APPELLATE JURISDICTION OF NIGERIAN COURTS IN CIVIL MATTERS

BY

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LL.M. THESIS 1997

D E C L A R A T I O N

I hereby declare that this project has been produced by me by virtue of my own research work. It has not been presented in any previous application for a higher degree by anybody. All quotations and references are indicated in the footnotes and sources of information are duly acknowledged thereat.

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1997

C E R T I F I C A T I O N

This thesis entitled:- APPELLATE JURISDICTION OF NIGERIAN COURTS IN CIVIL MATTERS by ABDULLAHI USMAN meets the regulation governing the award of the Degree of Masters of Law at Ahmadu Bello University, Zaria and is approved for its contribution to knowledge and literary presentation.

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D E D I C A T I O N

This study is dedicated to the Law Teachers, Legal Researchers, Legal Practitioners and Judges who give their contributions towards enriching teaching of Law and making its practice more relevant to suit the needs of the people.

A C K N O W L E D G E M E N T

With most and profound gratitude to the Almighty Allah for giving me the ability to write this thesis.

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A B S T R A C T

The majority of appellants and some appellat courts are ignorant or oblivious of the proper rules of appeal as a result of which a lot of injustices and caprices are associated with appeals; leading to the miscarriage of justice. It is in view of this that the topic of this thesis, namely, "Appellate Jurisdiction of Nigerian Courts in Civil Matters, has been chosen.

This study is to present and analyse the nature and extent of the practices and proceedings of appeals in our courts in sivil matters and to show the need for the impartial application of the rules of appeal with the hope that justice would be duly administered to all parties concerned in accordance with the provisions of the law applicable to appeals with the view of avoiding miscarriage of justice$_0$

The study is composed of six chapters. Chapter one is an introduction consisting of nature of appeals, objectives and scope of the thesis as well as the method of approach adopted.

Chapter two discusses civil appeals in the Upper Area Court which include the historical background of the court, its appellate jurisdiction and procedural matters with regard to appeals in the court. The chapter will also look into civil appeals in the customary Court of Appeal and discuss, generally, application of Customary Law, Historical background of the Courts, its appellate jurisdiction and constitution as well as procedures on appeal to the courto

Chapter three examines civil appeals in the High Court and the Sharia Court of Appeal. With regard to the High Court, there will be a brief historical outline of the court, its applicable legislation in respect of appeals, procedure for appeals, how additional evidence will be entertained and the powers of the court. Furthermore, the chapter will deal with brief history of the Sharia Court of Appeal, the applicable legislation, appellate jurisdiction of the court and the procedure for appeal.

Chapter four is entirely devoted to examination of civil appeals in the court of Appeal and it includes a historical outline of the court, the applicable legislation, appellate jurisdiction, appeals as of right and appeals with leave. Other areas of

discussion in the chapter include statutory exclusion of jurisdiction, coram, jurisdiction to grant interlocutory relief, the "entering" of appeals, conditions and procedure of appeals, powers of the court as well as judgment and orders.

Chapter five expounds civil appeals in the Supreme Court. This includes historical background of the court, applicable legislation, its appellate jurisdiction, commencement of proceedings, Notice of appeal, right of appeal, appeal with leave, appeal out of time, record of appeal, filing of briefs, jurisdiction pertaining to interlocutory decision, jurisdiction with regard to final decision, conditions and procedure of appeals, powers of the Supreme Court as well as orders and reviews.

Chapter six concludes the thesis by giving a brief summary of what has been discussed in the rest of the chapters, some observations with regard to application of the rules of appeal and, thus, suggestion proferred with the hope that the rules of appeal would be duly applied in that spirit of impartiality which it requires in order to avoid miscarriage of justice and misuse of judicial powers.

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CHAPTER ONE

1.0 INTRODUCTION:

In this chapter, we shall examine the nature of appeals in civil matters in Nigerian Courts, objectives and scope of the study as well as the approach adopted in writing the thesis.

1.1 Nature of Appellate Jurisdiction:

Appeals in civil matters deal with proceedings in which no one is accused of any offence. Thus, any party who is not satisfied with the decision of the court below in civil proceedings may lodge a complaint at an appeal court and the prospective appellant must come within the provisions of the statute creating the appeal otherwise the appeal will not be entertained. It is, therefore, the duty of the appellant to comply with the conditions for the exercise of the right of appeal and also the burden is on him to show that the decision of the Lower Court is wrong.[1]

An appellate court hearing an appeal in civil matters may reverse, vary or confirm the decision of the court below. Similarly, in the exercise of its appellate jurisdiction, the appellate court has the discretion to re-hear the whole case or not and it

has power to make any order which the trial court might have made as well as the power to substitute any order which it considers appropriate as the justice of the case demands. Further, the appellate court may quash the proceedings of the court below and order a fresh hearing before the trial court or before any other court of competent jurisdiction.[2]

However, it must be emphasised that an appeal court is not a trial court and, therefore, it is not the business of the appellate court to reopen disputes. Thus, the duty of the court is to see whether the courts below have used correct procedures with a view to arriving at the right dicisions.[3]

In the case of Victor Woluchem & Ors. V. Chief Gudi & Ords. where Nnamani, J.S.C. succinctly explained how an appeal court would interfere with the findings of the court below and said:-

> ... It is now settled law that if there has been a proper appraisal of evidence by a trial court, a court of appeal ought not to embark on a fresh appraisal of the same evidence in order merely to arrive at a different conclusion from that reached by the trial court. Furthermore, if a court of trial unquestionably evaluates the evidence, then it is not the business of a Court of Appeal to substitute its own views for the views of the trial court.

Thus, from the above quotation, it is very clear that once a trial court considers the totality of the evidence adduced by the parties and decides the case upon the preponderance of credible evidence, then an appeal court will not interfere with the findings of the lower court. In other words, the rule is that in a situation in which a lower court, in deciding an issue, evaluates the facts given in evidence by the parties and puts the two sets of facts on an imaginary scale, weigh one against the other, then decide upon the evidence that carries more weight and then apply the appropriate law to it bearing in mind the cause of action. In this respect, an appellate court has no business to appraise the evidence adduced or to distort the findings of fact of the lower court or to substitute its own views for those of the trial court.[4]

This is in view of the fact that a trial court has the opportunity to assess witnesses, form impression about them and evaluate their evidence in the light of the impression which the court forms of them. The appeal court, therefore, examines the grounds that led to the conclusions reached by and the inferences that have been drawn from such conclusions of the trial court and then decide whether or not the judgment appealed against is against the weight of evidence. But it is to bear in mind that where a point of consideration borders on the credibility or reliability of witnesses, the proper course to be taken by an appeal court is to make an order for a retrial.[5]

An appellate court, therefore, should disturb or interfere with the finding of the trial court where it is satisfied, on the evidence before it, that the finding is wrong, and could not ordinarily have been based on the evidence which would lead to a miscarriage of justice.[6] That is to say that it is only where the necessary finding has not been made and there is evidence on the record, can the appeal court exercise its appellate jurisdiction and make its own findings.[7]

However, it would amount to a misuse of judicial power for an appellate court to raise an issue which the parties have not raised,[8] just because it is material for the determination of the appeal before it - although, in the interest of justice, the parties to the appeal may have been given an opportunity to argue the point before any decision is taken.[9]

It is important to bear in mind that where there is no appeal against the findings of fact by the trial court, then the appellate court cannot evaluate any findings of facts made by the trial court because where a party does not appeal against the specific findings of fact of a trial court, it means that there is no issue before the appellate court and such a party cannot be heard to challenge the findings of fact so made.[10]

This is in view of the fact that it is a well settled rule that it is presumed that the judgment of the trial court is correct and the burden of showing the contrary is always on the appellant,[11] and if there is no appeal the presumption cannot be rebutted. It is really not the function of an appellate court to create dispute for the parties but rather to

adjudicate on disputes properly submitted in accordance with the Rules or Practice of the court.

