

IN THE SUPREME COURT OF NIGERIA

Suit No: SC263/2000

Petitioner: Ikko Kashadadi

And

Respondent: Ingila Sarkin Noma

Date Delivered: 2012-10-12

Judge(s): Niki Tobi ,George Adesola Oguntade ,Aloma Mariam Mukhtar, Walter Samuel Nkanu Onnoghen ,Christopher Mitch

Judgment Delivered

This matter started from the Upper Area Court No. 1, Minna. That was in 1995 and in Suit No. UAC/MN/CVF/203/95. It was a claim of title over a farmland by the plaintiff/respondent. The defendant/appellant denied the respondent's title. He said that he borrowed the farmland from Yeko who he said owned the farmland. The Upper Area Court gave judgment in favour of the defendant/appellant. The court did not find the case of the plaintiff/respondent proved. The court said at page 8 of the Record: "Having carefully studied the evidence of the both parties squarely and placed the testimonies of each party on the scale of justice this court found out that the evidence of the plaintiff is not strong enough to grant him the title of the land he is praying for. Instead the evidence of the defendant out-weigh that of the plaintiff coupled with the fact that it was the defendant who told (sic) the possession of the land prior to the filing," On appeal to the High Court, that court allowed the appeal. The learned appellate Judge gave judgment to the respondent. The Court of Appeal upheld the decision of the High Court and dismissed the appeal. The appellant has come to this court. He formulated three issues for determination. The respondent formulated two issues for determination. The respondent has raised a preliminary objection on all the four grounds of appeal. The crux of the objection is that the grounds of appeal, being grounds of mixed law and fact, needed leave of court. The argument of counsel for the respondent is at pages 4 to 7.

Learned counsel for the respondent, Mr. Ibrahim Isiyaku, submitted that although Ground 1 alleges error of law, the Particulars of Error relates to facts adduced in evidence, that is, the plaintiff did not adduce enough evidence of facts to support the judgment in his favour. The alleged failure, learned counsel argued, is therefore entangled with the evidence of facts adduced. He also argued that Error No. (b) in the Particulars of Error is vague. He submitted on Ground 2 that it is vague and offends the provisions of Order 8 rule 2(3) and (4) of the Supreme Court Rules. No issue can be made out of a ground that is vague and the effect is that it will be struck out. He cited *Avinla v. Adigun* (1986) 3 NWLR (Pt. 30) 511 at 520 and *Ejoughomu v. Edok-Eter Ltd.* (1986) 5 NWLR (Pt. 39) 1 at 16. He also submitted that the ground is one of mixed law and fact, as this court must of necessity consider the facts adduced in evidence before considering whether there was proper evaluation of those facts. Taking Ground 3, learned counsel submitted that the ground does not amount to an error of law but a finding based on the facts adduced in evidence. Whether or not there was such evidence of facts to support the finding of the Court of Appeal that the plaintiff had established his claim is a question of fact, or at worst, one of mixed law and facts but definitely not one of law alone, counsel contended. On Ground 4, learned counsel submitted that whether or not there was evidence in support of the declaration in favour of the appellant was a question of fact. He argued that the ground involves mixed, law and fact. In dealing with the law, learned counsel submitted that an appeal does not lie as of right where a ground of appeal raises question of fact alone, or as in this case, question of mixed law and facts. He cited section 233(3) of the 1999 Constitution and the case of *Metal Construction (WA) Ltd, v. Migliore* (1990) 1 NWLR (Pt. 126) 299 at 324. Relying on *UBA v. GMBH* (1989) 3 NWLR (Pt. 110) 374 at 410, learned counsel contended that mere assertion, as in this appeal, that a ground of appeal is based on "error of law" does not make it one if the error stated in the particulars is no more than one of fact or mixed law and fact. He urged the court to strike out all the grounds as well as the appeal. Learned counsel for the appellants submitted in his reply brief that Ground 1 is purely on points of law only. He was silent on Ground 2, 3 and 4. I should read the Notice of Appeal, avoiding the introduction and commencing from the grounds of appeal:

'3. Grounds of Appeal

3.1. The Court below erred in law for failure to properly consider the issues raised by the appellant on appeal to it.

Particulars of Error

(a) The appellant submitted that the plaintiff respondent even by his pleadings and the evidence he in support did not adduce enough evidence to warrant the judgment being given in his favour by the Court below.

