

SUPREME COURT OF NIGERIA
FRIDAY 1ST JULY, 2016. SC. 21/2005
CORAM:- S. GALADIMA, N. S. NGWUTA,
M. U. PETER-ODILI, C. B. OGUNBIYI,
J. I. OKORO, JJSC

KERIAN IKPARA OBASI APPELLANT
AND
MIKSON ESTABLISHMENT
INDUSTRIES LTD RESPONDENT

APPEALS - Preliminary objection - Purpose of - Preliminary objection is aimed at scuttling hearing of appeal - And as such must be determined as threshold matter (H1)

APPEALS - Grounds - Distinction - Grounds and their particulars are examined - As a ground is of law where issue of law based on proved facts is disclosed - But where disputed facts is disclosed - Then it is of mixed law and facts (H2)

APPEALS - Grounds of law - Validity - The grounds being complaint that rules of law were applied wrongly to established facts - Are grounds of law which can be raised without leave (H3)

JUDGMENTS - Foreign judgment - Registration of - The registration shall be set aside where - Rights under the judgment are not vested in person - By whom application for registration was made (H4)

JUDICIAL PRECEDENTS - Application of - Basis - Although decisions of superior Court are binding on all lower Courts - Yet a decision is authority for what it actually decided - Based on facts and law (H5)

APPEALS - Technicality - Weight - The appeal is based on mere technicality - As appellant lost nothing by the deletion of "Establishment" from respondent's name (H6)

FACTS

This action commenced at the High Court of Kano State, Kano Judicial Division. Applicant/respondent as the judgment creditor in respect of a foreign judgment filed an *ex parte* application for an order, pursuant to section 10 of the Foreign Judgments (Reciprocal Enforcement) Act Cap. 152 LFN 1990, to register the said judgment for the purpose of its execution in Nigeria. The genesis of the matter is that respondent had sometime in 1998, sued appellant in the Miscellaneous Offences Tribunal, Maradi, Niger Republic. The said Tribunal gave judgment in favour of respondent. Consequently, respondent brought this application before the trial Court in Kano State.

Satisfied that respondent had satisfied the requirements of the law for the grant of the relief sought, the Court ordered that the foreign judgment be registered and enforced as its judgment. Upon the registration of the judgment, respondent levied execution against the moveable properties of appellant as judgment debtor. Aggrieved by the registration and enforcement of the foreign judgment against him, appellant applied to the Court, seeking *inter alia*, an order setting aside the registration of the foreign judgment. The application was heard and dismissed. The Court further ordered for substitution of name to reflect the proper and authentic name of the plaintiff as contained in the foreign judgment registered by the Court. Dissatisfied particularly with the order for substitution of name, appellant appealed to the Court of Appeal Kaduna Division. The appeal was heard and dismissed. Aggrieved further, appellant appealed to the Supreme Court. Respondent brought notice of preliminary objection, challenging the hearing of the appeal.

ISSUES FOR DETERMINATION

“(i) Whether the power conferred by the provisions of Order 11 Rule 2 of the Kano State High Court (Civil Procedure) Rules 1988 can be exercised ‘suo motu’ by the Court to amend the title of an action as held by the Court below without occasioning a miscarriage of justice.

(ii) Whether the decision of this Court in Njemanze v. Shell BP Port Harcourt (1966) All NLR p.8 at pp 10-11 and Maersk Line & Anor (2002) FWLR (Pt. 125) p.608 at pp 617-640 or (2002) 11 NWLR (Pt. 778) p.317 at 359 cited before the Court below are relevant to this appeal and should have been followed by the Court

below:

(iii) *Whether the Court below was right in holding, as it did, that the registering Judge exercised his discretion correctly under the law by correcting the name of the parties to prevent the occurrence of substantial injustice.*

(iv) *Whether the Court below could, in the circumstances of this appeal, disturb the finding of fact of the registering Judge which says:*

‘I must say that I entirely agree with the noble submission of the learned Counsel that the person that was named in the motion paper under which the judgment was registered as the applicant was not the same as the judgment creditor who obtained judgment against the applicant/judgment debtor at Maradi.

(v) *Whether the provisions of Section 6 (1) (A) (VI) of the Foreign Judgments (Reciprocal Enforcement) Act Cap 152 Laws of the Federation of Nigeria 1990 does (sic) not apply to this appeal to provide the basis for the setting aside of the registration of the foreign judgment.”*

HELD (Unanimously dismissing the appeal per NGWUTA JSC)

APPEALS - Preliminary objection - Purpose of

1. My noble Lords, a preliminary objection is aimed at scuttling the hearing of a matter or an aspect of a matter before the Court. By its intendment it has to be determined as a threshold matter. There is objection to Grounds 2 to 7 of the appellant’s seven grounds of appeal and ordinarily if the objection is sustained the appeal can still be heard on the surviving ground 1. However, the respondent has also attached Ground 1 on the ground that issue framed therefrom was agreed along with issues framed from the grounds he complained of as being incompetent. Therefore, the preliminary objection related to the entire appeal. (p. 3375 H)

APPEALS - Grounds - Distinction

2. A ground of appeal is not a ground of law or fact or mixed law and fact just because it was so labeled by a party. The

ground and its particulars will be examined and where such examination discloses an issue of law based on an admitted or proved set of facts it is a ground of law. But where the examination of the grounds and its particulars discloses that the ground of appeal is based on disputed facts or unascertained facts or set of facts, it is a ground of mixed law and fact.

The import of the distinction between a ground of law and a ground other than a ground of law is the fact that while an appeal in the former is of right but the right of appeal in the latter can only be exercised by leave of Court first sought and had. See Section 233 (2) (a) of the Constitution of the Federal Republic of Nigeria 1999 (as amended) which provides:

“S.233(2) An appeal shall lie from the decision 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...”

By Section 233 (3) of the Constitution (*supra*) the right to appeal on ground other than of law cannot be exercised except by leave of Court. The distinction between a ground of law on one hand and a ground other than one of law on the other hand, is a very thin one. However, there was no disputed fact before the Court of Appeal. (p. 3376 C)

APPEALS - Grounds of law - Validity

3. In view of the above analysis, it is my view that in substance all the seven grounds of appeal challenge the application of rules of Court *suo motu* and in alleged disregard of established legal principle contained in case law. Each is in substance a complaint that the rules of law were applied wrongly to established facts.

I agree with learned Counsel that the seven grounds of appeal are grounds of law and can be raised without leave of Court. See Section 233 (2) of the Constitution (*supra*). I find no substance in the preliminary objection and it is hereby dismissed.

I think it is pertinent to add that where the facts are es-

established or not disputed, there is no inference drawn from the established facts. (p. 3378 A)

JUDGMENTS - Foreign judgment - Registration of

4. By Section 6 (1) (d) (vi) of the Act the Registration of a foreign judgment shall be set aside on the ground, among other grounds, “that the right under the judgment are not vested in the person by whom the application for registration was made.” In my view, the onus is on the foreign judgment/debtor who applied to set aside the registration of the judgment to satisfy the Court that the applicant for the registration of the judgment has no right under the judgment.

In my view, the registering Court can set aside the Registration under- Section 6 (1) (a) (vi) of the Act without recourse to the High Court Rules and so whether or not the registering Court could exercise its powers under Order 11 Rule 2 of the Kano High Court Rules (*supra*) suo motu has no relevance to this appeal.

“Order XVI Rules of the Supreme Court 1983” said to be in *pari materia* with Order 11 R 2 of the Kano State High Court (Civil Procedure) Rules does not appear to be our own Supreme Court Rules. Its interpretation and decisions based on same offer no guide to the resolution of the issue in this appeal. Also appellant did not appeal on the legal personality *vel non* of the respondent, nor was the issue raised as a fresh issue. It cannot be entertained. I resolve issue one against the appellant. (p. 3378 G)

JUDICIAL PRECEDENTS - Application of - Basis

5. The doctrine of judicial precedence makes the decision of a superior Court binding on all Courts below it. This applies even if the decision was wrongly reached, as long as it has not been set aside by a Court of competent jurisdiction. However, a decision is an authority for what it actually decided based on the facts and applicable law. Where the facts and the point decided are not the same or similar a decision in one case cannot bind the Court adjudicating on another case.

In the case of Maersk (*supra*) the bone of contention

was the application of Order 32 of the Federal High Court (Civil Procedure) Rules 1996. It decided that the Court can effect amendment in the process before it under stated condition and that the power can be exercised suo motu. The case actually supports the respondent's case. In any case, none of the two cases had any element relating to the Foreign Judgment (Reciprocal Enforcement) Rules. In my view the Courts below are not bound to follow the decisions in either of the two cases. I resolve issue two' against the appellant.

