IN THE SUPREME COURT OF NIGERIA

Suit No: SC306/2001

Petitioner: Ekulo Farms Ltd & Anr
And
Respondent: Union Bank of Nigeria Plc

Date Delivered: 2006-04-21

Judge(s): Salihu Modibbo Alfa Belgore , Akintola Olufemi Ejiwunmi , Dahiru Musdapher , Walter Samuel Nkanu Onnoghen , I

Judgment Delivered

In the High Court of Justice of Anambra State of Nigeria, in the Onitsha Judicial Division holden at Onitsha, and in suit No 0/258/94, the Plaintiff under the undefended list procedure claimed jointly and severally against the Defendants the sum of N4, 912,797.30 (Four million nine hundred and twelve thousand seven hundred and ninety seven naira and thirty kobo) with interest at the rate of 21% per annum from 1/2/1994 up to, the date of judgment and thereafter at the rate of 5% per annum until the final liquidation of the judgment debt. The Writ of Summons marked 'undefended' was served on both Defendants and the suit was fixed for hearing on the 7/7/1994. The Defendants on the morning of 7/7/1994 moved a Motion praying for enlargement of time within which to file a Notice of Intention to defend the suit and deeming the Notice of Intention to Defend the action, exhibited as Exhibit 'A' to the affidavit in support of the Motion as duly filed and served. The Plaintiff opposed the application and filed Counter-affidavits. The Defendants after filing further affidavit in support of the Motion, finally moved the Motion on the 31/5/1995 and after hearing the arguments of Counsel, the learned trial Judge delivered his Ruling on the matter on the 25/7/1995. In concluding his Ruling the learned trial Judge, said thus: -

'In the circumstances of this case I will grant the application in terms of the motion paper. The applicants are given up till today to file their Notice of Intention to defend. The Notice of Intention to Defend and accompanying affidavit already filed are deemed properly filed and served.'

The learned trial Judge did not stop there, he continued after granting the Motion before him: -

'I am satisfied that this case should be transferred from the Undefended List to General Cause List. I make the order accordingly. Parties to file their pleadings in accordance with the Rules.'

The Plaintiff felt unhappy with the decision and appealed to the Court of Appeal.

Based on the grounds of appeal, three issues were submitted to the Court of Appeal for the determination of the appeal. The issues read: -

'1. Whether the trial Court was right in granting the application of the Defendants/Respondents under Order 20 Rule 3(1), (2) of the High Court, Rules 1988, in the circumstances of the case when the same Rules make special provisions under Order 24 Rule 9(1) (2) (3) (4) (5) for hearing of a suit placed in the Undefended List.

2. Whether the trial Court had the jurisdiction to make the order transferring Suit No 0/258/94 from the Undefended List to the General Cause List and ordering the parties to file their pleadings in the said suit when the said reliefs were not prayed for by the Defendants/applicant in their Notice of Motion or in the course of moving their said Motion.

3. Whether the trial Court was right in the Ruling on the application before him to go beyond the said application and deal with issues relating to The trial of the case and proper to determine the same without giving the Plaintiff the opportunity of being heard on the said issue.'

In their brief for Respondents at the Court of Appeal, the Appellants herein raised the issue of the competency of the appeal. It was argued that once ah order granting unconditional leave to defend an action is made, the Plaintiff has no right of appeal against the decision in accordance with Section 220 (2) (a) of the 1979, Constitution. Learned Counsel relied on the case of National Bank of Nigeria Ltd vs. Weide and Company (Nig) Ltd and Others. (1996) 8 NWLR (Pt. 465) 150. Accordingly the Respondents to the appeal, the Appellants herein urged the Court of Appeal to strike out the appeal.

In the lead judgment of the Court of Appeal delivered by Fabiyi J.C.A. and concurred to by Akpabio and Mohammad J.C.A., the learned Justice at page 107 of the record stated thus: -

'It goes without saying that after granting extension of time to file Notice of Intention to defend the suit and deeming the same as filed and served, the trial Court was duly bound to hear both sides on the next way forward. In Bello vs. Farmers Supply Co. Ltd. [1994] 5 NWLR (Pt. 342) 127 at page 132. It is clear that after a similar application was granted, the learned Counsel for the Appellants then moved and prayed the Court to transfer the action to the general cause list. The position is the same in Barclays Bank DCO vs. Onashile (1964) LLR 74 at 75, such tallies with reasoning, as a party should be heard before adverse order is made against him. I agree that the trial Court was wrong to have gone beyond the application before it to make an order against the appellant without hearing his Counsel on the same. Such was in breach of the rules of natural justice enshrined under section 33(1) of the 1979 Constitution. To that extent, the order of the trial Court transferring the suit to the General Cause List and filing of pleadings by the parties is null and avoid. The appellant is entitled to as a matter of justice to have same set aside.'

On the issue of the Preliminary Objection to the competence of the appeal, the learned justice said at page 108 of the record of appeal thus: -

'I now wish to touch on the Respondents' Preliminary Objection argued by their Counsel towards the end of their brief. It Was contented that vide section 220 (2)(a) of the 1979 Constitution, the appellant hag no right to appeal against the order which transferred to suit to the General Cause List. The argument ingenious as it appeared, failed to hit the target. This is because the order has been found to be a nullity as it was made without jurisdiction. I agree that for a decision to be covered or protected by section 220 (2)(a) of the 1979 Constitution, it must not be a null decision order made without jurisdiction as in this case. The appeal touching on jurisdiction is one of law alone and there is no doubt that the appellant had the right of appeal under section 220 (1) (b) of the 1979 Constitution. The Preliminary Objection stands on a weak wicket. It is accordingly overruled'.

