**AGBAMU**

**V.**

**OFILI**

COURT OF APPEAL (BENIN DIVISION)

FRIDAY, 11TH APRIL, 2003

CA/B/91/2001

**LEX (2003) - CA/B/91/2001**

OTHER CITATIONS

2PLR/2017/30 (CA)

**BEFORE THEIR LORDSHIP**

MUHAMMAD SAIFULLAHI MUNTAKA-COOMASSIE, JCA (Presided)

KUMAI BAYANG AKAAHS, JCA

AMINA ADAMU AUGIE, JCA (Read the lead Judgment)

**BETWEEN**

M. C. AGBAMU

AND

D. K. OFILI

**ORIGINATING COURT**

IKA SOUTH AREA CUSTOMARY COURT AGBOR-OBI, DELTA STATE (Judgment delivered on the 11th of August, 1997).

HIGH COURT OF DELTA STATE, AGBOR (judgment delivered by by Diai J. on the 9th of May, 2000).

**REPRESENTATION/LAWYERS**

J. O. NWABOR - For the Appellant.

S. O. UZUH - For the Respondent.

**ISSUES FROM THE CAUSE(S) OF ACTION**

REAL ESTATE AND PROPERTY LAW - LANDLORD AND TENANT - MESNE PROFIT:- Definition of mesne profit as damages for trespass arising from the particular relationship of landlord and tenant or as intermediate profits accruing between two points of time (between the date when the defendant ceased to hold the premises as a tenant and the date he gives up possession) – When starts to run - Action for mesne profit – Whether does not lie unless the landlord has recovered possession, or the tenant’s interest in the land has come to an end, or the landlord’s claim is joined with a claim for possession.

REAL ESTATE AND PROPERTY LAW - LANDLORD AND TENANT - MESNE PROFIT:- Possession – Whether is inextricably tied with award of rent and mesne profit – Proof that tenant has given up possession – Address of counsel – Whether suffices

CONSTITUTIONAL LAW – ACCESS TO COURT – APPEAL:- Right of - Basis of - Section 241(1) (a) & (b) AND Section 242(1) of the 1999 Constitution - Grounds of appeal – Ground of fact; law; of mixed law and fact - When a litigant is bound to first secure the leave of court before bringing an appeal against a decision of a lower court – Effect of failure thereto

**PRACTICE AND PROCEDURE ISSUES**

ACTION - ACTION FOR MESNE PROFIT - When lies

ACTION - ADDRESSES OF COUNSEL:- Purport of – Assertions therein – Whether constitute evidence

APPEAL - GROUND OF APPEAL:- Types of – Questions of law, or questions of fact; or questions of mixed law and facts - How properly determined – Need to focus on the essence of the ground, the reality of the complaint embedded therein and not the cognomen, or designation - Legal implication

APPEAL - GROUND OF APPEAL:- Incompetent ground of appeal – Where the other side is not left in doubt and without adequate information as to what the complaint of the appellant actually is - Duty of court thereto

APPEAL - GROUNDS OF APPEAL - Particulars of error complained about in an appeal - Whether mandatory to state same in a separate paragraph of the main ground of appeal - Whether can be included in the main ground itself.

APPEAL - ISSUES FOR DETERMINATION:- When formulated from incompetent grounds of appeal – Effect.

APPEAL – ISSUES FOR DETERMINATION:- Where raises issue of law - How treated.

COURT - APPELLATE COURT:- Exercise of discretion by trial court – Invitation of appellate court to substitute its own discretion for that of trial court – How treated

COURT - TRIAL COURT AND APPEAL COURT:- Distinction between – Whether extends to grounds of appeal formulated against their decisions.

COURT - TRIAL COURT:- Duty to ensure proper evaluation of evidence adduced before it - How determined.

JUDGMENT AND ERROR - COURT’S JUDGMENT:- Slip or error therein - Whether every slip or error therein will lead to reversal of.

JUDGMENT AND ORDERS - COURT’S JUDGMENT - Whether every slip or error therein will lead to reversal of.

WORDS AND PHRASES:- ‘MESNE PROFIT’ – “RENT” - Meanings and distinction between

WORDS AND PHRASES:- ‘The decision is against the weight of evidence’ - Meaning of.

**CASE SUMMARY**

ORIGINATING FACTS AND CLAIMS

The appellant who was a tenant of the respondent for many years was sued by the Respondent (his landlord) in respect of a three bedroom flat and premises situate and lying at No. 1 Osagie Street, Boji-Boji Agbor in Delta State before the Ika South Area Customary Court Agbor-Obi for Possession of the said flat and premises; the sum of N6,400.00 (six thousand four hundred naira) representing the arrears of rents from April 1995 to July 1995; mesne profits at the rate of N2,500 (two thousand five hundred naira) per month from the month of August 1995 till possession of the flat and premises is delivered to the plaintiff.”

The appellant who was the defendant therein filed a cross action against the respondent at the said Ika South Area Customary Court, Agbor-Obi, wherein he claimed for a declaration that the notice of rent increase issue by the defendant and dated 23rd February, 1995 is illegal, unreasonable, null and void and without any effect whatsoever. a declaration that the plaintiff is still a lawful tenant of the defendant who has not breached the terms of the tenancy of House No. 1 Osagie Street, Boji Boji, Agbor or in the alternative, an order fixing the standard rents payable by virtue of the Rent Control (Standard and Maximum Rent) Order 1977, applicable to Delta State and an order of perpetual injunction restraining the defendant, his servants and or agents from evicting or threatening to evict or eject the defendant from the premises known and called No. 1 Osagie Street, Boji Boji, Agbor.

The two suits were consolidated and heard in the same proceedings by the trial court. At the end of the trial, the Ika South Area Customary Court, Agbor-Obi delivered two separate judgments for the said suits on the 11th of August, 1997.