(p. 3379 E)

APPEALS - Technicality - Weight

6. In my view, this appeal is founded on mere technicality. Appellant has lost nothing by the deletion of the word "Establishment" from the name of the respondent. The days of technicality in the application of law and rules are spent. Technical justice has been replaced by substantial justice in our Courts. (p. 3381 A)

REPRESENTATION

D. D. Onietan, Esq., for the Appellant

Steve Adehi Esq., with Peter Onuh, Esq., and Matthew Ovulaja, Esq., for the Respondent

CASES REFERRED TO

Tetlow v. Orela Ltd. (1920) 2 Ch 24

Sodipo v. Lemnin-Kainen Oy (No.2) (1986) 1 NWLR (pt. 15) 220

Bank of Baroda v. Lylabani Coy Ltd (2002) (pt. 124) 494

G Maersk Line v. Addide Investment Ltd. (2002) 11 NWLR (pt. 778) 317

Emoga v. State (1997) 9 NWLR (pt. 519) 25

Ajani v. Giwa (1986) 3 NWLR (pt. 32) 796

Shroeder & Co v. Major & Co (2002) All FWLR (pt. 125) 1304

H Inakoju v. Adeleke (2007) 4 NWLR (pt. 1025) 4223

ACB v. Hassan (1997) 8 NWLR (pt. 515) 110

Clement v. Iwuanyanwu (1989) 3 NWLR (pt. 107) 39

Unilag v. Aigoro (1988) 1 NWLR (pt. 1) 143

Guda v. Kitta (1999) 12 NWLR (pt. 629) 21

Obasi v. Mikson Est. Ind. Ltd. (2016) 7 KLR Ngwuta JSC 3367

Ayeni v. Sowemimo (1982) 5 SC 60

UBA v. Achora (1990) 6 NWLR (pt. 156) 250

Duruji v. Azie (1992) 7 NWLR (pt. 256) 668

STATUTES & RULES REFERRED TO

Foreign Judgments (Reciprocal Enforcement) Act Cap. 152 LFN B
1990, ss. 6(1)(A)(VI), 10

Evidence Act 2011, s. 131

Constitution of the Federal Republic of Nigeria 1999, s. 233(2)(a)

Kano State High Court (Civil Procedure) Rules 1988, O. 11 r. 2, O.
26 r. 3 C

Federal High Court (Civil Procedure) Rules 1996, O. 32

BOOK REFERRED TO

Black's Law Dictionary, 7th Ed. p. 479

D

LEAD JUDGMENT BY NGWUTA JSC

This appeal is against the judgment of the Court of Appeal, Kaduna Judicial Division. The said Court, in its judgment delivered on 23rd November, 2004 dismissed the appellant's appeal and affirmed the judgment of the High Court of Kano State, Kano Judicial Division. E

The facts leading to the appeal to this Court are summarised hereunder.

Sometime in 1998 the Respondent sued the Appellant in the
Miscellaneous Offences Tribunal, Maradi, Niger Republic. The suit
number is Trial No. 45/98. The said Tribunal gave judgment in favour
of the Respondent. F

Before the Kano State High Court of Justice, sitting in Kano, G
the Respondent, as the judgment creditor in respect of the foreign
judgment, filed an *ex parte* application for an order, pursuant to Sec-
tion 10 of the Foreign Judgments (Reciprocal Enforcement) Act Cap.
152 Laws of the Federation 1990, to register the foreign judgment
for the purpose of its execution in Nigeria. Satisfied that the applicant H
(now Respondent) had satisfied the requirements of the law for the
grant of the relief sought, the Kano State High Court ordered as
follows:

“(I) That a judgment delivered in Niger Republic against the

judgment debtor/Respondent known and called Kirian Ikpara Abasi who is now resident here in Kano within the jurisdiction of this Court in Suit No. Trial 45/98 is hereby registered as the judgment of this Court.

B *(2) The said judgment should be enforced as the judgment of this Court.”*

C The order registering the foreign judgment was made on 29-6-99. Upon the registration of the judgment the Respondent, as the judgment/creditor levied execution against the moveable properties of the appellant as judgment/debtor. The appellant, aggrieved by the enforcement of the foreign judgment against him, applied to the Court for the following reliefs:

“To set aside the Registration of the foreign judgment between the above named parties as shown above.

D *To set aside the execution carried out on 29/6/99 and 1/7/99 against the above named judgment debtor/applicant and seizing his moveable personal properties including any other. Execution which the registrar Court may carry out after the filing of this motion on notice.*

E *An order compelling the bailiff of the Registering Court to release forthwith all moveable properties of the named judgment debtor applicant to him.”*

F The Registering Court heard the application and in its ruling delivered on 16/7/99, it dismissed the application in its entirety. In addition it made the following order:

G *“That it is hereby ordered that the name of the plaintiff being described as MIKSON ESTABLISHMENT INDUSTRIES LTD in the motion paper dated 28th June 1998 be substituted with the name MIKSON INDUSTRIES LTD as the proper and authentic name of the plaintiff as contained in the foreign judgment registered by the Court on 29-6-00.”*

H Appellant was aggrieved with the ruling, particularly with the order on the name of the Respondent judgment creditor on the motion paper. He appealed to the Court of Appeal, Kaduna Division. In its judgment delivered on 22nd day of November, 2004 the Court below dismissed the appeal in the following words:

“Finally I found no merit at all in this appeal which I hereby dismiss. There shall be N5000.00 costs to the Respondent against the

appellant.”

Dissatisfied with the judgment of the Court below appellant appealed to this Court on seven grounds from which learned Counsel distilled the following five issues for determination:

“(i) *Whether the power conferred by the provisions of Order 11 Rule 2 of the Kano State High Court (Civil Procedure) Rules 1988* ^B *can be exercised ‘suo motu’ by the Court to amend the title of an action as held by the Court below without occasioning a miscarriage of justice. (Distilled from Grounds 1 & 2).*

(ii) *Whether the decision of this Court in Njemanze v. Shell BP Port Harcourt (1966) All NLR p.8 at pp 10-11 and Maersk Line & Anor (2002) FWLR (Pt. 125) p.608 at pp 617-640 or (2002) 11 NWLR (Pt. 778) p.317 at 359 cited before the Court below are relevant to this appeal and should have been followed by the Court below. (Ground 3).* ^C

(iii) *Whether the Court below was right in holding, as it did, that the registering Judge exercised his discretion correctly under the law by correcting the name of the parties to prevent the occurrence of substantial injustice. (Grounds 4 & 5).* ^D

(iv) *Whether the Court below could, in the circumstances of this appeal, disturb the finding of fact of the registering Judge which says:* ^E

‘I must say that I entirely agree with the noble submission of the learned Counsel that the person that was named in the motion paper under which the judgment was registered as the applicant was not the same as the judgment creditor who obtained judgment against the applicant/judgment debtor at Maradi. (Grounds 6)’. ^F

(v) *Whether the provisions of Section 6 (1) (A) (VI) of the Foreign Judgment (Reciprocal Enforcement) Act Cap 152 Laws of the Federation of Nigeria 1990 does (sic) not apply to this appeal to provide the basis for the setting aside of the registration of the foreign judgment. (Ground 7).”* ^G

In his own brief of argument, learned Counsel for the respondent gave notice of preliminary objection to the hearing of the appeal. He made lengthy submissions in respect of Grounds 2 to 7 of the Grounds of Appeal. He argued that the issue drawn from Ground 1 which he said is competent is adversely affected by issues from incompetent grounds with which it was argued. ^H

In case his preliminary objection is not sustained, learned Counsel for the Respondent collapsed the five issues in appellant's brief into one issue which reads:

B “Whether having regard to the provision of Section 6 (1) (a) (iv) of the Foreign Judgments (Reciprocal Enforcement) Act, the Court of Appeal was correct to affirm the refusal of the High Court of Kano State to set aside the registration in that Court of a judgment delivered by a Court in Maradi, Niger Republic between the appellant Karian Ikpara Obasi and Mikson Industries Ltd.”

C In his argument in issue one in his brief, learned Counsel for the appellant reproduced both Order 11 Rule 2 of the Kano State High Court (Civil Procedure) Rules 1988 and “*Ord. XVI Rule Rules of the Supreme Court 1983*” which he said are in *pari material*. He urged the Court to be persuaded by the interpretation of “*Ord. XVI R. 2 RSC 1983*” by Russel, J in *Tetlow v. Orela Ltd* (1920) 2 Ch 24.

D He argued that the Court cannot exercise its powers under the rule *suo motu* and that an application has to be brought before the Court can “*substitute another person for the living defendant*”. He referred to the phrase “if satisfied” in the rule and submitted that the power donated by the rule is discretionary and that the exercise of the power *suo motu* is whimsical and capricious and not judicial and judicious. He relied on *Sodipo v. Lemnin-Kainen Oy & Anor* (No.2) (1986) 1 NWLR (Pt. 15) p.220 at 224.

F He contended that the exercise of its power *suo motu* is in breach of the *audi alteram partem*. He relied on *Draus Thompson Organisation Ltd. v. University of Calabar* (2004) 9 NWLR (Pt. 879) p. 631 at 640 and *Alexander Mountain & Co Suing as a Firm) v. Rumene Ltd* (1948) 2 KB 436.

G Relying on *Bank of Baroda v. Lylabani Coy Ltd* (2002) (Pt. 124) p. 494 at 511 he raised doubt as to the legal personality of Mikson Establishment Industries in spite of the word “Ltd” added to it. He argued that the decisions of this Court on amendment of title to an action are not different from decisions of English Courts on the subject. He relied on *Njemanze v. Shell BP Port Harcourt* (*supra*) and *Maersk Line & Anor v. Addide Investment Ltd & Anor* (2002) 11 NWLR (Pt. 778) p.317 at 359.

H On issue one learned Counsel for the appellant took 15 pages of his brief to argue that the trial Court was wrong to have effected

the amendment *suo motu* and urged the Court to so hold.