It will, therefore, amount to judicial rescality for an appellate court to close its eyes to the express provision of the law with regard to the proceedings before it. Thus, it is very essential for an appellate court to fulfil all the conditions that make the exercise of its jurisdiction valid. This means that for an appellate jurisdiction the following conditions must be fulfilled:-

(a) The court must be properly constituted with regard to numbers and qualifications of Judges and none of them is disqualified due to one reason or another;

(b) The case before the court is initiated by due process of law;

(c) The subject matter of the case is within the jurisdiction of the court and there is no provision of the law or an element in the case that ousts the jurisdiction of the court and

(d) The court must fulfil any condition precedent to the exercise of its appellate jurisdiction.[12]

It is very important to emphasise that it is of the essence of the appellate structure in our legal system that the parties to the appeal must come within the provision of the statute creating the appeal and an appellate court must exercise its jurisdiction according to the terms and conditions laid down by the statute. This is in view of the fact that all appeals in civil proceedings exist solely by statute and an appellate court determines an appeal in accordance with express provisions of the law.

1.2 OBJECTIVES OF THE STUDY:

This thesis is a study of appellate jurisdiction of Nigerian Courts in civil matters and the following objectives are to be looked into:-

(a) To explain the nature and objectives of appeals according to the appellate structure of the Nigerian Legal System with a view to enabling the reader to understand and evaluate the laws and rules governing appeals so that parties to an appeal should endeavour to comply with the provisions of the statute creating the appeal.

(b) To discuss in detail how courts in Nigeria exercise appellate jurisdiction in civil matters starting with the state appellate courts, namely the Upper Area Court, the Customary Court of Appeal, the Sharia Court of Appeal and the High Court. At the Federal level there are the courts of Appeal and the Supreme Court. This is to show how the courts are hierarchically graded in determining appeals and the weight their decisions carry on the Lower Courts.

(c) To analyse the provisions governing appeals in Nigerian Courts and to see to what extent the provisions are complied with or violated by both the courts and parties to the appeal.

(d) To explain how to remedy some inadequacies in the appellate structure of our courts and suggest ways of improving upon the structure so that justice will be administered in the spirit of impartiality in accordance with the provisions governing appeals in order to avoid miscarriage of justice.

Thus, it is very important for people particularly parties to appeals to understand the principles applicable

to appeals so that they will be able to exercise their rights of appeal in accordance with the provisions of the statute creating the appeal as well as the appellate courts to make sure that they fulfil all conditions precedent to the exercise of their appellate jurisdictions in order not to defeat the obvious ends of justice and making its practice more relevant to suit the needs of the people.

1.3 THE SCOPE OF THE STUDY:

The scope of this study pertains to detailed analyses of appellate jurisdiction of Nigerian Courts in civil matters. These include the detailed explanation of the nature of appeals and the appellate structure of Nigerian Courts, namely, the Upper Area Court, the Customary Court of Appeal, the Sharia Court of Appeal, the High Court, the Court of Appeal and the Supreme Court.

With regard to the respective jurisdiction of the appellate courts, the applicable legislation, constitution of the courts, procedural matters for appeals, conditions precedent to the exercise of their appellate jurisdiction, powers of the courts and other essential matters relating to appeals are discussed.

It is important to point out that Nigerian Courts exercising appellate jurisdiction in civil matters are hierarchically graded in the sense that the higher a court stands in determining appeals, the greater is its authority and the weight of its decision is binding on the Lower Court. However, an analysis of the Doctrine of Judicial Precedent is not within the scope of this study.

1.4 THE APPROACH:

The method of Approach of this research programme involves a lot of discussions, collection of data and facts as well as tremendous application of decided cases.

Thus, in my efforts to collect relevant data and facts as well as to understand the behavioural dimensions of the roles that people like judges, lawyers, judicial officers and parties to appeals play with regard to appellate structure in our legal system with particular reference to civil matters; in this regard, we have conducted research, interviews and practically observed the peculiarities of the exercise of each court's appellate jurisdiction.

We have also explained, in detail, the provisions governing appeals as stated in the statute and almost all views and principles enunciated in the thesis are supported with textual and legal authorities.

The major emphasis of this study is to make a significant contribution to the development of legal and judicial system with a particular reference to appellate structure in our court system. This is in view of the fact that law being an instrument of social change which must keep pace with a progressive modern society as well as taking into consideration the prevailing social and political circumstances in our society, we have had some discussions with legal scholars Judges, Lawyers, Judicial Officers and some other people in their respective specialised fields who have provided some materials for the thesis and, thus, enable us to give our contribution towards making appellate structure in our courts more relevant to suit the needs of the people.

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C H A P T E R T W O

2.0 CIVIL APPEALS IN THE UPPER AREA COURT:

Under this chapter, we shall examine the historical background of Upper Area Court, its appellate jurisdiction, procedural matters partaining to appeals in the court as set out in the Area Courts Edict 1968 and the Area Courts (Civil Procedure) Rules 1971.

2.1.0 Historical Outline:

Upper Area Courts operate mainly in the Northern States of Nigeria and have appellate jurisdiction with regard to appeals from Area Courts. However, formerly the courts were known and called Native Courts of Appeal. The appeal system in the Native Courts was enhanced by virtue of the Native Courts Ordinance of 1933[1] which empowered the Resident, with the approval of the Governor, to establish a Native Court by warrant to be a court of appeal in order to hear appeals from native courts located in his province. A further appeal lay to a Head Chief's Court which was designated as a final native court of appeal except if otherwise directed by the Governor.[2]

Therefore, any aggrieved party who was not satisfied with the decision of a native court could, within thirty days, appeal to a native court of appeal or to a final native court of appeal, as might be directed by the warrant establishing the court. This means that no appellate authority other than a native court of appeal could hear an appeal from a native court decision with regard to marriage, guardianship of children, family status, inheritance, testamentary disposition of administration of an estate. But the Governor had the power to direct otherwise in the native court's warrant.[3]

It is important to point out that the provisions of the 1933 Native Courts Ordinance relating to appeals established a series of complicated systems of appeal. For instance, there were Grade A Courts and Final Native Courts of Appeal otherwise called as Emir's Courts and Courts of Appeal designated as Chief Alkali's Courts.

The system of appeal, as shown above, provided that from District Alkali's Court, an Appeal would lie to the Chief Alkali's Court and further appeal to the Emir's Court which would be final.

However, from the Chief Alkali's Court sitting at first instance appeal would lie to the Supreme Court as would appeal from the Emir's Court. But when exercising his appellate jurisdiction, appeal would lie to the District officer. Similarly, where the appellate court was B or less, usually appeals from original and appellate jurisdictions lay to the District Officer.

