IN THE HIGH COURT OF JUSTICE
OF EDO STATE OF NIGERIA
IN THE UROMI JUDICIAL DIVISION
HOLDEN AT UROMI
BEFORE HIS LORDSHIP, HON.JUSTICE P.A.AKHIHIERO,
JUDGE, ON THURSDAY THE
24TH DAY OF JANUARY, 2019.

BETWEEN:SUIT NO: HCU/1CA/2018

MRS. OBEHI OKOZI ----------APPELLANT

AND

MR. GODDEY OKOZI ----------RESPONDENT

JUDGMENT

This is an appeal against the orders made by the Area Customary Court Uromi on the 8th of November 2017 and 23rd of January 2018 in respect of the judgment of the Lower Court delivered on the 10th of May 2017 in suit No. ACC/143/2016. It is against the said orders that the appellant filed this appeal.

The facts giving rise to this Appeal are that the respondent, who was the petitioner at the lower court, instituted a divorce petition against the appellant for dissolution of their marriage which was contracted under Esan Native Law and Custom of Uromi.

At the lower Court, judgment was delivered in favour of the Respondent and the marriage was dissolved on the 10th of May 2017. The court however granted custody of the only child of the marriage, EfuaOkozi who was about six years old to the Appellant and the Respondent was granted unhindered access to visit his daughter any time he desires.

Due to the alleged refusal of the Appellant to allow the Respondent unhindered access to their daughter, the Respondent filed an *ex parte*application at the lower court for the Appellant to show cause why she should not be committed to prison for flouting the order of the lower court granting him unhindered access to see his daughter in custody of the Appellant.

The Appellant failed to attend court in order to show cause and the court issued a warrant of arrest against her.

When the matter came up at the lower court on the 23rd of January 2018, the Appellantôs counsel pleaded with the court to vacate the bench warrant whereupon the Appellant agreed to grant the Respondent unhindered access to his daughter.The lower court thereafter discharged the order of bench warrant against the appellant.

Dissatisfied with the aforesaid orders made by the lower court, the Appellant filed a Notice of Appealon the 15th day of February 2018, containing three Grounds of Appeal as follows:

GROUND ONE

The trial court erred in law when she issued a bench warrant and ordered for the arrest of the Appellant without regard to the relevant provisions of the Sheriff and Civil Process Act 2004.

GROUND TWO

The trial court misdirected herself when upon an ex parte application and without the knowledge of the Appellant of any pending application after judgment, ordered for her arrest and detention.

PARTICULARS OF MISDIRECTION

- ***A. The application was by motion ex parte.***
- ***B. There was no evidence that the Appellant was ever aware of any pending application after judgment.***
- ***C. There was no evidence that the Appellant was in disobedience of any order of the trial court.***
- ***D. The Appellant was denied fair hearing.***

GROUND THREE

The trial court acted without the requisite jurisdiction as it was functus officio.

GROUND FOUR

The lower court erred when on the 23rd January, 2018 while vacating the bench warrant after the Appellant's arrest, unilaterally varied an order in her judgment without any application from the parties or counsel.

Thereafter, Counsel for the parties filed and exchanged their respective briefs of arguments in consonance with the rules of this Court.

In his Brief of Argument, the learned Counsel for the Appellant,Joe EkoreEhizode Esq., identified two Issues for Determinationand articulated his arguments on them. The two Issues for Determination are as follows:

(a) ***Whether the trial court was right when upon an application ex parte, ordered for the arrest and detention of the Appellant without an opportunity of being heard first. (Couched from grounds 1 and 2)***

(b) ***Whether the trial court was right to have varied an order in her judgment unilaterally without any application from parties or counsel. (Couched from grounds 3 and 4).***

On his part, the learned counsel for the Respondent,Dr. P.E.Ayewoh-Odiase, filed a Notice of Preliminary Objection to the Appeal wherein he raised four grounds of objections as follows:

1. ***That the notice of appeal filed on the 15th day of February 2018 against the interlocutory order of the lower court delivered on the 23rd of January 2018, is incompetent.***

2. ***That the notice of appeal filed on the 15th of February 2018 against the interlocutory order of the Lower Court made on the 6th day of November 2017, is invalid.***

3. ***That the appellant's appeal against the interlocutory decisions and/orders of the lower Court was filed outside the FOURTEEN DAYS period allowed under the Rules of Court.***

4. ***That the appropriate and/or prescribed filing fee was not paid by the appellant for the said notice of appeal.***

The Notice of Preliminary Objection was supported by an affidavit of 15 paragraphs and a Written Address of Counsel.