In issue two, he argued that the decisions of this Court in Njemanze v. Shell BP Port Harcourt (*supra*) and “*Maersk Line & Anor (2002) FWLR (Pt. 125) p.608 at 617 & 640*” are relevant to this case and that the Court below acted in disobedience to the doctrine of *stare decisis* by failure to follow the principles in the cases. He B relied on Emoga v. State {1997} 9 NWLR (Pt. 519) p.25 at 29 para B and University of Lagos & Anor v. Olaniyan & Ors (2001) FWLR in his argument that the High Court and the Court of Appeal are bound by the decisions of the Supreme Court.

He referred to Njemanze v. Shell BP (*supra*) and said that the C broad principle established in the case is that “*an amendment to the title of an action cannot be had for the asking*”. He urged the Court to hold that the Courts below erred by not following and applying the principle in the two cases. D

Issue three queries the exercise of the trial Judge’s discretion by correcting the name of the parties. He referred to Black’s Law Dictionary 7th Edition page 479 for the definition of “*Judicial discretion*”. He said that the under listed must be borne in mind by anyone exercising judicial discretion: E

- (1) That he has power to act.
- (2) That the applicant is not entitled to the exercise of power as of right.
- (3) That the exercise of the power must follow laid down rules and F principles of law.

He conceded that the Court has power to act but argued that no facts were presented to the Court by the respondent upon which the Court could have effected the amendment. He referred to Ajani v. Giwa (1986) 3 NWLR {pt. 32} p.796 at 808 to 809 and impugned G the lower Court’s exercise of its discretion as it did not take into account the claim of both parties. He urged the Court to set aside the trial Court’s exercise of discretion as the same was not judicial and judicious.

In issue four, the learned Counsel reproduced the finding of H fact of the Registering Court to the effect that “*I must say that I entirely agree with the noble submission of the learned Counsel that the person that was named in the motion paper under which the judgment was registered as the applicant was not the same as the*

judgment creditor who obtained judgment against the applicant/judgment debtor at Maradi” and contended that the Court below ought not to have disturbed the said finding. He said that the Court below attempted to substitute its own view of the facts for that of the registering Court.

B Issue five is on the application of Section 6 (1) (A) (VI) of the Foreign Judgments (Reciprocal Enforcement) Act Cap 152 Laws of the Federation of Nigeria 1990. He referred to the ruling of the Registering Court that the name of the applicant for registration was not the same as the judgment/creditor. He said that the trial Court should
C have set aside the registration as the applicant for same was not the person who obtained judgment in Maradi.

He maintained that the Court below should have relied on the finding of the registering Court to set aside the registration. Learned
D Counsel argued that in adopting the opinion of the registering Court the Court below lost sight of the fact that the Certified True Copy of the judgment was not the one that was registered but the English translation version since French is not the language of our Courts.

He explained that the word “*Establishment*” included in the
E name of the applicant for registration of the judgment must be the French way of describing a private company like the judgment/creditor Court but said that the said explanation was not offered by anyone. He submitted that the conclusion reached by the Court below on the provisions of Section 6 (1) (A) (VI) of the Foreign Judgment
F (Reciprocal Enforcement) Act is not borne out of the facts of the case and ought to be set aside.

In conclusion he submitted as follows:

“(a) *The powers of the Court under Ord. 11 r. 2 of the Kano State High Court Rules (supra) cannot be exercised by a Court suo motu.*

G

(b) The Court below erred in not following the decision of this Court in Njemanze v. Shell BP (supra) and Maersk Line & Anor v. Addide Investment Ltd & Anor (supra).

H *(c) That the Court below was in error when it held that the registering Court exercised its discretion correctly.*

(d) That the Court below was in error in substituting its own views for that of the registering Court when it held that the name of the judgment creditor was correctly stated on the motion paper, and

(e) That the Court below was in error when it held that the provisions of Section 6(1) (a) (vi) of the Foreign Judgments (Reciprocal Enforcement) Act cannot apply to provide a basis for setting aside the registration of the foreign judgment.”

The lone issue in the Respondent’s brief is “*Whether, in view of the provisions of Section 6 (1) (a) (iv) of the Foreign Judgments (Reciprocal Enforcement) Act the Court of Appeal correctly affirmed the refusal of the High Court of Kano State to set aside the registration of the judgment delivered in Maradi, Niger Republic between the Appellant, Kerian Ikpara Obasi v. Mikson Industries Ltd.*”

Learned Counsel for the respondent submitted that the statute relevant to the determination of this appeal is the Foreign Judgment (Reciprocal Enforcement) Act and that Order 11 Rule 2 of the Kano State High Court (Civil Procedure) Rules 1988 relied on by the appellant is peripheral to the determination of the appeal.

Learned Counsel stated the judgment/creditor in the judgment of the Tribunal in Maradi is Mikson Ind. Ltd and the applicant for the Registration of the foreign judgment as Mikson Establishment Industries Ltd and submitted that the two entities are one and the same, adding that this fact was known to the appellant even though he chose to deny it. He argued that under Section 6 (1) (a) (vi) of the Act the Registration of a foreign judgment may be set aside “*if the Court is satisfied that the rights under the judgment are not vested in the person by whom the application for Registration was made.*”

He submitted that the onus is on the appellant as the party against whom the registered judgment may be enforced to satisfy the Registering Court that by virtue of the word “*Establishment*” in the respondent’s name the rights under the judgment were not vested in the respondent. He relied on Section 168 (1) of the Evidence Act 2011 on presumption of regularity of official acts until the contrary is proved.

He relied on Section 131 of the Evidence Act 2011 for the principle that he who asserts must prove. He relied on Alade v. Alice (2011) FWLR (pt. 653) pages 1849-1860A. Learned Counsel argued further that the appellant failed to satisfy the Registering Court that the respondent is not the judgment/creditor in the registered foreign judgment and urged the Court to so hold.

He referred to various affidavits deposed to on behalf of the

appellant in the Kano State High Court wherein the parties in the foreign judgment were stated as Kerian Ikpasa Obasi v. Mikson Establishment Ind. Ltd as Judgment/Debtor - Applicant and Judgment/Creditor - Respondent, respectively, the parties in the affidavits and also the parties in this appeal. Learned Counsel argued that the appellant stated the name of the respondent who obtained judgment against him in Maradi, as Mikson Establishment Ind. Ltd. in his affidavits in support of his application to vacate the registration of the foreign judgment.

Learned Counsel reproduced certain provisions of the affidavit to prove that appellant acknowledged the respondent in the appeal as the Judgment/Creditor in the foreign judgment. Learned Counsel referred to Order 11 Rule 2 of the Kano State High Court Rules (*supra*) and submitted that the rule is silent on whether or not the Court can amend the name of a party *suo motu* or on application of the party seeking the amendment.

He urged the Court to refuse the appellant's invitation to read Order 11 Rule 2 together with Order 26 Rule 3 (both of the Kano State High Court Rules) adding that the former is a *specific* provision whereas the latter is a general provision on amendments. He argued that the specific provisions prevail over the general provision for which he relied on the cases of Shroeder & Co v. Major & Co (2002) All FWLR (Pt. 125) p.1304, Inakoju v. Adeleke (2007) 4 NWLR (Pt. 1025) p.4223 at 589.

On the appellant's argument that the misstatement of the name of the respondent was done by the respondent itself and not by the appellant, learned Counsel argued that the appellant was neither misled nor did he suffer any prejudice. On judicial precedent Counsel argued that the facts of the cases of Njemanze v. Shell BP Port Harcourt (*supra*) and Maersk Line & Anor v. Addide Investment Ltd & Anor (*supra*) relied on heavily by the appellant are not relevant in the determination of this appeal as the facts on which they were decided are different from the facts of the case at hand.

The doctrine of precedence will apply only if the earlier decision of a superior Court is based on facts similar to facts of the case wherein the doctrine is invoked. He relied on, *inter alia*, ACB v. Hassan (1997) 8 NWLR (Pt. 515) 110 at 126; Clement v. Iwuanyanwu (1989) 3 NWLR (Pt. 107) 39 at 53. He contended that the facts of the cases

relied on by the appellant are different from the facts of the present case.

He referred to and relied on the finding of fact affirmed by the Court below that the mistake in the name of the Judgment/Creditor/Respondent was made by the interpreter who translated the judgment from the French text to English. He referred to Order 11 Rule 2 of the Kano State High Court Rules (supra) and argued that the Court has a discretion which is implied by the word “*satisfied*” used in the rule. He relied on *Unilag v. Aigoro* (1988) 1 NWLR (Pt. 1) p.143; *Guda v. Kitta* (1999) 12 NWLR (Pt. 629) p.21 and urged the Court not to interfere with the exercise of the trial Court’s discretion.

Placing reliance on *Ayeni v. Sowemimo* (1982) 5 SC 60 at 74; *UBA v. Achora* (1990) 6 NWLR (Pt. 156) p.250 at 273 and *Duruji v. Azie* (1992) 7 NWLR (Pt. 256) p.668 at 707, Counsel argued that the concern of the appellate Court is whether the decision is right and just and not the reason for same. He relied on the affidavits filed by the appellant in both Courts below and said that the appellant admitted that Mikson Establishment Ind. Ltd. is the Judgment/Creditor in respect of the judgment entered by the Court or tribunal in Maradi, Niger Republic against him. Having summarised his arguments learned Counsel urged the Court to dismiss the appeal for lack of merit.

In his reply brief learned Counsel for the appellant dealt with the respondent’s challenge to Grounds 2-7 of the Grounds of Appeal and concluded thus:

(a) All the grounds of appeal complained of relate to already proved and established facts.

(b) There was a misunderstanding and/or a misapplication of the law by the Court below to the already proved and established facts.

