

SUPREME COURT OF NIGERIA
FRIDAY 1ST JULY, 2016. SC. 138/2006
CORAM:- O. RHODES-VIVOUR, I. T. MUHAMMAD,
N. S. NGWUTA, C. C. NWEZE, A. SANUSI, JJSC

MR. IME IME UMANAH JNR APPELLANT
(Substituted for Chief I. Sampson Umanah)
AND
NIGERIA DEPOSIT INSURANCE
CORPORATIONRESPONDENT
(Liquidator of Century Merchant Bank Ltd)

APPEALS - Preliminary objection - Failure to respond - Once Court is satisfied that appellant was given opportunity to react - But failed to do so - The objection should be heard and ruling rendered (H1)

APPEALS - Preliminary objection - Incorporated in brief - Respondent can argue his preliminary objection in his brief - And appellant is expected to respond by filing reply brief (H2)

APPEALS - Preliminary objection - Filing - Purpose of - Isah v. INEC - It is filed against hearing of the appeal - To convince Court that the appeal is fundamentally defective (H3)

APPEALS - Grounds - Classification of - To classify ground of law or mixed law and facts - Court should examine the grounds and their particulars - And identify the substance of the appeal (H4)

APPEALS - Grounds - Issues - Validity - Where ground is incompetent - Issues formulated from such ground - Are liable to be struck out (H5)

APPEALS - Grounds - Filing - Mixed law and facts - Leave must be obtained before such grounds are filed - As failure to do so renders the grounds and issues arising therefrom incompetent (H6)

FACTS

Before the Federal High Court Lagos Division, plaintiff/appel-

lant commenced this action, claiming recovery of debt of N15m from defendant/1st respondent, Rabo Farms Ltd. and three others. The said amount was given to 1st respondent as a loan. The sum was guaranteed by 2nd respondent. Subsequently, 2nd respondent brought an application on notice, seeking an order of court striking out his name from the suit. The application was supported with a 13 paragraph affidavit and a further affidavit of 12 paragraphs with annexure OA, AI, and OA2. No counter-affidavit was filed by appellant.

The motion became necessary because 2nd respondent was of the view that he had repaid above the guaranteed sum of N15m, and so his liability should be discharged. The trial Court was therefore left to decide whether 2nd respondent as guarantor of the principal debt should be discharged at this stage. The application was heard, at end of which the Court granted same and struck out the name of 2nd respondent from the suit. Dissatisfied, appellant appealed to the Court of Appeal Lagos Division. The Court allowed the appeal and ordered that the matter be heard by another Judge of the trial Court. Still not satisfied, appellant appealed to the Supreme Court. Respondent raised a preliminary objection, contending that all the grounds of appeal being of mixed law/facts, should be struck for failure to obtain leave. Appellant did not respond to the objection.

HELD (Unanimously striking out the appeal per **RHODES-VIVOUR JSC**)

APPEALS - Preliminary objection - Failure to respond

1. At the hearing of the appeal on 19 January 2016, learned counsel for the appellant informed this court that the preliminary objection had been addressed in his amended appellants brief. I have read the amended appellants brief over and over again and nowhere in it did learned counsel for the appellant respond to the preliminary objection. Furthermore, it is impossible for the appellant amended brief filed on 21 January, 2016 to contain a response to a preliminary objection contained in a brief filed on 25 January, 2016. It is thus very safe to conclude that there is no response by the appellant to the preliminary objection. Once the court is satisfied as I am satisfied that the appellant was given ample opportunity to react

to the objection but failed to react the court should go ahead and consider the Preliminary objection and render a Ruling. This is premised on the position of the law that the court can strike out on its own motion any ground of appeal which is vague or general in terms or which discloses no reasonable ground of appeal. In the circumstances failure of the appellant to respond to a preliminary objection is no reason why the preliminary objection is not heard. It must be heard.
(p. 3472 D)