Thereafter, the learned counsel also filed a Respondentôs Brief of Argument wherein he formulated two Issues for Determination and articulated his arguments on them.Thetwo Issues for Determination are as follows:

1. ***Whether the lower court has powers to make consequential orders in respect of its judgment; and***

2. Whether the lower court has powers whether statutory or inherent to regulate, protect and enforce its decisions.

Upon receipt of the Respondentôs Written Address on the Preliminary Objection and the Respondentôs Brief of Argument, the learned counsel for the Appellant filed a Reply Brief of Argument.

At the hearing of the appeal, both counsel adopted their respective Written Addresses and Briefs of Arguments.

Arguing his Issue 1, which is:***Whether the trial court was right when upon an application ex parte, ordered for the arrest and detention of the Appellant without an opportunity of being heard first,*** the learned counsel for the Appellant submitted that the Respondentôs claim before the trial court was for the dissolution of marriage contracted under Esan native Law and Custom.

That there was evidence from the parties that the Appellant presently resides in Lagos and this was why she was served by substituted service by pasting the originating processes on the door of her fatherôs house within the jurisdiction of the court.

He said that by the judgment of the lower court, an order was made dissolving the said marriage contracted by the parties, while custody of the only child of the marriage was granted to the Appellant. He said that no right of access was granted in favour of the Respondent and referred to page 7 of the judgment.

He posited that by an *ex parte* application dated the 6th day of November 2017, the Respondent applied for the issuance and service of criminal summons to have the Appellant arrested, brought to court to show cause why she should not be committed to prison, for refusing the Respondent unhindered access to his daughter. That inparagraphs 6, 7, 8, 9, 10 and 11 of the affidavit in support of the said application, the Respondent deposed to the fact that by a judgment delivered on the 10th may 2017 he was granted unhindered access to see his daughter, and that the Appellant has frustrated attempts made by him in that regard. That the Appellant recently changed her phone numbers and moved away from where she was before and all efforts at knowing her where about proved abortive. That her relatives at Uromi were not ready to assist with her present address and that the Appellant boasted in court after the judgment that he will never see his daughter again.

Learned counsel submitted that the judgment of the lower did not grant the Respondent ó unhindered accessô to the child of the marriage, in custody of the Appellant. That the Respondent did not state when he went to the Appellantôs house in Lagos, and could not have access to his child, but was suddenly able to have access and know her address when a criminal summons was issued for her arrest and detention.

He referred to the case of:***HART V. HART (1990) 2 S.C.N.J. 1 @ 8***where the Supreme Court held that ***contempt of court is either civil or criminal. It is civil when it consists of interference with administration of law thus impeding and perverting the course of justice. It is civil when it consists of disobedience to the judgments, order or other processes of the court resulting or involving private injury.*** He submitted that where (as in this present case) the Respondent alleged that the Appellant is in breach of the judgment or order of the court that would amount to civil contempt.

Counsel further submitted that where the act constituting the contempt is committed outside the face of the court, that is; *ex facie curiae*, the proper cause of action in line with the provision of the Sheriff and Civil processes Act 2004, is to serve on the Appellant Form 48, followed by Form 49 to enable whoever is in contempt to stop forthwith or to purge himself or herself of the contemptuous act.

He said that in the instant case, none of these statutorily prescribed steps were followed. Rather, the Respondent went ahead to file an*ex parte* application for the issuance of criminal summons which led to the arrest and detention of the Appellant.

Again he submitted that where an order of court involving an act which was not committed in the face of the court is said to have been disobeyed, in line with the principle of fair hearing, a different court ought to try the contempt. He submitted that the trial court acted without jurisdiction on the 8th day of November 2017 when it issued a criminal summons on the Appellant, which led to her arrest and detention. See ***OMOIJAHE V. UMORU (1999) 8 N.W.L.R. (Pt. 614) 178@ 193-194 paras C-E, Ratio 6.*** He therefore urged the Court to hold that the trial court exceeded its jurisdiction and that the issuance of the criminal summons which led to the arrest and detention of the Appellant was a nullity.

Arguing his Issue 2 which is: ***Whether the trial court was right to have varied an order in her judgment unilaterally without any application from parties or counsel***, learned counsel conceded that right of access is usually granted in divorce proceedings in favour of the party who is not in custody of the child or children of a marriage but same was not granted in the instant case.