The above system of appeal operated mainly in the Muslem predominant areas of the North. On the other hand, in the non-Muslem areas, appeal usually lay to the District Officer, whether or not it came from the native court of appeal. It is to bear in mind that the main aim of the above systems of appeal was to provide the litigants with sources of redress against unjust native courts' judgments which they could avail themselves, in addition to the discretionary remedies of transfer and review.[4]

In 1956, the Native Courts Law[5] was enacted and, as a result, the complicated systems of appeal under the 1933 Ordinance were simplied.

Thus, appeals from Grades C and D courts and some selected Grade B Courts, lay to a native court of appeal. Appeals from the Native Court of Appeal as well as appeals from Grades A and A limited courts in cases governed by Muslem law lay to the Muslem Court of Appeal and all other cases to the High Court.

In 1960 by virtue of the Native Courts (Amendment Law) 1960[6] the appeal system was changed. Thus, the Native Court of Appeal was now under the High Court and for the purpose of hearing an appeal, there should be two High Court Judges and a Sharia Court Judge. Any of the Judges who had the greatest knowledge of the law to be administered in the case should preside. This was called the Provincial Court system with the Native Courts having appellate jurisdiction. The courts being under the Regional Government were set up with the aim of ensuring impartiality in the hearing of appeals from native courts of lower grades.

By virtue of the Area Court Edict 1968,[7] all the native courts in the Northern States were abolished and the Chief Justices of the states under their respective Area Courts Edicts established

new Area Courts under the control of the High Courts. Moreover, the states (Creation and Transitional) Provisions Decree 1976[8] with particular reference to the Area Courts Edict applicable in the Northern States provides as follows:

> Area Court means a court established under or in pursuance of this Edict and shall include an Upper Area Court. 9

The above cited provision means that an Upper Area Court is the highest court in the line of Area Courts and the court hears appeals from Area Courts Grade I, II and III within its appellate jurisdiction.[10]

Furthermore, the court has unlimited jurisdiction for it entertains appeals in all civil causes and matters involving questions of debt, inheritance or succession of property, ownership, possession or occupation of land, administration of estates, marriage, divorce including issues relating to custody of children, etc. However, appeals from the court lie to the Sharia Court of Appeal in matters pertaining to Islamic Law of Personal Status and the High Court in all other cases.[11]

2.1.1 Appellate Jurisdiction:

According to the provisions of the Area Courts Edict, 1968, under part ix, an Upper Area Court in the exercise of its appellate jurisdiction, shall entertain appeals from Area Courts Grade I, II, and III having jurisdiction in the Area in which such area courts are situated.[12] This means that any party aggrieved by a decision or order of an Area Court may appeal therefrom to the Upper Area Court within whose jurisdiction the lower Court is situated.

Part II of the First Schedule to the Area Courts Edict provides for the jurisdiction of the Upper Area Court in causes and matters relating to native law and custom with regard to marriage, custody of children, succession to property and administration of estates as well as matters concerning the ownership, possession or occupation of land. In all these civil causes and matters, the appellate jurisdiction of the court is unlimited.

It is worthy of note that the main concern of an appeal court is to look into the way in which the trial court has tried and decided the case and to determine whether substantial justice has been done in that respect.[13] This is to avoid situation in which area courts will be incapacitated merely by their failures to observe procedures at the expense of justice.

The cardinal principle is that once there is no miscarriage of justice in the decision or order of the court below, the Upper Area Court is not expected to interfere with the proceedings of the lower court on appeal. However, it is important to emphasise that where it is shown that the Judge of the lower court has an interest in the case he decided, the proceedings are invariably a nullity because there is every possibility that substantial justice could not be said to have been done.[14]

It is also important to bear in mind that before an Upper Area Court exercises its appellate jurisdiction, the court must fulfil any condition precedent to the exercise of its appellate jurisdiction, for instance, any appeal that comes

before it, must be initiated by due process of law; the subject-matter of the case is within its jurisdiction and there is no feature in the case that ousts the jurisdiction of the court. Moreover, the court must be properly constituted and no Judge or Judges of the court that are disqualified for one reason or another. These are the essential conditions for an appeal court which must be fulfilled before there is a valid exercise of jurisdiction.[15]

2.1.2 Procedural Matters:

The Upper Area Court approaches appeals from Area Courts in the light of native law and custom applicable in the court of trial, provided the principles of such native law and custom have not been abrogated by an order or rule of procedure.[16]

Generally, therefore, the time for appeal in civil matters is thirty days. The practice being adopted is that when a party is aggrieved by a decision or order of any Area Court, he may give notice of appeal either in the lower court or

appeal court. It is also allowed for a prospective appellant to give oral notice of appeal in open court or in writing to the registry of the lower court within the prescribed period.

The Registrar of the lower court, in this respect, shall notify the Registrar of the Upper Area Court in the Judicial Division in which the Area Court is situated and copies of proceedings of the case on appeal shall be prepared and sent by the Registrar of the lower court to the Registrar of the appeal court after the appellant has paid all the necessary fees. The Registrar of the Upper Area Court, therefore, shall notify all the parties in the appeal of the time and place the appeal shall be heard.

It is to bear in mind that both the provisions of the Area Courts Edict and the Area Courts (Civil Procedure) Rules are silent with regard to the procedure for giving notice of appeal as well as not specifying the action to be taken by the Registries of both lower and appeal courts. This is a very serious lacuna in the provisions of the laws which ought to be rectified so that an appellant may know the proper steps to be taken when prosecuting

his appeal which should be in accordance with prescribed laws.

However, there is a provision in the Edict providing for leave to appeal out of time to any court upon such terms as the courts shall seem proper.[17] Thus, applications for leave to appeal out of time may be entertained upon reasonable grounds being shown. Although section 57 of the Edict does not say whether or not notice is required, the rule of natural justice, audi alteram partem must be taken to apply unless excluded by the statute. But it is pertinent to state that the grant of leave to appeal out of time after inordinate delay and without adducing any convincing reason for an appeal court to reopen a case after about ten years of a lower court's decision would amount to an apparent misuse of judicial power.[18]

Order 1 rule 1 (3) of the Area Courts (Civil Procedure) Rules, 1971 provides for the use of native law and custom in procedural matters in the exercise of appellate civil jurisdiction by the Upper Area Court. Similarly, Order xi, Part 1 of

the Rules provide that the Upper Area Court shall continue to hear a case on appeal in accordance with Moslem practice and procedure as it was administered or applied in the lower court. But non-Muslem cases on appeal to the court shall be heard according to the applicable law and procedure thereto if the court is satisfied that no injustice will result.

According to section 54 of the Edict, it is provided that appeals will lie from a decision or Order of an Upper Area Court to the Sharia Court of Appeal in cases involving questions of Muslem personal law and to the High Court in all other cases.

Therefore, when appealing against a decision or order of the Upper Area Court to the High Court, the appeal shall be brought by notice of appeal which shall be lodged in the lower court within thirty days of the decision appealed from and all parties concerned by the appeal shall be served within that period.[19]

But with regard to the Sharia Court of Appeal, every appeal from the Upper Area Court shall be entered in the registry of the Sharia Court of Appeal nearest to the lower court and the Registrar of the appeal court shall send notice of appeal to the

court below,[20] and every appeal shall be entered within thirty days from the date of the Order or decision appealed against.[21]

2.1.3 Powers of the Court:

In reviewing or deciding a case on appeal from an Area Court, the Upper Area Court is empowered to examine the record of proceedings of such court relative to the matter on appeal before it.[22] But the court should not upset or vary the proceedings of the court below solely by reason of defective procedure or process. In otherwords, no proceedings, process or decree issued by the lower court shall be varied or declared void merely on the basis of any defect in procedure or want of form. A corollary to the above principle is that the court shall decide all matters on appeal from Area Courts according to substantial justice without undue regard to technicalities.[23]

Thus, where the court is exercising its appellate jurisdiction in civil matters, after rehearing the whole case or not, it may reverse, vary or confirm

the decision of the lower court from where the appeal is brought. In this respect, the Upper Area Court has the discretion to make any such order or exercise any such power as it deems appropriate.[24] However, it is important to point out that this power given to the court is very wide in the sense that it is not defined in terms of money value of the cause.