(c) Grounds 2 and 5 are complaints of lack of fair hearing against the appellant.

(d) Where a ground of appeal complains of lack of fair hearing leave is not required.

(d) Where a ground of appeal complains of misunderstanding or misapplication of the law already proved and established facts such ground of appeal is a ground of law.

My noble Lords, a preliminary objection is aimed at scut-

ting the hearing of a matter or an aspect of a matter before the Court. By its intendment it has to be determined as a threshold matter. There is objection to Grounds 2 to 7 of the appellant's seven grounds of appeal and ordinarily if the objection is sustained the appeal can still be heard on the surviving ground 1. However, the respondent has also attached Ground 1 on the ground that issue framed therefrom was agreed along with issues framed from the grounds he complained of as being incompetent. Therefore, the preliminary objection related to the entire appeal.

A ground of appeal is not a ground of law or fact or mixed law and fact just because it was so labeled by a party. See Nigerian National Supply Co Ltd v. Establishment Sima of Vacluz (1990) 7 NWLR (Pt. 164) 526. The ground and its particulars will be examined and where such examination discloses an issue of law based on an admitted or proved set of facts it is a ground of law. But where the examination of the grounds and its particulars discloses that the ground of appeal is based on disputed facts or unascertained facts or set of facts, it is a ground of mixed law and fact. See Ogbechie v. Onochie (1986) 2 NWLR (Pt. 23) 484; Nwadike v. Ibekwe (1987) 2 NSCC 1219 at 1232.

The import of the distinction between a ground of law and a ground other than a ground of law is the fact that while an appeal in the former is of right but the right of appeal in the latter can only be exercised by leave of Court first sought and had. See Section 233 (2) (a) of the Constitution of the Federal Republic of Nigeria 1999 (as amended) which provides:

"S.233(2) An appeal shall lie from the decision 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. ..."

By Section 233 (3) of the Constitution (supra) the right to appeal on ground other than of law cannot be exercised except by leave of Court. See Kano Textile v. Gloede & Hoff Ltd

(2005) 22 NSCQR 3440 ratio 1. **The distinction between a ground of law on one hand and a ground other than one of law on the other hand, is a very thin one. However, there was no disputed fact before the Court of Appeal.**

Both parties are *ad idem* on the decision of the Tribunal in which the appellant was a party and judgment/debtor. The judgment was registered in the High Court, Kano State for enforcement in Nigeria. While the parties in the foreign judgment appeared as Mikson Industries Ltd v. Kerian Obasi as is clearly stated at page one of the record in the application to register the judgment, the word “*Establishment*” crept in and the parties became Mikson Establishment Ind. Ltd. v. Kerian Ikpara Obasi. The registering Court in Kano corrected the apparent error, attributing it to error in the translation from the French to English language. This was affirmed in the Court below.

The above are settled issues of fact. The essential issue before the Court is whether or not the lower Court correctly applied the law/rules to the established facts.

Ground 2 is based on a portion of the judgment of the Court below and the central point is that the amendment was made when no reason for it was adduced by the present respondent. In fact the complaint is that the Court made the order *suo motu* and that in substance is a challenge to the application of a rule of law to proved fact. There is no disputed fact involved.

Ground 3 complained of the failure of Court to apply the case law to the facts established. Again, the facts are not disputed. What is disputed is the application of established legal principle to the facts. The appellant’s case is that the Court abandoned the appropriate legal principles and applied the wrong procedure.

Ground 4. The main issue here is that Court applied the rules *suo motu* for it is not disputed that the respondent did not apply for amendment.

Ground 5. The main complaint is lack of fair hearing based on accepted facts and application of the rules. There is no dispute on the facts.

Ground 6 is based on the amendment made based on the undisputed facts in the affidavit of the appellant.

Ground 7 is confined to the fact that the order was made without an explanation by the respondent. This fact is not contested.

In view of the above analysis, it is my view that in substance all the seven grounds of appeal challenge the application of rules of Court suo motu and in alleged disregard of established legal principle contained in case law. Each is in substance a complaint that the rules of law were applied wrongly to established facts.

I agree with learned Counsel that the seven grounds of appeal are grounds of law and can be raised without leave of Court. See Section 233 (2) of the Constitution (supra). I find no substance in the preliminary objection and it is hereby dismissed.

I think it is pertinent to add that where the facts are established or not disputed, there is no inference drawn from the established facts] or no (sic) issue relating to evaluation of evidence no (sic) issue of fact or mixed law and facts is likely to arise in the application of law/rules to the established facts as in the current case.

I will determine the appeal on the merits.

Learned Counsel for the appellant raised and argued five issues from his seven grounds of appeal. Learned Counsel for the respondent raised a single issue in the argument of which he traversed the five issues in the appellant's brief. I will determine the appeal on the appellant's issues and I will do so *seriatim*.

In issue one appellant impugned the exercise of its powers under Order 11 Rule 2 of the Kano State High Court (Civil Procedure) Rules 1988) by the Kano State High Court *suo motu*. On the other hand, learned Counsel for the respondent argued that the relevant statute is the Foreign Judgment (Reciprocal Enforcement) Act 1960 which repealed the Foreign Judgments (Reciprocal Enforcement) Ordinance Chapter 73 of the 1948 Law.

By Section 6 (1) (d) (vi) of the Act the Registration of a foreign judgment shall be set aside on the ground, among other grounds, "that the right under the judgment are not vested in the person by whom the application for registration was made."
In my view, the onus is on the foreign judgment/debtor who applied to set aside the registration of the judgment to satisfy the Court that the applicant for the registration of the judgment has no right under the judgment.

In my view, the registering Court can set aside the Registration under Section 6 (1) (a) (vi) of the Act without recourse to the High Court Rules and so whether or not the registering Court could exercise its powers under Order 11 Rule 2 of the Kano High Court Rules (supra) suo motu has no relevance to this appeal.

“Order XVI Rules of the Supreme Court 1983” said to be in pari materia with Order 11 R 2 of the Kano State High Court (Civil Procedure) Rules does not appear to be our own Supreme Court Rules. Its interpretation and decisions based on same offer no guide to the resolution of the issue in this appeal. Also appellant did not appeal on the legal personality vel non of the respondent, nor was the issue raised as a fresh issue. It cannot be entertained. I resolve issue one against the appellant.

Issue two raises the time-honoured principle of *stare decisis*. It was argued with considerable heat that the two Courts below violated the principle in not following the decisions of this Court in *Njemanze v. Shell BP Port Harcourt* (1965) All NLR page 8 and *Maersk Line & Anor v. Addide Investment Ltd & Anor* (2002) FWLR (Pt. E 125) 608 at 617 and 640.

The doctrine of judicial precedence makes the decision of a superior Court binding on all Courts below it. This applies even if the decision was wrongly reached, as long as it has not been set aside by a Court of competent jurisdiction.

See *NEPA v. Lenan* (1997) 1 NMLR (Pt.484) 680 SC. ***However, a decision is an authority for what it actually decided based on the facts and applicable law. Where the facts and the point decided are not the same or similar a decision in one case cannot bind the Court adjudicating on another case.***

In the *Njemanze* case, the plaintiff wrongly stated the name of the defendant in the originating process. On the other hand in the case at hand the suit was commenced and concluded and judgment delivered with the names of the parties properly stated. There is a subsisting finding of fact that the error in the name of one of the parties occurred in the translation from the French language to the English language when the application for registration was made.

The facts of the two cases are not even similar. ***In the case***

of Maersk (*supra*) the bone of contention was the application of Order 32 of the Federal High Court (Civil Procedure) Rules 1996. It decided that the Court can effect amendment in the process before it under stated condition and that the power can be exercised *suo motu*. The case actually supports the respondent's case. In any case, none of the two cases had any element relating to the Foreign Judgment (Reciprocal Enforcement) Rules. In my view the Courts below are not bound to follow the decisions in either of the two cases. I resolve issue two' against the appellant.

Issue three subtly replicates issue two already dealt with in this judgment. In the case of Maersk (*supra*) a case relied on by the appellant, this Court decided that an error in the name of a party to a suit can be amended by the Court even *suo motu* in the overall interest of justice. Based on the reasoning in issue two, I resolve issue 3 against the appellant.

In issue four appellant's grudge is that the Court below disturbed the finding of fact of the Registering Court on the name of the Judgment/Creditor in the application for Registration of the foreign judgment. In my view, this is none issue. The Court below affirmed in its entirety the judgment or ruling of the Registering Court. The issue of substitution does not arise and could not have arisen as the Court below did not disagree with the Registering Court on any aspect of its ruling. I think that learned Counsel for the appellant "*fished*" for as many issues as possible as if the success of the appeal is a function of the number of issues raised. I resolve issue four against the appellant.

Issue 5 is on whether or not Section 6 (1) (A) (VI) can be relied on to set aside the registration of the foreign judgment. I have already reproduced the relevant part of the Act. As I indicated earlier under the Act, the registration of a foreign judgment can be set aside if the judgment/debtor satisfies the Court that the rights under the judgment are not vested in the applicant for registration. The onus is on the judgment/debtor to satisfy the Court in this regard.

Learned Counsel for the respondent made copious references to the appellant's affidavits which left no one in doubt that the rights in the judgment registered in the High Court Kano are vested in the respondent. Based on the averments in the various affidavits relied on heavily by learned Counsel for the respondent, it is my view that

the appellant had not been consistent in the prosecution of the appeal. I resolve the issue against the appellant.

