

IN THE SUPREME COURT OF NIGERIA

Suit No: SC68/2002

Petitioner: Corporative Commerce Bank Plc Ikechukwu Oji Ukpaghari

And

Respondent: Jonah Dan Okoro Ekperi

Date Delivered: 2007-01-26

Judge(s): Sylvester Umaru Onu, Niki Tobi, Dahiru Musdapher, Sunday Akinola Akintan, Walter Samuel Nkanu Onnoghen

Judgment Delivered

This is an appeal against the judgment of the Court of Appeal holden at Port Harcourt in appeal CA/PH/42/97 delivered on the 26th day of April, 2001 in which it set aside the decision of the High Court of Imo State holden at Aba in Suit No. A/413/89 delivered on 17th December, 1990. On the 9th day of October 1989, the respondent as plaintiff instituted an action against the appellants, as defendants at the Aba Judicial Division of the High Court of Imo State in which he claimed the following reliefs:

1. A declaration that the plaintiff did not mortgage his property known as and called plot 9 in block 25 Aba or 180 Jubilee Road, Aba in respect of the overdraft facilitating of '420,000.00 granted him by the first defendant.
2. A declaration that the first defendant fraudulently falsified Current Account No. 253 maintained by the plaintiff at the Aba Main Branch to the detriment of the plaintiff.
3. A declaration that the purported sale or auction of the plaintiff's house and property situate at Aba and known as plot 9 in block 25 or No. 180 Jubilee Road, Aba by the first defendant to the second defendant was fraudulent, collusive, in bad faith, is improper, illegal, null and void and of no effect whatsoever.
4. An order of court setting aside the purported sale or auction of the plaintiffs property known as and called Plot 9 in block 25 or No. 180 Jubilee Road, Aba.
5. An order that the first defendant do release forthwith the property lease in respect of plot 9 in block 25 or No. 180 Jubilee Road, Aba, deposited by the plaintiff before the Nigerian Civil War with the first defendant for safe-keeping.
6. An order of court that the first defendant withdraws forthwith from Lands Registry Owerri the purported mortgage registered as No. 6 at page 6 in volume 257 of the Lands Registry in the office at Owerri,
7. The sum of N500,000,00 general damages for embarrassment, mental torture and loss of business caused the plaintiff by the purported sale or auction of the said plot 9 in block 25 or No. 180 Jubilee Road, Aba by the first defendant to the second defendant. There is no disputing the fact that a banker/customer relationship exists between the 1st appellant and the respondent in the course of which the respondent deposited his title deeds in respect of his property at plot 9 in block 25 or No. 180 Jubilee Road, Aba with the 1st appellant for safe keeping, before the outbreak of the Nigerian Civil War. The title deed continued to be in the custody of the 1st appellant after the said war. As the banker/customer relationship between the parties continued, 1st appellant, at the request of the respondent granted credit facilities to the respondent on two occasions of '410,000.00 each making a total credit facility of '420,000.00. This has not been disputed by the parties. There is also no disputing the fact that in the course of that banker/customer relationship the respondent requested the 1st appellant to open letters of credit on his behalf for which respondent contends he used the title deed as security for the transaction and that 1st appellant duly opened the letters of credit and the transaction was successfully concluded and the charge discharged. The respondent contends that he never used the title deed as security for the credit facility of N 20, 000.00 and that the said facility was unsecured. He does not deny owing the money but simply contends that his title deed in issue were never mortgaged to the 1st appellant as security

for the said facility of N 20, 000.00 but for the letters of credit which transaction was duly completed and the parties discharged. The first appellant on the other hand maintains that the mortgage was for the '420,000.00 credit facility as clearly stated in the mortgage deed, exhibit 9 while the respondent countered that he only signed a blank mortgage deed for the 1st appellant in relation to the letters of credit transaction. In any event the respondent did not repay the credit facility of N20, 000.00 despite repeated demands as a result of which the property, subject of the alleged mortgage, was advertised and sold by public auction. It was the 2nd appellant who bought it at the sale resulting in the action by the respondent, which he lost at the High Court. Upon appeal to the Court of Appeal, the decision of the High Court was set aside resulting in the instant appeal to this Court. In the appellants' brief of argument signed by learned counsel for the, appellants, ANN N. MUOMA Esq (MRS) and deemed filed on 9/7/03 the following issues have been identified for determination:-

