

1. DR. ALEX OTTI
2. ALL PROGRESSIVE GRAND ALLIANCE (APGA)

V.

1. DR. SAMPSON UCHECHUKWU OGAH
2. PEOPLES DEMOCRATIC PARTY (PDP)
3. DR. OKEZIE VICTOR IKPEAZU
4. INDEPENDENT NATIONAL ELECTORAL COMMISSION (INEC)
5. SIR FRIDAY NWANOZIE NWOSU

*SUPREME COURT OF NIGERIA*

*SC.718/2016*

IBRAHIM TANKO MUHAMMAD. J.S.C.  
(Presided)

OLUKAYODE ARIWOOLA, J.S.C.

CLARA BATA OGUNBIYI. J.S.C. (Read the  
Leading RULING)

KUMAI BAYANG AKA' AHS, J.S.C.

KUDIRAT MOTONMORI OLATOKUNBO

KEKERE-EKUN, J.S.C

CHIMA CENTUS NWEZE, J.S.C.

A MIRU SANUSI, J.S.C.

FRIDAY, 27<sup>TH</sup> JANUARY 2017

*APPEAL - Grounds of appeal - Classification of - Guide to.*

*APPEAL - Grounds of appeal - Classification of - Where party not  
certain of classification of*

*ground of appeal - Fee to seek and obtain leave to argue.*

*APPEAL - Grounds of appeal - Ground of appeal filed without leave  
where required - Competence of - How treated.*

*APPEAL - Grounds of appeal - Ground of mixed law and fact Leave to argue - Application*

*therefor – need for respondent not to be subjective in opposing.*

*APPEAL - Grounds of appeal - Ground of mixed law and fact Leave to argue - Failure to*

*seek and obtain – Effect of effect on jurisdiction of court.*

*APPEAL - Grounds of appeal - Ground of fact or mixed law and fact - Leave to argue - Need*

*to seek and obtain.*

*APPEAL - Grounds of appeal - One competent ground of law whether can sustain appeal.*

*APPEAL - Interlocutory appeal - Determination of - Need for appellate court to avoid determining issue in substantive appeal.*

*APPEAL - Leave to appeal - Application for - Determination of Relevant consideration.*

*APPEAL - Leave to appeal - Application for - Ruling of court refusing - Whether decision of court under section 318(1), 1999 Constitution.*

*APPEAL - Leave to appeal - Application therefor - Discretion of court to grant or refuse.*

*APPEAL - Leave to appeal - Application therefor - What applicant must show.*

*APPEAL - Right of appeal - Appeal from decision of Court of Appeal to Supreme Court - When as of right.*

*APPEAL - Right of appeal - Right of appeal against decision of court refusing leave to appeal as interested party - Whether extant.*

*APPEAL - Right of appeal - When enures - Constitutional guarantee of.*

*CONSTITUTIONAL LAW - Decision of court - Ruling of court refusing application for*

*leave to appeal - Whether decision of court under section 318(1), 1999 Constitution.*

*CONSTITUTIONAL LAW- Right of appeal - Appeal from decision (if Court of Appeal to*

*Supreme Court - When as of right.*

*CONSTITUTIONAL LAW - Right of appeal - Right of appeal against decision of court refusing leave to appeal as interested parts - Whether extant.*

*CONSTITUTIONAL LAW - Right of appeal - When enures - Constitutional guarantee of.*

*CONSTITUTIONAL LAW - Right to fair hearing - Whether can be denied on ground of*

*technicality.*

*FAIR HEARING - Right to fair hearing - Whether can be denied on ground of technicality.*

*JUDGMENT AND ORDER - Decision of court - Ruling of court refusing application for leave to appeal - Whether decision of court under section 318 (1), 1999 Constitution.*

*PRACTICE AND PROCEDURE - Appeal - Grounds of appeal - Classification of – Where party not certain of classification of ground of appeal - Need to seek and obtain leave to argue.*

*PRACTICE AND PROCEDURE - Appeal - Grounds of appeal - Classification of – Guide to.*

*PRACTICE AND PROCEDURE - Appeal - Grounds of appeal - Ground of appeal filed without leave where required -Competence of - How treated.*

*PRACTICE AND PROCEDURE - Appeal - Grounds of appeal - Ground of mixed law and fact - Leave to argue - Application therefor - Need for respondent not to be subjective in opposing.*

*PRACTICE AND PROCEDURE - Appeal - Grounds of appeal -Ground of mixed law and fact - Leave to argue - Failure to seek and obtain - Effect of - Effect on jurisdiction of court.*

*PRACTICE AND PROCEDURE - Appeal – Ground of Appeal, Ground of fact or mixed law and fact - Leave to argue - need seek and obtain*

*PRACTICE AND PROCEDURE - Appeal – Interlocutory Determination of - Need for appellate court determining issue in substantive appeal*

*PRACTICE AND PROCEDURE - Appeal - Leave to Appeal Application for - Determination of Relevant consideration.*

*PRACTICE AND PROCEDURE - Appeal - Leave to Appeal Application for - Ruling of court refusing Whether deep of court under section 318{1}, 1999 Constitution.*

*PRACTICE AND PROCEDURE - Appeal - Leave to Appeal Application therefor - What applicant must show.*

*PRACTICE AND PROCEDURE - Appeal Leave to appeal Application therefor - Discretion of court to grant or refuse*

*PRACTICE AND PROCEDURE - Appeal - Right of appeal – Appeal from decision of Court of Appeal to Supreme Court - When of right.*

*PRACTICE AND PROCEDURE - Appeal - Right of appeal of appeal against decision of court refusing leave to appeal as interested party - Whether extant.*

*PRACTICE AND PROCEDURE - Appeal – Right of appeal –When enures - Constitutional guarantee of.*

*PRACTICE AND PROCEDURE - Right to fair hearing – when can be denied on ground of technicality*

**Issue:**

Whether, considering the materials placed before the Supreme Court coupled with the peculiar facts and circumstances of this case, the Supreme Court ought to exercise its discretion in favour of a grant of applicants' application.

**Facts:**

1st and 3<sup>rd</sup> respondents as members of the 2<sup>nd</sup> respondent political party participated in the 2<sup>nd</sup> respondent's governorship primary election for Abia State conducted on 8<sup>th</sup> December 2014. The 2<sup>nd</sup> respondent returned the 3<sup>rd</sup> respondent as the winner of primary election, while the 1<sup>st</sup> respondent came second in the election.

Dissatisfied, the 1<sup>st</sup> respondent commenced an action by originating summons at the Federal High Court claiming several reliefs. In its judgment, the trial court granted the reliefs and ordered the 4<sup>th</sup> respondent to issue a certificate of return to the 1<sup>st</sup> respondent as Governor-elect and restore all entitlements to him as the elected Governor of Abia State.

Following the delivery of the judgment, the applicants filed application at the Court of Appeal seeking *inter alia* an order granting them leave to appeal as interested persons against the judgment and an order deeming their notice of appeal already filed against the judgment as properly filed and served.

After hearing parties, the Court of Appeal in its ruling dismissed the application.

Consequently, the applicants appealed to the Supreme Court and subsequently filed a motion on notice at the Supreme Court seeking an order granting them leave to appeal against the decision after Court of Appeal on grounds of mixed law and facts as set out their notice of appeal; and an order deeming the notice of appeal properly filed and served. The applicants filed the application out of an abundance of caution since, as they contended, some of the grounds of appeal were not exclusively of law alone but of mixed law and facts.

The application was opposed by all the respondents except the 4<sup>th</sup> respondent. Some of the reasons advanced against the grant of the application were that all the grounds of appeal were of mixed law and facts: that the application for leave to argue thereon ought to have been filed first at the Court of Appeal and no special circumstance was shown to

warrant it being tiled directly at the Supreme Court; that the judgment of the trial court against which they sought leave to appeal as interested persons no longer subsisted, having been set aside by the Court of Appeal based on the appeals filed against it by the 2<sup>nd</sup> and 3<sup>rd</sup> respondents; that if the applicants were granted the leave they sought, there was no longer a judgment to appeal against; that even if they were granted leave to appeal and the appeal eventually succeeded, it would amount to an academic exercise.

**Held** (*Unanimously granting the application*):

1. *On What applicant must show in application to appeal -*

**In an application for leave to appeal, the applicant must show by good and substantial reason why the appeal ought to be heard and this must be exhibited by a notice of appeal showing arguable grounds of appeal if leave is granted. The grant of leave is not a matter of course. It is also not necessary that the appeal should have merit but the question is whether there is a right and reason to appeal. (Pp. 27-28. paras. H-B)**

2. *On Discretion of court to grant or refuse application for leave to appeal -*

**The grant or refusal to grant leave to appeal to an applicant is a matter of discretion of the court; However, such discretion is to be exercised judicially and judiciously. In an application which calls for the exercise of the court's discretion, the discretion must be exercised judicially and judiciously taking all the facts and case into consideration. [Ukachukwu v. PDP (2014) 4 NWLR (Pt. 1396) 65 referred to.] (P. 28, paras. B-D)**

3. *On Relevant consideration in determining application for leave to appeal -*

**It will defeat the cause of justice to letter the right of access to the court by way of declining to grant an application for leave to appeal. The path to tread should be that of justice as against technicality. Such an application should not be opposed for the sake of either doing so or because the opponent feels threatened. The overriding consideration must always be justice and fairness. The applicant is not required to show that the appeal would succeed if leave is granted. It is sufficient to show that there is an arguable appeal. In the instant case, the applicants having appealed within time and having subscribed other valid grounds of appeal on the notice of appeal duly filed earlier within the time allowed by law, there was nothing before the Supreme Court to prevent the exercise of discretion in favour of their application, [obikoya v. Wema Bank Plc. (1989) 1 NWLR (Ft. 96) 157; Holman Brothers (Nig.) Ltd. v. Kigo (Nig.) Ltd. (1980) 8 - 11 SC 43 referred to.] (Pp. 3J-32, paras. H-D).**

4. *On Whether ruling of Court of Appeal refusing application for leave to appeal decision of court under section 318(1) of 1999 Constitution –*

**A ruling of the Court of Appeal refusing an application for leave to appeal is a decision of the court within the meaning of section 318(1) of the Constitution of the Federal Republic of Nigeria 1999 (as amended) which is appealable. [Shyllon v. Asein (1994) 6 NWLR (Ft. 353) 670; Rabiou v. State (1980) 2 NCLR 293; Tomtec (Nig.) Ltd. v. F.H.A. (2009) 18 NWLR**

(Ft. 1173) 358 referred to.] (P. 32. paras. F-H)

