**KURUNGU KAUDE**

**V.**

**ALHAJI AUDU MAIGISHIRI**

IN THE COURT OF APPEAL OF NIGERIA

THE 20TH DAY OF DECEMBER, 2013

CA/J/279/2010

**LEX (2013) - CA/J/279/2010**

OTHER CITATIONS

2PLR/2013/98

(2013) LPELR-22794(CA)

**BEFORE THEIR LORDSHIPS**

TIJJANI ABDULLAHI, JCA

ALI ABUBAKAR BABANDI GUMEL, JCA

IBRAHIM SHATA BDLIYA, JCA

**BETWEEN**

KURUNGU KAUDE - Appellant(s)

AND

ALHAJI AUDU MAIGISHIRI - Respondent(s)

**REPRESENTATION**

EMMA NWAEKWE - For Appellant

AND

C. D. KADALA - For Respondent

**ORIGINATING COURT**

1. GOMBE STATE HIGH COURT (Coram: Heman, CJ and Awak, J)

2. UPPER AREA COURT, BILLIRI (Coram: Alh. Umar Tukulma (Judge) and Mr. Dan Asabe Audu (Member))

3. GOMBE STATE TANGALE WAJA CIVIL AREA COURT BILLIRI (Alhaji Idris Umar Reme., Presiding)

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

REAL ESTATE AND PROPERTY LAW - LAND:- Dispute over title to land – Appeal arising therefrom – How treated

CONSTITUTIONAL LAW:- Section 241 (2) (a) and (b) of the 1999 Constitution – When appeal shall lie as of right to the Court of Appeal from a decision of the High Court – When leave is required

**PRACTICE AND PROCEDURE ISSUES**

APPEAL - APPEAL AS OF RIGHT:- When an appeal shall lie as of right to the Court of Appeal from a decision of a High Court

APPEAL **–** GROUNDS OF APPEAL:- – Need for grounds of appeal to relate to the decision, the ratio decidendi of the case appealed from

APPEAL - ISSUES FOR DETERMINATION: Requirement that an issue for determination in an appeal must not only arise from and relate to the grounds of appeal filed and no more, but must be such a proposition of law or of fact or both so cogent, weighty and compelling that a decision on it in favour of a party to the appeal will entitle him to the Judgment of the court - Any part of a brief or argument which does not arise directly from at least one of the grounds of appeal filed – Whether is incompetent and ought to be disregarded

**MAIN JUDGMENT**

ALI ABUBAKAR BABANDI GUMEL, J.C.A. (DELIVERING THE LEADING JUDGMENT):

This matter started as suit No. 42107 before the Tangale Waja Civil Area Court Billiri, Gombe State presided by Alhaji Idris Umar Reme, Principal Judge. Judgment was delivered on 2/08/07 in favour of the Appellant herein. (see page 20 of Record of Appeal). The Respondent herein Alhaji Audu Maigishiri appealed to Upper Area Court, Billiri in Suit No. JUD/BUAC/43183 dated 6/08/08 -Coram Alh. Umar Tukulma (Judge) and Mr. Dan Asabe Audu (Member). In a judgment dated 23/4/09, the Upper Area Court dismissed the appeal and affirmed the Judgment of the Tangale Waja Civil Area Court, Billiri in favour of Kurungu Kaude.

In a notice of appeal dated and filed on 24th April,2009, Alhaji Audu Maigishiri appealed against the Judgment of the Upper Area Court, Billiri to the Gombe State High Court. It is appeal No.GM/40A/09. In a Judgment dated 6th August, 2010, the High court (coram Heman, CJ and Awak, J) decided thus:-

"In the result, we hereby resolve the issue in favour of the Appellant and hold that the judgment of the Trial court which was affirmed by the lower court was against the weight of evidence. We hereby allow this appeal, set aside the judgments of the Trial Court and of the upper Area court and dismiss the Respondent's claim in favour of the Appellant."(see page 48 lines 22 - 26 of record of appeal).