He said that the lower court did not see the need to grant any right of access in favour of the Respondent. That instead of approaching a higher court, the

Respondent went back to the same trial court to purportedly seek the enforcement of a non-existing order. He submitted that by issuing a criminal summons followed by a warrant on the Appellant, they effectively varied the judgment of the lower court by enforcing a non-existing order.

Counsel submitted that a trial court cannot add to or vary its own judgment after delivering and signing. He maintained that the *slip rule* only enables a court to correct typographical mistakes or errors in a judgment and certainly not to enforce a non-existing order.

He urged the Court to hold that the lower court was *functusofficio* when it considered the *ex parte* application that led to the issuance of a warrant of arrest of the Appellant. He submitted that the entire post judgment proceedings amounted to an abuse of court process and urged the Court to hold that it was a nullity.

In conclusion, he submitted that the entire appeal should be allowed since the lower court acted without jurisdiction.

As earlier stated, the learned counsel for the Respondent filed a Notice of Preliminary Objection to the Appeal. He also filed a Written Address incorporating his arguments on the Preliminary Objection.

In his Written Address, counsel submitted that there is no competent appeal before this Honourable Court worth entertaining and determining. That it is trite law that an appeal against an interlocutory order or decision as in the instant case must be filed within a period of fourteen days. He said that by a simple arithmetical calculation, the said notice of appeal was filed outside fourteen days after the said orders of the lower court without leave of court.

He referred to Order 55 of the Edo State High Court (Civil Procedure) Rules 2012 on appeals from Magistrateôs Court and other Courts. He said that the footnote under Civil Form 44 specifically states that the rules on civil appeals from Magistrates Courts should be looked at carefully. He said that this guide implies that the rules of the lower court, be it Magistrate, District or Customary Court, must be complied with. That this appeal emanated from the decision of the Area Customary Court Uromi where the Edo State Customary Court Rules 2011 and the Edo State Customary Court of Appeal Rules 2000 provide for rules governing appeals.

He referred to: Order 7 Rule 2(1) of the Edo State Customary Court of Appeal rules 2000, which provides as follows:

> ***"Every appeal shall be brought by notice of appeal which shall be lodged in the lower court within thirty days where the appeal is against a final decision and fourteen days' where the appeal is against an interlocutory decision. It shall be served on all other parties affected by the appeal".***

He submitted that all the rules of Courts ranging from the inferior courts to the superior courts of record provide that interlocutory decisions be appealed within fourteen days of the ruling appealed against. He relied on the case of:***Gbasha V Lovebet (Nig.) Ltd (2006) 1 F.W.L.R. part 206, 1688*** where the Court of Appeal while drawing a distinction between final and interlocutory decision, held that an appeal against an interlocutory decision must be lodged within fourteen days. He also cited the case of:***Nasco Management Services Ltd V. AN. Amaku Transport Limited 2003, 2 NWLR Part 804, 290*** and submitted that where an appeal as in the instant case, was not filed in accordance with due process, the jurisdiction of the appellate Court cannot be activated. See:***First Bank of Nigeria Plc, V Olanrewaju Commercial services Ltd (2006) 4 FWLR part 343, 7105 at 7108 7109. Paras.G-H; A – B.***

Counsel further submitted that the appellantôs failure to obtain leave before filing his appeal out of time renders his appeal and any subsequent steps taken based on the initial omission, incompetent. See:***Nwabueze V Nwora (2005) 8 NWLR part 926, I at 20 paras. B-C***. He submitted that where an appeal as in the instant case, is incompetent, the appellate court will lack jurisdiction to entertain the appeal on the ground that the issue of jurisdiction is fundamental to the question of the competence of the court to adjudicate. See:***Mosoba V Abubakar (2005) 6 NWLR part 922, 460 at 470 para. F.***

On the issue of filing fee, Counsel submitted that where a party as in the instant case, fails to pay the requisite filing fee, the Court will not have the requisite jurisdiction to entertain the appeal. He referred to page B59 of the Edo State Customary Court Rules 2011 under column C- óAPPEALS IN CIVIL AND CRIMINAL CAUSES OR MATTERSô item I thereof which stipulates the payment of N1,000.00 for notice and ground of appeal filed out of time. He said that a look at the appellantôs notice of appeal shows that the sum of N500.00 was paid as against the N1, 000.00 prescribed fee.