With regard to the power of re-hearing a case as given to the court, it means that the court may re-hear the case by considering the record of the court below or by hearing all the evidence of each side. However, it is important to emphasise that the re-hearing is limited to the original case and, when taking evidence, generally speaking, no additional or different evidence is allowed. Moreover, where it is necessary to take evidence of witnesses again, they should be the same witnesses who testified at the trial and all of them should be heard.[25] This means that the court is not allowed to hear some of the witnesses and to rely for the rest of the evidence on the record.

Thus, it is to bear in mind that the duty of the appeal court is to see whether the trial court has used correct procedures in arriving at a decision. That is to say that the concern of the court is to inquire into the way in which disputes have been tried and decided. Therefore, where a court of trial unquestionably evaluates the evidence and appraises the facts, it is not the duty of an appeal court to substitute its own views for the views of the trial court.[26]

However, where the proper findings have not been made by an area court, the Upper Area Court may quash the proceedings of such Area Court if it is considered desirable and order a retrial of such a case before the court of first instance or before any other court of competent jurisdiction.[27] The effect of ordering a trial is to hear the case afresh and from the beginning and any witness could be heard.

But the court should have good reason before ordering the retrial. For instance, a retrial may be ordered by the court where it is of the opinion

that there is an issue that affects the credibility of the witnesses that makes the decision of the lower court not sustainable.[28] On the other hand, it is well settled that according to the administration of justice in our legal system that the hearing of an appeal does not permit an appeal court to enquire into disputes, but to inquire into the ways the disputes have been tried and settled. Thus, the court should be very cautions in ordering a retrial merely because there is additional evidence to be heard, except that if it is of the opinion that such evidence could not, by reasonable diligence, have been adduced at the trial.[29]

Moreover, where an appeal court correctly admits additional evidence and it is of the opinion that the trial court might have reached a different decision if it has heard that evidence, in this respect, the court should not reverse the decision but order a retrial.[30] This means that in a situation in which an Upper Area Court had admitted additional evidence which if it had been admitted initially by the trial court, the decision arrived at by the latter would have been different and, thus, the Upper Area Court should order a retrial of the case before the trial court or before another area court of competent jurisdiction.

2.2.0 Civil Appeals In The Customary Court Of Appeal:

Generally Speaking, the word 'Law' is defined as the body of rules which are recognised as obligatory by members of a given community. A custom, therefore, is a rule which has obtained the force of law in a particular district as a result of long usage.[31] Thus, section 82 of the Customary Courts Law of the Eastern Region[32] expatiates as follows:-

> Customary Law means a rule or body of rules which obtains and is fortified by established usage and which is appropriate and applicable to any particular cause, matter, dispute, issue or question.

From the above definition, it would be clear that a custom would not obtain the force of law until it is established among the members of a particular community. That is to say that customary law is the established body of rules which have always been observed by a particular community and its supposed antiquity is the basis for its authority. But in most cases the law is more adaptable in a rapidly changing society than codified or case law in that judges applying the law take cognisance of

the prevailing circumstances and do away with past judgments which are unsuited to modern problems.[33] In other words, the law is flexible and it is almost always guided by motives of expediency which shows its unquestionable adaptability to altered circumstances but its individual characteristics are, in most cases, unaffected.[34]

With the above brief background of customary law, we are now in a better position to appreciate the main functions of the Customary Court of Appeal of a state particularly its appellate jurisdiction. Under this section, therefore, we shall discuss the historical background, albeit briefly, of the court, its appellate jurisdiction and constitution as well as procedures on appeal to the court.

2.2.1 Historical Outline:

The Western Region (which comprises Oyo, Osun, Ondo, Ogun, Edo and Delta States) and the Eastern Region (which includes Anambra, Enugu, Imo, Abia, Cross River, Akwa-Ibom and Rivers States) had statutory courts known as Customary Courts.

In the former Western Region, the Customary Courts Laws[35] established four grandes of Customary Courts, namely: A.B.C. and D. According to the provisions of the law, all Grades A and B Courts were to be presided over by legal practitioners and the courts had appellate jurisdictions in civil and criminal matters. Appeals lay from the decisions of any Customary Court not presided over by a legal practitioner to the Grade A Courts or Grade B Courts designated as Customary Courts of Appeal. Appeals from the decisions of these courts lay to the High Court.

In 1959 three classes of Customary Courts were established namely, Grades A, B and C Customary Courts.[36] Appeals from a Grade C Customary Court and a Grade B Customary Court not presided over by a legal practitioner lay to a Grade A Customary Court which had appellate jurisdiction.[37] But appeals from a Grade B Court presided over by a legal practitioner and from a Grade A Court lay to the High Court.[38]

However, by virtue of the Customary Courts Edict of 1973[39] the Customary Courts law with regard to the Western States was repealed and a

single grade of Customary Courts was established and appeals from this court lay to the Magistrate's Court from where appeals lay to the High Court.[40] But it is to bear in mind that this class of single grade of Customary Courts were established outside the city of Lagos.

It is important to point out that with the creation of states in 1966, the Mid-Western State was created from the Western Region and the Customary Courts Edict of 1966[41] of the Mid-Western State replaced the customary courts law with regard to Mid-Western Nigeria. The Edict established a single grade of customary courts with very little jurisdiction and powers. However, by virtue of Customary Courts (Abolition) Edict of 1973[42] all customary courts were abolished in the state.

The Customary Courts Law, 1956[43] of the Eastern Region established the Customary Courts in that part of the country. The law established two types of customary courts styled as District Courts and County courts. Appeals were to lie from the former to the latter. However, the Military Governor of Eastern Nigeria (comprising East-Central, South-Eastern and Rivers States) made an Edict known as the Customary

Courts (No. 2) Edict of 1966[44] which provided for the establishment of District Courts and Customary Courts of Appeal which was presided over by a legal practitioner and appeals from the decisions of a District Court lay to the Customary Court of Appeal and the decisions of the latter on appeal lay to the High Court of each of the three states.

In 1969, the South Eastern State Government made an Edict cited as the Customary Courts Edict, 1969 which repealed the Customary Courts (No. 2) Edict of 1966 with respect to the state. The Edict provided for two classes of Customary Courts, namely, Customary Courts of Appeal and District Courts. But many of the provisions relating to Customary Courts of Appeal had been modified and transferred to the Magistrate's Courts. Thus, appeals lay from the decisions of District Court to a Magistrate's Court acting as a Customary Court of Appeal from where appeals lay to the High Court.[46] With regard to the East Central State, however, the Customary Courts were abolished by the Magistrates Courts Law (Amendment Edict, of 1971[47] and section 43 (1) of the

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law provided that the Magistrates' Courts were required to administer the Customary Law prevailing in the area of jurisdiction of the courts or the law binding between the parties.

