

Ailara v. Garuba

21 Augustt 1995

H.R.H. OBA M.J. AILARA

(THE UBANLOMA OF BABALOMA)

V.

H.R.H. ALHAJI ABUBAKAR GARLBA

(THE OLUPAKO OF SHARE)

MALLAM MDSTAPHA

CA/K/160/94

APPEAL - Grounds of appeal - Classification of grounds as one of law, or of facts or of mixed law and facts - Guide thereto - Relevance of such classification.

APPEAL - Order or decision of lower court - Determination of whether final or interlocutory for purposes of appeal - Guiding principle.

APPEAL - Right of appeal - Final decision of High Court - Appeal to Court of Appeal - Nature of - Time to file - Whether appellant needs leave of court.

JUDGMENT AND ORDER - Order or decision of court - Whether final or interlocutory - How determined as such - Relevance of such determination.

PRACTICE AND PROCEDURE - Appeal - Order or decision of lower court - Determination of whether final or interlocutory for purposes of appeal - Guiding principle.

PRACTICE AND PROCEDURE - Appeal - Right of appeal - Final decision of High Court - Appeal to Court of Appeal - Nature of - Time to file - Whether appellant needs leave of court.

PRACTICE AND PROCEDURE - Grounds of appeal - Classification of grounds as one of law, or of facts or of mixed law and facts - Guide thereto

Issue:

Whether the notice of appeal is competent or valid or is incompetent and should be struck out.

Facts:

The appellant, as plaintiff, had brought an action against the respondents as defendants, at the Kwara State High Court sitting at Omu-Aran claiming the following reliefs:-

1. A declaration that under the custom and tradition of Arogunyo and Okose Wards in Ifelodun Local Government of Kwara State it is the exclusive preserve of the plaintiff the Ubanloma to appoint, install and turban the Ward Heads and approve the appointment of the Baales under the aforesaid Wards.
2. A declaration that the 1st defendant's area of jurisdiction does not extend to Arogunyo and Okose Wards and that any claim by the 1st defendant to overlordship of the community(ies) under the said Ward is misconceived, lacking in historical support and of no effect whatsoever.
3. A perpetual injunction restraining the 1st defendant by himself or through any person(s) however from appointing, installing or turbaning the 2nd defendant or any other person(s) as Baale for Lakanla or any other communities within and under the jurisdiction of the plaintiff.
4. An injunction restraining the 2nd defendant from presenting himself to the 1st defendant for turbaning as the Baale of Lakanla."

At the time of filing his Writ of Summons, the appellant also filed an Ex-parte motion on Notice for an interim injunction to stop the planned turbaning ceremony of the 2nd respondent. The Ex-parte Motion was heard and granted on 4th February 1994. On 14th February, 1994, the lower court heard arguments on the motion on notice for interlocutory injunction restraining the 1st respondent from installing or turbaning the 2nd respondent as the Baale of Lakanla.

In the course of his response to the arguments of the appellant's counsel. Learned counsel to the respondents viva voce raised objection on the competence of the action itself in that the appellant had not complied with the mandatory provisions of the Kwara State Chiefs (Appointments and Deposition) Edict No. 3 of 1988 which required the payment of N10,000.00 deposits filing the action. In the determination of the motion, the learned trial judge decided to treat the issue of incompetence of the action itself first as raised by the respondents. After considering the issue in his ruling of 28th February 1994, the learned trial judge came to the conclusion that the non-joinder of necessary parties to the action filed by the appellant was fatal and so also was the failure of the appellant to fulfill the conditions precedent of paying N 10,000.00 deposit prior to the filing of the Writ of Summons rendered the appellant's action against the respondents incompetent. The entire action filed by the appellant was therefore struck out as being incompetent by the learned trial Judge without actually going into the merits of the arguments on the motion for interlocutory injunction.

After striking out the appellant's action, on the same 28th February 1994. The learned trial Judge heard evidence and arguments of counsel on both sides on damages incurred by the respondents following the Ex-parte interim order of injunction given on 4-2-1994. Restraining them from performing the installation or turbaning ceremony. At the end of that hearing, the learned trial Judge awarded the sum of N3, 000.00 and N9, 000.00 respectively as exemplary damages in favor of the 1st and 2nd respondents against the appellant.