'(a) Whether there was a valid contract (deed) of mortgage between the Respondent as mortgagor and the 1st Appellant as mortgagee'

(b) Whether the Respondent was indebted to the 1st appellant at the time the said mortgage was foreclosed and the mortgage property sold to the 2nd Appellant'

(c) Whether the allegation of fraud was proved against the 1st Appellant by the Respondent on the standard of proof stipulated by section 138(1) of the Evidence Act'

(d) Whether the 2nd Appellant obtained a good title under the mortgage sale by the 1st Appellant'

(e) Whether the power of sale under the contract or deed of mortgage was validly exercised by the Appellant. However, in the respondent's brief of argument filed on 3/4/06 by E.O. ONYEMA Esq of counsel for the respondent, there is a Notice of Preliminary Objection to the competence of the appeal. The grounds of the said objection are stated as follows:-

'(a) That the sole ground of Appeal contained in the notice of Appeal initiating the appeal does not arise from or relate to the judgment of the Court of Appeal, which is appealed against.

(b) That this appeal which is predicated upon grounds of mixed law and facts was initiated without the leave either of the Court of Appeal or the Supreme Court contrary to the mandatory requirements of 8.233(3) of the Constitution of the Federal Republic of Nigeria 1999. Arguing the objection learned counsel for the respondent referred the court to the sole ground contained in the Notice of Appeal and submitted that it complains against the appraisal and interpretation of the Deed of Mortgage whereas the judgment appealed against did not determine anything relating to the interpretation of the contents and extent of the legal mortgage which in any event did not arise for determination, the issue before the trial court being whether the parties entered into any binding legal mortgage in respect of the overdraft, facility which the 1st appellant granted to the respondent; that the decision of the Court of Appeal giving rise to this appeal is that there was no binding legal mortgage made by the parties in respect of the overdraft facilities. Learned counsel therefore submitted that the sole ground does not arise from the judgment of the Court of Appeal now on appeal and consequently incompetent and liable to be struck out relying on *Mercantile Bank of Nigeria PLC vs Nwobodo* (2005) 130 LRCN 2269 at 2277 - 2278; *Ikweki vs Ebete* (2005) All FWLR (pt. 257) 1401 at 1420 - 1421. Learned counsel further stated that the appellants subsequently filed two additional grounds of appeal which actually relate to the judgment appealed against but submitted that the additional grounds cannot cure the fundamental defect which arose from the incompetent sole ground of appeal, relying on *Enitan vs State* (1986) 3 NWLR (pt. 30) 604 at 609; *Merotohun vs State* (1992) 7NWLR (pt. 254) 443 at 451; *Dambam vs Lele* (2000) FWLR (pt. 52) 2068 at 2078; *Afrirbank (Nig) PLC vs Eddy Motors Ltd* (2002) 13 NWLR (pt. 785) 639 at 645. Turning to the second arm of the objection learned counsel submitted that the sole ground of appeal is at best a ground of mixed law and fact as it deals with the appraisal of a document and the ascertainment of the extent of the rights/obligations of the parties thereto, relying on *Ogbechie vs Onochie* (1986) 2 NWLR (pt. 23) 484; that by the provisions of section 233(2) and section 233(3) of the 1999 Constitution, leave of the Court of Appeal or of the Supreme Court is required to be sought and obtained before a party can appeal from the Court of Appeal to the Supreme Court where the grounds of appeal are of mixed law and facts and where no such leave is sought and obtained the appeal is incompetent, relying on *Maigoro vs Garba* (1999) 71 LRCN 2809 at ,2830 -