The trial Customary Court upheld the respondent’s claim although it fixed the rent payable by the appellant at N1,300.00 per month. It dismissed the appellant’s claim. The appellant aggrieved by the decision of the trial Customary Court appealed to the Agbor High Court. The respondent, also aggrieved by the amount awarded him by the trial Customary Court as mesne profit, appealed to the Agbor High Court on the following ground of appeal - “The lower court erred in law and in fact when it fixed the mesne profit payable in respect of the three-bed room flat situate and lying at No. 1 Osagie Street, Boji-Boji, Agbor at N1,300.00 per month”.

**DECISION(S) APPEALED AGAINST**

In its judgment delivered on the 9th of May, 2000, the Agbor High Court presided over by Diai J. dismissed the appellant’s appeal. It, however, allowed the respondent’s cross-appeal and awarded the sum of N1,600.00 to the respondent as mesne profit. The appellant further aggrieved by the decision of the Agbor High Court appealed to the Court of Appeal.

**ISSUE(S) FOR DETERMINATION ON APPEAL**

*BY APPELLANT:*

1, Whether the learned trial Judge was right in shifting the onus of compilation of records to the appellant.

2, Whether the learned trial Judge was right when he held that the appellant waived his rights to benefits accruable from the Rent Control and Recovery of Premises Law.

3, Whether the learned trial Judge was right to have upheld the only ground in the cross appeal as being competent.

4, Whether the learned trial Judge was right to have approbated and reprobated on some issues OR whether the judgment of the learned trial Judge is not replete with contradictions and inconsistencies.

*BY RESPONDENTS*

1. Whether the court below was right in holding that the appellant waived his rights to the benefits (if any) conferred on him by the Rent Control Standard and Maximum Rent Order, 1977.

2. Whether the court below was right in dismissing the appellant’s appeal.

3. Whether the court below was right in allowing the respondent’s cross appeal and in awarding the sum of N1,600.00 to the respondent as mesne profits.

*AS ADOPTED BY COURT*

[The Court adopted issue No. 3 formulated by the Respondent].

DECISION OF SUPREME COURT

1. What is important in determining whether a ground of appeal involved questions of law, or fact, or mixed law and facts, is not its cognomen, nor its designation as “error in law”. It is rather the essence of the ground, the reality of the complaint embedded in that name that determines what any particular ground involves.

2. What makes a ground incompetent in these circumstances, is whether the other side is left in doubt and without adequate information as to what the complaint of the appellant actually is. The particulars of the ground of appeal complained about sufficiently disclose what the cross-appellant is complaining about making it competent and valid, since it gives the appellant sufficient notice of the respondent’s complaint.

3. Mesne profits are the profits accruing from the date the defendant ceases to hold the premises as a tenant to the date he gives up possession. Possession is inextricably tied with award of rent and mesne profit and it was therefore wrong of the learned Judge to hold that possession was no longer a live issue before him.

4. There was no evidence before the lower court suggesting or indicating the fact that the appellant had given up possession of the flat. Evidently, the Judge accepted the statement of counsel in his address that the appellant had given up possession of the flat to arrive at his conclusion to that effect. Addresses by counsel are not evidence. Addresses of learned counsel are designed to assist the court in arriving at a just decision and they are clearly not substitutes for cogent and credible evidence proffered by the parties on the issues that call for determination.

5. It is trite law that where there was an error or omission committed by a court that did not form the basis of the decision arrived at by that court, the judgment appealed against will not be reversed on that ground alone. It is only those mistakes that have been shown to have affected or influenced the decision appealed against that will result in the appeal being allowed – which is not the case in this appeal.

**MAIN JUDGEMENT**

**AUGIE, JCA** (Delivering the Lead Judgment):

The appellant was a tenant of the respondent for many years in a three bedroom flat and premises situate and lying at No. 1 Osagie Street, Boji-Boji Agbor in Delta State. In an action before the Ika South Area Customary Court Agbor-Obi, in Suit No. IACC/115/95, the respondent who was the plaintiff therein claimed for:-

(a) Possession of the said flat and premises;

(b) The sum of N6,400.00 (six thousand four hundred naira) representing the arrears of rents from April 1995 to July 1995; and

(c) Mesne profits at the rate of N2,500 (two thousand five hundred naira) per month from the month of August 1995 till possession of the flat and premises is delivered to the plaintiff.”

The appellant who was the defendant therein also filed a cross action against the respondent at the said Ika South Area Customary Court, AgborObi in Suit No. ACC/121/95, wherein he claimed as follows -

1. A declaration that the notice of rent increase issue by the defendant and dated 23rd February, 1995 is illegal, unreasonable, null and void and without any effect whatsoever.

2. A declaration that the plaintiff is still a lawful tenant of the defendant who has not breached the terms of the tenancy of House No. 1 Osagie Street, Boji Boji, Agbor.

3. In the alternative, an order of this Honourable Court fixing and defendant (sic) according to the standard rents payable by virtue of the Rent Control (Standard and Maximum Rent) Order 1977, applicable to Delta State.

4. An order of perpetual injunction restraining the defendant, his servants and or agents from evicting or threatening to evict or eject the defendant from the premises known and called No. 1 Osagie Street, Boji Boji, Agbor.

The two suits were consolidated and heard in the same proceedings by the trial court. At the end of the trial, the Ika South Area Customary Court, Agbor-Obi delivered two separate judgments for the said suits on the 11th of August, 1997. The trial Customary Court upheld the respondent’s claim although it fixed the rent payable by the appellant at N1,300.00 per month. It dismissed the appellant’s claim. The appellant aggrieved by the decision of the trial Customary Court appealed to the Agbor High Court in Suit No. AG/2A/98 on the following grounds -

1. The decision is against the weight of evidence.

2. The trial court erred in law when it exercised jurisdiction in fixing the rents payable for No. 1 Osagie Street, without regard to the Rent Edict of 1985.

3. The trial court erred in law when it held that there did not exist material contradictions in the evidence of the plaintiff as to the purpose and intent of exhibit “A”.