The appellant was dissatisfied with the two decisions of the trial court and he appealed vide a Notice of Appeal filed on 7th March 1994 and containing ten grounds. After the appellant had filed his brief of argument, but before the appeal was heard, the respondents filed a notice of preliminary objection contending that the appeal is incompetent and should be dismissed on the grounds, inter alia, that the decision appealed against being interlocutory and the Notice of Appeal being made of grounds other than of law alone, the appellant required leave of court to file the appeal but that he did not obtain any.

In deciding the issue thus raised the Court of Appeal considered the provisions of section 220(I) (a),(b) and g(ii) of the Constitution of the Federal Republic. 1979 and section 25(2)(a) of the court of Appeal Act 1976. Cap. 75, Laws of the Federation. 1990. Those provisions reads as follows:

"220(I) An appeal shall lie from the decision of a High Court to the Court of Appeal as of right in the following cases-

- a. Final decisions in any civil or criminal proceedings before the High Court sittings at first instance.
- b. Where the ground of appeal. involve questions of law alone, decision in any civil or criminal proceedings."

25(2) (a) The Periods for the giving of Notice of Appeal or notice of application for leave to appeal are:-

(a) in an appeal in a civil cause or matter, fourteen days where the appeal is against an interlocutory decision and three months where the appeal is against a final decision.

Held (Unanimously overruling the preliminary objections):

1. On Test for determining whether order of court is final or interlocutory -

In determining whether an order or decision of a court is final or interlocutory two tests have emerged:-

- (a) the nature of the application test; and
- (b) the nature of the order test.

In Nigeria, the nature of the order test is generally preferred and the question normally asked is: - ' Does the order as made finally dispose of the right of the parties? If it does, then it is a final order but if it does not it is treated as an interlocutory order. In the instant case, the High Court having struck out the appellant's case for being incompetent for absence of jurisdiction, had nothing further to determine in regard to the rights of the appellant and the respondents. Its decision is therefore final. [Akinsanya V. U.B.A Ltd(1986)4 NWLR (Pt.35)273 referred to and applied] (pp.500-50,paras.B-A)

2. On Exercise of right of appeal against final decision of high court-

A party dissatisfied with a final decision of the High Court can appeal to the Court of Appeal as of right (i.e without leave) within three months from the date of such decision irrespective of whether the grounds of appeal are of facts, or of mixed law and facts. In this case, the decision of the High Court was made on 28th February 1994 while the appellant filed his notice of appeal on 7th March 1994, therefore by virtue of section 221(1)(a) of the 1979 Constitution and section 25(2)(a) of the Court of Appeal Act, 1976, Cap. 75 Laws of the Federation of Nigeria, 1990, the appeal is competent. [Aqua Ltd v. Ondo State Sport Council(1998)4NWLR(Pt.91)622 at 655-656 referred to and followed].(p.501,paras.B-C)

3. On Guide to classification of grounds of appeal -

It is not how a party to an appeal christens a ground of appeal that will determine whether the ground of appeal is one of law, or of facts or of mixed law and facts but what the ground of appeal complains about. In this case all the grounds of appeal filed by the appellant are grounds of law alone for which no leave is required to file same [Ogbechie V. Onochie (1986) 2 NWLR (Pt.23) 484; Nwadike v. Ibekwe (1987) 4 NWLR (Pt. 67) 718;Ifediorah V. Ume (1988) 2 NWLR (Pt 74) 5 referred to] (P. 502. Paras.A-C).

