

SUPREME COURT OF NIGERIA
FRIDAY 16TH DECEMBER, 2016. SC. 76/2006
**CORAM:- W. S. N. ONNOGHEN Ag. CJN, M. U. PETER-
ODILI, O. ARIWOOLA, K.B. AKA'AHs,
K.M.O. KEKERE-EKUN, JJSC**

1. ALEX NZEI

(Former Chairman and Ex-officio Member,
(Academic Staff Union of University,
University of Nigeria, Nsukka Branch (ASUU-UNN)

2. DR. A. M. IBEANU APPELLANTS

(Chairman of Academic Staff Union of University,
(for themselves, and on behalf of the Academic
Staff Union of Universities, University of Nigeria,
Nsukka Branch (ASUU-UNN)

(Substituted by the Order of the Court on the
27th Day of April, 2016

AND

1. UNIVERSITY OF NIGERIA (UNN)

2. PROF. F. N. C. OSUJI

(for himself, for and on behalf of the
Council UNN)

3. DR. S. ABDULRAHMAN ... RESPONDENTS

(For himself, for and on behalf of the “Adhoc
Committee on Violent Student’s Demonstration
of 12th July, 2000...”

4. PROF. G. F. MBANEFOH

(Vice-Chancellor, UNN)

5. MRS. G. I. ADICHIE

(AG. Registrar, UNN)

APPEALS - Grounds - Mixed law & facts - Leave - Where appellant
appeals on such grounds - Leave must be sought and obtained -
Otherwise the appeal is incompetent and Court will have no jurisdic-
tion (H1)

FACTS

Before the Federal High Court Holden at Enugu, plaintiffs/appellants instituted this action by way of judicial review, seeking inter alia for a declaration that the Council as a domestic tribunal of the University of Nigeria Nsukka (UNN) has neither the competence to investigate nor to try appellants, any other member of the Academic Staff Union of Universities (ASUU) UNN, nor any student for conduct amounting to crime. The genesis of the matter that led to the filing of the action in Court is that on 12th July 2000, when 2nd respondent (the then Vice-Chancellor of the University of Nigeria Nsukka) was to deliver an address during a Forum organized by the institution, the students of the institution rioted and disturbed the forum. When the rioting became violent, the University was forced to close down following which the University Council set up an ad hoc committee to investigate amongst other things, the remote and immediate causes of the riot. The Committee was given two weeks within which to submit an interim report.

Upon the setting up of the Committee and prior to their commencement of duty, appellants approached the Court by way of judicial review. In reaction, respondents filed an application on notice, praying inter alia for an order striking out or dismissing the originating motion filed by appellants. The grounds for the application are that appellants have no locus standi to institute the action, the motion is incompetent in so many respects, and that appellants have no legal right to sustain the reliefs being sought. The motion was supported by affidavit to which appellants filed counter affidavit. After arguments, the Court struck out the suit for lack of locus standi. Dissatisfied, appellants appealed to the Court of Appeal Enugu Division. The appeal was dismissed. Still dissatisfied, appellants appealed to the Supreme Court.

HELD (Unanimously striking out the appeal per
ONNOGHEN Ag. CJN)

APPEALS - Grounds - Mixed law & facts - Leave

1. It has been determined by a plethora of authorities that this Court will not be misled by the mere description of a ground

of appeal as a ground complaining of error in law when in fact, the particulars clearly show that it is complaining of evaluation, assessment of evidence, findings of fact or misdirection on facts or mixed law and fact. Where an appellant desires to appeal on facts or mixed law and facts, section 233(3) of the 1999 Constitution (as amended) enjoins the appellant to seek and obtain the leave of the lower court or of this Court before filing such an appeal. Where an appellant fails to so act, as in the instant case, the appeal is incompetent and the court would have no jurisdiction to hear and determine same as the grounds are incompetent and liable to be struck out.

In conclusion, I find merit in the preliminary objection and consequently uphold same. I find and hold that all the eleven (11) grounds of appeal herein are either of facts or mixed law and facts for which the leave of the Court of Appeal or of this Court is required to make the appeal competent in accordance with the provisions of section 233(3) of the 1999 Constitution (as amended) and that the failure to obtain the required leave renders the grounds of appeal incompetent and liable to be struck out; that the appeal being grounded on the said incompetent grounds same is incompetent and liable to be struck out. (p. 4668 B)

NOTABLE POINTS OF INTEREST

ARIWOOLA JSC

1. Courts – Competence of

This court has long established what guarantees the competence of a court. A court is competent when:

(a) it is properly constituted as regards numbers and qualifications of the members of the bench, and no member is disqualified for one reason or another;

(b) the subject matter of the case is within its jurisdiction and there is no feature in the case which prevents the court from exercising its jurisdiction;

(c) the case comes before the court initiated by due process of law and upon fulfillment of any condition precedent to the exercise of its jurisdiction.

Any defect in competence is said to be fatal, for the proceedings are a nullity however well conducted and decided, the defect is extrinsic to the adjudication. (p. 4677 C)

KEKERE-EKUN JSC

B 2. Appeals – Grounds – Distinction of

It has been observed on several occasions by this court that it is often difficult to draw a distinction between a ground of law and a ground of mixed law and fact, as the distinction is a narrow one. However, C certain principles have been laid down in numerous decisions of this court to serve as a guide. On what constitutes a ground of law, this court, per Adekeye, JSC in *General Electric Company vs Harry Akande & Ors.* (2010) 18 NWLR (Pt.1225) 596 @ 623-624-A held:

“The Supreme Court in their numerous decisions laid down D the general principles for determining whether a ground of appeal is that of law, fact or mixed law and facts. A question of law is given three distinct meanings as follows:-

(1) A question the court is bound to answer in accordance with a rule of law. The question is already determined and answered E by the laws.

(2) That which explains what the law is. An appeal on a question of law in this sense means an appeal in which the question for argument and determination is what the true law is on a certain matter for example, a question relating to the construction of a statutory F provision.

(3) All questions within the judicial powers of a Judge to determine and not that of a jury for instance, the interpretation of documents.

G *Any ground of appeal alleging misunderstanding of lower court of the law or misapplication of the law to the facts already proved, undisputed or admitted, or a misdirection, is a ground of law. Similarly, where the lower court reaches a conclusion which cannot reasonably be drawn from the facts as found and the appeal court will H assume that there has been a misconception of the law - it is a ground of law.”*

It is settled that in order to determine whether the grounds of appeal are of law alone or of mixed law and facts, the grounds of appeal

must be read together with their particulars. Where the particulars are based on facts or where the grounds of appeal question the evaluation of evidence before the application of the law, it is a ground of mixed law and fact. (p. 4683 G)

REPRESENTATION

Ejike Ezenna Esq. for Appellants with Dr. C. J. Ubanyonwu and S. I. Okonkwo Esq.

Nwachukwu Ibegbu Esq. for Respondents

CASES REFERRED TO

Jor v. Kutuku Dom (1999) 9 NWLR (pt. 620) 538

Ojemen v. H.H. Momodu II (1983) 3 S.C. 73

Governor of Kaduna State v. Dada (1986) 4 NWLR (pt. 38) 687

Momodu v. Nomoh (1991) 1 NWLR (pt. 169) 608

Ifezue v. Mbadugha (1984) 5 SC 79

Madukolu v. Nkemdilim (1962) 1 ALL NLR (pt. 4) 587

Ogundare v. Ogunlowo (1997) 5 SCNJ 281

Aqua Ltd v. Ondo State Sports Council (1988) 10-11 SCNJ 26-59

Ifediora v. Ume (1988) 2 NWLR (pt. 74) 5

Irhabor v. Ogiamien (1999) 8 NWLR (pt. 616) 5171

Obiajuru v. Ozims (1985) 2 NWLR (pt. 6) 167

Akiwuwu Motors Ltd. v. Sangonuga (1984) 5 SC 1841

Oke v. Eke (1982) 12 SC 228

Akpasubi v. Unweni (1982) 11 SC 132

Uchendu v. Ogoni (1999) 5 NWLR (pt. 603) 337

STATUTE REFERRED TO

Constitution of the Federal Republic of Nigeria 1999, s. 233(3)

LEAD JUDGMENT BY ONNOGHEN Ag. CJN

This is an appeal against the judgment of the Court of Appeal (Enugu Division) in appeal No. CA/E/118/2001 delivered on the 30th day of June, 2005 in which the court dismissed the appeal of the present appellants against the decision of the Federal High Court Holden at Enugu in suit No. FHC/EN/CP/147/2000 delivered on the 30th day of March, 2001, striking out the suit on grounds of lack of

locus standi.