The Court of Appeal thus allowed the appeal in part and set aside the order transferring the suit to the General Cause List and remitted the matter back to the trial Court for the matter to be started de novo before another Judge. The Defendants felt unhappy with the turn of events and they have now appealed with leave to this Court. The Notice of Appeal contains two grounds of appeal. In the brief for the Appellants filed by the learned Counsel two issues for the determinations of the appeal are submitted and they read thus: -

'1. In view of the provisions of section 220 (2) (a) of 1979 Constitution of the Federal Republic of Nigeria [applicable in this case] was it proper for the Court of Appeal to hold that the Order of the trial Court transferring the suit to the General Cause List was null and void when, on the materials before it, both sides to this Appeal are ad idem that the decision of the trial Court supra gave the Defendants/ Respondents/Appellants unconditional leave to defend the suit.

2. Was the decision of the Court of Appeal to the effect that section 220 (2) (a) of the Constitution of the Federal Republic of Nigeria 1979 does not apply to null decisions correct in law''

The learned Counsel for the Respondent formulated and submitted one issue for determination, which in my view is covered, by the issues formulated by the Appellants.

The learned Counsel for the Appellants argued issues 1 and 2 together. It is submitted that the learned trial Judge clearly made two orders (1) granting the Appellants' application by extending the time within which to file the Notice of Intention to defend the action and for deeming the Notice of Intention to defend as duly filed and served and (2) the

order transferring the matter to the General Cause List which formed the subject matter-of the-preliminary-objection and the appeal herein. It is submitted that both parties agree that the effect of transferring the suit to the General Cause List is to let the Appellants defend the action unconditionally and that by virtue of section 220 (2) (a) of the 1979 Constitution there is no right of appeal from the High Court to the Court of Appeal. It is submitted that once an order is given granting leave to defend an action unconditionally, the Plaintiff has no right of appeal. See National Bank of Nigeria Ltd vs. Weide and Company [Nig] Ltd Supra.

It is submitted that the exercise of a right of appeal is statutory and the appellate jurisdiction of the Court of Appeal to hear and determine appeal from the High Court is also purely statutory. See Ugwu vs. A.G. of East Central State [1975] 6 SC 13. Adigun vs. A.G. of Oyo State and Others [1987] 2 NWLR (Pt 56) 197. It is further stressed that the Constitution has prohibited an appeal on the subject matter to the Court of Appeal and as such the Court of Appeal has no jurisdiction to entertain the appeal. The Court of Appeal has no competence to look into the matter no matter how well it was decided. It is again submitted that section 220 (l)(b) does not apply since the exclusion of jurisdiction under section 220 (2) (a) is absolute.

The learned Counsel for the Respondent on the other hand submits that the Order transferring the suit to the General Cause List was made without jurisdiction, it was made when it was not asked for and it was also made in breach of section 33 of the Constitution 1979 when the Respondent as the Plaintiff was not given the opportunity of being heard. Learned Counsel for the Respondent cited the following cases in support of the decision of the Court of Appeal and of the above submission: -

1. Etim Ekpenyong & Others vs. Inyang Efiong Nyong & Others (1975) 2 SC 71.

2. Nigerian Housing Development Society Ltd & Anor. vs. Y.Y Mumuni (1977) 2 SC 57 at 81.

3. Union Beverages Ltd. vs. M.A. Owolabi (1988) 1 NWLR (pt. 68) 128. I.B.W.A. Ltd vs. Kennedy Transport (Nig) Ltd (1993) 7 NWLR (Pt 304) 328.

4. Chief Lands Officer & Others vs. Joel Alor & Others (1991) 4 NWLR (Pt 187) 617.

5. Chief Godfrey Onyekwulunne & Others vs. Augustine Ndulue & Others (1997) 7 NWLR (pt 512) 250, and

6. Ben E. Chidoka and Anor vs. First City Finance Co. Ltd. (2001) 2 NWLR (pt. 697) 216

It is argued further though section 220 (2) (a) of the 1979 Constitution prohibits or does not confer a right of appeal from a decision of the High Court granting unconditional leave to defend an action, the section does no protect or cover a situation where the order granting leave to defend the action is null and void. It is further submitted that a null order or judgment binds no one and is incapable of giving rise to any right or obligation under any circumstances.

Learned Counsel referred to Osafile vs. Odi [1990] 3 NWLR (pt 137) 130 at 177. It is added that section 220 (2) (a) was not enacted to prohibit an appeal against an order or decision that is null and void. It is finally argued that the decision in National Bank of Nigeria Ltd vs. Weide & Co. Nigeria Ltd supra is distinguishable from this case, in that case there was no issue of nullity on the order appealed. So that decision does not apply to the facts of this case. Now sections 220 and 221 of the 1979 Constitution in pari materia with section 240 and 241 of the 1999 Constitution make provisions for appeals from a decision of the High Court or the Federal High Court to the Court of Appeal.

Thus the exercise of the appellate jurisdiction of the Court of Appeal from the decisions of the High Court is derived from the Constitution. The sections provide: -

'220(1)An appeal shall lie from decisions of the High Court to the Court of Appeal as of right in the following cases: -

(2) Nothing in this section shall confer any right of appeal-

(a) from a decision of any High Court granting unconditional leave to defend an action.

22(1) Subject to the provisions of section 220 of this Constitution, an appeal shall lie from the decisions of a High Court to the Court of Appeal with leave of the High Court or the Court of Appeal.'