Generally speaking, the Customary Court systems have been reformed especially with regard to the control and supervision of the courts as well as their appellate jurisdictions. Thus, the 1979 Constitution (as amended) permits any state that requires a Customary Court of Appeal for the state to establish one[48] and such a court, when established, shall exercise appellate and supervisory jurisdiction in civil proceedings involving questions of customary law only.[49]

Moreover, the House of Assembly of a state that establishes the Customary Court of Appeal has been empowered to make laws for the exercise of the court's appellate jurisdiction in civil matters.[50] But in the absence of the House of Assembly the Judicial Advisory Committee may prescribe laws for the court.[51]

2.2.2 Appellate Jurisdiction

The appellate jurisdiction of a Customary Court of Appeal of a state is set out in section 247 (1) of the 1979 Constitution which provides that the Court "shall exercise appellate and supervisory jurisdiction in civil proceedings involving questions of Customary Law." This means that a State Customary Court of Appeal does not have original jurisdiction in civil proceedings involving questions of Customary Law nor does it have the power to exercise any appellate, original or supervisory jurisdiction in criminal causes or matters for such jurisdiction will be contrary to the provisions of the Constitution.[52]

However, reading sub-section (1) of section 247 conjunctively with section 247 (2) of the 1979 Constitution, the question that readily comes to mind is: Would it be proper to say that sub-section (2) has given a State House of Assembly power to enlarge the jurisdiction given in sub-section (1)? For the purposes of clarification on this issue, we provide section 247(2) as follows:-

> (2) For the purposes of this section, a Customary Court of Appeal of a state shall exercise such jurisdiction and decide such questions as may be prescribed by the House of Assembly of the State for which it is established or by the Advisory Judicial Committee.

Before answering the above question, it is very important to emphasise that when interpreting constitutional provisions conferring a right of appeal that should be done in a liberal manner,[53] and such provisions cannot be read in isolation where they are qualified by some other considerations.[54] Therefore, the interpretation should be done with a view to giving them their ordinary and natural meaning in order to implement the intention of the legislature.[55]

Thus, the clear interpretation of sub-section (2) is to give the Customary Court of Appeal of any state appellate and supervisory jurisdiction in respect of Customary Law in civil matters only. This shows that the power granted the State House of Assembly or the Advisory Judicial Committee to make laws for the court in sub-section (2) is limited to the jurisdiction granted in sub-section (1) of section 247 which is very definite, categorical and unambiguous. The state legislature therefore, cannot go beyond the limits

of its legislative powers to make provision for appeals as of right in matters contrary to what sub-section (1) prescribes. In other words, any law made by the state legislature which is contrary to what has been prescribed in sub-section (1) is, doubtlessly, inconsistent with the provisions of the constitution and, consequently, null and void.

2.2.3 Constitution of Customary Court of Appeal:

A state that establishes a Customary Court of Appeal is empowered, according to the 1979 Constitution, to prescribe the number of Judges for the court for the purpose of exercising its appellate jurisdiction.[56] Thus, the question to ask is:- Would the court be properly constituted if it had a single Judge sitting as Customary Court of Appeal of a State? To answer this question, it is worthwhile to look at the provision of section 248 of the Constitution which is provided as follows:-

> 248, for the purpose of exercising any jurisdiction conferred upon it by this constitution or any law a Customary Court of Appeal of a state shall be duly constituted if it consists of such number of Judges as may be prescribed by law for a sitting of the court.

From the above Constitutional provision, apparently, a state could enact a law with regard to the number of Judges who would duly constitute the court for the purpose of exercising the court's appellate jurisdiction irrespective of whatever number prescribed. But on broader and wider interpretation of the section with a view to implementing the intention of the legislature, the section had intended a minimum of two or more Judges to sit in a Customary Court of Appeal before it could be properly constituted. That is to say that a single Judge sitting as Customary Court of Appeal of a State cannot duly constitute the court.[57]

The above assertion would be clearer when one reads section 248 along with section 243 of the 1979 Constitution. It is obvious that section 248 empowers the state legislature to make laws with respect to the number of judges that would make a Customary Court of Appeal properly constituted whereas section 243 provides a minimum number of two Judges (Kadis) below which the Sharia Court of Appeal could not be properly constituted.

According to sections 214, 232 and 248 of the Constitution, all the superior courts of record as established under section 6(5) should consist of more than one Judge when exercising appellate jurisdiction. Therefore, it must be the intention of the constitution to make a Customary Court of Appeal to consist of more than one Judge.

In other words, a provision in a constitution cannot be read independent of other incidental considerations[58] and it is clear from the provisions of the Constitution that the superior appellate courts of record be multi-members courts and obviously the Customary Court of Appeal cannot be an exception in this respect.

Therefore, for the reasons that the Constitution is an organic scheme to be dealt with as an entirety and to be interpreted liberally, the phrase "such number of Judges" in section 248 should be given liberal interpretation in order to bring it in line with the other appellate courts established by the Constitution so that the Customary Court of Appeal will be duly constituted by more than one Judge so as to fulfil the object and purpose for which the court is established under the Constitution.

2.2.4 Procedure on Appeals:

According to section 249 of the 1979 Constitution, the procedure on appeals to the Customary Court of Appeal of a state shall be in accordance with the provisions of the Constitution or by any law that prescribes rules of procedure for the court. But such rules of procedure shall be conferred on the court in the light of section 247(1) of the Constitution which provides that the court is vested only with appellate and supervisory jurisdiction in civil proceedings involving questions of Customary Law. This means that an aggrieved party may appeal from the decisions of customary courts to the Customary Court of Appeal of a State in civil matters involving Customary Law.

Generally speaking, those states that have complied with the provisions of section 245(1) of the constitution and established Customary Courts of Appeal have enacted Customary Courts Rules to regulate procedure on appeals to the courts. Thus, the general practice in these courts is that any party aggrieved by a decision or order of a Customary, Court, may, within thirty days of the date of such

decision or Order, appeal to the Customary Court of Appeal of the State in civil matters involving questions of Customary Law.[59]

What obtains in practice is that any person who wishes to appeal against the decision or order of a Customary Court should notify the trial court in writing of his intention to appeal before the expiration of thirty days from the date of the decision or order. However, the prospective appellant must fulfil all conditions precedent before his grounds of appeal can be forwarded to the appeal court together with the record of proceedings of the court on the case. Some of the conditions include payment of money into the court especially depositing a sum of money to cover the cost of making up and transmitting the record of proceedings to the Appeal Court.

2.2.5 Powers Of The Court:

Where an appeal is properly before a Customary Court of Appeal, the court has power to inspect the records or books of the customary court relating to the appeal.[60] But it should be borne in mind that

the appeal court shall not nullify any decision due to defect in procedure or want of form, instead, the court shall decide all matters on appeal according to substantial justice rather than giving undue regard to technicalities.[61]

As regards the condition of appeal out of time, the court has power to enlarge time within which to appeal subject to any law of rules of court for the time being in force regulating the practice and procedure for that court with respect to appeals.[62] This follows that where such rules do not contain a provision for appeal out of time, there could be no power to authorize an appeal to be lodged out of time.

Looking at the powers granted the court by the constitution, section 247(1) clearly and unequivocally restricts jurisdiction of the Court to appellate and supervisory jurisdiction in civil proceedings involving questions of Customary Law and sub-section 2 of section 247 merely allows a state legislature to specify the nature of civil proceedings with regard to Customary Law

in respect of issues pertaining to marriage, infant, guardianship of an infant, inheritance etc.