4. Further and additional grounds of appeal to be filed when certified copy of proceedings is received.

The respondent, also aggrieved by the amount awarded him by the trial Customary Court as mesne profit, appealed to the Agbor High Court on the following ground of appeal –

“The lower court erred in law and in fact when it fixed the mesne profit payable in respect of the three-bed room flat situate and lying at No. 1 Osagie Street, Boji-Boji, Agbor at N1,300.00 per month”.

In its judgment delivered on the 9th of May, 2000, the Agbor High Court presided over by Diai J. dismissed the appellant’s appeal. It, however, allowed the respondent’s cross-appeal and awarded the sum of N1,600.00 to the respondent as mesne profit. The appellant further aggrieved by the decision of the Agbor High Court has further appealed to this court against the said judgment of the Agbor High Court.

In keeping with the rules of this court, the appellant and respondent filed and exchanged briefs. In the respondent’s brief, the respondent raised a preliminary objection to the appellant’s grounds of appeal and it reads:

“TAKE NOTICE that the respondent shall either at or before the hearing of this appeal raise a preliminary objection to the competency of grounds 1, 2, 3, 4, 5 and 6 of the grounds of appeal.

GROUNDS OF OBJECTION

1. The judgment appealed against by the appellant was given by the court below in the exercise of its appellate jurisdiction.

2. Grounds 1, 2, 3, 5 and 6 of the grounds of appeal, when examined in the light of their particulars are either grounds of facts alone or grounds of mixed law and facts.

3. By virtue of section 241 and 242 of the Constitution of the Federal Republic of Nigeria, 1999, the appellant is duty-bound to seek and obtain either the leave of the Honourable Court or of the court below before he can appeal on grounds of facts alone or mixed law and facts from the decisions of the court below sitting in the exercise of its appellate jurisdiction.

4. The appellant has neither sought nor obtained the leave of the Honourable Court or of the court below before appealing on the said grounds of appeal. He has also argued them without the requisite leave.

5. Ground 4 is a ground of law alleging error of law on the part of the court below. However, the particulars and nature of the alleged error of law are not stated as by Order 3, rule 2(2) of the Court of Appeal Rules, 1981 as amended.”

Mr. S. O. Uzuh, learned counsel for the respondent, submitted that the question whether a ground of appeal is one of facts alone, mixed law and facts or law alone does not depend so much on the label assigned to it by the appellant. His argument is that the proper approach is to examine the substance of the complaint and not the form or the name given to it by the appellant, relying on the following authorities - Alhaji Mohammadu Hassan & Ors. vs. The Military Governor of Plateau State (2002) FWLR (Pt. 89) 1168 at 1185 - 1186; Chief Kalu Igwe & 2 Ors. vs. Chief Okuwa Kalu & 2 Ors. (2002) FWLR (Pt. 97) 677, (2002) 97 LRCN 975 at 990 - 991; and Oba Felix Abidoye & 4 Ors. vs. Oba Jacob Alawode & 4 Ors. (2001) FWLR (Pt. 43) 322, (2001) 85 LRCN 735 at 753 - 755.

In respect of ground 4, he cited Alhaji Eniola Amusa Adeleke vs. Bayo Asani & Anor. (2002) FWLR (Pt. 106) 482, (2002) 97 LRCN 928 at 939 - 941, and submitted that the ground is not a composite ground of appeal as the particulars of the alleged error of law is not inherent in it, and in the absence of the requisite particulars of the alleged error of law, the ground is vague and therefore incompetent. He therefore urged this court to strike out the said grounds of appeal as being incompetent. Furthermore, that the appeal itself should also be dismissed or at least struck out as most incompetent.

The appellant did not file a reply brief, and on the hearing of the appeal, his counsel, Mr. J. O. Nwabor, informed the court that he had gone through the objections and there was no need for a reply to it. He however added that the grounds of appeal are competent and the objections of the respondent should be discountenanced as it is misconceived.

Section 241(1) (a) & (b) of the 1999 Constitution provides as follows-

(1) An appeal shall lie from decisions of the Federal High Court or a High Court to the Court of Appeal as of right in the following case -

(a) Final decisions in any civil or criminal proceedings before the Federal High Court or a High Court sitting at first instant;

(b) Where the grounds of appeal involves questions of law alone, decisions in any civil or criminal proceedings. (Italics mine)

Section 242(1) of the same Constitution provides as follows -

1. Subject to the provisions of section 241 of this Constitution, an appeal shall lie from decisions of the Federal High Court or a High Court to the Court of Appeal with the leave of the Federal High Court or that High Court or the Court of Appeal.

The sum and substance of the objection raised by the respondent is that by virtue of the above provisions of the 1999 Constitution, the appellant is duty-bound to seek and obtain either the leave of the Honourable Court or of the court below before he can appeal on grounds of facts alone or mixed law and facts from the decisions of the Agbor High Court sitting in the exercise of its appellate jurisdiction. It is not in dispute that the appellants did not obtain leave at either the Agbor High Court or this court before filing this appeal.

As learned counsel for the respondent rightly submitted, what is important in determining whether a ground of appeal involved questions of law, or fact, or mixed law and facts, is not its cognomen, nor its designation as “error in law”. It is rather the essence of the ground, the reality of the complaint embedded in that name that determines what any particular ground Involves. See Abidoye vs. Alawode (2001) FWLR (Pt. 43) 322, (2001) 6NWLR (Pt. 709) 463; NEPA vs. Eze (2001) 3 NWLR (Pt. 701) 606; Ezeobi vs. Abang (2001) FWLR (Pt. 56) 652, (2000) 9 NWLR (Pt. 672) 230; and Ojukwu vs. Kaine (2000) FWLR (Pt. 28) 2231, (2000) 15 NWLR (Pt. 691) 516.