5. *On Whether right of appeal against decision of court refusing leave to appeal as interested party extant –*

**A party's constitutional right of appeal against the decision of a court refusing him leave to appeal as an interested party remains extant and cannot be waived or taken away from him. The obligation to hear the other side of a dispute or the right of a party in dispute to be heard is such a basic and fundamental principle of Nigerian adjudicatory system in the determination of disputes that it cannot be compromised on any ground. [MFA v. Inongha (2014) 4 NWLR (Ft. 1397) 343; 7-Up Bottling Co. v. Abiola & Sons (Nig.) Ltd. (1995) 3 NWLR (Pt. 383) 257; Deduwa v. Okorodudu (1976) 1 NMLR 236; Tsokwa Motors (Nig.) Ltd. v. U.B.A. plc. (2008) 2 NWLR (Pt. 1071) 347; Audu v. F.R.N. (2103) 5 NWLR (Pt. 1348) 397 refered to.] (P.33 paras. C-G).**

6. *On When right of appeal enures -*

**An appellant has a right of appeal where the decision of a court is a final decision. By section 241(1), 244(2) and 245(1) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended), every citizen of Nigeria has the right to approach a higher court to exercise his right of appeal as provided. the instant case, the decision of the Court of Appeal was a final decision which prevented the appellant from appealing against the orders made by the trial court. Being a final decision the applicants had a right of appeal. (P. 28, paras. E-G)**

7. *On Whether one competent ground of law can sustain appeal -*

**One competent ground of law is enough to sustain an appeal to the Supreme Court. In the instant case, it was only in respect of one ground that leave to appeal on ground of mixed law and fact was sought. [Nwaolisah v. Nwabufor (2011) 14 NWLR (Pt. 1268) 600; Abitbakar v. Dankwambo (2015) 18 NWLR (Pt. 1491) 213 referred to.] (Pp. 28-29, paras. H-A).**

8. *On When appeal from decision of Court of Appeal to Supreme Court is as of right -*

**By section 233(2)(e)(iv) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended), an appeal from the decision of the Court of Appeal to the Supreme Court is as of right. A party should never be denied the right of appeal if he satisfied the conditions for appeal. In the instant case, the applicant had the constitutional right to appeal against the decision of the Court of Appeal made against them. [P.D.P. v. Okorochoa (2012) 15. NWLR (Pt. 1323) 205; Ugba v. Suswan (2014) HI NWLR (Pt. 1427) 264; Anachebe v. Ijeoma (2014) 14 NWLR (Pt. 1426) 168; Ngere v. Okuruket XIV (2014) 11 NWLR (Pt. 1417) 147; Katol Inv. Ltd. v. U.A.C.N. P.D. Co. Plc. (2011)16 NWLR (Pt. 1273) 211 referred to.] (P. 29, paras. A-E)**

9. *On Need to seek and obtain leave to argue ground of fact or ground of mixed law and fact -*

**Section 233(2) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) provides for the circumstances in which appeals to the Supreme Court from decisions of the Court of Appeal are as of right. Section 233(2)(a) provides**

**for appeals as of right where the ground of appeal in any civil or criminal proceeding involves questions of law alone. Thus, where questions of facts or of mixed law and facts are in issue, leave must be sought and obtained. [Abubakar v. Dankwambo (2015) 18 NWLR (Pt.1491) 213; Okwuagbala v. Ikwueme (2010) 19 NWLR (Pt.1226) 54; Opuiyo v. Omoniwari (2007) 16 NWLR (Pt. 1060) 415 referred to.] (P. 38, paras. F-11)**

10. *On Effect of failure to seek and obtain leave to argue ground of mixed law and fact –*

**An appellant should seek the leave of court in instances where the leave of court serves as a pre-condition upon which concerned grounds are properly filed before the appellate court, failure of which the defective grounds may be struck out. Where leave, which means permission, is a precondition before an appellant can file a notice of appeal containing grounds of mixed law and fact, an appellant who files a notice of appeal without satisfying or obtaining that pre-condition would have his process thrown out. [ Abubakar v. Dankwambo (2015) 18 NWLR (Pt. 1491) 213 referred to.] (P. 29, paras. E-H)**

11. *On Effect of failure to seek and obtain leave to argue ground of mixed law and fact -*

**The failure of an appellant to seek the leave of court to argue a ground of mixed law and facts which is subscribed on the notice of appeal touches or robs the appellate court of its jurisdiction to consider and pronounce on such a ground as it is deemed incompetent before the court. Where grounds of**

**appeal involve questions of fact alone or question of mixed law and fact, leave of the Court of Appeal or the Supreme Court must be obtained to make the appeal competent and invest the Supreme Court with jurisdiction to hear the appeal. In the instant case, the refusal of the Supreme Court to grant the applicants leave to argue the ground of mixed law and fact as subscribed on the notice of appeal would rob the applicants of the right to be heard on the ground. The leave of the Supreme Court was inevitable before the affected ground of appeal could be properly before the court. [Akiwivu Motors Ltd. v. Sangonuga (1984) All NLR (Reprint) 309; Anachebe v. Ijeoma (2014) 14 NWLR (Pt. 1426) 168 referred to.] (P.31, paras. A-E)**

12. *On Competence of ground of appeal filed without leave where required -*

**A ground of appeal filed without leave where leave is required is incompetent and liable to be struck out. [C.B.N, v. Okojie (2002) 8 NWLR (Pt.768) 48; Kano Textile Printers Ltd. v. Gloede and Hoff(Nig.) Ltd. (2005) 13 NWLR (Pt.943) 680 referred to.] (P. 39, para. A)**

13. *On Need for respondent not to be subjective in opposing application for leave to argue ground of mixed law and fact –*

**when the law lays down a condition that leave is to be sought and obtain before filing grounds of appeal on mixed law and fact, it does not give a reason for exploitation by the opposite party in making it difficult for the applicant to access the discretion of court. In order words, when the law expects the applicant to lay before a court all a court**

**all materials necessary for the exercise of discretion in his favour, the respondent is not to be subjective in his opposition but rather allow the principle of law and objectivity to apply. (P. 30, paras. A-B)**

- 14 *On Need to seek and obtain leave to argue ground of appeal where party not certain of classification of ground -*

**Where it is not apparent on record or when a party is not sure whether a ground of appeal can be classified as a ground of law or a ground of mixed law and fact, leave of court to appeal on such ground could be obtained as a safe or precautionary measure. [F. B. N. Plc. v. T. S. A. ind. Ltd. (2010) 15 NWLR (Pt. 1216) 247; Kano Textile Printers Ltd. v. Gloede and Hoff (Nig.) Ltd. (2005) 13 NWLR (Pt.943) 680; CBN. v. Okojie (2002) 8 NWLR (Pt.768) 48 referred to.] (Pp. 31, paras. E G; 39. paras. A-C: 40, paras. A-C)**

15. *On Classification of grounds of appeal –*

**A court has a duty to do a thorough examination of the grounds of appeal which an appellant filed. The main purpose of the examination will be to find out whether, if from the grounds, it is evident that the lower court misunderstood the law or whether the court misapplied the law to the facts which are already proved or admitted. In any of the two instances, the ground would qualify as a ground of law. On the other hand, if the ground complains of the manner in which the lower court evaluated the facts before applying the law, the ground is of mixed law and fact. The determination of grounds of fact is much easier. Thus, it is the essence of the ground or the main grouse, that is, the**

**reality of the complaint embedded in the name that determines what any particular ground involves. In effect, it is neither its cognomen nor its designation as error of law that determines the essence of a ground of appeal. [Abidoye v. Alawode (2001) 6 NWLR (Pt.709) 463; NEPA v. Eze (2001) 3 NWLR (Pt. 709) 606; Ezeobi v. Abang (2000) 9 NWLR (Pt.672)230; Ojukwu v. Kaine (2000)15 NWLR (Pt. 691) 516; UBA Ltd. V. Stahlbau GmbH & Co. (1989) 3 NWLR (Pt. 110) 374; Ojemen v. Momodu II (1983) 1 SCNLR 188 referred to.] (Pp. 40-41, paras. D-A).**

16. *ON WHETHER RIGHT TO FAIR HEARING CAN BE DENIED ON GROUND OF TECHNICALITY -*

A PARTY'S RIGHT TO FAIR HEARING AS PROVIDED UNDER SECTION 36 OF THE CONSTITUTION OF THE FEDERAL REPUBLIC OF NIGERIA, 1999 (AS AMENDED) IS INVIOABLE AND AS SUCH CANNOT BE DENIED ON THE GROUNDS OF TECHNICALITIES. COURTS ARE TO DO SUBSTANTIAL JUSTICE WITHOUT DUE REGARD TO TECHNICALITIES. [ABUBAKAR V. YAR'ADUA (2008) 4 NWLR (PT. 1078) 465 REFERRED TO.] (P. 30, PARAS. C-D)

17. *On Need For Appellate Court To Avoid Determining In Interlocutory Appeal Issue In Substantive Appeal –*

**An appellate court should not prejudge in an interlocutory appeal issues arising in a pending substantive appeal. An appeal court should refrain at an interlocutory stage from delving into the merit of the substantive question before it. In an appeal arising from an interlocutory decision, care should be taken**

**by an appellate court to avoid making an observation which may appear to prejudice the issues yet to be determined in the pending substantive appeal.** [*magnusson v. Koiki (1993) 9 NWLR (pt. 317) 287; kotoye v. C.B.N(1989) 1 NWLR (PT. 98) 419; obeya m. S. Hospital v. A.-g., fed.(1987) 3 NWLR (pt. 60) 325 referred to.*] (pp. 30, paras. D-E, F-G; 33-34. Paras. H-b)