The facts of the case, as can be gathered from the record include the following:

On the 12th day of July, 2000, during a University Forum convened by the Council of the 1st respondent in which the 2nd respondent, the then Vice-Chancellor of the 1st respondent, was to deliver an address, the students of the 1st respondent rioted and disturbed the Forum.

When the rioting became violent, the University was forced to close down following which the University Council set up an Ad Hoc Committee to investigate the riot with the following terms of reference:-

- “(i) *To establish the remote and immediate causes of the demonstration.*
- D “(ii) *To assess the extent of damage done to University/private property during the demonstration.*
- “(iii) *To identify any person or group of persons who may have been directly or indirectly involved in the crisis and make appropriate recommendations.*
- E “(iv) *To recommend appropriate measures that will forestall a re-occurrence of such violent protests.*”

The Committee was given two weeks within which to submit an interim report.

Soon after the setting up of the said Ad Hoc Committee, and before the Committee could start work, appellants instituted their action in the Federal High Court, Holden at Enugu by way of judicial review seeking the following reliefs:-

- G “(a) *Declaration that the Council as a domestic tribunal of the University of Nigeria has no competence to investigate, or try the applicant, any other member of ASUU-UNN, or any student for conduct amounting to crime.*
- “(b) *Declaration that in so far as term (iii) of the Terms of Reference given to the 3rd respondent usurps exclusive jurisdiction of the Nigerian Police-Force (for investigation of crime) and the criminal courts (for trial of suspected offenders) it is ultra vires the powers of the respondents, unconstitutional, null and void (on the face of the record)*

(c) Declaration that having already declared the applicant and members of the ASUU-UNN guilty of inciting the students to commit the crimes of riot and attempted murder; it is unconstitutional, and violates all rules of decency and natural, justice, for the 2nd respondent (Council) to empanel the 3^d respondents (Ad Hoc Committee) to again purport to consider the matter. B

(d) Injunction restraining the respondents from processing with any consideration of the issues arising from the said crisis of 12th July, 2000 until the independent bodies set up by the Constitution, to wit the police and the courts, have concluded the on-going criminal proceedings against the applicant and his colleagues of ASUU-UNN. C

(e) An order of certiorari directed at the respondents to bring up before this Honourable Court for the purpose of being quashed, all the records and proceedings setting up the 2nd respondent "Ad Hoc Committee on Violent Students' Demonstration of the 12th July, 2000 at the Nsukka Campus of the University" chaired by the 3rd respondent on record. D

(f) An order of prohibition stopping any further proceedings by the aforesaid 3^d respondent (Ad Hoc Committee. Vide page 4 of the Record of Proceedings, hereinafter referred to as the record. E

Upon the service of the ex parte order for leave to present the application on notice for the orders being served on them, the respondents filed a motion on notice in which they prayed the court for the following reliefs:- F

"1 An order striking out or dismissing the Originating Motion dated 27th day of July, 2000 and filed on the same day and other processes thereto.

2. An order discharging or varying the Ex Parte Order made G by the Honourable Court on the 24th day of July, 2000.

3. And for such further order or orders as the Honourable Court may deem fit in the circumstances;"

The application was grounded on the following:-

"(a) The applicant has no locus standi to institute this action; H that therefore affects adversely the jurisdiction of the court to entertain the suit

(b) The motion is incompetent in so many respects.

(c) *The applicant has no legal right to sustain the reliefs being sought.*”

The above motion was supported by an affidavit to which the appellants filed a counter affidavit.

B After arguments, the trial court discharged its interim order and struck out the suit for lack of locus standi.

C The decision resulted in an appeal to the lower court which was dismissed resulting in the instant further appeal to this Court, the issues for the determination of which have been formulated by learned Counsel for appellants, Prof R.A.C.E. ACHARA in the appellants’ brief filed on 20/6/16, as follows:-

“3.01. *Without any opportunity for the parties to respond, was it right for the Honourable Court of Appeal to hold that there was no longer a live issue in appeal? (Distilled from Ground 1)*

D 3.02. *As between the Applicant’s “Claim” and the Respondent’s challenge thereto, which of the perspective should the Court of Appeal have considered when reviewing the Federal High Court’s decision on the Appellants/Applicants’ locus standi? (Distilled from Grounds 2, 3 and 8)*

E 3.03. *Was there in this Appeal a breach of any of the fair hearing guarantees in chapter IV of the 1999 Constitution? (Grounds 4, 6, 7, 9 and 10)*

F 3.04. *Had not the Special Procedure on Application for Judicial Review already raised and considered the jurisdictional question of locus standi at the stage of leave to institute this suit?*

G *If the answer is in the affirmative, had not the Court of Appeal misdirected itself by justifying the Federal High Court, which for a second time at the threshold, considered that same jurisdictional question and without contrary facts from the respondents reversed Itself on the matter? (Distilled from Ground II)*

H 5.05. *In the light of the law specifying what materials to consider, and in the face of the Applicants’ uncontradicted evidence before it, was not the Honourable Court of Appeal bound by law to reverse the Federal High Court’s decision that the Applicants/Appellants lacked a locus standi? (Distilled from Ground 5)”*

It is very necessary to state that learned Counsel for the respondents, C.V. EJIKE-UME ESQ raised objection to the appeal in

the respondents brief of argument filed on the 15th day of September, 2016 and duly' argued same therein.

It is the contention of learned Counsel for the respondents that the grounds of appeal NOS 1 - 11 at pages 175 - 181 of the record of proceedings, are based on facts and at best mixed law and facts and as the appellants did not seek leave nor obtained same either from the Court of Appeal or the Supreme Court, the grounds are incompetent and liable to be struck out. Learned Counsel referred the Court to the provisions of section 233(3) of the Constitution of the Federal Republic of Nigeria, 1999 and submitted that the said provision is a condition precedent for appealing to this Court on facts and mixed law and facts; that a ground of appeal is not a ground of law simply because the appellant or a party calls it so - relying on *Akaaer Jor vs. Kutuku Dom* (1999) 9 NWLR (pt. 620) 538 at 546-541; *S.U Ojemen & Ors vs H.H. Momodu II and Ors* (1983) 3 S.C 73 at 211 - 212. Learned Counsel then proceeded to comment on each of the grounds of appeal and came to the conclusion that they are of facts and/or mixed law and facts and submitted that appellants haven failed to seek and obtain the leave of court before filing same, the appeal is incompetent and liable to be struck out and urged the court to so hold.

I have to point out that at the hearing of this appeal on the 27th day of September, 2016, learned Counsel for appellants identified the reply brief he filed on the 20th day of June, 2016 as one of the briefs on which he relied in arguing the appeal and urging the Court to overrule the preliminary objection and allow the appeal, I have carefully gone through the contents of the said reply brief of 20th June, 2016 and must confess that the said reply brief was not only filed before the respondents' brief in which the preliminary objection was argued, the arguments therein relate to a completely different preliminary objection allegedly filed in 2006 at various dates. In the circumstance, it is my considered view that there is no valid reply brief on record challenging the submissions of Counsel for the respondents on the competence of the grounds of appeal. The reply brief filed by Counsel for appellants on 20/6/16 and relied upon during argument of the appeal not being relevant to the preliminary objection as argued in the respondents' brief of 19th September, 2016

is hereby struck out for being incompetent.

