objection in its brief as the respondent in the appeal for the appellants to respond to same in his reply brief. Parties are

H ordered to bear their respective costs.

I. T. MUHAMMAD JSC

My learned brother, M. D. Muhammad, JSC, afforded me

an opportunity to read in draft the Ruling just delivered. I entirely agree with his reasoning and conclusion that in order to be fair to the respondent to the application, the applicant should argue his objection in his brief of argument to afford the appellant/respondent to reply the objection raised. This is in compliance with the current practice of brief writing. I abide by all orders made in the lead ruling including one on costs. B

PETER-ODILI JSC

I agree with the judgment just delivered by my learned brother, Musa Dattijo Muhammad JSC and in support of the reasoning, I shall make some comments. C

This is an appeal against the judgment of the Court of Appeal, Abuja Division or Court below for short which allowed the appeal of the present Respondent and set aside the decision of the trial Federal High Court, Abuja per Bello J, delivered on the 12th May, 2011. The Appellant aggrieved has come before the Supreme Court for redress. D

The respondents filed a notice of preliminary objection on the 15/1/2014 which is hereunder reproduced thus:- E

NOTICE OF PRELIMINARY OBJECTION PURSUANT OF ORDER 2, RULE 9(1), OF THE SUPREME COURT RULES

TAKE NOTICE that the Respondent shall, at the hearing of this appeal, rely upon a preliminary objection to the hearing of the appeal. F

GROUND OF OBJECTION

1. All the Grounds of Appeal In the Appellant's Notice of Appeal are either of mixed law and facts or of facts alone for which the prior leave of the Court below or of this Honourable Court ought to have been sought and obtained. G

2. The leave of the Court below or that of this Honourable Court was neither sought nor obtained before the Grounds of Appeal were filed. H

3. The Grounds of Appeal are therefore, incompetent.

4. The Notice of Appeal, not having any competent Ground of Appeal, is incompetent and, consequently, this Honourable Court lacks the jurisdiction to entertain this appeal based on the incompe-

tent Notice of Appeal.

5. The four issues formulated and argued in the Appellant's Brief of Argument are incompetent, having been formulated from incompetent Grounds of Appeal.

On the 26th day of January 2016 date slated for the hearing of the Appeal, the Preliminary Objection had to be moved by Wale Agunbiade, learned counsel for the Respondent/Objector.

J. B. Daudu of counsel for the Appellant responded countering the views put across by the Respondent contending that the grounds of appeal were purely of law and needed no leave of Court to be filed.

Mr. Agunbiade of counsel for the Objector stated that they are calling for the striking out of grounds 1, 4, 5, 6 and 7 of the Grounds of Appeal alongside Issues 1, 3, and 4; That the grounds as stated are either of mixed law and facts or of facts alone for which leave of Court was needed to be sought and obtained but this was not done. That the issues are therefore incompetent stemming from incompetent grounds of appeal. Learned counsel admitted not attaching the Grounds of Appeal to the Motion.

Learned senior counsel J. B. Daudu reacted by stating that the application itself was incompetent and unknown to law.

That the motion is said to be predicated on Order 2, Rule 28 (1) of the Supreme Court Rules which is not so covered as the appropriate rule of Court is Order 2, Rule 9 (1) for a Preliminary Objection against an appeal.

The said Order 2, Rule 28 (1) of the Supreme Court Rules 1999 (as amended) under which the Applicant is anchoring stipulates thus:-

"28 (1): Every application to the Court shall be by notice of motion supported by affidavit. It shall state the rule under which it is brought and the ground for the relief sought".

I agree with Mr. J. B. Daudu SAN that the appropriate related order and rule is Order 2, Rule 9 (1) of the Rules of the Supreme Court (supra) and that is as follows

"9 (1): 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”.

It is interesting that the Respondent who is throwing stones at the purported incompetence of the Grounds of Appeal of the Appellant is coming from an imperfect Motion with the said Objection containing nothing as there is no written address upon which arguments were made in that regard. He just filed the Motion impugning the grounds of appeal without more and failed to have incorporated arguments on the objection in his Respondent's Brief of Argument. Anyway, the Motion cannot be declared incompetent though not properly positioned in the appropriate Rule of Court, Order 2, Rule 9 (1) precisely and so, I am at one with the lead Ruling that the Motion Applicant can place his argument on the preliminary objection in his Brief of argument, since technicality will not take the place of substantiality.

