IN THE CUSTOMARY COURT OF APPEAL
EDO STATE OF NIGERIA
HOLDEN AT AUCHI

ON MONDAY, THE 29TH DAY OF NOVEMBER, 2010

BEFORE THEIR LORDSHIPS

PETER OSARETINMWEN ISIBOR	-	JUDGE (PRESIDED)
MARY NEKPEN ASEMOTA	-	JUDGE
TIMOTHY UKPEBOR OBOH	-	JUDGE
PETER AKHIMIE AKHIHIERO	-	JUDGE
OHIMAI OVBIAGELE	-	JUDGE

APPEAL NO. CCA/16A/2009

BETWEEN:

1. CHIEF ROBERT DOGO
2. CHIEF EZEKIEL UGBOGA ….. …… APPELLANTS
3. CHIEF BEN USIFUOKHAI

(SUING ON BEHALF OF THE ENTIRE ORAKE COMMUNITY OF OTUO)

AND

MR. VINCENT IMOBIGHE ……. …… RESPONDENT

JUDGMENT
DELIVERED BY PETER AKHIMIE AKHIHIERO (JCCA)

This is an appeal against the ruling of the Owan East Area Customary Court, Afuze delivered on the 30th day of March, 2009 in Suit No.

OEACCA/62[M]/2008, wherein the court refused an application for interlocutory injunction to restrain the respondent from further trespassing into, or offering for sale, any part of the land belonging to the Orake community at Ghiroro New site, Orake-Otuo.

Dissatisfied with the ruling of the trial court, the appellants filed a Notice of Appeal containing five original grounds of appeal.

The five grounds of appeal without their particulars are as follows:

> "1. The learned trial President and the Members erred in law and thereby came to a wrong conclusion when the interlocutory application was refused.
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> 2. The learned trial President and the Members erred in law by delving into the substantive matter in reaching a conclusion to refuse the interlocutory application on the ground that the applicants were indolent.
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> 3. The learned trial President and the Members were misdirected and in the process misdirected itself (sic) as to the true position of the law and wrongly evaluated the facts.
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> 4. The court erred in law when it held that the only deposition relating to balance of convenience on the side of the appellants is contained in paragraph 26 of the affidavit in support of the motion.
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> 5. The court erred in law when it pronounced on the substantive matter at the interlocutory stage thereby denying appellants' right of fair hearing."

Subsequently, with the leave of this Court, the appellants filed four additional grounds of appeal.

The additional grounds of appeal bereft of their particulars are as follows:

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"6. The learned trial President and the Members erred in law when after it (sic) held that there was a serious issue to be tried, went ahead to resolve all the affidavit evidence in favour of the respondent.

7. The court erred in law when it held that the plaintiffs/appellants will not suffer damages if the application is refused.

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8. The court erred in law when it drew its own facts as if the act the plaintiffs/appellants want restrained is a completed act.

9. The court erred in law when it resolved the affidavit evidence in favour of the defendant/respondent without taking oral evidence on these contentious issues."

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In consonance with the rules of this Court, learned counsel for the parties filed and exchanged their respective briefs of argument. Furthermore, pursuant to the rules of Court, the learned counsel for the respondent filed a Notice of preliminary objection to this appeal, dated the 28th day of June, 2010. The grounds of his objection are stated as follows:

"1. That this interlocutory appeal is incompetent.

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2. That the plaintiffs/appellants did not comply with the mandatory provisions of section 37(1) of the Customary Court of Appeal Edict,

1984."

In his brief of argument, the learned counsel for the appellants, E. A. Okaka Esq., formulated eight issues for determination in this appeal as follows:

"1. Whether the court was right in refusing the appellants application for interlocutory injunction in the face of the affidavit evidence before the court.

2. Whether the court was right in refusing the interlocutory application having first made an interim order that the defendant/ respondent should not continue to sell the land in issue.

3. Whether from the affidavit evidence before the court it is not inferable that the nature and use of the land will be altered by the sale of same to non-indigenes of Orake quarter, Otuo.

4. Whether it was right for the court to listen to the defendant/ respondent's submission urging the court to refuse an application in respect of a land which he claims he does not know.

5. Was the court right in concluding that the balance of convenience in the application was in favour of the defendant/respondent?

6. Was it right for the court to have pronounced on who is in possession of the land at this stage?

7. Whether the court was right when it held that from the affidavit evidence, there was no urgency.

8. Whether the act of the respondent was a completed act that cannot be restrained."

On the other hand, in his brief of argument, the learned counsel for the respondent, Rev. J. Imohi, formulated two issues for determination as follows:

"1. Whether this interlocutory appeal is competent having regard to the appellants' failure to comply with section 37 (1) of the Customary Court of Appeal Edict, 1984.

2. Whether the lower court was wrong in law when it refused to grant the appellants' application for interlocutory injunction in view of the affidavit evidence before it."

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We deem it expedient at this stage to consider the preliminary objection raised by the respondent before deciding which of the issues formulated by counsel are to be adopted.

The preliminary objection is on the competence of the entire appeal.

10 This is a fundamental point.

In his brief of argument, the learned counsel for the respondent articulated his arguments on the preliminary objection under his "Issue 1" We must point out that the so called "Issue 1" as formulated by the learned counsel was in fact no issue at all, but what could have been properly

15 captioned and argued as a "preliminary objection." Under our law, an "issue" properly so called, can only arise from the grounds of appeal filed. Any issue which does not arise from a ground of appeal should be ignored or discountenanced. See the following decisions on the point:

1. Aja v Okoro (1991) 7 N.W.L.R. (Pt. 203) 260;

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2. Nwosu v Udeaja (1990) 1 N.W.L.R. (Pt. 125) 188;

3. Erinwingbovo v Amayo (1994) 3 N.W.L.R. (Pt. 332) 365 at 373.

The issue of leave to appeal is not contained in any ground of appeal before us.