**NIGERIAN CASES REFERRED TO IN THE RULING:**

*7-Up Bottling Co. V. Abiola & Sons (Nig.) Ltd. (1995) 3 NWLR (pt. 383) 257*

*Abidoye V. Alawode (2001) 6 NWLR (pt. 709) 463*

*Abubakar V. Dankwambo (2015) 18 NWLR (pt. 1491) 213*

*Abubakar V. Yar'adua (2008) 4 NWLR (pt. 1078) 465*

*Akwiwu Motors Ltd. V. Sangonuga (1984) all NLR (Reprint)309*

*Alor v. Ngene (2007) 17 NWLR (pt. 1062) 163*

*Amaechi v. INEC (2008) 5 NWLR (pt. 1080) 227*

*Anachebe V. Ijeoma (2014) 14 NWLR (pt. 1426) 168*

*Audu v. F.R.N. (2013) 5 nwlr (pt. 1348) 397*

*B.A.S-F- (Nig) Ltd. V. Faith Ent. Ltd. (2010) 4 NWLR (pt. 1183) 104*

*C.C.B. (Nig.) Plc. V. A.-G., Anambra State (1992) 8 NWLR (pt. 261)528*

*C.B.N. v. Okojie (2002) 8 NWLR (pt. 768) 48*

*Comm., Education, Imo State V.Amadi (2013) 13 NWLR (pt.1370) 133*

*Deduwa V. Okorodudu (1976) 1 NMLR 236*

*Eligwe V. Okpokiri (2014) 2 NWLR (pt. 1443) 348*

*Ezeobi V. Abang (2000) 9 NWLR (pt. 672) 230*

*F. B. N. Pic. V. T.S.A. Lnd. Ltd. (2010) 15 NWLR (pt. 1216)247*

*Dolman Brothers (Nig.) Ltd. V. Kigo (Nig.) Ltd. (1980) 8 -  
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*Kano Textile Printers Ltd. V. Gloede And Hoff (Nig.) Ltd.  
(2005) 13 NWLR (pt.943) 680*

*Katol Inv. Ltd. V. U.A.C.N. P.D. Co. Plc. (2011)16 NWLR  
(pt. 1273) 211*

*Kotoye V. C.B.N. (1989) 1 NWLR (pt. 98) 419*

*M.D.P.D.T. V. Okonkwo (2001) 7 NWLR (pt. 711) 206*

*Magnusson V. Koiki (1993) 9 NWLR (pt. 317) 287*

*MFA V. Inongha (2014) 4 NWLR (pt. 1397) 343*

*NEPA v. Eze (2001) 3 NWLR (pt. 709) 606*

*Ngere V. Okuruket "XIV" (2014) 11 NWLR (pt. 1417) 147*

*Nwadike V. Ibekwe (1987) 4 NWLR (pt. 67) 718*

*Nwuolisah V. Nwabufor (2011) 14 NWLR (pt. 1268) 600*

*Nvvokoro V. Onuma (1990) 3 NWLR (pt. 136) 22*

*Obatoyinbo V. Oshaiobo (1996) 5 NWLR (pt. 450) 531*

*Obexa M. S. Hospital V. A.-G., Fed. (1987) 3 NWLR (pt. 60) 325*

*Obikoya V. Wema Bank Plc (1989) 1 NWLR (pt. 96) 157*

*Ogbechie V. Onochie (1986) 1 NWLR (pt. 70) 370*

*Ojemen V. Momodu II (1983) 1 SCNLR 188*

*Ojukwu V. Kaine (2000) 15 NWLR (pt.691)  
516*

*Okwuagbala v. Ikvviteme (2010) 19 NWLR (PT.  
1226) 54*

*Olori Motors Co. Ltd. v. B.N. Plc. (2006) 10 NWLR  
(PT. 989) 586*

*Opuiyo v. Omoniwari* (2007) 16 NWLR (Pt. 1060) 415  
*P.D.P. v. Okorochoa* (2012) 15 NWLR (Pt. 1323) 205  
*Rabin v. STATE* (1980) 2 NCLR 293  
*Tomtec (Nig) Ltd. v. F.H.A.* (2009) 18 NLWR (Pt. 1173) 358  
*Tsokwa Motors (Nig) Ltd. v. U.B.A. Plc.* (2008) 2 NWLR (Pt. 1071) 347  
*U.B.A. Ltd. v. Stahlbau Gmbh & Co* (1989) 3 NWLR (PT. 110) 374  
*Ugba v. Suswan* (2014) 14 NWLR (Pt. 1427) 264  
*Ukachukwu v. P.D.P.* (2014) 4 NWLR (Pt. 1396) 65

**Foreign Cases Referred To In The Ruling:**

*Benmax V. Austin Motors Co. Ltd.* (1945) all ER 326  
*Clarke V. Edinburgh Etc. Tramways* (1919) SC (HL) 35  
*Cooper V. Stubbs* (1925) 2 KB 277  
*Currie V. Inland Revenue Commission* (1921) 2 KB 536  
*Edwards (Inspector Of Taxes) V. Bairstows* (1955) 3 all ER 48

**Nigerian Statutes Referred to in the Ruling:**

*Constitution of the Federal Republic of Nigeria, 1999 (as amended), Ss. 233(1), (2)(a)(e)(i)(iv) and (3), 241(1), 244(2) 245(1) and 318(1)*

*Electoral Act, 2010 (as amended), Ss. 31(2), (5) & (6) and 87(4)(b)(1)(2)*

*Supreme Court Act, S. 22*

**Nigerian Rules of Court Referred to in the Ruling:**

*Supreme Court Rules 1985 (as amended), O. 2 r.28(3) &(4), O. 3 r. 15 and O. 6 r. 2(1)*

**Books Referred to in the Ruling:**

*C. T. Emery and Professor B. Smythe, Error of Law in Administrative Law in Law Quarterly Review Vol. 100 October 1984*

*Peoples Democratic Party Electoral Guidelines 2014 Part IV Art. 14a*

### **Application**

This was an application seeking leave to appeal against the 7<sup>th</sup> of the Court of Appeal on grounds of mixed law and facts. The supreme Court, in a unanimous decision, granted the application.

### **History of the Case**

*Supreme Court:*

*Names of Justices that sat on the application:*

*Ibrahim Tanko Muhammad, J.S.C. (PRESIDED)-, Olukayode Ariwoola, J.S.C; Clara Bata Ogunbiyi, J.S.C. (READ THE LEADING RULING), Kumai Bayang Aka'ahs, J.S.C, Kudirat Motonmori Olatokunbo Kekere-Ekun, J.S.C; Chima Centus Nweze, J.S.C; Amiru Sanusi, J .S.C APPEAL NO.: SC. 718/2016*

*Date of Ruling: Friday.27<sup>th</sup> January 2017*

*NAMES OF COUNSEL: Yusuf Ali, SAN and P.I.N. Ikwueto, SAN (WITH THEM, Yakubu Daudu, Esq.; C. I. Ndukwe. Esq.; Luther K. Onyemkpa, Esq.; Alex Akoja. Esq.; O. D. Soyebó, Esq.; C. D. Ezech, Esq.; Patricia Ikpegbu [Mrs.]; K. O. Lawal; Precious Kalu, Esq. and Safinat Lamidi [Miss]) - FOR THE APPLICANTS*

*Dr. Alex A. Izinyon, SAN and O. J. Nnadi, SAN (WITH THEM, Max Ozoaka, Esq.; B. K Abu, Esq.; K. O. Omoruan, Esq.; H. Abdurrahman [Mrs.]; E. Oghojafor, Esq.; Chijioke Udeogu, Esq.; L. O. Fagbemi, Esq. and C. U. Adah [Miss]) - FOR THE /" RESPONDENT Dr. Onyechi Ikpeazu, SAN; Dr. Paul*

*Ananaba, SAN and Prof. Ernest Ojukwu. SAN (WITLI THEM, Henry Baloguu, S. N. Mbanezue, Esq.; Emeka Eze, Esq.; Nwaehukvui Ibegun, Esq.; Godswill D. Nwani, Esq.; Obinna Onya. Esq.; Julius Mba, Esq.; Nwamaka Ofoegbu [Miss]; Oluchi Elendu [Miss]; S. T. Moses Ogbonna, Esq.; D. D. Nkume and Uche Ihemanna) - FOR THE 2<sup>ND</sup> RESPONDENT Chief Wole Olanipekun, SAN: Chief Kami Agabi, SAN; S. F. Hon, SAN and J. U. K. Igwe, SAN (WITH THEM, Olabode Olanipekun, John Ochogwu, Bolarinva Awujoola, Vanessa Onyemauwa [Miss], Akinola Afolarin, Adebayo Majekolagbe. Anita Pascal [Mrs.], P. K. Obie [Mrs.]. Linus Akwaji, Peter ErivwoJe Anthony Odule, Uchenna Ede, Chika Odoemene, Gloria Owu and Jude Daniel-Odi) -for the 3<sup>rd</sup> Respondent and Wendu Kuku (Mrs.) (with him, Rahimaru Aminu [Mrs] and Ahmed Goni Ismaila) - for the 4<sup>th</sup> Respondent J.C. Idoko, Esq. (with him, Ben Ukandu, Esq., John Adah Esq. and Ijeoma Okoye (Miss]) - for the 5<sup>th</sup> Respondent*

**Court of Appeal:**

Division of the Court of Appeal from which the application was brought: Court of Appeal, Abuja.

*Names of Justices that sat on the appeal:*  
Helen Moronkeji Ogunwumiju, J.C.A. (Presided);  
Abubakar Datti Yahaya J.C.A. (Read the Leading Ruling);  
Philomena Mbua Ekpe, J.C.A.; Ibrahim Shata Bdliya, J.C.A.; Saidu Tanko Husaini, J.C.A.

Appeal No.: CA/A/390<sup>c</sup>/M/2016

Date of Ruling: Friday, 5<sup>th</sup> August 2016

Names of Counsel: Yusuf Ali, SAN (with him, P.I.M Ikweto, SAN, A. J. Owonikoko, SAN; Mahmud Magaji, SAN, K. K. Eleja, SAN;

Prof. Wahab Egbewole; Lawrence John; S. A Oke; Kenneth C. Ahia; C.I. Mbaeri: Danjuma Ayeye, John Ishaya Chindo; Luther Kingsley Onyemkpa; Alex Akoja; K.T. Sulyman-Hassan [Mrs.]; C. Ogbuafi; C. D. Ezeh; Ifeanyi Azuamah; C. I. Onumemeke; Chris Kelechi Udeoyibo; Patricia Ikpegbu [Mrs.]; Kenechukwu Azie; Efut Okui; M.M. Grema [Mrs.]; U. M. Medugu; K. O. Lawal; Safinat Lamidi [Miss]; A. O. Usman; Paulinus Igwe Nwagu; Isaac Adekola Olawoye; S.P. Ashelekaa; Philemon Omode; Nifemi Aje [Miss]; A. B. Eleburuiké, Ahmed Musa, Adaobi Ike [Miss] C. N. Akuneto, Tejumola Opejin [Miss]; Usman Idris; Ifeoma Johnson [Miss] and N.A. Bandawa) – For the appellant/Applicants

Dr. Alex A. Iziyon, SAN (with him, Dipo Okpeseyi, SAN; O. J. Nnadi, SAN; Temi Talana SAN; C. N. Nsobundu: Max Ozoaka; Chikezie S. Ekeocha; Hannatu Abdurrahman [Mrs.]; Ejovi Oghojafor; Chijioke Udeogu; L. O. Fagbemi; S. E. O. Maliki; Alex Iziyon 11, Josephine Majebi [Miss]: Charity Adah [Miss]; Abimbola Akintola [Miss] and Emmanuel O. Dina) - for the 1<sup>st</sup> Respondent Dr. Onyechi Ikpeazu OON, SAN (with him, Dr. Joseph Nwobike, SAN; Paul Ananaba, SAN; Prof. Ernest Ojukwu, SAN; Chief H. Balogu; Charles Esonu; O. O. Nkume; Ifeoma Ononye [Mrs.]; Valentine Offia; Emeka Ize; Sir Morris Eleri; S. N. Mbaezue; Godswill D. Nwani; Chukwudi Chibuzor; Nwachukwu Ibegbu; Obinna Onya; Samuel Anah; Ugochukwu Njoku; A. A. Akaahs; Henrietta Elendu C. Ibochi, Chikodi Okeorji and Amaefule-Orie Joy [Miss]) - for the 2<sup>nd</sup> Respondent Chief Wole Olanipekun, OFR, SAN [with him, Chief Kami Agabi, SAN; S.T. Hon. SAN; J. U. K. Igwe, SAN; Bolarinwa Awujoola; Adebayo Majekolagbe; Madu Gadzama; Eric Otojahi; Linus Oko; Nkechi Ekeato; Von Emeka Aneke [Mrs.]; Ilo Vero Asuelimen; N. Uja [Miss]; G. T. Ionver; J. J.