APPEALS - Preliminary objection - Incorporated in brief

2. The rule ensures that the appellant is not taken by surprise and it gives the appellant enough time to respond to the preliminary objection. It is now accepted practice for a respondent to argue his preliminary objection in his brief as the respondent has done thereby obviating the necessity of filing Notice of Preliminary objection. The appellant is expected to respond by filing a reply brief. The respondent's brief containing arguments on the Preliminary objection was duly filed and served on 25 January 2016. This appeal was heard on 19 April, 2016. The appellant had more than enough time to respond to the preliminary objection, but failed to respond. (p. 3473 A)

APPEALS - Preliminary objection - Filing - Purpose of

3. In *Isah v INEC & 3 ors (2014) 1- 2 SC (Pt.iv) p.101*, I made it clear when a Preliminary objection should be filed and when a Notice of Motion would suffice when I said that:

"A Preliminary objection should only be filed against the hearing of an appeal and not against one or more grounds of appeal which are not capable of disturbing the hearing of the appeal. The purpose of a Preliminary objection is to convince the court that the appeal is fundamentally defective in which case the hearing of the appeal comes to an end if found to be correct. Where a preliminary objection would not be the appropriate process to object or show to the court defects in processes before it a motion on notice filed complaining about a few grounds or defects would suffice..."

In the Notice of Appeal there are three grounds of appeal. It

is the contention of learned counsel for the respondent that all three grounds are incompetent. The learned counsel for the respondent was in the circumstances correct to file and rely on a preliminary objection because if he succeeds the hearing of the appeal would abate. (p. 3473 D)

B

APPEALS - Grounds - Classification of

4. In *NNPC v Famfa Oil Ltd (2012) ALL FWLR (Pt.635) p.204.*

I observed that the difference between a ground of law and a ground of mixed law and facts can be narrow. Labeling a ground of appeal error of law, or misdirection may not necessarily be so. The appellation is irrelevant in determining whether a ground of appeal is of law or mixed law and fact. For the correct classification of ground of law or mixed law and fact or facts the court should examine the ground and their particulars and identify the substance of the appeal. At the end of such an exercise whether a ground of appeal is of law or mixed law and fact would be resolved. A ground on facts is much easier to identify.

E **A ground of appeal which complains of a misunderstanding by the lower court of the law or a misapplication of the law to the facts already proved or admitted is a ground of law.**

A ground of appeal which questions the evaluation of facts before the application of the law, is a ground of mixed law and fact. If the ground of appeal complains that the judgment of the trial court is against the weight of evidence is a ground of fact. (pp. 3475 D/3476 E)

G *APPEALS - Grounds - Issues - Validity*

5. Applying the principles already stated and the decisions of this court, grounds 1, 2, and 3, the only grounds contained in the Notice of Appeal are grounds of mixed law and fact. They are caught by section 233 (2) of the Constitution (as amended)

H **and are hereby struck out. It is long settled that an issue for determination does not exist independently. It is formulated from a ground of appeal, and so if a ground of appeal is incompetent, issues formulated from incompetent grounds are liable to be struck out.** (p. 3478 D)

APPEALS - Grounds - Filing - Mixed law and facts

6. Leave must be obtained from the Court of Appeal or this Court before grounds of appeal on mixed law and fact or on facts alone are filed.

In this appeal two issues were formulated from three grounds of appeal. The three grounds of appeal are of mixed law and fact and no leave or permission was obtained before they were filed. All the three grounds of appeal are in the circumstances incompetent.

The two issues formulated from the three grounds of appeal collapse and the appeal is accordingly struck out on the Preliminary objection of learned counsel for the respondent, Mr. T.A.B. Oladipo, since there is no longer any competent ground of appeal to save the appeal. (p. 3478 F)