Nigerian Cases Referred to in the Ruling:

Akinsanya V. U.B.A Ltd (1986) 4 NWLR (Pt. 35) 273

Aqua Ltd V. Ondo State Sport Council (1988) 4 NWLR (Pt. 91) 622

Ifediorah V. Ume (1988) 2 NWLR (Pt.74) 5

Nwadike V. Ibekwe (1987) 4 NWLR (Pt. 67) 718

Ogbechie v. Onochie (1986) 2 NWLR (Pt.23) 484

Foreign Case Referred to in the Ruling:

Bozson V.Altrincham (1930) Q.B. 547

Nigerian Statutes Referred to in the Ruling:

Court of Appeal Act. 1976 Cap. 75. Laws of the Federation, of Nigeria 1990.S. 25 (2) (a)

Constitution of the Federal Republic of Nigeria. 1979 Ss.220 (1) (a) (g) (ii) and

221(1)

Preliminary objection -

This was a preliminary objection by the respondents to the competence and validity of the appellant's appeal on the ground that the appellant required leave to appeal but did not obtain the leave before

filing the Notice of Appeal. The Court of Appeal, in a unanimous decision, overruled and dismissed the preliminary objection.

History of the Case:

Court of Appeal:

Division of the Court of Appeal to which the Application was brought: Court of Appeal. Kaduna.

Names of Justice that sat on the application: Umaru Abdullahi, J.C. A. (presided); Muritala Aremu Okunola J.C.A.; Mahmud Mohammed, J.C.A. (Read the Leading Ruling)

Appeal No: CA/K/60/94

Date of Ruling: Tuesday, 14th March, 1995

Counsel:

Yusuf A. Alli (with him, A. Adelodun) - for the Appellant Deji Ghadeyan. Esq. - for the Respondents

MOHAMMED J.C.A. (Delivering the Leading Ruling): The appellant as plaintiff had brought an action against the defendants/respondents at the Omu-Aran High Court of Justice. Kwara State claiming the following reliefs:-

- "1. A declaration that under the custom and tradition of Arogunyo and Okose Wards in Ifelodun Local Government of Kwara State it is the exclusive preserve of the plaintiff the Ubanloma to appoint, install and turban the Ward Heads and approve the appointment of the Baales under the aforesaid Wards.
2. A declaration that the 1st defendant's area of jurisdiction does not extend to Arogunyo and Okose Wards and that any claim by the 1st defendant to overlordship of Community (ies) under the said Ward is misconceived, lacking in historical support and of no effect whatsoever.
3. A perpetual injunction restraining the 1st defendant by himself or through any person (s) however from appointing, installing or turbaning the 2nd defendant or any other Person (s) as Baale for Lankanla or any other communities within and under the jurisdiction of the plaintiff.
4. An injunction restraining the 2nd defendant from presenting himself to the 1st defendant for turbaning as the Baale of Lankanla."

At the time of filing his Writ of Summons, the appellant also filed an Ex-parte motion and a Motion on Notice for an interim injunction to stop the planned turbaning ceremony of the 2nd respondent. The Ex-

pane Motion was heard and granted on 4th February. 1994. On 14th February. 1994, the lower court heard arguments on the motion on notice for interlocutory injunction restraining the 1st respondent from installing or turbaning the 2nd respondent as the Baale of Lankanla pending the determination of the substantive action. In the course of his response to the arguments of the appellant's counsel, learned counsel to the respondent's viva voce raised objection on the competence of the action itself in that the appellant had not complied with the mandatory provision of the Kwara State Chiefs- (Appointment and Deposition) Edict No.3 of 1988 which required the payment of N10,000.00 deposit before filing the action. In the determination of the motion, the learned trial Judge decided to treat the issue of incompetence of the action itself first as raised by the respondents. After considering the issue in his Ruling on 28th February. 1994. The learned trial Judge came to the conclusion that the non-joinder of necessary parties to the action filed by the appellant was fatal and so also was the failure of the appellant to fulfill the condition precedent of paying N10,000.00 deposit prior to the filing of the Writ of Summons rendered the appellant's action against the respondents incompetent. The entire action filed by the appellant was therefore struck out as being incompetent by the learned trial Judge without actually going into the merits of the arguments on the motion for interlocutory injunction.