Dabo; E. N. Agoh [Mrs.]; Basil Ude; Peter Eriwode; Afamefuna Mmagu and Somto Anteme)  
-for the 3<sup>rd</sup> Respondent

T. M. Inuwa (with him, Alhassan Umar) - for  
the 4<sup>th</sup> Respondent

J. C. Idoko (with him, Ajayi Ilesanmi and Joy  
Adah) - Jor the 5<sup>th</sup> Respondent

High Court:

*Name of the High Court:* Federal High Court. Abuja

*Suit No:* FHC/ABJ/CS/71/2016

*Date of Judgment:* Monday, 27<sup>th</sup> June 2016

**OGUNUNBIYI, J.S.C. (Delivering The Leading Ruling):** The following facts are relevant to this application. The 1<sup>st</sup> and 3<sup>rd</sup> respondents are members of the Peoples Democratic Party, the 2<sup>nd</sup> respondent herein, while the 1<sup>st</sup> applicant is a member of the All progressives Grand Alliance, the 2<sup>nd</sup> applicant herein.

The 1<sup>st</sup> and 3<sup>rd</sup> respondents as members of the 2<sup>nd</sup> respondent before participated in the 2<sup>nd</sup> respondent's Governorship Primary election for Abia State on 8<sup>th</sup> respondent as the winner of the said in State Governorship Primary Election while the 1<sup>st</sup> respondent same second in the said primary election.

Dissatisfied with the declaration of the 3<sup>rd</sup> respondent as the winner of the 2<sup>nd</sup> respondent's Governorship Primary Election and upon the 1<sup>st</sup> respondent becoming aware that the 3<sup>rd</sup> respondent breached the 2<sup>nd</sup> respondent's Electoral Guidelines for 2014 -section 31(2), (5) and (6) of the Electoral Act 2010 (as amended) the 1<sup>st</sup> respondent commenced an action by originating summons at the Federal High Court in suit No. FHC/UM/CS/94/2015 which later was culminated into Suit No. FHC/ABJ/CS/71/2016 upon the transfer of the said suit to the Federal High Court Abuja Division In the 1<sup>st</sup> respondent's amended originating summons in the said suit filed by him, several reliefs were claimed and numbering from 1 - 13 as evidenced and shown at pages 34 - 40 of exhibit "ALU" attached to the

applicants' further affidavit in support of their application.

In its judgment delivered on 27<sup>th</sup> June 2016, the trial court granted the aforesaid reliefs claimed by the 1<sup>st</sup> respondent and further ordered that INEC should forthwith issue certificate of return to the 1<sup>st</sup> respondent as Governor elect and restore all entitlement to him as the elected Governor of Abia State. Following the delivery of the aforesaid judgment, the applicants brought an application at the court below on the 15<sup>th</sup> July, 2016 seeking for the following reliefs among others:

- “1. An order granting the appellants/applicants leave to appeal as interested persons against the final judgment of the Federal High Court Abuja Division, delivered on 27<sup>th</sup> June, 2016 in suit No: FHC/ABJ/CS/71/2016 (FHC/UM/CS/94/2015 - Dr. Sampson Uchechukwu Ogah v. Peoples Democratic Party ( PDP) & 3 Ors.
2. An order deeming the notice of appeal already filed on the 15<sup>th</sup> Day of July, 2016 against the said judgment as properly filed and served, the appropriate filing fees thereto having been paid.”

After hearing the respective parties in the aforesaid application, the court below in its considered ruling delivered on the 5<sup>th</sup> August, 2016 dismissed same and hence a notice of appeal was filed to this court by the appellants/applicants here in against the said ruling on the 17<sup>th</sup> August, 2016.

The application which is the subject matter of contention now before us was filed on the 15<sup>th</sup> September, 2016 and pursuant to section 233(3) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended), Order 3 rule 15. Order 6(2)(1) of

the Court Rules 1985 (as amended) and under the inherent jurisdiction of this court filed 15<sup>th</sup> September, 2016 and seeking for flowing relief's:

- “1. An order of this honourable court granting leave to the appellants/applicants to appeal against the decision of the Court of Appeal Abuja Division delivered on 5<sup>th</sup> day of August, 2016 in Appeal No: CA/A/390/2016: Dr. Alex Otti & Anor v. Dr. Sampson Uchechukvu Ogah & 4 Ors, on grounds of mixed law and facts as set out in the notice of appeal already filed at the Court of Appeal, Abuja registry on the 17<sup>th</sup> day of August, 2016.
  
2. An order of this honourable court deeming as properly filed and served the notice of appeal filed at the Court of Appeal Abuja Registry on the ,7<sup>th</sup> day of August, 2016 the correct filing fee having been paid.
  
3. And for such further order(s) as this honourable court may deem fit to make in the circumstance of this case.”

In support of the motion is on affidavit of 15 paragraphs corn to by one Abdulrasheed Usman, Esq. one of the counsel representing the appellants/applicants. There is a further affidavit and a further and better affidavit sworn to by the same deponent, to predicating the application are ten grounds enumerated as (1 and reproduced hereunder as follows:

***Grounds of the Application***

- i. The Federal High Court, Abuja delivered its judgment in suit No. FHC/ABJ/CSI/71/2016 on the 27<sup>th</sup> day of June, 2016.
- ii. The appellants/applicants being affected with the judgment filed an application to the Court of Appeal to be allowed to appeal against the said decision of the Federal High Court, Abuja delivered on the 27<sup>th</sup> day of June, 2016. as interested parties.
- iii. The Court of Appeal delivered us ruling on the application in appeal No. CA/A/390/2016 and dismissed the application.
- iv. The appellants/applicants being dissatisfied with the said ruling is (sic) desirous of appealing against the said decision.
- v. The appellants/applicants had filed a notice of appeal at the Court of Appeal Registry and which has formed part of the record before this court.
- vi. Some of the grounds of appeal are not exclusively grounds of law.
- vii. The appellants/applicants are constitutionally required to seek and obtain the leave of this honourable court to appeal on grounds of mixed law and facts.
- viii. The leave of this honourable court is *sine qua non* to the validity of the concerned grounds of appeal.
- ix. The appellants/applicants have arguable grounds of appeal.
- x. This application is made in the interest of justice."

For purpose of substantiating the application, their counsel Mr Yusuf Ali, SAN filed a written address on the 30<sup>th</sup> September, 2016.

On behalf of the 1<sup>st</sup> respondent, a counter affidavit was filed on the 7<sup>th</sup> October, 2016 and was

supported by a written address in opposition to the application. There is also a counter affidavit filed on the 6<sup>th</sup> October, 2016 on behalf of the 2<sup>nd</sup> respondent which was supported by a written address. Furthermore, and on behalf of the 3<sup>rd</sup> respondent, two affidavits i.e. to say a counter and a further counter affidavits were filed on the 21<sup>st</sup> September and 6<sup>th</sup> October, 2016 respectively as well as a written address in opposing the motion filed. The 3<sup>rd</sup> respondent also deemed it pertinent to attach the final judgment of the lower court delivered on the 18/8/16. Replies were also filed on the 10<sup>th</sup> October, 2016 in response to the 1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> respondents and on the 11<sup>th</sup> October, 2016 also to that by the 5<sup>rd</sup> respondent respectively. The 4<sup>th</sup> respondent did not file any process in respect of the application. On the part of the 5<sup>th</sup> respondent, a counter affidavit was filed on the 11<sup>th</sup> October, 2016 as well as a written address.

On the 8<sup>th</sup> November, 2016, when the application was heard, the senior counsel, Mr. Yusuf Ali, SAN with his brother silk, Mr. P.I. N. Ikweto, SAN also in company of other counsel, represented the appellants/applicants. Dr. Alex Izinyon. SAN with D.Okpeseyi SAN and leading a host of counsel in chambers represented the 1<sup>st</sup> respondent. The learned senior counsel Dr. Onyechi Ikpeazu. SAN also in company of his brothers silk Dr. Paul Ananaba, SAN and Prof. Ernest Ojukwu, SAN led a number of counsel and represent, the 2<sup>nd</sup> respondent. Chief Wole Olanipekun, SAN with Chief Kanu Ogabi, SAN, S. F. Hon, SAN and J. U. K. Igwe, SAN and a teaming of other counsel represented the 3<sup>rd</sup> respondent. The 4<sup>th</sup> respondent represented by Mrs. Wendy Kuku. leading R. Aminu (Mrs) and Ahmed Goni Ismaila. Finally, the 5<sup>th</sup> respondent was represented by Mr. J. C. Idoko appearing with Ben N. Ukandu, Adah and Ijeoma Okoye (Miss).

At the hearing of the application, all counsel with respective process filed. While the appellants/applicant's counsel urged for discretion to be exercised in favour of their clients by granting the reliefs sought, the respondents were vehement and

prayed that the application should be dismissed because the subject matter is non-existent. There was nothing to urge on behalf of the 4<sup>th</sup> respondent.