In my view, this appeal is founded on mere technicality. Appellant has lost nothing by the deletion of the word “Establishment” from the name of the respondent. The days of technicality in the application of law and rules are spent. Technical justice has been replaced by substantial justice in our Courts. B

Having resolved all the five issues against the appellant, I hereby dismiss the appeal as devoid of merit. The appellant is damnified in cost in the sum of N250,000.00 (Two hundred and fifty thousand naira only) in favour of the respondent. C

Appeal dismissed.

GALADIMA JSC D

I have been obliged a copy of the leading judgment of my learned brother *NGWUTA, JSC* just delivered. I agree that the appeal is bereft of any merit and should be dismissed. I wish to make a short contribution on Appellant’s issue (iii). It reads: E

“Whether the court below was right in holding as it did, that the registering Judge exercised his discretion correctly under the law by correcting the name of the parties to prevent occurrence of substantial injustice. (Grounds 4 and 5)”

The Appellant’s grouse here is that the court below was wrong F when it held that the registering Judge exercised his discretion rightly by correcting the name of parties. Reference was made to the Black’s Law Dictionary, 7th Ed at page 479 for the definition of the phrase *“Judicial discretion”*. He stated that in defining the phrase the following facts must be borne in mind by one called upon to exercise judicial discretion: G

- (a) that he has power to act;
- (b) that the applicant of that power is not entitled to the exercise of that power as of right; H
- (c) that in exercising the power he must follow laid down rules and principles of law.

On the laid down principles reliance was placed on two decisions of this court, namely: UNIVERSITY OF LAGOS & ANOR v

OLANIYAN & ORS (2001) FWLR (Pt. 56) P. 778 at Page 806-807; AJANI v GIWA (1986) 3 NWLR (Pt.32) P. 796 at 808-809. The latter was referred to query the registering court's exercise of discretion as the same was not judicial and judicious. It is contended that the exercise of the registering court's discretion to *suo motu* correct the name of the Respondent, on the title to the action before it, without the mistaking party offering any explanation for the mistake, and therefore the exercise of such discretion was one sided as it did not take into consideration the Appellant.

On his part, learned counsel for the Respondent submitted that the judgment/creditor in the Tribunal in Maradi was "*MIKSON IND. LTD*" and the applicant for the Registration of the Foreign Judgment as "*MIKSON ESTABLISHMENT LTD*". He therefore contended that the two entities are one and the same. He added that this fact is well known to the Appellant and cannot be denied.

I must observe that both parties are in agreement on the decision of the Maradi Tribunal Niger Republic, in which the appellant was a party and judgment/debtor. It is also a fact that the judgment was registered in the High Court of Kano State of Nigeria for enforcement in Nigeria. While the parties in the foreign judgment appeared as MIKSON INDUSTRIES LTD v KERIAN IKPARA OBASI as clearly stated at page one of the record in the application to register the judgment, the word "*ESTABLISHMENT*" came about and the parties became MIKSON ESTABLISHMENT LTD v KERIAN IKPARA OBASI at the registering High Court of Kano State.

In the affidavit of one Pius Okoko at the Kano High Court on the 11th October, 1999, on behalf of the appellant (at pages 79 -81 of the record herein), it was averred in paragraph 3 (a) thereof thus:

"Sometime ago (the appellant) had a dispute with the judgment creditor at Maradi, Niger Republic and the dispute was taken before the Miscellaneous Offences Tribunal in that town."

The "*Judgment creditor*" referred to by the appellant is named in the title of the affidavit as MIKSON ESTABLISHMENT IND. LTD. i.e. the Respondent to this appeal.

The registering High Court in Kano corrected this apparent error, attributing it to the improper translation from French to English language. Thus amending the name of judgment creditor from "*MIKSON IND. LTD*", *suo motu*. The procedure leading to this amend-

ment was affirmed by the Court of Appeal. In the case of **MAERSK LINE v ADDIDE INVESTMENT** (2002) FWLR (Pt. 125) at 608 the case relied on by the appellant, this court support such amendment, *suo motu* in the overall interest of justice.

The learned Judge of the Kano State High Court rightly held at page 8 of the record of appeal thus:- B

“I have no slightest doubt in my mind that the mistake in the name of the judgment - creditor/respondent was by the interpreter who interpreted the French text judgment into English. The word “Establishment” included in the name must be French way of describing a private company like the judgment - creditor - respondent. It is not a genuine mistake in good faith but in (sic) not misleading as to the true identity of the judgment - creditor respondent company since its name is correctly mentioned in the certified true copy of the original judgment itself”. (emphasis supplied). C

The court below rightly upheld the findings of the learned trial Judge on this issue. This court will not reverse a discretionary order of a trial court merely because it would have exercised its discretion differently. See **UNILAG v AIGORO** (1985) 1 NWLR (Pt. 1) 143; **OGOLO v OGOLO** (2006) ALL FWLR (Pt. 313) 1 and **WAZIRI v GUMEL** (2012) ALL FWLR (Pt. 652) P. 1160 at 1678. The appeal which is founded on mere technicality has no merit. Appellant has not shown that he suffers any miscarriage of justice by the deletion of the word *“ESTABLISHMENT”* from the name of the respondent. D

With this little contribution and resolution of all the issues in favour of the Appellant in the leading judgment of my brother **NGWUTA, JSC**, I too dismiss the appeal. I abide by the order on costs. E

Appeal Dismissed. F

G

PETER-ODILI JSC

I am in total agreement with the judgment just delivered by my learned brother Nwali Sylvester Ngwuta, JSC and the reasoning from which the decision came about. For emphasis in support thereof, I shall make some comments. H

This is an appeal from the decision of Kaduna Division of the Court of Appeal (the Court below) which affirmed the refusal of the

Kano State High Court per Saka Yusuf J to set aside the registration in that Court of a judgment delivered by a court in Maradi, Niger Republic between MIKSON INDUSTRIES LTD v KERIAN IKPARA OBASI.

The background facts are well captured in the lead Judgment.

B D. D. Onietan, learned counsel for the Appellant on the 26/4/2016 adopted the Brief of Argument of the Appellant filed on the 13/4/2005 and raised five issues for determination which are as follows:-

C i. Whether the power conferred by the provisions of Order 11, Rule 2 of the Kano State High Court (Civil Procedure) Rules 1988 can be exercised ‘suo motu’ by the Court to amend the title of an action as held by the Court below without occasioning a miscarriage of justice. (Distilled from Grounds 1 & 2).

D ii. Whether the decisions of this Court in Njemanze v Shell BP Port Harcourt (1966) All NLR P8 at pp.10-11 and Maersk Line & Anor (2002) FWLR (Pt. 125) p.608 at pp 617 & 640 or (2002) 11 NWLR (pt. 778) p.317 at 359 cited before the Court below are relevant to this appeal and should have been followed by the court E below. (Ground 3).

iii. Whether the Court below was right in holding, as it did, that the registering Judge exercised his discretion correctly under the law by correcting the name of the parties to prevent the occurrence of substantial injustice. (Grounds 4 & 5).

F iv. Whether the Court below could in the circumstances of this appeal, disturb the finding of fact of the registering Judge which says:
“I must say that I entirely agree with the noble submission of the learned counsel that the person that was named in the motion paper under which the judgment was registered as the applicant was not the same as the judgment creditor who obtained judgment against the applicant/judgment debtor at Maradi”. (Ground 6).

G v. Whether the provisions of Section 6 (1) (A) (VI) of the Foreign judgments (Reciprocal Enforcement) Act CAP152, Laws of the H Federation of Nigeria 1990 does not apply to this appeal to provide the basis for the setting aside of the registration of the foreign judgment (Ground 7).

Appellant’s counsel also adopted the Reply Brief filed on the 30/11/2015 and deemed filed on the 26/4/16.

Steve Adehi Esq, learned counsel for the Respondent adopted the Brief of argument filed on the 5/6/2013 and deemed filed on the 26/6/13. He argued in the Brief of Argument the Preliminary Objection he raised.

That Objection has to be tackled first since the competence of the appeal is challenged and the fallout being whether or not this Court has jurisdiction to even venture into the appeal. B

PRELIMINARY OBJECTION

The crux of the Respondent in the Preliminary Objection is that the competence of the appeal is challenged based on the lack of competence of Grounds 2, 3, 4, 5, 7 and 7 because the said Grounds consist of at best mixed law and fact and therefore require leave before they are filed pursuant to the provisions of Section 233 (3) of the Constitution of the Federal Republic of Nigeria 1999. C

That since no leave was obtained to raise the said Grounds, D the Issues 1, 2, 3, 4 and 5 therefrom are incompetent and should be struck out. Also that the incompetent Ground 2 is argued under Issue 1 together with Ground 1 which does not require leave, it is also afflicted by the same defect and as a consequence, is incompetent.

