**GLOBAL WEST VESSEL SPECIALIST (NIGERIA) LIMITED**

**V**

**NIGERIA NLG LIMITED AND OTHERS**

SUPREME COURT OF NIGERIA

20TH DAY OF JANUARY 2017

SC. 544/2014

**LEX (2017) - SC. 544/2014**

OTHER CITATIONS

2PLR/2017/142 (SC)

**BEFORE THEIR LORDSHIP**

IBRAHIM TANKO MUHAMMAD, JSC (Presided)

OLUKAYODE ARIWOOLA, JSC (Read the Lead Judgment)

KUMAI BAYANG AKA’AHS, JSC

CHIMA CENTUS NWEZE, JSC

AMIRU SANUSI, JSC

**BETWEEN**

GLOBAL WEST VESSEL SPECIALIST (NIG.) LTD

AND

1. NIGERIA NLG LIMITED

2. ATTORNEY-GENERAL OF THE FEDERATION

**ORIGINATING COURT**

1. COURT OF APPEAL, LAGOS DIVISION

2. FEDERAL HIGH COURT

**REPRESENTATION/LAWYERS**

No legal representation for the appellant.

OLAWALE AKONI SAN with B.B. LAWAL, Esq., A. O. UTAKE, Esq. and A. ACHINIUN - for the 1st Respondent.

OSCAR NLIAM with ADEOLA ADENIYI, Esq., NNANNA OKETA, Esq. and AKINTOLA MAKINDE, Esq.) - for the 2nd Respondent.

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

ADMIRALTY AND MARITIME/SHIPPING LAW:- Application challenging the blockage and prevention of vessel from accessing a Maritime facility (Bonny Camp) – Grant of interim application relating thereto – Appeal against same – How treated

CONSTITUTIONAL LAW – JUDICIAL POWERS - SECTIONS 241(1) AND 242(2):– Appeal as of right - When shall lie from the Federal High Court or State High Court

**PRACTICE AND PROCEDURE ISSUES**

ACTION - PARTIES - PROPER PARTIES AND NECESSARY PARTIES:– Distinction between.

APPEAL - GROUND OF APPEAL:- Nature of - How determined - Guidelines for identifying - - Characterisation of – Formulae employed by the Supreme Court thereto.

APPEAL - INTERLOCUTORY DECISION OF A HIGH COURT:– Appeal against - Need to seek and obtain the leave of court in respect thereof - Section 14 of the Court of Appeal Act considered.

APPEAL - LEAVE TO APPEAL:- When required – Duty thereto

COURT - APPEAL AS OF RIGHT:- When shall lie from the Federal High Court or State High Court - Sections 241(1) and 242(2) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) considered.

COURT - COURT OF APPEAL ACT, SECTION 14 – Interlocutory decision of a High Court - Appeal against – Whether a party must seek and obtain the leave of court to enter appeal against same.

COURT- SENTIMENT OR EMPATHY:- Impropriety of in the application of law.

JUDGMENT AND ORDERS - INTERLOCUTORY DECISION OF A HIGH COURT:- Appeal against - Need to seek and obtain the leave of court in respect thereof - Section 14 of the Court of Appeal Act considered.

**CASE SUMMARY**

ORIGINATING FACTS AND CLAIMS

The 1st respondent instituted an action vide originating summons at the Federal High Court Lagos. It sought the interpretation of some Acts relating to Maritime Law. It challenged the blockade and prevention of its vessels from assessing Bonny Camp. It sought various interim and interlocutory injunctive reliefs against the appellant and 2nd respondent. The court granted all the interim reliefs sought.

The 2nd respondent filed a notice of preliminary objection challenging the jurisdiction of the trial court to entertain the suit for non-joiner of a necessary party. He sought an order of court striking out the suit. The appellant also through an application sought a discharge of the interim injunction against it. The court in its ruling dismissed both the 2nd respondent’s preliminary objection and the application seeking a discharge of the order of interim injunction. Dissatisfied, the appellant appealed to the Court of Appeal.

The 1st respondent objected to the competence of the appeal, challenging it on grounds that the leave of the trial court was not sought and had before the notice of appeal was filed. The court heard the substantive appeal and arguments on the preliminary objection. The court upheld the preliminary objection and held that the notice of appeal was incompetent as the requisite leave of court was not sought and had. The court struck out the notice of appeal.

Dissatisfied still, the appellant appealed to the Supreme Court..

**DECISION(S) APPEALED AGAINST**

The Court of Appeal entered judgment, holding that the appeal was incompetent as the Appellant had failed to seek leave to appeal. Dissatisfied, the Appellant appealed to the Supreme Court.

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

*BY APPELLANT:*

1. Whether the Court of Appeal, Lagos Division was right in holding that the appellant’s notice of appeal before it, filed without leave of court was incompetent thereby proceeding to strike out same on account that the grounds of appeal contained therein are not grounds of law alone but of mixed law and fact

2. Whether the Court of Appeal, Lagos Division was right in dismissing the appellant’s appeal and affirming the ruling of the trial court without proffering any reason for its decision, after withholding the 1st respondent’s preliminary objection and consequently striking out the notice of appeal.

*BY 1ST RESPONDENT:*

“1. Whether from the facts and circumstances of this case, the court below, was right in upholding the 1st respondent’s preliminary objection and consequently striking out the appellant’s notice of appeal which was filed without the statutorily required leave of court?

2. Whether the court below was right in affirming the ruling of the trial court dismissing the appellant’s preliminary objection after finding that the appellant’s notice of appeal against the ruling was incompetent?

*AS ADOPTED BY COURT*

[The Court adopted the issues formulated by the Appellant].

**MAIN JUDGMENT**

ARIWOOLA JSC (DELIVERING THE LEAD JUDGMENT):

This is an appeal against the judgment of the Court of Appeal, Lagos Division, delivered on 11 August 2014 in appeal No. CA/L/849B/2013, wherein the appeal was, inter alia, struck out.