In submission to substantiate their application, the senior counsel for the appellants related copiously to exhibit 1, being the judgment of the Federal High Court, from whence [following statements of facts are evident:

1. That the court found that the 3<sup>rd</sup> respondent herein, who submitted false information in his form CF001. was not qualified to contest the 2015 Abia State Governorship Election.
2. Trial court also found that 1<sup>st</sup> respondent who contested primaries with 3<sup>rd</sup> respondent should be recognized as the candidate of the PDP at the April, 2015 Abia State Gubernatorial Election.
3. That the court made a consequential order that 1<sup>st</sup> respondent be issued with a Certificate of Return.

Learned counsel related closely to section 31(5) and (6) of the Electoral Act 2010. It is the submission of counsel further that his clients became aware of the judgment only through the media and filed an application to the lower court to be allowed to appeal as interested party. This is in view of the applicants having anticipated at the election and having scored the second highest number of lawful votes; that the lower court *in* as ruling delivered on the 5<sup>th</sup> day of August, 2016 dismissed the application and hence the appeal filed before this court on the 17<sup>th</sup> August. 2016. It is the counsel's contention that the notice of appeal filed at the registry of the Court of Appeal is of mixed law and facts. The counsel submits necessity of this application to seek the leave of this court therefore before the appellants can argue the ground of mixed law and fact in their notice of appeal.

In urging for an exercise of discretion application, the learned counsel for the appellants/applicant re-iterates strongly that

with the ruling of the lower court delivered on the 5<sup>th</sup> August, 2016 being a final decision, the relief sought for is within their constitutional right. This, counsel submits because their application is not seeking leave to appeal outrightly in view of an already existing notice and grounds of appeal filed 17<sup>th</sup> August, 2016 as shown on the record of appeal at pages 422-430 and which is sufficient to sustain the entire appeal as competent. To buttress his submission further, the learned counsel cites copiously the provision of section 233 (2) (e) (iv) of the Constitution of Federal Republic of Nigeria, 1999 (as amended) as well as decided numerous case laws in support. It is counsel's further submission that the law enjoins an appellant to seek the leave of court in instances where the notice of appeal contains grounds of mixed law and facts; that the leave of court serves as pre-condition upon which concerned grounds are properly filed before the appellate court; In the absence of the leave, the grounds will be rendered as incompetent and liable to -be struck out as it was held by this court in the case of *Abubakar v. Dankwambo* (2015) 18 NWLR (Pt. 1491) 213 at 234-235; that the consequential effect of the failure to seek the leave of court to regularize such grounds robs the appellate court of jurisdiction to consider and pronounce thereon, the grounds. Again, the counsel cites in support the decision of this court in *Akiwuwu Motor Ltd. v. Sangonuga* (1984) ANLR (Reprint) 309 at 311.

The application, counsel contends, relates to ground 4 of the grounds of appeal only and does not affect the other grounds which are valid and subsisting before the court; that this application is brought out of abundance of caution in order to save ground 4 in the notice of appeal; that the

appellants/applicants have placed before this court sufficient facts in the depositions of their affidavits in support for the determination of this application.

In further submission, the applicants' counsel related affidavit wherein they acknowledged the two separate appeals filed by the 1<sup>st</sup> respondent against the decisions of the lower court in Appeal No. CA/A/390/2016 and CA/A/390A/2016 and the appeals are entered in this court as SC. 717/2016 and SC. 719/2016. And are pending before this court. For the foregoing following reasons therefore, the applicants' counsel re-iterates strongly that their constitutional right of appeal should not be tampered-with simply on the ground which judgment had since been *delivered by the lower court that the court of appeal having refuse the appellants/applicants leave to appeal, proceeded to determine the appeal before it without and in absence of the appellants/applicants*. This, counsel submits, is sufficient to raise a threshold issue of denial of right to fair hearing: since an appeal is a continuation of the case, the learned counsel has urged this court to see the reliefs which the present appellant/applicants are seeking from this court vide their notice Teal filed 17<sup>th</sup> August, 2016 that the appellants' constitutional right of appeal against the decision of the Court of Appeal refusing them leave to appeal as interested party, remains extant and ought respected; that the issues raised in the instant appeal relate the right of fair hearing and the constitutional right to such is anonymous with the common law principles of natural justice. counsel cites in support the cases of 7-Up Bottling Co. v. Abiola & son (Nig-) Ltd. (1995) 3 SCNJ 37, (1995) 3 NWLR (Id. 383 and Deduwa v. Okorodudu (1976) 1 NMLR 236 at 246; that the judgment of the lower court in the substantive appeal has not Sited appellants/applicants' pending appeal before this court in way. This, counsel argues because in the substantive appeal, prayer is asking the court to

invoke section 22 of the Supreme Act; that all the issues raised by the respondents against this application can be canvassed appropriately in the substantive appeal and not at this stage.

The learned counsel submits finally that the application should be granted in the interest of justice.

In opposing the application, a 12 paragraph counter affidavit filed on behalf of the 1<sup>st</sup> respondent on the 7<sup>th</sup> October, 2010. In the said counter affidavit, the learned senior counsel Dr. Alex Izinyon, SAN who represented the 1<sup>st</sup> respondent, gave a detailed background history of this case and relied copiously on all the paragraphs deposed to in their counter affidavit and also the exhibits "A" and "B" which are the judgments of the court below setting aside the judgment of the Federal High Court Abuja.

Counsel submits vehemently that a careful perusal of the appellants' relief 1, will reveal clearly that it is the entire grounds of appeal that are on mixed law and facts which leave is required file same. Counsel further re-asserts the trite law that, for a ground mixed law and fact to be competent, leave of court where such notice is to be filed, must be obtained first as a condition precedent to the filing of the ground. Counsel cites in support the provision of Order 2 rule 28(3) and (4) of the Rules of this court and a host of case laws in *B. A. S. F. (Nig) Ltd. v. Faith Ent. Ltd* (2010) 4 NWLR (Pt. 1183) 104 at 128, paras. D - H; also the cases of *Opuiyo v. Omoniwari* (2007) 16 NWLR (Pt. 1060) 415 at 440; *C. C.B. Plc v. A.-G., Anambra State* (1992) 8 NWLR (Pt. 261) 528 at 545 and *Comm. Education, Imo State v. Amadi* (2013) 13 NWLR (Pt. 1370) 133 at 148.

It is the argument of counsel further that the applicants here have not shown any exceptional circumstance to warrant bringing this application directly to this court; that with the applicant application at the court below having been dismissed on 5<sup>th</sup> August 2016, they had every opportunity between the said date and the 17<sup>th</sup> August, 2016 when they filed their said notice of appeal to have filed an application at the court below for leave to appeal on ground of mixed law and fact; that this, they had

failed to do and have not shown any exceptional circumstance why discretion should be exercised in favour of their application. The learned senior counsel restates the trite principle of law that where a law prescribes a procedure for doing an act, it must be rigidly followed. The senior counsel cites in support the case of Amaechi v. IN EC (2008) All FWLR (Pt. 407) 1 at 98, (2008 ) 5 NWLR (Pt. 1080) 227 a decision of this court, also the case of C.C.B. Nig. Plc. v. A.-G., Anambra State (supra) that in the case at hand, the applicant failed to comply with the procedure prescribed by the aforesaid rule of court and as a result their application should be dismissed. Counsel urges the court to discountenance the assertion by the applicants' counsel that their said application relates to ground 4 of their notice of appeal only that the submission, counsel argues is highly misconceived.

On a further contention, the learned counsel submits the application as being academic and is therefore spent; that the reliefs which the applicants want this court to consider and grant by invoking section 22 of this court's act are the ones in the notice of appeal before the court below, and with the court below having set aside the judgment of the Federal High Court based on 2<sup>nd</sup> and 3<sup>rd</sup> respondents' appeal, the invocation of section 22 of the Supreme Act will be nothing other than an academic exercise. Counsel cites a number of decided case laws in support of his argument and urges finally that the application be dismissed for lack of merit.

In the address filed on behalf of the 2<sup>nd</sup> respondent, the two issues raised to oppose the motion on notice filed on 15/9/2016 are flows:

1. Whether having conceded that the grounds of appeal in the notice of appeal filed on 17<sup>th</sup> August, 2016 require leave, this application is competent before the Supreme Court.
2. Whether the applicants are entitled to the reliefs sought by them in the motion paper.

Submitting on behalf of the 2<sup>nd</sup> respondent, the learned senior counsel Dr Onyechi Ikpeazu, SAN drew the court's attention paragraphs 8, 9, 10 and 11 of the affidavit in support of the applicants'

application and re-iterates that they did not specify the grounds on which the leave was required by reason of which none be excluded. As a consequence, that it is not for this court to decipher which ones were or were not validly filed without the leave of the Court of Appeal, which being a pre-condition to the validity of the appeal renders the entire process nugatory if the prescribed leave was not obtained. Copious reference was made to section 233(1) of the Constitution of the Federal Republic of Nigeria 1999 and Order 2 rule 28(4) of the rules having been made in the first instance at the court below, it cannot now be made at the level of this court: that where as in this case, the applicants did not specify any ground of appeal which is excluded from the application so as to sustain a valid appeal as of right, the appeal could not have been incepted at all without the leave of the Court of appeal in the first instance; that without a valid appeal, there can be no valid compilation of record of appeal, which is instrumental to a valid entry of appeal; that the operative relief 4(ii) in this purported appeal which prays this court to invoke the provisions of section of the Act to "consider and grant the reliefs subscribed on the notice of appeal that was before the Court of Appeal" may only be able if the decision of the Federal High Court was extant; that the position is now different since the decision against which the leave to appeal is founded no longer exists: that in the absence of any judgment a person cannot conceivably be an aggrieved party or a party interested in the outcome of an adverse judgment; also that in the absence of any existing judgment, there cannot be any right of appeal as sought for in this application.

The 3<sup>rd</sup> respondent as a party to this application also raised an issue *in tandem* with the counterpart respondents and the applicants, that is to say whether or not the application is grantable in the circumstance. The learned counsel Mr. Olabode Olanipekun counsel for the 3<sup>rd</sup> respondent concurred with the earlier argument on the academic nature of the application which is not worth considering.

Counsel submits further that an academic appeal is not arguable; that an interlocutory appeal has no reason to exist at the substantive appeal had been heard and determined. Counsel submits that the decision, applicants are seeking the leave of court to appeal against, was given as a ruling on August 5, 2016 in substantive appeal No. CA/A/390/2016 (and not in Appeal No. CA/A/390C/2016, as applicants have misleadingly stated in paragraph 1 of Their written address) before the determination of the substance of that appeal on August 18, 2016. For purpose of drawing the line between interlocutory and final decisions counsel cites the decision of this court in *Alor & Anor v. Ngene & Ors.* (2007) 17 NWLR (Pt. 1062) 163 at 175. that the decision in respect of which leave is sought to appeal against is an interlocutory decision of the lower court which cannot enure when a lower court has already delivered its final judgment. Counsel cites in support the case of this court in *Olori Motors Co. Ltd. v. B. N. Plc* (2006) 10 NWLR (Pt. 989) 58 at 606.