In all, there are 11 grounds of appeal in the notice of appeal at pages 175-181 of the record of appeal. They complain, inter alia, as follows:-

“Grounds of Appeal:

- B 1. *The Honourable Court of Appeal erred in law by basing its Judgment on the issue it raised outside the parties’ briefs and without the requisite opportunity to the Appellant to respond thereto. The Honourable Court of Appeal thereby breached the rules of fair hearing in Chapter IV of the 1999 Constitution and this breach, which unduly affected the court’s mind in the rest of the judgment, led to a gross miscarriage of justice.*

PARTICULARS OF ERROR

- D (a) *Without reference to the briefs filed and issues raised by the parties, the learned Justices of the Court of Appeal predicated all aspects of the Judgment directly and indirectly on their impression “that there is no life issue in this appeal any more.”*

- E (b) *No such issue was raised in any of the briefs filed by the parties and neither was any such issue a part of counsel’s addresses or arguments on appeal.*

- F (c) *The Honourable Court of Appeal was unduly swayed by the result of this unfair procedure into a hasty and dismissive treatment of that part of the Applicant/Appellant’s case that was considered.*

- G 2. *The Honourable Court of Appeal misdirected itself on the law and thereby came to a wrong conclusion, which occasioned a grave miscarriage of justice; when, in upholding the trial court’s decision of Applicant’s lack of a locus standi, it relied on the defence of the respondents rather than solely on the claim of the Applicant.*

PARTICULARS OF MISDIRECTION

- (a) *Locus standi or lack thereof is a matter of law, which questions the jurisdiction/competence of a court and is to be decided by a judge, not a jury.*

- H (b) *In a suit initiated by an application for judicial review, the “claim” is the Applicant’s originating motion and supporting affidavit(s) and the Supreme Court has repeatedly held that jurisdiction can only be determined by reference to the claim, not the defence.*

(c) *The learned Justices of the Court of Appeal Inadvertently relied for their decision on locus standi only on the Respondents' "affidavit evidence before the court which," it thought, "was not controverted by the appellants."*

(d) *If the Honourable Court of Appeal had properly directed itself as to the proper materials to consider for locus standi it would have found that the claim of the Applicant reveals by the 7 Relief's sought, the grounds for them and the affidavit verifying the facts, that the Applicant had clearly triable complaints not yet controverted by the Respondents.*

3. *The Honourable Court of Appeal breached the provisions of chapter IV of the 1999 Constitution by considering the appeal only from, or unduly weighted on, the perspective of the respondents or the "learned senior counsel for the respondents" without reference to the equal entitlement of the Applicants to balanced and a fair hearing of their disputes or grievances.*

PARTICULARS OF ERROR

(a) *The Applicant predicated his appeal on four different issues but the Court below determined the appeal on only that part of the four, which the Respondents' counsel partially addressed. The rest, which should have been held as admitted and resolved in favour of the Applicant were collapsed to the advantage of the Respondents into one broad and platitudinously vague issue.*

(b) *In spite of the legal position that a challenger on locus standi/jurisdiction must take the facts as outlined by the party whose suit is challenged, the court's narration of the facts of the case totally adopts the Respondents' perspective (including some typographical errors made by the respondent) and leads to the impression that the real facts based on the Applicant's yet, uncontradicted evidence have not been read or appreciated.*

(c) *The Honourable Court predicated its judgment on the convenience of the 1st Respondent's having put the matter behind it, when it is the Applicant that instituted the action and it is his complaint that is at stake.*

(d) *If the Honourable Court of Appeal has given equal status to both parties cases, it could not have come to the decision that it did.*

4. *The Honourable Court of Appeal erred in law and breached the rules of fair hearing as guaranteed by Chapter IV of the 1999 Constitution by allowing itself to appear as it would only work to a predetermined conclusion regardless of the uncontradicted facts on it records.*

B **PARTICULARS OF ERROR**

(a) *Even when the Respondents appeared before the Honourable Court of Appeal by counsel and never applied for substitution of the parties on record, the court suo motu decided they were, in effect, no longer parties, in order, by this finding, dismiss Applicant's appeal.*

(b) *Even when it is obvious that the university (1st Respondent) is not a human being and has perpetual succession, the Honourable Court below held that the case had lost its life because the respondents were no longer there.*

(c) *In order to sustain this somewhat strange reasoning, the Honourable, Court of Appeal ignored all the facts before it to make findings without pinpointing the evidential/factual bases of such conclusions.*

(d) *Our courts ought not be seen as predeterminately turning a suppliant away from the seat of justice.*

5. *The Honourable Court of Appeal-erred-in law when, in spite of the leave granted and the uncontradicted claims of direct breaches of the Applicant's civil rights and obligations, it yet held that the court of first instance was right in denying a locus standi to the Applicant/Appellant.*

PARTICULARS OF ERROR

(a) *The uncontradicted evidence on the court's record was that the Respondents, who accused the Applicant(s) of conspiracy, hot and attempted murder, had set up another domestic tribunal of Its own membership to again purport to investigate and punish the Applicants for the same crimes of which they had already found them to be guilty.*

(b) *There were 7 uncontradicted reliefs sought by the Applicant of which complained of personal, direct, and judicially remediable breaches by the Respondents of the Applicant/Appellant's constitutional, statutory equitable and common law rights and inter-*

ests.

(c) *Uncontradicted evidence in the court's records showed that some of the anticipated breaches sought to be prohibited had been, in spite of a pending court order, actually committed by the Respondents against the named Applicant and some of those he represents.* B

(d) *By the applicable tests as stipulated by the Supreme Court, the court below was consequently bound to find that the Applicant had disclosed a sufficient interest in the suit and thus that the court of first instance was wrong in its decision on locus standi.* C

6. *The Honourable Court of Appeal breached Chapter IV of the 1999 Constitution when, in deciding the question of locus standi and the sufficiency of the applicant's interest in the suit, it took account of irrelevant matters in order to unfairly benefit the Respondents while totally disregarding the relevant matters disclosed by the uncontradicted facts on record to the prejudice of the Applicant's case.* D

PARTICULARS OF MISDIRECTION

(a) *In guiding itself, on the background of facts, the Honourable Court of Appeal relied entirely on non-usable counsel surmises, conjectures and opinions in the Respondent's Brief while totally disregarding or not reading the true facts of the case as based on the Records of the Appeal.* E

(b) *In coming to the conclusion "that there is no life (sic) issue in this appeal any more," the Honourable court below had relied on the entirely irrelevant matter of the change of the "mismanagement" of the 1st Respondent, while totally disregarding the only relevant consideration, to wit, that the person sued as the 1st Respondent is not the "management of the University of Nigeria, Nsukka" G but a statutory, legal person, which has perpetual succession and acts by constantly changing human and non-human agents and agencies.* F

(c) *In the face of counsel appearance for all the respondents, the presence of briefs that did not claim the absence of those sued, and without any application for substitution of parties, the Honourable Court of Appeal had disregarded relevant considerations of fair hearing in these adversarial proceedings in preference for irrel-* H

evant speculations and conjectures about the continued availability of the Respondents to sustain the suit.

(d) *The Honourable court disregarded the legal principle that even one remaining respondent could sustain the suit. Rather, it relied on the irrelevant consideration that some of the parties sued*
 B *“are no longer there.”*

(e) *The Honourable court below relied on the irrelevant preferences or a party sued for a breach to short-circuit the suit of its victim: totally disregarding the only relevant consideration, which is*
 C *that the principal purpose and object of courts under section 6(6)(b) of the 1999 Constitution is to ensure that justiciable grievances shall be fairly and dispassionately heard even when the complaints are directed against institutional authorities or power bastions such as the Respondents in this suit.*

(f) *The Honourable Court of Appeal had thought that the appeal before it was concerned with the 1st Respondent-University’s “functioning and turning out students after the riot that led to this action.” In relying on this false and irrelevant premise, the court thereby failed to rely on the only relevant consideration in the circumstances, to wit, the Respondents’ ulterior designs and overt acts*
 E *to use an unfairly constituted domestic tribunal to settle old scores against him and those he represents.*

(g) *In relying on the view that “the University has put that problem behind it” and, consequently, “it follows therefore, that this appeal is merely an academic exercise” the Honourable Court of Appeal relied on irrelevant considerations for determining what is an*
 F *“academic question” while totally ignoring the Supreme Court test that an academic question arises only when a judgment for the claim-*
 G *ant would be moot or of no benefit to him, even if granted.*

7. The Honourable Court of Appeal breached Chapter IV of the 1999 Constitution and thereby occasioned a grave miscarriage of justice by misrepresenting the case of the Applicant.

PARTICULARS OF MISDIRECTION

(a) *The Honourable Court of Appeal falsely represented that functus officio was the only point raised by the Applicant to challenge the trial court’s finding on locus standi; when, in fact, the records and briefs show other contentions such as: a lack of a fair hearing to*
 H

the Applicant and of a misunderstanding of the case put up by him at the trial.