After striking out the appellant's action, on the same 28th February. 1994. The learned trial Judge heard evidence and arguments of counsel on both sides on damages incurred by the respondents following the Ex-parte interim order of injunction given on 4-2-1994. Restraining them from performing the installation or turbaning ceremony. At the end of that hearing, the learned trial Judge awarded the sum of N3, 000.00 and N9,000.00 respectively as exemplary damage in favour of the 1st and 2nd respondents against the appellants.

Dissatisfied with the two decisions of the trial court of 28-2-1994 the appellant had appealed to this court upon filing his notice of appeal complaining the following 10 grounds of appeal.

"1. The learned trial judge erred in law when he struck out the case of the appellant in his ruling on a motion for interlocutory injunction, on the ground that the appellant did not make a mandatory deposit of N 10,000.00 before commencing the action in purported compliance with the provisions of S.I 5(1) of the Chiefs (Appointment and Deposition; (Amendment) Edict No. 3 of 1988.

PARTICULARS

- I. The claim of the appellant did not challenge the appointment of a Chief.
- II. The Baale of Lakanla i.e. the issue in controversy, is not a Chief in accordance with the Chiefs (Appointment and Deposition) (Amendment) Edict No. 3 of 1988
- III. It is the claim of the plaintiff that determines the jurisdiction of the court.

2. The learned trial judge erred in law when he held as follows:-

'The non joinder of the necessary parties is fatal.

PARTICULARS

- I. Non joinder or misjoinder perse cannot defeat a claim.
- II. Okose and Arogunyo are neither necessary nor desirable parties to the appellant's action.
- III. The Ifelodun Local Government is not a necessary or desirable party to the action.
- IV. The Ekiti/Ifelodun/Irepodun Traditional council is not a necessary or desirable party to the action.
- V. The court cannot raise a defence for the respondents.
- VI. Under the rules of the trial court, the court ought to have ordered the joinder of any party who have interest in the subject-matter of the suit.

3. The learned trial Judge erred in law by his holding that the fourth relief of the appellant challenged the appointment of the 2nd respondent as the Baale of Lakanla. And same is perverse and not in accord with the claim of the appellant, which was before the trial court.

PARTICULARS

- I. Relief No. iv of the appellant's claim only asks for injunction against the 2nd respondent.
- II. The learned trial Judge construed the relief out of context.
- III. The misconstruction of the appellant's 4th relief has occasioned serious miscarriage of justice.

4. The learned trial Judge erred in law by holding thus:-

'Apart from the other reliefs highlighted above the found relief is explicit that it challenges the appointment of the 2nd defendant as the Baale of Lakanla.'

PARTICULARS

- I. The fourth relief does not challenge the appointment of the 2nd respondent as Baale.
- II. The entire action was not a challenge to any appointment.
- III. The action only seeks to enforce the applicable native law and custom of Babanloma Community.

5. The learned trial Judge misdirected himself on the facts when he held as follows:-

'The plaintiff is challenging the validity of the appointment of the 2nd defendant as the Baale of Lakanla by the 1st defendant, the Ekiti/Ifelodun/Irepodun Traditional Council and the Ifelodun Local Government.'

PARTICULARS

- I. The claim concerned declarations as to the correct native law and custom on the appointment of the Baale of Lakanla.
 - II. The appellant did not challenge the powers of the Ekiti/Ifelodun/Irepedun Traditional Council and/or the Ifelodun Local Government to appointing the 2nd respondent,
 - III. The 1st respondent is not an appointing authority for the Baale of Lankanla.
6. The learned trial Judge erred in law in holding as follows:-

'Consequently, to have a competent suit in which this Court can exercise its jurisdiction on a matter such as this, in strict compliance with S.15 (1) of the Chiefs (Appointment and Deposition) (Amendment) Edict No.3 of 1988, the plaintiff make a mandatory deposit of N10, 000.00 with the state's Accountant General. There is no evidence of this. In the circumstance; the action is incompetent as the condition precedent has not been met.

PARTICULARS.