The facts of this case are as follows: the 1st respondent was the plaintiff at the trial court. It had commenced an action by an originating summons before the Federal High Court in suit No. FHC/C/L/CS/847/2013. The said summons was filed along with an affidavit dated 17 June 2013 against the 2nd respondent and the appellant (hereinafter referred to as AGF) and Global West respectively, as the 1st and 2nd defendants. The plaintiff had then sought the interpretation of the following:

1. Nigeria LNG Act;

2. The Nigerian Maritime Administration and Safety Agency (NIMASA) Act;

3. The Coastal and Inland Shipping (Cabotage) Act, Cap. C51, Laws of the Federation of Nigeria, 2004;

4. The Marine Environmental (Sea Protection Levy) Regulations, 2012; and

5. The Merchant Shipping (Ship Generated Marine Waste Reception Facilities) Regulations, 2012.

The plaintiff also challenged the blockade of its vessels and the prevention of same from accessing the Bonny Channel by a vessel with men in military uniform on board, identified as representatives of Global West, etc.

The plaintiff further filed a motion ex-parte along with a notice of motion dated 17 June 2013 seeking various interim and interlocutory injunctive reliefs respectively against the Federal Government of Nigeria and its agents and Global West.

The trial court on 18 June 2013 granted all the interim reliefs sought.

The 2nd defendant - Global West filed a notice of preliminary objection dated 24 June 2013, challenging the jurisdiction of the trial court to entertain the suit on grounds of misjoinder and non-joinder of a necessary party and consequently sought an order of the trial court to strike out the suit for lack of jurisdiction and or strike out its name from the suit for misjoinder.

Global West also filed an application praying the trial court to discharge the order of interim injunction earlier made against it.

The trial court on Friday, 12 July 2013 dismissed the 2nd defendant’s preliminary objection together with the application seeking to discharge the order of interim injunction granted against it.

2nd defendant was dissatisfied with the ruling of the trial Federal High Court, hence it appealed by the notice of appeal dated 23 July 2013 to the court below.

By a notice of preliminary objection, dated 28 March 2014, the plaintiff now 1st respondent objected to the competence of the aforementioned notice of appeal on the grounds, inter alia, that - leave of the trial court or of the court below was not sought and obtained before the said notice of appeal was filed in accordance with the provisions of the Constitution of the Federal Republic of Nigeria, 1999 (as amended).

On 18 June 2014, the court below heard the substantive appeal along with arguments on the preliminary objection and in its considered judgment delivered on 11 August 2014, upheld the said objection to the effect that the notice of appeal filed by the appellant was incompetent having been filed without leave of either the trial court or of the court below. The court below consequently struck out the notice of appeal and thereby affirmed the ruling of the trial court.

Further dissatisfied with the judgment of the court below, led to the instant appeal on eight grounds vide the notice of appeal filed on 22 August 2014.

The appellant and 1st respondent filed and exchanged briefs of argument. Appellant’s brief of argument filed on 8 April 2015 was deemed properly filed and served on 15 March 2016. The 1st respondent filed its brief of argument within time on 19 April 2016. It is noteworthy that the 2nd respondent – Attorney General of the Federation did not file any brief of argument or any other process in this appeal.

When this appeal came up for hearing on 24 October 2016, both the 1st and 2nd respondents were represented by counsel but there was no legal representation for the appellant. Upon enquiry, the court was duly informed that there was proof of service of hearing notice to the counsel for the appellant.

Appellant having duly filed and served its brief of argument, same was deemed argued.

Mr. Akoni, learned senior counsel for the 1st respondent identified his brief of argument. He adopted and relied on same to urge the court to dismiss the appeal for want of merit.

Mr. Nliam, learned counsel for the 2nd respondent once again announced to the court that he did not and does not intend to file any brief of argument for the 2nd respondent. Accordingly, the appellant’s brief of argument settled by Selekeowei Larry SAN was duly considered.

The following two issues were distilled by the appellant for the determination of the appeal in its brief of argument:

Issues for determination

1. Whether the Court of Appeal, Lagos Division was right in holding that the appellant’s notice of appeal before it, filed without leave of court was incompetent thereby proceeding to strike out same on account that the grounds of appeal contained therein are not grounds of law alone but of mixed law and fact (Distilled from grounds 4, 5, 6, 7 and 8 of the notice of appeal).

2. Whether the Court of Appeal, Lagos Division was right in dismissing the appellant’s appeal and affirming the ruling of the trial court without proffering any reason for its decision, after withholding the 1st respondent’s preliminary objection and consequently striking out the notice of appeal. (Distilled from grounds 1, 2 and 3 of the notice of appeal).

The issues were argued seriatim in the appellant’s brief of argument.

On the first issue, it was contended that the court below was in error when it struck out the appellant’s notice of appeal before it as incompetent, as no leave of court was first sought and obtained before same was filed, for the reason that the grounds contained therein are not of pure law but of mixed law and fact.

Learned senior counsel for the appellant referred to section 241(1)(b) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) and contended that an appeal from a decision of the Federal High Court to the Court of Appeal is as of right where the grounds of appeal raise questions of law alone. In other words, he submitted that in such a case, a specific right of appeal is conferred by the Constitution devoid of any requirement of leave to appeal notwithstanding, that the appeal is against an interlocutory decision. He referred to the four (4) grounds of appeal contained in the notice of appeal in question, filed on 23 July 2013 before the court below. He submitted that no leave was required to file the said notice of appeal contrary to the findings of the court below.

Based on the decisions of this court in couple of cases, learned counsel submitted that the way out on this line of distinction between a ground of appeal simpliciter on law and mixed law and fact, is to carefully examine the grounds of appeal along with the particulars attending to them, to determine whether they reveal a misunderstanding by the lower court of the law or a misapplication of the law to facts already proved or undisputed or admitted. He cited, Nwadike v. Ibekwe (1987) 4 NWLR (Pt. 67) 718; K.T.P. Ltd v. GaH (Nig.) Ltd (2005) 13 NWLR (Pt. 943) 680; Iwueke v. I.B.C. (2005) All FWLR (Pt. 288) 1025, (2005) 17 NWLR (Pt. 955) 447.