*(b) Even on the sole argument represented as advanced by the Applicant, the Honourable Court of Appeal, had constructed a “straw-man” argument to represent the Applicant as saying that with the grant of leave to start the suit, the court of first instance was to-
tally precluded from ever again considering the issue of locus standi. This totally unmaintenable argument seemed designed to ridicule and suppress, or had the effect of ridiculing and suppressing, the Applicant’s actual case that the “Application for Judicial Review” pro-
cedure presumes, at the grant of leave, the existence of a “sufficient
interest”. And that the question of “sufficient interest” cannot again be reviewed as a threshold issue unless fresh facts are presented by the Respondent to challenge the truth of affidavits and papers on which leave was originally obtained: In the special procedure
known as Application for Judicial Review,’ these knew (sic) facts could come in only by fiving the respondents’ counter affidavits (i.e. at the merits stage).*

*8. The Honourable Court of Appeal misdirected itself on the law and thereby came to a wrong conclusion, which occasioned a
grave miscarriage of justice when it directed itself that: “since the issue of locus standi turned on the jurisdiction of the trial court to hear the matter, the trial court was justified in taking and ruling against the appellant on the affidavit evidence before the court which was not
controverted by the appellant.”*

PARTICULARS OF MISDIRECTION

(a) The premise was a question on whether or not the court could review a question on jurisdiction.

(b) The answer was that the court could.

(c) Without asking or inquiring as to the next question whether, in the current case the Applicant had or had not a locus standi, the Hon. Court relied on the different and sole question asked to say that locus standi was properly resolved against the Applicant.

(d) The court thus failed to distinguish between the jurisdictional point whether it could review the presumption of locus standi embedded in the grant of leave to Apply for Judicial Review, on the hand; and, on the other hand, having set to determined, whether or

not the particular facts of the case would justify the trial court's holding (on that review) that there was no locus standi?

(e) *There was no affidavit evidence before the trial court "which was not controverted by the appellant." It was rather the appellant's affidavits that were never controverted by the Respondents at trial.*

9. *In the light of the uncontradicted evidence on the records, the Honourable Court of Appeal breached Chapter IV of the 1999 Constitution by relying for its judgment, on perverse findings of fact and thereby occasioned a grave miscarriage of justice.*

PARTICULARS OF ERROR

(a) *The uncontradicted evidence showed that the Applicant was challenging only Term (Hi) of the Ad Hoc committee's terms of reference (identification and sanction, of culprits for the riot) and it was perverse to suggest that the other terms of reference (on resolving "the conflict" and avoiding "future occurrence") were being obstructed by the suit except in respect of the biased composition of that domestic tribunal*

(b) *In the light of the Applicants yet uncontradicted affidavits, reliefs and other processes (including uncontradicted exhibits), it was totally perverse to hold and rely for its judgment on the respondent-favouring holding that: "The applicant did not show sufficient interest to justify standing in the case."*

(c) *By uncontradicted affidavit evidence, the records show that the Respondents had openly concluded that the Applicant and those he represents procured the students to riot and thus that the 3^d Respondent Ad Hoc committee was an ulterior instrument designed to officially corroborate this predetermined conclusion. It was therefore perverse and in breach of a fair consideration of the cases of both parties to hold that: "The Ad Hoc committee... was a general one which made no reference whatsoever to the appellant.*

10. *The Honourable Court of Appeal erred in law and breached Chapter IV of the 1999 Constitution (by offending the rules of fair hearing and natural justice) when, in order to prop up the case of the Respondents, it relied for its judgment on material nowhere to be found in the Respondent's Brief or the records of the court's proceedings.*

PARTICULARS OF ERROR

(a) *Having sustained Appellant's submission that the Respondents had abandoned their preliminary objection, nothing raised there could be used anymore in the appeal.*

(b) *The issue of the Respondent's entitlement to raise again the issue of locus standi after the trial court had ruled on its existence as part of leave, was not raised by the Respondent in its briefer at the oral arguments.* B

(c) *Respondents do not file Reply Briefs, only the Appellant*

(d) *The Records show that the Respondents' never made any reply regarding the effect of the grant of leave on the issue of locus standi.* C

(e) *To prop up the Respondents' case, the Honourable Court below relied for its judgment on the false finding that: "the respondents submitted in reply that the issue of locus standi... could be raised at any time."* D

11. *The learned Justices of the Court of Appeal misdirected themselves on the law and thereby came to a wrong conclusion, which occasioned a grave miscarriage of justice when, without adverting to the temporal basis of the appellant's case on the point, they held as follows (per J.O. Ogebe, J.C.A., leading):* E

"It is trite law that the issue of jurisdiction can be raised at anytime and at any stage of the proceedings.... since the issue of locus standi turned on the jurisdiction of the trial court to hear the matter, the trial court was justified in taking it..." F

PARTICULARS OF MISDIRECTION

(a) *The Honourable Court of Appeal set up a "man of straw" argument for the appellant in order to easily destroy it and divert attention from the true issue/argument raised.* G

(b) *It was not the Appellant's case that a jurisdictional question cannot be raised at any stage; rather, the case was predicated on the evidential consequences of raising such a question at certain stages of the special proceedings known as the 'Application for Judicial Review.' In such proceedings, the grant of leave to apply automatically means that the court of first instance has determined the matter of locus standi in favour of the Appellant and to avoid an objection that the court is functus officio, the matter can only again be raised at a* H

later (merits) stage of the proceeding with the production of new facts outside those considered for the grant of leave.

(c) The Honourable Court of Appeal, thus exercised itself on uncontested points and ruled to the appellant's prejudice without advertng to the real issues before it."

B At page 2 of the appellants brief under the heading "INTRODUCTION", learned Counsel for appellant stated as follows:-

C *"As of right, the appellants have on 9/9/2005, appealed under S. 233(2) (c) and (b) of the 1999 Constitution "(as amended) to this Honourable Court. As a consequence, they have had to restrict their grounds of appeal only to breaches of chapter IV of the 1999 Constitution (as amended) or to matter of pure law. See the Record of Appeal: pages 165 -174 and 175-191)".*

D In other words, it is the contention of Counsel for appellants that since the grounds of appeal in this appeal are on breaches of Chapter IV of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) and complaints on pure law, the provisions of section 233(3) of the said 1999 Constitution requiring leave to appeal on facts and/or mixed law and facts do not apply. I had already E reproduced the grounds of appeal in this appeal and the next stage is to determine whether the said grounds are of law as contended by Counsel for appellants or of facts and or mixed law and facts as the respondents contend.

F Section 233(2) (c) and (b) of the 1999 Constitution (as amended) provide as follows:-

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

G *(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.*

(b) decisions in any civil or criminal proceedings on questions as to the interpretation or application of this Constitution."

H I have had to reproduce the above provisions in line with their citation in the appellants' brief otherwise paragraph (b) of sub section (2) of section 233 of the 1999 Constitution (as amended) ought to have come before paragraph (c) thereof.

I had earlier reproduced the reliefs claimed by appellants at the court of trial. I, however, must state that this appeal does not arise from a decision of the trial court and the lower court on the merits of the suit but from a ruling on a motion by the trial court striking out the suit on the ground that appellants have no locus standi to institute the action and consequently that the court has no jurisdiction to entertain same. B

On the other hand, learned Counsel for the respondents has cited and relied on the provisions of section 233(3) of the 1999 Constitution, (as amended) which enacts as follows:-

“(3) 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 leave of the Court of Appeal or the Supreme Court.” C

There is no doubt that appellants did not obtain the leave of D either the Court of Appeal or of the Supreme Court, their contention being that they do not need such leave.

The question then is, whether appellants are right in the views they hold.

I have gone through the eleven grounds of appeal earlier E reproduced in this judgment and I have no doubt whatsoever in coming to the conclusion that the grounds are either on facts or mixed law and facts irrespective of the attempt at christening some of them as errors in law.

The grounds are clearly complaining of receipt of or assessment F of evidence, which is complaint on fact or at best mixed law and fact. Apart from grounds 1 and 2 complaining of misdirection and wrong receipt of evidence, it also complains that the lower court was in error in coming to the conclusion that appellants lacked locus G stand which is clearly a complaint on evaluation of evidence which is not an error in law.