2831;-Orakosim vs Menkiti (2001) FWLR (pt. 52) 2068; Nyambi vs Osadim (1997) 46 LRCN 200 at 208; Akiwuwu Motors Ltd vs Songonuga (1984) AI NLR 309 at 311. In respect of the two additional grounds of appeal learned counsel submitted that they are at best, of mixed law and facts for which leave is required and that since no leave was obtained before they were filed, they are incompetent and liable to be struck out, citing and relying on Cross River State Newspaper Corp. vs Oni (1995) 26 LRCN 51 at 67; Irhabor vs Ogiamien (1999) 70 LRCN 1750 at 1765; that relief No. (d) contained in the appellants motion dated 1/7/2002 and filed on 9/10/2002 but granted on 9/7/2003 as prayed does not cure the incompetence of the appeal particularly having regard to the provisions of section 233(3) of the 1999 Constitution and urged the court to uphold the preliminary, objection and strike out the appeal for being incompetent. On his part, learned counsel for the appellant K.C. NWUFO Esq, in the Appellants Reply Brief of Argument deemed filed on 7/11/06 submitted that the preliminary objection is misconceived particularly as the purported distinction between the issue of existence of any binding legal mortgage and that of the extent of the rights of the parties thereto is a mere semantics as both issues, according to learned counsel for the appellants are inter related and are the same; that assuming without conceding that the original sole ground of appeal was incompetent, the two additional grounds filed pursuant to an order of the court corrected the alleged incompetence, relying on the case of Nalsa & Team Associates vs NNPC (1991) 11 SCNJ.51 at 61 - 62; that :\'an amendment relates back to the date of the original process being amended. Thus the original Notice of Appeal having been amended by the two additional Grounds of Appeal remains competent,\'' Learned counsel further submitted that learned counsel for the respondent did not oppose the application to file the two additional grounds of appeal and as such it is now too late to raise the objection. Turning to the second arm of the objection, learned counsel submitted that on the 19th day of July, 2003 this court granted the appellants\'leave to amend the original Notice of Appeal by filing two additional grounds of Appeal and leave to argue grounds of facts or mixed law and facts as may be contained in the Amended Notice of Appeal,\'' which grant breathed life to the original ground of appeal and therefore rendered the same competent. Learned counsel submitted that the cases cited and relied upon by learned counsel for the respondent in support of his contentions are irrelevant and inapplicable and urged the court to dismiss the objection. It is not in doubt that the legal mortgage which is the bone of contention between the parties is exhibit 9 and that the plaintiffs claim in relation thereto is as contained in paragraph 30(1) of the Statement of Claim to wit:\'A declaration that the plaintiff did not mortgage his property known as and called plot 9 in block 25 Aba or No. 180 Jubilee Road, Aba in respect of the overdraft facility of N20,000.00 granted him by the first defendant.\''The question therefore that called for determination by the trial court is whether the legal mortgage entered into by the parties was in relation to the overdraft facilities as contended by the 1st defendant or in respect of letters of credit as maintained by the plaintiff. It does not call for the interpretation or appraisal of the legal mortgage particularly as the extent of the rights of the parties thereto was never in issue. The question is what is the decision of the trial court as regards the claim of the plaintiff in relief No. 1 supra' At page 76 of the record appears the answer in the following words:-\'From the totality of the pleadings and evidence before me, I am satisfied that the legal mortgage is referable to the loan of N20,000.00 only, not to any other transaction, not certainly in connection with the opening of any letters of credit for the plaintiff by the first defendant.\''The respondent in this Court, who was plaintiff at the trial court, was not happy with the decision of that court, part of which is reproduced above, and consequently appealed to the Court of Appeal which allowed the appeal and set aside the said decision of the trial court by stating inter alia, at pages 182 to 183 of the record thus:-\'With the admission by 1st respondent\'s witness that neither the initial N10,000.00 overdraft nor the increased facility was secured by any collateral and the unchallenged evidence to that effect it is hard to understand how the learned judge could arrived (sic) at the conclusion that-\''From the totality of the pleading and evidence before me, I am satisfied that the legal mortgage is referable to the loan of N20,000.00 only, not to any other transaction, not certainly in connection with the opening if any letters of credit for the plaintiff by first , defendant\''..... Had the learned judge given careful consideration to the evidence before him he would have seen the following facts. He would have seen that the appellant had successfully established that at the time the latter signed Exh. 9 in blank it was understood by the parties that the mortgage was to secure the advance to him by way of letters of credit and no' other debt. He would have seen also that thereafter the 1st respondent unilaterally and without the knowledge or consent of the appellant filled out the deed form to make it referable to the overdraft facility instead of the letters of credit which latter matter was what the parties had in mind when the appellants signed the form\'The court therefore resolved issues 1 and 3 in favour of the appellants therein. The said issues 1 and 3 are as follows:-

\'(1) Was the learned trial judge justified in holding that the legal Mortgage was in respect of the overdraft of N20,000.00 and not the letters of credit.