It is the submission of counsel also that the right of a party to appeal is not without its limitations. Hence in the case at hand the court should consider whether such appeal is arguable; that the court has the inherent powers to refuse to entertain an appeal which is patently incompetent; See *Rabiu v. State* (1980) 12 NSCC 291 (1981) 2 NCLR 293.

The counsel submits further that by the judgment of the lower court delivered on August 18, 2016 in appeal No. CA/A/390/201 and appeal No. CA/A/390A/2016, the judgment of the Federal High Court no longer exists. In other words, that the issue of leave to appeal against the decision of the Federal High Court is spent and lifeless, since the Court of Appeal has already finally and conclusively entertained and determined appeals against the same decision; that contrary to the submission by the counsel for the applicants, there is nowhere in the applicants' motion paper stating that "ground 4" is that in respect of which leave is sought. The sole reference made to ground 4, counsel argues is not only true, but also an afterthought. Counsel cites

several authorities support and urges further that by parity of reasoning the claims the instant motion paper do not make any reference remotely approximately, to ground 4 of the notice of appeal as wrongly conceived by the applicants' counsel: that by the use of a general phrase. "some of the grounds of appeal", it makes the application dilative and the reason why the court should also refuse same on this ground; that parties should be encouraged to pursue appeal just final decisions rather than appealing interlocutory decisions pronounced by this court in *Eligwe v. Okpokiri & 2 Ors.*, LER 2014) SC/475/2011, (2015) 2 NWLR (Pt. 1443) 348. Counsel pages for the dismissal of this application without much add and with substantial costs.

In summary the reply by the applicants in response to the 1<sup>st</sup>. and 3<sup>rd</sup> respondents are very succinct and to the point, for instance the learned counsel for the appellants' applicants re-iterates that the court should discountenance the arguments the respondents that the application is either academic or that the activation of section 22 of the Supreme Court Act will render .academic. This, counsel submits, is in view of the existing incompetent and valid notice of appeal having been entered in this court predicated on a valid record of appeal, duly compiled. Also, at contrary to the submission on behalf of the 3<sup>rd</sup> respondent, ' applicants cannot appeal against the lower court's decision in peals Nos. CA/A/390/2016 and CA/ A/390A/2016 because they are not parties in those appeals. Finally, that by the use of the phrase some of the grounds of appeal" in the application, it presupposes that not all the grounds of appeal are affected by the application, in other words, while the application applies to the incompetent rounds of appeal, it does not apply to the existing grounds that if competent. Counsel finally solicits for the applicants' right to be heard.

The lone issue for determination is:

Whether considering the materials placed before this honourable court coupled with the peculiar facts and circumstances of this case, this is a

case to exercise the court's discretion in favour of a grant of this application.

It is trite law that in an application of this nature, an applicant for leave to appeal must show by good and substantial reason why the appeal ought to be heard and this must be exhibited by a notice of appeal showing arguable grounds of appeal if leave is granted. The grant of leave is not a matter of course as rightly submitted by the respondents' counsel. It is also not necessary that the appeal should have merit, but the question is whether there is a right and reason to appeal.

The law is well settled also that the grant or refusal to granted leave to appeal to an appellant/applicant is a matter of discretion of the court. However, such discretion is to be exercised judicially and judiciously. See the case of *Ukaclutkwu v. PDP* (2014) All FWLR (Pt. 728) 887 at 911 (reported in (2014) 4 NWLR (Pt. 1396) 65 at 90, para. F) wherein it was held that:

"In an application which call for the exercise of the court's discretion, the discretion must be judicially and judiciously taking all the facts and case into consideration."

The application of this nature is seeking leave in respect of grounds that are not on pure law and the situation is not the same as-one seeking leave to appeal in absolute terms.

It is on record affirmatively that the appellants/applicants filed a valid, competent and subsisting notice of appeal exhibit AU3. The said substantive appeal is challenging the refusal of the court below to grant the appellants/applicants leave to appeal as interested parties against the consequential orders contained in the judgment of the trial court. At pages 422-430 of the record of appeal, the decision of the Court of Appeal delivered on the 5<sup>th</sup> day of August, 2016 is a final decision which presented the appellants from appealing against the orders made by the learned trial judge. Being a final decision the appellants/applicants have a right of appeal. By

section 241(1), 244(2) and 245(1) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) every citizen of Nigeria has the right to approach a higher court to exercise his right of appeal as provided.

In the matter at hand and under consideration, it is only In respect of ground 4 therefore that leave to appeal on ground of mixed law and fact is sought.

As rightly submitted by the learned senior counsel for the appellants/applicants, the law is well settled that one competent ground of law alone is enough to sustain an appeal to this court. See *Nwaolisah v. Nwabufor* (2011)14 NWLR (Pt. 1268) 600 at 625 also *Abubakar v. Dankwanbo* (2005) 18 NWLR (Pt.1491) 213 at 244 decision of this court. Section 233(2) (e) (iv) of the Constitution also clear that an appeal shall be from decisions of the Court of appeal to this court as of right. The appellants/applicants hate the constitutional right to appeal against the decision of the lower court made against them. See *PDP v. Okorochoa* (2012) 15 NWLR (Pt.) 205 at 273,240. This court while putting succinctly the issue right of appeal had this to say in the case of *Ugba v. Suswam* 2014) 14 NWLR ( Pt. 1427) 264 at 340-341. paras. H A : C-D.

*“It is the glory, happiness and pride of Nigeria’s various constitutions that to prevent any injustice no man is to be concluded by the first judgment, but that if he apprehends himself to be aggrieved he had another court to which he can resort to for relief. For this purpose, the law furnishes him with the right of appeal as of right, if there is no appeal at all possible the system would be intolerable. The doors of the appellate court have to be kept open if right and freedom are to be preserved”*

*(Emphasis provided).*

See also the cases of *Anachebe v. Ijeoma* 426) 168 at 183-184 and *Syere v. Okun* NWLR (Pt. 1426) 168 at 183 and *Ngere v. Okuruket* XIV (2014) where it was held by this court that a party should never be denied the right of appeal if he satisfy the conditions for

appeal. See again *Katol Inv v. Ltd. r. UAC N P. D. Co. Plc(2011)* 16 NWLR (Pt. 1273) 211 at 223.

It is also the requirement of the law that on appellant should seek the leave of the court in instances where the leaves of the court serves as pre-condition upon which concerned grounds are properly filed before the appellate court failure of which The defectives grounds may be struck out. See this court in the case of *Abubakar v. Dankwambo* (supra) AT 234- 235, paras. G-A wherein it was held that:

"Where leave, which means permission is a pre-condition before an appellant can file a notice of appeal, containing ground of mixed law and fact, an appellant who filed a notice of appeal without notifying or obtaining that pre-condition would have his process thrown out. In the instant case, the appellant having not obtained leave of the Court of Appeal was caught by the provisions of section 242 of the Constitution and grounds, I. 2, 4. 5 AND 6 in the notice of appeal were correctly struck out by the Court of Appeal"

When the law lays down a condition that leave is to be sought and obtained before filing grounds of appeal on mixed law and facts, this does not give a reason for exploitation by the opposite party in making it difficult for the applicant to access the discretion of court. In other words, when the law expects the applicant to lay before a court all materials necessary for the exercise of discretion in his favour, the respondent is not to be subjective in his opposition but rather allow the principle of law and objectivity to apply This is more so especially when regard is had to the submission made on behalf of the appellants/applicants that they cannot appeal against the lower court's decisions in appeals Nos. CA/A/390/2016 and CM/A/390A/2010 because they were not parties therein. The applicat' application boards squarely on their right to be heard on a case that affects their interest. I seek to restate at this

point also that the of 1999 Constitution of the Federal Republic of Nigeria (as amended) is inviolable and as such, cannot be denied on the grounds of technicalities. See *Abubakar v. Yar'adua* (2008) 4 NWLR (Pt. 1078) P. 465. wherein this court re-iterated in strong terms that courts are to do substantial justice without due regard to technicalities.

The appellate court is also enjoined not to prejudge an interlocutory appeal issues arising in a pending substantive appeal. See the case of *Magnusson v. Koiki* (1993) 9 NWLR (Pt. 317) page 287 at 298.

At paragraph 3.18 of his written address, the 1<sup>st</sup> respondent contends that the grant of this application will "confer legal stamp of validity on their notice of appeal filed on 17<sup>th</sup> August, 2016." It is warned in the earlier case of *Magnusson v. Koiki* (supra) that an appeal court should refrain from delving into the merit of the substantive question before it, at an interlocutory stage. At page 298, para. G for instance, this court said:

"In an appeal arising from an interlocutory decision, care should be taken by an appellate court to avoid making an observation which may appear to re judge the issues yet to be determined in the pending substantive appeal."

By the very nature of this application and the justice it seeks to serve, it will not, make it an academic exercise, contrary to the submission by the Ist respondent's counsel that the activation of the provisions of section 22 of the Supreme Court Act will be nothing other than an academic exercise.

The failure of an appellant to seek the leave of court to argue grounds of mixed law and facts which are subscribed on the notice of appeal touches or robs the appellate court of its jurisdiction to consider and pronounce on such grounds as they are deemed incompetent before the court. For instance,

in the case of *Akiwivu motors Ltd v. Sangonuga* (1984) ANLR (Reprint) 309 this court this to say at page 311:

"This court has, in a series of cases, decided that where grounds of appeal involve questions of facts alone or questions of mixed law and facts, leave of the Court of Appeal or the Supreme Court must be obtained to make the appeal competent and invest the Supreme Court with jurisdiction to hear the appeal. See section 213(3) (sic) Constitution 1979, *Ojemen v. Momodu III* (1983) 3 SC 173. (1983) 1 SCNLR 188: *Oke v. Eke* (1982) 12 SC 228 and *Akpasubi v. Unweni* (1982) II SC 132."

From the foregoing deduction, it is obvious that the refusal this court to grant the appellants/applicants leave to argue the grounds of mixed law and fact as subscribed on the notice of appeal i.e. ground 4 will rob the appellants-applicants of the right be heard on the said ground of their notice of appeal. See also *Anachehe v. Ijeoma* (2015) All FWLR (Pt. 784) 183 at 201. (2014) NVVLR (Pt. 1426) 168.