(b) The appellant raised the issue that the respondent failed to do what is essential to the declaration of any land in his favour.

(c) The plaintiffs/respondents claim before the Court below amounts to no claim at all and should not have been entertained or should have been dismissed.

Particulars of Error

3.2. The lower court found that the respondent before it admitted that at worst he as the plaintiff at the Upper Area Court ought to have been non-suited and that the appellant knew before this court conceded that a retrial ought to have been ordered.

3.3. The Lower Court erred in law to have held that the respondent had established his claim.

Particulars of Error

The learned judge of the court below held that the plaintiff at the Trial Court had established his claim by traditional evidence, evidence of an adjoining neighbour.

3.4 The learned court erred in law for failure to declare the land in favour of the appellant/defendant in view of the appellant's counter claim.

Particulars of Error

The appellant insisted that the land does not belong to the respondent because he didn't know him on the land on which he is in possession and that he only borrowed veko. Learned counsel for the respondent correctly submitted that mere assertion on the part of an appellant that a ground of appeal is based on "error of law", does not make it one if the error stated in the particulars is no more than one of fact or mixed law and fact. As a matter of law, there is nothing sacrosanct on the nomenclature "error of law" in a Notice of Appeal because an appellant will in most cases, and understandably, so name a ground, with all the sentiments and sensitivity for his case. It is left to the respondent to carefully remove the chaff from the grain and see whether the ground of appeal involves law not tainted with facts, which makes it wear some vogue of a mixed grill. In determining whether a ground of appeal is one of fact, mixed law and facts or facts simpliciter, the court should go further than the ground of appeal as couched by the appeal and move down to the particulars of error numerically tabulated thereunder. This is because it is the total package of the ground of appeal and the particulars therein that complete the exercise leading to the conclusion whether a ground of appeal is one of exclusive law or one of mixed law and fact or one of facts simpliciter. It is the experience in quite a number of cases that while the ground of appeal deals with pure and unadulterated law, the particulars that edify the grounds move to the stream of mixed law and fact, and in some cases to facts and facts only. And so there is nothing magical in the expression "error of law", to the extent that it tells the whole story of the ground of appeal as one dealing with law and law alone or only. I must say that there are instances where the drawing line between law and mixed law and fact is thin and difficult to make. But our adjectival law requires the courts to bring out the distinction as it has so much value and strength in the determination of the appeal. One way of discovering the dichotomy is to examine very closely the particulars of error, whether they sing the same chorus of error of law with the ground of appeal or they sing not quite the same chorus in the sense that they add some mixed law or facts simpliciter.

I should now examine the four grounds of appeal. One common expression in the particulars of error in grounds 1, 2 and 3 is evidence. While particular of error (a) uses the word "evidence", ground 2 also uses the word "evidence". The only particular of error in ground 3 uses the words "traditional evidence". Evidence, whether under statute, common law or customary law, is presented to the court on facts by witnesses. The facts could be oral or documentary. In such a situation, it cannot be said that a ground of appeal is exclusively law because the evidence, the probative material received by the court to persuade it as to the truth or veracity of the matter is factual. Accordingly, it is my view that grounds 1, 2 and 3 involve mixed law and facts. Ground 4 complains that the Court of Appeal was wrong in failing to declare that the land belonged to the appellant in the light of the counter claim. This ground of appeal involves the proof of the counter claim and that can only be done by evidence and evidence can only be led and admissible in court by facts. Section 213(3) of the 1979 Constitution provides that subject to the provisions of section 213(2), an appeal shall lie from the decisions of the Federal Court of Appeal to the Supreme Court with leave of the Federal Court of Appeal or the Supreme Court. Section 213(2) provides for matters in which appeal from the Court of Appeal lie as of right to the Supreme Court. The matter involved in this appeal is not one of such matters. Therefore, appeal lies with leave of the Court of Appeal or the Supreme Court. By the Constitution, the Supreme Court cannot hear an appeal on grounds of

mixed law and fact unless leave of the Court or the Court of Appeal is obtained. See *Oluwole v. LSDC* (1983) 5 SC 1; *Faleye v. Otapo* (1987) 4 NWLR (Pt. 64) 186. So too appeal on facts only. See *Adejumo v. State* (1983) 5 SC 24; *Owhotemu-Kowo v. State* (1983) 5 SC 17; *State v. Omeh* (1983) 5 SC 20. Where an appeal requires the leave of court and the leave is not sought and obtained, the appeal is incompetent and will be struck out. See *Russel v. Russel* (1987) 2 NWLR (Pt. 57) 437. This is because a court of competent jurisdiction has no jurisdiction to hear an incompetent appeal. In sum, this appeal is incompetent and this court lacks the jurisdiction to go into the merits accordingly, the appeal is struck out. I award N10, 000.00 against the appellant in favour of the respondent.