(3) Was the learned trial judge justified, having regard to the entire circumstances of the case, in holding that the legal mortgage was not tainted with fraud and therefore void but was rather valid and impeachable? From the above decision of the Court of Appeal in relation to the relevant issues before it, it is very clear and I hereby find and, hold that the issue before that court and which was duly resolved in that judgment was not on the appraisal or interpretation of exhibit 9, the legal mortgage agreement nor the extent of the legal rights and obligations of the parties thereto. The next question to determine is having regard to the decision of the Court of Appeal the sole original ground of appeal of the appellant before this court can be said to have arisen from that decision or related thereto. To answer that question we have to look at the said ground of appeal. It complains as follows:- "Error In Law The Learned Court of Appeal erred in law by failing to properly appraise and correctly interpret exhibit 9 (being the Deed of Mortgage dated the 9th day of September 1981 and registered as No. 6 at page 6 in volume 257 of the Lands Registry) so as to ascertain the liabilities and/or obligations of the parties there under thereby occasioning a miscarriage of justice.

Particulars of Error

(1) Exhibit 9 in the proceedings clearly and unambiguously stated inter alia as follows:-

" the Borrower hereby covenants with the bank to repay to the Bank the said sum of N20,000.00 (Twenty Thousand Naira) and any further advances made by the Bank to the Borrower together with interest and other charges accruing at the compound rate of (11%) Eleven per cent per annum on demand or within"

(2) From the said Exhibit 9 it stands out clearly that the said exhibit (Deed of Mortgage aforesaid) was a continuous or floating security for all loans and/or advances made by the mortgagee (the bank) to the mortgagor (the borrower) together with interest and other charges accruing at the compound rate of (11%) eleven percent per annum."

(3) In law the said Deed of Mortgage (Exhibit 9) covered all the loan/advances transactions between the parties thereto while the banker/ customer relationship lasted. There is no dispute that the above is the only ground of appeal contained in the original Notice of Appeal filed within time on 18/7/2001 and contained at page 190-192 of the record. It is also not disputed that the said ground of appeal was filed without the leave of court. Looking at the first arm of the preliminary objection it is very clear and I hereby hold that the sole ground of appeal together with the particulars supplied by the appellants seek to inquire into the content of the legal mortgage and the extent of the rights and obligations of the parties thereto as contended by learned counsel for the respondent. I hold the further view that the above complaint of the appellants also touches on the appraisal and interpretation of the legal mortgage, exhibit 9 whereas the relevant issue before the Court of Appeal and the decision of that court thereon was that there was no binding legal mortgage made by the parties in respect of the overdraft facilities of N20, 000.00 which gave rise to the cause of action. Learned counsel for the appellants has argued that there is no difference between appraisal or interpretation of a document and validity of the document and that the use of the expressions is a matter of semantics and nothing more. With due respect to learned counsel I do not agree with that proposition. It is very clear that whereas an issue of the existence of a valid or binding legal mortgage questions the very existence of the origin of any legal rights or obligations arising there from, the question or issue of the rights and obligations of the parties to the legal mortgage assumes the validity of that legal mortgage but appraises or interprets its contents so as to determine what rights or obligations are conferred therein on the parties thereto. They are definitely not the same thing as contended by learned counsel for the appellants. To make matters worse learned counsel for the appellants then formulated issue No (a) in the appellants brief of argument deemed filed on 9/7/03 which states as follows:-

"(a) Whether there was a valid contract (Deed of mortgage between the respondent as mortgagor and the 1st Appellant as mortgagee" It cannot be said that issue (a) formulated from the original sole ground of appeal which was earlier reproduced in this judgment and which never complained of the validity of exhibit 9 but complained of the interpretation or appraisal of same as to the extent of the legal rights and obligations of the parties thereto arose from the said sole ground of appeal. I therefore agree with the submission of learned counsel for the respondent that the complaint in the original sole ground of appeal contained in the Notice of Appeal does not relate to the decision of the Court of Appeal allegedly appealed against. It is clear that the sole ground of appeal does not arise from that judgment. It is settled law that for grounds of appeal to be valid and competent, they must be related to the decision being appealed against and should constitute a challenge to the ratio of the decision on appeal. It is still good law that where a ground of appeal as formulated does not arise from the judgment and purports to raise and attack an issue not decided