D

OKORO JSC

This ruling is in respect of a motion on notice dated and filed on the 6th July, 2015. In it, the Respondent/applicant prayed for the following reliefs:

E

1. An order striking out grounds 1, 4, 5, 6 and 7 of the Grounds of Appeal on the notice of Appeal in this Appeal for being incompetent.

2. An order striking out issues 1, 3 and 4 formulated and argued in the appellant's brief of argument for being incompetent.

F

There are seven grounds upon which the application is predicated.

They are:-

1. Grounds 1, 4, 5, 6 and 7 of the Grounds of Appeal in the Notice of Appeal in this Appeal are either of mixed law and facts or of facts alone for which the prior leave of the court below or of this Honourable Court ought to have been sought and obtained.

2. The leave of the Court below or that of this Honourable Court was neither sought nor obtained before Grounds 1, 4, 5, 6 and 7 of the Grounds of Appeal in the Notice of Appeal were filed.

3. Grounds 1, 4, 5, 6 and 7 of the Grounds of Appeal in the Notice of Appeal are, therefore, incompetent.

4. Issue 1 formulated and argued in the Appellant's Brief of

Argument is based on Grounds 1 (one of the grounds complained of herein] and

5. Issue 3 formulated and argued in the Appellant's Brief of Argument is based on Grounds 4 and 5 while issue 4 thereof is based on Grounds 6 and 7.

B 6. Issues 1, 3 and 4 formulated and argued in the Appellant's Brief of Argument, being distilled from or related to Grounds 1, 4, 5, 6 and 7, which are incompetent, are incompetent.

C 7. This Honourable Court has the jurisdiction to strike out the five (5) incompetent Grounds of Appeal and Issues 1, 3 and 4 in the Appellant's Brief of Argument, which relate to the five incompetent Grounds of Appeal.

In support of this application is a 13 paragraph affidavit.

D On 26th January, 2016 when this application was heard, the Respondent/applicants' counsel admitted that he did not exhibit the notice of appeal containing the grounds of appeal he urged the court to strike out. Also, the applicant did not attach a written address in respect of the application. As it stands, there is no argument for and/or against the competence or otherwise of the grounds and issues
E sought to be struck out. It is not in the brief and was not annexed to the instant motion. In the circumstance, the applicant who has found fault has also defaulted.

Be that as it may, I agree with my learned brother Musa
F Dattijo Muhammad, JSC in the lead Ruling that in view of the fact that the issues raised in the motion tends to challenge the jurisdiction of this court, to hear this appeal, the applicant is ordered to argue his objection in his brief so that the appellant/Respondent can have an opportunity to respond. I have taken this position because courts are
G enjoined to do substantial justice to parties before them. See *Tukur v Government of Taraba State & ors* (1997) 6 NWLR (pt 510) 549, *Obiora v Osele* (1989) 1 NWLR (pt 97) 279 at 300.

I also agree that parties shall bear their respective costs.

H

SANUSI JSC

The applicant herein filed a motion on Notice on 6th July, 2015 seeking the under listed reliefs:

(1) An order striking out grounds 1,4,5, 6 and 7 of the Notice

of appeal for being incompetent

(2) An order striking out issues 1, 3 and 4 formulated and argued in the Appellant's Brief of Argument for being incompetent

The application was brought by the applicant pursuant to Order 2 Rule 28(1) of the Supreme Court Rules and under the inherent powers of this court. Also the application was based upon seven grounds listed in the motion paper. It was also supported by a thirteen paragraph affidavit. None of the paragraphs in the supporting affidavit was challenged by the learned senior counsel for the Respondent Mr. J.B. Daudu, SAN, as no counter affidavit was filed by him to challenge the averments in the affidavit supporting the motion.

In arguing the application, the applicant's learned counsel. Wole Agunbiade Esq. vehemently attacked the competence of grounds 1, 4, 5, 6 and 7 contained in the appellant's/respondent's Notice of Appeal because according to him, the said grounds are not grounds of law alone and therefore requires prior leave to be sought and obtained which said leave was not so obtained from either the lower court or from this court. He argued that in the absence of such prior leave sought and obtained, there are no valid and competent issues that can be distilled from or raised on any or all the grounds of appeal. He cited and relied on the cases of SPDC Ltd vs Amadi (2011) 14 NWLR (pt. 1266) 157 and Odunukwe v Ofomota (2010) 18 NWLR (pt.1225). He therefore urged this court to discountenance the incompetent grounds of appeal and the issues so formulated on any or all of them.