REPRESENTATION

O. Fabunmi with J. Agim, for the appellant

T. A. B. Oladipo with B. E. Mesele, for the respondent

CASES REFERRED TO

Isah v. INEC (2014) 1- 2 SC (pt. iv) 101

Nwaolisah v. Nwabufoh (2011) 6-7 SC (pt. 11) 138

Dakolo v. Dakolo (2011) 6-7 SC (pt. III) 104

Wachukwu v. Owunwanne (2011) 5 SC (pt. I) 168

Ogbechie v. Onochie (1986) 2 NWLR (pt. 23) 484

Ojemen v. Momodu II (1983) 1 SCNLR 188

Okwuagbale v. Ikwueme (2010) 19 NWLR (pt. 1226) 54

NNPC v. Famfa Oil Ltd (2012) ALL FWLR (pt. 635) 204

Ekunola v. CBN (2013) 7 SCM 40

Iro v. Echenwendu (1996) 8 NWLR (pt. 468) 629

Onigbiden v. Balogun (1975) All NLR (pt. 1) 233

Agbaka v. Amadi (1998) 11 NWLR (pt. 572) 16

Buzu v. Garabi (2000) 13 NWLR (pt. 684) 228

Onamade v. ACB Ltd (1997) 1 NWLR (pt. 480) 123

Oduntan v. General Oil Ltd (1995) 4 NWLR (pt. 387) 8

MDPDT v Okonkwo (2001) 3 KLR (pt.117) 739

Abidoye v Alawode (2001) 3 KLR (pt. 118) 917, 919

STATUTE & RULES REFERRED TO

Constitution of the Federal Republic of Nigeria 1999, ss. 233 (2)(a), (3)

Supreme Court Rules, O. 2 r. 9

B

BOOK REFERRED TO

Law Quarterly Review vol. 100 of October 1984

LEAD JUDGMENT BY RHODES-VIVOUR JSC

C

This is an appeal from the Judgment of the Court of Appeal, Lagos Division, delivered on 9 February 2005 in appeal No. *CA/L/52/2002* which upset the judgment of a Federal High Court, Lagos Division, delivered on 1 November, 2001 in Suit No: *FHC /L/ FB/2000*. It arose as follows:

D

In the trial court the appellant was the plaintiff, while the defendants were:

1. Rabo Farms Ltd
2. Chief Ime Sampson Umanah,
3. Mrs. Nnene Ime Umanah
4. Ime Ime Umanah

E

3 and 4 were subsequently struck out.

The 1st Respondent obtained credit facilities amounting to fifteen million naira (N15m) from the plaintiff. The sum was guaranteed by the 2nd respondent. The plaintiff's claim is for recovery of the debt of N15m.

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On 2 May, 2001 the 2nd respondent filed a motion on notice seeking an order of court striking out his name from the suit. The 2nd respondent supported his application with a 13 paragraph affidavit and a further affidavit of 12 paragraphs with annexures OA, AI, and OA2. The plaintiff did not file a counter affidavit. The motion on notice became necessary because the 2nd defendant was of the view that he had repaid above the guaranteed sum of N15m, and so his liability should be discharged. The issue considered by the learned trial judge was whether the 2nd respondent as guarantor of the principal debt should be discharged at this stage.

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H

After hearing submissions from counsel and examining affidavits and annexures, (the plaintiff did not file counter-affidavit) the

learned trial judge in the penultimate paragraph observed that:

“The guarantor in this case has shown he paid the principal sum and extra 45 million in addition. A guarantor cannot be liable for more than he has undertaken.”

And concluded as follows:

“In view of the foregoing on the provision of order 2 rule 5(3) B of the Federal High Court (civil procedure) rules 2000, I grant the application sought and order that the name of the 2nd respondent/ applicant chief Umanah be struck off the list. Trial in respect of the principal plaintiff will continue.”

From this decision the plaintiff appealed to the Court of Appeal. That court upset the Ruling of the learned trial judge when it concluded thus:

The conclusion that I have arrived at in this appeal is that the failure by the learned trial judge to consider the pleadings has resulted in a miscarriage of justice. I therefore allow the appeal, set aside the judgment of the lower court delivered by Nwodo, J on 1/11/2001 in suit No; FHC/L/FB/2000 and order that the matter be heard by another judge of the Federal High Court.