The Appellant herein, as the Respondent at the High Court, was dissatisfied with the Judgment and appealed to this Court in a notice of appeal filed on 16/8/2010. It is predicated on 4 grounds of appeal with copious particulars. For reasons of exigency and convenience I hereby set out these grounds of appeal with their particulars. They are:-

*GROUND ONE:*

*The decision of the lower court is against the weight of evidence.*

*PARTICULARS OF ERROR*

*1. Plaintiff's at the trial court clearly established Appellant's roots of title.*

*2. Defendant/Respondent's witnesses were unable to controvert the plaintiff's witnesses yet lower court did not factor this in Judgment.*

*GROUND TWO*

*Lower court erred in law as it interfered with trial courts findings of fact in the absence of evidence in rebuttal.*

*PARTICULARS OF ERROR*

*1. PWI at trial court clearly stated the root of title of the plaintiff Appellant and which was believed by the court and the Upper Area Court.*

*2. Testimonies of the Appellants witnesses remained certain, convincing, and uncontroverted as certified by the trial and Upper Area Court (Court of 1st Appeal).*

*3.**PW1, II and III remained consistent in the fact that land belonged to the Appellant through BALA his progenitor.*

*4. Whereas respondent traced his root of title through Alhassan -no evidence was led to sustain Alhassan's root of title as against those of the Appellant.*

*GROUND THREE:*

*The learned justices of the lower court erred in law and misdirected themselves when they held inter alia: "looking through the Judgment of the trial court...The trial court failed to properly assess and evaluate the evidence before it in arriving at its decision we are of the view that this failure on its part rendered its findings perverse,, which occasioned a miscarriage of justice and resolved the case against the Appellant whereas these findings were covered by the findings of the trial court.*

*PARTICULARS OF ERROR*

*1. PG 1B trial court's record "PW1 by Name Nerus Rubenu\_he said the place belongs to his uncle because they grew up there and he has never heard that Baba Bala sold the place". Lines 6-8.*

*2. Pg 18 "PW2 by name Bello Mohammed said there was Baba Kurungus farmland at Awai" Lines 10-12.*

*3. Pg 18 "PW3 after he has affirmed he said the father of Kurungu by name Bala reside there with fobe Bukar\_he was at the western side while Bala is at the eastern part"\_\_lines 15-20.*

*4. Pg 19 "\_\_-since Alhassan has failed to establish the plot, this goes on to show that he has no plot talk less of selling it---and this sale has no witness and no sale agreement to enable us see the seller and the witnesses\_\_". Lines 1-29.*

*GROUND FOUR*

*The Judgment of the High court of Gombe sitting on Appeal is unreasonable, unwarranted and cannot be supported having regard to the weight of evidence adduced.*

To argue the appeal, learned counsel to the Appellant filed a brief of argument on 19/11/2010. The Respondents' brief is dated 23/12/2010 but filed on 05/01/2011. Learned Counsel to the Appellant distilled and argued 2 issues for the determination of this appeal. They are:-

*1. Having regard to the claim and the evidence adduced before the trial court whether it was correct to find that the Appellant did not establish his claim for a declaration of title (Grounds 1, 2 and 4).*

*2. Reconciling the trial Court record whether it could be said that the findings of that court was perverse. (Ground 3)*

*Learned Counsel to the Respondent formulated the following 3 issues for the determination of this appeal. They are:-*

*(a) Whether by virtue of the provision of Section 241 of the 1999 Constitution of Nigeria, there is a competent appeal before the Court.*

*(b) Whether the grounds of appeal filed by the Appellant are grounds of law which do not require the leave of Court.*

*(c) Whether the High Court was right in holding that the Appellant did not prove his case by reliable evidence.*

Before the hearing of this appeal, learned Counsel to the Respondent, Mr. C. D. Kadala filed a notice of preliminary objection dated 22/4/13 but filed on 23/04/13, pursuant to Order 10 Rules 1 of the Rules of this Court, 2011. It seeks for the following 3 reliefs. They are:-