Responding, the learned silk for the respondent Mr. J.B. Daudu, who as I said earlier, did not file any counter affidavit, has made far-reaching submissions on points of law and stated that the two cases cited and relied on by the applicant's learned counsel supra, are not relevant to the situation of this instant case, as in none of the two cases did this court decide that objection to the competence of grounds of appeal are to be raised by way of motion on notice as opposed to the procedure laid down under Order 2 Rule 9 of Supreme Court Rules.

He further argued that in the two cases mentioned above, the competence of some and not all grounds of appeal in the appellant's notice of appeal was in issue as is the position in this in-

stant application. He said appropriately, the learned applicant's counsel should have pursued his preliminary objection in attacking or challenging the said grounds of appeal as he did in his respondent's brief of argument which he filed earlier, rather than resorting to attacking or challenging them in the instant motion. Learned silk relied in support of his submissions on the authorities of *Auto Import/Export v Adebayo* (2002) 18 NWLR (pt.799) 554; *Wassah & ors vs Kara & ors* (2014) LPELR 24212 (SC) and *Alh Sadic Ameen & ors vs Amos & ors* (2013) LPELP 2008 6 (SC) among others. He then urged this court to dismiss the application.

As I stated supra, the applicant brought this application simply predicating same on Order 2 Rule 28(1) of Supreme Court Rules which provides as follows:-

Order 2 Rule 28(1) -

"Every application to the Court shall be by notice of motion support by affidavit. It shall state the rule under which it is brought and the ground for the relief sought".

It is the contention of the learned senior advocate for the appellant/respondent Mr. J.B. Daudu, that the correct or appropriate Order and rule under which the application should have been brought is Order 2 Rule 9(1) of the Supreme Court Rules. I think he is correct in that his stance. The said Rule reads thus:-

"Rule 9(1) - A respondent intending to rely upon a preliminary objection 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".

Now looking at the provisions of the two rules vis-à-vis, the prayers the applicant engages this court to avail him with, there is no gainsaying that the application was brought under a wrong rule.

However, that notwithstanding this court is replete with multiplicity of decided authorities to the effect that a court is entitled to grant an application brought under a wrong rule of court or statute provided there is legal basis for it. See *Maja vs Samouris* (2002) 9 NSCQR 546 at 567. In fact, this court had this to say in *Uchendu vs Ogoni* (1999) 5 NWLR (pt.603) 337 at 351.

"It is trite that a particular rule of court or law under which a motion is brought is generally stated in the motion paper but failure

to do this will not make the motion incompetent nor the order upon which the motion is granted invalid, so long as there exists a rule of law which can back up the motion.”

I am therefore not inclined to agree with the learned silk’s submission that the motion is incompetent and deserves to be struck out simply because it was brought under a wrong law, since he himself suggested that it should have been predicated on Order 2 Rule 9(1) of this Court’s Rules. This presupposes that a rule exists under which the motion can comfortably be pigeon holed or brought.

At any rate, it is noted by me that the applicant herein, did not proffer any argument orally or in writing to advance reason(s) why the grounds of appeal he is challenging should be struck out since he failed to annex to his motion paper any written address or brief of argument for this court to consider in deciding whether to oblige him with the reliefs sought in the motion or not. On that premise, I am in entire agreement with my noble lord M. Dattijo Muhammad JSC in his leading ruling that the applicant herein, be enjoined to pursue the preliminary objection he already filed and argued in his (Respondent’s) brief of argument which had also incorporated all the reliefs he is now seeking in the instant application. That is more ideal, since this court had for time immemorial cultivated the habit of allowing parties to ventilate their grudges or complaints without any hindrance and also to give opportunity to the adverse party to respond or reply to such grudges or complaints. This gesture is in the spirit of fair hearing and also for the court to have balanced judgment or ruling on issues or points canvassed by parties before it after considering the submissions made by both parties.

On the whole, I am in entire agreement with the more detailed reasons given and the conclusion arrived at by my learned brother M. Dattijo Muhammad JSC. While adopting them as mine, I also abide by the consequential order made in the leading ruling, including the order as to costs.