Learned senior counsel contended that a careful examination of the four grounds of appeal in the vexed notice of appeal before the lower court would reveal that the grounds centre on the misunderstanding or misapplication of the law of agency to the proved, established, accepted, undisputed or admitted fact that the appellant was sued as an agent to a disclosed principal - NIMASA, which was never joined as a party. He contended further that the 1st respondent, by its own admission in its pleadings vide paragraph 5 of the supporting affidavit to its originating summons sued the appellant as an agent of NIMASA for acts, levies, taxes, etc. done or demanded by NIMASA from the 1st respondent in the exercise of the statutory powers of NIMASA under several extant legislations without making NIMASA a party to the suit.

The appellant referred to the 1st respondent’s preliminary objection of 25 June 2013, wherein it moved the trial court to strike out the suit for want of jurisdiction and/or strike out the appellant’s name from the suit for misjoinder and set aside the Form 48 issued against it. The appellant did not file any counter affidavit and so did not join issues with the 1st respondent on facts. He submitted that it was the decision of the trial court, which overruled and dismissed the objection that form the basis for the four grounds of appeal in the vexed notice of appeal before the court below.

Learned senior counsel submitted that the said grounds of appeal in the vexed notice of appeal being such that allege misunderstanding and/or misapplication of the law cannot be highly struck down as the lower court did as being of mixed law and fact, and therefore requiring leave to be competent.

He contended that even on a more global view, the objection culminating in the ruling appealed against therein is one that raises the question of jurisdiction against the trial court, and therefore indicative of raising grounds of pure law. He urged the court to resolve the issue against the 1st respondent and hold that the notice of appeal is competent as it requires no leave to be competent.

On the second issue, the appellant contended that the court below erred when it dismissed the appellant’s appeal without giving reasons for its decision, and that the court below in so doing violated its right to fair hearing guaranteed under section 36 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended), and abdicated its judicial responsibility under section 294 (1) of the same Constitution. The appellant’s learned senior counsel submitted that the appellant’s grouse is that the court below heard the substantive appeal on the merits alongside the respondent’s preliminary objection which it upheld, and proceeded to affirm the ruling of the trial court without proffering any reason.

Learned senior counsel contended that a court has a duty to decide the merit of a case upon the issues canvassed before it. The reason is that, being an intermediate appellate court, its decision on jurisdiction could be reversed on appeal to this court, in which case if all other issues had been decided, atleast, in the alternative, it would prevent the necessity of the Supreme Court having to remit the appeal to the court below for it to resolve other issues originally arising in the appeal. He relied on several cases, including: Elelu-Habeeb v. Attorney-General, Federation (2012) All FWLR (Pt. 629) 1011, (2012) 13 NWLR (Pt. 1318) 423; Tanko v. U.B.A. Plc (2010) 17 NWLR (Pt. 1221) 80, (2011) All FWLR (Pt. 556) 408; Obisi v. Chief of Naval Staff (2004) 11 NWLR (Pt. 885) 482; Okotie-Eboh v. Manager (2004) 18 NWLR (Pt. 905) 242, (2005) All FWLR (Pt. 241) 277.

Learned senior counsel referred to the conclusion of the judgment of the court below whereby, it dismissed the appellant’s appeal and affirmed the ruling of the trial court. He contended that the court below did not give any reason for its decision to dismiss the appeal before it which it had already struck out in the preceding paragraph of the judgment. He submitted that a decision of a court, without the reason for the same is in law, no decision at all. He submitted further that the substance of a court judgment is the ratio decidendi but not in the mere passing remarks. He contended that every court whose decision is subject to appeal is required to state the reason(s) for its decision to enable the parties know how the court arrived at its decision.

He relied on Abubakar v. Nasamu (No. 1) (2012) All FWLR (Pt. 630) 1207, (2012) 17 NWLR (Pt. 1330) 523; Ogboru v. Uduaghan (2012) All FWLR (Pt. 651) 1475, (2012) 11 NWLR (Pt. 1311) 357; P.D.P. v. Okorocha (2012) All FWLR (Pt. 626) 449, (2012) 15 NWLR (Pt. 1323) 205; Oyeyemi v. Irewole L.G. (1993) 1 NWLR (Pt. 270) 462.

Learned senior counsel contended that the court below abdicated its duty to consider the substantive issues placed before it in the appeal despite having heard the appeal contemporaneously with the preliminary objection. He further contended that despite declining to consider the appeal on the merit, the court below proceeded to affirm the ruling of the trial court, without proffering reason for the decision. He submitted that the decision of the court below dismissing the appeal and affirming the trial court’s decision is a nullity and he urged the court to so hold.

The appellant referred to section 22 of the Supreme Court Act, Cap. S15, Laws of the Federation of Nigeria, 2004. He contended that the Supreme Court is empowered to exercise full jurisdiction over a case and deal with it in the same way a trial court or the court below would have done. He however contended further that before this court would invoke its said omnibus powers, it must ensure that the following are considered:-

(a) The availability before it of all necessary materials on which to consider the request of the party;

(b) The length of time, between the disposal of the action in the court below and the hearing of the appeal at the Supreme Court; and,

(c) The interest of justice to eliminate further delay in the hearing of the matter and minimize the hardship of the party.

He relied on Odedo v. I.N.E.C. (2007) All FWLR (Pt. 392) 1907, (2008) 17 NWLR (Pt. 1117) 554; Obi v. I.N.E.C. (2007) All FWLR (Pt. 378) 1116, (2007) 11 NWLR (Pt. 1046) 564; Ladoja v. I.N.E.C. (2007) All FWLR (Pt. 377) 934, (2007) 12 NWLR (Pt. 1047) 119; Yusuf v. Obasanjo (2003) FWLR (Pt. 185) 507, (2003) 16 NWLR (Pt. 847) 554.

