APPEALS*

Introduction

The need for an efficient and effective administration of justice has made the establishment of hierarchy of courts and provision for appeal from one court to the other within the hierarchy not only desirable but also expedient. Judges as humans are not infallible. Appeals, therefore, provide avenue for correction of error and elimination of mistakes as far as possible. Also, "the possibility that a decision by an inferior court may be scrutinized on appeal by a higher court, at the instance of an aggrieved party…is by itself a safeguard against injustice by acting as a curb against capriciousness or arbitrariness"[1]

Oputa J.S.C., in **Oredoyin v Arowolo**[2] described an appeal as an invitation to a higher court to find out whether on proper consideration of the facts placed before it, and the applicable law, the lower court arrived at a correct decision.

It is well settled that appellate jurisdiction is entirely statutory. There is no general right of appeal. A party cannot appeal against the decision of any court unless there is a statute creating such right of appeal.[3] In Nigeria, the right of a litigant to appeal, the jurisdiction of the appellate court to entertain such appeal and the procedure to be followed are governed by the Constitution and other statutes (including subsidiary legislations such as rules of courts).[4]

The main appellate courts in Nigeria are the Supreme Court, the Court of Appeal, the Sharia- Courts of Appeal, the Customary Courts of Appeal and the High Courts (State and Federal). These are also the only superior courts mentioned in S.6 of the Constitution.[5]

The Supreme Court takes appeal directly from the Court of Appeal.[6] The Court of Appeal takes appeal from the High Courts (State and Federal), the Sharia Court of Appeal and the Customary Court of Appeal.[7].

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[1] See per Irikefe J.S.C. in Rabiu v. State (1980) 8-11 S.C.130 at 175 –176.
[2] [1989]4 NWLR (pt.114)172 at211. See also Iweka v. S.C.O.A. (2000)3 S.C. 21 at 31.
[3] See Adigun & Ors. v. A-G. Oyo State [1987]2 NWLR (pt.56)197 at 230
[4] Ibid.
[5] See S.6 Constitution of the Federal Republic of Nigeria 1999
(Hereafter referred to as '1999 Constitution')

The High Courts take appeals in civil matters from the Magistrate Courts in the South[8] and the District and Upper Area Courts in the North.[9] The Sharia and Customary Courts of Appeal take appeals in civil matters involving Sharia and Customary Laws from lower courts adjudicating on such matters e.g. Area Courts in the North and Customary Courts in the South.[10]

In this chapter, we shall focus attention only on civil appeals from Magistrate and District Courts to the High Court, from the High Court to the Court of Appeal and from the Court of Appeal to the Supreme Court. Appeals in the Sharia and Customary Courts of Appeal from lower courts administering Sharia and Customary Laws are to be treated under separate chapters.

APPEALS FROM MAGISTRATE AND DISTRICT COURTS TO THE HIGH COURTS

Right of Appeal.

According to S.59 of the Magistrate Court Law of Lagos State,[11] any aggrieved person may, subject to the conditions prescribed by the rules of court, appeal to the High Court from a decision, judgment or order of a Magistrate Court in civil proceedings where:

a. The decision is given in respect of a sum of twenty naira or more or
b. The decision determined directly or indirectly a claim or question respecting money, goods or other property or any civil right or other matter of the amount or to the value of twenty naira or more or
c. The decision is given in respect of an adoption order or

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[6] See S.233, 1999 Constitution.
[7] See S.240, 1999 Constitution.
[8] See e.g. S.28 High Court Law, Cap. H3, Laws of Lagos State 2003.
[9] See S. 54(b) Area Court Act Cap 477 Laws of the Federation of Nigeria (Abuja) 1990 and S.32 High Court Act Cap 510 Laws of the Federation of Nigeria (Abuja) 1990
[10] See Ss.262, 267, 277 and 282, 1999 Constitution.
[11] Cap.M1, Laws of Lagos State 2003 (hereafter referred to as 'the Magistrate Court Law')

d. The decision is made as an interim order in respect of an adoption proceeding.

The position in the other Southern States are substantially the same as above. Also, other than paragraphs c and d above, section 73(1) of the Abuja District Courts Act[12] which is a replica of the District Courts Laws of the Northern States is similar to the above provisions. However, section 73(2) goes further to provide that in any case where the sum as mentioned above is less than twenty Naira, an aggrieved party may still appeal with the leave of the High Court. There is no similar provision in the Magistrate Courts Laws of the Southern States. It appears that there is no right of appeal in such cases in the South. This difference may no longer be material in view of the current value of the naira. It is hard to imagine a case today which will involve less than twenty naira.

Commencement of appeal.

The procedure regarding this category of appeals in Lagos State is governed by the High Court of Lagos State (Appeal) Rules 2003. In all the other States of the Federation where Uniform Rules apply, the procedure for such appeals is governed by Order 44 of the Uniform Civil Procedure Rules[13]. Under the Federal Capital Territory, Abuja (Civil Procedure) Rules, 2004 (2004 Abuja Rules), the procedure for such appeals is contained in Order 43 of the Rules. However, It must be pointed out that the procedures under all the rules are substantially the same.

Under these rules, an appeal is commenced by giving a notice of appeal together with sufficient number of copies for service on the respondents and for the use of the High Court within 30 days of the judgment.[14]

The notice of appeal which must be filed at the registry of the lower court is to contain the following:

i The suit number of the proceedings from which the appeal arose

ii The names of the parties

[12] Cap.495 Laws of the Federation of Nigeria (Abuja) 1990.
[13] See for example Or. 44,Oyo State High Court (Civil Procedure) Rules 1988.
[14] See Or. 3r. 1 Lagos Appeal Rules; Or. 44r. I Uniform; Or.43r.1, 2004 Abuja Rules.

iii The date and substance of the decision

iv The ground of appeal which shall be stated clearly and succinctly. Each ground of appeal shall be set out separately and where a ground of appeal alleges error in law the nature of such error shall be stated. The ground of appeal may simply state that the decision of the lower court is against the weight of evidence. This is known as the omnibus ground.

v. The appellant's address for service within jurisdiction and

vi. The name of the legal practitioner (if any), representing the appellant.

The notice of appeal and all the copies must be signed by the appellant or by his legal practitioner.[15]

The appendix to each of the Rules contains a form of notice of appeal and an appellant is required to adopt the form with such variation as circumstances may require.

Respondent's Notice and Cross Appeal

A respondent who is served with a notice of appeal and intends at the hearing of the appeal to contend that the decision of the court below be varied or that the judgement be confirmed on grounds other than those stated by the lower court must give notice to that effect. This is called the respondent notice which must be filed at the registry of the lower court within 14 days of service of the notice of appeal. A clear statement of the grounds on which he intends to rely at the hearing for his contention must accompany the respondent's notice.[16]

Under the Uniform as well as the Abuja Rules, a respondent may, within 14 days of the service on him of the appellant's notice of appeal, file his own notice and ground of appeal against any part of the judgment of the lower court.[17] This is a cross appeal. There is no corresponding provision in the Lagos Appeal Rules.

However, since a cross appeal is an independent appeal and is generally governed by the same rules as the main appeal, it is submitted that a respondent who intends to cross appeal

[15] See Or 3 r 1,2 & 3 Lagos Appeal Rules; Or .44.r.2 Uniform; Or. 43r. 2, 2004, Abuja Rules.
[16] See Or 3 r. 15 Lagos Appeal Rules; Or. 44 r.13 Uniform; Or. 43r. 15, 2004, Abuja Rules.
[17] Or 44 r 14 Uniform; Or 43r. 16 , 2004, Abuja Rules.

in Lagos must file his appeal within 30 days of the judgment of the lower court or apply for extension of time to do so, exactly the same way the main appellant would have done.

This is the position with a cross appellant to the Court of Appeal or to the Supreme Court.[18]

Record of proceedings

Appeal at the High Court is heard based on the record of the proceedings at the lower court. After an appeal has been lodged at the registry of the lower court, it is the duty of the registrar of the lower court to prepare and certify the records of the proceeding before the court and forward same to the registrar of the High Court together with sufficient copies for the parties.

For the purpose of compilation of the records, the appellant must deposit such amount as may be assessed by the registrar of the lower court as the cost of preparing and forwarding enough copies of the records.[19]

Under the Uniform and Abuja Rules, the registrar of the lower court is to compile the records within 3 months of the decision appealed against and must forward same to the High Court within 7 days of such compilation.[20] On the other hand, the Lagos Appeal Rules simply provide that the registrar of the lower court shall compile the records with utmost dispatch, after the requisite fee is paid by the appellant. There is no express stipulation as to time in the Lagos Rules.[21]

It must be noted that under the 2004 Abuja Rules, the Court may, on application of either party, grant a departure from the Rules, thereby allowing the parties to compile the records.[22] This is an innovation which has no counterpart in the Lagos Appeal Rules or in the Uniform Rules.

[18] See Western Steel Works Vs Iron and Steel Workers Union [1987] 1 NWLR (pt.49) 284; Oloriegbe Vs Omotosho [1993] 1 NWLR (pt.270) 286.
[19] See Or. 3rr. 6&7 Lagos Appeal Rules; Or 44 r 3 Uniform; Or. 43r.3, 2004 Abuja Rules.
[20] See Or 44 rr 3 and 4 Uniform; Or. 43rr.3 and 4, 2004 Abuja Rules.
[21] See Or 3 r 7 Lagos Appeal Rules.
[22] See Or. 43r. 11, 2004 Abuja Rules.

When the registrar of the High Court receives the records together with a copy of the notice of appeal and other documents, the appeal shall be deemed to have been entered. The registrar of the High Court is to enter the appeal on the cause book of the Court. The significance of an appeal being entered at the High Court is that the High Court becomes solely seized of the jurisdiction over the matter and the interlocutory applications in respect of the matter must be filed at the High Court. Before the appeal is entered, both the lower court and the appellate High Court have jurisdiction but an application must first be filed at the Lower Court.[23]

Enlargement of time

All the rules contain provisions empowering the appellate High Court to extend the time prescribed for the taking of any step under the rules.[24] The rules talk only of the High Court as the court that has the power to grant an extension of time. In any event, once the time prescribed by the rules for filing of notice of appeal has elapsed, the lower court does not have the jurisdiction to grant extension of time within which to appeal. It is only the appellate court that can do so.[25]

Application for extension of time is by motion on notice supported by an affidavit setting out facts on which the applicant relies.[26]

The grant of extension of time is at the discretion of the High Court which makes the order on such terms as it may deem fit to impose.[27]

The respondent may, however, apply by way of motion on notice, to the appellate High Court to strike out the appeal for want of diligent prosecution where the time for the taking of any step has expired. On such application, the court may either strike out the appeal or enlarge the time for sufficient cause shown.[28]

Stay of execution

[23] Bashorun v Chief of Army Staff [1989] 5 NWLR (pt.123) 590.
[24] See Or 3 r. 8 Lagos Appeal Rules; Or 44 r 6 Uniform; Or. 43r. 6, 2004 Abuja Rules.
[25] See Mobil Oil v Agadaigbo. [1988] 2 NWLR (pt. 77) 383.
[26] See Or 3 r. 8 Lagos Appeal Rules; Or 44 r 6 Uniform; Or. 43r. 6, 2004 Abuja Rules.
[27] Or 3 r 8 (3) Lagos
[28] S.63 Magistrate Court Law, Lagos; Or 44r 7 Uniform; Or. 43r. 7, 2004 Abuja Rules.

An appeal does not operate as a stay. Therefore, a judgement may be executed or any other intermediate step taken except where there is a specific order for stay.[29] However, an appellant may apply for stay of execution of the judgement appealed against any time after the filing of the notice of appeal. Before the appeal is entered, both the lower court and the appellate High Court have jurisdiction to grant stay. However, the general rule is that when an application can be made either to the lower court or the appellate court, the application must be made first to the lower court except there are special circumstances which render it impracticable to apply to the lower court in the first instance.[30]

Once the appeal is entered, only the appellate court has jurisdiction to entertain interlocutory applications and the application for stay at that stage must be made to the High Court without first going to the lower court. It must also be emphasized that where execution has been ordered, application for stay must be made direct to the High Court.[31]

Furthermore, when an application has been made to the lower court, any party dissatisfied by the order of the lower court may bring an application by way of motion on notice to the High Court for a review of the order.[32]

Under the Uniform and the 2004 Abuja Rules, the application for stay may be made by motion **ex- parte**, though the court may order the respondent to be put on notice. Where the order is made **ex-parte**, the registrar is to notify the respondent of the order made.[33] On the other hand, the Lagos Appeal Rule categorically provides that application for stay shall be by motion on notice.[34]

It must be emphasized that in each case, the affidavit in support must set out special circumstances sufficient to persuade the court to grant a stay as the courts do not make a practice of depriving a successful litigant the fruit of his success.[35]

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[29] See S.63 Magistrate Court Law, Lagos State; Or. 44 r. 22(7) Uniform; Or. 43r. 24(7), 2004 Abuja Rules.
[30] Bashorun v Chief of army staff (Supra).
[31] See Or 3 r 9 Lagos; Or 44 r 22 Uniform; Or. 43r. 24, 2004 Abuja Rules.
[32] Ibid.
[33] Or. 44r. 22 (4) Uniform; Or. 43r. 24(4), 2004 Abuja Rules.
[34] Or 3 r 9 (2) Lagos Appeal Rules.
[35] See Vaswani Trading Co. Ltd. v Savalakh (1972) 12 S.C.77.

When granting an application for stay of execution pending appeal, the court may impose one or more of the following conditions:

(a) That the appellant shall deposit a sum fixed by the court not exceeding the amount of the money or the value of the property affected by the judgement or give security to the court's satisfaction for the said sum.
(b) That the appellant shall deposit a sum equal to the amount of the Costs allowed against him or give security for same.
(c) That the appellant shall, when the judgement relates to possession of land give security for the performance or compliance with the judgement in the event of the appeal being dismissed.
(d) That the appellant's property shall be seized and attached pending the making of a deposit or giving of security.
(e) That the appellant's property be seized, attached and sold and the net deposited in court pending the determination of the appeal.[36]

It is submitted that the above list is not exhaustive or exclusive and the court may make any order and impose any condition as it may deem fit in the circumstances of the case.[37]

Under the Uniform and the 2004 Abuja Rules, an order for stay is to specify the time (not more than 30 days) for the performance of any condition imposed and direct that execution may issue in default of performance within that period.[38] There is no similar provision in the Lagos Appeal Rules. However, it is submitted that the Courts in Lagos can exercise similar power.[39]

Briefs of Argument

Under the 2004 Abuja Rules, all appeals to the High Court shall be heard and determined on briefs of argument unless the Court gives leave to the contrary. The appellant must file his brief within 21 days of his receiving the record of proceedings from the Court below. The respondent must file his own brief within 14 days of service on him of the appellant's

[36] See Or.3 r. 9 (3) Lagos; Or. 44 r. 22 Uniform; Or. 43r. 24, 2004 Abuja Rules.
[37] See Or. 3 r 8 (3) Lagos Appeal Rules.
[38] See Or. 44 r. 22(2) Uniform; Or. 43r. 24(2), 2004, Abuja Rules.
[39] See Or. 3 r 8(3) Lagos Appeal Rules.

brief. The appellant may file a reply brief within 7 days of receiving the respondent's brief.[40]

There is no provision for brief writing in the Lagos Appeal Rules and the Uniform Rules. However, with the introduction of written addresses in respect of both final and interlocutory proceedings at the Lagos High Court[41], that Court may want to order filling of briefs in appeals before it on ground of convenience. In any case it is hoped that both the Lagos Appeal Rules and the Uniform Rules will be amended to expressly introduce brief writing in the interest of expeditious disposal of appeals to the High Courts.