It is trite law that the right of appeal is statutory and is contained in the Constitution and it is clear that section 220 (2) (a) the 1979 Constitution has prohibited an appeal from a decision of any High Court granting an unconditional leave to defend an action. The facts of this case are clear. The Respondent's claims were placed on the Undefended List procedure and if the Appellants did not take the appropriate steps timeously, judgment may be given against them on the next hearing date. They filed an application praying for extension of time to file the Notice of Intention to defend the action and also prayed for an order deeming the Notice of Intention to defend and the affidavit in support as duly filed and served. The learned trial Judge granted the prayers. But he went further to allow the Defendants to defend the action by transferring the suit to the General Cause List and also by ordering pleadings. There is no dispute that the Defendants did not move any Motion (oral or otherwise) to that effect, there is no dispute that the Plaintiff was not heard before the Order of granting leave to defend the action was made. The trial Judge did not hear the parties before he reached his decision to allow the Defendant to defend the action. Ordinarily, he was wrong. He was wrong not to allow the Defendants move to show that they have a prima facie defence to the action. He jumped the gun.

But what the learned trial Judge did, was in essence, to grant the Appellants as Defendants, leave to defend the action. The question is, can the Plaintiff Respondent appeal against the decision as of right' The first consideration is to see whether the said decision of the trial Judge comes within the provision of section 220 (2)(a) of the 1979 Constitution. It seems to me that the framers of the Constitution having set out the situations where an intending appellant can appeal as of right to the Court of Appeal in section 220(1) and had made other provisions in section 221(1) where appeals lie with leave, it intentionally excluded any right of appeal in the three cases set out in section 220(2) (a) (b) and (c). In fact the exclusion under (a) and (b) is absolute whereas in (c) it is qualified.

Uwais CJN in N.B.N. Ltd. vs. Weide & Co. supra at page 167 stated thus: -

'The wordings of section 220 subsection 2(a) of the 1979 Constitution (Cap 62 Laws of the Federation of Nigeria, 1990), are very clear, they simply mean that there is no right of appeal from A decision of any High Court to the Court of Appeal where the former grants an unconditional leave to defend an action. In my opinion, the dissenting decision of Uwaifo J.C.A, in Societe Generale Bank (Nig) Ltd vs. Panatrade Ltd and Others (1994) 6 NWLR (Pt. 353) 720 at p.734 is correct. The decision of the Court of Appeal in Nishizawa Ltd vs. Jethwani (1995) 5 NWLR (pt 398) 668 at p. 670 per Nnameka-Agu J.C.A (as he then was) appears to me with respect, to be wrong. In reaching that decision the Court of Appeal had to import words not found in the provisions of section 220 subsection (2)(a) of the Constitution to arrive at the decision that there can be an appeal against the granting of an unconditional leave to defend an action.'

I respectfully agree, the provisions of the section are very clear and unambiguous. They do not therefore call for additional words before they can be given their ordinary meaning. In the instant case the Court of Appeal was clearly in error to have imported the issue of the nullity of the Order which is not stated in the subsection as an exception to the intendment Clearly when the Court of Appeal held that the decision of the trial Court transferring ft e suit to the General Cause List was null and void, the Court of Appeal was making a decision on the correctness validity or otherwise of the decision of the trial Court and that jurisdiction was clearly taken away from the Court of Appeal. It is bite law that where a Court or tribunal lacks the jurisdiction to adjudicate on a matter, any proceedings before it in relation to the subject matter, no matter how v/ell conducted is an exercise in futility.

Now in its decision, the Court of Appeal appears to suggest that the Respondent could appeal under section 220, the learned justice said at page 109 of the record of appeal thus: -

'The appeal touching on jurisdiction is one on law alone and there is no doubt that the appellant had the right of appeal under section 220(1) (b) of the 1979 Constitution'.

Now, section 220 (1) list out cases where right of appeal, as of right is conferred, while subsection (2) absolutely bars

any right of appeal in the three case listed. Subsection (2) is explicit enough and is conclusive in what it forbids, that is the right to appeal in the three mentioned cases. In any view, the provisions of section 220 (2) (a) of the 1979 Constitution clearly preclude the Court, of Appeal from considering an appeal on its merit on an issue where a High Court grants a. Defendant an unconditional leave to defend an action. The Court of Appeal would have no jurisdiction to entertain the appeal and decide it on the merits.

In the N.B.N. vs. Weide Co case supra. Belgore JSC at page 168, hit the nail on the head when he stated: -

'The purport of section 220(2) of the Constitution of the Federal Republic of Nigeria, 1979 is so clear that its interpretation should present no problem. There is no right conferred to appeal in the three instances mentioned therein. Section 221 (supra) is made subject to section 220 (supra) and I cannot find where the right to appeal the unconditional right to defend exists in the present suit now on final appeal to this Court. The right to appeal from High Court Co the Court of Appeal is not ambiguous and 220(2) (a) (b) and (c) set out the situations that are not appeallable. To bring in the effect of section 221 of the Constitution or section 220 1(b)] is to do mischief to the intendment of section 220(2).'

In my view, no matter how one looks at it, an appeal under the circumstances is precluded and therefore the Court of Appeal is clearly and absolutely bereft of jurisdiction to entertain the appeal. Jurisdiction is the very basis on which any tribunal tries a case it is the lifeline of all trials. A trial without jurisdiction is a nullity.

I accordingly resolve the two issues argued together in favour of the Appellants. This appeal succeeds and is allowed by me. The decision of the Court Appeal given on 11/12/2000 is set aside. In its place, the appellant's Preliminary objection is upheld. There is no right of appeal for the Respondents to appeal to the Court of Appeal on the question of granting the Defendants leave to defend the action. The entire appeal before the Court of Appeal is rendered incompetent and is struck out. The Appellants are entitled to costs both in the Court of Appeal and this Court assessed at N7, 500.00 and N10, 000.00 respectively.