The Supreme Court pointed out in Ogbechie & Ors. vs. Onochie & Ors. (1986) 2 NWLR (Pt. 23) 484 at 491, that it is always difficult to distinguish a ground of law from a ground of fact but what is required is to examine thoroughly the grounds of appeal in the case concerned to see whether the grounds reveal a misunderstanding by the lower court of the law or a misapplication of the law to the facts already proved or admitted, in which case it would be question of law, or one that would require questioning the evaluation of facts by the lower court before the application of the law in which case it would amount to question of mixed law and facts. Furthermore, that the issue of pure fact is easier to determine, for example, a grounds which complains that the decision of the trial court is against the weight of evidence or contains unresolved contradictions in the evidence of witnesses is purely a grounds of fact which requires leave for an appeal to a Court of Appeal or a further Court of Appeal.

In this appeal, ground 1 of the grounds of appeal states that “the decision is against the weight of evidence”. When an appellant makes such a complaint, all he means is that when the evidence adduced by him is balanced against that adduced by the respondent, that judgment given is against the weight which should have been given to the totality of the evidence. Appeal against weight of evidence is basically on facts. See FBN Plc vs. Oniyangi (2000) 6 NWLR (Pt. 661) 497; Fasanya vs. Adekoya (2001) FWLR (Pt. 34) 516, (2001) 15 NWLR (Pt. 689) 22 and Mercantile Bank of Nig. Plc vs. Nwobodo (2000) 3 NWLR (Pt. 648) 297. In the circumstances of this appeal, such a ground of appeal is incompetent. Accordingly, it is struck out.

Ground two of the grounds of appeal states as follow -

“The learned trial Judge erred in law when he held as follows –

‘Apart from this last issue, the other two raised in the omnibus ground has to do with recovery of possession of the premises. Since the appellant has given up possession, the court agrees with the submission of cross appellant’s counsel that these issues are no longer ‘Live’ issues in this appeal. Considering them therefore would amount to a mere academic exercise. Be that as it may, the court would observe at this stage, that ground 3 of the appeal reads more like particulars in support of a ground of appeal rather than a ground itself. I am also of the view that in spite of the omnibus ground, there is no appeal against the order granting possession of the premises to the cross appellant as it may, the exhibits complained of, especially exhibit ‘F’ complained of, are not part of the record. It is the duty of the appellant to ensure that the record of appeal is complete. The complaints about exhibit ‘F’ is about signing same and adding a figure thereafter. In view of the absence of this document, the court is unable to relate the submission of the facts before the lower court. On the alleged contradiction in evidence of the plaintiff/cross-appellant in respect of the reasons given for wanting possession of the premises, having gone through the record the court agrees with the lower court that no such contradiction exist. The cross-appellant said he wanted possession because his brother who returned from America would occupy the house. There is no where in his evidence wherein he stated that he wanted the appellant out in order to rent the premises out to prospective tenants at the rate of N2,500.00 monthly.

The figure came up to justify his claim for the amount as mesne profit.’

Particulars of Error

(a) Failure to hold that the omnibus ground filed constitute one ground and it was not apparent on the record that the issue of possession was “no longer live”.

(b) Failure to hold that ground 3 was a proper ground and so fit for proper examination.

(c) Possession is inextricably tied with award of rent and mesne profit.

(d) Shifting the onus of compilation of record to the appellant and refusal to draw counsel’s attention to the non-availability of the dispatch book (exhibit F) on transmission of record.

(e) Failing to see evidence of the plaintiff at page 5, this “I am claiming N2,500.00 as mesne profit, because some prospective tenants offered more than that as rent. They even promised to pay two years rent as advance. If the defendant had packed out, I would have been collecting N2,500.00 as rent per month from the flat”

As I stated early, complaints of errors emanating from a conclusion on undisputed facts, is a ground of law. However, if the errors complained of are founded on disputed facts and by the complaint the correctness of the ascertained facts is being challenged, the ground is one of mixed fact and law. See Ojukwu vs. Kaine (supra) and Ezeobi vs. Abang (supra). I must point out here that the judgment appealed against by the appellant was given by the Agbor High Court in the exercise of its appellate jurisdiction. Eso, JSC had this to say in Ogbechie & Ors. vs. Onochie & Ors. (supra) at page 493, on the distinction between a court of trial and a Court of Appeal -

“The first thing a Court of Appeal learns is that it is not a court of trial. It is not to try a case, find the facts, or assess the witnesses. Witnesses are not before a Court of Appeal. Such court deals only with printed record and where it has cause to deal with facts, on printed evidence. The other evidence, the important one, evidence of witnesses where demeanours are observed and manners of witnesses help the decision of credibility, is absent. Where therefore a trial court fails to apply the facts, which it has found, correctly to the circumstances of the case before it, and there is an appeal to a Court of Appeal, which alleges a misdirection in the exercise of the application by the trial court, the ground of appeal alleging the misdirection is a ground of law and not of fact. When the Court of Appeal finds such application to be wrong and decides to make its own findings, such findings made by the Court of Appeal are issues of fact and not law. Where the Court of Appeal interferes in such case and there is a further appeal to a higher Court of Appeal on the application of the facts, the ground of appeal alleging such misdirection by the lower Court of Appeal is a ground of law and not of fact. It is only where there is an appeal against the finding made by the Court of Appeal in this exercise that issues of fact arise and leave will be required.”

Applying the above principle to the ground of appeal under consideration, it is evidently clear that this ground of appeal, raises issues of law and not mixed fact and law and as such, leave of court is not required.

The objection to this ground is overruled.

Grounds 3 and 5 of the grounds of appeal are as follows -

3. The learned trial Judge erred in law when he held that the appellant waived his rights to benefits accruable from the Rent Control and Recovery of Premises Law.

Particulars of Error

A. The issue of rent is expressly stated in the statute as not capable of being waived.

B. The address of counsel is essentially not the evidence on which courts would act but serves as guide in reaching a just decision.