Learned senior counsel referred to the two issues the appellant considered to be in controversy in the appeal before the court below and urged the court to determine same and make appropriate orders. He referred to the documents in the record already transmitted and contended that since the substantive matter is still pending before the Federal High Court, Lagos, it is in the interest of justice that this court steps into the shoes of the court below and deal with the real issues earlier identified rather than remitting same to the court below. He urged the court to invoke section 22 of the Supreme Court Act and resolve the real issues put before the court below which it failed to consider.

From the eight grounds of appeal filed by the appellant, the 1st respondent distilled the following two issues as it considered germane to the just determination of this appeal, to wit:-

“1. Whether from the facts and circumstances of this case, the court below, was right in upholding the 1st respondent’s preliminary objection and consequently striking out the appellant’s notice of appeal which was filed without the statutorily required leave of court? (Distilled from grounds 4, 5, 6, 7 and 8 of the notice of appeal).

2. Whether the court below was right in affirming the ruling of the trial court dismissing the appellant’s preliminary objection after finding that the appellant’s notice of appeal against the ruling was incompetent? (Distilled from grounds 1, 2 and 3 of the notice of appeal)”

Learned senior counsel for the 1st respondent took the issues seriatim. On issue No. 1, he contended that it is now settled beyond equivocation that by a combined reading of sections 241 and 242 (1) of the 1999 Constitution of the Federal Republic of Nigeria, and section 14 of the Court of Appeal Act, appeals against interlocutory decisions of a High Court mandatorily require the leave of the High Court or of the court below to be first sought and obtained before filing the notice of appeal, in so far as the grounds of appeal are not based on grounds of law alone. In other words, obtaining leave of court is a desideration to the successful exercise of a right of appeal whenever the decision complained against is an interlocutory decision and grounds of appeal are of mixed law and facts.

He contended further that there is no dispute that the appellant did not first seek and obtain leave of either the High Court or the court below before it filed its notice of appeal to the court below and that parties agreed on the point that the vexed decision of the trial court delivered on 12 July 2013 is an interlocutory decision rather than a final decision, as same did not determine the rights of the parties in the 1st respondent’s suit. The point of divergence between the parties is the question whether the grounds of appeal before the court below were grounds of mixed law and facts, thus requiring leave of the trial court or of the court below or grounds of law alone.

Learned senior counsel contended that a notice of appeal is an originating process which activates the jurisdiction of an appellate court. He relied on P.M.B. Ltd v. N.D.I.C. (2011) 12 NWLR (Pt. 1261) 253 at 262; Nigerian Navy v. Labayo (2012) All FWLR (Pt. 640) 1237, (2012) 17 NWLR (Pt. 1328) 56 at 81.

He submitted that the principles that should guide a court in its quest for the proper determination of whether a ground of appeal is ground of law, a ground of mixed law and facts or simply a ground of fact has been laid down by this court in Ogbechie & Ors. v. Onochie & Ors. (1986) 2 NWLR (Pt. 23) 484 at 491.

Learned senior counsel contended that in arguing that the grounds of appeal before the court below were grounds of law alone, the appellant set out the grounds of appeal and contended that they were grounds of law, alone. He submitted that the approach adopted by the appellant is misleading and contravenes the directives of this court. He relied on Kisdhadadi v. Sarkin Noma (2007) 13 NWLR (Pt. 1052) 510 at 522.

He referred to the notice of appeal filed by the appellant at the court below at pages 1551 - 1555 of the record of appeal and considered each of the four grounds of appeal raised in the said notice of appeal. He submitted that all the questions necessarily involve evaluation of facts and hence the grounds of appeal are grounds of fact or at best of mixed law and facts and he urged the court to so hold. He submitted that where an appellant ought to have sought leave before filing his notice of appeal and no such leave was sought, the appeal is incompetent and liable to be struck out. He relied on Abubakar v. Waziri & Ors. (2008) All FWLR (Pt. 436) 2025, (2008) NWLR (Pt. 1108) 507; Coker v. U.B.A. Plc (1997) 2 NWLR (Pt. 490) 641; Njemanze v. Njemanze (2013) All FWLR (Pt. 672) 1658, (2013) 8 NWLR (Pt. 1356) 376; Garuba & Ors. v. Omokhodion & Ors. (2011) All FWLR (Pt. 596) 404, (2011) 6 NMLR 143 at 165.

Learned senior counsel submitted that by a combined reading of the extant provisions of sections 241(2) and 242 Constitution of the Federal Republic of Nigeria, 1999 and section 14 of the Court of Appeal Act, and on the strength of the judicial authorities cited, the court is urged to resolve the issue against the appellant; uphold the finding of the court below that the appellant’s notice of appeal having been filed without the requisite leave of court, is consequentially incompetent and was correctly struck out.

On issue No. 2 formulated by the 1st respondent, the learned senior counsel contended that the effect of a combined consideration of grounds 1, 2 and 3 of the appellant’s notice of appeal against the judgment of the court below will reveal that the appellant’s grouse with the judgment revolves around the question of whether the court below was right in affirming the ruling of the trial court dismissing the appellant’s preliminary objection to the competence of the substantive suit. Learned senior counsel contended that in arguing this issue, the appellant has made heavy weather of the fact that the court below dismissed the appellant’s appeal after striking out the notice of appeal. He submitted that this is non-issue.

He referred to the judgment of the court below and to the extent that the court had already struck out the notice of appeal for incompetence, he submitted that there was nothing left to dismiss and the order of striking out remains the only extant order of the court below. He submitted further that, indeed, the law is that where a dismissal order is made in circumstances where the action cannot be said to have been determined on the merits, such dismissal would be legally construed as a mere striking out and not a dismissal on the merits. He relied on Panabina World Transport v. Olandeen International & 4 Ors. (2010) 12 SC (Pt. 111) 30 at 49.