The application at hand presupposes that the notice of appeal filed on the 17<sup>th</sup> day of August. 2016 and exhibited as exhibit AU3 the affidavit in support of the motion on notice, contains a ground mixed law and facts: as such, the leave of this court is inevitable before the affected ground of appeal is to be properly before the court. It is trite law and also reasonable in my view that, where is not apparent on record or when a party is not sure whether a ground of appeal can be classified as a ground of law or a ground of mixed law and fact, leave of court to appeal on such ground could obtained as a safe or precautionary measure. See *F.B.N. Plc v. S.A. ind. Ltd.* (2010) 15 NWLR (Pt. 1216) 247 at 292.

As rightly submitted by the learned counsel for the appellants/applicants, with his clients having appealed within time and having scribed other valid grounds of appeal on the notice of appeal y filed earlier within the time allowed by law, there is

nothing ore this court to prevent the exercise of discretion in favour of their application. It will defeat the cause of justice to fetter the right of access to the court by way of declining to grant an application of this nature. The principle had long been laid down that path to tread should be that of justice as against technicality. such application should not be opposed for the sake of either doing so or because the opponent feels threatened. The overriding consideration-must always be justice and fairness. The principle has been well entrenched affirmatively by this court in the following cases of *Obikoya v. Wema Bank PLC* (1989) 1 NWLR (Pt. 96) 157 at 179 and *Holman Brothers (NIG.) Ltd. v. Kigo (NIG.) Ltd*(1980) 8-11 SC 43 at 62 and 63 where it was held that:

"an application is not required to show that the appeal would succeed if leave is granted. It is sufficient to show that there is an arguable appeal. ----- Having regard to the grounds of appeal Exhibited the facts disclosed in the affidavit evidence - - - - the Court of Appeal was in error to refuse the application and prevent a hearing of the appeal."

As rightly submitted by the appellant/applicants' counsel, the fact that judgment had already been delivered by the lower court in the case in which his clients are seeking leave to be joined as interested parties at the Court of Appeal, cannot hinder the exercise of their constitutional right to Appeal this is especially when their appeal to this court was properly, and timeously filed.

It is pertinent to recapitulate that the appellants/applicant were denied leave to appeal as a party interested by the lower court; the poser question is, whether such persons cast rightly exercise their constitutional right of appeal against the decision of the Court of appeal refusing them leave to appeal? It is elementary to say that the ruling of the lower court refusing the appellants, applicants leave 318(1) of the Constitution 1999 which is therefore appealable. See *Shyllon v. Asein* (1994) 6 NWLR (Pt. 353) 670 at 751- 752: *Rabiu v.*

State (1980); 8-11 SC (Reprint) 85,(1981) 2 NCLR 293; and Tomtec (*Nig*), Ltd. v. F.H.A. (2009) 18 NWLR (Pt. 1173)358 at 375-376. The refusal of leave to appeal is, without more, a denial of right to fair hearing.

The present application is praying the court to exercise its powers under section 22 of the Act to grant the reliefs which the appellants/applicants sought before the court below. The grounds eradicating the application as well as the facts deposed to on the affidavit in support are very evident. The exhibits AU1,AU2 and AU3 are also relevant being the final judgment of the Federal High court, Abuja, ruling of the Court of Appeal, Abuja dismissing the appellants/applicants' application praying to be joined as interested parties and the notice of appeal filed at the Court of Appeal registry on 17<sup>th</sup> August, 2016 and challenging the riding of the lower if delivered on 5<sup>th</sup> August, 2016 all attached herein respectively.

The issue before the lower court which is centered on the principle of fair hearing cannot be waived off as sought by the respondents. As rightly submitted on behalf of the appellants/applicants. It is of no moment that the lower court had determined the substantive appeal before it. It is sacrosanct that the appellant/applicants' constitutional right of appeal against the decision of the lower court refusing them leave to appeal as interested party remain extant and cannot be waived or taken away from them. The following authorities are supportive on the principle of fair hearing: *MFA v. Inongha* (2014) 4 NWLR (Pt. 1397) 343 at 375- 376; *Bottling Co. v. Abiola & Sons (Nig) Ltd* (1995; 3 SCNJ 37. (1995) 3 NWLR (Pt. 383) 257; *Deduwa v. Okorodudu* (1976) 1 NMLR 236 at 246; *Tsokwa Motors (Nig) Ltd v. U.BA. Plc* (2008) All FWLR (Pt.403) 124 at 1255. (2008) 2 NWLR (Pt. 1071) 347. Also in the recent case of *Abubakar Audu v. FRN* (2014) 53 NSCQR 456 at 469,(2013)5 NWLR (Pt. 1348) 397 at 410. paras. G-H this court site rated thus amongst others:

" - - - - - THE obligation to hear the other side of a dispute or the right of a party in dispute to be heard, is so basic and

fundamental a principle of our adjudicatory system in the determination of disputes that it cannot be compromised on any ground. See *Nwokoro v. Onuma* (1990) 3 NWLR (Pt. 136) 22-----“

In the substantive appeal per relief (ii).the appellants/applicants spraying this court to invoke section 22 of the Supreme Court Therefore, the judgment of the lower court in the substantive appeal has not affected appellants/applicants pending appeal before this court. Again and as rightly submitted by the learned counsel for the applicants all the issues being raised by the respondents against this application can be determined appropriately in the substantive appeal and should not be looked into at the interlocutory stage at hand, which as stated earlier is prohibited, as it will amount to determining the merit of the substantial appeal that is yet to be heard. See again the case of *Kotoye v. C.B.X.* (1989) 1 NWLR (Pt. 98) 419 and *Obeya M. S. Hospital v. A.-G.. Federation* (1987) NWLR (Pt. 60) 325 at 340. In other words, the objection by the 3rd respondent is clearly an invitation to the court to determined the substantive appeal at an interlocutory stage, which this court will surely not do.

The appellants/applicants in my view, have placed before this court all relevant materials necessary for the grant of this application. The application is seeking to render as competent ground 4 of the notice of appeal which appears to be a ground of mixed law and facts. The justice of the application would be achieved if the discretion of this court is exercised in favour of the application thereof in the absence of any reason put before this court that the granting of same will either prejudice the respondents or overreach them.

The appellants/applicants already have in place a valid and subsisting appeal which was properly and timeously filed the registry of the lower court. In the result.I

hereby grant the application as per the orders prayed:

1. Leave is granted the appellants applicants to appeal against the decision of the Court of Appeal Abuja Division delivered on the 5<sup>th</sup> day of August 2016 in appeal No. CA/A/390/2016, *Dr. Alex Otti & Anor v. Dr. Sampson Uchechukwu Ogah & Ors.* on grounds of mixed law and facts as set out in the notice of appeal already filed at the Court of Appeal. Abuja Registry on the 17<sup>th</sup> day of August, 2016.
2. A further order is also made and deeming as properly filed and served the notice of appeal filed at the Court of Appeal. Abuja registry, on the 17<sup>th</sup> day of August, 2016 the correct filing fees having been paid.
3. There shall be no order as to costs.

**I.T. MUHAMMAD, J.S.C.:** My learned brother. Ogunbiyi, JSC graciously, permitted me to read in draft form, the ruling just delivered. I am in complete agreement with my learned brother in his reasoning and conclusion. I too grant the reliefs prayed by the applicants in their motion and notice. I abide by consequential made in the leading ruling including one on costs.

**ARIWOOLA, J.S.C.:** I have been obliged before now with a copy of the lead ruling of my learned brother. Clara Ogunbiyi, JSC must delivered. I am in complete agreement with the reasoning and conclusion that this application has merit and should be granted. Application is therefore granted by me. I abide by the consequential orders in the said lead ruling including the order on costs.

**KA'AH S J.S.C.:** my learned brother. Clara Bata Ogunbiyi JSC made available to me in advance the

ruling which has just been delivered. I am in total agreement that the application has merit and be granted.

The 1<sup>st</sup> and 3<sup>rd</sup> respondents as members of the Peoples Democratic Party (PDP) participated in the primary election (the governorship of Abia state on 18<sup>th</sup> December, 2014 and Okezie Victor (3<sup>rd</sup> respondent) was the person nominated as gubernatorial candidate for Abia state while Dr. Sampson Uche Chukwu Ogah (1<sup>st</sup> respondent) came second in the exercise, satisfied with the outcome of the nomination exercise, the 1<sup>st</sup> respondent commenced an action by originating summons in the Federal High Court, Umuahia in suit no. FHC/UM/CS/94/2015 which was later transferred to Abuja and became suit no. FHC/BJ/CS/71/2016. In the amended originating summons, the 1<sup>st</sup> respondent sought for several reliefs against the 3<sup>rd</sup> respondent, and sought to join the 3<sup>rd</sup> respondent as a party.

The reliefs that affected the respondent are:

- “1. A declaration that Dr. Okezie Ikpeazu the 2<sup>nd</sup> defendant herein was not eligible nor qualified to be nominated or to participate or take part in the gubernatorial primary election for Abia state conducted by the People's Democratic Party and her officers on 8<sup>th</sup> December, 2014 which the plaintiff, Dr. Okezie Ikpeazu the 2<sup>nd</sup> defendant and others participated as aspirants.
2. A declaration that Dr. Okezie Ikpeazu not being qualified to be nominated or to participate or take part in the Peoples Democratic Party Gubernatorial primary election on 8<sup>th</sup> December, 2014 is not the aspirant scored in law and in fact the highest number of votes cast in the Peoples Democratic Party primary election pursuant to section 87(4)b(1) and (2) of the Electoral Act 2010 (as amended) and part IV. Article 14 (a)

of the Peoples Democratic Party Electoral Guidelines 2014.

3. A declaration that the votes allegedly scored by Dr. Okezie Ikpeazu in the Peoples Democratic Party's primary election for Abia State on 8<sup>th</sup> December 2014 are wasted votes, null and void and none of the defendant is entitled to act on the scores credited to Dr. Okezie Ikpeazu (the 2<sup>nd</sup> defendant) based on the said Peoples Democratic Party's primary election which Dr. Okezie Ikpeazu the 2<sup>nd</sup> defendant *ab initio* is not qualified to be nominated or participate in the said primary election".