- I. The action of the appellant is totally outside the purview, contemplation or intendment of S. 15(1) of the Chiefs (Appointment and Deposition) (Amendment) Edict No. 3 of 1988.
 - II. The reliefs sought are in the main to declare the turbaning authority of Baale of Lankanla under the relevant law and custom.
 - III. There was no prayer in the writ challenging the appointment of any Chief.
 - IV. The learned trial Judge took extraneous matter into consideration in holding that S.15(1) of Edict No.5 of 1988 applies.
 - V. The decision in *Gambari v. Gambari* (1990) 5 N WLR (Pt.152) p. 572 was misapplied by the trial court.
7. The learned trial Judge erred in law in entertaining the respondent's prayer for striking out of the appellant's case when the prayer was clearly a demurrer which has been abolished under the rules of the trial court and when the application to strike out the action was made in disregard of the Court rules in an application for inter-locutory injunction.

PARTICULARS

- I. Order 24 of the Kwara State High Court (Civil Procedure) rules, 1989 has abolished demurrer.
- II. The objection/prayer of the respondent on the non-payment of N10, 000.00 deposits was clearly a demurrer.
- III. Order 2 of the Kwara State High Court (Civil Procedure) rules. 1989 requires an application to set aside to be by motion or summons and before any fresh step has been taken.
- IV. The respondents had filed two separate Counters - affidavits, joining issues with the appellant on the motion for injunction.

8. The learned trial Judge erred in law when he struck out the case of the appellant on the oral application of the respondents who are neither appointing authorities nor persons for whose benefit the provisions of S.15(l) of Edict No.3 of 1988 was made.

PARTICULARS

- I. The provision of S. 15(1) of the chiefs (Appointment and Deposition) (Amendment) Edict no.3 of 1988 was to ensure to the benefit of Kwara State Government.
 - II. The respondents have no locus standi to rely on or take benefit of the provision of the said S. 15(1) of Edict No.3 of 1988.
 - III. The respondents are meddlesome interlopers.
 - IV. The respondents have no higher stakes in the observance of the provisions of S. 15(1) of Edict No.3 of 1988 over and above any other member of Kwara State public.
9. The learned trial Judge erred in law when on the day fixed for ruling and without prior notice to the appellant, he called for oral evidence from the respondents and this procedure denied the appellant his right to fair hearing as enshrined in section 33 of the 1979 Con-stitution.

PARTICULARS

- I. The appellant's counsel was in Court on 28th February, 1994 only to take the ruling on the motion for injunction.
 - II. There was no prior notice to the appellant that oral evidence would be called to prove any damages.
 - III. The trial Judge made it clear that he would not adjourn the matter for any purpose whatsoever.
 - IV. The appellant was totally caught by surprise when the trial court called for oral evidence on the day of the ruling.
 - V. The procedure adopted on 28th February, 1994 by the trial Judge denied the appellant his right to fair hearing.
10. The learned trial Judge erred in law and exercised his discretion capriciously by awarding a whopping sum of N 12.000.00 as damages to the respondents when there was no factual or legal basis for such.

PARTICULARS

- I. All the heads of claim of the respondents were in the nature of special damages.
- II. There were no particulars of the damages given or supplied to the appellant before 28th February. 1994.
- III. The damages were awarded in flagrant disobedience of decided authorities of this Court and the Supreme Court."

However, before the appeal came up for hearing, and after the appellant had filed his brief of argument, the respondents filed a notice of preliminary objection in the following terms:-

"The appeal lodged via the notice of appeal filed at the lower court Registry on 7th March, 1994 and contained on pages 100 -106 of the record of appeal is incompetent and should be dismissed with costs." The grounds of the objection as stated in the notice are -