This appeal is against that judgment. Briefs were filed and exchanged by counsel. Learned counsel for the appellant O. Fabunmi filed the appellant’s brief on 21 January 2016, while learned counsel for the respondent, T.A.B. Oladipo filed the respondents brief on 25 January 2016. Both counsel adopted their briefs at the hearing of the appeal on 19 April, 2016. Learned counsel for the appellant urged this court to allow the appeal, while learned counsel for the respondent drew the attention of the court to the fact that he argued a Preliminary Objection in his brief, urging the court to strike out the appeal. He observed that he argued the appeal in the alternative. On his part learned counsel for the appellant informed the court that he did not respond to the Preliminary objection raised, but that the Preliminary objection had been taken care of in the amended appellants brief. The learned counsel for the appellant formulated two issues from his three grounds of appeal.

The issues are:

1. Whether the learned Justices of the Court of Appeal were right in determining the appeal before them on the pleadings of the parties filed at the trial court when no such issue was canvassed in the

appeal.

2. Whether the learned trial judge ought to have taken evidence from the parties in this case before deciding on whether to strike out the name of the appellant from the suit when the facts contained in the affidavit of the appellant before the lower court were

B not contradicted by a counter-affidavit by the appellant.

On the other side learned counsel for the respondent formulated a sole issue for determination of the appeal. It reads:

1. Whether after having correctly found that issues of fact have
C been joined in the pleadings, the Court of Appeal was right in holding that the learned trial judge was duly bound in considering those issues before taking a decision to strike out grounds of mixed law and fact for which no leave of court was obtained. Reliance was placed on section 233 (2)(a) and (3) of the Constitution. Learned counsel
D for the appellant did not file a reply brief to respond to the Preliminary objection.

***At the hearing of the appeal on 19 January 2016, learned counsel for the appellant informed this court that the preliminary objection had been addressed in his amended appellants
E brief. I have read the amended appellants brief over and over again and nowhere in it did learned counsel for the appellant respond to the preliminary objection. Furthermore, it is impossible for the appellant amended brief filed on 21 January, 2016 to contain a response to a preliminary objection contained in a brief filed on 25 January, 2016. It is thus very safe to conclude that there is no response by the appellant to the preliminary objection. Once the court is satisfied as I am satisfied that the appellant was given ample opportunity to react
F to the objection but failed to react the court should go ahead and consider the Preliminary objection and render a Ruling. This is premised on the position of the law that the court can strike out on its own motion any ground of appeal which is vague or general in terms or which discloses no reasonable
G ground of appeal. In the circumstances failure of the appellant to respond to a preliminary objection is no reason why the preliminary objection is not heard. It must be heard.***

Order 2 rule 9 of the Supreme Court Rules states that:

“A respondent intending to rely on 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,”

The rule ensures that the appellant is not taken by surprise and it gives the appellant enough time to respond to the preliminary objection. It is now accepted practice for a respondent to argue his preliminary objection in his brief as the respondent has done thereby obviating the necessity of filing Notice of Preliminary objection. The appellant is expected to respond by filing a reply brief. The respondent’s brief containing arguments on the Preliminary objection was duly filed and served on 25 January 2016. This appeal was heard on 19 April, 2016. The appellant had more than enough time to respond to the preliminary objection, but failed to respond.

In *Isah v INEC & 3 ors (2014) 1- 2 SC (Pt.iv) p.101*, I made it clear when a Preliminary objection should be filed and when a Notice of Motion would suffice when I said that:

“A Preliminary objection should only be filed against the hearing of an appeal and not against one or more grounds of appeal which are not capable of disturbing the hearing of the appeal. The purpose of a Preliminary objection is to convince the court that the appeal is fundamentally defective in which case the hearing of the appeal comes to an end if found to be correct. Where a preliminary objection would not be the appropriate process to object or show to the court defects in processes before it a motion on notice filed complaining about a few grounds or defects would suffice...” See *Nwaolisah v Nwabufoh (2011) 6-7 SC (Pt. 11) p.138*, *Dakolo & 2 ors. v Dakolo & 3 ors. (2011) 6-7 SC (Pt.III) p.104*, *Wachukwu & anor v Owunwanne & anor (2011) 5 SC (Pt.I) P168*. **In the Notice of Appeal there are three grounds of appeal. It is the contention of learned counsel for the respondent that all three grounds are incompetent. The learned counsel for the respondent was in the circumstances correct to file and rely on a preliminary objection because if he succeeds the hearing of the appeal would abate.**