*1. An order striking out or dismissing this appeal No.CA/J/279/2010 for being incompetent, null and void.*

*2. An order striking out all the grounds of appeal contained in the notice of appeal filed on 16/8/2010 for being incompetent null and void*

*3. Leave to adopt the argument contained in the respondent's brief of argument filed on 5/1/2011 with regards to the preliminary objection.*

This notice of objection is predicated on the following 4 grounds. They are:-

*1. The Judgment of the High Court in Appeal No.GM/40A/09 delivered on 6/8/2010 against which the Appellant/Respondent is appealing is not of the High Court sitting at first instance.*

*2. Leave was not sought for and obtained before the appeal was filed as required by Section 242(1) of the 1999 Constitution of the Federal Republic of Nigeria (as amended).*

*3. All the grounds of appeal filed by the Appellant/Respondent are not grounds of law alone but are grounds of facts or mixed law and facts and the leave of court has not been obtained to file the grounds.*

*4. The notice of appeal and the grounds of appeal filed in default of the leave of court are incompetent, null and void.*

At the hearing of this appeal, no mention was made of this notice of objection. It was never brought to the attention of the Court. It is however curious to note that it was this so-called notice of preliminary objection that was entirely argued, and nothing more, in the brief of argument of the Respondent. However, during the hearing, respective learned Counsel adopted and relied on their briefs of argument. While learned Counsel to the Appellant urged on us to allow the appeal and set aside the Judgment of the lower court, learned counsel to the Respondent urged on us to dismiss the appeal and affirm the Judgment of the lower court.

Before I go further I wish to point out that the Respondent's issues for the determination of this appeal do not appear to me to sufficiently flow from the grounds of appeal. I have earlier on in this Judgment set out the grounds of appeal in full. I have also set out the 3 issues formulated on behalf 'of the Respondent for the determination of this appeal. A very simple perusal and juxtaposition of the two reveals no direct relationship.

It is a well settled proposition of law in respect of which there can hardly be a departure that the grounds of appeal against a decision must relate to the decision and should constitute a challenge to the ratio of the decision. See SARAKI v. KOTOYE (1992) 11/12/SCNJ 26. This is the clear starting point.

Now, moving to the next level, it is well settled and defined law that an issue for determination in an appeal must not only arise from and relate to the grounds of appeal filed and no more, but must be such a proposition of law or of fact or both so cogent, weighty and compelling that a decision on it in favour of a party to the appeal will entitle him to the Judgment of the court. See SARAKI v. KOTOYE (1992) 6 SCNJ 76. Also in both the cases of ONWUMERE v THE STATE (1991) 4 NWLR (Pt.186) 428 and OJE and ANOR v BABALOLA & ORS (1991) 4 NWLR (Pt.185) 267, the Supreme Court reemphasized its stand in many of its earlier decisions that issues for determination as well as arguments in an appeal should be based on the grounds of appeal duly filed. The court added further that any part of a brief or argument which does not arise directly from at least one of the grounds of appeal filed is incompetent and ought to be disregarded.

Therefore, to the extent of having been formulated without any direct relationship to the 4 grounds of appeal, the 3 issues formulated by learned Counsel Mr. Kadala, on behalf of the Respondent are and remain absolutely incompetent and are hereby struck out.

With respect to the notice of preliminary objection. It was duly served on learned counsel to the Appellant in good time as required by the extant provisions of Order 10 Rules 1 of the Court of Appeal Rules, 2011. Learned Counsel had ample time to respond to it in the very usual way by filing a reply brief as envisaged by the Rules of this Court. However learned Counsel failed to do so. Since learned counsel to the Respondent had filed a so-called brief, which only seemingly argued his preliminary objection but not the issues formulated on behalf of the Appellant or other issues he could have properly formulated directly from the 4 grounds of appeal, to this extent it remains a defective brief. According to the decision of the Supreme Court inTITILOYE v. OLUPO (1991) 7 NWLR (pt.204) 519 at 538 F-G, this court may permit the use of a defective brief of argument, particularly, if an objection is not raised against it. If an objection is not raised, the irregularity is regarded as having been waived, See also ONYEKWE V THE STATE (1988) 1 NWLR (Pt.72) 565.