In canvassing the reasons for the Objection, Mr. Adehi of counsel E stated that the Grounds 2, 3, 4, 5 6 and 7 are either of facts simpliciter or at best of mixed law and fact in spite of the Appellant's labeling them errors of law. He cited Section 233 (2) (a) and (3) of the 1999 Constitution; *Opuiyo v Omoniwari* (2007) 16 NWLR (Pt.1060) 415 at 443-444; *Nwadike v Ibekwe* (1987) 4 NWLR (Pt.67) 718 at 729; *Ojemen v Momodu II* (1983) NSCC (Vol. 14) 135. F

He further contended that Ground 2 is an invitation by the Appellant to this Court to consider whether the Court below was correct to hold that no miscarriage of justice was occasioned by the fact that the amendment in question was effected by the Kano High Court suo motu. That in assessing or evaluating whether the said amendment possessed this quality, this Court must necessarily consider all the facts and circumstances of this matter, as can be gleaned from the record which makes it a ground of mixed law and fact. G H

On Ground 3, learned counsel for the Objector contended that decisions of this Court are only binding in appropriate cases and that it is a clear concession by the Appellant that it is not in all cases that decisions of this Court bind lower Courts which is indeed law but

that when the Court is making the consideration of the complaint in the ground of appeal which will involve a comparison of some cases, then the ground becomes one of mixed law and fact. He referred to *Njemanze v Shell B.P. Port Harcourt* (1966) All NLR 8 and *Maersk Line & Ors v Addide Investment Ltd & Anor* (2002) FWLR (Pt.125) 608; *Okoye v Centre Point Merchant Bank* (2008) 15 NWLR (pt.1110) 335 at 362; *Onyia v The State* (2006) 11 NWLR (pt.991) 267; *ACB v Hassan Co. Ltd* (1997) 8 NWLR (Pt.515) 110 at 126.

In respect to Ground 4, it was submitted for the Appellant that the finding of the Court of Appeal on the timing of the order made by the High Court of Kano State amending the name of the Respondent, that whilst the Court of Appeal held that the order was made “*after dismissing the Appellant’s application to set aside the order registering the foreign judgment*”, the appellant contends it was made when the Court was delivering its said ruling. Also that the second complaint in this Ground of Appeal is whether the Court of Appeal was correct to affirm the exercise by the High Court of Kano State of its discretion to amend the name of the Respondent.

That whilst the timing of the said order of amendment by the High Court is a question of fact, a ground of appeal questioning the exercise of discretion by a Lower Court is not a ground of law alone but of mixed law and facts. He referred to *Garba v Omokhodion* (2011) All FWLR (Pt. 596) 404 at 431; *F.B.N. v Abraham* (2008) 18 NWLR (Pt. 1118) 172 at 189.

On Ground 5, learned counsel for the Appellant said the complaint of a lack of fair hearing raised for the first time by the Appellant is only competent with leave of Court. He cited *Akpene v Barclays Bank* (1977) 1 SC 47, *Ohochukwu v A.G. of Rivers State* (2012) All FWLR (Pt.626) 412 at 431; *Ojiogwu v Ojiogwu* (2010) All FWLR (Pt.538) 840 at 854 etc.

On Ground 6, learned counsel for Respondent/Objector stated that the opening words of the Ground, “*certainly from the materials placed before the Lower Court*”, contain the reason for the finding of the Court below being impugned is one of facts simpliciter or at best of mixed law and fact. He cited *Abbey v Alex* (1991) 6 NWLR (Pt. 198) 459 at 464.

In respect to Ground 1 which learned counsel said required no *leave*, since it was argued under Issue 1 together with Ground 2

which is incompetent, it had become afflicted with the defect and so equally incompetent. He cited *Laah v Opaluwa* (2004) 9 NWLR (Pt. 879) 558; *Ngige v Obi* (2006) 14 NWLR (Pt.999) 1 at 165 etc.

In reply, Mr. Onieten for Appellant stated that the law recognizes that where a ground of appeal reveals a misunderstanding by the Lower Tribunal of the law or a misapplication by it, of the law to the facts already proved or admitted, such a ground of appeal is unquestionably a ground of law requiring no leave to file. He cited *Ononuju v A.G. Anambra State & 2 Ors* (2009) 5 SCNJ 31 at 45.

That looking at ground 2 which has to do with the correctness or otherwise of the order of amendment was made suo motu by the trial Court and the Court below in its judgment does not require leave as it is a ground of law. He cited *Bamigboye v University of Ilorin & Anor* (1999) 6 SCNJ 295 at 320.

Learned counsel for the Appellant said ground 3 is one of the pure law requiring no leave. That the objection on grounds 4, 5, 6 & 7 are a waste of time as there is no need for leave to file same. That grounds 6 and 7 are grounds on already proved facts and well established and only awaiting the application of the law. The Objection should be dismissed as unmeritorious.

At the root of this Preliminary Objection is the fact that while the Objector contends that all the Ground of Appeal save ground one are incompetent, the appeal cannot be saved because the said Ground 1 which requires no leave was argued under Issue 1 together with Ground 2 an infected ground lacking competence and so the appeal cannot be rescued under any guise.

The Appellant now Respondent to this Objection dismisses those assertions on the basis that all the grounds of appeal complained of relate to already proved and established facts and in the case of Grounds 2 and 5 which complained of lack of fair hearing and in that leave is not required.

My humble understanding is that this contest is anchored on the constitutional provision of Section 233 of the 1999 Constitution which stipulations, I shall quote hereunder thus:-
SECTION 233(2)(A) OF THE 1999 CONSTITUTION provides thus:

“An appeal shall lie from decisions of the Court of Appeal to the Supreme Court as of right... where the Ground of Appeal involves questions of law alone, decisions in any civil criminal proceed-

ings before the Court of Appeal”.

SECTION 233(3) OF THE 1999 CONSTITUTION provides:

“Subject to the provisions of subsection (2) of this Section, an appeal shall lie from the decisions of the Court of Appeal to the Supreme Court with the leave of the Court of Appeal or the Supreme Court”.

The grounds of appeal at the centre of this Objection are quoted with their particulars for clarity thus:-

GROUPS OF APPEAL

1. The Court of Appeal erred in law and thereby occasioned miscarriage of justice when it held at page 9 of its judgment that there is nothing in Order 11, Rule 2 of the Kano State High Court (Civil Procedure) Rules 1988, showing that the power conferred therein (under the said Order 11, Rule 2) cannot be exercised by a Court suo motu.

PARTICULARS OF ERROR

a. The use of the phrase “the Court or a Judge in chambers, may, if satisfied that it has been so commenced through a bona fide mistake in Order 11, Rule 2 implies or presupposes that certain materials must be placed before the Court, upon which the court mayor may not be satisfied that the mistake was made bona fide.

b. The other party is entitled to react to such materials so placed before the court, especially when the mistake relates to the party in error misstating its or his own name.

c. Order 26, Rule 3 of the Kano State High Court (Civil Procedure) Rules 1988, which specifically provides for the amendment of processes, should be read together with Order 11, Rule 2 of the same rules in the interest of justice.

2. The Court Below erred in law and thereby occasioned miscarriage of justice when at page 10 of its judgment it held:-

“Although in the present case in making the amendment, the Lower Court used the word “substitution” in correcting the name of the party, the same result could have been achieved by merely using the words ‘deleting’ or ‘removing’ the word ‘establishment’ from the name of the plaintiff/respondent. Be that as it may, I fail to see any substance in the argument that a miscarriage of justice has been occasioned by the Lower Court in making the order complained of suo motu”.

PARTICULARS OF ERROR

a. To amend is to make right, to correct or rectify, to change the words of, to alter formally by adding or deleting or by modifying the words, hence the use of words like ‘deleting’ or ‘removing’ as suggested by the Court below did not remove the act of the “registering Court”, (High Court of Kano State) from the realm of amendment. B

b. On the authorities, an order of amendment is not just made, reasonable excuse must be given (not by the judge) by the party in error, as to why or how the error was made in the first instance. C

3. The Court below erred in law when it failed to follow and/or be bound by the decisions of this Court on amendment of title of an action, in NJEMANZE v SHELL BP PORT HARCOURT (1966) ANLR p.8; MAERSK LINE & ANOR v ADDIDE INVESTMENT LTD & ANOR (2002) FWLR Pt. 125, P.608. D

PARTICULARS OF ERROR

a. An amendment of the title of an action cannot be had merely for the asking.

b. An order of amendment is not just made, reasonable excuse must be given by the party in error why and/or how the error was made in the first instance. E

c. Decisions of this Court constitute binding precedents on all other Courts in appropriate cases.

4. The Court below erred in law and occasioned miscarriage of justice when as page 11 of its judgment it held: F

“The order complained of was made after dismissing the appellant’s application to set aside the order registering the foreign judgment made by the Lower Court. In other words, the order, at the time it was made, did not have any effect in influencing the Lower Court in arriving at its decision to dismiss the appellant’s application to set aside the order registering the foreign judgment, at the Court below. On the whole on this issue, I think the learned judge of the Court below exercised his discretion correctly under the law in making the order correcting the name of the parties”. H

PARTICULARS OF ERROR

a. The order complained of was made while the said Court was delivering its ruling on the appellant’s application to set aside the registration of the foreign judgment.

b. Amendment of the names of the parties to an action cannot be made for the asking.

c. Discretion is not to be exercised capriciously but according to law and reason.

5. The Court below erred in law when at pages 6-7 of its judgment under review it held:

“Taking into consideration the time this order of amendment was made on the 16-7-99 after dismissing the appellant’s application to set aside the Lower Court’s order registering the foreign judgment on 29-6-99, the aim of the Lower Court in making the order was no doubt to correct the record and to prevent the occurrence (sic) of substantial injustice”.

PARTICULARS OF ERROR

a. It is substantial injustice and amounts to lack of fair hearing for the Court to suo motu make an order correcting the name of a party, especially when the mistake is that of the party whose name is being corrected, without giving any explanation for mistaking its name or asking for the correction to be done.

b. The appellant repeats Particular (a) of ground 4.