Thus, the supervisory power of the court is limited to the matters we have listed above. In other words, the court does not have competence in matters other than those involving customary law as well as being incompetent to supervise such other matters. For instance, the court has no power to entertain a suit in land matters because the Land Use Act, 1978, a statute, is the law governing land matters. Similarly, the court has no power to entertain any matter arising from a statute such as Penal Code or Criminal Code because it is a matter outside the jurisdiction of the court.

This shows that a State Customary Court of Appeal has no jurisdiction original appellate or supervisory in criminal causes or matters. Moreover, the court has no original jurisdiction in civil proceedings involving questions of Customary Law.

The above assertions could be understood when one looks into the provision of section 224(1) of the Constitution which states that an appeal lies as of right in civil proceedings from a Customary Court of Appeal to the Court of Appeal with regard to any question of Customary Law and such other matters as may be prescribed by an Act of the National Assembly.

Thus, in the absence of any other enactment from the National Assembly in this respect, it does follow that the jurisdiction of the Court of Appeal to entertain appeal from the Customary Court of Appeal is limited to matters of civil proceedings before the Customary Court with respect to questions of Customary Law only. However, as a Superior Court of record under the Constitution which exercises all the powers of such a court, subject, of course, to the law of the House of Assembly, the decisions of the Customary Court of Appeal in civil proceedings involving questions of customary law are binding on lower courts and it possesses the capacity to lay down rules which are of quotable authority.[63]

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26. Obisanya V. Nwoko (1974)6 S.C. 69.

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42. No. 18 of 1973.

43. No. 21 of 1956.

44. No. 29 of 1966.

45. No. 9 of 1969 (S.E.S.).

46. Section 50(1) as amended by the Customary Courts (Miscellaneous Provisions) Edict 1971 (No. 6 of 1971 - S.E.S.).

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48. Section 245(1) of the 1979 Constitution.

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50. Ibid Section 6(5) (h)

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C H A P T E R T H R E E

3.0 CIVIL APPEALS IN THE HIGH COURT:

High Courts have powers of appeal over certain subordinate courts and they have minimal jurisdictional limits because they hear appeals from the subordinate courts in civil matters as may be prescribed by any written law.[1] These courts exercise appellate jurisdiction at the state level.

In this chapter, we shall deal with brief history of the High Court, its applicable legislation, procedural matters, how to take additional evidence on appeal and powers of the court.

3.1 Historical Outline

With the introduction of Federalism in Nigeria in 1954, the pre-1954 Supreme Court was restyled High Court and each Region was empowered to establish its own High Court including the Federal territory (i.e Lagos).[2] Although section 177 of the 1963 Constitution gave the High Courts direct access to the Supreme Court with regard to appeals, by virtue of section 3 of the Constitution (Miscellaneous Provisions) Decree No. 27 of 1967 and the Court of Appeal Edict No. 15 of the same year, the Western Nigeria established a Court of Appeal

which heard appeal from the High Court of the Region. But in 1976 this court was abolished and each state of the Federation was empowered to establish a High Court.[3]

It is important to emphasise that every High Court in Nigeria is of co-ordinate rank with the others and also with the former Supreme Court.[4] This means that the courts cannot bind each other but a High Court accepts the decision of another High Court and such a decision is considered as representing the law, with a strong persuasive effect.[5] However, when a High Court of a State sits as a Court of Appeal and it is constituted by two or more judges as it is in the Northern States, its decision, therefore, bind a judge of the High Court sitting as a court of first instance.[6] The High Court heard appeals from the decisions of the Magistrates' Courts and those of the native courts.[7]

By virtue of section 236(1) & (2) of the 1979 Constitution, the High Court has power to exercise appellate and supervisory jurisdiction in Civil causes or matters on the District Courts (in the Northern States), the Magistrates' Courts (in the Southern States), other subordinate courts,

any Tribunal or Board as may be provided in an enactment provided such enactment is not inconsistent with the provisions of the Constitution.

3.1.1 Applicable Legislation:

The applicable legislation in each state of the Federation with regard to appeals from the Lower Courts to the High Courts is as enshrined in the respective States' High Court Laws, District Court Laws, and the Magistrates' Court Laws as well as the unified civil procedures of the High Court of 1988. For instance, States in the Northern part of the country[8] apply the High Court Law, Cap 49, in the 1963 edition of the Laws of Northern Nigeria and the District Court Law, Cap. 33 as contained in order 26 of the District Court Civil Procedure Rules, No. 14 of 1960.[9]

Thus, section 43 of the High Court Law and section 75 of the District Court Law State the rules governing appeals from District Courts to the High Court. Similarly, sections 37 to 38 of the High Court Law and section 71 of the District Court law prescribe the power to hear appeals from the District Courts to the High Court. Also section 54 of the Area Court Edict, 1968, provides

that the High Court shall hear appeals from decisions of the Upper Area Court in civil matters with the exception of cases involving questions of Muslem Personal Law. The general provisions relating to appeals, therefore, are contained in section 61 of the High Court Law and section 76 - 77 of the District Court Law.

In the Eastern part of the country, the states there[10] operate the High Court law Cap. 61 in the in the 1963 edition of the laws of the Eastern Nigeria and the Magistrates' Courts Law.[11] Section 32 of the High Court Law confers jurisdiction on the High Court to hear appeals in civil cases and matters from the decisions of the Magistrates Courts given in the exercises of their original jurisdiction whereas section 33 gives the High Court power to hear appeals from other subordinate courts as may be provided by any written law.

In the Western zone,[12] the applicable legislation is the High law Cap. 44 of Western Nigeria as well as the Magistrates' Courts Law, Cap. 74

of Western part of the country. Sections 17 and 18 of the High Courts Law confers jurisdiction on the High Court to hear appeals from Magistrates' Courts. Sections 4 and 64 of the Magistrates' Court Law contain procedural provisions for appeals to the High Court in civil cases and matters from the decisions of the Magistrates Courts.

The Lagos High Court Law, Cap. 52 of 1973 in section 28 of the law, the High Court has power to hear all appeals from the decisions of the Magistrates Courts in civil proceedings. Section 31 states the power of the High Court in civil appeal and section 29 provides that in the exercise of its appellate jurisdiction the High Court shall be constituted by a single Judge but where three Judges sit on an appeal, the majority decision shall be the decision of the court.

In Delta and Edo States the applicable legislation is the High Court Law Cap. 65 of 1976 and the Magistrates' Court Law Cap. 97. In sections 18 and 19 of the High Court Law and section 64 of the Magistrates' Court Law, the High Court is empowered to hear appeals from Magistrates' Courts exercising original or appellate jurisdiction.

Furthermore, the High Court has jurisdiction to hear appeals from other subordinate courts in a state as might be prescribed by any law in force in the state.[13] Thus, the constitution has empowered the High Court to hear appeals from Area Courts and Customary courts from time to time as might be prescribed by the House of Assembly of the State. This is in view of the fact that the High Court has minimal jurisdiction limits with regard to the type of subject-matter that comes before it. In this respect, the High Court has power to exercise its appellate or supervisory jurisdiction on lower Courts and it may, in addition, exercise other jurisdiction as may be conferred upon it by law.[14]

With regard to the Federal High Court exercising its appellate jurisdiction, clause ten in the first schedule to the Income Tax Management Act 1961 provides that the decision of the Joint Tax Board is appealable to the Federal High Court. Thus, the court exercise jurisdiction throughout the country on Federal Government fiscal matters as specified in the Federal High Court Act of 1973.