Because the notice of preliminary objection has raised a very weighty issue of the competence of the notice of appeal and the jurisdiction of this court to entertain this appeal, no proper progress can be made in the hearing of this appeal without first and foremost putting this issue under scrutiny. Having set out the full antecedents of this appeal at the opening paragraphs of this judgment, there is no doubt that this appeal falls into the category of those appeals that are colloquially or euphemistically called "double appeals".

With respect to the status of an appeal in the category that this appeal finds itself, it appears to me that the decision of the Supreme Court in the old case of AQUA LTD v. ONDO STATE SPORTS COUNCIL (1988) 4 NWLR (pt.91) 622 at 655 - 656 could be relevant. According to this decision an appeal as of right can be filed in this court from the decision of a High Court when it is sitting as a court of first instance. And after considering all the circumstances, the Supreme Court further opined that in all instances where an appeal cannot be brought as of right leave of the High Court or this court must be sought and obtained. A number of other decisions of this court and the Supreme Court have decided that an appeal against the decision of a State High court in the exercise of its appellate jurisdiction on issues of fact alone or mixed law and fact cannot be brought to this court as of right but with the leave of the High Court or this court as the case may be see SAMUEL SOGBESAN V ADEBOWALE OGUNBIYI & ORS. (2006) 4 NWLR (Pt.969) 18, OLASUPO V. FABUSUYI (2012) LPELR 8572, ARUM & ANOR V. OKECHUKWU NWOBODO (2004) 9 NWLR (Pt.878) 411.

In SOGBESAN V. OGUNBIYI (supra) this court considered and applied the provisions of Section 241 (2) (a) and (b) of the 1999 Constitution and held that it provided for the instances under which an appeal cannot be brought to this court from the decision of a High Court as of right but with the leave of that court or this court. Both OLASUPO V. FABUSIYI (supra) and ARUM V. NWOBODO (supra) were similarly decided by this court while referring and applying the decision of KARIBI WHYTE, JSC in AQUA LTD V. ONDE STATE SPORTS COUNCIL (Supra).

With respect to the facts and circumstances in the instant appeal, a simple and careful perusal of the grounds of appeal will clearly show on the strength of very well known decisions of the Supreme Court that grounds 1, 2 and 4 are clearly grounds of facts alone, while ground 3, though couched in a language that suggests an error in law, is at best a ground of mixed law and fact. See OGBECHIE V. ONECHIE (1986) 2 NWLR (pt.23) 484 at 493.

On the strength of all the decisions of the Supreme Court and this Court available to me against the antecedents of this matter leaves me in no doubt that this appeal falls into the category of appeals that cannot be brought as of right but with the leave of the High Court or this Court. Looking at the entire record of appeal and more particularly the notice of appeal at pages 49 to 51 thereof does not indicate or show to my satisfaction that the Appellant herein sought for and obtained leave to bring this appeal to either the Gombe State High Court or this court. To that extent, the notice of appeal filed on 16/8/2010 to purportedly commence this appeal is irregular and this court totally lacks the competence and jurisdiction to entertain it as presently constituted. The notice of appeal and the appeal itself are struck out for being incompetent. I order for N30,000.00 costs against the Appellant in favour of the Respondent

**TIJJANI ABDULLAHI, J.C.A.**:

I read in draft the lead judgment of my learned brother **Gumel, JCA** just delivered. My Lordship has dealt with all the live issues that call for determination in this appeal. I entirely agree with his reasoning and conclusions arrived thereat. I have nothing more to add. I too struck out the notice of appeal and the appeal itself for being incompetent. I abide by the order as to costs contained therein.

**IBRAHIM SHATA BDLIYA, J.C.A.**:

I agree.