Judgment delivered by
Salihu Moddibo Alfa Belgore, J.S.C.

I read in advance the judgment of my learned brother, Musdapher, J.S.C. and I agree entirely with his conclusions. I also resolve the two issues in favour of the appellant and therefore allow the appeal. I also uphold the preliminary objection. It follows that the appeal before the lower Court was incompetent and ought to have been struck out by it. I make the same consequential orders as to costs.

Judgment delivered by
A.O. Ejiwunmi J.S.C.

Having had the opportunity of reading before now the draft of the judgment just delivered by my learned brother, Musdapher J.S.C., I agree with him for the reasons given in the said judgment that the appeal has merit.

The appeal touches upon an aspect of our law and procedure. The problem that arose in the instant appeal began with the Statement of claim filed against the Defendants/Appellants at the High Court of Justice, Anambra State in the Onitsha Judicial Division for the sum of N4, 912,797.30 with interest at the rate of 21% per annum from 1/2/94 up to the date of judgment and thereafter at the rate of 5% per annum until the final liquidation of the judgment debt. The Suit No 0/258/94, which was placed on the undefended list, the Defendants/Appellants were duly served and the matter fixed for hearing on 7/7/94. On that morning, the Defendants/Appellants sought to move a motion praying for enlargement of time within which to file a Notice of Intention to defend the suit and deeming same as duly filed and served. An affidavit marked 'A' was attached to the application.

This application was opposed by the Plaintiff/Respondent and the matter was further adjourned for hearing to the 31/5/95. On the adjourned date, the motion was duly moved by the Defendants/Appellants. After hearing Counsel appearing for the parties, the learned trial Judge granted the application in terms of the motion paper. He also granted the ancillary prayers. The learned trial Judge thereafter ordered that the case be transferred from the Undefended List to the General Cause List and parties to file their pleadings in accordance with the Rules. That decision was appealed to the Court below. That Court allowed the appeal and set aside the Order transferring the suit to the General Cause List, and further ordered that the matter be started de novo before another Judge. The Defendants who are now Appellants, not being satisfied with that judgment, have now appealed to this Court.

In their briefs of argument filed in this Court pursuant to their appeal, the Defendants/Appellants raised the following two issues for the determination of the appeal. They read: -

'1. In view of the provisions of section 220 (2) (a) of 1979 Constitution of the Federal Republic of Nigeria (applicable in this case), was it proper for the Court of Appeal to hold that the Order of the trial Court transferring the suit to the General Cause List was null and void when, on the materials before it, both sides to this appeal are ad idem that the decision of the trial Court (supra) gave the Defendants/Respondents/Appellants unconditional leave to defend the suit.

2. Was the decision of the Court of Appeal to the effect that section 220 (2) (a) of the Constitution of the Federal Republic of Nigeria 1979 does not apply to null decisions correct in law''

The central question that calls for determination in this appeal is simply, whether there is a right of appeal from the decision of the High Court granting an unconditional leave to defend an action that is appeallable to the Court of Appeal.

Now, the learned Counsel to the Appellants properly referred to the provisions-of S. 220 (2) (a) of the Constitution of 1979 and then referred to the interpretation given to the said provisions in National Bank of Nigeria Ltd. v. Weide and Coy. (Nig) Ltd & Ors (1996) 2 N.W.L.R. (pt. 465) 150 to the effect that once an Order granting leave to defend an action is made, the Plaintiff has no right of appeal against the said decision. He clearly in that regard, concedes it that the exercise of the right of appeal is statutory. He then further argued that the Court below fell into error, when that Court went on to make pronouncements on the appeal, which was wrongly laid before it.

Learned Senior Counsel for the Respondent has however sought to argue in the Respondent's brief, that a decision which is null and void is appeallable, from the High Court to the Court of Appeal. In support of that submission, he submits that as 'null and void' means that which binds no one or is incapable of giving rise to any right or obligation, the decision of the Court of Appeal was right with regard to the Orders made by that Court. In my humble view, the argument of Counsel is to put it mildly preposterous. The question that arises for determination in this appeal is certainly not with regard with the nature of the -decision of that Court. What is paramount in this appeal is, whether the Court below had the necessary competence to hear the appeal. I must in the circumstances hold that Mr. Obi Akhude is right in his submission that, as the Court below had no jurisdiction to hear the appeal, it fell into error when it heard and made pronouncement thereon; It is settled law that the right of appeal is created by statute or the constitution and no Court has jurisdiction to hear any appeal unless it is derived from a statutory provision. See Ugwu v. Attorney General of East Central State (1975) 6 SC 13; Adigun & Ors v. Attorney General of Oyo State & Ors (1987) 2 NWLR (pt. 56) 197; Ajomale v. Yaduat No. 1 (1991) 5 NWLR (pt. 191) 257; Odofin & Ors v. Agu & Ors. (1992) 3 NWLR (pt. 229) 350; National Bank of Nigeria Ltd. v. Weide & Co. (Nig) Ltd (supra)

In the result, I also allow this appeal for the above reasons and the fuller reasons given in the lead judgment of my brother Musdapher J.S.C. I also abide with the Order, made as to costs.

Judgment delivered by
Walter Samuel Nkanu Onnoghen, J.S.C.

The Respondent, as Plaintiff in the High Court of Anambra State, holden at Onitsha in suit NO. 0/258/94 claimed against

the Appellants, as Defendants, inter alia, as follows:

N4, 912,797.30 (Four million nine hundred and twelve thousand, seven hundred and ninety seven naira, thirty kobo) with interest at the rate of twenty one per centum from the 1st day of February, 1994 at the rate of five per centum per annum until the final payment of the judgment debt.

