IN THE CUSTOMARY COURT OF APPEAL,
EDO STATE OF NIGERIA
HOLDEN AT BENIN CITY

ON WEDNESDAY, THE 8TH DAY OF JUNE, 2011

BEFORE THEIR LORDSHIPS

TIMOTHY UKPEBOR OBOH ….. ….. JUDGE (PRESIDED)

PETER AKHIMIE AKHIHIERO ….. ….. JUDGE

OHIMAI OVBIAGELE ….. ….. JUDGE

APPEAL NO. CCA/19A/2010

BETWEEN:

1. OSOBASE OKOKHUE EHIGBOCHIE (Suing by his Attorney, Engr. Isaac Ehigbochie)
2. FELIX EHIGBOCHIE
3. MRS OFURE OSUNDE

…… ..... APPELLANTS

AND

JACOB EHIGBOCHIE ….. ….. ….. ….. RESPONDENT

JUDGMENT
DELIVERED BY PETER AKHIMIE AKHIHIERO (JCCA)

This is an appeal against the ruling of the Igueben Area Customary Court, holden at Igueben, delivered on the 22nd day of June, 2010 in Suit No. IACC/2/MI/2010, wherein the court refused an application for an order on the respondent to show

cause why he could not be imprisoned for committing contempt of the said court by disobeying the order of the court made in its judgment dated 9th November, 2009.

In the aforesaid suit, the appellants (as plaintiffs), sued the respondent (as defendant), and obtained judgment based on the Terms of Settlement filed in the lower court, dated 19th November, 2007. The Terms of Settlement was made the judgment of the court.

Subsequently, the respondent purportedly flouted the order of the court made in the said suit. This prompted the appellants to institute the application for committal which was refused by the trial court.

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

The original grounds of appeal are as follows:

"1. That the decision of the Area Customary Court is against the weight of affidavit and documentary evidence before the court.

2. That the trial court erred in law and on the facts when it failed to give the correct interpretation in law of the paragraphs in Exhibits "A" and "B"

PARTICULARS OF ERRORS

This will be supplied as soon as the record of appeal is ready."

Subsequently, with the leave of this Court, the appellants filed three amended grounds of appeal. The grounds are reproduced without their particulars as follows:

"1. The trial court erred in law and on the facts when it held, 'This is answering questions (a) and (b) formulated by us (sic) we hold that the

applicants have failed to discharge the onus placed on them. In the circumstance, this application fails and is therefore hereby dismissed.'

2. The trial court erred in law when it held that the appellants did not file a further affidavit in reply to the respondent's counter-affidavit.

3. The trial court erred in law when it failed to convict the respondent/contemnor on contempt of court stated in the application in court."

In consonance with the rules of this Court, learned counsel for the parties filed and exchanged their respective briefs of argument.

The learned counsel for the appellants, P. A. Eromosele Esq., in his brief of argument, formulated two issues for determination as follows:

"1. Whether the trial court interpreted the words (sic) 'past' used in the Terms of Settlement Exhibit 'A' which was typed as 'part' as contained in the judgment of court dated 9th November, 2006 which is Exhibit 'B'.

2. Whether there is enough affidavit evidence in support of the motion for contempt upon which the trial court ought to have convicted the respondent?"

On his part, the learned counsel for the respondent, S. A. Uwagbale Esq., in his brief of argument, raised a preliminary objection to the appeal on two grounds, to wit:

"(a) Whether this Honourable Court has jurisdiction to entertain this criminal appeal; and

(b) Whether this Honourable Court has jurisdiction to entertain the grounds of appeal which deal with mixed law and fact without leave of court sought and obtained."

The learned counsel for the respondent did not formulate any issue for determination in this appeal. It is settled law that where a respondent fails to formulate issues for determination, he is deemed to have adopted the issues as formulated by the appellant. See the following decisions on the point:

1. Morenikeji v Adegbosin (1995) 3 NWLR (Pt. 381) 77 at 87;
2. Ajibade v Pedro (1992) 5 NWLR (Pt. 240) 257 at 267; and
3. Adejumo v Olawaiye (1996) 1NWLR (Pt. 425) 436 at 442.

On the authorities listed above, the respondent is deemed to have adopted the issues as formulated by the appellants.

Upon a careful consideration of the issues formulated by the learned counsel for the appellants, we are of the view that the issues are quite germane to the determination of this appeal and we accordingly adopt them with slight amendments and tie them to the grounds of appeal as follows:

1. Whether the trial court correctly interpreted the word "past" used in the Terms of Settlement Exhibit "A" which was typed as "part" as contained in the judgment of court dated 9th November, 2006 which is Exhibit "B". (Ground one)
2. Whether there is enough affidavit evidence in support of the motion for contempt upon which the trial court ought to have convicted the respondent (Grounds two and three).