by the judgment appealed against as is evident in the instant appeal, the same becomes incompetent and liable to be struck out. The ground of appeal does not arise from the judgment of the court below neither can it be said that issue (a) as formulated is derivable from the said sole ground of appeal. The question that follows is whether the filing of the additional two grounds of appeal cured the fundamental defect in the Notice of Appeal so as to "breath life" into same as contended by learned counsel for the appellants. It is settled law that a Notice of Appeal filed within time but without any ground or valid ground of appeal is a worthless piece of paper being grossly incompetent and liable to be struck out. In the instant case I hold that the sole ground of appeal contained in the notice of appeal is incompetent and therefore liable to be struck out. I hold the further view that it is settled law that you cannot put something on nothing and expect it to stand. That being the case, it follows that with the notice of appeal being incompetent or void for not containing a ground(s) of appeal known to law, it remains dead and buried and cannot be resuscitated or revalidated by the subsequent filing of additional grounds of appeal which may be regarded in certain respects as being valid. The reason is simple and very obvious. At the time the additional grounds of appeal were filed by the appellants no fresh' notice of appeal was filed along with them neither did the appellants seek and obtain any extension of time within which to file same the time to appeal having, long lapsed. From the record, the judgment of the Court of Appeal was delivered on the 26th day of April 2001 while the Notice of Appeal containing the sole ground of appeal was filed on 18/7/2001. On the other hand, the Amended Notice of Appeal was filed in this court on 9/10/2002, and there was no extension of time granted for the appellant to file same. The amendment was done on the simply assumption that the original Notice of Appeal was valid and subsisting. With the finding that the said original notice of appeal cannot in law be said to have existed, it follows that what is void, or non-existent in law cannot be validly amended. That being the case I hold that the purported amended Notice of Appeal was an exercise in futility, and could not have "breathed life" into the fundamentally defective original notice of appeal. In conclusion I find merit in the preliminary objection which is hereby upheld. I therefore hold that since the Notice of Appeal filed on 18/7/01 is legally without any ground of appeal and therefore incompetent, the appeal it sought to initiate is equally without competence and is consequently struck out with N10, 000.00 costs to the respondent. Appeal struck out for being incompetent.

Judgment delivered by

Sylvester Umaru Onu, J.S.C.

Having been privileged to read in draft the judgment of my learned brother Onnoghen, J.S.C just delivered, I am in entire agreement with him that there is merit in the preliminary objection raised. I therefore hold that since the Notice of Appeal filed on 18/7/01 is legally without any ground of appeal and therefore incompetent, the appeal it sought to initiate, is equally without competence. Consequently, I too strike out the appeal with N10, 000.00 costs to the Respondent.

Judgment delivered by

Niki Tobi, J.S.C

I have read in draft the judgment of my learned brother, Onnoghen, J.S.C, and I agree with him. Grievance in and dissatisfaction with a judgment is articulated and conveyed to an appellate court in ground or grounds of appeal. As a matter of law, grounds of appeal are indexes of an appellant's complaints against a judgment of a court. Accordingly, where there are no grounds of appeal or there are no properly formulated grounds of appeal, an appellate court will conclude that there is no appeal before it. There is some distinction and I should bring it out. Where no ground of appeal is filed on a matter, the court will come to the conclusion that the appellant is satisfied with the particular matter. However, where there is no competent ground of appeal on a matter the court will come to the conclusion that there is no competent ground on that matter. In the second situation, the appellant may have a complaint but the complaint has not been competently articulated in the ground of appeal. In both situations, appellate court will not go into the hearing on the appeal.

It is elementary law that a ground of appeal must arise from or relate to the judgment of the court. It must directly emanate from the judgment of the court. It must complain against the ratio decidendi of the case, not the obiter dictum. An appellate court should not be placed in a position of speculation or conjecture whether a ground of appeal arises from or relates to the judgment of the court. And that is why our adjectival law requires that grounds of appeal must be drafted with concision, precision or exactness. There is no room for vague and rigmarole language in the drafting of grounds of