C. There was evidence on record that counsel were asked if they had questions for Mrs. Beatrice Ekwunife as the court is undoubtedly dominis litis throughout trial. The introduction of Mrs. Molokwu showed that the court was not in firm grisp of the facts.

D. Ground 1 of the notice and grounds of appeal had sufficiently covered this complaint.

E. The trial court acted without jurisdiction and arbitrarily, in fixing the rents payable in respect of No. 1 Osagie Street, Boji Boji, Agbor and thus occasioned a miscarriage of justice.

5. The learned trial Judge erred in law when he held as to mesne profit as follows:

“It is clear from the judgment of the lower court that the award of N1,300.00 a month as mesne profit was based on rent fixed by them for the property. Nothing was said in the judgment about the sum of N2,500.00 claimed as mesne profit. On this issue, it is the evidence of the cross-appellant that the sum is being claimed because prospective tenants offered him the amount as rent on the property. This piece of evidence is unchallenged.”

Particulars of Error

a. This holding contradicts an earlier finding that no contradiction ever existed in the evidence of the plaintiff.

b. The trial court noticed this contradiction and thus refused to act on it.

c. Evidence of the annual value of profit was not furnished by the respondent, beyond stating that prospective tenants had offered to pay for two years in advance.

d. The alleged evidence of Mrs. Beatrice Ekwunife (in private discussion with the trial court in locu quo) cannot be reliable fact to assess mesne profit.

e. The decision has occasioned a miscarriage of justice. A careful reading of the above grounds 3 and 5 show that the complaint therein is that the lower court did not do a proper evaluation of the evidence thereby reaching a wrong conclusion. In order to decide whether the lower court failed in its duty to consider the evidence properly, it will be necessary for this court to examine facts as given in evidence.

This court will therefore have to deal with conflicting facts in the process of judging the performance of the lower court. That makes the ground of appeal at best one of mixed law and fact for which leave must be sought and obtained in an appeal to this court - see Abidoye vs. Alawode (supra). See also Ogbechie & Ors. vs. Onochie & Ors. (supra), where the Supreme Court held that a ground which complains that the decision of the trial court contains unresolved contradictions in the evidence of witnesses is purely a ground of fact which requires leave for an appeal to a Court of Appeal. The objection is upheld and grounds 3 and 5 of the grounds of appeal are accordingly struck out.

The 4th ground of appeal states as follows -

“The learned trial Judge erred in law when he upheld the only ground in the cross-appeal as being competent when he did not show alleged particulars are of law or facts; or mixed law and fact.”

The objection to this ground of appeal is that it is vague in that it contains no particulars of the error complained about, and is therefore incompetent. It is trite law that a ground of appeal alleging an error in law or a misdirection must contain particulars. See Order 3, rule 2(2) of the Court of Appeal Rules, 1981 as amended. It is not mandatory though it is customary to state particulars in a separate paragraph of the main ground.

However, as this court pointed out in Arinze vs. Afribank (Nig.) Plc (2000) FWLR (Pt. 6) 1032, (2000) 7 NWLR (Pt. 665) 383 at 389, it is permissible to include the particulars in the main ground itself where this can be conveniently done. In Aderounmu vs. Olowu (2000) 4 NWLR (Pt. 652) 253 at 265, the Supreme Court per Ayoola, JSC, observed -

“The rules of our appellate procedure relating to formulations of grounds of appeal are primarily designed to ensure fairness to the other side. The application of such rules should not be reduced to a matter of mere technicality, whereby the court will look at the form rather than the substance. The prime purpose of the rules of appellate procedure, both in this court and the Court of Appeal, that the appellant shall file a notice of appeal which shall set forth concisely the grounds which he intends to rely upon on the appeal; and that such grounds should not be vague or general in terms and must disclose a reasonable ground of appeal, is to give sufficient notice and information, to the other side of the precise nature of the complaint of the appellant and, consequently, of the issues that are likely to arise on the appeal. Any ground of appeal that satisfies that purpose should not be struck out, notwithstanding that it did not conform to a particular form.”

The particulars of error in this ground of appeal under consideration are discernible in the main ground itself. Applying the principle in Aderounmu vs. Olowu (supra), I am of the view that the ground, though inelegantly drafted, gives the respondent sufficient notice and information, of the precise nature of the complaint of the appellant and, consequently, of the issues that are likely to arise on the appeal. The objection to this ground of appeal is therefore overruled.

Ground 6 states as follows -

“The learned trial Judge erred in law when he held partly as follows -

‘The cross-appeal is allowed and the sum of N1,600.00 per month is hereby awarded to the cross-appellant as mesne profit from August 1995 until possession is given up by the defendant/appellant.

Particular of Error

a. Having held that possession was no longer a live issue, this order constitutes a contradiction in terms and thus capable of miscarriage of justice.

b. This order, apart from being uncertain, is capable of asking the appellant to pay until eternity.

c. The basis of award is not shown in the judgment; as same constitutes an open and wide road to varied interpretations. As in ground 2, this ground of appeal is clearly a ground of law. It is an accepted principle that when an appellant complains that an inference drawn by the court below is absolutely unsupported by evidence; or that the decision is so manifestly unreasonable, that no reasonable tribunal could have come to that conclusion, on the evidence, then the appeal raises an issue of law, as such a decision would be regarded as perverse. See UBA vs. Gmbh (1989) 3 NWLR (Pt. 110) 374. The objection to this ground is also overruled.

Having determined the respondent’s objection to the appellant’s grounds of appeal, it is now necessary to relate the remaining grounds of appeal with the issues formulated in the appellant’s brief of argument to see whether any of the issues is affected following the striking out of grounds 1, 3 and 5 of the appellant’s grounds of appeal. Where an issue for determination is formulated from an incompetent ground of appeal, or from several grounds of appeal one of, which is incompetent, the issue and related argument will be struck out as well by the court. See Kachia vs. Yazid (2001) 17 NWLR (Pt. 742) 431; P. N. Udoh Trading Co. Ltd. vs. Abere (2001) FWLR (Pt. 57) 900, (2001) 11 NWLR (Pt. 723) and Okonyia vs. Ikengah (2002) FWLR (Pt. 53) 158, (2001) 2 NWLR (Pt. 697) 336.