Hearing of the appeal

After the records of appeal have been received by the registrar of the High Court and the appeal entered, the registrar of the High Court is to notify the parties of the date fixed for the hearing of the appeal and forward to each party a copy of the record.[42]

Under the Lagos Appeal Rules, the appellant may withdraw or abandon his appeal by giving written notice of abandonment to the registrar of the lower court not less than two clear days before the date fixed for hearing of the appeal. If the appeal has been entered, the registrar of the lower court shall immediately after receiving the notice notify the registrar of the High Court and the respondent that the appeal has been abandoned. If the appeal has not been entered, he merely notifies the respondent. Where an appeal has been abandoned, it shall be deemed to have been dismissed.[43]

There is no provision for withdrawal of appeals under the Uniform and 2004 Abuja Rules. However, it is submitted that an appellant who has no desire to pursue his appeal should be free to withdraw same by notice to the Court and the respondent.

Under all the Rules, if on the date fixed for hearing or any adjournment of the appeal, the appellant does not appear, the appeal shall be struck out and the judgement of the lower court confirmed, unless the court thinks fit, for sufficient cause shown, to order otherwise.

[40] See Or. 43r. 10, 2004 Abuja Rules.
[41] See Or. 31, Lagos State High Court (Civil Procedure) Rules, 2004.
[42] See Or. 3 r. 10 Lagos; Or. 44 r. 9 Uniform; Or. 43r. 9, 2004 Abuja Rules.
[43] See Or 3 r 16 Lagos Appeal Rules

On the other hand, once the appellant appears, the court shall proceed to the hearing and determination of the appeal and give judgement according to the merit of the case, whether or not the respondent appears. However, if it appears that the appellant has not complied with the requirement precedent to the hearing of the appeal, the court shall dismiss the appeal and affirm the decision of the lower court with or without cost of the appeal against the appellant.[44]

For the purpose of hearing the appeal, the High Court in its appellate jurisdiction is constituted by a single judge, except that in Lagos, the Chief Judge may direct that the appeal in a particular case be heard by three judges.[45]

The appellant must confine his argument to the grounds of appeal filed by him. He is not entitled to raise issues outside the grounds of appeal. However, where the court is of opinion that other grounds of appeal should have been given or that the statement of the grounds of appeal is defective, the court in its discretion may allow such amendment of the grounds as it may deem fit.[46]

At the hearing, the High Court may, in any case where it considers it necessary that evidence should be adduced either:

(a) order such evidence to be adduced before it on a day to be fixed for that purpose or

(b) refer the case back to the lower court to take such evidence, and may, in such case, either direct the lower court to adjudicate afresh after taking such evidence, or after taking such evidence, to report specific finding of fact for the information of the High Court. On any such reference, the case should, as far as practicable and necessary, be dealt with as if it were being heard in the first instance.[47]

[44] See Or 3 rr. 11 and 12 Lagos Appeal Rules; Or 44 r 11 Uniform; Or.43r. 12, 2004 Abuja Rules.
[45] See S 29 High Court Law, Lagos State Cap H3 2003; Or. 44r. 8, Uniform; Or. 43r. 8, 2004 Abuja Rules.
[46] See Or 3 r 13 Lagos Appeal Rules; Or 44 r 12 Uniform; Or. 43r. 14, 2004 Abuja Rules.
[47] See S. 45 High Court Law, Lagos; Or 3 r14 Lagos Appeal Rules; Or 44 r 18 Uniform; Or. 43r. 20, 2004 Abuja Rules.

According to the Lagos Appeal Rules, at the conclusion of hearing, the High Court may draw any inference of fact and either:

(a) order a new trial on such terms as it thinks just ,or

(b) order judgement to be entered for any party, or

(c) make a final or other order on such term as the court thinks proper to ensure the determination on the merit of the real question in controversy between the parties.[48]

Although, there is no similar provision under the Uniform and 2004 Abuja Rules, it is submitted that the position under those Rules will be the same as the above represent the general powers of an appellate court.

The High Court must certify its judgement or order to the lower court and the lower court is to make such order as may be necessary to carry into effect the judgement of the High Court.[49] Both the High Court and the lower court have the power of enforcing the judgement of the High Court given on appeal.[50]

APPEAL FROM THE HIGH COURT TO THE COURT OF APPEAL

Rights of Appeal

Appeal as of right

According to S.240 of the 1999 Constitution, the Court of Appeal has exclusive jurisdiction to hear appeals from the High Courts, State and Federal, as well as from the Sharia and Customary Courts of Appeal. Such appeal may be as of right or with leave.

S.241(1) sets out the various instances where an appeal from the High Court to the Court of Appeal can be as of right. These include appeal against:

[48] See S.31 High Court Law Lagos
[49] See S. 47 High Court Law Lagos; 0r 44 r 28 Uniform; Or. 43r. 27, 2004 Abuja Rules.
[50] See Or 44 r 27 Uniform; Or. 43rr. 28 & 29, 2004 Abuja Rules.

(a) final decision in civil or criminal cases before the High Court sitting at first instance;

(b) decisions in civil or criminal cases where the ground of appeal involves questions of law alone;

(c) decisions in civil or criminal proceedings on question as to the interpretation of the Constitution;

(d) decision in any civil or criminal proceedings on question as to whether any of the provision of Chapter IV of the Constitution (relating to fundamental rights) has been , is being or is likely to be contravened in relation to any person;

(e) decision in criminal cases where the High Court has imposed a sentence of death;

(f) decisions by the High Court:

(i) where the liberty of a person or custody of an infant is concerned;

(ii) where an injunction or appointment of a receiver is granted or refused;

(iii) in the case of a decision determining the case of a creditor or the liability of a contributory or other officer under any enactment relating to companies in respect of misfeasance or otherwise;

(iv) in the case of a decree nisi in a matrimonial cause or a decision in an admiralty action determining liability,

(v) and such other cases as may be prescribed by any law in force in Nigeria.

It is clear from the provisions cited above that once a decision comes within any of the paragraphs (c), (d), (e) and (f) of S.241(1), it is appealable as of right whether the High Court that gave it was sitting as a Court of first instance or as an appellate Court, whether it is a final or interlocutory decision and whether the ground of appeal involves questions of law or fact.

Therefore, appeal is as of right in respect of any decision on the interpretation of the Constitution or an issue involving any of the fundamental rights guaranteed by the Constitution whether the decision is final or interlocutory and whether the ground of appeal

involves questions of law or fact. This is also the case with respect to decisions as to custody in matrimonial causes and grant or refusal of bail in criminal cases. The same position applies with respect to decisions granting or refusing an injunction or the appointment of a receiver and these include refusal to vacate or discharge an order of interim injunction.[51]

A decree nisi for dissolution of marriage falls within these paragraphs. However, it is important to note that these paragraphs give rights of appeal only in respect of the specific subjects mentioned in each of them.

On the other hand, paragraph (a) of S.241(1) gives a general right of appeal. It gives a right to appeal as of right in respect of any decision on any subject matter on any ground whether of law of fact. The only restrictions here is that the High Court that gave the decision must be sitting as a Court of first instance and the decision must be a final decision.[52] The application of this paragraph often turns on the meaning of the words 'final decision' as opposed to 'interlocutory decision'

As regards paragraph (b) of S.241(1), it gives a right of appeal as of right with respect to: (i) any interlocutory decision of the High Court sitting at first instance or on appeal, (ii) any final decision of the High Court sitting on appeal. The only restriction here is that the ground of appeal must involve questions of law alone. The application of this paragraph often turns on the classification of the ground of appeal as a ground of law alone, of mixed law and fact or of fact.

Appeal also lies as of right to the Court of Appeal from the decision of the Sharia Court of Appeal and the Customary Court of Appeal in any civil proceedings with respect to any question of Islamic or Customary law as the case may be.[53]

Furthermore, appeal lies as of right to the Court of Appeal from the decisions of Code of Conduct Tribunal, National Assembly Election Tribunal as well as Governorship and

[51] See Attamah Vs Anglican Bishop [1999] 9 SCNJ 23 at 29
[52] See Nafiu Rabiu Vs State (supra); Aqua Ltd. Vs Ondo State Sport Council (1988) 10-11 S.C. 31.
[53] See Ss.244 and 245 of the Constitution

Legislative Houses Election Tribunal on the question of validity of the election or terms of office of the person to whom the decision relates.[54]

Appeal with leave

S.242 of the Constitution provides that subject to S.241, an appeal shall lie from the High Court to the Court of Appeal with leave of the High Court or of the Court of Appeal. In other words any decision of the High Court which is not covered by S.241 can only be appealed with the leave of either the High Court or the Court of Appeal. It has been held by the Supreme Court in **Aqua Ltd. Vs Ondo State Sport Council**[55] that S.242 covers:

> (a) appeal against any interlocutory decision of the High Court on ground of fact or of mixed law and fact, and
>
> (b) appeal against a final decision of a High Court sitting on appeal on ground of fact or of mixed law and fact.

In addition, S.241(2) specifically provides that a party can only appeal with leave against any decision of the High Court which is made with the consent of the parties or any decision of the High Court as to cost only. Therefore, any party who intends to appeal against a consent order or judgement must obtain the leave of the High Court or of the Court of Appeal.[56] The same applies to a party who intends to appeal against a decision of a High Court where the appeal is based solely on the issue of cost.[57]

It must be emphasised that where leave is required, the Court of Appeal lacks the jurisdiction to entertain an appeal in the absence of such leave.[58]

Cases where there is no right of appeal

According to S.241(2) there is no right of appeal in the following cases:

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[54] See S.246 of the Constitution.
[55] (Supra).
[56] See Abdulkareem Vs Incar (Nig.) Ltd. [1992]7 SCNJ(pt2) 366
[57] See Ayanboye Vs Balogun [1990] 5 NWLR (PT) 392 at 410
[58] See Ojeme vs. Momodu (1983) 1 SCNLR 188 AT 206; Ogbechie vs. Onochie [1986]2 NWLR (pt.23) 484 at 491.

(a) against a decision of the High Court granting an unconditional leave to defend. Therefore, in an action brought under the undefended list or summary judgement procedure, if the defendant has been granted unconditional leave to defend, the plaintiff cannot appeal against the order granting leave either as of right or with leave.[59]

(b) against an order absolute for the dissolution or nullity of a marriage at the instance of any party who has had the time and opportunity to appeal against the decree nisi but failed to do so. Though, appeal lies as of right against a decree nisi for dissolution or nullity of marriage, once the decree nisi becomes absolute no party can appeal against it either as of right or with leave.[60] However, it appears from the wordings of the provision, that the absence of right of appeal applies only to a party who has had the time and opportunity to appeal against the decree nisi. We therefore submit that a party who has not had such an opportunity through no fault of his should be able to apply for leave to appeal against the decree absolute. The court should be able to grant such leave after taking into consideration every circumstance of the case, including intervening rights of third parties or change in status of either party, e.g. by remarriage.

What is a decision?

It appears from the various provisions of the Constitution regarding rights of appeal that only a 'decision' can be appealed against. In other words, it is not everything said or done by the Court that can be the subject of an appeal.[61]

The word 'decision' has been defined in S.318 of the 1999 Constitution to mean "in relation to a court, any determination of that court and includes judgement, decree, order, conviction, sentence or recommendation."

[59] See National Bank Vs Weide and Co.[1996]9-10 SCNJ 147 at159.
[60] See Nabhan Vs Nabhan (1967) 1 All NLR 47 at 56.
[61] See Deduwa Vs Okorodudu (1976) 1 NMLR 236

In **United Agro Venture Ltd Vs FCMB**.[62] it was held that the word 'decision' implies the exercise of a judicial determination as the final and definite result of examining a question; a judgement, decree or order pronounced by a Court in settlement of a controversy submitted to it and by way of authoritative answer to question raised before it.

In concurring with the ruling striking out the appeal in that case, Musdapher J.C.A.(as he then was) said:

> *"The order appealed against is not in my view a decision within the meaning of the S.277 of the 1979 Constitution (now S318 1999 Constitution). The order of learned trial Judge to hear the application together one after the other does not amount to appealable decision since it did not determine in any way the right of the parties…the procedure adopted by learned trial Judge is only a matter of style and does not affect the rights of the appellant at all. To amount to a decision within the meaning of S.277 of the Constitution, there must be a determination by the Court which settles a point in favour and against the parties respectively."*[63]

The Supreme Court has held in **Ige Vs Olunloyo**[64] that decision does not include a dissenting or minority opinion of a Judge. "The right of appeal grated by the Constitution is against the decision of the Court which means the opinion of the majority of Judges constituting the Court."[65]

The same Court also held in **Abacha Vs Fawehinmi**[66] that an **obiter dictum** of a Judge does not qualify as a decision and is therefore not appealable. Also, the exercise of his power by the Chief Judge to assign a case to one Judge or the other, or to transfer a case from one Judge to another, being purely administrative does not qualify as a decision and therefore cannot be the subject of an appeal.[67]

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[62] [1998]4 NWLR (pt.547) 546; See also Dike Vs Anduba [2000] 2 SCNJ 41 at 48.
[63] Ibid at 564; See also Balogun vs. Adejobi [1995]2 NWLR (pt.376) 131 at 161; NITEL vs. Jattau [1996]1 NWLR (pt.425)392 at 403; Gov. of Kwara State vs. Eyitayo [1996]5 NWLR (pt.451) 693 at 701.
[64] (1984) 15 SCNLR 158.
[65] Ibid at 165 per Obaseki J.S.C.
[66] (2000) 4 S.C. (pt.II) 1.
[67] See for instance S.59 High Court Law Cap H3 Laws of Lagos State 2003; see also Dike Vs Andubah (supra) at 49.

Final or Interlocutory Decision.

The implication of the distinction between final and interlocutory decisions is far reaching. In the first instance, as we have seen above, whether a party can appeal as of right or must obtain leave may depend on whether the decision he is appealing against is final or interlocutory.[68] Secondly, as we shall see shortly, the time within which a party may appeal depends on whether the decision he is appealing against is final or interlocutory.

However, "the question whether a decision of a Court is interlocutory or final has been one of perennial difficulty for the Courts. This difficulty stems from the lack of precision or certainty in the definition of the words or the uncertainty in the judicial decisions on the issue."[69] Furthermore, whilst S318 of the Constitution defines the word 'decision' there is no definition of the words 'final' or 'interlocutory' in the Constitution or any other statute or rules of Court. Therefore, the task of identifying a decision as final or interlocutory has devolved on the Courts. To this end, various attempts have been made by the Courts to set out some guidelines in categorising a decision.