6. The Court below erred in law and occasioned miscarriage of justice when it tried to justify the amendment made by the registering court by referring to pages 109 and 110 of the record in the Court below, when at page 8 of its judgment, it said:-

“The Respondent, which was the Judgment Creditor in the foreign judgment was correctly named on the motion paper at page 109 of the record which named the parties as follows:

MIKSON INDUSTRIES LTD ... PLAINTIFF/APPLICANT

AND

KERIAN OBASI DEFENDANT /RESPONDENT

Also the affidavit in support of the ex parte motion at page 110 of the record of this appeal, the plaintiff/applicant was correctly named:

‘Mikson Industries Ltd.’”

PARTICULARS OF ERROR

a. The registering Court admitted at page 6, lines 38-43 of its ruling, the subject of the appeal at the Court below as follows:

“I must say that I entirely agree with the noble submission of the learned counsel that the person that was named in the motion paper under which the judgment was registered as the applicant was

not the same as the judgment creditor who obtained judgment against the applicant/judgment debtor at Maradi Republic”.

7. The Court Below erred in law and occasioned a miscarriage of justice, when at pages 14-15 of its judgment, it held:

“Certainly, from the materials placed before the Lower Court, there is nothing to support the claim of the Appellant that the rights under the foreign judgment registered at the Lower Court were not vested in the person by whom the application for registration of the foreign judgment was made. The provisions of Section 6(1) (a) (vi) of the Foreign Judgments (Reciprocal Enforcement) Act 1990 Laws of the Federation of Nigeria cannot therefore apply to provide the basis for the setting aside of the registration of the foreign judgment”.

PARTICULARS OF ERROR

a. The registering Court admitted in its ruling that the person in whose name the judgment was registered was not the same as the judgment creditor who obtained judgment against the appellant at Maradi, Niger Republic.

b. The mistake by the Respondent in stating its name correctly on the motion paper for registering the foreign judgment on the authorities must be explained to the satisfaction of the Court before same can be amended.

Having set out fully the Grounds of Appeal, the next task to be widertaken is the interpretation of whether any or all the Grounds of Appeal fall within the category designated as facts or mixed law and facts or just law. In the former classification leave would be required according to the prescription under Section 233(2) & (3) of the Constitution while in the latter no leave would be expected. This Court has set the guides in the classification of which ground falls into one of pure law or that which is of facts or mixed law and facts I refer to:- Opuiyo v Omoniwari (2007) 16 NWLR (Pt. 1060) page 415 at 443 - 444, where this Court, per Chukwumah-Eneh, JSC, held as follows:-

“To determine whether leave is required under Section 233(3) of the 1999 Constitution as against appealing as of right has to be determined by reading the ground of appeal against the particulars of error together so as to crystallize the issues raised in the grounds and to see whether they relate to questions of law or facts simpliciter or are matters of mixed law and facts as it is not the tag put on a

ground of appeal by a party that has to determine its fate in this regard. This requirement is a constitutional one so that dire consequences follow where the requirement of first seeking leave is breached. A further implication of Section 233(3) of the Constitution is that where leave is not sought, that is, where particularly it should,
 B *then the grounds of appeal are incompetent, leading to want of jurisdiction of the Court to entertain such grounds”.*

See also CENTRAL BANK OF NIGERIA v OKOJIE (2002) 8 NWLR (Pt.768) Pg.48 SC; UNITY BANK PLC v BOUARI (2008) 7 NWLR (Pt.1086) Pg. 372 at 378 SC and OKWUAGBALA v IKWUEME
 C (2011) FWLR (Pt.563) Pg.1877 at 1890D.

In the determination of the categorization of the grounds of appeal, it is now trite that such a function cannot be done with just the grounds of appeal without the particulars. For it is from the particulars that which class the ground of appeal falls into would be discerned. This duty is not served merely by an appellant naming a
 D ground of appeal one of “misdirection of law” or “error of law”. However, one is mindful that in the categorization, there is a thin line as it is simply one that can be made without proper ascertainment of
 E the particulars alongside the Grounds in issue. I place reliance on Nwadike v Ibekwe (1987) 4 NWLR (Pt. 67) 718 and 729; Ojemen v Momodu II (1983) NSCC Vol. 14 Page 135.

A perusal of Ground 2 would show that it is an invitation to this Court to consider the correctness of what the Court Below did in
 F respect to a possible miscarriage of justice in the amendment being effected by the Kano State High Court suo motu. In the assessment or evaluation of that amendment as to its being in line with justice, the Court of Appeal must consider all the facts and circumstances in
 G relation thereto which will naturally situate the ground of mixed law and fact.

In regard to Ground 3 which refers to whether the Court below did not err in law when it failed to follow or be bound by the decisions of this Court on amendment of title of an action in
 H NJEMANZE v SHELL B.P. PORT HARCOURT (1966) ALL NLR page 8 and the case of MAERKS LINE & ANOR (2002) FWLR P. 125 AT 608, the Respondent/Objector says in the consideration of whether stare decisis and precedent applied cannot be determined in isolation of the facts. This I agree with in that for a Lower Court to be bound

by a superior decision, that decision has to have similarity of facts with the one, the Lower Court is faced with. The principle of precedent or stare decisis is not applied or operated in vacuo as the facts the Court is currently faced with must be on all fours with the earlier decision of the higher Court and not otherwise or blindly. See *Okoye v Centre Point Merchant Bank* (2008) 15 NWLR (Pt. 1110) 335 at 362; *Onyia v The State* (2006) 11 NWLR (Pt. 991) 267; *ACB v Hassan Co. Ltd* (1997) 8 NWLR (Pt 515) 110 at 126. B

Another way of stating what I have been grappling with above is that in the application of a ratio decidendi in any case to another case, it cannot hold where the surrounding circumstances are different and so in making the decision on that differential or similarity as the case may be, the matter on ground is one of facts or mixed law and facts. C

Ground 4 questions whether the Court below erred in law D and occasioned a miscarriage of justice when in its judgment it made the order after dismissing the Appellant's application to set aside the order registering the foreign judgment at the Court below. This in considering whether the Court of trial was right in exercising its discretion in law in making an order correcting the name of the parties. E This clearly poses a question of mixed law and fact since it is to consider the correctness or otherwise of the trial Court. I rely on the case of *Garba v Omokhodion* (2011) All FWLR (Pt. 596) 404 at 431; *FBN v Abraham* (2008) 18 NWLR (Pt.1118) 172 at 189. F

On Ground 5 which contests the timing of the amendment when registering the foreign judgment and if the Appellant's right to fair hearing was impaired. The learned counsel for the Objector said the appellant cannot raise the issue of a lack of fair hearing at this stage when it failed to do so at the High Court and it was not an issue in the judgment of the Court of Appeal and so leave of Court is of the essence. The Appellant disagrees saying it is a constitutional right and leave is not required to raise it. G

The position of the Appellant would have been the acceptable but for the fact that it did not come up at the Court .of Appeal and thereby laying the Supreme Court at the risk of taking an appeal from the High Court without recourse to what transpired at the Court of Appeal. That brings up the competence of the Supreme Court to entertain an appeal from the High court directly and so the issue of a H

lack of fair hearing being raised for the first time at this stage requires leave of Court. See *Akpene v Barclays Bank* (1977) 1 SC 47; *Ohochukwu v A. G. Rivers State* (2012) All FWLR (Pt. 626) at 412 at 431; *Buhari v Yusuf* (2003) FWLR (Pt. 174) 329 at 384.

B Clearly the situation envisaged by the Appellant is not so simply displayed here for which the case of *Bamigboye v University of Ilorin & Anor* (1999) 6 SCNJ 295 at 320 would apply to avail his cause to raise a lack of fair hearing in that amendment. The reason being that it was not first raised at the Court of Appeal but rather take flight from the High Court to the Supreme Court in this instance
C which has changed the coloration of what is allowable without leave.

For Grounds 6 and 7 raising the complaint of the Court of Appeal erring in law and occasioning substantial miscarriage of justice in trying to justify the amendments made by the registering Court
D which consideration would go into findings of both the Kano High Court and the Court of Appeal which raise grounds of facts or mixed law and facts since the consideration had to be done with the materials placed before the Court. See *Abbey v Alex* (1991) 6 NWLR (Pt. 198) 459 at 464.

E Indeed I am at one with learned counsel for the Respondent/ Objector that Grounds 2 to 7 of the Grounds of Appeal invalidated all the five issues formulated by the appellant and thus rendered them incompetent. Ground 1 alone which is one of law that would have sustained the appeal having been combined with Ground 2 in the
F framing of Issue 1 has been incurably infected by that fundamental vice and so cannot survive. See *Iroegbu v Mpama* (2010) All FWLR (Pt.549) 1116 at 1154; *LAAH v Opaluwa* (2004) 9 NWLR (Pt. 879) 558; *Nkoro v Azuru* (2011) All FWLR (Pt.556) 530 at 550-551.

G From the foregoing and the well articulated lead judgment, I too admit the merit of this Preliminary Objection which I uphold. I therefore strike out the appeal as I abide by the consequential orders made.

H

OGUNBIYI JSC

I read in draft the lead judgment by my learned brother Nwali Sylvester Ngwuta, JSC. I agree that while the preliminary objection raised is lacking in merit and should be dismissed, the appeal is also

devoid of any merit and equally dismissed.

The appeal is against the judgment of the Court of Appeal Kaduna Division delivered on the 22nd November 2004 wherein the lower court dismissed the appellant's appeal and hence the appeal now before this court.