He submitted that nonpayment of the requisite filing fee by the appellant has further hampered the competence of this Honourable Court to entertain this appeal. On effect of nonpayment of prescribed filing fee, he referred to the cases of:***Henkel Chemicals (Nig) Ltd V Ferroro& Co. Ltd (2003) 4 N.W.L.R, part 810, page 306 at 322 paras. D – E; andSule V Orisajinmi (2007) 35 WRN 94 at 111-112 lines 44-45***.

He submitted that the appellantôs appeal is incurable defective, incompetent and should be struck out and/or dismissed with substantial costs.

The Respondent filed a Brief of Argument wherein he formulated two Issues for Determination and articulated his arguments on them. The two Issues for Determination are as follows:

1. ***Whether the lower court has powers to make consequential orders in respect of its judgment; and***

2. ***Whether the lower court has powers whether statutory or inherent to regulate, protect and enforce its decisions.***

ISSUE ONE:

On issue one; learned counsel submitted that the Area Customary Court has powers to make consequential orders particularly as it relates to the interest and welfare of the child. He referred to Section 27 of the Customary Courts Edict 1984 applicable in Edo State which provides as follows:

"(1) In any matter relating to the guardianship of children, the interest and welfare of the child shall be the first and paramount consideration; and
(2) Whenever it shall appear to a Customary Court that an order made by such Court shall, in the interest of a child be reviewed, the Court may of its own motion or upon the application of any interested person vary or discharge such order".

He submitted that in the instant case, the lower court exercised the powers conferred on it by law in reviewing its order relating to custody of the respondentôs child. Furthermore, that the review was to enhance the respondentôs access to his daughter who is in custody of the appellant. That the order of review was based on the agreement of the appellant to allow the respondent unhindered access to his daughter, EfuaOkozi. See: page 15, line 15 of the printed record. Furthermore, he maintained that the appellant also agreed that their daughter would be allowed to visit the respondent every long holiday subject to the approval of the respondent. See also page 15 lines 15 ï 20 of the printed record.

Counsel submitted that the said agreement of the petitioner made in the presence of her Counsel is binding on her and cannot be the subject of an appeal as in the instant case, particularly as she was not coerced by the lower court to enter such agreement.

He submitted that supposing without conceding that the lower court never made such order allowing the respondent access to his daughter, the respondentôs right of access to his child, cannot be restricted by the appellant as same is implied in every judgment where guardianship or custody of a child, is in issue. He submitted that a consequential order as in the instant case, merely gives effect to the judgment and nothing more. He referred to the case of:***Nigerian Deposit Insurance Corporation V Savannah Bank of Nigeria PLC (2003) 1 NWLR, part 801, page 311 at Pp 368, paras. E – F, 386-387, paras. H-C***, where the Court of Appeal defined a consequential order as follows:

> ***"By the nature of the term "consequential", any consequential ordermust be one giving effect to the judgment. The word consequential means following as a result or inference, following or resulting indirectly. Therefore, a consequential order need not be claimed but a substantive order must be claimed and sustained from the facts before the Court".***

He submitted that the order of review made by the Lower Court directing the appellant to allow the respondent unhindered access to the child of the marriage was ancillary to the respondentôs relief for custody at the Lower Court which the Lower Court granted in favour of the appellant who did not file any cross-petition let alone, claiming any relief for custody. He further submitted that since the judgment of the Lower Court was not appealed against, any of the parties has the right to approach the Court for an ancillary order as in the instant case. See the case of:***Nigerian Deposit Insurance Corporation V Savannah Bank of Nigeria (Supra) P. 422, Paras. C – D,*** where the Court defined the term óancillaryô as follows:

> ***"Ancillary means aiding, attendant upon or which aids another proceeding considered as principal, auxiliary or subordinate".***

He maintained that in the light of the foregoing, the submission of appellantôs Counsel that the respondent cannot enjoy the benefit of a relief not granted by the Lower Court, is misplaced. On the importance of a childôs welfare, custody and guardianship, he referred to the case of:***Anyaso V Anyaso (1998) 8 NWLR part 564, 150 at Pp. 176 – 177.***

He therefore urged the Court to resolve issue one in the affirmative.