Judgment Delivered By

George. Adesola Oguntade, J.S.C.

I have read in draft a copy of the lead judgment by my learned brother Tobi J.S.C. I agree with him that the grounds of appeal raised by the appellant in his notice of appeal are all of mixed law and fact or facts alone. Under Section 213(3) of the 1979 Constitution (which is applicable), the appellant needed to have sought and obtained the leave of the court below or this Court before raising the said grounds of appeal. However, the appellant failed to seek or obtain the needed leave to appeal. This appeal is therefore incompetent. I would also strike it out with N10, 000.00 costs in favour of the respondent against the appellant.

Judgment Delivered By

Aloma Mariam Mukhtar, J.S.C.

In his brief of argument, the respondent attacked the appellant's grounds of appeal, (though not by way of preliminary objection), but by what he described as "Objections/Observation". The learned counsel for the appellant however, understood it to be what it was meant to be, and filed an appellant's reply brief of argument, the content of which did not satisfactorily contest the objections raised in the respondent's brief of argument. Besides, the appellant's reply brief deviated from what it is required to contain, as it was as if the learned counsel completely re opened his argument on the appeal by canvassing arguments that he had even earlier on canvassed in the appellant's main brief of argument. That is not the function of an appellant's reply brief. An appellant's reply brief is meant to address new points raised in the respondent's brief of argument, and not to further duplicate the content of the appellant's brief. See *Okonji & Ors v. Njokanma & Ors* 1999 14 NWLR part 638 page 250. In essence, the complaint of the respondent is predicated on the competence of the appellant's grounds of appeal, which learned counsel has canvassed are incompetent, in that they are not grounds of law, but grounds of mixed law and facts, which require the leave of this Court or the Court of Appeal before it can sustain the appeal. By virtue of section 233 (2) of the Constitution of the Federal Republic of Nigeria 1999, an appeal shall lie as of right to this court in many cases, and the relevant case in this appeal is as contained in sub-section (a) which stipulates thus, (read together with section (2): -

"(2) An appeal shall lie from the decision of the Court of Appeal to the Supreme Court as of right in the following cases (a) where the ground of appeal involves questions of law alone, decisions in any civil or criminal proceedings before the Court of Appeal." Where the ground of appeal does not involve question of law alone, then the provision of sub-section (3) of section 233 of the Constitution supra comes to the rescue of the appellant, for that section states:

"(3) subject to the provisions of sub-section (2) of this section, an appeal shall lie from the decisions of the Court of Appeal to the Supreme Court with the leave of the Court of Appeal or the Supreme Court." It is a fact that the grounds of appeal in this appeal, challenged the Court of Appeal of erring in law in its decision as is contained in each ground of appeal. In determining the validity or competence of a ground of appeal, it is absolutely necessary to read the ground in its entirety, i.e. the main body of the ground and its particulars thereunder. I have perused the grounds of appeal in the Appellant's notice of appeal, and my view is that none is a ground of law simpliciter. They are all grounds of mixed law and fact, and since no leave has been obtained either from the Court of Appeal or this court, as provided by section (3) above, there is no way the appeal can be saved. If any or even one of the grounds of appeal was one of law, it would have sustained the appeal and save it from being struck out, but the situation is not so in this appeal. The fact that the grounds were christened "error in law" does not make the ground one of law. See *Nwadike v. Ibekwe* 1987 4 NWLR part 67 page 718. As I have said earlier on, a thorough examination of ground of appeal is necessary to determine its complaint and the nature of the complaint, and the approach for this determination is as set out by Esho J.S.C. in the case of *Ogbechie & Ors v. Onochie & Ors* 1986 2 NWLR part 23 page 484 at 491 which reads as follows: - "..... What is required is to examine thoroughly the grounds of appeal in the case concerned to see whether the grounds reveal a misunderstanding by the lower tribunal of the law or a misapplication of the law to the facts already proved or admitted, in which case it would be question of law, or one that would require questioning the evaluation of facts by the lower tribunal before the application of the law, in which case it would amount to question of mixed law and fact." I am guided