- a. The decision of the lower court appealed against is basically interlocutory in nature because the rights of the parties before it were not in any way determined.
- b. All the grounds of appeal contained in the notice of appeal filed at the lower court's registry on 07 March, 1994 are not grounds on questions of law only as directed by section 220(1)(b) of the 1979 Constitution of Nigeria (as amended) and as such, the said notice of appeal stands unsustainable.
- c. All the grounds of appeal are of questions of fact or mixed law and fact and the appellant is constitutionally required under section 221(1) of the 1979 Constitution (as amended) to either obtain the leave of either the High Court sitting at Omu-Aran or of this Honorable Court.
- d. The appellant herein did not obtain the leave as required by section 221(1) of the 1979 Constitution (as amended).
- e. As the grounds were not grounds on questions of law only and no leave was obtained either, this Honorable Court should dismiss the appeal in its entirety.
- f. Grounds 2,3,4 and 5 of the notice of appeal are vague, general in terms and they disclose no reasonable grounds of appeal.
- g. Ground 7 of the notice of appeal raised for determination, a fresh issue of demurrer without the leave of this Honorable appellate court.
- h. Grounds 3,7,8,9 and 10 of the notice of appeal are merely narrative and also urging on the court, arguments as opposed to the required particulars and the nature of the mis directions or errors which should have been clearly stated."

In his oral submission before us in support of the objection, learned counsel to the respondents had argued that since the action was struck out by the trial court for failure of the appellant to meet the precondition of the payment of the N 10,000.00 deposit before filing the action, the respective rights of the parties have not been finally determined as the appellant could on the payment of the required deposit file fresh action at the trial court. Learned counsel pointed out that all the grounds of appeal filed by the appellant are grounds of facts or mixed law and facts and as no leave was obtained before filing the notice of appeal, the appeal is incompetent citing the case of *N.Y.S.C v. Establishment Sima of vaduz*(1990) 7 NWLR (Pt.164)526.

Mr. Adelodun for the appellant however insisted that all the grounds of appeal filed by the appellant are grounds of law alone complaining against final decision of the lower court and as such the respondents' preliminary objection is misconceived. Learned counsel submitted that the two orders of the trial court striking out the appellant's action and the award of damages to the respondents are final orders that

could be executed without recourse to the lower court. This is because according to the appellant's counsel, the rights of the parties in respect of the application for injunction as well as the award of damages have been finally determined and as such the decisions of the lower court are not interlocutory having regard to the case of *Afuwape & ors v. Shodipe* (1957) SCNLR 265 at 267 and *Ebokam v. Ekwenibe & Sons Trading Co. Ltd.* (1993) 6 NWLR (Pt.297) 108 at 116. It was further argued for the appellant that since the appeal is against the refusal of the lower court to grant injunction, the appellant has the right of appeal as of right by virtue of section 220(1)(a)(g)(ii) of the 1979 Constitution. That even from the nature of the order of the lower court, the order awarding damages is final and not interlocutory. That ground 1, 2,3,4,6 and 8 relate to interpretation of S.15 (I) of the Chiefs Appointment and Deposition (Amendment) Edict No.3 of 1988 of Kwara State. Ground 7 on the other hand relates to the interpretation of Kwara State High Court (Civil Procedure) Rules 1989 Order 24 thereof while ground 9 relates to the interpretation of S. 33 of the 1979 Constitution. Learned counsel finally pointed out that ground 10 is an appeal against final decision of the lower court on the award of damages and that in any case having regard to the decision of this Court in *Ibrahim v. Habu & Anor* (1993) 5 NWLR (Pt. 295) at 570, even if only one ground of appeal is found to be valid, the appeal could be sustained.

On the test for determining whether an order or decision is final or interlocutory, a consideration of the available authorities reveals the emergence of two tests for the determination of the question. The tests are:-

The 'nature of the application test and the 'nature of the order' test.

However the latter test of the nature of the order is generally preferred in Nigerian B Courts. Kayode Eso, J.S.C (as he then was) in *Akinsanya v. U.B.A Ltd* (1986) 4 NWLR (Pt. 35) 273 after an exhaustive discussion of the authorities both English and Nigerian said at page 295

"Such is the difficulty."Such is the uncertainty'. There is no doubt that I see nothing obnoxious in *Salama v. Warner* test as a test; but I think it is more practicable and more certain to keep to just one test *Bozson v. Altrincham* test which has been preferred in this country for so long."

The test as propounded by Lord Alverstone, C.J. in *Bozson a. Altrincham* therefore is

"Does the order as made finally dispose of the right of the parties? If it does, then I think it ought to be treated as a final order, but if it does not it is then in my opinion an interlocutory order."