In grounds 3 and 4, appellants are complaining of the decision of the lower court being contrary to *the “uncontradicted facts on the record.”* The same applies to ground 5 which is also complains of H *the decision being irrespective of “uncontradicted evidence of the court’s record.....”* Ground 6 is complaining of *“disregarding the relevant matters disclosed by the uncontradicted facts on record.”* etc,

etc.

The holding that all the grounds of appeal in the instant appeal are either grounds of fact or mixed law and fact is supported also by the issues formulated by learned Counsel for appellants for the determination of this appeal which issues had earlier been reproduced in this judgment.

It has been determined by a plethora of authorities that this Court will not be misled by the mere description of a ground of appeal as a ground complaining of error in law when in fact, the particulars clearly show that it is complaining of evaluation, assessment of evidence, findings of fact or misdirection on facts or mixed law and fact. Where an appellant desires to appeals on facts or mixed law and facts, section 233(3) of the 1999 Constitution (as amended) enjoins the appellant to seek and obtain the leave of the lower court or of this Court before filing such an appeal. Where an appellant fails to so act, as in the instant case, the appeal is incompetent and the court would have no jurisdiction to hear and determine same as the grounds are incompetent and liable to be struck out. See *Ojeman & Ors vs. H.H. Momodu II & Ors* (1983) 3 S.C 173 at 211 - 212; *Governor of Kaduna State vs A.A. Dada* (1986) 4 NWLR (pt. 38) 687 at 698-699.

In conclusion, I find merit in the preliminary objection and consequently uphold same. I find and hold that all the eleven (11) grounds of appeal herein are either of facts or mixed law and facts for which the leave of the Court of Appeal or of this Court is required to make the appeal competent in accordance with the provisions of section 233(3) of the 1999 Constitution (as amended) and that the failure to obtain the required leave renders the grounds of appeal incompetent and liable to be struck out; that the appeal being grounded on the said incompetent grounds same is incompetent and liable to be struck out.

I therefore strike out appeal No. S.C/76/2006 for being incompetent.

Parties to bear their costs.

Preliminary objection sustained and appeal struck out.

PETER-ODILI JSC

I am in total agreement with the judgment just delivered by my learned brother, W. S. N. Onnoghen Ag. CJN and to underscore my support for the reasoning I shall make some comments.

This is an appeal from the Court of Appeal, Enugu Division which court dismissed the appeal from the decision of the Federal High Court, Enugu Division which refused the judicial review sought. The detailed facts are well set out in the lead judgment and so I shall not go into them.

On the 27th September, 2016, learned counsel for the appellant, Ejike Ezenwa Esq adopted the appellant's Brief of Argument filed on the 20th June, 2016 in which were couched five issues for determination which are stated thus:

1. Without any opportunity for the parties to respond, was it right for the Honourable Court of Appeal to hold that there was no longer a live issue in the appeal? (Distilled from Ground 1)

2. As between the applicants' "Claim" and the respondents' challenge thereto; which of the perspective should the Court of Appeal have considered when reviewing the Federal High Court's decision on the appellants/applicants locus standi (Distilled from Ground 2, 3 and 8).

3. Was there in this appeal a breach of any of the fair hearing guarantees in Chapter IV of the 1999 Constitution? (Ground 4, 5, 7, 9 and 10).

4. Had not the special procedure on "Application for Judicial Review" already raised and considered the jurisdiction question of locus standi at the stage of leave to institute this suit? If the answer is in the affirmative, had not the Court of Appeal misdirected itself by justifying the Federal High Court, which for a second time at the threshold, considered that same jurisdiction question and without contrary facts from the respondents, reversed itself on the matter? (Distilled from Ground 11)

5. In the light of the law specifying what materials to consider, and in the face of the applicants' uncontradicted evidence before it, was not the Honourable Court of Appeal bound by law to reverse the Federal High Court's decision that the applicants/appellants lacked a locus standi? (Distilled from Ground 5)

Also adopted by learned counsel is the appellant's reply brief filed on the 20/6/16. The briefs of the appellant had been settled by Prof. R. A. C. E. Achara.

Learned counsel for the respondents, Nwachukwu Ibegbu adopted their brief settled by C. V. Ejike-Ume and filed on 15/9/2016. In the said brief of the respondents was raised a Notice of Preliminary Objection and the arguments also made therein, The prime position of the Preliminary Objection needs no saying and therefore has to be tackled firstly before the court can venture into the appeal since the court has to be satisfied of its competence and jurisdiction on which it can adjudicate.

PRELIMINARY OBJECTION

Learned counsel for the respondents/objectors contended that all the Grounds of Appeal are based on facts and/or at best, mixed law and facts and as the appellants did not seek leave nor obtained same either from the Court of Appeal or the Supreme Court, the said Grounds of Appeal are incompetent and liable to be struck out. He cited section 233(3) of the Constitution of the Federal Republic of Nigeria 1999 (as amended); Momodu v Nomoh (1991) 1 NWLR (Pt. 169) 608 at 618; Ifezue v Mbadugha (1984) 5 Sc 79 at 168, 178.

That obtaining the said leave is a condition precedent for filing a valid or competent appeal and failure to do so operates to deprive the court of jurisdiction to hear the appeal. He cited Madukolu v Nkemdilim (1962) 1 ALL NLR (Pt. 4) 587 at 595.

That labeling a ground of law simply does not imbue it with being so. He cited Akaaer Jor v Kirtirkii Dom (1999) 9 NWLR (Pt. 620) 538 at 546 - 547; Ojemen & Ors v His Highness Nomodu II & Ors (1983) 3 SC 173 at 211 - 213.

It was further submitted for the objectors that a close look at the Grounds of Appeal show that all the grounds complained of receipt and assessment of evidence, which relate to fact or, mixed law and fact. Also one ground complains of appellant being deprived of fair hearing in the proceedings while ground 2 talks of misdirection, which deal with receipt and evaluation of evidence which are certainly not ground of law simpliciter and therefore the need for leave to appeal those grounds and in the absence of the leave those

grounds of appeal will lack competence and must be struck out.

On his own part, learned counsel for the respondents contended that although jurisdiction can be raised for the first time even on appeal this has to be done after compliance-with procedural and factual foundations for such an objection. He cited *Ogundare v Ogunlowo* (1997) 5 SCNJ 281 at 286; *Odigie v Oblvan* (1997) 54 B LRCN 2631 at 2653 & 2654 etc.

It was further submitted for the appellants that it is not correct that the only appeal as of right to the Supreme Court is that on ground of law and that the current appeal is of right to the Supreme Court. He cited 233(2) of the 1999 Constitution. That what is called for in this appeal is purely of law as it is for the appropriate interpretation and application of the constitution. The cases of *Aqua Ltd v Ondo State Sports Council* (1988) 10-11 SCNJ 26 - 59; *Ifediora v Ume* (1988) 2 NWLR (pt. 74) 5 etc were cited. D

That the particulars of the appeal follow the ground which show that the appellants are relying entirely on the court's own records to amount this challenge and there are no disputes over any factual matters and so the preliminary objection should struck out.

The respondents/objections' position is that Grounds of Appeal viz, one to six of the appellants' Grounds of Appeal are based on facts and/or, at best, mixed law and facts and since the appellants neither sought leave nor obtained such either from the court below or the Supreme Court, those grounds of appeal are incompetent and liable to be struck out by the Apex Court. In relation to the stance above is Section 233 of the constitution of the Federal Republic of Nigeria 1999 (as altered). E F

Interestingly, there is no reply filed in respect to this Preliminary Objection as the Reply on Points of law referred to by the appellants was in relation to another process and not the current one. G

Section 233(2) of the 1999 constitution confers a right of appeal without the need for leave of court in six circumstances:

"1 Where the ground of appeal involves questions of law alone...." H

2. Decisions.....on questions as to the interpretation or application of this constitution.

3. Decisions.....on question as to whether any of the provi-

sions of chapter IV of this constitution has been, is being or is likely to be, contravened in relation to any person,

4. Decisions..... in which any person has been sentenced to death.....

5. Decision on any question - (i) whether any person has been validly elected; president or vice president... (ii) whether the term...; has ceased; (iii) whether the office... has become vacant; and

6. Such other cases as may be prescribed by any Act of the National Assembly”

Section 233 (3) of the constitution of the Federal Republic of Nigeria 1999 provides thus:

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 leave of the Court of Appeal or the Supreme Court”

I am at one with the respondents that the provisions of the constitution above quoted are mandatory and so, the leave necessary to be sought and obtained assumes a condition precedent status for the filing of a valid or competent appeal and failure to so seek and obtain automatically deprives the court of jurisdiction to hear the appeal.