In **Omonuwa Vs Oshodin**,[70] after considering several judicial authorities in that regard, the full Court of the Supreme Court tried to set out some guidelines. According to that Court, there are two tests for determining whether or not an order of Court is final or interlocutory. The first is to see the nature of the application made to the court. The second is to consider the nature of the order made. In Nigeria, it is the nature of the order made test that has been consistently applied in respect of decisions of courts of first instance.[71]

For instance, it was held by the Federal Supreme Court in **Oguntimehin & Anor. Vs Tokunbo**,[72] that the proper test in determining whether a judgement is final or interlocutory was as laid down in the case of **Bozson Vs Altricham UDC**[73] to the effect that if the order made finally disposes of the rights of the parties then that order is final, if it does not, it is

[68] See S.241(1)(a) 1999 Constitution.
[69] Per Karibi Whyte J.S.C. in Omonuwa vs. Oshodin [1985]2 NWLR (pt.10) 924 at 932.
[70] (Supra)
[71] See Omonuwa vs. Oshodin (Supra).
[72] (1957) 2 FSC 56 at 57
[73] (1903) 1 KB547 at 548

interlocutory. The test looks at the order made and not at the nature of the proceedings that gave rise to the order.

According to the Supreme Court in **Ebokan Vs Ekwenibe**,[74] what the court has to determine is whether the rights of the parties are finally determined by the order appealed against. An order is final when the order given by the court is such that the matter would not be further brought back to itself. This test operates whether or not the order is wrong or whether an appeal court may order the matter to be sent back for a rehearing. The time of examining the test is when the order is given. However, where the decision only disposed of an issue or issues in the case, leaving the parties to go back to claim other rights in that court, then that decision is interlocutory.

An order of court is interlocutory if it does not deal with the final rights of the parties or if it gives no final decision on the matter in dispute but merely directs how the parties are to proceed in order to obtain that final decision.[75]

In the more recent case of **Igunbor Vs Afolabi**,[76] a motion was brought to join the applicants as co- administrators of an estate in a pending application for Letters of Administration. The motion was granted by the High Court. One of the issues on appeal was whether the decision granting the motion for joinder was interlocutory or final for the purpose of determining whether leave to appeal against it was required or not.
In holding the decision to be final, the Supreme Court said:

> *"The determination of the question whether an order is interlocutory or final has never been one of mean difficulty. The test has been to look at the nature of the order made rather than the nature of the proceedings resulting in the order. What has to be considered is whether the order has finally determined the rights of the parties in the proceedings in issues appealed against, and not whether the rights of the parties in the substantive action have been finally disposed of ….*
> *A final order or judgement 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*

[74] [1999]7 SCNJ 77 at 87
[75] Ibid
[76] [2001] 5 SC (PT I) 105

the litigation as to all parties on the merits. On the other hand an interlocutory order or judgement is one given in the process of the action or cause, which is only intermediate and does not finally determine the rights 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, in the action. However, where the order made finally determines the rights of the parties, as to the particular issue disputed, it is a final order even if arising from an interlocutory application. For instance, an order of committal for contempt arising in the course of proceedings in an action is a final order …. The instant case as rightly submitted by Appellant's counsel, is an interlocutory motion by the Appellant to be joined as Co-Administrators with the Respondents. The order of the learned trial Judge granting the application determined the rights of the parties in the application. It is an order which did not require something else to be done in answer, and without any further reference to itself or any other court of co-ordinate jurisdiction. The order of the learned trial Judge is therefore a final order. An appeal on the said order is as of right under section 220(1) of the Constitution 1979."

It is important to note that the court acknowledged the fact that the application in this case was interlocutory but nevertheless held that the ensuing order was final.

As to how to determine whether or not an order of an appellate court is final or interlocutory, the Supreme Court has held in **Omonuwa v Oshodin**[77] that such appellate court must not only consider whether or not it finally determines the right of the parties to that appeal, it must also consider whether the nature of the appeal before it was only in respect of an issue in a suit which was still pending in the lower court or in respect of the whole suit itself. Where only an issue is the subject matter of an order of an appeal court, the determination of an appeal court which is a final decision on that issue before it, but which does not finally determine the rights of the parties in the suit pending at the lower court, is only interlocutory. In other words, both the nature of the proceedings as well as the order made must be considered.

[77] (Supra)

Therefore, a decision by the Court of Appeal on an interlocutory appeal from the High Court is interlocutory except where the decision is to the effect that the High Court has no jurisdiction to entertain the case or where the decision of the Court of Appeal completely puts an end to the substantive suit before the High Court.[78]

In **Akinsanya v U.B.A. Ltd**.[79] which partially overruled the decision in **Omonuwa v Oshodin,**[80] the Supreme Court pointed out that in determining whether the decision of a court of first instance is interlocutory or final, the proper test is the nature of order made test as enunciated in **Bozson v Altrichan**[81] But for the purpose of determining the nature of the decision of the Court of Appeal, both the nature of the proceedings or application as well as the order made must be considered.

Whatever may be the uncertainties, it is settled that an order of committal for contempt of court is a final order.[82] Also, an order of non suit is a final order.[83]

Furthermore, the decision of a court as to whether or not it has jurisdiction is a final decision.[84] The rational given for this by the Supreme Court in **Western Steel Works Ltd v Iron and Steel Workers Union,**[85] is that the issue of jurisdiction touches on the right of the parties to approach the court. It is the right of the plaintiff to invoke the judicial powers of the court that is in issue and any decision on that issue concludes the matter either way and is a final decision.

Finally, there is no doubt that an order made after a full trial and at the conclusion of a case is a final order. It has also been held that a decision on a constitutional reference is a final decision because such reference is regarded as distinct from the proceedings from which the referred question arose.[86] A decision of a High Court on a point referred to it by an arbitrator is a final decision because such a decision completely brings to an end the matter

[78] See Ocean Steamship v Sotuminu (No.2) [1987]4 NWLR (pt. 67)996.
[79] [1986] 4 NWLR (pt. 35)273
[80] (Supra)
[81] (Supra).
[82] See Adeyemi vs. Awobokun (1968) 2 All NLR 318.
[83] See Omonuwa vs. Oshodin (Supra).
[84] See Ebokan vs. Ekwenibe (Supra); Western Steel Works Ltd vs. Iron & Steel Workers Union (Supra); Akinsanya vs. U.B.A. Ltd (Supra).
[85] Supra
[86] See D.P.P. v. Chike Obi (1961)1 All NLR 458; Adegbenro v Akintola (1962)1 All NLR 465.

before the High Court though the proceeding from which it arose may still be pending before the arbitrator.[87] On the other hand, an order for consolidation is interlocutory.[88]

Ground of law or of fact.

As we have seen above, an appeal against a final decision of a High Court sitting on appeal or against any interlocutory decision of the same court (sitting on appeal or as a court of first instance) can be as of right under S.41 of the Constitution only when the appeal involves grounds of law alone. Where such appeal involves questions of fact or mixed law and fact leave is mandatory.[89]

Ogundare J.S.C. while delivering the judgement of the Supreme Court in **Orakosim v Menkiti**[90] pointed out that:

> *"This Court has in a number of cases considered the question: what is a ground of law? and has laid down guidelines to follow in answering this question. See in particular the lead judgement of Eso J.S.C. in Ogbechie v Onochie [1986]2 NWLR (pt23) where the learned Justice of the Supreme Court observed: 'There is no doubt that it is always difficult to distinguish a ground of law from a ground of fact but what is required is to examine thoroughly the ground of appeal in the case concerned to see whether the ground raised a misunderstanding by the lower tribunal of the law or misapplication of the law to the facts already proved or admitted in which cases it would be question of law or one that would require questioning the evaluation of facts by the lower tribunal before the application of the law in which case it would amount to question of mixed law and fact. The issue of pure fact is easier to determine.'...In determining the nature of a ground of appeal, the ground and its particulars must be read together. For it is only by reading the ground as a whole that it can be determined what the appellant is complaining about in the judgement. The body of the ground is not to be considered in isolation of its particulars."*[91]

[87] See Automatic Telephone and Electric Co Ltd. v Federal Military Govt. (1968)1 All NLR 429.
[88] See Ifediora v Ume [1988]2 NWLR (pt. 74) 5
[89] See Ogbechie v Onochie (Supra)
[90] (2001) 5 S.C. (pt. I) 72 at 80
[91] See also Medical and Dental Practitioners' Disciplinary Tribunal vs. Okwonkwo (2001) 3 SC 76 at 87 per Ayoola JSC; Abidoye vs. Alawode (2001) 3 SC 1 at 7 per Onu JSC; P.N. Udoh Trading Co.Ltd. vs. Abere (2001)5 SC (pt.II) 64 at 70 per Kalgo JSC.

While dealing with the same problem in **Nwadike V Ibekwe,** [92] Nnaemeka-Agu JSC said:

> *"When then is a ground of appeal that of law? I shall deal with five particular classes, although by its very nature, the categories of errors in law are not closed.*
>
> *(i)It is an error in law if the adjudicating tribunal took into account some wrong criteria in reaching its conclusion or applied some wrong standard of proof or, if although applying the correct criteria, it gave wrong weight to one or more of the relevant factors….*
>
> *(ii)Several issues that can be raised on legal interpretation of deeds, documents, terms of art, words or phrases and inferences drawn therefrom are grounds of law…*
>
> *(iii)Where a ground deals merely with a matter of inference, even if it be an inference of fact, a ground framed on it is a ground of law, provided it is limited to admitted or proved and accepted facts….*
>
> *(iv) Where a tribunal states the law on a point wrongly, it commits an error in law.*
>
> *(v) ….where the complaint is that there was no evidence or no admissible evidence upon which a finding or decision was based. This is regarded as a ground of law, on the premises that in a jury trial there would have been no evidence to go to the jury. Before a judge sitting with a jury could have left a case to the jury there ought to have been more than a scintilla of evidence. So, for this rather historical reason, a ground of appeal complaining that there was no evidence, or no admissible evidence, upon which a decision or finding was based has always been regarded as a ground of law."*

Also, in **Metal Construction (W.A) Ltd V Migliore**,[93] Nnamani JSC held as follows:

> *"No one can now argue that where facts are not disputed and the complaint is as to the way the lower court has applied the law to those established, undisputed facts the ground of appeal is anything but one of law. Nor can it be disputed that whenever the decision of a court is perverse in the sense that no reasonable tribunal could on the evidence before it have reached such a decision, or that there was no evidence to support the decision reached by the court, a complaint against such a decision can*

[92] [1987] 4 NWLR 718 at 744-745

[93] [1990]1 NWLR 299 at 325

raise any questions other than questions of law. The grey area, or better the area of persistent conflict appears to be around exercise of discretion by courts. A discretion is exercised by a court in the context of certain circumstances placed before that court. If the exercise of that discretion is challenged before an appellate court, that court, in my view, is bound to look at the surrounding circumstances to determine whether the lower court exercised the discretion judiciously or judicially or arbitrarily. That is why I am of the view that such questions necessarily raise issues of mixed law and fact."

In **Comex V Nigerian Arab Bank**,[94] it was held by the Supreme Court that a ground of appeal challenging the manner the lower court has exercised its discretion is a ground of fact or at best a ground of mixed law and fact.

However, it must be emphasized that the important consideration in the determination of the nature of a ground of appeal is not the form of the ground but the question it raises and in each case the court has to critically examine the ground of appeal to determine its nature regardless of the contention of the parties.[95] As Achike J.S.C. stated in **Abidoye v Alawode:**[96]

" the law is quite clear that it is not what the appellant chooses to designate a ground of appeal that controls, rather, it is the nature of the ground of appeal read together with the particulars that characterize the ground of appeal as one of pure law or mixed law and fact or fact alone."

Who may appeal?

According to S.243 of the 1999 Constitution, right of appeal from the High Court to the Court of Appeal shall be exercisable in the case of civil proceedings at the instance of a party thereto, or with the leave of the High Court or the Court of Appeal, at the instance of any other person having an interest in the matter.

[94] [1987] 4 SCNJ 38 at52
[95] See M.P.D.T. VS. Okwonkwo (Supra) at 87-88 per Ayoola JSC.
[96] (Supra) at 13

Therefore, appeals in civil cases can only be at the instance of a party to the proceedings in the lower court or at the instance of a party interested, who, however, must obtain the leave of the lower or appellate court.

It is always easy to ascertain who the parties to a proceeding are. Ordinarily, these are the persons whose names appear on the records as plaintiffs and defendants. What is not always easy is how to identify who is an interested party for the purpose of appeal.

Adopting the definition in the Black's Law Dictionary, Oputa J.S.C. stated in **Fawehinmi v N.B.A.(No.1)**[97] that :

> *"A party to an action is a person whose name is designated on records as plaintiff or defendant…. Party is a technical word having a precise meaning in legal parlance; it refers to those by, or against whom a legal suit is brought whether in law or in equity…. A party is either a plaintiff or defendant whether composed of one or more individuals and whether natural or legal persons – all others who may be affected by the suit, indirectly or consequently are persons interested but not parties"*

In **Societe Generale Bank Limited v Afekoro**[98] Ogundare J.S.C., after reviewing the authorities in this regard concluded as follows:

> *"On the authorities, therefore, the expression 'person having an interest' is synonymous with person aggrieved. And a person aggrieved is a person who has suffered a legal grievance, a person against whom decision has been given which has deprived him of something or affected his right or title to something…. His interest must be one that is legally recognizable…."*

While either party to the proceeding at the lower court may appeal as of right, a person interested can only appeal with the leave of the lower or appellate court. According to Ejiwumi JSC in Afekoro's case:

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[97] [1989] 2 NWLR (pt.105) 494.
[98] [1999]11 NWLR (pt.928) 521 at 639

"It is manifest from a careful reading of Section 222(a) of the 1979 Constitution (now Section 243 of the 1999 Constitution) that under that section either party to the action in the High Court has a right of appeal to the Court of Appeal. But where a party, described as an interested party wishes to appeal against the decision of the High Court, that party is obliged to obtain the leave of the High Court or the Court of Appeal, prior to the hearing of the appeal. But such leave can only be granted to that interested party if he could show his interest in the decision for which he is seeking leave to appeal. It is therefore clear in my respectful view that a busy body or meddler in the affairs of others is not likely to be granted such leave. In other words, a person who wishes to appeal in such circumstance must show that he was aggrieved by the decision, in the sense that he had suffered a legal grievance. He must show that the decision wrongfully deprived him of something. It must also be shown that the decision is likely to affect or aggrieve the person seeking for such leave to appeal to the Court of Appeal."[99]

In practical terms, where a party interested intends to appeal on grounds which require leave under Ss.241 and 242 of the 1999 Constitution, he must apply both for leave to appeal as an interested party as well as leave to appeal on those grounds. The two prayers may be made in the same motion paper but must be distinctly set out.