The appellant formulated 6 issues for determination in this appeal as follows -

1, Whether the learned trial Judge was right in shifting the onus of compilation of records to the appellant.

2, Whether the learned trial Judge was right when he held that the appellant waived his rights to benefits accruable from the Rent Control and Recovery of Premises Law.

3, Whether the learned trial Judge was right to have upheld the only ground in the cross appeal as being competent.

4, Whether the learned trial Judge was right to have approbated and reprobated on some issues OR whether the judgment of the learned trial Judge is not replete with contradictions and inconsistencies.

Issues Nos. 1, 4 and 6 were formulated from grounds 1, 3 and 5 respectively. Grounds 1, 3 and 5 are struck out, and in the absence of these grounds, issues No. 1, 4 and 6 have no legs to stand upon. Consequently, the appellant’s issue No. 1, 4 and 6 arising out of the incompetent grounds of appeal struck out are also hereby struck out. The end result is that all arguments in support of issues No. 1, 4 and 6 formulated by the appellant shall be ignored. Inasmuch as issues No. 2, 3 and 5 in the appellant’s brief do not relate to any of the incompetent grounds 1, 3 and 5 struck out, the three issues are not affected and therefore remain valid.

The respondent also formulated three issues for determination in his brief of argument, which he stated were without prejudice to the preliminary objection raised in the same brief. The issues formulated by the respondent are as follows -

1. Whether the court below was right in holding that the appellant waived his rights to the benefits (if any) conferred on him by the Rent Control Standard and Maximum Rent Order, 1977.

2. Whether the court below was right in dismissing the appellant’s appeal.

3. Whether the court below was right in allowing the respondent’s cross appeal and in awarding the sum of N1,600.00 to the respondent as mesne profits.

The respondent’s issues No. 1 and 2 were obviously formulated from the appellant’s grounds of appeal, which are struck out. However, I am of the view that the respondent’s issue No. 3 encapsulates the appellant’s issues No. 2, 3 and 5 remaining for determination in this appeal. I will therefore adopt it in considering this appeal. As it was submitted for the respondent, the said issue No. 3 has two arms -

(a) Whether the sole ground of appeal in the respondent’s cross-appeal in the court below is competent; and

(b) Whether the court below was justified in fixing the mesne profit at N1,600.00 per month. This first arm of the respondent’s issue No. 3 is more or less the same as issue No. 5 formulated by the appellant. The ground of appeal in the respondent’s cross-appeals in the court below states -

“The lower court erred in law and in fact when it fixed the mesne profit payable in respect of the three-bed room flat situate and lying at No. 1 Osagie Street, Boji-Boji, Agbor at N1,300.00 per month.

Particulars of Error

(a) Mesne profit is not fixed on the basis of the rent as done by the lower court in this case.

(b) There is unchallenged evidence on record that the tenant who occupies the other three-bedroom flat in the same building pays the sum of N1,500.00 (one thousand, five hundred naira) per month.

(c) There is also unchallenged evidence on record that some prospective tenants offered to pay the sum of N2,500.00 (two thousand, five hundred naira) per month for the said three bed room flat. Mr. Nwabor, learned counsel for the appellant, submitted that the above ground of appeal is incompetent in law and not worth considering.

He argued that the complaint is about an error in law and at the same time, in fact, that there is nothing like an error in fact but misdirection. He further submitted that a ground of appeal that complains of error in law and a misdirection is incompetent since a misdirection occurs when a Judge misconceives the issues, whether of facts or law or summarizes the evidence inadequately or incorrectly. Furthermore, that when the error relates to his findings, it would be described as an error in law.

He referred the court to the cases of Nwadike vs. Ibekwe (1987) 12SC 14; and Akuchie vs. Nwamadi (1992) 8 NWLR (Pt. 258) 214, and submitted that the learned trial Judge was wrong to have upheld the only ground in the cross appeal as being competent.

On his own part Mr. Uzuh, learned counsel for the respondent submitted that the particulars of error were clearly specified, and was neither vague nor ambiguous nor misleading. Furthermore, that they gave the appellant clear-cut notice of what the respondent’s complaint was. He also submitted the ground of appeal together with the specified particulars of error is reasonable and by virtue of Order 3, rule 2(4) of the Court of Appeal Rules, 1981 as amended, is competent and valid. His argument is that the complaint against the ground of appeal in the cross appeal in the court below is only as to the name by which the ground of appeal was described by the cross-appellant; that the appellant has not complained that the ground of appeal was vague or that he was misled by the name assigned to it by the respondent; or that the ground did not disclose any reasonable ground of appeal.

He further submitted that in deciding whether a ground of appeal is competent, the proper approach is to examine the substance of the complaint and not the form or the name given to it by the appellant. Furthermore, that a careful perusal of the only ground of appeal in the cross appeal in the court below will reveal that the ground of appeal is a ground of law, notwithstanding that the ground complained of error in law and in fact. He was also of the view that the appellant was not in doubt as to what the respondent’s complaint was. Relying on Aderounmu vs. Olowu (2000) 75 LRCN 438 at 440, it is his submission that the ground is competent and valid, since it did give the appellant sufficient notice of the respondent’s complaint. Order 3, rule(2), (3) and (4) of the Court of Appeal Rules, 1981 as amended provides as follows -

(2) If the grounds of appeal allege misdirection or error in law, the particulars of the misdirection or error shall be clearly stated.

(3) The notice of appeal shall set forth concisely and under distinct heads the grounds upon which the appellant intends to rely at the hearing of the appeal without any argument or narrative and shall be numbered consecutively.