I place reliance on the cases of Momodu v Momoh (1991) 1 NWLR (Pt. 169) 608 at 618; Ifezue v Mbadugha (1984) 5 Sc 79 at 168, 178; Madukolu v Nkemdilim (1962) 1 ALL NLR (Pt. 4) 587 at 597.

It is to be noted that a ground of appeal does not translate to being a ground of law merely by the say so of the prospective appellant. It is from the contents of the ground that the real colour of the ground, whether of law, mixed law and/or facts can be discerned. In the light of the above it is the bounden duty of the Court of Appeal or the Supreme Court to examine and study the grounds in support of an appeal presented before it and carefully consider and satisfy itself that the court has jurisdiction to entertain those grounds before commencing with the hearing of the appeal.

What I am laboring to put across has earlier been stated and restated by this court and I cannot resist but refer to a few of those dicta of court. See Akaer Jor. V. Kutuku Dom (1999) 9 NWLR (Pt.

620) 538at pp. 546 - 547 H. A. the Supreme Court per Belgore JSC (as he then was) restated the law thus:

"It is clear that grounds 1, 2, 3, 4, 6 and 7 are all grounds of mixed law and facts. Each ground either complains of evidence not being considered or wrongly considered. The particulars of each are clearly matters of evidence. A ground is not a ground of law simply because the appellants calls it so, it is the content of the ground that will indicate what it really is. The issues formulated for consideration in this appeal, which are matters to be considered for deciding the appeal hardly, follow the grounds of appeal. This appeal is therefore in so far as Grounds 1, 2, 3, 4, 6 and 7 are concerned cannot be competently considered. Those grounds are incompetent and they are struck out."

In an earlier judgment of the Supreme Court in the case of: S. U. Ojemen & Ors v His Highness Momodu II & Ors (1993) 3 SC. 173 at pp. 211-213, it was held thus:

"Having briefly examined all the grounds of appeal, it is probably necessary to emphasis that this court will not be a Ground of Appeal as a Ground complaining of error in law when in fact, the particulars show clearly that the complaint or the substance thereof is against evaluation, assessment, weight of evidence, findings of fact or a complaint of misdirection or facts or mixed law and fact. As this court has no jurisdiction to entertain appeals from decision of the Federal Court of Appeal on grounds which involve questions of facts or mixed law and fact without leave either of the Federal Court of Appeal or this court, this court has a heavy constitutional duty to examine and study the grounds in support of appeal before it carefully, and satisfy itself that they are those in respect of which it has jurisdiction to entertain commencing with the hearing of the appeal. Having examined all the Grounds of appeal in this case, I find the Grounds 1, 2, 3, 4, 5, 7, 8 and 11 involve questions of fact or mixed law and fact. I hereby strike them out" Vide also Governor of Kaduna State v A. A. Dada (1986) 4 NWLR (Pt. 38) 687 at pp. 689 – 699, A"

The learned counsel to the respondents contended that all the Grounds of Appeal in this instance are of receipt and assessment of evidence which relate to facts and or mixed law and facts.

Taking the judicial authorities and the constitutional provisions in context with what is before the court, one would see that

Ground 1 complains of the Court of Appeal not granting to the appellant a fair hearing in the proceedings. Clearly this issue deals with receipt and evaluation of evidence which is a question of fact or mixed law and fact. Ground 2 complains of misdirection/again raising issues of evaluation of evidence as well as fair hearing. The particulars talk
B of proceedings and decisions which are evidently issues of mixed law and fact.

Again the misdirection pushed forward in Ground 3 whereby appellants complained of the Court of Appeal misdirecting itself on the law by a wrong interpretation of the decision of the court of trial.
C To settle this/ evaluation of evidence would come up thereby producing a question of fact or mixed law and fact. The particulars therein mentioned ‘unchallenged records of the court which are issues of fact or mixed law and fact.

D Ground 4 complaint is that of misdirection and “failing or neglecting or refusing to consider the uncontested case” which is glaringly on fact or mixed law and fact since evaluation of evidence comes to play out there.

In Ground 5 the court was complained against for going
E outside the issues and evidence provided by the parties, there is certainly no way in tackling this ground without evaluation of evidence coming into it which then takes the ground to the realm of fact and or mixed law and facts.

F The last and 6th ground raises the complaint of evaluation of uncontroverted and unchallenged evidence or case of the appellants, again clearly a matter of evaluation of evidence to ascertain the veracity of the assertion and therefore based on fact and or mixed law and fact.

G Having stated the situation on ground, there is no gain saying that this Preliminary Objection is not just a flying of a kite but rather properly grounded on the constitutional provisions on what makes a valid appeal upon which the jurisdiction of the court can be based. Having gone into the objection in relation to the complaints
H proffered there is no hope in sight upon which this appeal can survive as being an appeal with grounds of mixed law and or facts the mandate of the constitution cannot be circumvented without leave of Court of Appeal or the Supreme Court. The absence of that leave has provided a lack of competence of this appeal and thereby de-

prived this court of the necessary vires on which it can base a hearing of the appeal. See Section 233(3) of the 1999 Constitution of the Federal Republic of Nigeria (as amended); *Madukolu v Nkemdilim* (1962) 1 ALL NLR (Pt. 4) 587 at 595.

In the light of the foregoing and the better articulated reasoning in the lead judgment, I too uphold the Preliminary Objection as I strike out the appeal. B

I abide by the consequential orders made.

ARIWOOLA JSC

I had the opportunity of reading in draft the lead judgment of my learned brother, Onnoghen, Ag. CJN just delivered. I agree entirely with the reasoning therein and the conclusion arrived thereat. C

It is an appeal against the judgment of the Enugu division of the Court of Appeal delivered on 30/6/2006 in which the court dismissed the appeal of the present appellants against the decision of the Federal High Court, Holden at Enugu which was delivered on 30/3/2001 in which the plaintiffs' action was struck out on the ground that the plaintiffs lacked the required locus standi to institute the action. D E

The facts of the case have been given in detail in the lead judgment and I need not repeat same here.

After briefs of argument were settled and duly exchanged, the appeal came up for hearing on 27/9/16. It is note worthy that in the respondents' brief of argument which was filed on 15/9/2016 the respondents gave their Notice of Preliminary Objection to the appeal and duly argued same in their brief. F

The said preliminary objection to the appeal is predicated on the ground that all the Grounds of Appeal, to wit, Grounds 1 to 11 of the Grounds of appeal contained on pages 175-181 of the Record of Appeal are based on facts and at best, mixed law and facts but that as the appellants did not obtain leave of either the court below or the Supreme Court to file the appeal, all the said grounds of appeal are incompetent and liable to be struck out. G H

Learned counsel for the respondents referred to Section 233(3) of the Constitution of the Federal Republic of Nigeria, 1999

as amended and submitted that the said constitutional provision is a condition precedent for appealing to the Supreme Court on facts and mixed law and facts.

B He referred to page 2 of the appellants' brief of argument under "Introduction" and submitted that ail the grounds of appeal are on facts and mixed law and facts. And that a ground is not a ground of law simply because the appellant calls it so. He relied on Akaaer Jor Kutuku Pom (1999) 9 NWLR (Pt.620) 538 at 446; S. U. Ojemen & Ors Vs His Highness Momodu II & Ors (1983) 3 SC 173 at 211.

C Learned counsel took the said eleven (11) grounds of appeal one after the other and concluded that they are all either on facts and or on mixed law and facts by which the appellants were required to seek and obtain leave to file the appeal. Not having so D obtained the said leave, he urged the court to strike out the entire eleven grounds of appeal and in the result, strike out the appeal itself for being incompetent.