ISSUE TWO:

On issue two, learned counsel submitted that the lower court has powers both ancillary and inherent to regulate its proceedings and carry out investigation regarding any infractions or disobedience against its orders. That the said powers of the Area Customary Court are spelt out in Order XVI Rule (1), Rule 3(1) and (2) of the Edo State Customary Court Rules 2011. That where a party refuses to honour a Court summons as in the instant case, the Court has inherent powers to issue a warrant of arrest.On powers of Court to punish for contempt, he cited the case of:***Ejembi V Attorney-General, Benue State (2003) 16 NWLR, part 846, page 337.***

He further submitted that even where no law specifically empowers a court to deal with issues relating to contempt, it has inherent jurisdiction to do so. He referred to the case of:***Yusufu V Obasanjo (2003) 15 NWLR part 843, page 293***, where the Court of Appeal held that inherent jurisdiction is that power or jurisdiction which attaches to and inheres in the court by the very fact that it is a Court. That it is not a matter for legislation.

He submitted that where an order or summons is made/issued against a party, as in the instant case, he has duty to obey it. See the case of:***Goji V Ewete (2007) 6 NWLR part 1029, page 72 at P.81 paras. F – H.***

He finally urged the Court to resolve issue two in the affirmative and to dismiss the appellantôs appeal with substantial cost for lack of merit.

The Appellantôs Counsel filed a Reply Brief of Argument. In his Reply Brief, he submitted that the Respondent misconceived the purport of this appeal. That the facts are already before court. That to determine whether the order is interlocutory or final is an issue of law, not facts. That a closer look at the grounds of appeal and the issues formulated therefrom, shows that the entire appeal revolves round the proceedings conducted behind the Appellant after judgment in the case was given, without notice to the Appellant or any opportunity of being heard. Needless to add that, the said order was one of warrant of arrest of the Appellant.

Learned counsel submitted that the said order is final for all intents and purposes. That the real test for determining whether an order is interlocutory or final is: if the judgment or order has finally determined the rights of the parties, then it is unquestionably a final order, but if it does not, it is then an interlocutory order. He maintained that in the instant case, the order appealed against has finally determined the rights of the parties, and having given judgment, there is nothing pending for the court to determine. For this submission, he relied on the following decisions:***U.B.A PLC V. BONEY MARCUS IND. LTD (2005) 48 W.R.N. 55 @***

57 ratio 1;E.O. FALOLA V. U.B.A. PLC. (2005)10 W.R.N. 177@ 180 ratio 4; and NUHU V. OGBLE (2004) 9 W.R.N. 95 @ 106 ratio 12,

He submitted that the order appealed against is not one flowing from the judgment, although it even went ahead to vary the judgment itself. That it came to the attention of the Appellant on the 23rd of January 2018 when she was arrested and brought to the trial court. He submitted that the order is a final order as nothing remains for the court to determine again. He therefore urged the Court to dismiss the notice of preliminary objection as being grossly misconceived.

He submitted that if the court finds that the order is final, the sub issue of not having paid the prescribed fee also becomes irrelevant.

Counsel submitted that the two issues for determination formulated by the Respondent are totally unrelated to the grounds of Appeal filed by the Appellant. That since the Respondent did not file any Cross Appeal or Respondentôs Notice, he cannot raise such issues.

On the Respondentôs Issue 1 on the power of the lower court to make consequential orders, he reiterated that this is not referable to the grounds of appeal filed, or the issues formulated therefrom. That the appeal is neither a challenge to the statutory power nor the inherent jurisdiction of the lower court.

He contended that where the Respondent is canvassing arguments on other grounds other than, those contained in the Appellantôs Ground of Appeal, the Respondent is under a duty to file a Respondentôs Notice or a Cross Appeal raising these grounds and not to raise the issue(s) out of the blues.

He maintained that issues for determination must be distilled from grounds of Appeal filed. That the Respondent who has not filed any Cross Appeal or Respondentôs Notice has placed something on nothing, which cannot stand.

He relied on the case of:***C.A.T.C.O v. A.R.C (2010) A.F.W.L.R. (Pt 517) 677 at 689-690 paras. H-D***, where the Court of Appeal held thus:

"Issues for determination formulated by respondent who filed no cross appeal must arise from the grounds of appeal by the appellant. In other words, issues for determination must be formulated from the grounds of appeal, whether the issues arise from the Appellant's brief or the Respondent brief…Neither a party nor a court is permitted to argue or deal with an issue not related to any grounds of appeal."