The respondent contended that assuming without conceding that the court below was wrong to dismiss the appellant’s appeal and affirm the trial court’s ruling rather than merely striking out the appeal for incompetence, the 1st respondent submitted that this is a mere error or slip which is not substantial enough to warrant the court reversing the entire judgment of the court below.

He submitted further that it is not every error of a court that has the effect of leading to a reversal of the judgment by an appellate court. For the court to set aside or reverse the decision of the court below, such wrong complained about must have occasioned a serious miscarriage of justice against the aggrieved party. He relied on Bayol v. Ahemba (1994) 10 NWLR (Pt. 623) 381; Pan Atlantic Shipping & Trans v. Rhein Mass GMBH (1997) 3 NWLR (Pt. 493) 248.

Learned senior counsel submitted that even if this court find that the court below ought not to have made the order dismissing the appeal, having come to the right conclusion that the appellant’s notice of appeal was incompetent, the proper order for this court to make is not to allow this appeal, but to substitute the order of dismissal with an order striking out. He relied on Road Transport Employers Association of Nigeria v. National Union of Road Transport Workers (1992) NWLR (Pt. 224) 381.

On the contention of the appellant that this court ought to invoke the provisions of section 22 of the Supreme Court Act and deal with the issues in the appeal that was filed at the court below rather than remitting same to the court below for determination, learned senior counsel referred to the issues distilled by the appellant and 1st respondent respectively and went to town with his copious submissions on the appeal before the court below and finally urged the court to dismiss the appeal in its entirety and uphold the ruling of the court below dismissing the appellant’s appeal and upholding the trial court’s dismissal of the appellant’s preliminary objection.

As I stated earlier, the 2nd respondent did not file any brief of argument in this appeal. Even on the date this appeal was heard, learned counsel for the 2nd respondent announced to the court that he did not file any process and did not intend to file any process in the appeal. As a result, this appeal shall be resolved or determined based on the processes filed by the appellant and 1st respondent only.

I have carefully examined the two issues formulated by both the appellant and 1st respondent respectively and I have come to the conclusion that their respective issues having been duly formulated from the same grounds of appeal filed by the appellant and saying the same thing though slightly differently couched, I shall utilize the two issues of the appellant to determine this appeal.

Issue No. 1

The first issue is whether the court below was right in holding that the appellant’s notice of appeal before it, filed without leave of court was incompetent thereby proceeding to strike out same on account that the grounds of appeal contained therein are not grounds of law alone but of mixed law and fact.

As I earlier stated, the appellant herein was also the appellant at the court below and a defendant before the trial Federal High Court, Lagos Division. It had filed an appeal before the court below against the decision of the trial court, but the said appeal was decided by the court below upon the preliminary objection raised by the 1st respondent. That had led to the instant appeal.

There is no doubt that appellate jurisdiction of both the court below and this court are provided for in the Constitution.

Subject to the provisions of the Constitution, the Court of Appeal shall have jurisdiction to the exclusion of any other court of law in Nigeria, to hear and determine appeals from the Federal High Court, the National Industrial Court, the High Court of the Federal Capital Territory, Abuja, High Court of a State, Sharia Court of Appeal of the Federal Capital Territory, Abuja, Sharia Court of Appeal of a State, Customary Court of Appeal of a State and from decision of a Court Martial or other Tribunals as may be prescribed by an Act of the National Assembly. See; section 240 of the Constitution of Federal Republic of Nigeria, 1999 (as amended).

However, with regard to appeals as of right from the Federal or State High Courts, section 241 provides inter alia, as follows:

“Section 241(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 cases:-

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

(b) Where the ground of appeal involves questions of law alone, decisions in any civil or criminal proceedings;

(c) Decisions in any civil or criminal proceedings on questions as to the interpretation or application of this Constitution.

But subject to the provisions of section 241 of the Constitution above, an appeal shall lie from decisions of the Federal High Court or a State High Court to the Court of Appeal with the leave of the Federal High Court or that of States High Court or the Court of Appeal. See section 242(1) of the 1999 Constitution of Federal Republic of Nigeria (as amended).

Yet by law, appeals against interlocutory decisions of a High Court require the leave of the High Court or of the Court of Appeal to be first sought and obtained before the filing of the notice of appeal, in particular, where the grounds of appeal are not based on grounds of law alone. See section 14 of the Court of Appeal Act.

In the instant matter, certain facts are not in dispute and are very clear from doubt, on the records. They are:

i. The fact that the appeal in question to the court below was an interlocutory decision of the Federal High Court.

ii. The appellant neither sought nor obtained any leave of either the Federal High Court or the court below before the notice of appeal was filed.

What is therefore being contested is whether or not there was need to or rather whether the grounds of appeal are not of law alone that will not require that leave of court be first sought and obtained before the filing of the notice of appeal. In other words, the point of divergence between the parties is the question whether the grounds of appeal filed by the appellant before the court below were grounds of mixed law and facts which require leave of either the trial Federal High Court or that of the court below or ground of law alone.

The appellant had contended strongly that there was no need to have sought leave of court before the appellant filed the notice of appeal in the case that was put before the court below.

But the 1st respondent thought differently, that with the grounds of appeal contained in the notice of appeal, the appellant required and ought to have obtained leave of either the trial Federal High Court or the court below. And not having so obtained the said required leave, it considered the said notice of appeal incompetent and liable to be struck out.

However, it is trite law that in order to see whether or not the alleged grounds of appeal filed with the notice of appeal before the court below are grounds of mixed law and facts thus requiring leave of court before being filed, there is need to state the said grounds and their respective particulars. They are as follows:

Grounds of appeal:

1. The learned trial judge erred in law when his lordship held that the appellant - a purported agent of NIMASA was a proper party to the action for acts purportedly done by NIMASA, when NIMASA itself was not joined as a party.

Particulars

(i) By its originating summons, the 1st respondent sought the determination of questions relating to the interpretation of certain provisions of some statues relating to NIMASA’s supervisory functions over it (1st respondent).