It is to bear in mind that with effect from 1st October, 1979 the Federal Revenue Court has been restyled the Federal High Court.[15] The Act of the court confers appellate jurisdiction on the court in respect of matters within its exclusive jurisdiction pertaining to the revenue of the Government of the Federation. Thus, Section 27 of the Act provides that appeals lie to the Federal High Court from Magistrates' Courts which include District Courts of the Northern States. However, experience has shown that most appeals that lie to the Federal High Court come from tax appeals from the decisions of Boards of Customs and Excise. In the absence of any legislation or rules of practice, the Federal High Court would be duly constituted by a single Judge even when exercising its appellate jurisdiction.[16]

3.1.2 Procedure For Appeals:

Section 236 of the 1979 Constitution provides for rights of appeal to the High Court but such rights are to be conferred expressly in an enactment provided such enactment is not inconsistent with the provisions of the constitution.[17] Thus, any aggrieved person may appeal to the High Court in respect of any civil case or matter with

the date of such decision as well as the grounds of appeal.[21] It would be an abuse of the process of court for an appellant to lodge an appeal without grounds of appeal with a view to causing delay in the execution of judgment.[22] The appellant should specify whether the notice pertains only to a part of the decision, otherwise, he shall be taken to by complaining of the decision as a whole.[23] The address of the appellant shall be stated and it shall be within the Judicial Division in which the lower court appealed from is situated.

It is the duty of the Registrar of the Lower Court, after payment by the appellant of fees with regard to the preparation of the copies of the proceedings to prepare, within three months of the decision appealed from, as many certified copies of the proceedings required, for the consideration of the appeal, as there are parties on record.[24] However, if the appellant fails to make the deposit of the sum of money required of him within the time stipulated, the appeal may be struck out.[25] But where the appellant has paid all the fees required of him, the Registrar of the Lower Court shall prepare

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the copies of the proceedings as per the number required and send the same to the Registrar of the High Court in the Judicial Division in which the Lower Court is situated within seven days of the preparation and it is the Judge of that Division that shall decide the appeal.[26] This is to promote the speedy hearing of an appeal. In this respect, the Registrar of the High Court shall supply the Respondent with a copy of the proceedings and the day fixed for hearing of the appeal.[27] The appeal is heard by at least one Judge of the High Court.[28]

The time prescribed for filing an appeal or service of the notice of appeal may be enlarged by the High Court as the court may seem fit after the appellant has given notice to the respondent for such enlargement of time.[29] However, if the appellant did not apply for enlargement of time within the time prescribed, the respondent, may apply to the High Court to strike out the appeal after notifying the appellant of his intention to file the application or extent the time for satisfactory reason.[30]

Furthermore, after the expiry of the time to file an application and no leave for extension of time was sought and obtained, the High Court may hold that the appeal is incurably defective.[31] Similarly, is a situation in which the appellant is unable to obtain the judgment of the lower court for the purposes of framing his notice of appeal within the time prescribed, the High Court may not extend the time for giving notice of appeal.[32]

Where the appellant fails to appear in court on the day of hearing or at any adjournment of the case, the court may strike out the appeal and, as a result, affirm the decision of the Lower Court, except if sufficient cause is shown with a view to convincing the court to order otherwise.[33] If the respondent appears, the appellant shall bear the costs of the appeal, provided the court does not think otherwise. However, where the respondent does not appear, the court shall use its discretion in fixing costs.[34]

It is to bear in mind that where the appellant appears in court to presecute his appeal, the court shall proceed to hear and determine the appeal on its merits whether or not the respondent appears

unless it is proved to the court that the appellant has not complied with the laid down rules pertaining to the hearing of an appeal, in which case, the court shall dismiss the appeal and affirm the decision of the Lower Court. It is to be emphasised that, generally speaking, when an order of dismissal of an appeal is given that indicates that the appeal has been finally disposed of. On the other hand, when a court strikes out an appeal that means that the appeal may be re-listed provided the High Court does not expressly affirm the decision appealed against and, consequently, an order has been drawn up and entered which indicates that the appeal has come to an end, as far as the High Court is concerned, and it has no jurisdiction to re-open the matter.[35]

However, Order 43, rule 24(4) provides that where an appeal is dismissed, the appellant may, by leave of the High Court, take further step or proceeding for re-instatement of the appeal within a month of such dismissal upon application by motion on notice and the application may be granted on such terms as the court may deem fit.

An appellant is only entitled to be heard on the grounds of appeal contained in his notice of grounds for appeal.[36] However, the appellant may seek and obtain the leave of the High Court to amend the notice of appeal in order to vary or add other grounds for appeal than those contained in the notice. Similarly, any error or defective statement in the grounds of appeal may be amended so that the appellant may be heard and this is sequel upon such conditions as the court may direct.[37] The respondent is entitled to request the court on grounds different from those stated by the court below and he shall attach a clear statement of the grounds to the notice which shall be filed in the High Court within 14 days of service on him of the appellant's notice and grounds for appeal. The appellant or his legal representative shall be served with the notice and grounds for appeal of the respondent.[38] The respondent may also in the grounds of appeal, challenge any part of the judgement of the court below.[39]

However, the respondent is not entitled to object any defect or error to the summons or other process of appeal which could have been amended if challenged at the lower court and neither can be object to any difference between the summons and

any other process in the Lower Court unless if he shows that he was thereby deceived or misled in which case the High Court may refer the case back to the court below for retrial or to make an order for disposing of the case on its merits.[40] On the other hand, a defect to the notice of appeal which has been objected to by the respondent, after showing sufficient cause by the latter, may be emended by the High Court on such terms as it deems just.[41]

It is discernible, therefore, from the above rules that the High Court has power to allow an appellant to correct,any errors in the process of setting for his grounds of appeal, or as it relates to the notice of appeal or in respect of the recognizance he is expected to enter into. Moreover, if the defects or errors pertain to the proceedings of the Lower Court, the High Court, may refer the case back to the court below with a direction to re-hear and determine the case or to reverse the decision appealed from,[42] or to make such other order with a view to disposing of the case as justice may demand.[43] But it is the duty of the High Court to emphasise to the parties concerned the exercise of due diligence in processing appeal.[44]

3.1.3 Additional Evidence:

Generally speaking, additional evidence will not be allowed to be adduced on appeal provided such evidence could not, by reasonable diligence, have been adduced at the trial.[45] However, the High Court has power to order additional evidence to be taken where it may consider it necessary either by ordering such evidence to be adduced before it on a particular day or by referring the case back to the lower court to take such evidence as may be directed by the appellate court.[46]

On the other hand, the High Court will not refer a case back to the lower Court for evidence to be adduced on a point which was not raised at the trial.[47] Similarly, if evidence was available at the time of trial and due to lack of exercise of reasonable diligence the evidence was not adduced, the High Court in its appellate capacity will not grant a new trial with a view to adducing such evidence.[48]

It is to bear in mind that where evidence became available after the parties have closed their cases but before judgment, it cannot be regarded as evidence which was available at the trial and the appellate

court will allow such evidence to be adduced.[49] Thus, when the Lower Court is directed to take additional evidence, it shall take the evidence as directed and certify such evidence to the High Court which shall thereupon proceed to determine the case.[50] When the additional evidence is adduced, the appellant or his legal representative shall be present and such evidence is considered as being taken at the trial before the court below.[51]