E There is no doubt that the appellants had no reply to the arguments of the respondents on their preliminary objection. In other words, as earlier observed, the preliminary objection of the respondents was raised in their brief of argument which was filed on 15/9/2016, whereas the purported reply brief of argument which the appellant claimed to rely on in response to the said objection has no F relevance to the objection. Indeed, the said appellants' reply brief was filed on 20/6/2016, three clear months long before the respondents filed their own brief of argument which contained their objection. It then means that there was no response to the objection of the respondents to the appeal and I so hold. Accordingly the appellants' purported reply filed on 20/6/2016 is discountenanced. G

H However, I am required to state all the said grounds of appeal to see whether or not they are actually caught up by the Constitutional requirement of leave of court before the appeal was filed. But these eleven grounds of appeal and their respective particulars have been beautifully stated in the lead judgment of my learned brother, and I need not reproduce same again. I have read through all the said eleven grounds of appeal contained in the Notice of Appeal filed by the appellants at pages 175-181 of the Record of appeal

taken out by Professor R.A.C.E Achara.

Generally, the requirement of law is that, an appeal shall lie from the decisions of the Court of Appeal to the Supreme Court with leave of the Court of Appeal or the Supreme Court, subject to the provisions of subsection 2 of Section 233 of the Constitution of the Federal Republic of Nigeria 1999 as amended. See; Section 233 (3) of the Constitution (supra). B

The constitutional requirement of obtaining leave of either the Court of Appeal or this court before filing an appeal against the judgment or decision of the Court of Appeal on facts alone or mixed law and facts, is a condition precedent which must be fulfilled to enable this court assume jurisdiction. C

This court has long established what guarantees the competence of a court. A court is competent when:

(a) it is properly constituted as regards numbers and qualifications of the members of the bench, and no member is disqualified for one reason or another; D

(b) the subject matter of the case is within its jurisdiction and there is no feature in the case which prevents the court from exercising its jurisdiction; E

(c) the case comes before the court initiated by due process of law and upon fulfillment of any condition precedent to the exercise of its jurisdiction.

Any defect in competence is said to be fatal, for the proceedings are a nullity however well conducted and decided, the defect is extrinsic to the adjudication. See *Madukolu & Anor Vs. Nkemdilim* (1962) 1 All NLR (Pt.4) 587 at 595; (1962) SCNLR 341 at 348. F

There is no doubt that a court will lack competence where there is failure to fulfill any condition precedent to the exercise of the court's jurisdiction. The condition precedent to the exercise of its jurisdiction to entertain an appeal against a decision of the Court of Appeal to this court on facts alone or mixed law and facts is the obtaining of leave of either the Court of Appeal or this court. G

This court lacks jurisdiction or necessary competence to entertain an appeal on a ground of fact or mixed law and fact, unless leave is sought and obtained from either the Court of Appeal or this court. Where the grounds of appeal are only of facts or of mixed law H

and facts then, the grounds as well as the appeal must be struck out, as incompetent unless leave is shown to have been duly obtained. See; Emmanueal Irhabor & Anor Vs. Ogiamien (1999) 8 NWLR (Pt.616) 5171 Ojemen & Ors Vs. Momodu 11 & Ors (1982) 1 SCNLR 188 at 203; Obiajuru Vs Ozims (1985) 2 NWLR (Pt.6) 167 at 176-185.

A careful examination of the eleven grounds of appeal in the instant appeal reveals that, ground 1 complains of receipt and or of assessment of evidence, which is purely a ground of fact or at best of mixed law and facts. Ground 2 complains of misdirection and wrong receipt of evidence and coming to the conclusion that the appellant lacked locus stand. Grounds 3 & 4, complain of the court's adoption of the narration of the facts from the respondents and not applicant's uncontradicted evidence. And that complaint that the court below predetermined conclusion regardless of the uncontradicted facts on its record. These are based on facts.

Grounds 5 & 6 complain about the uncontradicted evidence on record and disregard of relevant matters disclosed by the uncontradicted facts on record. These are based on facts and mixed law and fact.

Grounds 7, 8, 9, 10 and 11 of the Grounds of appeal all deal with misunderstanding of the appellant's case, ruling on affidavit evidence, uncontradicted evidence all are based on facts or mixed law and fact.

In the case of Akiwuwu Motors Ltd & Anor Vs. Dr. Babatunde Sangonuga (1984) 5 SC 1841 (1984) All MLR 309, it was re-stated that this court has, in several cases, decided that where grounds of appeal involve questions of fact alone or question of mixed law and fact, leave of the Court of Appeal or the Supreme Court must be obtained to make the appeal competent and invest the Supreme Court with jurisdiction to hear the appeal. See also Ojemen Vs. Momodu II (Supra) Oke Vs. Eke (1982) 12 SC 228, Akpasubi Vs Unweni (1982) 11 SC 132.

There is no doubt that all the eleven grounds of appeal filed in this appeal are either of facts alone or of mixed law and facts. None of the grounds can therefore sustain an appeal as of right without leave, not being purely of law. And since there is no controversy

whether or not leave was obtained before the appeal was filed, it follows that leave of court not having been sought and obtained before this appeal was filed renders all the grounds incompetent, consequent upon which the appeal itself becomes incompetent, liable to being struck out as this court lacks jurisdiction to entertain it. The appellants failed to meet the condition precedent to empower this court to assume jurisdiction. B

In the circumstance, for this reason and the detail reasoning of my learned brother - Onnoghen, Ag. CJN, the respondents' objection is sustained rendering the appeal liable to being struck out. C

Accordingly, appeal is struck out by me.

I abide by the order on costs.

AKA'AH'S JSC

My Lord, Onnoghen Ag. Chief Justice of Nigeria made available to me in draft the judgment just delivered and I agree with him that the grounds of appeal reproduced in the judgment are grounds of facts or at best of mixed law and fact which require the leave of this Court or the Court below before the appeal becomes competent. E

In the absence of such leave being sought and granted, the appeal is incompetent by virtue of section 233(3) of the 1999 Constitution (as amended). The preliminary objection filed and argued by the respondents succeeds and is hereby upheld. Consequently the Notice of Appeal filed on 9th September, 2005 is incompetent and appeal No. SC. 76/2006 is struck out. I agree that the parties should bear their costs as made in the lead judgment. F

KEKERE-EKUN JSC

I have had the benefit of reading in draft, the well considered judgment of my learned brother, WALTER SAMUEL NKANU ONNOGHEN, ACTING CHIEF JUSTICE OF NIGERIA just delivered. H

I agree with the reasoning and conclusion that there is merit in the preliminary objection raised and argued by the respondents in their brief of argument filed on 15/9/2016. I agree that the appeal is

incompetent and liable to be struck out.

The basis of the preliminary objection is that all the grounds of appeal contained in the Notice of Appeal dated 9th September 2005 at pages 175-181 of the record are grounds of facts or mixed law and facts in respect of which the appellant failed to seek and
B obtain leave to appeal either from the court below or from this court.

A brief summary of the facts of the case would provide an insight into what was given rise to the instant appeal.

On 12/7/2000 there was a violent demonstration at the
C Nsukka Campus of the University of Nigeria, Nsukka, which led to serious damage to the property of the institution and assault on the person of the then Vice Chancellor of the University, Prof. G. F. Mbanefoh. The demonstration occurred as a result of a forum convened by the Council of the University (1st respondent) to address
D the students on certain matters that had created tension on the campus. As a result of the demonstration, the University was closed down. The University Council then set up an ad hoc committee to look into the immediate and remote causes of the disturbance.

The original appellant, Dr. H. M. G. Ezenwaji was displeased
E with the setting up of the committee, its composition and terms of reference. He therefore instituted an action before the Federal High Court sitting at Enugu for judicial review. Upon being served with the processes, the respondents filed a motion on notice seeking the following reliefs:
F

1. An order striking out or dismissing the originating motion dated 27/7/2000 and filed the same day and other processes hereto.
2. An order dismissing or varying the ex-parte order made on 24/7/2000.
- G 3. Such further order or orders as this Honourable Court may deem fit to make in the circumstances.

The grounds for the objection were:

a. The appellant lacks locus standi to institute the action. That
H it therefore affects adversely the jurisdiction of the court to entertain the suit.

b. The motion is incompetent in so many respects.

c. The applicant has no legal right to sustain the reliefs being sought.

After hearing arguments from learned counsel, the trial court held that the appellant lacked the locus standi to institute the action. It discharged the interim order previously granted staying proceedings in all matters related to the suit and struck out the suit.

The appellant's appeal to the lower court was dismissed and the ruling of the trial court affirmed. The appellant is still dissatisfied and has further appealed to this court vide his notice of appeal containing 11 grounds of appeal. B

The original appellant was substituted by the present appellants pursuant to an order of this court made on 27/4/2016. C
The grounds of appeal along with their particulars have been fully set out in the lead judgment.