The suit was duly placed under the Undefended List but the Defendants (Appellants) failed to file their notice of intention to defend the suit together with an affidavit disclosing their defence within the time allowed by the rules of Court. Later on, the Appellants brought a motion praying for:

(a) an order enlarging the time within which the Defendants could file a notice of intention to defend the suit.

(b) an order deeming the notice of intention to defend which is exhibit 'A' to the affidavit in support hereof as having been duly filed and served (necessary fees having been paid.

(c) such further or other orders as the Honourable Court may deem fit to make in the circumstances.

The application was opposed by the Respondent but the Court after hearing arguments from both Counsel, held as follows:

'In the circumstances of this case, I will grant the application in terms of the motion paper. The applicants are given up till today to file their Notice of Intention to defend. The notice of intention to defend and accompanying affidavit already filed are deemed properly filed and served.

I am satisfied that this case should be transferred from undefended list to General Cause. I make the order accordingly. Parties to file their pleadings in accordance with the Rules.'

The Respondent was not happy with the above decision, particularly the second arm which transferred the suit from the Undefended to the General Cause List, and consequently appealed to the Court of Appeal which allowed the appeal by holding that the decision of the trial Court was null and void and that section 220(2) (a) of the Constitution of the Federal Republic of Nigeria, 1979 (hereinafter referred to as the 1979 Constitution) does not apply to null decisions; thereby setting the stage for the present appeal before this Court.

When the appeal came up for hearing on 21/1/06 neither Counsel was present in Court despite the fact that hearing notices were duly dispatched to them. The appeal was therefore taken as argued on the briefs filed.

The issues as formulated by learned Counsel for the Appellants, Obi Akpudo Esq in the Appellants' brief of argument filed on 20/3/02 are as follows: -

'(1) In view of the provisions of S.220 (2) (a) of the Constitution of the Federal Republic of Nigeria, 1979, (applicable to this case) was it proper for the Court of Appeal to hold that the order of the trial Court transferring the suit to the General Cause List was null and void when on the material before It, both sides to this appeal are ad idem that the decision of the trial Court supra gave the Defendants/Respondents/Appellants unconditional leave to defend the suit'

(2) Was the decision of the Court of Appeal to the effect that S.220 (2) (a) of the Constitution of the Federal Republic of Nigeria, 1979 does not apply to null decisions correct in law''

The case of the Appellants, as I understand it, is simply that the Respondent has no right of appeal whatsoever against the decision of the trial Court transferring the matter from the Undefended to the General Cause List and as a result, the Court of Appeal is without jurisdiction to entertain the appeal of the Respondent on the aforesaid decision. In other words I understand Appellants as saying that one must first have a right to approach the Court of Appeal before that Court could hear his complaint and decide whether the complaint has merit or not. On the other hand, the position of the Court of Appeal which is adopted and strongly urged upon this Court by learned Counsel for the Respondent is that

since the decision of the trial Court is null and void, section 220 (2) (a) of the 1979 Constitution does not apply and consequently went ahead to review the decision.

There is no doubt that the trial Court, by the second arm of its order which gave rise to the appeal to the Court of Appeal granted the Appellants an unconditional leave to defend the action originally placed under the Undefended List.

To appreciate the issue under consideration, it is necessary to take a look at the provisions of sections 220 and 221 of the 1979 Constitution particularly as they confer the right of appeal on parties:

220(1) An appeal shall lie from the decision 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;

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

(e) decisions in any criminal proceedings in which the Federal High Court or a High Court has imposed a sentence of death;

(f) decisions made or given by the Federal High Court or a High Court -

(i) where the liberty of a person or the custody, of an infant is concerned,

(ii) where an injunction or an appointment of a receiver is granted or refused,

(iii) in the case of a decision determining the case of creditor or the liability of a contributory or other officer under any enactment relating to companies in respect of misfeasance or otherwise;

(iv) in the case of a decree nisi in a matrimonial cause or a decision in an admiralty action determining liability, and

(v) in such other cases as may be prescribed by any law in force in Nigeria.

(2) Nothing in this section shall confer any right of appeal -

(a) from a decision of the Federal High Court or any High Court granting unconditional leave to defend an action.

(b) from an order absolute for the dissolution or nullity of marriage in favour of any party who, having had time and opportunity to appeal from the decree nisi on which the order was founded, has not appealed from that decree nisi; and

(c) without the leave of the Federal High Court or a High Court or the Court of Appeal, from a decision of the Federal High Court or High Court made with the consent of the parties or as to costs only.

221(1) subject to the provisions of section 220 of this Constitution, an appeal shall lie from the 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.'

It is very clear from the above constitutional provisions that whereas section 220 confers a right of appeal on a party as of right To appeal to the Court of Appeal, section 221 (1) grants a right of appeal to a litigant upon leave of Court.

It is settled law that the jurisdiction of the Court of Appeal to hear and determine appeals is statutory see Adigun vs A-G of Oyo State (1987) 2 NWLR (pt. 56) 197. Also settled is that the exercise of a party's right of appeal is statutory. It is my view that by virtue of the provisions of section 220 (2) (a) of the 1979 Constitution, the Respondent has no right of appeal against the decision of the trial Court granting Appellants unconditional leave to defend the action neither has the Court of Appeal the jurisdiction to entertain and determine that appeal. It is also settled law that the Constitution and its provisions constitute the supreme law of the land and that any law or decision which is inconsistent with it or its provisions is to the extent of that inconsistency void.