In his brief of argument, the respondent's counsel raised a preliminary objection without filing the Notice of Preliminary objection as stipulated in Order 7, Rule 17(1) of the Customary Court of Appeal Rules, 2000. This is quite irregular. The preliminary

objection is on the competence of the entire appeal. This is a fundamental point and we are of the view that in the interest of justice and pursuant to the powers vested in this Court under Order 10, Rule 2 of the Rules, we shall waive the issue of non-compliance with Order 7, Rule 17(1). Furthermore, we shall consider the arguments on the preliminary objection before the issues for determination in the appeal.

Arguing the first ground of the preliminary objection, the learned counsel for the respondent submitted that this Court lacks the jurisdiction to entertain the subject matter of this appeal. He maintained that for a court to be competent to entertain a case, the subject matter must be within its jurisdiction and there should be no features to prevent the court from exercising its jurisdiction. For this proposition he cited the case of Oyegun v Nzeribe (2010) 180 LRCN 50 at 54.

The learned counsel posited that the subject matter of the appeal is on law simpliciter and not on customary law. He submitted that the jurisdiction of a court is a matter of statute and that by virtue of section 245(1) of the 1999 Constitution, this Court can only entertain appeals in respect of matters of customary law and not on law simpliciter. He also cited section 49(b) of the Customary Court of Appeal Edict 1994 in support.

In addition, counsel submitted that the appeal being criminal in nature, it ought to have been filed at the High Court by virtue of section 49(a) of the 1994 Edict.

Arguing the second ground of objection, counsel submitted that ground one of the amended grounds of appeal raises issues of mixed law and fact. Furthermore, he

maintained that grounds two and three raise issues of law while their particulars raise issues of fact. Counsel submitted that these grounds raise questions of mixed law and fact for which the appellant is required to seek leave of court before appealing. He maintained that the appellant did not obtain any leave and this is fatal to the appeal.

The learned counsel for the appellants filed a reply brief to address the preliminary objections of the respondent. In his reply, counsel submitted that the subject matter of the appeal is the inheritance of the family land of late Pa Ehigbochie Oseghale. He contended that the contempt proceeding is predicated on inheritance of family land. He maintained that sections 245(1) of the 1999 constitution and section 49(b) of the Customary Court of Appeal Amendment Law are not relevant to this appeal. He cited the following cases in support:

1. Magagi v Matari (2000) 2 SCNQR 636 at 638;
2. Ogunjobi v FRN (2001) 53 WRN 200
3. Olukale v Awosanya (2000) 1 SCQR 149 at 153

Furthermore, counsel submitted that the issue of jurisdiction was first raised at the lower court and overruled. He argued that the authorities cited by the respondent's counsel are not relevant. He cited the case of Kashadadi v Noma (2007) vol. 149 LRCN where Tobi JSC stated that it is difficult to make a distinction between law and mixed law and facts.

Counsel maintained that contempt of court is a quasi criminal matter which is purely an issue of law for which leave of court is not required. According to him, this is

an interlocutory appeal against the ruling of the lower court on an application to commit a party for contempt.

We have carefully considered the submissions of counsel on the preliminary objection raised against this appeal. The objection is a two pronged attack against the appellants' right of appeal.

It is settled law that a right of appeal is created by statute and no court has the jurisdiction to hear any appeal unless it is derived from a statutory provision. See the following decisions on the point:

1. Ugwu v Attorney – General of East Central State (1975) 6 S.C. 13;
2. Ajomale v Yaduat No. 1 (1991) 5 NWLR (Pt. 191) 257; and
3. N. B. N. Ltd v Weide & Co. (Nig) Ltd. (1996)8 NWLR (Pt. 465) 150 at 167.

Coming to the instant appeal, section 282 (1) of the 1999 Constitution provides that:

"A Customary Court of Appeal of a state shall exercise appellate and supervisory jurisdiction in civil proceedings involving questions of customary law"

Furthermore, section 49(b) of the Customary Court (Amendment) Edict of 1994 provides that "Any party who is aggrieved by a decision of a Customary Court in a civil cause or matter may, within 30 days of the date of such decision or order (underlining supplied) appeal to the Customary Court of Appeal on issues involving questions of customary law"

A careful examination of the above statutory provisions will reveal that the paramount consideration is whether the appeal is against a decision or order of a customary court in a civil cause or matter involving questions of customary law. The

issue of whether the grounds of appeal raise questions of mixed law and fact is quite irrelevant as it relates to this Court.

The learned counsel for the respondent also argued that the appeal is criminal in nature and should have been filed at the High Court.