Learned counsel for the respondent observed that all the three

grounds of appeal raise questions of mixed law and fact contending that for the grounds of appeal to be valid the appellant must have obtained the leave either of the Court of Appeal or the Supreme Court. Reliance was placed on section 233 (2) (a) and (3) of the Constitution. He submitted that since the appeal was filed without
 B leave, all the grounds of this appeal are incompetent and are liable to be struck out. He placed reliance on: *Ogbechie v. Onochie* (1986) 2 NWLR (Pt.23) p.484 *Ojemen v Momodu II* (1983) 1 SCNLR p.188 *Okwuagbale v Ikwueme* (2010) 19 NWLR (Pt.1226) p.54. He urged
 C this court to strike out the Notice of Appeal and dismiss the appeal.

I earlier on in this judgment said that learned counsel for the appellant did not respond to the Preliminary objection, but the court still has to consider it.

The Preliminary objection was based on one ground viz-
 D That the three ground of appeal are based on grounds of mixed law and fact but no leave of either the Court of Appeal or the Supreme Court was obtained as required by section 233 of the Constitution.

Section 233 (2) of the Constitution provides for right of appeal. That is to say in all the under-listed cases a litigant dissatisfied with a judgment of the Court of Appeal has a right of appeal to the Supreme Court.

233(2) An appeal shall lie from decisions of the Court of Appeal to the Supreme Court as of right in the following cases-
 F

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

(b) decisions in any Civil or Criminal proceedings on questions
 G as to the interpretation or application of this Constitution;

(c) decisions in any Civil or Criminal proceedings on questions as to whether any of the provisions of chapter iv of this Constitution has been, is being or is likely to be, contravened in relation to any person;

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

(e) decisions on any question-

(i) whether any person has been validly elected to the Office of

President or Vice- President under this Constitution.

(ii) whether the term of President or Vice-President has ceased.

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

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

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

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

(f) Such other cases as may be prescribed by an Act of the National Assembly, C

Where the ground/s of appeal do not come within the preview of section 233 (2) of the Constitution leave must be obtained. That is to say leave must be obtained before grounds of appeal on mixed law and facts or facts can be said to be competent. D

In NNPC v Famfa Oil Ltd (2012) ALL FWLR (Pt.635) p.204. I observed that the difference between a ground of law and a ground of mixed law and facts can be narrow. Labeling a ground of appeal error of law, or misdirection may not necessarily be so. The appellation is irrelevant in determining whether a ground of appeal is of law or mixed law and fact. For the correct classification of ground of law or mixed law and fact or facts the court should examine the ground and their particulars and identify the substance of the appeal. At the end of such an exercise whether a ground of appeal is of law or mixed law and fact would be resolved. A ground on facts is much easier to identify. See Ogbechie & ors v Onochie & ors (1986) 1 NSCC p.443 Nwadike v Ibekwe (1987) 4 NWLR (Pt.67) p. 718 In Ogbechie & ors v Onochie & ors (supra). E F G

This court adopted the explanation and the way to identify grounds of appeal by the authors of the Law Quarterly Review Vol. 100 of October 1984. The authors said:

1. If the tribunal purports to find that particular events occurred although it is seised of no admissible evidence that the events did not in fact occur, it is a question of law. But where admissible evidence has been led, its assessment is entirely for the tribunal, in other words, it is a question of fact. H

2. *If the tribunal approached the construction of a legal term art in a statute on the erroneous basis that the statutory wording bears its ordinary meaning, it is a question of law.*

3. *If the tribunal approaches the construction of a statutory word or phrase bearing an ordinary meaning on the erroneous basis that it is a legal term of art, it is a question of law.*

4. *If the tribunal, though correctly treating a statutory word or phrase as a legal term of art, errs in elucidation of the word or phrase, it is a question of law.*

5. *If the tribunal errs on its conclusion (that is, in applying the law to the facts) in a case where this process requires the skill of a trained lawyer, it is error of law.*

6. *If in a case where a conclusion can as well be drawn by a layman (properly instructed on the law) as by a lawyer, the tribunal reaches a conclusion which cannot reasonably be drawn from the facts as found, in that event, the superior court has no option but to assume that there has been some misconception of the law. But the issue may admit of more than one possible resolution. The inferior tribunals conclusion may be one of the possible resolutions; yet it may be a conclusion which the superior court (has it been seised of the issue) would not have reached. Nevertheless, the inferior tribunal does not err in law. The matter is one of degree, and a superior court with jurisdiction to correct only errors of law will not intervene.”*

A ground of appeal which complains of a misunderstanding by the lower court of the law or a misapplication of the law to the facts already proved or admitted is a ground of law.