I shall adopt this test in this ruling. If the orders made by the learned trial Judge in the present case are such that the orders finally disposed of the rights of the appellant and the respondents in the matter before the lower court, the orders are final.If on the other hand the orders do not disposed of the rights of the parties, the orders are interlocutory.

What are the orders appealed against in this appeal against which the preliminary objection is taken by the respondents? It is clear from the record of this appeal that although it was the appellant's motion on

notice for interlocutory injunction that gave rise to the Ruling the subject of this appeal which in turn gave rise to the preliminary objection, the ruling did not in fact determine the motion. Rather it determined the entire action based on the objection raised to its competence F by the respondents' counsel in the course of arguing the motion for interlocutory injunction. The learned trial Judge having considered the objection to the competence of the entire action alone in his ruling of 28-2-94. held that the non joinder of necessary parties to the action was fatal and also the failure of the appellant to fulfill the necessary condition precedent of paying N 10,000.00 deposit prior to the filing of the action was fatal, struck out the case for being incompetent G and for lack of jurisdiction on the part of trial court to entertain the case.

In *Akinsanya v. U.B.A.* (supra) one of the issues canvassed was whether the decision of the Court of Appeal striking out appellant's claim was a final or interlocutory decision. The Supreme Court applying the nature of the order test held that the Court of Appeal having determined that the trial court had no jurisdiction had nothing further to determine in regard to the rights of the parties. H The decision is therefore final as being a final decision of the Court of Appeal. Applying this decision to the present case, it is not difficult to see that the lower court having struck out the case for being incompetent for absence of jurisdiction on the part of the lower court to entertain it, the lower court had nothing further to determine in regard to the rights of the appellant and the respondents. The decision is therefore final and not interlocutory. In the same vein, the order of the lower court on the award of damages to the respondents arising from the undertaking made by the appellant in the Ex-parte order of interim injunction made by the lower court on 4-2-1994. the award having been made after hearing evidence and address, the lower court had nothing further to determine in regard to the rights of the parties. The order is therefore final and not interlocutory. Therefore by virtue of section B 25(2) (a) of the Court of Appeal Act CAP "5 of the Law of the Federation 1990. The two orders of the lower court being final months within which to file his notice of appeal on 28-2-94 by the lower court, while the appellant's notice an appeal having been filed at the lower court on "-3-1994. the appeal competent and does not require any leave irrespective of whether the ground of appeal are grounds of facts or mixed law and fact under section 221(11 of the 1999 Constitution). Therefore in view of the provisions of section 220(1) (a) of the 1979 Constitution which gives the appellant the right to appeal as of right against final decision of the High Court sitting at first instance, the need to consider the other leg of the objection that the appellant's 10 grounds of appeal being grounds of facts alone or mixed law and fact would require necessary leave, is hardly necessary. This is because an appeal against a final decision given by a High Court sitting at first instance in a civil case on grounds of mixed law and fact falls under section 220(1 H a) of the 1979 Constitution and therefore lies as of right. Section 220(1) (a) and (b) read -

"220(I) An appeal shall lie from the decision of a High Court to the Court

of Appeal as of right in the following cases –

- a. Final decisions in any civil or criminal proceedings before the High Court sitting at first instance.

- b. Where the ground of appeal involve questions of law alone, decision in any civil or criminal proceedings."

Therefore having regard to the decision of the Supreme Court in *Aqua Ltd v. Ondo State Sport Council* (1988) 4 NWLR (Pt. 91) 622 at 655 - 656, the appellant's F notice of appeal being against final decisions of the lower court, is quite competent irrespective of the fact that the notice of appeal contains grounds of facts or mixed law and fact.

It must be observed however, that although the original motion giving rise to the Ruling the subject of this preliminary objection is a motion seeking the relief of injunction, the relief was not in fact determined by the lower court. In other words the Ruling of 28-2-1994 by the lower court did not refuse or grant the relief of injunction sought although the merits of the application were heard. Therefore the right of appeal conferred by section 220(l) (g)(ii) of the 1979 Constitution to appeal as of right to the Court of Appeal against the grant or refusal to grant injunction by the lower court does not apply in the present case. The decisions of the lower court striking out the appellant's action on the grounds of incompetence H and absence of jurisdiction and the award of damages to the respondents against the appellant do not arise from injunction sought. The attempt by the appellant to sustain his notice of appeal on this ground therefore cannot stand.