Contempt of court is either criminal or civil. It is criminal when it consists of interference with the administration of the law, thus impeding and preventing the course of justice; it is civil when it consists of disobedience to the judgments, orders or other processes of the court. See the case of Ezekiel Hart v Ezekiel Hart (1990) 1 NWLR (Pt. 126), 276 at 286. Furthermore, in the English case of Comet Products v Hawkex Plastics (1971) 1 All E.R. 1141 at 1143 – 1144, Lord Denning M. R. explained the distinction thus: "A criminal contempt is one which takes place in the face of the court, or which prejudices a fair trial and so forth. A civil contempt is different. A typical case is disobedience to an order made by the court in a civil action."

Applying the above principles to the instant case, it is clear that the contempt proceedings, arising from the alleged disobedience of the court order amount to civil contempt. The proceeding is therefore civil and not criminal.

The next question is whether the appeal can be said to be on a matter involving questions of customary law. The learned counsel for the respondent has argued that the appeal is one of law simpliciter and not on customary law.

In his reply, the learned counsel for the appellant has urged us to look at the proceedings from the lower court upon which the contempt proceedings are predicated.

We agree with the submissions of the appellants' counsel that we cannot isolate the contempt proceedings from the substantive proceedings at the lower court. The substantive suit was on the inheritance of the family property of the late Pa Ehigbochie Oseghale under customary law for which this Court has jurisdiction.

The submission of the respondent's counsel that the appeal is one of law simpliciter and not on customary law appears to be a distinction without a difference, for customary law is law properly so called.

In the event, we hold that the preliminary objection lacks merit and it is accordingly dismissed.

We shall now consider the appeal on its merit. Issue one is challenging the trial court's interpretation of the word "past" used in the Terms of Settlement, which was typed as "part" in the judgment of the trial court.

Arguing Issue one, the learned counsel for the appellants referred the Court to the Terms of Settlement at page 28 of the records where it was stated that: "The Defendant hereby surrenders with immediate effect any <u>past</u>, (underlining supplied) subsisting, contingent or future interest he has, except those interest and rights as were devised to him by their late father Pa. Ehigbochie Oseghale."

Counsel submitted that the trial court erroneously construed the word past used in the Terms of settlement with the word part which was typed in the judgment. He maintained that the word "part" which appeared in the judgment was clearly a typographical error and the court should have called for the record of proceedings in order to clarify the error.

Counsel further submitted that from the Terms of Settlement, it was clear that the respondent in the past allocated lands not devised to him, so the court ought to have accepted the word past as stated in the Terms of Settlement. Counsel argued that the speculations of the trial court on the words "past" or "part" were quite unwarranted and that on this ground, the decision of the lower court should be set aside.

It is pertinent to observe that in his brief, the learned counsel for the respondent did not make any attempt to address this issue of the interpretation of the words "past" and "part" by the trial court. The legal effect is that the appellants' arguments on this issue stands unchallenged. See the case of Aliyu v Adewuyi (1996) 4 NWLR (Pt. 442) 284 at 292.

We have considered the arguments of the appellants' counsel on this issue. As he rightly observed, the judgment of the trial court was based on the Terms of Settlement attached as Exhibit "A" to the motion. The trial court merely entered its judgment upon the terms of settlement as agreed by the parties. The word "part" which appeared in the judgment instead of "past" was clearly a typographical error.

The speculations by the trial court in that regard were quite unnecessary and unwarranted. We do not agree with the trial court that the introduction of the word "part" made the judgment or order to be unclear and ambiguous. We are of the view that the lower court did not properly interpret the words "past" and "part" as used in the Terms of Settlement and the Judgment respectively. The failure of the lower court in this regard amounted to an irregularity which occasioned a miscarriage of justice.

We accordingly resolve Issue one in favour of the appellant.

Having resolved this issue in favour of the appellant, we do not think it is necessary to consider the second issue for determination. Where a consideration of an issue is enough to dispose of an appeal, an appellate court is not under any obligation to consider all the other issues raised. See the cases of: Okonji v Njokanma (1991) 7 NWLR (Pt. 202) 131 at 146; and Anyaduba v N.R.T.C. Ltd. (1992) 5 NWLR (Pt. 243) 535 at 567.

In the event, this appeal succeeds and we accordingly set aside the ruling of the Igueben Area Customary Court, Igueben in Suit No. IACC/2/MI/2010, delivered on 22/06/2010 dismissing the application dated 12th April, 2010, together with the consequential orders made therein. We hereby order that the same application be remitted to the Esan West Area Customary Court sitting at Ekpoma, for hearing and determination de-novo.

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

HON. JUSTICE TIMOTHY UKPEBOR OBOH

HON. JUSTICE PETER AKHIMIE AKHIHIERO

HON. JUSTICE OHIMAI OVBIAGELE

P. A. EROMOSELE, ESQ … … COUNSEL FOR THE APPELLANTS

S. A. UWAGBALE, ESQ … … COUNSEL FOR THE RESPONDENT