In the case of National Bank of Nigeria Ltd vs. Weide & Co. Nigeria Ltd (1996) 8 NWLR (pt. 465) 150 the appellant therein filed an action at the Lagos High Court claiming monetary reliefs against the Respondents therein. The writ of summons was therefore specially endorsed and had a Statement of Claim attached. The 1st-3rd Defendants entered an unconditional appearance while the 4th Defendant could not be served with the writ.

The appellant later applied to the Court for summary judgment under order 10 rule 1 of the Lagos State High Court (Civil Procedure) Rules 1972. The Respondents filed counter affidavit in opposing the summons for judgment and annexed a Statement of Defence. On the other hand, the 3rd Defendant filed a motion praying that Court to strike out his name from the proceedings. The applications were taken together by the trial Court at the end of which the Court dismissed both applications and granted the Respondents unconditional leave to defend the action.

The appellant therein was dissatisfied with the ruling and appealed to the Court of Appeal, which dismissed the appeal.

Upon a further appeal to the Supreme Court, this Court raised suo motu, the issue whether the appellant has a right of appeal to the Court of Appeal from the decision of the High Court and invited addresses of Counsel for the parties, which were submitted accordingly.

In resolving the issue, the Supreme Court held that the wordings of section 220(2) of the 1979 Constitution are very clear in that the sub section bars a right of appeal, whether as of right or with leave in two cases listed in paragraphs (a) and (b) thereof and that there is no right of appeal to the Court of Appeal from a decision of any High Court granting unconditional leave to defend an action. The Supreme Court went further to hold that the decision of the Court of Appeal in that case was a nullity since the appellant did not have the right of appeal it purportedly exercised.

While dealing with the issue in more detail, Ogwuegbu, J.S.C. at page 165 of the report stated the law as follows: -

'It seems to me that the legislature having set out the situations where an intending appellant can appeal to the Court of Appeal as of right in section 220 (1) of the Constitution and made other provisions in section 221(1) where appeals lie with leave, it intentionally excluded any right of appeal in the three cases set out in sub-sections 220 (2) (a) (b) and (c) of the 1979 Constitution. In fact the exclusion in my view is absolute in sub-section (2) (a) and (b) whereas sub-section 2 (c) is qualified in the sense that with leave of the High Court or the Court of Appeal, the right of appeal against a decision made with the consent of the parties or as to costs only is preserved.

Reading sections 220 to 225 together and most importantly, section 220 and 221, I am satisfied that the words used in section 220(2) are unambiguous and ought to receive the construction according to their plain meaning. Section 220 cannot be read and construed in isolation from section 221. While section 220 deals with appeals as of right, section 221(1) deals with appeals with leave. The special provision made by the legislature in section 220(2) must have been deliberate and for good reasons.'

It is therefore very clear and I hereby hold that the Respondent in the instant case had no right of appeal to the Court of Appeal against the decision of the trial Court granting unconditional leave to defend the action, and that the Court of Appeal lacked the jurisdiction to entertain and determine the purported appeal.

Much has been made of the trial Court\'s decision to transfer the suit from the Undefended List to the General Cause List without hearing arguments from learned Counsel for the Respondent herein which the lower Court sees as rendering the decision null and void to which section 220 (2) (a) is said not to be applicable. I do not agree with that reasoning and conclusion. By the provisions of the applicable Rules of Court, it is the duty of the trial Judge to ex parte take the initial decision whether to hear the matter under the Undefended List or transfer same to the General Cause List to be dealt with accordingly after he must have gone through the affidavit filed along with the writ of summons by the Plaintiff.

The procedure under the Undefended List starts with the Plaintiffs application for the issue of a writ of summons for a claim for liquidated money demand which application is to be accompanied by an affidavit setting forth the grounds upon which the claim is based and stating that in the belief of the deponent there is no defence to the claim. The Court to which the application is made then considers same ex parte and if satisfied that there are good grounds for believing that there is really no defence to the claim enters the suit for hearing in a list which is called the Undefended List and marks the writ of summons accordingly and enters therein a date for hearing. The processes are thereafter served on the Defendant who if he desires to defend the action, has to deliver to the Registrar a notice in writing that he intends to defend the suit, together with an affidavit disclosing a defence on the merit.

The Court may, on the basis of the affidavit by the Defendant give the Defendant leave to defend the action upon such terms as it may think fit. It is not provided that before the Court decides to let in the Defendant to defend the action, the Plaintiff or his Counsel must first be heard. Where leave to defend is given by the Court, the action is automatically removed from the Undefended List to the General Cause List or ordinary cause list thereby bringing an end to the procedure for summary judgment.

On the other hand, where the Court comes to the conclusion that the affidavit discloses no defence on the merit, it proceeds immediately thereafter to enter judgment for the Plaintiff without the Plaintiff calling evidence. Where a Defendant who has been served with the processes filed no notice of intention to defend together with an affidavit disclosing such a defence is present in Court, he or his Counsel cannot be heard before judgment is entered on the date for hearing.

In the present case I hold the view that the trial Judge was right in proceeding to order pleadings after considering the affidavits evidence before him and coming to the conclusion that the affidavit of the appellant discloses a defence on the merit and thereby granted him unconditional leave to defend.

Where both Counsel are present and the Court is disposed to hearing them before taking the decision it may do so but not because Counsel has a right of audience before the decision either to retain a matter under the Undefended List or transfer same to the General Cause List is taken by the Court. The fact is that both parties have been heard by virtue of the affidavits filed in compliance with the rules of Court and which the Court considers before deciding either to retain the matter under the Undefended List or transfer same to the General Cause List. In the circumstances it cannot legally be said that Respondent was never heard and that its right to fair hearing was thereby breached by the trial Court. As has been demonstrated, the decision so reached by the trial Judge is by virtue of the provisions of section 220(2) (a) of the 1979 Constitution not subject to any right of appeal by either party.