For the purposes of this contribution I shall set out the grounds without their particulars.

1. *The Honourable Court of Appeal erred in law by basing its judgment on the issue it raised outside the parties' briefs and without the requisite opportunity to the appellant to respond thereto. The Hon. Court of Appeal thereby breached the rules of fair hearing in Chapter IV of the 1999 Constitution and this breach, which unduly affected the court's mind in the rest of the judgment, led to a gross miscarriage of justice.* D E

2. *The Honourable Court of Appeal misdirected itself on the law and thereby came to a wrong conclusion, which occasioned a grave miscarriage of justice, when, in upholding the trial court's decision of applicant's lack of a locus standi, it relied on the defence of the respondents rather than solely on the claim of the applicant.* F

3. *The Honourable Court of Appeal breached the provisions of Chapter IV of the 1999 Constitution by considering the appeal only from, or unduly weighted on, the perspective of the respondents or the "learned senior counsel for the respondents" without reference to the equal entitlement of the applicants to a balanced and a fair hearing of their disputes or grievances.* G

4. *The Honourable Court of Appeal erred in law and breached the rules of fair hearing as guaranteed by Chapter IV of the 1999 Constitution by allowing itself to appear as if it would only work to a predetermined conclusion regardless of the uncontradicted facts on it (sic) records.* H

5. *The Honourable Court of Appeal erred in law when, in spite of the leave granted and the uncontradicted claims of direct breaches of the applicants' civil rights and obligations, it yet held that the court of first Instance was right in denying a locus standi to the applicant/appellant*

B 6. *The Honourable Court of Appeal breached Chapter IV of the 1999 Constitution when, in deciding the question of locus standi and the sufficiency of the applicant's interest in the suit, it took account of irrelevant matters in order to unfairly benefit the respondents while totally disregarding the relevant matters disclosed by the*
C *uncontradicted facts on record to the prejudice of the applicant's case.*

7. *The Honourable Court of Appeal breached Chapter IV of the 1999 Constitution and thereby occasioned a grave miscarriage*
D *of justice by misrepresenting the case of the applicant.*

8. *The Honourable Court of Appeal misdirected itself on the law and thereby came to a wrong conclusion, which occasioned a grave miscarriage of justice when it directed itself that "since the issue*
E *of locus standi turned on the jurisdiction of the trial court to hear the matter, the trial court was justified in taking it and ruling against the appellant on the affidavit evidence before the court which was not controverted by the appellant"*

9. *In the light of the uncontradicted evidence on the records, the Honourable Court of Appeal breached Chapter IV of the 1999*
F *Constitution by relying for its judgment, on perverse findings of fact and thereby occasioned a grave miscarriage of justice.*

10. *The Honourable Court of Appeal erred in law and breached Chapter IV of the 1999 Constitution (by offending the rules*
G *of "fair hearing and natural justice) when, in order to prop up the case of the respondents, it relied for its judgment on material nowhere to be found in the respondent's brief or the records of the court's proceedings.*

11. *The learned Justices of the Court of Appeal misdirected*
H *themselves on the law and thereby came to a wrong conclusion, which occasioned a grave miscarriage of justice when, without advertng to the temporal basis of the appellant's case on the point, they held as follows (per J.O. Ogebe, JCA leading):*

“It is trite law that the issue of jurisdiction can be raised at any time and at any stage of the proceedings... Since the issue of locus stand/turned on the jurisdiction of the trial court to hear the matter, the trial court was justified in taking it...”

Section 233 (1) of the 1999 Constitution (as amended) confers jurisdiction on the Supreme Court, to the exclusion of any other court of law in Nigeria to hear and determine appeals from the Court of Appeal. B

Section 233 (2) (a) to (f) provides for the various circumstances in which appeals shall lie as of right from the Court of Appeal to the Supreme Court. For the purposes of this appeal, Section 233 (2) (a) provides for a right of appeal against decisions in any civil or criminal proceedings before the Court of Appeal where the ground of appeal involves questions of law alone. Thus any ground of appeal on facts or on mixed law and facts requires the leave of the Court of Appeal or the Supreme Court otherwise it is incompetent. In the case of: NALSA & Team Associates Vs NNPC (1991) 8 NWLR (Pt.212) 652 @ 666 A - C this court held per Nnaemeka-Agu, JSC: C

“whereas an intending appellant can validly exercise his right of appeal as of right at will within the time fixed by statute, leave of either court is a condition precedent to his exercise of the right of appeal with leave. It is trite that where that condition precedent is necessary but has not been fulfilled, there is no appeal. Any notice of appeal filed upon only facts or mixed law and fact without leave where leave is necessary is full and void and of no effect. See on this, Olowosoke vs Oke (1972) 11 SC. 1.” D

See also: Uchendu vs Ogboni (1999) 5 NWLR (Pt. 603) 337; Opuiyo vs Omoniwari (2007) 16 NWLR (Pt. 1060) 415 @ 443-444 G-A; Yaro vs Arewa Construction Ltd. & Ors. (2007) 16 NWLR (Pt. 1063) 333 @ 358 G-H; Ojemen vs Momodu II & Ors (19883) 2 SC 173. It has also been held that were christening of a ground of appeal as error of law does necessarily not make it so. E

It has been observed on several occasions by this court that it is often difficult to draw a distinction between a ground of law and a ground of mixed law and fact, as the distinction is a narrow one. However, certain principles have been laid down in numerous decisions of this court to serve as a guide. On what constitutes a ground F

of law, this court, per Adekeye, JSC in General Electric Company vs Harry Akande & Ors. (2010) 18 NWLR (Pt.1225) 596 @ 623-624- A held:

“The Supreme Court in their numerous decisions laid down the general principles for determining whether a ground of appeal is that of law, fact or mixed law and facts. A question of law is given three distinct meanings as follows:-

(1) A question the court is bound to answer in accordance with a rule of law. The question is already determined and answered by the laws.

(2) That which explains what the law is. An appeal on a question of law in this sense means an appeal in which the question for argument and determination is what the true law is on a certain matter for example, a question relating to the construction of a statutory provision.

(3) All questions within the judicial powers of a Judge to determine and not that of a jury for instance, the interpretation of documents.

Any ground of appeal alleging misunderstanding of lower court of the law or misapplication of the law to the facts already proved, undisputed or admitted, or a misdirection, is a ground of law. Similarly where the lower court reaches a conclusion which cannot reasonably be drawn from the facts as found and the appeal court will assume that there has been a misconception of the law - it is a ground of law.”

See also: Jim-Jaja Vs C.O.P Rivers State & Ors. (2012) LPELR - SC.97/2010; Ehinlanwo vs Oke & Ors. (2008) 6-7 SC (Pt. II) 123; Ajuwa & Anor. Vs SPDC Nig. Ltd. (2011) LPELR - SC.90/2007. It is settled that in order to determine whether the grounds of appeal are of law alone or of mixed law and facts, the grounds of appeal must be read together with their particulars. Where the particulars are based on facts or where the grounds of appeal question the evaluation of evidence before the application of the law, it is a ground of mixed law and fact. See: Metal Construction (WA.) Ltd. Vs Migliore fl99Cn 1 NWLR (Pt.126) 299; Odunitkure Vs Ofomata & Anor. LPELR - 50.294/2003. It was held in Metal Construction (W.A.) Ltd. Vs Migliore (supra) at 320 G that:

“An appeal in matters of fact allows investigation at the hearing of the appeal of the evidence and the proper inferences from it whereas an appeal on a point of law limits consideration of the appeal to such questions as to whether facts admitted or held proved justify or permit by the rules of law a particular decision or disposal of the case before the court. B

In a secondary sense, any matter to be decided on evidence and inference therefrom is a matter of fact and other matters are matters of law.”

Upon a close examination of the grounds of appeal along C with their particulars, and applying the principles referred to above, I am in complete agreement with my learned brother, Onnoghen, ACTING CHIEF JUSTICE OF NIGERIA that all the grounds of appeal in this matter are of fact or of mixed law and facts in respect of which leave to appeal ought to have been sought and obtained to D render them competent before this court.

Having failed to obtain the required leave, the appeal is incompetent. It is hereby struck out.

I abide by the order as to costs, as contained in the lead E judgment.

F

G

H