by the above approach, and I reiterate here that the grounds of appeal in the instant appeal is at most grounds of mixed law and fact. Leave of either court has not been obtained to meet the requirement of the constitution, and the position being so, this court has no alternative than to strike out the appeal. See *Okoye v. Nwulu* 2000 4 NWLR part 658 page 508. *Obijiru v. Ozime* 1985 2 N.W.L.R. part 6 page 167, and *Oluwole v. Lagos State Development Property Corporation* 1983 5 SC 1. I have read in advance the lead judgment delivered by my learned brother Niki Tobi, J.S.C. I am in full agreement with him that the appeal is incompetent and ought to be struck out. In the light of the above reasoning and the fuller ones in the lead judgment I also strike out the appeal.

Judgment Delivered By

Walter Samuel Nkanu Qnnoghen, J.S.C.

I have had the opportunity of reading in draft the lead judgment of my learned brother Tobi, J.S.C., just delivered. I agree with his reasoning and conclusion that the appeal is incompetent and should be struck out since the grounds of appeal complain of facts and mixed law and facts and no leave of either the Court of Appeal or this Court has been obtained before filing the Notice and Grounds of Appeal. My learned brother has exhaustively dealt with the issue in the said lead judgment and I therefore have nothing useful to add. I abide by all the consequential orders made in the lead judgment including the order as to costs.

Appeal struck out.

Judgment Delivered By

Chukwuma Mitchel Chukwuma-Eneh, J.S.C.

In this matter the plaintiff sued the defendant at the Upper Area Court, Minna claiming a declaration of title to a piece of land, which he inherited, from his father Noma Kuta. The defendant has resisted the claim contending that "The land does not belong to the plaintiff and that he borrowed the land from one Yeko" The defendant did not counter claim. At the hearing the plaintiff called 3 witnesses and the defendant called 5 witnesses. The plaintiff's case at the Upper Area Court is that his father first cultivated the farmland, died and was buried there. And that after the death of his father, he inherited the farmland and started to cultivate it. The defendant's case on the other hand is that he "borrowed" the farmland from Yeko and had in turn "borrowed out" the land to DW1 and DW5 who paid tributes to him and that he inherited the land from his father at his death and that the ruins of the plaintiff's father's building on the land was erected after he "borrowed" the farmland to the plaintiff's father. At the conclusion of evidence the trial Court held as follows: "Having carefully studied the evidence of both parties squarely (sic), and placed the testimonies of each party on the scale of justice this Court found out that the evidence of the plaintiff is not strong enough to grant him the title of the land he is praying for. Instead the evidence (sic) of the Defendant outweighs that of the plaintiff coupled with the fact that it was the defendant who held (sic) the possession of the land prior to the filing." In the result, the trial Court declared title in favour of the Defendant, thus dismissing the plaintiff's claim. The plaintiff being aggrieved by the decision appealed to the High Court, which reversed the trial Court's decision thus allowing the plaintiff's appeal. The Defendant feeling aggrieved by the decision of the High Court, appealed to the Court of Appeal, which affirmed the decision of the High Court" and dismissed the defendant's appeal; the defendant still aggrieved has finally appealed to this Court upon four grounds of appeal- In this Court the Defendant is the appellant while the plaintiff is the respondent in the appeal. Parties have filed and exchanged their briefs of argument. The appellant in his brief of argument filed on 27/11/2006 has identified 3 issues for determination as follows:

1. Whether the lower Court properly considered the issues- raised by the appellant on appeal before it.
2. Whether the lower court was right in dismissing the appellant-appeal instead of allowing it upon the evaluation of the evidence before it.
3. Whether the respondent discharged the onus cast upon him by the law to warrant the declaration of title to the land to him. The respondent has also filed his brief of argument in which he has identified 2 issues as follows:
 - (1) Whether the Court of Appeal failed to properly consider the issues: -
 - (i) whether Plaintiff had established his title through evidence; and
 - (ii) whether there is/was a proper claim before the trial court.(See Ground 3, 1 and note that the particulars of error listed as No. (b) on p. 78 is vague.)
 - (2) Whether the Court of Appeal was right to have held that the Respondent had established his claim. (See Ground 3.3) The respondent has taken a preliminary objection to all the four grounds of appeal raised in this matter and has incorporated the same in his brief of argument. The ground for the objection against grounds 1, 3 & 4 is because of being a matter of mixed law and facts and no leave had first been sought and obtained from either the Court below or this Court to raise the grounds of Appeal. As regards ground 2 it is contended that it is vague. Relying on