(ii) In the affidavit in support of the originating summons, the 1st respondent described the appellant as an agent of NIMASA.

(iii) All actions complained of in the said affidavit were said to have been carried out by NIMASA - but that certain equipment of appellant were used by NIMASA in carrying out the actions.

(iv) NIMASA was not joined as a party to the action but an ex-parte order of injunction was obtained against the appellant in a bid to bind NIMASA.

2. The learned trial judge erred in law when his lordship held that, the appellant was properly joined as a party since there were allegations of wrong doing in some paragraphs of the affidavit in support of the originating summons.

Particulars

(i) It is the substantive claim/reliefs sought, rather than mere mention or narration of a person’s action in an affidavit that is required to establish a cause of action against the person.

(ii) The crux of the 1st respondent’s action before the honourable court was the interpretation of some provisions of certain law relating to its obligations and the supervisory functions of NIMASA - the purported principal of the appellant who was not joined as a party.

(iii) There was no specific relief sought against the appellant in the questions proffered for resolutions or the reliefs sought.

(iv) It is clear that the appellant, being a private body, is in no position to ensure the compliance with or execution of any provision of law relating to statutory bodies such as NIMASA.

3. The learned trial judge erred in law when his lordship refused to decline jurisdiction to entertain the suit when the proper parties necessary for proper resolution of the questions were not before it.

Particulars

(i) One of the prerequisites for a court to assume jurisdiction is the presence of necessary parties before it. Bello v. I.N.E.C. (2010) All FWLR (Pt. 526) 397, (2010) 3 NWLR (Pt. 1196) 341 at 410.

(ii) The 1st respondent’s originating summons primarily sought the interpretation of laws relating to the exercise of NIMASA’s supervisory functions over it which enable it to demand for taxes and levies and other payments.

(iii) NIMASA was not joined as a party to the action.

(iv) The Attorney-General was made the 1st defendant to the action and its joinder was predicated upon a conception that it was NIMASA’s principal.

(v) The appellant herein was joined as 2nd defendant to the action and described as an agent of NIMASA.

4. The learned trial judge erred in law when his lordship held that non-compliance with the pre-action notice to NIMASA under section 53(2) of the NIMASA Act, did not rob the court of jurisdiction to entertain the substantive suit which was brought against appellant, as an agent of NIMASA, because the suit raised claims in tort which could be proceeded with against principal and agent whether jointly or severally.

Particulars

(i) The distinction between action and other suits is not a valid exemption to compliance with the provisions of section 53(2) of the NIMASA Act.

(ii) The substantive action was not for redress in tort, but one for interpretation of statutory provision.

(iii) The jurisdiction of court over ancillary reliefs (if any) is lost where there is no jurisdiction to entertain the principal claim.

(iv) Pre-action notice in section 53(2) of NIMASA Act, prohibits the institution of a suit against NIMASA, its Directors, Board members, and employees without first giving 30 days’ notice to the agency with indication of the cause of action and reliefs sought

(v) Failure to give pre-action notice, where affected party objects, robs the court of jurisdiction.

(vi) The appellant having been sued as agent of NIMASA is entitled to raise the point of objection.

It is trite law, that it is difficult to distinguish a ground of law from a ground of fact. However, the grounds of appeal in any case concerned must be thoroughly examined to see whether the grounds reveal a misunderstanding by the lower court or tribunal of the law or a misapplication of the law to the facts already proved or admitted, in that case, it would be simply a question of law or one that would require questioning the evaluation of facts by the lower court or tribunal before the application of the law, in which case it would amount to question of mixed law and fact. But where the appeal is against the findings made by the court below, then the question is on facts and then leave of court will be required before filing the notice of appeal. See J. B. Ogbechie & Ors. v. Gabriel Onochie & Ors. (1986) 1 SC 54, (1986) 1 NWLR (Pt. 23) 484.

It is equally trite law and constitutionally required that while appeal to the court below from the trial court on the issue of law is as of right, an appeal purely on the facts or mixed law and facts requires leave of the court from where appeal lies or the court to which the appeal lies.

It had been held that in determining the nature of a ground of appeal, the ground and its particulars must be read together.

It is only by reading the ground as a whole that the complaint of the appellant about the judgment on appeal will be apparent. See Nnnanyelugo L. A. Orakosim & Ors. v. Grancis Ifeanyichukwu Menkiti (2001) FWLR (Pt. 52) 2068, (2001) 9 NWLR (Pt. 719) 529, (2001) 5 SC (Pt. 1) 72.

There is no doubt, and it is trite law that a ground of appeal does not become a ground of law merely or simply because it is so described in the notice of appeal. Indeed, the ground of appeal itself with its particulars must clearly show that it is a ground of law for it to require no leave of court before being filed.

This court in is several decisions had long laid down the general principles to guide the court and parties in determining whether a particular ground of appeal is one of law, or fact or mixed law and facts. The following are three ways to determine a question of law:

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

(b) 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 instance, a question relating to the construction of a statutory provision.

(c) All questions within the judicial powers of a judge to determine and not that for a jury, for instance, the interpretation of documents. In other words, any ground of appeal which alleges misunderstanding of the lower court of the law or misapplication of the law to the facts already proved, admitted or undisputed, or a misdirection, is purely a ground of law. See Ogbechie & 7 Ors. v. Onochie & Ors; Nwadike v. Ibekwe (1987) 4 NWLR (Pt. 67) 718; Metal Construction (West Africa) Ltd v. Migliore (1990) 1 NWLR (Pt. 126) 299; A.C.B. Plc v. Obimiami Brick & Stone (1993) 5 NWLR (Pt. 294) 399. General Electric Co. v. Hancy A. Akande & Ors. (2010) 18 NWLR (Pt. 1225) 596.