He also relied on the following decisions: ***Mohammed v. Abdulkadir (2006) A.F.W.L.R. (Pt 332) 1542 at 1553 paras B-C; and Umar v. White Gold Ginnery (Nig) Ltd (2007) A.F.W.L.R. (Pt 358) 1096 at 1119 paras. B-F.***

He pointed out that in this case, the Respondent neither filed nor served any Respondentôs notice on the Appellant nor filled any Cross- appeal. That such notice is filed in the interest of fair hearing so that the appellant will not be taken by surprise at the hearing of the appeal.

He urged the court to so strike out the Respondentôs Issue one, since it is not related to the grounds of appeal filed by the appellant in this appeal.

In the alternative, learned counsel submitted that the inherent powers of the lower court to make consequential orders otherwise known as the slip rule, only relates to making corrections as it relates to accidental omissions or mathematical errors. He said that the rule is never intended to vary the judgment already given or to grant an order that was earlier refused. He maintained that it is never intended to be exercised*ex parte*, as the court is deemed *ex officio*(sic). See:***Usman v. Kaduna State House of Assembly (2008) A.F.W.L.R. (Pt.397)79 @84 ratio10, Fortunato V. Hyacinth (2002)13 W.R.N. 172 @174 ratio.2, Anatogu V. Iweka ii (2004) 47 W. R.N.1 @ 9 ratio 10 & 11***.

He therefore urged the Court to hold that the inherent power of the lower court does not extend to varying an order in her judgment. He urged the Court to discountenance Respondentôs issue 1.

On issue 2 of the Respondentôs Brief, counsel submitted that the Respondentôs contention that the lower court has inherent powers to regulate, protect and enforce its decision is a gross a misunderstanding of the case of the Appellant on appeal. He said that the thrust of the Appellantôs complaint is that committal proceedings were conducted *ex parte* without giving the appellant an opportunity to be heard yet the lower court went ahead and ordered for her arrest, contrary to the express provisions of the dictates and the spirit of the Sheriff and Civil Process Act 2004.

He submitted that the powers of the lower court, and indeed any court for that matter, be it statutory or inherent does not empower the court to issue a warrant of arrest without affording the opportunity to show ócauseô or being heard. He submitted that courts have a duty to protect the integrity of their orders and judgments, but certainly not at the expense of a breach of fair hearing.

He maintained that enforcement of courts orders and judgments are statutorily regulated. He therefore urged the Court to discountenance this issue formulated by the Respondent.

Finally, he urged the Court to allow the Appeal.

I have carefully considered all the processes filed in respect of this Appeal together with the arguments of learned counsel for the parties on all the Issues formulated together with the Preliminary Objection and other ancillary matters.

The essence of a preliminary objection is to terminate at infancy, or to nip in the bud, without dissipating unnecessary energies in considering an unworthy or fruitless matter in a courtôs proceedings. In other words, it forecloses hearing of the matter in order to save time. See: ***Efetvs.I.N.E.C. (2011) 7 NWLR (Pt.1247) 423; and A.P.C. vs. I.N.E.C. (2015) 8 NWLR (Pt.1462) 531 at 541***.

Furthermore, where there is a preliminary objection, that objection should be determined first before going into the substantive matter. See: ***A.P.C. vs. I.N.E.C. (2015) 8 NWLR (Pt.1462) 531 at 541.***

In the event, I will deal with the preliminary objection and other ancillary matters before I determine the main issues in this Appeal.

Essentially, the preliminary objections are on main two fronts. First, on the ground that the appeal is against an interlocutory order of the lower court. So the appellant should have filed her Notice of Appeal within fourteen days. That since the present Notice of Appeal was filed after fourteen days, the appeal is incompetent. The second objection is consequent on the first one. That since theNotice of Appeal was purportedly filed out of time; the appropriate filing fee is not the normal N500.00 but N1, 000.00 for filing out of time.

In the recent case of: ***ROFICO LTD & ORS V. STERLING BANK (2018) LPELR-45832(CA)***, the Court restated the position of the law with regards to interlocutory appeals to the effect that a person who is appealing against an interlocutory decision of the lower Court has 14 days within which to file a Notice of Appeal, and where a person files outside the 14 days period, in the absence of any curative process, mainly an application for extension of time within which to appeal, such an appeal would be defective.
See also the following cases on the point: ***COMPAGNIE GENERALE DE (NIG.) LTD GEOPHYSIQUE v. ODURUSAM & ANOR (2017) LPELR-42575(SC); AMCON v. ESEZOOBO (2017) LPELR-42700(CA); and EZEUDU v. ADEKA & ORS (2014) LPELR-22550(CA).***

The main issue to determine now is whether the orders appealed against are interlocutory or final.