appeal. There is yet another very strong rule in our law of grounds of appeal. It is this. Where a ground of appeal involves both ground of law and facts, it becomes hybrid and therefore branded as one of mixed law and fact. In such a situation that could be likened to a cocktail, it is the requirement of the law that leave must be sought. This is not to enable the court to apply a machete to remove the chaff from the grain, but to put it and the adverse party on notice that the ground is one of mixed grill, so to say. And it is good that the court and the adverse party know this early in the appellate litigation. So much of the law. I now go to the factual situation. It is the ground of appeal. It reads: "The Learned Court of Appeal erred in law by failing to properly appraise and correctly interpret exhibit 9 (being the Deed of Mortgage dated the 9th day of September 1981 and registered as No. 6 at page 6 in volume 257 of the Lands Registry) so as to ascertain the liabilities and/or obligations of the parties there under thereby occasioning a miscarriage of justice." The ground is followed by three particulars of error. I have examined the arguments advanced by my learned brother on the fault located by him in respect of the ground and I do not think I am in a position to improve on it. He is right and I go along with him. Because parties are at liberty to file additional grounds of appeal, the appellant took advantage of the open invitation and filed two additional grounds. They are supposed to complement or boost the ego of the only original ground. The additional grounds can only sail through to the hearing of the appeal if the main ground they are designed to complement is competent. Where an original ground is not competent, it cannot receive additional grounds, though competent. There is an aspect of the law of nature and it is that one can put something on something and the something will remain and stand as that something. One can add nothing to something and the nothing will naturally fossilize into thin air in contact with the something and the something will stand as that something. But one cannot add something on nothing and expect the something to stand. Since the something has nothing to wedge it to stand, the something will not stand, as it will find itself in a situation of a mirage. The above law of nature is clearly against the scientific law of Newton's universal gravitation, though. In view of the fact that the original ground is incompetent, the additional grounds have no place for salvation. They crash. As the original ground of appeal is incompetent, it is struck out. This affects the Notice of Appeal which was put in place by the only ground of appeal. At the end of the day, the competence of the appeal is equally affected. The appeal itself is therefore struck out. The preliminary objection is upheld. I award N10,000.00 costs to the respondent.

Judgment delivered by
Dahiru Musdapher, J.S.C

I have had the honour to read in advance the judgment of my Lord Onnoghen, J.S.C just delivered with which I entirely agree. For the same reasons on which my Lord based his decision in this matter, which I adopt as mine, I too, do hereby find the preliminary objection on the competency of the appeal meritorious. I uphold the preliminary objection and strike out the Notice of appeal and the amended Notice of appeal. I award the respondent costs assessed at N10,000.00

Judgment delivered by
Sunday. Akinola. Akintan, J.S.C

I had the privilege of reading the draft of the lead judgment prepared by my learned brother, Onnoghen, J.S.C. The facts of the case and all the issues raised in the appeal are well set out and fully discussed in the judgment. I entirely agree with his reasoning and conclusions reached therein. The facts of the case are not in dispute. A dispute arose in the banker/customer relationship between the parties. It was over whether the title deed, in respect of a house owned by the respondent, deposited with the 1st respondent was mortgaged as security for a loan of N20,000.00 the 1st appellant, claiming that the house was mortgaged as security for the loan, sold the house to the 2nd appellant. The respondent instituted the action to challenge the sale. The trial High Court dismissed the claim. But on appeal to the court below, his appeal was allowed and the sale was set aside. The present appeal is from the judgment of the lower court in the matter. The appellants initially filed one ground of appeal. But additional grounds were later filed. At the hearing of the appeal in this court, a preliminary objection was raised as to the competency of the grounds of appeal filed by the appellants. The objection was founded on two grounds: that the original ground of appeal filed was incompetent in that the compliant in the said ground did not arise from the judgment on appeal; and that the additional grounds of appeal later filed were of mixed law and facts for which the appellants need leave and which they failed to obtain. I entirely agree with the reasons given in the lead judgment for holding that there is merit in the preliminary objections. I believe that once the grounds of appeal are defective and thereby incompetent, then one of the vital pre-conditions that must be met before we could entertain the appeal, as required by law, is missing: See *Madukolu v. Nkemdilim* (1962) 1 ALL

NLR587. For the above reason and the, fuller reasons given in the lead judgment, which I also adopt, I hold that the appeal is incompetent and I accordingly strike out the appeal and make similar order' on costs as made in the lead judgment.

Counsels

K. C .Nwafor

with him

N .T. Kamuche '... For the Appellants.

E.O. Onyema '... For the Respondent.