This indeed disposes of the preliminary objection. However, for whatever it is worth. I shall consider briefly the second leg of the objection that the grounds of appeal being of facts alone or mixed law and fact, required the leave of the trial

Court or of this Court. What constitutes a "ground of law or of mixed law and fact or of facts only has been the subject judicial decisions by the Supreme Court in a number of cases notably, in recent times *Ogbechie v. Onochie* (1986) 2 NWLR (Pt.23)484. *Nwadike v. Ibekwe* (1987)4 NWLR (Pi. 67) 718 and *Ifediorah v. Ume* (1988)2 NWLR (Pt. 74) 5. Bearing in mind the principles laid down in these cases and other similar cases. I now proceed to consider the nature of the grounds of appeal filed by the appellant in his notice of appeal to this Court against the decisions of the lower court of 28-2-1994. The grounds have already been set out earlier in this Ruling. I need to point out that it is not how a ground of appeal is christened that matters but what it complains about. Close examination of at least grounds 1, 2, 6, 7, 8 and 9 of the appellant's grounds of appeal reveals in my view, that they are grounds raising issues of law alone. The grounds do not relate to an examination of the manner in which the lower court exercised its discretion to grant or refuse the original application for interlocutory injunction, but rather complain of misconception of the respondents oral objection leading to the striking out of the entire action on an application for injunction. Therefore even if the decisions of the lower court were interlocutory and not final as I have already found in this Ruling, these grounds being grounds of law. Would have been able to sustain the appellant's appeal.

For the foregoing reasons the preliminary object raised by the respondents to the competence of the appellant's notice of appeal fails. Accordingly the preliminary objection is hereby dismissed.

ABDULLAHI, J.C.A.: I had the benefit of a preview of the Ruling just delivered by my learned brother Mohammed, J.C.A.

I agree with all the reasons given and conclusion reached. I adopt them as mine. I abide by the consequential orders made there in.

OKUNOLA, J.C.A.: I have had the privilege of reading in advance the leading Ruling just delivered by my learned brother Mohammed, J.C.A. I agree with the reasoning and the conclusions reached therein.

In the instant case, there was a motion for Interlocutory Injunction before the trial court and in determining the motion the learned trial Judge decided to treat the issue of the competence of the action itself which was raised in the preliminary objection.

In his ruling, the learned trial Judge found that the non-joinder of the necessary parties to the action was fatal and further that the failure of the appellant to fulfill the condition precedent of paying the N10, 000.00 deposit before filing the Writ of Summons as provided by Kwara State Chiefs (Appointment and Deposition) Edict No. 3 of 1988 rendered the appellants' action incompetent.

Further, the learned trial Judge after the evidence and arguments on the issue of damages, awarded the sum of N3, 000.00 and N'9,000.00 to the 1st and 2nd respondents respectively as exemplary damages.

No doubt, the two orders of the trial court striking out the appellant's action and the award of damage to the respondents are final orders, as they have finally determined the rights of the parties.

I must observe that the trial court did not grant the appellant's application for injunction and this is an appeal against the refusal of the lower court to grant the injunction and the appellant therefore has a right of appeal as of right by virtue of 220 (a)(g)(ii) of the Constitution which reads:-

"220. (I) An appeal shall lie from decisions of a High Court to the Federal Court of Appeal as of right in the following cases –

- a. final decisions in any civil or criminal proceedings before the High court sitting at first instance;
- b. decisions made or given by the High Court -

(ii) Where an injunction or the appointment of a receiver is granted or refused." For these reasons and the fuller reasons given in the leading Ruling, I find no merit in the Preliminary Objection raised by the respondents as to the competence of the appellant's Notice of Appeal. Consequently, the Preliminary Objection is accordingly dismissed.

Preliminary objection dismissed.