I therefore agree with the reasoning and conclusion of my learned brother Musdapher, J.S.C. that the appeal is meritorious and ought to be allowed. I allow same and abide by the consequential orders contained in the said lead judgment including the order as to costs.

Judgment delivered by
Ikechi Francis Ogbuagu, J.S.C.

I have had the advantage of reading before now, the lead Judgment of my learned brother, Musdapher, JSC, just read out and delivered in the open Court. I entirely agree with his reasoning and conclusion that the appeal is meritorious and

succeeds.

However, I wish to add a few words of mine by way of emphasis. As far as I am concerned, this appeal is straight forward, so also the issue for determination. It deals strictly, with the interpretation of Section 220 (2)(a) of the 1979 Constitution of the Federal Republic of Nigeria, which is similar to Section 241 (1)(a) of the 1999 Constitution. Section 220 (r)(a) and 241 (1) read as follows:

'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.

Sub-section 2 states -

'Nothing in this section shall confer any right of appeal -

(a) from a decision of the Federal High Court or High Court to the Court of Appeal granting unconditional leave to defend an action.'

The facts of the case have been carefully stated in the lead Judgment of my learned brother, Musdapher, J.S.C., and I will spare myself the trouble of repeating them here. What is important to note and to be stressed by me with profound humility and greatest respect, is that the framers of the Constitution, having set out the situations where an intending appellant, can appeal as of a right to the Court of Appeal in Section 220 (1) or 240 (1) and had made provisions in Section 221 (1) or 241 (1), as to where appeals lie with leave, they intentionally, excluded any right of appeal in the three cases set out in either sub Section (2) (a), (b) and (c). Indeed and in fact, the exclusion under (a) and (b), in my respectful view, is absolute whereas, in respect of (c), it is qualified.

Obviously, the said provisions are very clear and unambiguous. It is now firmly settled in a line of decided authorities in several different languages or pronouncements, that in the interpretation of Statutes and/or Constitution, words therein, should be given their ordinary meaning - See Otokolobo & Ors. v. Alamu & Anor. (1987) 7 SCNJ. 98, or that ordinary meaning of words therein used is to be adopted in order to discover the intention of the law maker ' See Olanrewaju v. The Governor of Oyo State & Ors. (1992) 11-12 SCNJ. 92, or that where words of a statute are clear and not ambiguous, effect should be given to them and that there is the need to avoid an absurdity. See Udoh & Ors. v. Orthopaedic Hospitals Management Board & Anor. (1993) 7 SCNJ. 436 @ 442, and City Engineering (Nig) Ltd. v. Nigerian Airports Authority (1999) 6 SCNJ. 261, (1999) 6 S.C. (Pt. II) 41 @ 47 or that ordinary or literal meaning is to be given to them and enforced accordingly - See Berliet Nig. Ltd. v. Alhaji Kachalla (1995} 12 SCNJ. 147 or that no more is necessary than to expound those words in their natural and ordinary sense of the words themselves in a case best declare the intention of the legislature or that there is need to construe words used In their natural and ordinary sense - See Rhein Mass Und See Schiffahrs Kontor GMBH & Anor. v. Rivway Lines Ltd. (1998) 4 SCNJ. 18 @ 29 or that there is no room for applying any of the principles of interpretation which are merely presumptuous in cases of ambiguity in the statute. That they ought to receive the construction according to their plain meaning - See National Bank of Nig. Ltd, v. Weide & Co. Nig. Ltd. & 3 Ors. (1996) 2 NWLR (Pt. 465) 150@ 165, 167 - 168; (1996) - 10 SCNJ. 147 @ 157, 166 - 167 where the case of Nafiu Rabiu v. The State (1980) 8 - 11 S.C. 139. 149- per Sir Udoma, J.S.C., was referred to and reproduced.

In the instant appeal, the case of National Bank of Nig. Ltd v. Weide & Co. Nig. Ltd. & ors. (supra), is most relevant and an applicable authority. In summary, the approach of this Court to the construction of the Constitution should be, as it has been, one of liberal ism and it is not the duty of the Court, to construe any of the provisions as to defeat the obvious ends the Constitution was designed to serve. This is why it was held by this Court therein, that the words used in Section 220 (2) of the 1979 Constitution, are unambiguous and ought and indeed, should receive the construction according to the plain meaning. That the legislature, when it inserted Section 220 (2) of the 1979 Constitution, did so deliberately, having regard to the history of appeals in such cases and the peculiar nature of the three cases covered by the proviso. That having regard to Section 220 (2) (a) of the 1979 Constitution, the Plaintiff, possessed no right of appeal against the decision. That the right of appeal is created by Statute or the Constitution and therefore, no Court has the

jurisdiction to hear any appeal, when it is derived from a statutory provision. That the Court of Appeal (hereinafter called the Court below) had and has no jurisdiction to hear and determine the appeal. That its decision was/is a nullity.

From the above, I have no doubt in my mind whatsoever, that the Court below, was in grave error to have imported the issue of the nullity of the Order which is not stated in the said sub-section, as an exception to the intendment of the said Constitution. When the Court below held that the decision of the trial Court transferring the suit to the General Cause List for hearing, was null and void, it seems to me with respect, that it was making a decision on the validity or call it, correctness or otherwise of the said decision of the trial Court. As appears in the above decision of this Court, the Court below, with respect, had no business delving into and pronouncing on the said decision of the trial Court. The said Constitution clearly ousted its jurisdiction to do so.