(4) No ground which is vague or general in terms or which disclose no reasonable ground of appeal shall be permitted, save the general ground that the judgment is against the weight of evidence, and any ground of appeal or any part thereof which is nor permitted under this rule may be struck out by the court of its own motion or on application by the respondent.

In the judgment of the lower court at pages 80 - 82 of the record, Diai J. quoted extensively from the decision of the Supreme Court in Aderounmu vs. Olowu (supra), in arriving at his conclusion that the ground was competent.

In Aderounmu vs. Olowu (supra), the Court of Appeal relying on Nwadike vs. Ibekwe (supra) struck out 3 grounds of appeal for incompetence, the appellant having alleged error in law and misdirection on each of the 3 grounds. On appeal against the order striking out the grounds, Ayoola, JSC stated as follows -

“In my opinion, what is important in a ground of appeal, and the test the court should apply, is whether or not the impugned ground shows clearly what is complained of as error in law and what is complained of as misdirection, or, as the case may be, error of fact. The view, with which I am inclined to agree, is expressed in the Court of Appeal case of Nteogwuija & Ors. vs. Ikuru & Ors. (1998) 10 NWLR (Pt. 569) 267, 310, that the mere fact that a ground of appeal is framed as an error and a misdirection does not make it incompetent. ...

Ultimately, it is for the court before which the question is raised to decide whether, viewed objectively, the ground satisfies the requirements of preciseness and clarity. ... What makes a ground incompetent is not whether it is framed as an error and a mis-direction but whether by so stating it, the other side is left in doubt and without adequate information as to what the complaint of the appellant actually is.”

Applying the above principle, the lower court in its judgment concluded -

“... The court is of the view that notwithstanding the fact that error in law and fact are alleged, the particulars sufficiently disclose what the cross-appellant is complaining about. The court is not unaware of the specific terms in which the particulars of the grounds in the above case were stated (that is to say, that under the particulars in support of each of the impugned grounds, the particulars or error in law and error on the facts were separately set out). Notwithstanding the fact that it was not so set out in the ground under consideration, the court is of the view that the particulars thereunder clearly leave no doubt as to what (sic) the ground of appeal is not incompetent and I so hold.”

The reasoning and conclusion of the lower court on this issue cannot be faulted in any way. On the authority of Aderounmu vs. Olowu (supra), what makes a ground incompetent in these circumstances, is whether the other side is left in doubt and without adequate information as to what the complaint of the appellant actually is. I have examined the said ground of appeal in question, and I am also of the view that the particulars sufficiently disclose what the cross-appellant is complaining about. I therefore agree with learned counsel for the respondent that the ground is competent and valid, since it gives the appellant sufficient notice of the respondent’s complaint. This issue is therefore resolved in favour of the respondent.

On the issue of whether the court below was justified in fixing the mesne profit at N1,600.00 per month, learned counsel submitted that possession is inextricably tied with award of rent and mesne profit. It is therefore his contention that the learned Judge was wrong when he held inter alia that possession was no longer a live issue before him.

Learned counsel for the respondent however contended that the court below was justified in awarding the respondent the sum of N1,600.00 per month as mesne profit per month. He submitted that while rent is paid by a tenant whose term is current, mesne profit is a form of damages or compensation which a tenant who is wrongfully holding over possession of premises after the expiration of his tenancy, is liable to pay to the owner of the premises; that it is calculated usually on the annual value of the property; where the annual value of the property is equal to the rent fixed by agreement of the parties, the mesne profit is that same as the rent; but where the annual value is higher than the rent, the mesne profit is also higher than the rent.

He further submitted that in this case, the rent fixed by the trial court and upheld by the court below is N1,300.00 and this is below the annual value of the property. He cited the following authorities to support his submission that the court below was justified in fixing the mesne profit for the property at N1,600.00 per month - Ahmend Debs & Anor. vs. Cheico (Nig.) Ltd. (1986) 6 SC 179 at 186 - 195; Metal Construction (W.A.) Ltd. vs. Chief Moyo Aboderin (1998) 60 LRCN 4034 at 4046 - 4047; and Alhaja Sabalemotu Ayinke vs. Alhaji Muniru Lawal & Ors. (1994) 25A LRCN 201 at 208 - 211. He urged the court to resolve this issue in favour of the respondent.

To begin with, it is necessary to have a clear idea of what mesne profits are. Simply defined, mesne profit is only another term for damages for trespass arising from the particular relationship of landlord and tenant. See Ige vs. Fagbohun (2002) FWLR (Pt. 91) 1545, (2001) 10 NWLR (Pt. 721) 468; and Debs & Anor. vs. Cheico (Nig.) Ltd. (supra), wherein the Supreme Court per Oputa, JSC also added -

“The extension “mesne profit” simply means intermediate profits - that is, profits accruing between two points of time - that is between the date when the defendant ceased to hold the premises as a tenant and the date he gives up possession. Rent is different from mesne profits. Rent is liquidated, mesne profits are not. Rent is operative during the subsistence of the tenancy, while mesne profits start to run when the tenancy expires and the tenant holds over. The action for mesne profit does not lie unless either the landlord has recovered possession, or the tenant’s interest in the land has come to an end, or his claim is joined with a claim for possession.”

Mesne profits are therefore the profits accruing from the date the defendant ceases to hold the premises as a tenant to the date he gives up possession. This is the fulcrum of the appellant’s complaint against the decision of the lower court, which is that possession is inextricably tied with award of rent and mesne profit and it was therefore wrong of the learned Judge to hold that possession was no longer a live issue before him. Another complaint by the appellant is that the order awarding mesne profits to the cross-appellant “from August 1995 until possession is given up by the defendant/appellant” is a contradiction in terms capable of miscarriage of justice. I agree with the appellant that there was no evidence before the lower court suggesting or indicating the fact that the appellant had given up possession of the flat. Evidently, the learned Judge accepted the statement of learned counsel in his address that the appellant had given up possession of the flat to arrive at his conclusion to that effect. Addresses by counsel are not evidence. Addresses of learned counsel are designed to assist the court in arriving at a just decision and they are clearly not substitutes for cogent and credible evidence proffered by the parties on the issues that call for determination.