From decided cases, two tests have been laid down for determining whether or not an order of court is final or interlocutory:

(a)The first is to see the nature of the application made to the court in order to determine whether or not the order is final or interlocutory; and
(b) The second is to consider the nature of the order made.

In Nigeria, it is the ***"nature-of-order"*** test that has been constantly applied. If the order made finally disposes of the rights of the parties, then the order is final. If the order made does not, then it is interlocutory. An order is also regarded as final, if it at once affects the status of the parties for whichever side the decision may be given; so that if it is given for the claimant it is conclusive against the defendant and if it is given for the defendant, it is conclusive against the plaintiff. In order to determine whether or not the decision of a court is final or interlocutory, the decision must relate to the subject matter in dispute between the parties, and not the function of the court making the order. See:***Omonuwa v. Oshodin (1985) 2 NWLR (Pt. 10) 924.***

The pertinent question therefore, is whether this present appeal constitutes an interlocutory appeal that would necessitate the application of the 14 days rule.

To fully appreciate the enormous issue involved in the characterization and differentiation between 'final' and 'interlocutory' decisions for the purposes of determining whether or not the Appellant in this appeal needed the prior leave of Court to appeal outside the 14 days period, I shall take a journey into the terrain of pronouncements on the subject matter by the Courts over the years both in England and in Nigeria to serve as guide to enable me chart the proper course of justice on this ground of preliminary objection in this appeal.

In the old English case of: ***Saltex Rex & C V. Hosh (1971) 2 All ER 865 @ p. 866***, Lord Denning M.R. had opined *inter alia* thus:

> ***"The question of 'interlocutory' is so uncertain that the only thing for practitioners to do is to look up the practice books and see what has been decided on the point."***

In the older English case of: ***Bozson V. Altrincham Urban District Council (1903) 1 k.b. 547 @ pp. 549 - 550***, on this vexed issue, Lord Alverstone LC., stated*inter alia* thus:

> ***"It seems to me that the real test for determining this question ought to be this: Does the judgment or order as made finally dispose of the rights 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, in my opinion, an interlocutory order."***

Again in the much older case of: ***Salaman v. Warner (1891) 1 QBD 734 @ p. 744***, Lopes L.J., gave a more precise characterization of what a final judgment or order is when he opined thus:

> ***"I think that a judgment or order would be final within the meaning of the rules when, whichever way it went, it would finally determine the rights of the parties."***

However, in the case of:***Blakey v. Latham (1890) 43 Ch. D. 23 @ p. 25***, Cotton L.J., shed more light when he succinctly exposited thus:

> ***"Any order, in my opinion, which does not deal with the final rights of the parties, but merely directs how the declaration of rights already given in the final judgment are to be worked out is interlocutory, just as an order made before judgment is interlocutory where it gives no final decision on the matters in dispute, but merely directs how the parties are to proceed to obtain that final decision ..... I cannot help thinking that no order in an action will be final unless a decision upon the application out of which it arises, but given in favor of the other party to the action, would have determined the matter in dispute."*** (Underlining, mine)

Now, back home to Nigeria, this issue was analysed in the case of: ***ODEJIDE & ANOR v. AMCON (2017) LPELR-42005(C.A.) Pp. 10-11, Paras. F-F,*** where per Owoade, JCA, stated thus:

"In determining the preliminary objection by the Respondent, I am bound to reiterate the recent opinion of the Supreme Court in the case of N.A.O.C. LTD. v. NWEKE (2010) ALL FWLR (Pt. 845) 1 AT 26-27 where Muhammed, JSC relying on the dictum of Karibi-Whyte (JSC Rtd) in IGUNBOR v. AFOLABI (2001) FWLR (Pt. 59) 284, (2001) 11 NWLR (Pt. 723) 148 postulated thus: "A final Judgment at law is one which brings to an end the rights of the parties in the action. It disposes of the subject matter of the controversy or determines the litigation as to all parties on the merits. On the other hand, an interlocutory order or Judgment is one given in the process of the action or cause, which is only intermediate and does not finally determine the right of the parties in the action. It is an order which determines some preliminary or subordinate issue or settles some step or question but does not adjudicate the ultimate rights of the parties as to the particular issue disputed"