However, as we earlier observed, the learned counsel for the respondent complied with our rules of Court by filing a Notice of Preliminary objection in accordance with the provisions of Order 7, Rule 17 of the Customary Court of Appeal Rules 2000.

We shall overlook his wrong approach and consider the arguments in his brief on the objection.

Arguing the point, the respondent's counsel submitted that the right to appeal is a creation of statute and any appeal commenced in a manner contrary to the law is incompetent and should be discountenanced by the Court. He cited in support the case of Raine V Ojukwu (2000) FWLR (Pt. 28) 2231 – 2233, ratio 1 & 2.

He maintained that this is an interlocutory appeal from the ruling of the Area Customary Court, Afuze. According to him, by virtue of section 37(1) of the Bendel State Customary Court of Appeal Edict, 1984, now applicable to Edo State, where an interlocutory order is made by an Area Customary Court in the exercise of its civil jurisdiction, an appeal shall lie only by leave of the trial court or the Customary Court of Appeal.

He submitted that the appellants did not obtain the leave of any court as required by the aforesaid provision of the Edict. He further submitted that failure to obtain leave rendered the appeal incompetent and it should be struck out.

5 To support this submission, he cited the case of State v Zannah (2001) FWLR (Pt. 78) 1110 at 1112 – 1113.

Counsel finally maintained that the issue of competence touches on the jurisdiction of a court and as this is fundamental, it can be raised at any stage of the proceedings. He relied on the following decisions on the point:

10 1. Aunam (Nig.) Ltd. V Leventis Motors Ltd, (1990) 5 N.W.L.R. (Pt. 151) 458 at 460.

2. Akkem v University of Ibadan (2002) FWLR (Pt. 85) 221 at 223 – 224.

It is pertinent to observe that the learned counsel to the appellants did not file any reply brief after he was served with the respondents brief of argument. Going through the entire gamut of the arguments in the

15 appellants' brief, there was no attempt whatsoever by the appellants' counsel to address the fundamental issue raised by way of preliminary objection. On the 25th of October, 2010, when both counsel adopted their briefs of

20 argument, the appellants' counsel still had the opportunity to address the issue by way of additional oral arguments. But there again, the issue was not

addressed. It appears to us that the appellants' counsel has no answer to the preliminary objection raised against this appeal.

Where an objection is raised as to the competence of an appeal, the jurisdiction of the Court to entertain the appeal is being challenged. It becomes therefore imperative on the Court, to determine that issue before deciding on the next course of action. See the cases of State v Onagoruwa (1992) 2 N.W.L.R. (Pt. 221) 33 and Lekwot v Judicial Tribunal (1993) 2 N.W.L.R. (Pt. 276) 410 at 442.

The provision of section 37 (1) of the Customary Court of Appeal Edict 1984 states as follows:

> "(1) Subject to subsection (2) of this section, where in the exercise by an Area Customary Court of its civil jurisdiction under this Edict, an interlocutory order or a decision is made in the course of any suit or matter, an appeal shall by leave of that court or of the Customary Court of Appeal, lie to the Customary Court of Appeal; but no appeal shall lie from any order made ex parte , or by consent of the parties, relating only to costs."

Upon a careful study of the above provision, it is evident that in respect of civil appeals against interlocutory orders and decisions, leave of court is required. It is settled law that where leave is required before an appeal is taken, any appeal filed in the absence of such leave is incompetent. The leave to appeal is a condition precedent to the appeal. Where leave is required, it is

the leave that confers jurisdiction on the court. It is fundamental that the leave must be obtained before the appeal is filed and any appeal filed without leave is incompetent as no jurisdiction can be conferred on the court. See the following cases on the point:

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1. Mosuro & Anor v Akinyele 13 W.A.C.A. 112 – 113;
2. Harrison Welli & ors v Okechukwu &ors (1985) 2 N.W.L.R. (Pt. 5) 63; and
3. Intl. Equitable Ass. Ltd v Okechie (1999) 5 N.W.L.R. (Pt. 604) 620 at 627.

It is clear that the decision of the trial court being appealed against is not a final decision, but interlocutory. By virtue of the provisions of section

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37 (1) of the Customary Court of Appeal Edict, leave of court is a sine qua non for the validity of the appeal. The appellants did not obtain any leave before filing this appeal neither has their counsel explained why they appealed without the leave of court.

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In the event, we uphold the preliminary objection of the learned counsel for the respondent. The leave of the trial court or this Court ought to have been sought and obtained before filing the notice and grounds of appeal. The legal effect of this is straightforward. The appeal is incompetent and this Court lacks the jurisdiction to consider the appeal on its merits. Accordingly,

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this appeal is struck out.

We award N3,000.00 (three thousand naira) costs in favour of the respondent.

HON. JUSTICE PETER OSARETINMWEN ISIBOR

HON. JUSTICE MARY NEKPEN ASEMOTA

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HON. JUSTICE TIMOTHY UKPEBOR OBOH

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HON. JUSTICE PETER AKHIMIE AKHIHIERO

____

HON. JUSTICE OHIMAI OVBIAGELE

E. A. OKAKA ESQ. … … … COUNSEL FOR THE APPELLANTS

REV. J. IMOHI … … … COUNSEL FOR THE RESPONDENT