Time within which to appeal

Time within which to appeal to the Court of Appeal is governed by S.25 of the Court of Appeal Act[100] which provides that: *"the period for giving notice of appeal are: (a) in an appeal in a civil cause or matter fourteen days where the appeal is against interlocutory decision and three months where the appeal is against a final decision…."*

It must be emphasised that where leave to appeal is required, the application for leave must not only be filed, it must be determined within the time stated above. Where leave is

[99] Ibid at 541- 542.
[100] Cap. C36, Laws of the Federation of Nigeria 2004 (Fomerly Cap. 75 Laws of the Federation of Nigeria 1990)

granted, notice of appeal must additionally be filed within the same period.[101] Where leave is refused, an applicant has additional period of 15 days to make a concurrent application to the Court of Appeal.[102]

If for any reason, the application for leave, though filed within time, is not determined or the notice of appeal is not filed, within time, the lower court lacks the jurisdiction to extend time and therefore can no longer grant leave to appeal. In such a case, application for extension of time to apply for leave and to file notice of appeal must be made to the court to which appeal lies.[103] Such application must contain three necessary prayers generally referred to as the trinity prayers:

(a) Extension of time within which to apply for leave to appeal
(b) Leave to appeal
(c) Extension of time to file notice of appeal[104]

In a case where leave is not required but the time to appeal has expired, the application to the court to which appeal lies need contain only one prayer:

Extension of time within which to file notice of appeal.[105]

The application in either case is by motion supported by affidavit. The applicant must demonstrate that he has arguable grounds of appeal. He does this by exhibiting his proposed notice of appeal containing arguable grounds. He must also give a good account of his delay as the court may refuse to extend time where a delay is considered inordinate or unreasonable.[106] Each application is considered on its merit depending on the circumstances of each case and the discretion of the court which is exercised judicially and judiciously.[107]

[101] See C.C.B. Vs. A.G. Anambra State.[1992] 8 NWLR (Pt.261) 558.
[102] See S. 25(4) Court of Appeal Act
[103] See Mobil Oil V Agadaigbo [1988] 2 NWLR (pt.77) 383.
[104] See Odofin vs. Agu [1992] 3 NWLR (pt.229) 350.
[105] Ibid
[106] See C.C.B. Vs. A.G. Anambra State.(supra)
[107] Ibid

An appeal filed outside the time prescribed and without the extension of time by the appellate court is incompetent and liable to be struck out.[108] Same goes for an appeal or grounds of appeal filed without leave where leave is required.[109]

Commencement of appeal

An appeal is commenced by filling in the registry of the lower court a notice of appeal containing the ground of appeal and setting out part of the decision appealed against, the relief sought, name and addresses of all parties directly affected by the appeal and address for service. The notice shall be accompanied by sufficient number of copies for service on all parties.[110]

Even where extension of time to appeal or leave to appeal is granted by the appellate court, notice of appeal pursuant to such order must still be filed at the registry of the lower court.
The ground of appeal is a compulsory requirement of the notice of appeal. Thus, a notice of appeal which does not contain any ground of appeal or which contains grounds all of which are incompetent, is null and void and does not constitute a valid notice. If there is no valid notice, the appellate court has no jurisdiction over the appeal.[111] However, a single competent ground of appeal is sufficient to sustain a notice of appeal. Even if the notice of appeal contains other grounds, which are incompetent, the appeal will still be valid at least as regards the single ground.[112]

The grounds of appeal must be set out concisely under distinct heads and numbered consecutively. Argument in support of the grounds must not be set out. Any ground of appeal, which is argumentative, unnecessarily lengthy, elaborate, and which contains detailed reasons may be struck out.[113] Also, a ground, which is vague or general in terms or which discloses no reasonable ground of appeal, is not allowed and may be struck out,

[108] See Adeleke vs. Cole (1961) 1 All NLR 35.
[109] See Igidi vs. Igba (1999) 6 SC (pt. I) 114; Oluwole vs. LSDPC (1983) 5 SC 1
[110] See Or. 3 r.2 & 5 Court of Appeal Rules, 2002 (C.A.R.), as well as form 3 in the Schedule thereto.
[111] See Oyebade vs. Ajayi [1993]1 NWLR (pt.269) 313
[112] See Global Transport Oceanico S.A V Free Enterprises Nig. Ltd. (2001) 2 S.C. 154
[113] See Agbaje Vs Younan (1974) 3 WSCA 66.

except the general ground of appeal that the judgement is against the weight of evidence in civil cases

The whole purpose of ground of appeal is to give notice to the other side to the appeal and care must be taken to set down all the grounds that an appellant intend to rely upon because he may not, at the hearing, be allowed to raise issues not covered by the grounds.[114] An appellant who wishes to raise issues not covered by his grounds of appeal must obtain leave either to file additional grounds or to amend his grounds.[115] Since there is a presumption that a judgement is correct until set aside, any finding or other aspect of the judgement not covered by any ground of appeal may not be interfered with by the appellate court.[116]

A ground of appeal must relate to the decision appealed against and must be connected with a live point in controversy between the parties.[117] An appellate court will not entertain a ground of appeal which is purely hypothetical or academic.[118]

A ground of appeal alleges either an error in law or misdirection. A misdirection occurs when the judge misconceives the issues whether of fact or of law or summarizes the evidence inadequately or incorrectly.[119] On the other hand when the judge's error relates to his finding on settled facts or misapplication of law to settled facts, this will be an error in law.[120]

It must be pointed out that a ground of appeal cannot be an error in law and misdirection at the same time. Therefore, a ground of appeal alleging both error in law and misdirection is bad.[121] However, once the complaint of the appellant is clear from the ground and the respondent is in no way misled, allegation of error in law and misdirection cannot be a ground for striking out a ground of appeal.[122]

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[114] See Kolawole Vs Alberto [1989] 1 NWLR (pt.98) 382
[115] See NIPC Vs Thompson Organisation (1969) NMLR 99.
[116] See Ekpezu Vs. Ndem [1991 6 NWLR (pt.196) 229.
[117] See Saraki Vs Kotoye [1992]9 NWLR (pt.264) 156.
[118] See Global Transport Oceanico S.A. Vs Free Enterprises Ltd. (Supra) at 165; Bamaiyi Vs A.G. Federation (2001) 7 SC (pt. II) 62 at 81.
[119] See Chidiak Vs Laguda (1964) 1All NLR 160.
[120] See Nwadike Vs Ibekwe (1987) 7 SC 149.
[121] Ibid
[122] See Hambe Vs Hueze (2001) 2 SC 26 at 34.

Where a misdirection is alleged, the appellant must quote the passage where the misdirection occurs and specify the nature of the misdirection, that is, in what respect has the judge misdirected himself.[123] Also, where error in law is alleged, particulars of such errors must be stated. Failure to supply particulars of misdirection or error in law renders the offending ground of appeal incompetent and liable to be struck out.[124]

However, it is not every failure to supply particulars of errors separately that is fatal. It is sufficient if the particulars are embodied in the ground of appeal such as not to leave any doubt as to the particulars upon which the ground of appeal is based.[125]

Cross appeal and respondent's notice

A respondent who is dissatisfied with the judgement appealed against and who seeks a reversal of the judgement or a fundamental or crucial finding therein must file his own notice of appeal.[126] This is known as cross appeal. It is a substantive appeal and is governed by the same rules as the original appeal. Where cross appeal is filed, both the appeal and the cross appeal will be argued together and separate briefs need not be filed in respect of the two.

On the other hand, where a respondent wishes to retain the judgement appealed against but is only contending that the decision be varied or that it should be affirmed on grounds other than those relied upon by the trial court, he must file a notice under Order 3 rule 14 of the Court of Appeal Rules. This is called a Respondent's Notice. A respondent in the Court of Appeal who has not filed a respondent's notice may not be allowed to urge the court to affirm the judgement appealed against on a ground different from that relied upon by the trial judge.[127]

It must be emphasised that a respondent who wants a complete reversal of the judgement appealed against or a crucial or fundamental finding therein or who intends to dispute the

[123] See Alade Vs Ogundokun [1992] 5 NWLR (pt.239) 43.
[124] See Osawaru Vs Ezeiruka (1978) 6-7 SC 135
[125] See N.B.N. Vs Opeola [1994] 1 NWLR (pt.319) 126.
[126] See Western Steel Works Vs Iron and Steel Workers Union [1987] 1 NWLR (pt.49) 284; Oloriegbe Vs Omotosho [1993] 1 NWLR (pt.270) 286.
[127] See Ali Vs Otanioku (1974) 4 WSCA184.

jurisdiction of the trial court or to maintain the absence of a fundamental pre-requisite cannot come by way of respondent's notice but must file a substantive cross appeal.[128]

Once a respondent's notice is served on the appellant, he cannot prevent the respondent from arguing the point raised in the notice by withdrawing his own appeal.[129]

Interlocutory applications pending appeal

While an appeal is pending, it may be necessary to maintain the **status quo** or to preserve the **res** of the litigation pending the outcome of the appeal. It may also be necessary to obtain an order of court in respect of certain steps required for proper prosecution of the appeal. The nature of the application to be made in this regard depends on the particular need of each litigant. The common forms of interlocutory applications that are constantly employed include the stay of execution, stay of proceedings and injunction pending appeal. We shall briefly look at each of these in turn.

Stay of execution

Generally, the judgement of a court takes effect upon delivery and may be enforced as such. Even an appeal against the judgement cannot prevent the judgement from being enforced as an appeal does not in itself operate as a stay.[130] However, all the courts of record in Nigeria have power to grant stay of execution .The power is both inherent and statutory.[131]

Therefore, a party against whom a judgement has been entered and who desires to stay the execution of same pending an appeal lodged by him must file an application for stay. The application is by motion on notice supported by an affidavit. In cases of extreme urgency an interim order of stay of execution may be made pending the hearing of a motion on notice.[132] The grant of stay is discretionary, but the courts are bound to exercise such

[128] See Eliochin Vs Mbadiwe [1986] 1 NWLR (pt.14) 47; Western Steel Works Vs Iron and Steel Workers Union (Supra).
[129] See Re Cavenders's Trusts (1881) 10 Ch. 270.

[130] See S.18 Court of Appeal Act.
[131] See Coker Vs Adeyemo (1965) 1 All NLR 120.
[132] See Molcan Investment Co. Ltd. Vs Zanen Verstoep & Co. Nig. Ltd. (Unreported) CA/L/55/95.

discretion judicially and judiciously.[133] Over the years, some guiding principles have been evolved by the courts in determining whether to grant or refuse a stay.

In the first instance, courts do not make a practice of depriving a successful litigant of the fruit of his litigation.[134] An applicant must therefore show by his affidavit evidence a special circumstance why the successful party should be prevented from taking immediate benefit of his victory. In this regard, poverty alone does not constitute a special ground for grant of stay except where the effect will be to deprive the appellant of the means of prosecuting his appeal.[135]

Generally, the courts will not grant a stay of purely declaratory order.[136]

On the other hand, stay will be granted where from the nature of the case justice demands that the **Status quo** be maintained until a final determination of the appeal.[137]

For instance where from the grounds of appeal filed, the applicant has a fair chance of success on appeal and the **res** may be destroyed unless stay is granted.[138] Where the chances of the applicant are virtually nill, stay will not be granted.[139]Also, stay will be ordered where the result of an appeal will be rendered nugatory in the absence of a stay of execution.[140] A money judgement will be stayed where there is no reasonable probability of recovering the money from the judgement creditor in case the appeal succeeds.[141] An applicant who relies on the strength or weakness of his financial position must disclose fully and with utmost candour all his sources of income and his liabilities.[142] Where an appeal genuinely raises a substantial issue as to jurisdiction, a stay ought to be granted.[143]

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[133] See Vaswani Trading Co. Vs Savalakh (1972) 12 SC77.
[134] See Nwabuze Vs Nwosu [1988]4 NWLR (pt.82) 257.
[135] See Okafor Vs Nnaife [1987]4 NWLR (pt.64) 159; Nwabuze Vs Nwosu (Supra); Vincent Standard Trading Co. Vs Xtodeus Trading Co. [1993]1 NWLR (pt280)675
[136] See Albion Construction Co. Ltd Vs Rao Investment & Property Ltd.[1992] 1 NWLR (pt.219) 583; Tukur Vs Govt. of Gongola State [1989]4 NWLR (pt.117) 592.
[137] See C.G.F.C Vs N.P.A. (1972) 12 SC107
[138] See See Vaswani Trading Co. Vs Savalakh (Supra)
[139] . Ibid
[140] See Okafor Vs Nnaife (Supra)

[141] See Ebiguna Vs Ebiguna (1974)3 WSCA 23.
[142] See Anyaogu Vs Our Lines Ltd. [1993]4 NWLR (pt.289) 607
[143] See Martins Vs Nicanner Foods [1988]2 NWLR (pt.74)75; Adefulu Vs Okulaja [1993]2 NWLR (pt.274) 227.

Generally, a stay pending appeal is granted only after a competent appeal has been lodged. However, courts have an inherent power to order an interim stay in cases of extreme urgency especially where leave has to be obtained before an appeal is filed and the **res** stands to be destroyed in the interval.[144]

Stay pending appeal will not be granted where the appeal is patently incompetent as where an appeal is filed out of time without an order for extension of time or without leave where leave is required.[145]

After appeal is filed but before it is entered, both the lower and the appellate courts have jurisdiction to entertain applications in the case including application for stay. Therefore, at that stage, application for stay may be made to either court. However, once an appeal is entered, the appellate court becomes seized of all the proceedings and is the only court with jurisdiction to entertain applications in the case.[146]

An appeal is lodged when a notice of appeal is filed at the registry of the lower court. On the other hand, an appeal is entered when the record of appeal is received at the registry of the appellate court and the appeal is entered in its cause list.[147]

Where an application may be made either to the lower court or the appellant court it must be made to the lower court in the first instance except where special circumstance exists for bringing it before the appellate court without going to the lower court first.[148]

If an application for stay is refused or is granted by the lower court on condition considered to be onerous by the applicant, a similar or concurrent application or an application for variation, as the case may be, may be filed before the appellate court[149] In an appeal to the court of appeal, if the court of appeal refuses a concurrent application for stay or grants it on onerous condition, an applicant cannot file a concurrent application to the Supreme

[144] See Molcan Investment Co. Ltd. Vs Zanen Verstoep & Co. Nig. Ltd. (Supra)
[145] See Mobil Oil Vs Agadaigbo [1988] 2 NWLR (pt. 77) 383.
[146] .See See Or.1 r.21; Bashorun Vs Chief of Army Staff [1989]5 NWLR (pt.123)590; Okotie Eboh Vs Okotie Eboh [1986]1 NWLR (pt.16) 264. Ogunremi V Dada (1962) 1 All NLR 63; Ezomo V A-G Bendel State [1986] 4 NWLR (pt.36) 445.
[147] See Or.1 r.21; Or.3 rr.5 & 13(2) C.A.R.
[148] See Or.3 r.3(4) C.A.R. 2002; Bashorun Vs Chief of Army Staff [1989]5 NWLR (pt.123)590; Okotie Eboh Vs Okotie Eboh [1986]1 NWLR (pt.16) 264.
[149] See Vaswani Trading Co. V Savalakh (Supra); C.G.F.C Vs N.P.A. (Supra)

Court without appealing against the decision of the Court of Appeal on stay.[150] If he appeals to the Supreme Court, he may still bring a similar application before that Court. Such an application will be granted only in very exceptional cases as it may amount to granting a substantive relief at interlocutory stage, a situation which the Court will always avoid.[151]
It must be pointed out that a respondent who is dissatisfied with the conditions of stay at fist instance cannot apply for variation of the order but can only appeal against it.[152]

Finally, a respondent who is served with an application for stay of execution must not execute the judgement or deal with the **res** in a way that will render the application for stay nugatory. If he does, such an act will be null and void and will be set aside.[153]

Stay of proceedings

Where an appeal is against an interlocutory decision, it may become necessary to apply for stay of further proceedings in the substantive case in order to preserve the **res** and ensure that the result of the appeal is not rendered nugatory.[154]

The principles governing the grant of stay of proceedings are similar to those for stay of execution.