From the said decision of this Court in National Bank of Nig. Ltd. v. Weide & Co. (Nig.) Ltd. & Ors. (supra), @ pages 167 - 169 of the NWLR, it seems to me and even very clear to me, that the said case, resolved the conflicting interpretation placed on Section 220 (2) (a) of the 1979 Constitution by the Court of Appeal in the case of Societe Generate Bank (Nig.) Ltd v. Panasirade Ltd. & ors. (1994) 6 NWLR (Pt. 353) 720 and the case of Nishizawa Ltd v. Jethwani (1995} 5 NWLR (Pt. 398) 668 when Uwais, CJN, stated, inter alia, as follows:

'In my opinion, the dissenting decision of Uwaifo, JCA, (as he then was), in Societe General Bank (Nig.) Ltd vs. Panastrade Ltd. & ors. (supra) is correct. The decision of the Court of Appeal in Nishizawa Ltd v. Jethwani, supra, per Nnaemeka-Agu, JCA, (as he then was) appears to me, with respect, to be wrong'.

I need to stress here, that throughout the 'journey' of the appeal to the Court below up to this Court, the Respondent and its learned Counsel, have not shown what miscarriage of justice that was occasioned by the said order of the trial Court. Or were they afraid that at the trial of the substantive action, there would be no question of G summary judgment' I stop here. No speculation please,

Indeed, in the case of Alhaji Bello & Anor. v. Farmers Supply Co. (KDS) Ltd, (1994) 5 NWLR (Pt. 342) 127 @ 136 per Abdullahi, JCA, (as he then was, now President), the Court of Appeal, Kaduna Division, held to the effect, that in an action on the undefended list, once the Defendant discloses a defence on the merit in an affidavit in support of the application for both an enlargement of time to file the Notice of Intention to defend the action where the Defendant is out of time and deeming a Notice of Intention to defend as properly filed and served (as in the instant case leading to this appeal), the Court ought to allow the Defendant, to defend the action which must then be transferred to the general cause list for hearing. See also the case of Bulet International (Nig.) Ltd. v. Adamu (1997} 3 NWLR (Pt. 493) 34 CA. Thus, there is no question of the Court hearing an address or argument of Counsel either for the Plaintiff or the Defendant, whether or not the suit should be transferred to the General or Ordinary Cause list for hearing or whatever to enter summary judgment for the Plaintiff. There is no such provision. I so hold.

In the Undefended List of the High Court Rules of Anambra State 1988, there is the provision that:

'Where leave to defend is given under this rule, the action should be removed from the undefended list and placed on the ordinary Cause List; and Court may order pleadings or proceed to hearing without further pleadings'.

See also Order 24 Rule 9 (2) thereof.

So, the rules are very clear, as to what a trial Court should do. It needs no further clarification or interpretation. Once the trial Court transfers the suit to the Ordinary or General Cause List for hearing (and this is automatic) that is the end to the procedure for summary judgment. Therefore, in my respectful view, the trial Court, was in order in the order it made transferring the suit to the Ordinary or General Cause List, having been satisfied that from the affidavit in support of the Notice of Intention to defend, that the Defendant, has disclosed a prima facie defence or has made out a good defence and not necessarily, a valid defence on the merits. I note that the Respondent is not contending or quarrelling, that on the merits, the Appellants, did not make out a prima facie case or good defence in their affidavit in support of the Notice of Intention to defend the suit. Rather, it complains about the procedure.

In the Undefended List procedure, the affidavit of the parties, is what a trial Court considers before deciding whether or not, to transfer the suit to the Ordinary Cause List for hearing and not addresses or submissions of Counsel. Well, if the Court, in its own discretion, decides or calls on Counsel present, to address him, the decision to do so, is not borne out as of right. Therefore, where he does his duty under the Rules after being satisfied and transfers the suit for hearing to the Ordinary or Genera! Cause List, there will be no question of any denial of fair hearing. The affidavit in support of the application to place the suit in the Undefended List is the case of the Plaintiff. Period. That decision is the one covered by Section 220 (2)(a) of the 1979 Constitution. By the said provision, the Plaintiff/Respondent has no right of appeal. The appeal to the Court below, was patently and absolutely incompetent.

Before concluding this Judgment, it is pertinent for me to note that in Order 25 Rule 5 of the said High Court Rules of Anambra State, 1988, the following appear;

'5. No proceeding in the Court and no process, order, ruling, judgment issued or made by the Court shall thereafter be declared void solely by reason of any defect in procedure, or Writ or form, as prescribed by these rules:
Rather every Court shall decide all issues according to substantial justice without undue regard to technicalities.

(the underlining mine)

The Respondent's Counsel, I am sure, is/was aware of these statutory provision in the said Rules, which is in the nature of a subsidiary legislation and therefore, have the force of law and of course, must be obeyed before he and his clients rushed to the Court below.

Again, the legal consequence of the said order of the learned trial Judge was to give the Appellants leave to defend the suit. By transferring the suit to the Ordinary or General Cause List for hearing, the trial Court, was allowing or saying that the Appellants, had been let in to defend the suit, which was on the Undefended List.
In concluding this Judgment, I resolve the two (2) issues in favour of the Appellants. It therefore, means that the preliminary objection, succeeds and it is also upheld by me.

Clearly, this instant appeal has merit and it is also allowed by me. I too, accordingly, set aside the said Judgment of the Court below which is not justified. I abide by the consequential order in respect of costs in the said lead Judgment of my learned brother, Musdapher, JSC.