However, where the facts are in dispute and the issue of evaluation of the facts by the lower or trial court arises before the application of the law, this will constitute a matter of mixed law and fact. See U.B.A. Ltd v. Stahlbau GMBH & Co. KG (1989); Briggs v. Okoye (2005) 4 SC 89 at 94. As I had earlier stated in this judgment, the decision of the trial court being appealed was not a final decision but interlocutory. Furthermore, it is not being disputed that the appellant neither sought nor obtained leave of either the trial Federal High Court or that of the court below. But to the latter, the appellant had argued that no leave was required to file the notice of appeal being challenged, the four grounds being grounds of law alone.

I have carefully perused the vexed grounds of appeal with their particulars. There is no doubt that grounds 1, 2 and 3 of the notice of appeal are talking about issue of proper and necessary parties in the action before the trial Federal High Court.

The issue of who is a proper or necessary party to be joined in an action depends on the evidence to be adduced before the court or rather the facts of the case. It has long been held that proper parties are those who though not interested in the plaintiff’s claim, are made parties for some good reasons, for example, in an action instituted to rescind a contract, any person who was active or concurring in the matters which gave the plaintiff the right to rescind, is a proper party to the action. Necessary parties are those who are not only interested in the subject matter of the proceedings but also who in their absence, the proceeding could not be fairly dealt with. In other words, the question to be settled in the action between the existing parties must be a question which cannot be properly settled unless they are parties to the action instituted by the plaintiff. See Chief Abusi David Green v. Chief (Dr.) E. T. Dublin Green (1987) 3 NWLR (Pt. 61) 481, (1987) LPELR SC 206/1986, (2001) FWLR (Pt. 76) 795; Amon v. Raphael Tuck & Cons (1956) 1 WB 357; Re Vandervills Trust (1971) AC 812; Re Vandervelle (1969) 3 All ER 497.

It is admitted that there were allegations of wrong doing in couple of paragraphs of the affidavit in support of the originating summons. Therefore, whether or not proper parties were before the trial court and whether there was proper evaluation of theaffidavit evidence to warrant the decision taken by the trial Judge will be a question of mixed law and facts.

Now to ground 4 of the notice of appeal. This ground when read with the particulars as it should be read, shows that the issue of pre-action notice to NIMASA under section 53(2) of the NIMASA Act cannot be considered unless and until the question of proper parties is resolved. In other words, the issue of non-compliance with the requirement of pre-action notice does not arise without the resolution of the necessity of its being a party who was required to be before the court. In the same vein, whether or not the substantive suit of the 1st respondent before the trial court which was brought against the appellant as an agent of NIMASA, is a suit that raised claims in tort which could be proceeded with against principal and agent is a question of mixed law and fact. In the result, it is clear that none of the four grounds of appeal raised in the vexed notice of appeal filed by the appellant is a pure ground of law. Indeed, they are all grounds of mixed law and facts which the law says cannot be filed without the leave of either the trial court or the court below.

In the final analysis, the appellant not having shown that leave of either the trial Federal High Court, Lagos or the Court of Appeal, Lagos division was duly obtained before the notice of appeal dated 23 July 2013 against the interlocutory decision of the trial court was filed, the said notice of appeal was incompetent and deserve to be struck out. Accordingly, the court below was right to have held that the said notice of appeal was incompetent and properly struck out.

Having found that the vexed notice of appeal filed by the appellant which was challenged by the 1st respondent was incompetent, leave not having been obtained to file same and was appropriately struck out, I do not consider it necessary to further consider the second issue raised by the appellant. In any event, once a notice of appeal is adjudged incompetent and struck out, there was nothing left with the appeal.

In the circumstance, and without any further ado, this appeal is lacking in merit and should be dismissed. Appeal is accordingly dismissed.

The decision of the court below delivered on 11 August 2014 by which the appellant’s notice of appeal filed before the court below was struck out is affirmed.

Parties are to bear their respective costs.

**MUHAMMAD JSC:**

My learned brother, Ariwoola JSC, graciously, made available to me, a copy of his lead judgment just delivered. I agree with him in his reasoning and conclusion. I, too, dismiss the appeal and abide by the consequential orders made in the lead judgment.

**AKA’AHS JSC:**

My learned brother, Ariwoola JSC made available to me before now, his judgment in this appeal which turns on the notice and grounds of appeal filed by the appellant after the Federal High Court sitting in Lagos had dismissed its preliminary objection together with the application seeking to discharge the order of interim injunction granted against it on 12 July 2013 in suit No. FHC/C/L/CS/847/2013. The appellant was dissatisfied with the ruling of the trial Federal High Court and appealed against it in appeal No. CA/L/849B/2013.

On 11 August 2014, the Court of Appeal struck out the appeal on account of incompetent notice and grounds of appeal since leave to appeal was not granted either by the Federal High Court or the Court of Appeal. It is against this judgement delivered on 11 August 2014 that the appellant further appealed to this Court and filed its notice of appeal containing eight grounds on 22 August 2014 from which two issues were distilled for determination.

We should not lose sight of the appeal which was struck out by the lower court. The notice was accompanied by four grounds of appeal. The said grounds shorn of their particulars are as follows:-

“Ground one

The learned trial judge erred in law when his lordship held that the appellant - a purported agent of NIMASA - was a proper party to the action for acts purportedly done by NIMASA, when NIMASA itself was not joined as a party.

Ground two

The learned trial judge erred in law when his lordship held that the appellant was properly joined as a party since there were allegation of wrong in some paragraphs of the originating summons.

Ground three

The learned trial judge erred in law when his lordship refused to decline jurisdiction to entertain the suit when the proper parties necessary for proper resolution of the questions were not before it.

Ground four

The learned trial judge erred in law when his lordship held that non-compliance with the pre-action notice to NIMASA under section 53(2) of the NIMASA Act, did not rob the court of jurisdiction to entertain the substantive suit which was brought against appellant, as an agent of NIMASA, because the suit raised claims in tort which could be proceeded with against principal and agent either jointly or severally”.