A ground of appeal which questions the evaluation of facts before the application of the law, is a ground of mixed law and fact. If the ground of appeal complains that the judgment of the trial court is against the weight of evidence is a ground of fact. See *NNPC v Famfa Oil Ltd. (2012) ALL FWLR (Pt.535) p.204.*

It is important for a proper understanding that the three grounds of appeal are reproduced to see if they are of law, mixed law and facts or facts.

GROUND 1

The learned Justices of the Court of Appeal erred in law in holding that the trial judge was duty bound to consider the pleadings

filed and the issues joined before deciding on the application dated 2 May, 2001.

PARTICULARS OF ERROR

A. The issue of considering the pleadings of the parties was not canvassed by the Respondent in its reply argument to the argument of the appellant in support of his motion before the trial court. B

B. The issue of considering the pleadings was not part of the grounds of appeal of the respondent before the Court of Appeal and was not one of the issues raised for determination before the court.

C. That even if the learned trial judge had considered the pleadings, she would not have arrived at a different decision in her ruling. C

D. The issue of the consideration of pleadings was raised by the learned justices of the Court of Appeal on their own without calling the parties to address it on the point.

E. The case of *Nnaji v Ede* (1996) 3 NWLR (Pt.466) p.332 D heavily relied upon by the Court of Appeal in arriving at its decision did not apply to this case

GROUND 2

The learned Justices of the Court of Appeal erred in law in holding that if the trial judge had adverted her mind to the pleadings, she would have found out that issues were joined on whether the 2nd respondent had discharged his obligations under the guarantee which included paying back not only the amount guaranteed but also the accrued interest and the amount to be set-off. E

PARTICULARS OF ERROR

A. The learned trial judge found from the further affidavit evidence of the appellant as contained in exhibit Ao2 that the appellant had paid a total sum of N50,888,559.25k to the respondent, which sum is over and above the N15,000 guaranteed by the appellant. F

B. The further affidavit evidence of the appellant with the attached exhibit Ao2 that the appellant had paid a total sum of N50,888,559.25k to the respondent, which sum is over and above the N15,000,000 guaranteed by the appellant, was not controverted by way of counter-affidavit and this finding was also made by the Court of Appeal. G

C. The striking out of the name of the appellant was rightly made by the learned trial judge under the provisions of Order 25 Rule 2(1), 2(2) and 3 of the Federal High Court (Civil Procedure) H

Rules 2000 as the pleadings to be envisaged under the rules is the statement of claim only as done by the learned trial judge in this case.
GROUND 3

The learned Justices of the Court of Appeal erred in law in holding that as the interest chargeable on the amount guaranteed is
B a bone of contention, evidence ought to be taken before the issue is resolved.

PARTICULARS OF ERROR

A. The trial judge cannot take evidence in the matter since no counter affidavit was filed by the respondent before the trial court to
C controvert the facts contained in the affidavit evidence of the appellant.

B. In several judicial authorities, the court will only take evidence from the parties where there is irreconcilable conflict in the
D affidavit evidence before the court.

C. The further affidavit evidence of the appellant was the attached exhibit Ao1 and Ao2 relied on by the learned trial judge that the appellant had discharged his obligation.