It must be emphasized that where there is an application before an appellate court for stay of proceedings in the lower court, the lower court should not do anything that will render the result of the application nugatory. To do so will amount to judicial impertinence and an affront to the authority of the appellate court. Whatever is done in such circumstances may be set aside.[155]

[150] 128b. Ibid.
[151] See FSB International Bank Vs Imano [2000]11 NWLR (pt.679)620.Cf. CBN Vs Ahmed (2001) 5 SC (pt.II) 146
[152] See C.G.F.C. Vs N.P.A. (Supra)
[153] See Vaswani Trading Co. Vs Savalakh (Supra); C.G.F.C. Vs N.P.A. (Supra)
[154] See Kigo Vs Holman Bros. (1980)5-7 SC 60.

[155] See Mohammed Vs Olawumi [1993] 4 NWLR (pt.287)254 at 277-278 per Olatawura JSC

Interlocutory decisions may be questioned in an appeal against the final decision.[156] Hence, litigants are discouraged from appealing against all and every interlocutory decisions and applying for stay instead of allowing the case to proceed to trial and final determination on the merit.[157] Therefore, an application for stay of proceedings will be refused where the grounds of appeal are frivolous and the stay is calculated merely to delay the trial of the action.

However, where the interlocutory decision would have a serious bearing on the course of trial as well as on the outcome, stay of proceedings will be granted.

Injunction pending appeal

A plaintiff whose claim is dismissed and who is appealing against the judgement may wish to preserve the **res** or maintain the **status quo** pending the determination of his appeal. The proper course for such plaintiff is to apply for an injunction pending appeal. A stay of execution is applied for by a defendant when the plaintiff who has the judgement of the lower court in his favour intends to enforce it.

Where the judgement is in favour of a defendant who has no counterclaim before the court and against the plaintiff whose claim is dismissed or struck out, such a judgement is not capable of being executed as there is nothing to execute.

Therefore, a plaintiff appealing against such judgement cannot apply for a stay of execution. The only way he can preserve the **res** or maintain the **status quo** is by applying for an order of injunction pending appeal.[158]

Similar requirements for granting any other type of injunction apply. In addition, the applicant must have a competent notice of appeal and the grounds of appeal must be

[156] See Orubu Vs N.E.C [1989]5 NWLR (pt.94) 323;Araka V Egbue (2003) 7 S.C. 75 at 87.
[157] See Odogwu Vs Odogwu [1990] 4 NWLR (pt.143)224.
[158] See Shodehinde V Registered Trustee of Ahmadiya Movement in Islam (1980)1-2 SC 16; Okafor V A-G Anambra State [1988]2 NWLR (pt.79) 736.

substantial and arguable.[159] However, in **CBN V Ahmed**[160] the Supreme Court granted an injunction pending appeal even when the notice of appeal had not been filed. All that was before the court in that case was a motion for extension of time and leave to appeal.

Records of appeal

Records of appeal mean the aggregate of papers relating to an appeal including the pleadings, proceedings, evidence, judgement and other papers proper to be laid before the court on the hearing of the appeal.[161]

Though an appeal is deemed to be brought when the notice of appeal is filed in the registry of the court below[162] an appeal is not entered until the records of appeal is received by the Registrar of the appellate court and the appeal is entered on the cause list.[163]

After filing and service of notice of appeal, the Registrar of the court below is to invite parties to settle records and to fix the amount to be paid by the appellant for compilation and forwarding of the records and other conditions of appeal to be fulfilled by the appellant. Whether parties attend or not, as long as they have been duly notified, the Registrar shall proceed to settle the records.[164]

The lists of the documents and the order in which they are to be compiled in the record of appeal to the Court of Appeal are contained in Order 3 rule 9 of the Court of Appeal Rules 2002.

The appellant has a duty to ensure that the records are compiled and forwarded by paying the fees necessary for the purpose and by perfecting other conditions of appeal.[165] as may be imposed by the Registrar of the court below. Failure by the appellant may be taken as an

[159] See Okafor V A-G Anambra State (Supra).
[160] (Supra)
[161] See Or.1 r.2 C.A R 2002.
[162] See Or.3 r.5 C.A R.
[163] See Ogunremi V Dada (1962) 1 All NLR 63; Ezomo V A-G Bendel State [1986] 4 NWLR (pt.36) 445.
[164] See Or3 r.8 C.A.R.
[165] These normally include payment of deposit or a bond for due prosecution of the appeal. See Or.3 r.10 & 11 C.A.R.

indication of lack of interest in the prosecution of the appeal and may entitle the respondent **ex debito justitiae** to have the appeal struck out.[166]

In deserving cases, the Court of Appeal has power to grant departure from the Rules thereby allowing either party to compile the records of Appeal.[167] Amongst the facts the court will take into consideration in exercising its discretion to grant such departure are:

(a) The need to accelerate the appeal in the light of the urgency involved as deposed to in the affidavit

(b) Whether it is in the interest of justice to accelerate the hearing of the appeal at the expense of other appeals pending before the court and which were earlier in time.

(c) Whether it is expedient and just to allow the rich litigant to receive quicker justice than his poor counterpart who may not have the means to accelerate his appeal out of turn and

(d) Whether it is in the interest of the Court itself to accelerate the hearing in the light of the workload on its hand and the desire to do justice within the time frame at its disposal [168]

The parties as well as the registrars have a duty to ensure that the bulk of record of appeal is reduced as much as possible.[169] Copies of the records shall be given to all the parties upon payment of the prescribed fee.

It must be emphasized that once the records of Appeal is received at the appellate court and the appeal is entered on the cause list of that Court, the appeal is deemed to have been entered and the appellate court becomes seized of the case and the **res** to which it relates. All applications in the case must from that time be made to that court.[170]

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[166] See Uwechia V Obi (1971)NMLR 308; Moses V Ogunlabi (1975)4 SC 81.

[167] See Or.7 r.2 C.A.R 2002.
[168] See Re MV Lupex [1993]2 NWLR (pt.287) 677 at 679 per Tobi JCA (As he then was)
[169] See Or.3 r.9(2)CA.; Enang V Okoro (1962)All NLR 530; Odunsi V Ojora (1961)1 All NLR 283
[170] See Ezeokafor V Ezeiko (1999) 6 SC 1

The Court is to decide the appeal based upon records of appeal presented before it. However, in deserving cases, the court has power to amend the record[171] Also, in appropriate cases the Court may grant amendment of pleadings to bring same in line with the evidence already adduced and may even allow fresh or further evidence to be called[172] albeit in exceptional cases. Some of the considerations the court will normally take into account in allowing fresh evidence are:

(a) The evidence must be such as could not have been with reasonable diligence obtained at the trial or relate to matters which have occurred after judgment in the trial court.

(b) The evidence should be such as it admitted, it would have an important, not necessarily crucial effect on the whole case and

(c) The Evidence must be such as is apparently credible though need not be incontrovertible.[173]

An amendment which is intended to overreach will not be granted. [174]

Brief of argument

A brief of argument has been defined as a succinct statement of the proposition of law or facts or both which a party or his counsel wishes to establish at the appeal together with reasons and authorities which can sustain them.[175]

Prior to1977, brief writing was unknown to appellate practice in
Nigeria. In line with the English tradition, hearing of appeals at the Court of Appeal and Supreme Court was based purely on oral submissions and arguments.[176] Hearing of appeals

[171] See Arase V Arase (1981) 5 SC 33; Akinyede V Opere (1967)1 All NLR 302.
[172] See Iweka V SCOA (2000) 3 SC 21; Onibudo V Akibu (1982)7 SC60.

[173] See Okpanubi V S.G.B.N.Ltd. [1998]7 NWLR (pt.559) 537; Re MV Lupex (Supra) at 685.
[174] See Kode V Yussuff (2001) 2 SC 85 at 99.
[175] See Mordi V Kwentoh [1996]2 NWLR (pt.433) 656 at 660; Nwokoro V Onuma [1990] 3 NWLR (pt.136) 22.
[176] See A. Ekundayo, Hints On Legal Practice (Lagos, NIALS 1990) p. 247; Niki Tobi, Brief System

was therefore a tedious, cumbersome and definitely time wasting exercise especially in view of the increasing number of appeal cases. This prompted the Supreme Court to introduce the system of brief writing in 1977 by the Supreme Court Rules of same year.

On the other hand, brief writing was introduced at the Court of Appeal in 1983 by means of a temporary practice direction requiring the filling of briefs in respect of appeals from election petitions. The introduction of brief writing on permanent basis at the Court of Appeal was in 1984 by the Court of Appeal (Amendment) Rules 1984, Order 6 of which provides for compulsory brief writing except where the Court directs otherwise. The position remains the same under order 6 of the Court of Appeal Rules 2002.

Compulsory brief writing at the Supreme Court is not limited to substantive appeals but also applies to application for leave to appeal. On other hand, the Court of Appeal Rules provide for compulsory brief writing only in respect of substantive appeals. In practice, both Courts do order filling brief in respect of interlocutory and other matters where the situation demands.[177]

The purpose of brief in the appellate court is to assist the administration of justice by making the work of both counsel and the Court easier once the matter has reached oral hearing stage. It is to promote justice, so that both Counsel and the Court may not embark on wild goose chase, chasing a futile course.[178] Brief "alleviates substantially the cumbersomeness, and often, the waste of time by verbose counsel in beating about the bush.[179]

As to what a brief should contain, these were set out by Ademola J.C.A. in **Archbold Engineering Ltd Vs Water Recourses Hydro Technique Wassertechnic A.G.**[180] These are:

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in Nigerian Courts (Lagos, Centre For Law And Development Studies 1999) p.1

[177] See Niki Tobi, **Op. Cit.**; A-G Abia State V A-G Federation (2002) 4 SC 1.

[178] See Ehot V State [1993] 4 NWLR (pt. 200) 644 at 665 per Ogundare JSC; See also Niki Tobi Op. Cit

[179] See Omojasola V Plisson Fisko Nig. Ltd. [1990] 5 NWLR (pt.151)434 at 441 per Achike JCA (as he then was).

[180] [1985]1 NWLR (pt.12) 300, cited with approval by the Supreme Court in Chinweze V Masi [1989] 1 NWLR (pt.97) 253; Gov. of Gongola State V Tukur [1987] 7 NWLR (pt.56) 308; Engineering Enterprises V A-G Kaduna State [1987] 2 NWLR (pt.57) 381; Adimora V Ajufo [1988] 3 NWLR (pt.80) 1 .

1. The Court in which the appeal is to be argued
2. The appeal number
3. Parties to appeal
4. Title of the brief- Appellant's brief, Respondent's brief as the case may be
5. The table of contents
6. Introduction of the Preliminary Statement giving a short history of the case and who is appealing and the nature of the appeal
7. Statement of facts
8. Issues for determination
9. Legal arguments
10. Summary or conclusion
11. List of authorities cited in the brief
12. Signature of the author indicating his capacity
13. Address for service

Counsel engaged in appellate briefs must master the art of brief writing that will not inflict on the court a tiresome task. He should avoid lengthy, otiose and a brief replete with repetition. He can do this by focusing on issues relevant for determination, advancing argument in his brief in a succinct manner. It is by doing this that counsel can be of immense assistance to the Court, his Client and also avoid delay in the administration of justice. Achike J.S.C's statement in **F.S.B. Vs Imano**[181]in this respect is very instructive:

> *"I cannot overlook the rather cumbersome nature of respondent's brief. I find it needlessly verbose and prolix. A brief submitted on behalf of each party to an appeal, as the term readily suggests is a precise or an abridgement of the relevant submission a disciplined counsel would wish to put across for consideration by the court demonstrating lucidly and succinctly why his contentions should be preferred rather than those of the opposing counsel. Counsel should caution himself and be reminded that good advocacy like writing a good brief, does not accommodate unnecessary argument. There is yet a new book on the subject of brief writing by Hon. Justice Niki Tobi titled <u>The Brief System in Nigeria Courts 1999 ed.</u> which I warmly commend to serious minded appellate Court practitioners if they are to excel in this aspect of their*

[181] (2000) 7 SC (pt I) 1 at 5-6.

legal practice. A good brief should be readable, concise but comprehensive, leaving no stone untouched in relation to the issues placed before the Court which must be adequately addressed. In contrast, a bad brief bores the Court and sometimes, even painstaking judge, may be eluded in eliciting the matter in controversy to the chagrin of counsel's client. It is therefore hoped that in the interest of the Court and the Client's case, Counsel should appreciate that presentation of a good brief is an indispensable assets to successful appellate legal practice".

It must be noted that whilst the importance of a good brief cannot be overemphasized, a bad brief or one which is faulty in form or in content is still a brief and will be used as such by the court in determining the appeal though it may attract negative comments from the Court. The decisions of the Court of Appeal in **Archbold Engineering Limited Vs water Resources Hydrotechque**[160]and **Gamstac Engineering Ltd Vs F.C.D.A.**[161] dismissing the appeals before it for want of prosecution on the ground that the appellants' briefs were faulty do not represent the law. This is in view of the decisions of the Supreme Court to the contrary in **Obiora Vs Osele**,[162] **Engineering Enterprises Vs A.g Kaduna State**[163] and **Ekpan V Uyo**[164]

In **Obiora Vs Osele**,[165] the Supreme Court expressly held that once a brief is filed, it constitutes the appellant's or the respondents' argument in the appeal and nowhere in the Court of Appeal Rules is any provision made for striking out the appellant's argument in the appeal no matter how inelegantly drafted and presented. A brief is a brief no mater how poor or faulty. In that case, Oputa J.S.C. graphically stated.

"A bad, faulty and/or inelegant brief will surely attract some adverse comments from the Courts but it will be stretching the matter too for to regard such defective brief as no brief. A faulty brief is a brief which is faulty. One cannot close one's eyes to the fact of its existence"[166]

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160. (Supra)
161. [1988] 4 NWLR (pt.88) 296.
162. [1989] 1 NWLR (pt.97) 279

163. (Supra)

164. [1986] 3 NWLR (p[t] 26) 63.