Both the grounds of appeal contained in the notice of appeal in the court below as well as the notice and grounds of appeal to this court must be scrutinised to see if they are grounds of law as claimed by the appellant or grounds of mixed law and fact as contended by the respondents in the court below and in this court. The use of the phrase “error in law” is not a magic wand that will automatically transform a ground of appeal into a ground of law. Guidelines have been given on how a ground of law is to be distinguished from one that is of mixed law and fact. See Ogbechie v. Onochie (1986) 1 NWLR (Pt. 23) 484; Nwadike v. Ibekwe (1987) 4 NWLR (Pt. 67) 718. In order to determine the nature of a ground of appeal, both the grounds and the particulars must be read together. See Nnanyelugo L. A. Orakasim & Ors. v. Francis Ifeanyichikwu Menkiti (2001) FWLR (Pt. 52) 2068, (2001) 9 NWLR (Pt. 719) 529.

My lord, Ariwoola JSC has admirably dissected the grounds of appeal in the court below and in this court and arrived at the conclusion that the court below was right to strike out the appeal since the grounds in the notice of appeal were grounds of mixed law and fact and leave was required before the appeal could become competent. Since leave was not sought either in the trial court or the court below, the appeal was incompetent and liable to be struck out which the court below did. I entirely agree.

The appeal lacks merit and it is accordingly dismissed. I also endorse the order that parties should bear their respective costs.

**NWEZE JSC:**

My lord, Ariwoola JSC obliged me with the draft of the leading judgement just delivered. I agree with his lordship’s reasoning and conclusion. In consequence, this short contribution would be circumscribed to a juridical phenomenon which has become an albatross to many appeals. As shown in the leading judgement, the respondent’s preliminary objection, at the lower court, was predicated on the irrefutable contention that, whereas the appellant’s grounds of appeal broached questions of mixed law and fact, no prior leave of either the Federal High Court or of the lower court was sought and obtained; hence the appeal was incompetent ab initio.

This submission found favour with the lower court. In this further appeal, the appellants still maintained that they needed no such leave either from the trial Federal High Court or the lower court. In effect, they impugned the conclusion of the lower court on this question.

Like the leading judgement, I find no merit in this complaint against the position which the lower court took; that is, its decision striking out the notice of appeal before it as being incompetent.

My lords, this conclusion notwithstanding, it ought to be restated here that even this court had confessed its difficulty in distinguishing a ground of law from a ground of mixed law and fact, Ogbechie v. Onochie (1986) 1 NWLR (Pt. 70) 370. There, Eso JSC, approvingly, adopted the scintillating expose on the subject by C. T. Emery and Professor B. Smythe in their article titled, “Error of Law in Administrative Law”, in Law Quarterly Review, Vol. 100 (October 1984).

Other examples include: U.B.A. Ltd v. Stahlbau Gmbh & Co. (1989) 3 NWLR (Pt. 110) 374, 391-392; Obatoyinbo v. Oshatoba (1996) 5 NWLR (Pt. 450) 531, 548; M.D.P.D.T. v. Okonkwo (2001) FWLR (Pt. 44) 542, (2001) 3 KLR (Pt. 117) 739, etc.

Instructively, however, this difficulty, notwithstanding, this court has, ingeniously, fashioned out formulae for navigating through the nuances of the characterisation of grounds of appeal.

The first formula aims at facilitating the ascertainment of what constitutes a ground of appeal. It comes to this: a court has a duty to do a thorough examination of such grounds which the appellant filed.

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

On the other hand, if the ground complains of the manner in which the lower court evaluated the facts before applying the law, the ground is of mixed law and fact. The determination of grounds of fact is much easier. Simply put, these formulae simply mean that it is the essence of the ground; the main grouse: that is, the reality of the complaint embedded in that name, that determines what any particular ground involves, Abidoye v. Alawode (2001) FWLR (Pt. 43) 322, (2001) 3 KLR (Pt. 118) 917, 919; N.E.P.A. v. Eze (2001) 3 NWLR (Pt. 709) 606; Ezeobi v. Abang (2000) FWLR (Pt. 56) 652, (2000) 9 NWLR (Pt. 672) 230; Ojukwu v. Kaine (2000) 15 NWLR (Pt. 691) 516.

In effect, it is neither its cognomen nor its designation as “error of law” that determines the essence of a ground of appeal, Abidoye v. Alawode 927; U.B.A. Ltd v Stahlbau Gmbh and Co. (1989) 374, 377; Ojemen v. Momodu (1983) 3 SC 173, (2001) FWLR (Pt. 37) 1138. Against this background, I sympathize with the appellants’counsel, and indeed, all counsel who have been enmeshed inthis nightmare. But wait a minute! My lords, permit me to add here that my sympathy for counsel is of no moment as the law brooks neither sentiment nor empathy: Suleiman v. C O. P., Plateau State (2008) 21 WRN 1, 13; Udosen v. State (2007) All FWLR (Pt. 356) 669, (2007) 4 NWLR (Pt. 1023) 125, 137; Ezeugo v. Ohanyere (1978) 6 - 7 SC 171; Oniah v. Onyia (1989) 1 NWLR (Pt. 99) 514; Omole and Sons Ltd v. Adeyemo (1994) 4 NWLR (Pt. 336) 48.

Accordingly, I agree with the lead judgement that this appeal is unmeritorious and must fail. As a result, I also enter an order dismissing it. I abide by the consequential orders in the lead judgment.

**SANUSI JSC:**

The judgment prepared by my learned brother, Ariwoola JSC was made available to me before now. Having perused same, I find myself in entire agreement with his reasoning and conclusion that this appeal is bereft of any merit and deserve to be struck out.

His lordship had thoroughly and painstakingly dealt with all the salient issues canvassed by the learned counsel to the parties before he arrived at such conclusion which I entirely agree with and adopt as mine. I also adjudge the appeal to be meritless. In affirming the judgment of the court below, I hereby also strike out the appeal and decline to award costs. Appeal struck out.

Appeal dismissed