Applying the principles already stated and the decisions of this court, grounds 1, 2, and 3, the only grounds contained in the Notice of Appeal are grounds of mixed law and fact. They are caught by section 233 (2) of the Constitution (as amended) and are hereby struck out. It is long settled that an issue for determination does not exist independently. It is formulated from a ground of appeal, and so if a ground of appeal is incompetent, issues formulated from incompetent grounds are liable to be struck out. See Egbe v Alhaji (1990) 1 NWLR (Pt.128) p.546.
F

Leave must be obtained from the Court of Appeal or this Court before grounds of appeal on mixed law and fact or on facts alone are filed.
G

***In this appeal two issues were formulated from three grounds of appeal. The three grounds of appeal are of mixed
H law and fact and no leave or permission was obtained before they were filed. All the three grounds of appeal are in the circumstances incompetent.***

The two issues formulated from the three grounds of appeal collapse and the appeal is accordingly struck out on

the Preliminary objection of learned counsel for the respondent, Mr. T.A.B. Oladipo, since there is no longer any competent ground of appeal to save the appeal.

Appeal struck out.

B

MUHAMMAD JSC

I have read the judgment of my learned brother, Rhodes-Vivour, JSC. I agree with his lordship that the appeal can be determined at the level of the Preliminary Objection raised by the respondent. It is true that all the grounds of appeal are of law and fact which require leave to Court of Appeal. No such leave was sought and obtained. This renders all the grounds incompetent. The Notice of Appeal becomes bare with no ground to support it. The purported appeal is hereby struck out. See *Ekunola v. CBN* (2013) 7 SCM 40.

C

D

NGWUTA JSC

I read in draft the lead judgment just delivered by my learned brother, Rhodes-Vivour, JSC and I entirely agree with His Lordship's analysis leading to the conclusion that each of the three grounds of appeal is incompetent, being a ground of mixed law and fact which cannot be raised without leave of either the Court below or this Court. See Section 233 (2) of the 1999 Constitution of the Federal Republic of Nigeria (as amended).

F

I think learned Counsel for the appellant was in dereliction of his duty to his client and to the Court. There is no way he could have anticipated the preliminary objection to his grounds of appeal and dealt with same in his appellant's brief before same was argued in the respondent's brief filed subsequent to the filing of the appellant's brief.

G

With due respect learned Counsel took a reckless risk. He lied when he said he dealt with the preliminary objection in his appellant's brief. The truth is that for reasons only he can explain, learned Counsel ignored the respondent's preliminary objection to his three grounds of appeal. He is deemed to have conceded that he had no answer to the respondent's objection. See *Joseph Iro & 3 ors v. Christopher Echenwendu & Sons* (1996) 8 NWLR (Pt. 468) 629 at 636 ratio 2

H

paras B-C.

All rights of appeal including the ancillary question of filing briefs in an appeal are statutory and a party cannot exercise such rights without strict compliance with the statutory provisions upon which the right is founded. See Joseph Iro & 3 ors v. Christopher Echenwendu & Sons (supra); Onigbiden v. Balogun (1975) All NLR (Pt. 1) 233. The three grounds of appeal were *ex facie* incompetent and liable to be struck out without the Court wasting its precious time to engage in exercise in futility. See Agbaka v. Amadi (1998) 11 NWLR (Pt. 572) 16; Buzu v. Garabi (2000) 13 NWLR (Pt. 684) 228.

Another area in which learned Counsel for the appellant, with respect, exhibited inexcusable nonchalance if not outright carelessness in the conduct of the appeal is in formulation of issues. Issue 2 reads in part: “Whether the learned trial judge ought to have taken evidence from the parties in this case ...”

This issue questions the propriety *vel non* of what the trial Court did or failed to do at the trial. It has no relation to the judgment of the Court below. This Court has no jurisdiction to hear appeal directly from the judgment of the High Court. In K. A. Onamade & Anor v. African Continental Bank Ltd (1997) 1 NWLR (Pt. 480) 123 ratio 9 at page 146 paras A-B issue 5 complained about the judgment of the trial Court quite unconnected with the decision of the Court of Appeal.

It was held that the Supreme Court had no jurisdiction to deal with the issue. See also Sunday Oduntan v. General Oil Ltd (1995) 4 NWLR (Pt. 387) page 8; Bankole & Sons v. Pelu (1991) 8 NWLR (Pt. 211) at 537; Kano Textiles v. Gloede & Hoff Ltd (2005) 22 NSCQR page 346 ratio 8.