165. (Supra)

166. Ibid at 300

Parties are bound by their briefs and whatever admission and concessions made in the brief will be binding on the party making same who will not be allowed to depart therefrom at the oral hearing or any other stage[167]

The time for filling of appellant's brief at the Court of Appeal is 60 days after receiving the records of appeal[168] whilst the time limited for filling of respondent's brief is 45 days of service of appellant's brief.[168a] A reply brief may be filed by the appellant within 14 days of service of the respondent's brief.[169]

However, the Court has the power to extend the time specified for filing of brief upon application for that purpose by the party concerned [170]

Failure by the appellant to file brief within the time stipulated by the rules or as extended by Court entitles the respondent to apply for sticking out of the appeal for want of prosecution. On the other hand, a respondent who fails to file a brief will not be heard in oral argument except by leave of the Court.[171] Additionally, where no reply brief is filed, the appellant will be deemed to have conceded all new points raised in the respondent's brief [172]

Twenty copies of the briefs must be filed at the Court of Appeal[173]

Argument on appeal is based on issues formulated in the brief from the grounds of appeal and not on the grounds of appeal themselves[174]

The purpose of formulating issues for determination is to isolate in the grounds of appeal filed the critical issues relevant for the determination of the appeal. Hence, an issue may be limited to one ground or traverse more than one grounds of appeal. The essential consideration is the identification of the critical issues, whilst at the same time, avoiding proliferation. It is not acceptable for counsel to formulate issues for determination not based on any ground of appeal. Such issues will not be countenanced by the Court and is liable to be struck out[175]As Karibi-

167. See Nimatek Associates Ltd. V Marco Constructions Limited [1991] 2 NWLR (pt.174) 411;

Menakaya V Menakaya [1996] 9 NWLR (pt. 427)256 at 288 per Tobi J.C.A. (as he then was).

168. See Or.6 r.2 C.A.R.

168a.See Or.6 r.4 C.A.R.

169. See Or.6 r.5. C.A.R.2002

170. See Or.3 r.4 C.A.R.

171. See Or.6 r.10 C.A.R.

172. Ibid.

173. See Or..6 r..8 C.A.R 2002

174. See Onwhosa Oduzon (1999) 1 SC 40 at 46; Kan V State (1992) 4 SCNJ 81.

175. See Omo V Judicial Service Commission (2000) 7 SC (pt.II) 1 at 8-9.

Whyte J.S.C. stated in **Olowosago V Adebanjo**[176]"the issues for determination cannot and should not be at large but must fall within the purview of the grounds of appeal filed".

It must be pointed out at this stage, that an appeal can only be based upon issues placed before and/or pronounced upon by the lower Court. Generally, a party will not be allowed to raise on appeal an issue which was not raised or considered by the Court below. However, where the issue involves substantial points of law, substantive or procedural and no further evidence need be adduced in respect of same, the court will allow such fresh issue to be raised in order to avoid miscarriage of justice.[177] However, a party who intend to raise such fresh issue on appeal must obtain leave of court as absence of leave renders the fresh issue incompetent and liable to be struck out by the court.[178] Grant of leave is a matter for court's discretion, which is exercised, based on established principles.[179]

Generally, the court will readily grant leave where the fresh issue is one of jurisdiction or competence of court since an issue of jurisdiction can be raised at any stage of the proceedings even on appeal[180]

A party will not be allowed to argue a ground in respect of which no issue has been formulated. Therefore, any ground in respect of which no issue has been formulated will be deemed abandoned and may be struck out.

Issues formulated must be cogent, weighty and substantial enough to influence the decision in the appeal in favour of the party raising such issues. In this regard, counsel should avoid proliferation of issues for determination. Nnameka Agu J.S.C. has observed in **Ugo Vs Obiekwe,** [181] that:

"Apart from the fact that a multiplicity of issues tends to reduce most of them (i.e. the issues) to trifles, experience shows that most appeals are won on a few cogent and substantial issues, well framed, researched and presented rather than on numerous trifling slips"

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176. [1988] 4 NWLR (pt.88) 275; See also Idika V Erisi [1988] 2 NWLR (pt.78) 563 per Nnamaeka
Agu JSC.
177. See Araka V Ejeagwu (2000) 12 SC (pt.I) 99.
178. See Global Transport Oceanico S.A. V Free Enterprises Ltd. (Supra) at 161.
179. See Eze V A-G Rivers State (2001) 12 SC (pt.II) 21 at 28.
180. Ibid
181. [1989] 1 NWLR (pt.99) 566 at 580.

Unless the issues arising in the appeal are clear cut or fall within a narrow compass, the attitude of the Courts is against the practice of respondents adopting almost on a routine basis appellants' formulation of issues arising in the appeals.[182] It is therefore desirable for the respondent to formulate his own issues though such issues must be based upon grounds of appeal filed by the appellant or respondent's notice. Any issues outside the grounds of appeal will be incompetent.

Arguments on the issues should be succinct, forceful and logical. It must be arranged in order of sequence based on the issues as formulated. In the composition of arguments, Counsel should also pay attention to what Oputa J.S.C. referred to as A.B.C. of Legal writing. These are , accuracy, brevity and clarity.[183]

Apart from normal types of briefs (that is Appellant's Briefs, Respondent's Brief and Reply Briefs) a party may also file a supplementary brief. As the name suggests, this is a brief filed as additional or supplementary to the main brief of the appellant or respondent. However, a supplementary brief can only be filed with the leave of Court.[184]

Also, in cases of public or national importance, the Court may invite briefs to be filed by **amici curea.**[185] An **Amicus curea** may also file brief in respect of an appeal pending before the Court upon his own application.[186]

Preliminary Objection

A respondent who intends to raise an objection to the hearing of the appeal is required to file a notice of preliminary objection three days before the hearing, setting out the ground of such objection. Twenty copies of the notice are to be filed with the Registrar.[186a] If the respondent fails to comply with this rule, the Court may refuse to entertain the objection[186b] or may adjourn the hearing at the cost of the respondent or

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182. See A. Ekundayo, Op.Cit.at pg.265; See also Standard Consolidated Dredging and Construction

Company Ltd V Katoncrest Nig. Ltd.[1986] 5 NWLR (pt.44) 791; Fasoro V Beyioku [1988] 2

NWLR (pt.76) 265.

183. See Engineering Enterprises Vs A.g Kaduna State (Supra)

184. See Oduye V Nigeria Airways Ltd. [1987] 2 NWLR (pt.55)126; Din V A-G Federation [1988] 4

NWLR (pt.87) 147; Okpala V Ibere [1989] 2 NWLR (pt.102) 208.

185. See for instance A-G Ogun State V Aberuagba [1985] 1 NWLR (pt.3) 395.

186. See Savanah Bank of Nigeria Ltd. V Ajilo [1989] 1 NWLR (pt.97) 305.

186a. See Or.3 r.15(1) C.A.R. 2002.

186b. See Oforkire V Maduike (2003) 1 SC (pt.III) 74 at 84

may make such other order as it thinks fit.[187] The notice is contained in Civil Form 13 in the Schedule to the Rules. However, since the purpose of the rule is to ensure that the appellant

is not taken by surprise, it is settled that the respondent may raise and argue his preliminary objection in the respondent's brief.[188] For this purpose, Tobi J.S.C. indicated in **Sanni V Ademiluyi** [189] that:

"a respondent who has an objection to raise should clearly indicate in his brief as follows: "Preliminary Objection" and this should normally be the first point in the brief."

It must be pointed out that a respondent who has raised a preliminary objection in his brief must specifically raise and argue the objection at the oral hearing of the appeal, otherwise it would be deemed to have been abandoned. According to Mohammed JSC in **Oforkire V Maduike**:[190]

"the notice of preliminary objection can be given in the respondent's brief, but a party filing it, in the brief, must ask the court for leave to move the notice of objection before the oral hearing of the appeal commences. Otherwise it will be deemed to have been waived and therefore abandoned."

Withdrawal of appeal

Before the appeal is listed for hearing, the appellant may file and serve on the parties a notice of withdrawal of the appeal.[191] The notice may be in Civil Form 14 or Civil Form 15 in the Schedule to the Rules. The withdrawal may be with or without the consent of the parties.

If the withdrawal is with the consent of the parties, the appellant may file the document or documents signifying such consent and signed by the parties or their legal representatives. The appeal shall thereupon be deemed to have been withdrawn and shall be struck out of the list by the Registrar. Any money deposited as security for cost of the appeal shall be paid out to the appellant. In this case, the withdrawal shall operate as a bar to further proceedings in respect of any respondent's notice under Order 3 rule 14.[192]

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187. See Or 3 r.15(3) C.A.R.

188. See Auto Import Export V Adebayo (2002) 12 S.C. (pt.I) 158 at 167.
189. (2003) 1 S.C. (pt.I) 77 at 91 that
190. Supra at pg. 80
191. See Or 3 r 18(1) C.A.R; Edozien V Edozien (1993) 1 SCNJ 166 at 176.
192. See Or 3 r 18(2)&(3) C.A.R.

On the other hand, where the withdrawal is without the consent of the parties, after the service of notice of withdrawal, the appeal will remain on the list and will come up for the hearing of any issue as to cost or otherwise remaining outstanding between the parties, such as a respondent's notice under Order 3 rule 14 and the disposal of any money deposited as security for cost.[193]

Once an appeal is withdrawn, with or without the consent of the parties, it shall be deemed to have been dismissed.[194]

Hearing and judgement

According to S.247 of the 1999 Constitution, the Court of Appeal must be constituted by not less than three Justices of the Court for the purpose of hearing and determination of any appeal.

At the hearing of the appeal, oral argument will be allowed to emphasise and clarify the written argument in the briefs filed. For this purpose, each side is entitled to one hour of oral presentation except otherwise directed by the Court.[195] The appellant shall be entitled to open and conclude the argument. Where there is a cross-appeal or a respondent's notice, the appeal and such cross-appeal or respondent's notice shall be argued together with the appeal as one case and within the time allowed for one case. The Court may, having regard to the nature of the appeal, inform the parties which of them is to open and close the argument.[196]

Except with the leave of court, no argument will be allowed on behalf of any party who has not filed a brief or in respect of a point not covered by a brief[197]

Also, when an appeal is called and the parties have been dully served with hearing notices and the briefs have been filed by all the parties concerned with no application by a party or counsel to present oral argument, the appeal will be treated by the Court as having been duly argued in terms of the briefs filed if any party fails to appear at the hearing. [198]

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193. See Or 3 r 18(4).
194. See Or 3 r 18(5); Edozien V Edozien (Supra).
195. See Or. 6 r 9(1)&(3) C.A.R.
196. See Or 6 r 9(2) CAR
197. See Or 6 r.9(4) CAR
198. See Or 6 r 9(5) CAR; Salami V Mohammed (2000) 6 SC (pt.II) 37 at 42.

In delivering the judgement of the Court, each Justice of the Court of Appeal shall express or deliver his opinion in writing or may state in writing that he adopts the opinion of any other Justice who delivers a written opinion provided that it shall not be necessary for all Justices who heard a cause or matter to be present when judgement is to be delivered and the written opinion of a Justice may be pronounced or read by any other Justice whether or not he was present at the hearing [199]

For the purpose of delivering judgement, the Court of Appeal may be constituted by a single Justice who will deliver the written opinions of others[200]

Therefore, under S294 of the Constitution, opinion of a Justice who joined in the hearing of an appeal but is unable to be present in person at the delivery of judgement may be read by any other Justice whether or not such other Justice was present at the hearing. It will not matter that such a Justice whose opinion is being read was subsequently elevated to a higher court, died or retired or was dismissed before the date of judgement provided he was a competent member of the Court as at the time he wrote his opinion.[201] The rational for this provision is to avoid having to reopen an appeal each time any of the above stated events occurs after decisions by the justices but before delivery in open Court.

It is important to emphasize that it is not every mistake or error in a judgement that will result in the appeal being allowed. It is only when the error is substantial, in that it has occasioned a miscarriage of justice, that an appellate court is bound to interfere[202]

Also, what the appellate court must decide is whether the decision of the lower court was right and not whether its reasons for arriving at the decision were and a misdirection not occasioning injustice is immaterial and cannot affect an otherwise unimpeachable decision[203]

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193. See Or 3 r 18(4).

194. See Or 3 r 18(5); Edozien V Edozien (Supra).

195. See Or. 6 r 9(1)&(3) C.A.R.

196. See Or 6 r 9(2) CAR

197. See Or 6 r.9(4) CAR

198. See Or 6 r 9(5) CAR; Salami V Mohammed (2000) 6 SC (pt.II) 37 at 42.

199. See S,294(2) 1999 Constitution; Shitta Bey V A-G Federation [1998] 10 NWLR (pt.570) 392 at 438.

200. See S.294(4) 1999 Constitution.

201. See A-G Imo State V A-G Rivers State (1983) 8 SC 10; Okino V Obanebira (1999) 12 SC (pt.II) 38; Adesokan V Adegorolu (1997) 3 SCNJ 1.

202. See Abimbola V Abatan (2001) 4 SC (pt.I) 64 at 74; Ojengbede V Esan (2001) 12 SC (pt.II) 1; Osolu V Osolu (2003) 6 SC (pt.I) 1 at 19-20.

203. See Ojengbede V Esan (Supra) at pg. 17.

In the same vein, it is settled that wrongful admission or exclusion of evidence cannot of itself be a ground for the reversal of a decision if it appears that such evidence cannot reasonably be held to have affected the decision and that the decision would have been the same regardless of the admission or exclusion of such evidence[204]

Save in exceptional cases, the Court of Appeal will not interfere with finding of fact by the trial Court since the trial Court is in the best position to assess the credibility of the evidence led before it. As Ejiwunmi J.SC reiterated in **Olatunde Vs Abidogun[205]**

"It is now settled that where a court of trial had clearly evaluated the evidence and appraised the facts, it is not the business of a Court of Appeal to substitute its own views for that of the trial Court."

The appeal Court will however interfere where it is shown that the appraisal of the evidence or the finding of the trial court is perverse or wrong in law.[206]

The Court of Appeal has wide powers under S.16 of the Court of Appeal Act. In its judgement, the Court can make any order as would meet the justice of the case, including an order remitting the case back to the lower court for retrial. Some of the factors the Court will consider for this purpose were highlighted in Thompson V Arowolo:[207]

"…where an appellate court is in a position, after considering the evidence, to do complete justice between the parties an order for a new trial should not be made…the court should where the circumstances of the case permit, correct the decision appealed against….Where however, a finding depends so much on the credibility of witnesses, an appellate court should order a retrial…"

According to S.246(3) of the 1999 Constitution, the decisions of the Court of Appeal in respect of appeals arising from election petitions shall be final.

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204 Ibid at pg.18

205. (2001) 12 SC (pt.I) 123 at 131; See also Osolu V Osolu (Supra).