Applying the foregoing principles to the instant case, our starting point is to examine the nature of the orders made. What are the orders the Appellant is

appealing against? The first order is the ***order of bench warrant issued against the Appellant on the 8th of November, 2017*** and secondly, the ***order made on the 23rd of January 2018, revoking the bench warrant.***

The pertinent question is whether these two orders are final or interlocutory. Can it be said that these orders finally disposed of the rights of the parties? I think not. For one thing, the first order of bench warrant was merely to summon the presence of the Appellant to the lower court to show cause why she should not be committed to prison for flouting an alleged order of court.As was explained in the case of: ***Blakey v. Latham (1890) 43 Ch. D. 23 @ p. 25***, ñ***Any order… which does not deal with the final rights of the parties, but merely directs how the declaration of rights already given in the final judgment are to be worked out is interlocutory."*** Certainly, the bench warrant did not deal with the final rights of the parties. Their rights were determined in the final judgment of the lower court delivered on the 10th of May, 2017. The bench warrant merely directed how the declaration of the rights already given in the final judgment should be worked out.

Of course, the second order made on the 23rd of January 2018, revoking the bench warrant was simply a follow up to the first order. It was a further direction on how the declaration of the rights already given in the final judgment should be worked out. Curiously, this second order revoking the bench warrant was quite favourable to the Appellant and I wonder why they are also appealing against it.

From the above analysis, I am of the view that the orders appealed against are interlocutory in nature and not final orders. It is settled law that every appeal shall be brought by notice of appeal which shall be lodged in the lower court within thirty days where the appeal is against a final decision and fourteen daysô where the appeal is against an interlocutory decision. See the recent case of: ROFICO LTD & ORS V. STERLING BANK (2018) LPELR-45832(CA).
See also the following cases on the point: COMPAGNIE GENERALE DE (NIG.) LTD GEOPHYSIQUE v. ODURUSAM & ANOR (2017) LPELR-42575(SC); AMCON v. ESEZOOBO (2017) LPELR-42700(CA); and EZEUDU v. ADEKA & ORS (2014) LPELR-22550(CA).

The Notice and Grounds of Appeal were filed on the 15th of February, 2018. This was clearly beyond fourteen days after the second order which was made on the 23rd of January 2018. On the authorities already cited in this judgment, where a person files a Notice and Grounds of Appeal outside the 14 days period, in the absence of any application for extension of time within which to appeal, such an appeal would be defective. That is the fate of the instant appeal. It was filed out of time without any order extending the time. It is fundamentally defective.

On the objection relating to non-payment of the appropriate filing fee of N1, 000.00 for filing out of time, Item 1 of Part C of the Second Schedule to the Customary Courts Rules, 2011 provides as follows:

"1. On filing Notice and Grounds of Appeal:
(a) If within time N500.00
(b) If out of time N1,000.00"

A look at the Appellantôs Notice of Appeal shows that the sum of N500.00 was paid as against the N1, 000.00 prescribed fees.From the above schedule of fees, it is evident that the Appellant did not pay the appropriate filing fees for filing her Notice and Grounds of Appeal out of time. No doubt this was a direct fallout from the error of classifying the appeal as a final appeal when it was in fact interlocutory. But the maxim is: ***ignorantiajuris non excusat*** (ignorance of the Law is no excuse).

I agree with the learned counsel for the Respondents that nonpayment of the requisite filing fee by the appellant has further hampered the competence of this Court to entertain this appeal. See the following decisions on the point: ***Henkel Chemicals (Nig) Ltd V Ferroro& Co. Ltd (2003) 4 N.W.L.R, part 810, page 306 at 322 paras. D – E; and Sule V Orisajinmi (2007) 35 WRN 94 at 111-112 lines 44-45.***

On the whole, the Preliminary Objection is upheld. The Appeal is fundamentally defective and incompetent.In view of this salient defect, I cannot proceed further to consider the Appeal on the merits. The Appeal is accordingly struck out with costs assessed at N10, 000.00 (ten thousand naira) in favour of the Respondent.

P.A.AKHIHIERO
JUDGE
24/01/19

COUNSEL:

1. Joe EkoreEhizodeEsqé é é é é .é é é é é é é é é Appellant
2. Dr. P.E.AyewohOdiaseEsqé é é é é é é é é é é Respondent