Briefly, a company called Mikson Industries Ltd had obtained judgment against the appellant in Maradi, Niger Republic sometimes in July 1998 in Suit No. Trial 45/98. The said judgment was subsequently registered in Nigeria in the name of a company called Mikson Establishment Industries Ltd on the 29th June, 1999 by Hon. Justice Saka Yusuf of the Kano State High Court of Justice (hereinafter called the Registering Court) vide an ex-parte application brought by the Respondent. It was the registration of the Maradi judgment and execution in the name of this new company that triggered the appellant, whereof he brought a motion before the registering court challenging the registration and urging the registering High Court of Kano State to set same aside. The registering High Court though in its ruling dated the 16th July 1999, agreed that the Respondent herein i.e. Mikson Establishment Industries Ltd was indeed not the judgment creditor in the Maradi judgment, nevertheless refused to set aside the registration but chose to *suo motu* amend this mistake whereupon the appellant appealed to the court below which dismissed the appeal and hence the appeal now before us.

The respondent filed a preliminary objection challenging grounds 2, 3, 4, 5, 6 and 7 of the grounds of appeal for being incompetent and predicating that they consist at best mixed law and facts and therefore require the leave of court before they are filed pursuant to the provision of section 233(3) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended).

The law is well settled wherein guiding principles have been developed over the years by the Superior Courts in the determination of whether a ground of appeal involves law alone or mixed law and fact. See *Abbey & Ors. V. Chief Alex and others* (1991) 6 NWLR (Pt .198) 459.

On when a ground of appeal involves a question of law alone therefore, the following principles and guidelines are relevant:-

(1) Where the ground of appeal reveals a misunderstanding of the position of the law by the court below.

(2) Where the ground deals exclusively with the misapplication of the law and the law alone to the exclusion of facts.

(3) Where the ground complains about the interpretation of the law by the court below and in the case the interpretation of the law should not involve the exercise of the discretionary power of the court below. This is because once a court of law exercises a discretionary power in the interpretation process, the position in most cases is no more that of law alone but becomes one of mixed law and fact.

(4) Where the facts of a case are not in dispute and formally admitted and the issue of law is based on authoritatively pre-determined principles of law. See *Fumudoh V. Aboro* (1991) 9 NWLR (Pt.214) 210 at 227- 228. See also *Ibrahim V. Habu* (1993) 5 NWLR (Pt.295) 510 at 577-578.

By the very nature of the grounds 2-7 of the grounds of Appeal, the said complaints relate to an already proved and established fact as rightly submitted by the appellant's counsel. There was also a complaint of misunderstanding and/or a misapplication of law by the court below to the already proved and established facts. A further ground which complains of lack of fair hearing is certainly a ground of law.

Without having to belabor the points raised, my learned brother Ngwuta, JSC has dealt adequately with the preliminary objection which should and is also hereby overruled and dismissed by me.

On the merit of the appeal, the provision of Order 11 Rule 2 of the High Court of Kano State Civil Procedure Rules is clear on the condition of the exercise of discretion by the trial court in this situation. In other words it must be satisfied that a mistake in stating the name of a party is made bona fide and without prejudice. The law is settled that an appellate court will not reverse a discretionary order of a trial court merely because it would have exercised its discretion differently. See *Unilag V. Aigoro* (1985) 1 NWLR (pt.1) pg.143. The same principle was laid down in *Dekit Const. Co. v. Adebayo* (2011) All FWLR (Pt. 596) p.515 at 536B.

The judgment appealed against is concurrent. It is not ordinarily open to this court to interfere with concurrent findings by the two lower courts except where there have been a proven and cogent reasons to do so. In the case under consideration the identity of both

Mikson Ind. Ltd and the respondent herein Mikson Establishment Ind. Ltd are one and the same. The slight variation is a mere technicality only. Hosts of authorities are settled that the court should...

“Not interfere... unless it has been shown that such concurrent findings have occasioned a miscarriage of justice or that such findings are perverse and cannot be supported having regard to the evidence.” B

See Okulate V. Awosanya (2000) 2 NWLR (Pt.646) p.530 at 551 per Mohammed, JSC; Obasuyi V. B. V. L (2000) 5 NWLR (Pt. 658) p.668 at 691 per Ogundare, JSC and Onogwu V. The State (1993) 6 NWLR (Pt.401) p.276 at 302 per Iguh, JSC.

As rightly submitted by the respondent’s counsel, the addition of Establishment to the name of the judgment-creditor in this appeal, Mikson Ind. Ltd has not occasioned a miscarriage of justice; the appellant was neither prejudiced nor misled as a result. Courts are not to be bogged down by technicalities. C

My learned brother Ngwuta, JSC had dealt adequately with all issues raised in this appeal. D

With the few words of mine supra, and more particularly on the fuller reasons given in the lead judgment I also find no merit in this appeal but dismiss same in terms of the lead judgment and further award N250,000.00 costs in favour of the respondent. E

Appeal is dismissed with N250,000.00 costs.

OKORO JSC

I read in draft the lead judgment of my learned brother, Ngwuta, JSC just delivered. I am in agreement with my learned brother that there is no merit in this appeal. It certainly deserves an order of dismissal. F

In this appeal, the respondent sued the appellant in the Miscellaneous Offences Tribunal, Maradi, Niger Republic. Judgment was entered for the respondent herein. The appellant then relocated to Kano State, Nigeria. The respondent as judgment creditor filed an *ex-parte* application before the Kano State High Court for an order registering the foreign judgment for the purpose of its execution in Nigeria pursuant to Section 10 of the Foreign Judgments (Reciprocal Enforcement) Act, Cap. 152 Laws of the Federation of Nigeria, 1990. The said application was granted and the foreign judgment regis- G H

tered for execution in Nigeria. The respondent herein, accordingly levied execution against the moveable properties of the appellant who was the judgment debtor.

Aggrieved with the said order of the Kano State High Court, the appellant herein applied to the High Court to set aside the order. B The application was refused. He appealed to the Court of Appeal Kaduna Division. The lower court dismissed the appeal. Appellant has further appealed to this court.

In the order of the High Court which registered the judgment it also made an order correcting the name of the respondent as follows:- C

“That it is hereby ordered that the name of the plaintiff being described as MIKSON ESTABLISHMENT INDUSTRIES LTD in the motion paper dated 28th June, 1998 be substituted with the name D MIKSON INDUSTRIES LTD as the proper and authentic name of the plaintiff as contained in the foreign judgment registered by the court on 29-6-99.”

There is no doubt that in the Ex-parte motion of 3/5/99 by which the respondent applied at the High Court for the registration E of the foreign judgment, the name of the plaintiff/ applicant (now respondent) was correctly written as “Mikson Industries Ltd.” So also the affidavit in support thereof. The court below found as a fact that the word “Establishment” found its way into the name of the plaintiff/judgment creditor/respondent through the English translation of F the proceedings of the foreign court at the High Court.

As was rightly held by the court below, the above situation is simply a misnomer which occurs when the correct person is brought to court under a wrong name. Where a party is sued in a wrong G name, it is trite that the courts will usually grant amendments to correct the mistake, even on appeal. It must be noted that naming a non-juristic person as a party is not misnomer and amending same to substitute a juristic person is out of it. .The reason is that there cannot be a valid amendment of the title of a suit since there never was a H legal person who was brought before the court by the action. See Emeson J. Continental Ltd V. Corona Shifah - RTSGEELS CHAFT MBH & Company (2006) II NWLR (pt. 991) 365, The Registered Trustees of the Airline Operators of Nigeria V. Nigeria Airspace Management Agency (2014) LPELR -22372 (SC). Such amendments

are made to prevent the occurrence of substantial injustice.

As was rightly observed by the court below, it appears the learned counsel for the appellant does not quarrel about an amendment being made but whether such amendment could be done *suo motu* by the court. Order 11 Rule 2 of the Kano State High Court (Civil Procedure) Rules 1988 under which the High Court made or- B
der correcting the name of the respondent provides:

*“Where an action has been commenced in the name of the wrong person as plaintiff, or where it is doubtful whether it has been commenced in the name of the right plaintiff, the court or a judge in chambers, may, if satisfied that it has so commenced through a bona C
fide mistake, and it is necessary for the determination of the real matter in dispute so to do, order any other person to be substituted or added as plaintiff upon such terms as may be just. “*

The above provision is clear and unambiguous. As was rightly D
held by the court below, for which I am in complete agreement with, there is nothing in the above provision of the rule showing that the power to make the amendment cannot be exercised *suo motu* by a court most especially as’ in the present case where the correction of the mistake in naming the party merely involved the deletion of the E
word “establishment” from the name of the plaintiff, now respondent which was occasioned by an obvious mistake through the translation of the proceedings of the foreign court at the High Court.

As can be seen, the appellant is in pursuit of technical justice. I
need to remind him that the days of technical justice are over. The F
appellant has failed to take benefit of the window of opportunity made available under Section 6 (1) (a) (vi) of the Foreign Judgments (Reciprocal) Enforcement Act (supra) wherein the registration can be set aside if the judgment debtor satisfies the court that the rights G
under the judgment are not vested in the applicant for registration. Having failed to do this, his pursuit of technical justice does not help him at all.

In view of all I have said above and the more elaborate reasons enumerated in the lead judgment, I agree that this appeal lacks H
merit and is accordingly dismissed. I abide by all the consequential orders made in the lead judgment, that relating to costs, inclusive.