206. See Thompson V Arowolo (2003) 4 SC (pt.II) 108.

207 Supra at pg.127 per Ejiwunmi JSC.

APPEALS FROM THE COURT OF APPEAL TO THE SUPREME COURT

The Supreme Court has an exclusive jurisdiction over appeals from the Court of Appeal[208] It must also be emphasized that a party cannot appeal against the decision of the High Court, State or Federal or a Customary or Share Court of Appeal, directly to the Supreme Court without first appealing to the Court of Appeal [209]

In the same vain, a party cannot appeal to the Supreme Court against a finding of any of the above courts which has not been appealed against at the Court of Appeal.[210]

The Supreme Court is the Court of last resort in Nigeria as appeal does not lie against its decision to any other body or person[211]

It is important to point out that the provision of the Constitution (Amendment) Decree No.3 of 1998 which prohibited interlocutory appeals from the Court of Appeal to the Supreme Court does not appear in the 1999 constitution. Therefore, the decision of the Supreme Court in **Eco Consult Vs Pancho Villa Ltd**.[212] based on the Decree no longer represents the Law. Appeal lies to the Supreme Court from decisions of the Court of appeal interlocutory or final. Such appeal may be as of right or with leave.

Right of appeal

As stated above, an appeal to the Supreme Court may be as of right or with leave. S.233 (2) of the Constitution provides that appeal shall lie as of right from the Court of Appeal to the Supreme Court in respect of:

(a) decisions in civil or criminal matters where the grounds of appeal involve question of law alone;
(b) decisions of any civil or criminal proceedings on the question as to the interpretation of the Constitution;
(c) decisions in any civil or criminal proceedings on the question as to whether any of the provisions of Chapter IV of the Constitution has been, is being or is likely to be contravened in relation to any person;

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208. See S233 1999 Constitution.

209. See Ajomale V Yaduat [1991] 5 NWLR (pt.191) 266.

210. Ibid.

211. See S.235 1999 Constitution; Adigun V A-G Oyo State [1987] 2 NWLR (pt.56) 197.

212. (1999) 1 SC 83.

(d) decisions in any criminal proceedings in which any person has been sentenced to death by the Court of Appeal or in which the Court of Appeal has affirmed a sentence of death imposed by any other court.

(e) decisions on any question:

(i) whether any person has been validly elected to the office of president or vice-president under the Constitution,

(ii) whether the term of office of the president or vice-president has ceased.

(iii) whether the office of the president or vice-president has become vacant

(f) such other cases as may be prescribed by Act of the National Assembly.

On the other hand, S.233(3) provides that subject to the provision of S.233(2), an appeal shall lie from the decisions of the Court of Appeal to the Supreme Court with the leave of the Court of Appeal or the Supreme Court.

It is apparent from the above provisions, that unless the case of an appellant comes within S.233(2), he can only appeal with leave under S.233(3).

S.233(2)(a) – (e) contain specific cases in respect of which a party may appeal as of right whilst 233(2) (f) empowers the National Assembly to prescribe any other case in respect of which appeal may be as of right. Up till date, the National Assembly has not prescribed any additional case where appeal shall lie as of right. Therefore, the only cases where appeal lies as of right are those set out in S,233(2)(a) – (e).

S.233(2)(a) contains a general provision for appeal as of right in any case involving questions of law alone. Therefore, in determining the nature of the right of appeal to the Supreme Court, it does not matter whether the appeal is against a final or interlocutory

decision. What matters is whether the appeal involves questions of law alone or not. Where the appeal involves questions of fact or mixed law and fact, leave must be obtained whether the decision appealed against is interlocutory or final.

The nature of the decision appealed against can only affect the time within which to appeal. Such consideration has no relevance to the nature of the right of appeal as far as appeals to the Supreme Court are concerned.

The problem of how to determine whether a ground of appeal involves questions of law alone or fact or mixed law and fact has already been dealt with under 'appeal to the Court of Appeal'. The same consideration applies to appeals to the Supreme Court.

As to who may appeal, S.233(5) provides that any right of appeal conferred by S.233 is exercisable in the case of civil proceedings at the instance of a party thereto, or with the leave of the Court of Appeal or the Supreme Court at the instance of any other person having an interest in the matter. This provision is similar to that of S.243 in relation to appeals to the Court of Appeal, which we have already examined.

Time within which to appeal

According to s 27(a) of the Supreme Court Act,[213] the periods prescribed for the giving of notice of appeal or notice of application for leave to appeal are:

(a) 14 days, where the appeal is against an interlocutory decision and
(b) three months, where the appeal is against a final decision.

Therefore, in determining the period within which a party may appeal, the primary consideration is whether the appeal is against a final or interlocutory decision. The distinction between an interlocutory and final decision has already been dealt with under appeals to the Court of Appeal.

S.27(3) provides that where an application for leave to appeal is made in the first instance to the court below, a party has additional period of 15 days from the date of the hearing of the application by the court below to make another application to the Supreme Court . The

wording of the above provision is slightly different from that of S.25(3) of the Court of Appeal Act, which provides that the party has 15days from the "determination" of the application by the lower court and not from "hearing" of the application.

It is submitted that the wording of Court of Appeal Act in this regard is clearer. However, in practice, both provisions are given identical

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213. Cap 424 Laws of Federation of Nigeria 1990,
interpretation, that is, 15 days from the date of refusal of the application by the lower court.

By virtue of S.27(4) of the Act, the Supreme Court has power to extend the time for filing of notice of appeal or of application for leave to appeal[214] It must be emphasized that once the time prescribed have expired, the of Court of Appeal no longer has jurisdiction to grant leave to appeal or to extend the time within which to appeal or to seek leave. These can be done only by the Supreme Court[215]

Where leave is required, application for leave must be filed, heard and where granted, the notice of appeal filed within the time prescribed above. Where application for leave is refused by the Court of Appeal, the applicant has 15 days to bring a concurrent application before the Supreme Court.

Where the time within which to obtain leave has elapsed, an application for extension of time to apply for leave and to file the notice of appeal must be made to the Supreme Court. The application must contain three necessary prayers referred to as the trinity prayers:

(a) Extension of time within which to apply for leave to appeal
(b) Leave to appeal
(c) Extension of time to file note of appeal[216]

Where leave is not required, and the time to appeal has expired, the application needs to contain only one prayer:

Extension of time within which to file notice of appeal.[217]

An appeal filed out of time without an order of court or without leave where leave is required is incompetent. The Supreme Court lacks the jurisdiction to entertain such appeal which must be struck out.[218]

Application for leave or for extension of time at the Supreme Court is by motion on notice supported by affidavit. The affidavit must contain the following as exhibits:

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214 See also Or 2 r 31 SC Rules.

215. See Mobil Oil V Agadaigbo [1988] 2 NWLR (pt.77) 383.

216. See Odofin V Agu [1992] 3 NWLR (pt.229) 350.

217 Ibid

218. See Igidi V Igba (1999) 6 SC (pt.I) 114.

(a) Certified copies of the judgements of the Court of Appeal and the trial court.
(b) Proposed notice of appeal containing arguable grounds of appeal.
(c) Certified copy of the ruling of the Court of Appeal if similar application has been made to that court.

The affidavit must contain sufficient facts upon which the court can exercise its discretion either to grant leave or extend time, as the case may be.

Apart from the above, the application must be accompanied by a brief of argument setting out:

(a) a statement of the questions which the applicant would like the Supreme Court to consider.
(b) the Constitutional provision, subsidiary legislation, if any, which are relevant to the application.
(c) A concise statement of the case containing the fact material for the consideration of the question presented and
(d) A direct and concise argument amplifying the reasons relied upon.

Failure on the part of the applicant to present with accuracy, brevity and precision whatever is essential for the clear and adequate understanding of the questions which require consideration shall be a sufficient reason for refusing the application[219]

A respondent may file a counter affidavit not less than two days before the hearing date. He may also file a reply brief within seven days, in the case of an interlocutory appeal, or within twenty-one days, in the case of final judgement, after been served with the applicant's brief. The Supreme Court has power to decide the application in Chambers based only on the papers filed and communicate its decision to the parties.[220] This provision saves a lot of time and cost.

It must be pointed out that the Supreme Court will not grant leave to appeal against a finding of fact by the High Court, confirmed by the Court of Appeal, which is referred to as concurrent finding of fact, except where there are exceptional circumstances221

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217 Ibid

218. See Igidi V Igba (1999) 6 SC (pt.I) 114.

219. See Or 6 r 2 SC Rules.

220 Ibid; Oyeyipo v Oyinloye [1987] 1 NWLR (pt.) 358

221. See Or 2 r 32 SC Rules; Ibhafidon V Igbinosun (2001) 4 SC (pt.I) 96

Commencement of appeal

The procedure in commencing an appeal to the Supreme Court is similar to that of appeal to the Court of Appeal. The notice of appeal in the Supreme Court is filed at the registry of the Court of Appeal. Our discussion on the issue under appeals to the Court of Appeal applies mutate mutandis.[222]

A respondent who is dissatisfied with the judgement appealed against and who seeks a reversal of the judgement, or a variation of it, must file his own appeal[223] An appeal by a respondent is usually referred to as a cross appeal. It is a substantive appeal and is governed by the same rules as the original appeal.

At the Court of Appeal, a respondent who wishes to retain the judgement appealed against but is only contending that the decision be varied or that it be affirmed on grounds other than those relied upon by the trial court is required to file what is known as respondent's notice under Order 3 rule 14 of the Court of Appeal Rules. Similar provision was contained in Order 8 rule 3 of the Supreme Court Rules 1985 but was omitted when the Rules were amended in 1991.[224] Therefore, a respondent who is dissatisfied for whatever reason with the judgement appealed against at the Supreme Court can only file a cross appeal [225]

Where a cross appeal is filed, both the appeal and the cross appeal shall be argued together and separate briefs need not be filed in respect of the two.[226]

Interlocutory applications pending appeal

The Supreme Court, pursuant to the general powers conferred on it by S.22 of the Supreme Court Act and the specific power in respect of stay of execution conferred on it by S.24 of the same Act, has power to make such interlocutory orders as stay of execution, stay of proceedings,

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222. See generally Or 2 r 30, Or 8 r 2 as well as Form 12 in the Schedule to the SC rules.
223. See Western Steel Works V Iron and Steel Workers' Union (Supra); Oloriegbe V Omotosho (Supra).
224. See Government Notice No 111 of 1991
225. See Akpan V Otong (1996) 12 SCNJ 3213 at 220; Aguda, Practice and Procedure in the High Courts, Court of Appeal and the Supreme Court, Lagos, MIJ Publishers, 2nd ed. Pg.977; Toriola Oyewo, The Law and Practice of Civil Appeals in Nigeria, pg 60; Fidelis Nwadialo, Civil Procedure In Nigeria (Lagos, University of Lagos Press, 2000) p.944.
226. See Or 6 r 6 S.C.Rules

injunction pending appeal and any order that may be necessary for the determination of the real question in controversy in the appeal.

The procedures regarding stay of execution, stay of proceedings and injunction pending appeal have been considered in relation to appeals at the court of appeal. The same procedures apply to the Supreme Court.
It must be pointed out again, that before the appeal is entered at the Supreme Court, both the Court of Appeal and the Supreme Court have jurisdiction in respect of any interlocutory application. However, such application must be made first to the Court of Appeal except where there are exceptional circumstances to justify applying directly to the Supreme Court.[227]

When the Court of Appeal refuses such application, an applicant may file a concurrent application to the Supreme Court. Once the appeal is entered, the Supreme Court becomes seized of the entire proceedings and all interlocutory applications from that stage must be made to it. The Court of Appeal no longer has the jurisdiction to entertain such applications.

Record of appeal

Under Order 7 of the Supreme Court Rules, there are two procedures for compilation of records. The first relates to appeals against final decision. In such appeals, as soon as the appellant has filed his notice of appeal, the Registrar of the Court of Appeal shall, with due expedition, start to prepare the record of appeal. What the record should contain are set out in Or.7 r.2(2).

When the notice of appeal is filed, the Registrar of the Court of Appeal is to inform the appellant of the amount assessed by him as the cost of the preparation and transmission of the record to the Supreme Court and as the amount of security for cost and due prosecution of the appeal. The appellant must, within 14 days, pay the assessed amount and deposit the sum prescribed as security for cost, or in lieu thereof, enter into bond to the satisfaction of the of the Registrar.[228] The Registrar is to forward ten copies of the record together with the documents specified in Or.7r.4 within six months of the filing of the notice of appeal.[229]

227. See Or 2 r 28(4) SC Rules; Bashorun V Chief of Army Staff [1989] 5 NWLR (pt.123) 590; Okotie

Eboh V Okotie Eboh [1986] 1 NWLR (pt.16) 264.

228. See Or.7 r. 3 SC Rules.

229. See Or.7 r.4.S.C.

The second procedure relates to appeal from interlocutory and other specified decisions. It shall not be necessary for the Registrar to prepare the record when the appeal from the Court of Appeal is in respect of:

(a) interlocutory decision of the Court of Appeal

(b) a decision made on appeal from an interlocutory decision of a High Court

(c) a decision affirming or reversing an order for summary judgement

(d) a decision made-

(i) where the liberty of a person or custody of an infant is concerned;

(ii) where an injunction or the appointment of a receiver is granted or refused;

(iii) relating to or connected with the winding up of companies;

(iv) in respect of a decree nisi in a matrimonial cause;

(iv) affecting the revenue of the Government of the Federation or a State;

(v) in such other cases as the Court, in its discretion, may direct.[230]

In such cases, the appellant shall either simultaneously with filing his notice of appeal or within 14 days thereafter prepare a record comprising:

(a) the index,

(b)office copies of documents and proceedings which the appellant considers relevant to the appeal, and

(c) a copy of the notice of appeal.

If the respondent considers that the documents and proceedings compiled by the appellant are inaccurate or insufficient, he shall, within 7 days after service on him of the record, file additional record.

All documents filed by either party must be verified by the affidavit of a person who has read and compared them with the originals.[231]

It must be pointed out, that, even in appeals against final decisions, the Supreme Court has the power to grant departure from the rules thereby

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230. See Or.7 r.1(2) & (6) S.C.
231. See Or. 7 r. 5 S.C.

allowing the parties, instead of the Registrar of the Court of Appeal, to compile the record.[232]

Here again, failure of the appellant to take necessary steps for the purpose of compilation of the record or satisfy any other condition of appeal may be a ground for an application by the respondent for the appeal to be struck out.[233]

Brief of argument

Brief writing was introduced at the Supreme Court for the first time by the Supreme Court Rules 1977. The 1977 Rules was replaced by the Supreme Court Rules 1985 which in its Order 6 provides for compulsory brief writing except where the Court otherwise orders. In the 1999 amendment of the Rules, provision relating to brief is still contained in Order 6.

It must be pointed out that unlike the position at the Court of Appeal, compulsory brief writing at the Supreme Court is not limited to substantive appeals. It applies to applications for leave and extension of time to appeal.[234] Also, unlike the position at the Court of Appeal where 20 copies of the brief must be filed, the Supreme Court Rules provide for the filing

of only 10 copies of the briefs. The appellant in a substantive appeal at the Supreme Court must file and serve his brief within ten weeks of the receipt of the records of appeal.[235] The respondent is to file his brief within eight weeks of service of the appellant's brief.[236] The appellant may file a reply brief within four weeks of service of respondent's brief, but except for good and sufficient cause,a reply brief shall be filed and served at least three days before the date set down for hearing of the appeal. Apart from these distinctions, the principles governing brief writing at the Supreme Court and the Court of Appeal are the same. Therefore, our discussion of the subject under appeals to the Court of Appeal also applies here.