See Daramola vs. Att.-Gen., Ondo State (2000) FWLR (Pt. 6) 997, (2000) 7 NWLR (Pt. 665) 440. The learned Judge was clearly in error in accepting the address of learned counsel as a substitute for evidence.

The question now is has this error in judgment occasioned a miscarriage of justice sufficient to justify a reversal of the judgment? It is trite law that where there was an error or omission committed by a court that did not form the basis of the decision arrived at by that court, the judgment appealed against will not be reversed on that ground alone. See Adeosun vs. Jibeson (2000) 11 NWLR (Pt. 724) 290. In other words, it is not every slip of the lower court that will result in an appeal against its decision being allowed. It is only those mistakes that have been shown to have affected or influenced the decision appealed against that will result in the appeal being allowed. See IBWA Ltd. vs. Pavex International Co. Ltd. (2000) FWLR (Pt. 26) 1891, (2000) 7 NWLR (Pt. 663) 105. To start with, what is the decision appealed against? Bearing in mind that 3 grounds of appeal were struck out in this appeal, the decision appealed against is clearly stated in ground 6 of the grounds of appeal as follows -

“The learned trial Judge erred in law when he held partly as follows -

‘The cross-appeal is allowed and the sum of N1,600.00 per month is hereby awarded to the cross-appeal as mesne profit from August 1995 until possession is given up by the defendant/appellant’.”

The follow-up question is has the error in judgment affected or influenced the decision appealed against? I think not. To start with, the appellant did not appeal against the order of the trial Customary Court to vacate the flat and deliver up possession to the respondent. Possession was therefore not an issue before the lower court. This is evident from the statement of the learned Judge thus –

“I am also of the view that in spite of the omnibus ground, *there is no appeal against the order granting possession of the premises to the cross-appellant*.” (Italics mine)

Furthermore, the award of mesne profit “from August 1995 until possession is given up” is not such a contradiction in terms to occasion a miscarriage of justice as argued by the appellant. There is an existing order of the Ika South Customary Court, Agbor-Obi asking the appellant to give up possession of the flat. If the appellant is still in possession, and the award of mesne profits is upheld, the mesne profits will be calculated up to the date he gives up possession. If the appellant has given up possession, and the award of mesne profits is upheld, the mesne profits will be calculated up to the date he gave up possession. The omission by the lower court to consider the issue of possession did not in any way affect or influence the decision appealed against, to result in the appeal being allowed on this ground and I so hold.

The respondent claimed the sum of N2,500.00 per month from the trial Customary Court as mesne profits per month. The trial Customary Court in awarding the sum of N1,300.00 instead of the amount claimed held -

“During our visit to the locus in quo we met one of the tenants who said she pays N1,500.00 per month. Ordinarily, we would have held the rent payable is N1,500.00 but plaintiff’s counsel has asked us to fix the rent in between N1,600.00 and N1,000.00. From our calculation, the average rent is N1,300.00. Since the rent is N1,300.00 per month, we also hold that the mesne profit is N1,300.00.”

On his own part, the learned Judge of the lower court held as follows-

“In this case, the only evidence apart from the assertion of the cross-appellant that he was offered N2,500.00 per month on the premises hence the claim of the amount as mesne profit, is the evidence that the other tenants pay N1,500.00 per month and the rent on the particular house is N1,600.00 per month.

Though the ipse dixit of the cross-appellant is admissible evidence, in the circumstances of this case, the court is of the view that though unchallenged, there is need for further proof, to supplement the evidence of the cross-appellant on the annual value of the premises. Such additional evidence abound in all the authorities cited and the court is of the view therefore that the sum of N2,500.00 claimed as mesne profit is not substantiated by the evidence before the court. In view of the facts before the court, the court is of the further view that a sum of N1,600.00 as mesne profit would meet the justice of the case in the circumstance and I so hold.”

It is a well established and settled principle of law that an appellate court will not, in principle, interfere with the discretion by the trial court unless that discretion is shown to have been exercised upon wrong principles or that the exercise was tinted by some illegality or substantial irregularity. See Cornelius Ltd. vs. Ezenwa (2002) FWLR (Pt. 117) 1207, (2003) Vol. 2 WRN 98. It is also well settled that in an appeal against the exercise of discretion by a lower court, the appellate court cannot substitute its own discretion for that of the lower court.

In this appeal, and applying the above principles thereto, I find that the lower court was wrong to have changed the order made by the trial court on the sum awarded as mesne profits. In the circumstances, this court can properly interfere with the decision of the lower court toward the sum of N1,600.00 in substitution of N1,300.00 awarded by the trial court. In the final analysis, the decision of the lower court presided over by Diai J. Is upheld save as to the sum awarded as mesne profit. The sum of N1,300.00 per month awarded to the respondent as mesne profit by the trial Customary Court is hereby restored. The respondent is also awarded N2,000.00 costs.

Appeal is dismissed save for the award of mesne profits.

**MUNTAKA-COOMASSIE, JCA**:

I have had the privilege of reading in draft the lead judgment of my learned Lord Augie, JCA, delivered in this appeal. I am in full agreement with her Lordship that the appeal fails in part and I too dismissed same - with the exception of the order of the court below vis-a-vis the mesne profit which is hereby restored and affirmed. I have nothing useful to add. Costs of N2,000.00 is awarded by me in favour of respondent.

**AKAAHS, JCA:**

I read in draft the leading judgment delivered by my Lord, Augie, JCA. I entirely agree with the reasoning and conclusion that the appeal lacks merit safe for the award of N1,600.00 as mesne profits. I agree that the award of N1,300.00 as mesne profits per month made by the trial Customary Court should be restored. I abide by the order on costs awarded against the appellant.

Appeal dismissed