Nwadike v. Ibekwe (19871 4 NWLR (Pt. 67) 718 at 742 - 3 H - B the respondent has urged to have all the grounds of appeal struck out and with them the entire appeal as incompetent. The appellant has not reacted to the preliminary objection in any way either by filing a reply brief of argument or at the oral hearing of the appeal. All the same the Court will consider its merits and demerits with a view to upholding the objection or dismissing it. See Olawuyi v. Adeyemi (1990) 4 NWLR (Pt. 147) 746. ' I think it is proper to dispose of this crucial question in the appeal, which I consider as capable of finally disposing of the entire appeal, therefore go to the preliminary objection. The -grounds of appeal in the eye of the storm, here are as follows:

"3.1 The Court below erred in law for failure to properly consider the issues raised by the appellant on appeal to it.

Particulars of Error

"(a) The appellant submitted that the plaintiff respondent even by his complaint and the evidence he adduced in support did not adduce enough evidence to warrant the judgment being given in his favour by the Court below.

(b) The appellant raised the issue that the respondent failed to what is essential to the declaration of any land in his favour.

(c) The plaintiffs/respondents claim before the Court below amounts to no claim at all and should not have been entertained or should have been dismissed.

Particulars of Error

3.2 The lower Court erred in law for failure to the appellant/defendant appeal on the proper evaluation of the evidence before it or at worst could have ordered for a retrial of the suit

Particulars of Error

The lower Court found that the respondent before it admitted that at worst he as the plaintiff at the Upper Area Court ought to have been non-suited and that the appellant knew before this Court conceded that a retrial ought to have been ordered.

3.3 The Lower Court erred in law to have held that the respondent had established his claim.

Particulars of Error

The learned judge of the Court below held that plaintiff at the trial Court had established his claim by traditional evidence, evidence of an adjoining neighbour

3.4 The learned lower Court erred in law for failure to declare the land in favour of the appellant/defendant in view of the appellants counterclaim.

Particulars of Error

The appellant insisted that the land does not belong to the respondent because he didn't know him on the land on which he is in possession and that he only borrowed Yeko. I have gleaned through the grounds of appeal canvassed in this appeal and I have no hesitation in holding that paragraph 1(a) of the particulars of-error in law to ground 1, and ground 2 which is not only vague but has raised questions of facts, and ground 3 and its sole particular of error, so also ground 4 and its particulars all respectively have, as can be seen, raised questions of mixed law and facts which by their nature require by virtue of sections 213 (3) of the 1999 Constitution, leave of the Court below or this Court that is, to appeal on grounds of mixed law and facts. See Nwadike v. Ibekwe (supra) The constitution as per Section 213 (3) has provided that 'Subject to the provisions of sub-section 2 of this section, an appeal shall lie from the decisions of Court of Appeal with the leave of the Court of Appeal, or the Supreme Court' And so it is a constitutional requirement to make the. said grounds of appeal competent before the Court. To ascertain whether a ground of appeal is one of law or not which court be tricky, the ground and its particulars have to be read and considered together. In this regard, I have examined the instant four grounds of appeal with particular reference to the said grounds and their particulars I have so identified above and I must say that the issues raised in them are entirely ones of mixed law and fact- Meaning that leave of the Court below or this Court is required before the memorandum and grounds of appeal is filed. It further means that in the absence of one competent ground of law in the instant appeal there is no competent appeal before this Court. Yet again it means that this Court lacks the jurisdiction to entertain the matter and should strike it out and I so agree with the respondent that having upheld the preliminary objection that this is the proper order to make. In the final analysis for all this and much fuller reasons contained in the lead judgment prepared by Tobi J.S.C., I agree with him that this appeal should be struck out for incompetency and I so order. I abide by the order on cost as stated in the lead judgment,

Counsel

Femi Fajemirokun Esq ". For the Appellant

Ibrahim Isiyaku Esq ".

For the Respondent