Even if the preliminary objection was not sustained and the appeal heard on the merit, issue 2 would have been struck out as incompetent before this Court.

For the above and the fuller reasons in the lead judgment I also strike out the three grounds of appeal as incompetent. I also strike out the appeal.

Appeal struck out.

NWEZE JSC

I had the advantage of reading the draft of the leading judgment which my Lord, Rhodes-Vivour, JSC, just delivered now. I, entirely, agree with His Lordship that this appeal must collapse since it is not anchored on any competent Ground of Appeal.

As demonstrably shown in the leading judgment, the respondent's preliminary objection was predicated on the irrefutable contention that, whereas the appellant's Grounds of Appeal broached questions of mixed law and fact, no prior leave of either the Court of Appeal or of this Court was sought and obtained; hence the appeal was incompetent *ab initio*.

Although, I endorse the conclusion that this appeal deserves to be struck out on the above ground, I sympathize with the appellant and his counsel. The reason is simple.

Even this court had confessed its difficulty in distinguishing a ground of law from a ground of mixed law and fact, *Ogbechie v Onochie* (1986) 1 NWLR (pt. 70) 370 [where Eso JSC, approvingly, adopted the scintillating expose on the subject by C. T. Emery and Professor B. Smythe in their article titled, "Error of Law in Administrative Law", in *Law Quarterly Review* Vol. 100 (October 1984)].

Other examples include: *UBA Ltd v Stahlbau GmbH & Co* (1989) 3 NWLR (pt 110) 374, 391-392; *Obatoyinbo v Oshatoba* (1996) 5 NWLR (pt. 450) 531, 548; *MDPDT v Okonkwo* (2001) 3 KLR (pt.117) 739 etc.

This difficulty, notwithstanding, it has, ingeniously, fashioned out formulae for navigating through the nuances of the characterization of grounds of appeal. The first formula aims at facilitating the ascertainment of what constitutes a ground of appeal. It comes to this: a court has a duty to do a thorough examination of the grounds of appeal filed.

The main purpose of the examination will be to find out whether - if from the grounds of appeal, it is evident that the lower court misunderstood the law or whether the said court misapplied the law to the facts which are already proved or admitted. In any of these two instances, the ground will qualify as a ground of law.

On the other hand, if the ground complains of the manner in which the lower court evaluated the facts before applying the law, the ground is of mixed law and fact. The determination of grounds of

fact is much easier.

Simply put, these formulae simply mean that it is the essence of the ground; the main grouse: that is, the reality of the complaint embedded in that name, that determines what any particular ground involves, *Abidoye v Alawode* (2001) 3 KLR (pt. 118) 917, 919; *NEPA v Eze* (2001) 3 NWLR (pt. 709) 606; *Ezeobi v Abang* (2000) 9 NWLR (pt. 672) 230; *Ojukwu v Kaine* (2000) 15 NWLR (pt. 691) 516.

In effect, it is neither its cognomen nor its designation as “Error of Law” that determines the essence of a ground of appeal, *Abidoye v Alawode* (supra) 927; *UBA Ltd v Stahlbau Gmbh & Co* (1989) (supra) 374, 377; *Ojemen v Momodu* (1983) 3 SC 173.

Having made the above observations, I must quickly add here that my sympathy for the appellant and his counsel is of no moment as the law brooks neither sentiment nor empathy, *Suleiman v C. O. P. Plateau State* [2008] 21 WRN 1, 13; *Udosen v State* [2007] 4 NWLR (pt 1023) 125, 137; *Ezeugo v Ohanyere* [1978] 6- 7 SC 171; *Oniah v Onyia* [1989] 1 NWLR (pt 99) 514; *Omole and Sons Ltd v Adeyemo* [1994] 4 NWLR (pt 336) 48. Accordingly, the appeal must fail.

It is for these, and the more elaborate reasons in the leading judgment that I, too, shall uphold the respondent’s preliminary objection. In consequence, I order that this appeal must be, and is hereby, struck out for being incompetent.

Appeal struck out.

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