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232. See Or.7r.5 S.C

233. See Moses V Ogunlabi (1975) 4 SC 81.

234. See Ord. 6 r 2 SC.

235. See Or 6 r 5(1) SC

236. See Or 6 r 5(2) SC

Preliminary objection and withdrawal of appeal

Before the hearing, the respondent may raise a preliminary objection to the hearing of the appeal. Also, before the hearing, the appellant may withdraw his appeal. The provision of Order 2 rule 9 of the Supreme Court Rules regarding preliminary objection and Order 8 Rule 6 of the same Rules, relating to withdrawal of appeal are identical with the provisions of the Court of appeal Rules considered above on the same subjects.

Hearing and judgement

By Section 234 of the 1999 Constitution, the Supreme Court shall be duly constituted for the purpose of hearing and determination of an appeal if it consists of not less than five justices of the Court. However, where the Court is sitting to consider an appeal on question as to the interpretation or application of the constitution or on question as to whether any of the provisions of Chapter IV of the Constitution has been, is being or is likely to be contravened in relation to any person or to exercise its original jurisdiction under S232 of

the Constitution or has been invited to overrule itself, the court shall sit as a full court (not less than seven Justices).

At the hearing of the appeal, each side is entitled to one hour of oral presentation. Any request for additional time must be made to the Court in writing not later than one month after service of the Appellant's Brief on the Respondent and the request must state in clear terms the reasons why the arguments cannot be presented within the time limit.[237]

Except with the leave of court, no argument will be allowed on behalf of any party who has not filed a brief or in respect of a point not covered by a brief.[238]

Also, when an appeal is called and the parties have been dully served with hearing notices and the briefs have been filed by all the parties concerned with no application by a party or counsel to present oral argument, the appeal will be treated by the Court as having been duly argued in terms of the briefs filed even in the absence of either party.[239]

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237. See Or 6 r 8(3) SC.
238. See Or 6 r 8(5) SC.
239. See Or 6 r 8(6) SC.

The position of the law relating to the manner of delivery of judgement and the constitution of the court for that purpose under S.294 1999 Constitution, which we have considered under appeals to the Court of Appeal equally applies to appeals to the Supreme Court.

Also, our discussion as to the role of an appellate court in relation to appeals before it, under hearing and judgement at the Court of Appeal equally applies to the Supreme Court.

We only need to add that it is now well settled that the Supreme Court will not interfere with concurrent finding of the High Court and the Court of Appeal except where there is exceptional circumstances to warrant such interference. As Kalgo J.S.C. pointed out in **Odonigi Vs Oyeleke:**[240]

"It is now well settled that this Court will not disturb concurrent findings of the Courts below, unless it is shown that either they were perverse or that there was a substantial error either in the substantive or procedural law which, if uncorrected will lead to a miscarriage of justice ….. In the instant case, I do not find any special circumstance or anything to show that the findings of the Court below were perverse or contained any substantial error of law or procedure amounting to miscarriage of justice to warrant disturbing the decision of the lower Court."

Any judgement given by the Supreme Court may be enforced by it, by the Court of Appeal or by any other court which has been seised of the matter, as the Supreme Court may direct.[241]

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240 (2001) 2 SC 194 at 210.

241. Or. 8 r.17 S.C.

Questions

1. In an action between Kolawole and Coker at the Chief Magistrate Court, Yaba, Lagos, judgement was entered in favour of the plaintiff on 1/2/2004. The defendant is not satisfied with the judgement and intends to appeal against the decision. He has retained your services for that purpose.

With the aid of relevant authorities, answer the following questions:

(a) To which Court will you appeal?

What would have been your answer if the decision had been that of a District Court in Abuja?

(b) When and where will you file your notice of appeal? Would your answer be the same if the case had been by a District Court in Abuja?

(c) In order to ensure that the judgement of the Magistrate Court is not executed until the determination of the appeal, what step will you take and at what stage will you take the step?

(d) The defendant wants to know whether there is a general right of appeal in favour of every litigant against every decision of Courts of law in Nigeria. Advise him.

2. Magi has commenced an action against Riko for declaration of title to a plot of land at Bwari before the High Court of Federal Capital Territory Abuja. On 1/3/2004, the Court granted an order of interlocutory injunction against the defendant restraining him from

interfering with the land in dispute pending the determination of the suit. The defendant, who is dissatisfied with the decision, has briefed you to appeal against the decision.

(a) What is the nature of the defendant's right of appeal in this case.

(b) When and where will you file the notice of appeal?

(c) If you intend to stay further proceedings in the case pending the determination of your appeal, to which court will you direct your application?

(d) If your application is refused by the court in (C) above, what further step can you take in respect of the application?

(e) If your application is granted by the court in (C) above, what step can a respondent who is not dissatisfied take?

3(a) In an appeal to the Supreme Court, whose duty is it to compile the record of appeal?

(b) In an appeal to the Court of Appeal, where a respondent intends to retain the judgement of the High Court but wants a variation therein, what step must he take? Would your answer be the same in respect of an appeal to the Supreme Court?

(c) What is a brief of argument? Outline in sequence what a brief of argument must contain.

(d) Set out the documents that must accompany a motion for leave or extension of time to appeal at the Supreme Court.

4 (a) The appeal between Yinka and Ngozi at the Court of Appeal, Lagos was heard by Justices Kuku, Kola and Kunle. However, on the date fixed for judgement, only Justice Kola sat. He read the lead judgement written by him and the written opinions of Justices Kuku and Kunle whereby they concurred with him. The judgement is against Ngozi who intends to appeal to the Supreme Court on the ground that the Court of Appeal was not properly constituted when it delivered judgement. Advice him.

(b) Mosebolatan Nigeria Ltd is proposing to remove Raheem from his position as a Director. The action commenced by Raheem at the Federal High Court, Lagos to stop the company from removing him has been dismissed. He has appealed to the court of Appeal, Lagos. In order to ensure that he is not removed from office pending his appeal, what step can he take? Give reason for your answer.

(c) Mr. Kafo intends to appeal against the final decision of the Kano State High Court sitting as a Court of first instance on the ground that the Court has taken into consideration all the facts and circumstances of the case failed to reaching its decision. The judgement was delivered on the 31/1/2004. He has retained your services for the purpose of this appeal.

(i) For the appeal to be competent, what application would you file, assuming you were briefed on the 30th June 2004. To which Court would you direct your application and why?

(ii) What would have been your answer to (i) above if the decision of the High Court had been an interlocutory decision?

(iii) Draft the necessary prayers in (i) and (ii) above separately.

Answers

1 (a) Appeal against the decision of a Magistrate Court in Lagos lies to the State High Court Lagos State; S59 Magistrate Court Law Lagos State. Appeal in this case will be to the High court of Lagos State.

Appeal against decisions of District Courts in the North and in Abuja lies to the High Court. Therefore, if the decision had been by a District Court in Abuja, appeal would have to been to the High court of the Federal Capital Territory, Abuja. See S.32, High Court Act (Abuja) and S73 District Court Act (Abuja).

(b) The notice of appeal must be filed within 30 days of the judgement and it must be filed at the registry of the lower court. See order 3 rules 1 and 2 of the Lagos State High Court (Appeals) Rules. Therefore, the notice of appeal in this case must be filed on or before 3/3/2004 at the registry of the Magistrate Court.

If the case had been by a District Court in Abuja, the answer would still be substantially the same. This is because an appeal against the decision of a District Court must be filed within 30 days at the registry of the lower court i.e. District Court. See order 44 rule 1, High Court of the Federal Capital Territory (Civil Procedure) Rules.

(c) An appeal itself does not operate as a stay of execution and the judgement of the Magistrate may be executed not withstanding the

appeal. To ensure that the judgement is not executed an application for stay of execution pending appeal must be filed. The application may be filed at any time after the filing of the notice of appeal but before execution of the judgement. See S63 Magistrate Court Law Lagos State; order 3 rule 9 High Court of Lagos State (Appeals) Rules.

(d) There is no general right of appeal. Right of appeal is purely statutory. Therefore, a party cannot appeal against the decision of any court unless there is a specific statute creating such report of appeal. See Adigun V A.G. Oyo State.

2 (a) Under the 1999 constitution, the right of a party to appeal against the decision of a High Court to the Court of Appeal may be as of right or with leave. The right of appeal where the High Court has granted or refused an injunction is as of right. Therefore, the nature of the defendant's right of appeal in this case is as of right. See S 241 (i) f, 1999 constitution.

(b) In appeal to the Court of Appeal from decision of a High Court, time within which to appeal depend on whether the decision is interlocutory or final. If it is interlocutory the time is 14 days of the decision. If it is final, it is three months. S.25 Court of Appeal Act. The decision in this case is an interlocutory decision. Therefore, the notice of appeal must be filed within 14 days.

Notice of appeal for the Court of Appeal must be filed at the registry of the lower court. Or 3 r 2 and 5 Court of Appeal Rules. In this case, therefore, the notice of appeal must be files in the registry of the High Court of the Federal Capital Territory Abuja on or before 15/3/2004.

(c) It depends on the stage at which the application is made. If the application is made before the appeal is entered, the application may be made either to the High Court or to the Court of Appeal but it must be made first to the High Court unless there are special circumstances which under it impracticable to go to the High Court for in the first instance in which case the application may be directed to the Court of Appeal. See Order 3 v 3 (4) Court of Appeal Rules; Bashorun V Chief of Army Staff; Okotie – Eboh V Okotie-Eboh.

If the appeal has been entered, the only court with jurisdiction to entertain the application in the Court of Appeal and the application must be directed through it. See Order 1 v 21 Court of Appeal Rules; Ogunremi V Dada; Ezomo V A.G. Bendel.

(d) If the application has been made at first instance to the High Court, the applicant can file a similar or concurrent application to the Court of Appeal. However, if the application has been made at first instance to the Court of Appeal, the applicant can only appeal against the refusal to the Supreme Court. Vaswani Trading Co. Ltd V Savalakh; C.G. F.C V N .P. A.

3(a) It depends on the nature of the decision applied against. If the appeal is against a final decision, it shall be the duty of the Registrar of the Court of Appeal to compile the records upon payment of requisite for by the appellant. On the other hand, if the appeal is against interlocutory or any of the decisions mentioned in order of the Supreme Court Rules, it shall be the duty of the appellant to compile the record of appeal. Order 7 of the Supreme Court Rules.

(b) According to Order 3 rule 14 of the Court of Appeal Rules, where a respondent who has been served with notice of appeal intends to retain the judgement a appealed against but wants a variation therein or intends to contend at the hearing that the judgement be affirmed on grounds other than those relied upon by the lower court, he must file a respondent's notice. See Ali V Otanioku.

Provisions similar to the above were contained in the 1985 Rules of the Supreme Court but were omitted in the 1991 amended Rules.

Therefore, a respondent who intends to vary the judgement on appeal to the Supreme Court can only come by way of a cross appeal. Akpan V Otong (1996).

© A brief of argument has been defined as a succinct statement of the preposition of law or facts or both which a party or his counsel wishes to establish at the appeal together with reasons and authorities which can sustain them. Mordi V Kwentoh.

A brief of argument must contain the following: the court in which the appeal is to be argued, the appeal number, parties to the appeal, title of the brief i.e. Appellant " Brief or Respondent" brief, the table of contents, introductory statement, statement of facts, issues for determinations, legal arguments, summary or conclusion, list of

authorities cited in the brief, signature and the capacity of the author and address for service.

Archbold Engineering Ltd V Water Resources Hydro Technique A.G.

(d) A motion for leave or extension of time to appeal at the Supreme Court must be accompanied by the following documents: the affidavit in support, certified copy of the judgement of the Court of Appeal, certified copy of the trial court, proposed notice of appeal containing arguable grounds of appeal, certified copy of the ruling of the Court of Appeal if a similar application has been made to that court and a brief of argument. Order C rule 2 S.C Rules.

4 (a) For the purpose of hearing an appeal, the Court of Appeal must be constituted by at least the justices of that court. S 247, 1999 constitution. However, for the purpose of delivering its judgement, the court may be constituted by a single justice who will deliver the written opinions of the other justices who heard the appeal. S 294 (4), 1999 constitution.

Therefore, the Court of Appeal in this law was validly constituted when it delivered judgement and an appeal on this ground cannot succeed.

(b) In order to ensure that Raheem is not remained pending his appeal, the only proper application for aim to file is for an injunction pending appeal. The reason is that a plaintiff whom claim has been dismissed or struck out and who intend to preserve the or maintain the status quo pending an appeal by him cannot apply for stay of execution as there is nothing to stay. A defendant in whose favour the judgement is given in such a case has

nothing to execute unless he has a counter-claim before the court and judgement is given to him on such counter-claim.

The only application in the circumstance is an application for an injunction pending appeal.

Shodehinde V Registered Trustee of Ahmadiya Movement In Islam, Okafor V A.G. Anambra State.

© (i) An appeal against a final decision of a High Court of sitting as a Court of first instance, whether on grounds of law or fact is as of right. There is no need to apply for leave to appeal. S 241, 1999 constitution.

However, such appeal must be filed within three months of the judgement on S 25 Court of Appeal Act. Once this period has expired, an order of extension of time within which to appeal is necessary for the appeal to be competent. Application for such an order must be made to the Court of Appeal which is the only court with jurisdiction to entertain such application. The High Court lacks the jurisdiction to entertain the application. Mobil Oil V Agadaigbo.

In this case, since three months have expired, an application for extension of time within which to appeal is necessary and the application must be directed to the Court of Appeal.

(ii) An appeal against an interlocutory decision of a High Court may be as of right or with leave. It can be as of right only where the grounds of appeal are grounds of law alone. Where the grounds of appeal are of mixed law and fact or facts appeal can only be with leave. SS 241 and 242 of the 1999 constitution. Ogbechie V Onochie.

Any appeal against an interlocutory decision of the High Court to the Court of Appeal must be filed within 14 days of the judgement. S25

Court of Appeal Act. Where the time has expired, an order of extension of time is necessary for the appeal to be competent and it is only the Court of Appeal that can grant such an order. Mobil Oil V Agadaigbo.

In this case, the grounds of appeal contending that the High Court had not taken into consideration all the facts and circumstances of the case can only be grounds of fact or at grounds of mixed law and fact. An interlocutory appeal on such ground enquired leave.

Since 14 days have expired, there is also the need for an order of extension of time.

In this case, where there is need for leave and the time to appeal has expired, only the Court of Appeal has expired, only the Court of appeal can grant leave and extend the time to appeal. Mobil Oil V Agodaigbo.

(iii) The prayer in (i) above

An order for extension of time within which to appeal.

The prayers in (ii) above

(i) An order for extension of time within which to apply for leave to appeal.

(ii) An order for leave to appeal.

(iii) An order for extension of time within which to appeal.

See for the two instances Odofin V Agu.