On 27/6/2016, the trial court granted the reliefs claimed by the 1<sup>st</sup> respondent and proceeded to order INEC to issue forthwith a certificate of return to the 1<sup>st</sup> respondent as the governor elect and restore all entitlements to him as the elected governor of Abia State. My Lord, Ogunbiyi, JSC has set out the steps which the applicants took to appeal against the judgment as parties interested but the application was dismissed on 5/8/2016. This prompted the appeal filed on 17/8/2016 and the present application filed on 15/9/2016 which according to the applicants contain grounds of mixed law and facts. Without granting this application, there will be no competent appeal as contained in the notice of appeal filed on 17/8/2016 since the applicants can only appeal with leave of the lower court or this court as interested parties and on grounds of mixed law and facts. See: section 233(3) Constitution of the Federal Republic of Nigeria 1999 (as amended).

The applicants have disclosed their interest in the appeal and justice demands that they should be given the opportunity to ventilate their grievances against the judgment where orders were made directly affecting their interest without their being afforded a hearing.

I share the views expressed by my Lord Ogunbiyi. JSC in the lead ruling which I adopt as mine. I endorse the order; contained in the lead ruling.

**KEKERE-EKUN, J.S.C.:** I have had the benefit of reading in the ruling of my learned brother. Clara Bata Ogunbiyi, JSC I agree with the reasoning and conclusion that the Ration has merit and should be allowed.

By their motion on notice filed on 15/9/2016 brought pursuant section 233(3) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) Order 3 rule 15 and Order 6 rule 2(1) Supreme Court Rules 1985 (as amended) and under the inherent jurisdiction of the court, the appellants/applicants seek its-reliefs:

- “1. An order of this honourable court granting leave to the appellants/applicants to appeal against the decision of the Court of Appeal Abuja Division delivered on the 5<sup>th</sup> day of August, 2016 in Appeal No. CA/A/390/2016 Dr. Alex Otti & Anor v. Sampson Uchechukwu Ogah & 4 ors., on grounds of mixed law and facts as set out in the notice of appeal already filed at the Court of Appeal, Abuja” registering on the 17<sup>th</sup> day of August, 2016.
2. An order of this honourable court deeming as proper filed and served the notice of appeal filed at the Court of Appeal Abuja Registry on the 17<sup>th</sup> day of August, 2016 the correct filing fee having been paid.
3. And for such further order(s) as this honourable court may deem fit to make in the circumstance of this case.”

Grounds for the reliefs in a nutshell, are that the applicants satisfied with a judgment delivered by the Federal High Abuja on 27<sup>th</sup> June 2016 in Suit No. FHC/ABJ/CS/71/2016, they were not parties.

They sought, leave of the Court, Abuja Division (the lower court) to appeal against the, which in their opinion, affected their interest as interested their application was refused on 5<sup>th</sup> August, 2016. Being dissatisfied with the refusal of their application, they tiled a notice to this court on 17/8/2016 within the time prescribed by of this court to do so. However, the applicants contend of the grounds of appeal are not exclusively of law of mixed law and facts. They have therefore brought this application to obtain the leave of this court to argue those grounds appeal that are not exclusively on law alone, out of an abundance of caution.

The application, not surprisingly, has been strenuously opposed by all the respondents except the 4<sup>th</sup> respondent (INEC). Some of the reasons advanced against the grant of the application ate all the grounds of appeal are of mixed law and fact and that application for leave to argue them ought to have been filed first to the lower court and that no special circumstance has been shown warrant it being filed directly before this court; that the judgment the Federal High Court against which they seek leave to appeal interested persons no longer subsists, having been set aside by the court below based on the appeals filed against it by the 2<sup>nd</sup> and 3<sup>rd</sup> respondents; that if the applicants are granted the leave they seek there is no longer a judgment to appeal against; that even are granted leave to appeal and the appeal eventually succeeds would amount to an academic exercise, as it would be impossible to invoke the provisions of section 22 of the supreme court Act, sought by the applicants, to enable them attack a judgment which no longer subsists.

I am in agreement with my learned brother, Ogunbiyi JSC that in opposing this application, learned counsel for the 1<sup>st</sup>, 2<sup>nd</sup> and 5<sup>th</sup> respondents have delved into the merits or otherwise of the substantive appeal and its chances of success. What is in issue this application is whether or not the applicants should be granted leave to argue the ground or grounds of appeal, which are of mixed law and fact. This is not an application for leave to

appeal or extension of time to seek leave to appeal. The notice of appeal filed within the time prescribed by the rules of this court. All the applicants are seeking to do by this application is to fulfil the requirement of the law in respect of grounds of appeal which not exclusively of law alone.

Section 233(2) of the 1999 Constitution provides for circumstances in which appeals to this court from decision the Court of Appeal are as of right. Section 233(2)(a) provide for appeals as of right where the ground of appeal in any civil criminal proceeding involves questions of law alone. Thus when questions of facts or of mixed law and facts are in issue, leave be sought and obtained. See: *Abubakar v. Dankwambo* (2015 NWLR (Pt. 1491) 213 @ 234-235; *OKWUAGBALA v. Ikwueme* (2010) 19 NWLR (Pt.1226) 54; *Opuiyo v. Omoniwari* (2007) 16 NWLR (Pt. 1060)415.

A ground of appeal filed without leave where leave h required incompetent and liable to be struck out See: *C.B.N. & Anor. V. Eji e* (2002) 8 NWLR (Pt.768) 48; *Kano Textile Printers Ltd. v. jede and Hoff Nig. Ltd.* (2005) 13 NWLR (Pt.943) 680. As partly submitted by learned senior counsel for the applicants, it is been held severally by this court that the line between a ground appeal on issues of law alone and a ground of appeal on issues mixed law and fact is very thin. Where counsel are not certain which category their ground or grounds of appeal fall, they are raised to seek leave out of abundance of caution. See: *F.B.N. Plc S.A. Ind. Ltd.* (2010) 15 NWLR (Pt. 1216) 247 @ 292. G.

The instant application is made in respect of ground 4 only, as intended by learned senior counsel for the applicants. The only are which requires the exercise of the court's discretion at this stage, is whether to grant the leave sought.

It is my considered view that it is in the interest of justice to this application which seeks to regularize the notice of appeal ready before this court. I am satisfied that the respondents will not prejudiced by the grant of same. Any issues

regarding the merit of the appeal itself should be addressed at the hearing of the appeal.

For these and the fuller reasoning contained in the lead ruling, motion on-notice tiled on 15/9/2016 is granted as prayed.

Make no order as to costs.

**WAEZE, J.S.C.:** My lord, Ogunbiyi, JSC, obliged me with the that of the leading ruling just delivered now. I am enamored of leadership's adroit resolution of the jockeying submissions on application under consideration.

Indeed, it is not surprising that the said application provoked agent responses from very senior counsel for the parties [except before the fourth respondent]. Let me explain.

The difficulty in typologising grounds of appeal into grounds law *simpliciter* and grounds of mixed law and facts has long been acknowledged in Anglo- Nigerian civil jurisprudence. In England, difficulty was acknowledged as early as 1919, if not earlier, *Merke v. Edinburgh etc Tramways* (1919) SC (H.L) 35; also, *Currie Inland Revenue Commission* (1921) 2 KB 536; *Cooper v. Stubbs* (1925) 2 KB 277; *Benmax v. Austin Motors Co Ltd* (1945) All ER *Edwards (Inspector of Taxes) v. Bairstows and Anor* (1955)3 All ER 48. This state of affairs prompted the very scine expose on the subject by C. T. Emery and Professor B. Smythe their article titled. "Error of Law in Administrative Law" Quarterly Review Vol. 100 (October 1984).

Although this court confessed its difficulty in distinguishing between a ground of law from a ground of mixed law *Ogbechie v. Onochie* (1986) 1 NWLR (Pt.70) 370 and app adopted the above academic treatise of C. T. Emery and Professor B. Smythe in *Ogbechie v. Onochie* at 490 -493, per Eso, JSC problem still persisted and triggered off a frequency of application this point *Nwadike and Ors v. Ibekwe and Ors* (1987) LPEL (SC) 42-43. (1987) 4 NWLR (Pt. 67) 718.

Other examples include: *UBA Ltd v. Stahlbau GmbH* (1989) 3 NWLR (Pt. 110) 374,391-392; *Obatoyinbo v. Oshoi* (1996) 5 NWLR (Pt. 450) 531, 548; *MDPDT v. Okonkwo*

KLR (Pt.117) 739. (20010 7 NWLR (Pt. 711) 206 etc.

Happily, however, this difficulty, notwithstanding, this has. Ingeniously, fashioned out formulae for navigating the nuances of the characterization of grounds of appeal. The formula aims at facilitating the ascertainment of what constitute a ground of appeal, it comes to this: a court has a duty to thorough examination of such grounds which the appellant filed.

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

On the other hand, if the ground complains of the manner which the lower court evaluated the facts before applying that the ground is of mixed law and fact. The determination of ground of fact is much easier.

Simply put, these formulae simply mean that it is the essence of the ground: the main grouse: that is the reality of the complaint embedded in that name, that determines what any particular ground involves, *Abidoye v. Alawode* (2001) 3 KLR (Pt. 118) 917, (2001) 6 NWLR (Pt. 709) 463; *NEPA v. Eze* (2001) 3 NWLR (Pt.709) 606; *Ezeobi v. Abang* (2000) 9 NWLR (Pt. 672) 230; *Ojukwu v. Kaine* (2000) 15 NWLR (Pt.69I) 516.

In effect, it is neither its cognomen nor its designation as "Error of Law" that determines the essence of a ground of appear,

*Abidoye v. Alawode* (Supra) 927; *UBA Ltd v. Stahlbau Gmbh* and (1989) (supra) 374, 377; *Ojemen v. Momodu* (1983) 3 Sc 173, (Pt. 193) 1 SCNLR 188.

All said and done, where counsel is unsurefooted. Or finds himself a dilemma in this characterization, he could apply a leave to do so for abundans cautela non nocet- abundant for sufficient caution does no harm. *FBN Plc v. T.S.A. Ind. Ltd.*

(2010) NWLR (Pt 1216) 247, 292. Such a precautionary approach could obviate all finicky objections on the incompetence of such grounds, *Kano Textile Printers Ltd V. Gloede* NWLR (Pt. 943 ) 680; *CBN and Anor v. Okojie* (2002); 8 NWLR (Pt.768) 48.

It is for these, and the more detailed, reasons in His lordship's leading ruling that I, too, shall order as prayed. Application is, therefore, granted. I abide by the consequential orders in the leading ruling.

**SANUSI. J.S.C.:** The ruling just delivered by my learned brother Clara Ogunbiyi, JSC, was made available to me before now. Having had it, I find myself at one with her reasons and the conclusion rived at therein. I also see merit in the application and hereby ant it as prayed. I abide by all the orders granted in the lead ruling. Decline to make an order as to costs.

*Application*

*allowed.*