3.1.4 Powers Of The Court:

The High Court has powers to order the payment of costs according to the avent of the appeal on just terms.[52] Also security for costs may be ordered where appropriate upon application on notice by motion supported by affidavit and the deposit or security shall be made within the thme limit ordered by the court otherwise the appeal shall be dismissed.[53] Thus, where the appeal is dismissed the respondent is entitled to all reasonable costs occasioned by the appeal.[54] However, by the leave of the High Court the appellant may apply by motion on notice within one month of such dismissal, for reinstatement of the appeal.[55]

The decision of the High Court in respect of an appeal shall be certified to the Lower Court in which the decision appealed against emanated and the Lower Court shall comply with the judgment accordingly.[56] The judgment, therefore, may be enforced by the Lower Court or by the High Court as may be most expedient.[57] It is to bear in mind that an order from the High Court directing the court of trial to enforce a judgment must be carried out by the latter court.[58] This is in view of the fact that after the pronouncement of the judgment of the High Court, the trial court has the same jurisdiction and power to enforce any decision of the High Court in respect of the appeal.[59]

3.2 CIVIL APPEALS IN SHARIA COURT OF APPEAL:

The Sharia Court of Appeal is a superior court of record under the Constitution of the Federation and the court shall have all the powers of a superior court of record subject, of course, to the law of a State House of Assembly.[60] It has appellate and supervisory jurisdiction in civil proceedings in respect of Islamic Personal Law.[61]

Thus, as a superior court of record, it has the power to lay down rules of Islamic Law in Civil Matters relating to Personal Law which are binding on Lower Courts and such rules should be of quotable authority.

Under this section, we shall examine brief history of the court, the applicable ligislation, its appellate jurisdiction and the procedure for appeal.

3.2.1 Historical Outline:

On Spetember 30, 1960 the Sharia Court of Appeal was established to replace the Muslem Court of Appeal, by virtue of the Sharia Court of Appeal Law No. 16 of 1960, Thus, the court was to hear appeals from native courts in cases involving Musliem Personal Law.

According to the Law, the court was directed to apply, principally, the Muslem Law of the Maliki School as customarily interpreted at the place where the court at first instance heard the case.

By virtue of the Area Courts Reform Act of 1968, the Native Courts were restlyled Area Courts which had jurisdiction in Muslem Civil Matters.

Appeals from the Upper Area Court lie to the Sharia Court of Appeal in questions involving Muslem Personal Law only. However, the Sharia Court of Appeal has jurisdiction to punish a person summarily for the offence commonly known as contempt of court except if such a person is punished under the provisions of the penal code for the same offence or omission.[62]

The 1979 Constitution has upheld the appellate jurisdiction of the Sharia Court of Appeal in matters involving Muslem Personal Law and each state of the Federation has been empowered to establish such a court if required.

At this juncture, it is worthwhile to mention that in 1976 there was an Area Court Reform Committee set up by the Federal Military Government and in its report to the Government recommended, among other things, that "The Sharia Court of Appeal Law should be amended to confer jurisdiction on the Sharia Court of Appeal to hear appeals in all civil matters emanating from Area Courts where the applicable law is Islamic Law." The Government accepted the recommendation and, thus, a decree No. 26 of 1986 was promulgated by the Government in

order to confer jurisdiction on the court to hear appeals in all Moslem Civil Matters. However, in a certain case,[63] the court of Appeal held that the Decree did not enhance or enlarge the jurisdiction of the Sharia Court of Appeal because sub-section (2) of section 242 of the 1979 Constitution defines and delimits the jurisdiction of the court to those matters so enumerated and specified. In essence, according to the Court of Appeal, the amendment did not serve the purpose for which it was intended and, thus, the Sharia Court of Appeal still exercises appelate and supervisory jurisdiction in civil proceedings involving questions of Islamic Personal Law. This is the position of the law as of now.

3.2.2. Applicable Legislation:

By virtue of section 240 (1) of the 1979 Constitution. It is provided that any state of the Federation that requires it shall have a Sharia Court of Appeal for that State and the court is subject to the law of the State.[64] This means that every state House of Assembly (or its equivalent) that has established a Sharia Court of Appeal has been empowered to make rules for the practice and procedure of the court.

However, the applicable legislation is the Sharia Court of Appeal Law No. 16 of 1960 which established the court in the Northern Region (now Northern States). Section 3 (1) of the law provides that the Sharia Court of Appeal is a court for the hearing of appeal from native courts (now Area Courts) in respect of cases involving Muslim Personal Law. Sections 4 and 5 provide for the constitution and qualifications of the Sharia Court Judges who should be a Grand Kadi, a Deputy Kadi and three other Judges learned in the Sharia. But the 1979 Constitution provides that the court shall be duly constituted if it consists of at least two Kadis of the court.[65]

Section 6 deals with the tenure of office of Judges and section 7 provides that the Grand Kadi shall be the president of the court and his deputy shall preside in his absence. The jurisdiction of the court is contained in sections 10 and 11 and provide that the court shall have jurisdiction to hear and determine appeals from area courts and the Sharia Court shall have all the powers, authority and jurisdiction of every Area Court of which judgment, order or decision is subject of an appeal to the court but it has no original jurisdiction in

any cause or matter except that it has power to review cases reported to it.[66]

Section 14 states that in the exercise of its jurisdiction, the court shall administer, observe and enforce the observance of the principles and provisions of the Muslem Law of the Maliki School as customarily interpreted at the Area Courts where the trial at first instance took place, the provisions of the Sharia Court of Appeal Law, 1960, the provisions of the Area Court with regard to Muslem Personal Law as well as the principles of natural justice, equity and good conscience.

The court shall hold sessions from time to time at such places as provided by Regulations of sessions.[67] However, the Grand Kadi has been empowered to dispense with holding of a session about to be held at any place if there is no business or no substantial amount of business to be transacted.[68] Generally, section 19 to 25 deal with representation of parties and officers of the court. Although section 20 (1) of the law provides that no legal practitioner shall appear on behalf of any party before the court, this section has been superceded

by a section of the Constitution which entitles every person to have a legal practitioner of his choice to act for or assist him before any court in Nigeria.[69] Sections 21 to 24 deal with officers of the court and their responsibilities and section 25 pertains to the powers of the Grand Kadi to make rules of court.

Thus, in exercise of the powers conferred upon him, the Grand Kadi, in 1960, made rules of court which came into operation on the 10th day of November, 1960 and to be cited as the Sharia Court of Appeal Rules 1960. It is important to point out that both the Sharia Court of Appeal Law, 1960 and the Sharia Court of Appeal Rules, 1960 have been incorporated in the Law of Northern Nigeria, No. 23 of 1963. The law is contained in volume 3, pages 1933 to 1941 whereas the Rules are in volume 5, pages 1275 to 1286 of the 1963 laws.

3.2.3 Appellate Jurisdiction of the Court:

The jurisdiction of the Sharia Court of Appeal is provided under section 242(1) and (2) of the 1979 Constitution, section 10 and 11 of the Sharia Court of Appeal Law,1960 and section 54(1) of the Area Courts (Amendment) Edict, 1979 (of Sokoto State).

The combined effect of these legislations, therefore, in that the Sharia Court of Appeal is only competent to decide appeal cases involving Muslem Personal Law. This means that the court can exercise such appellate and supervisory jurisdiction in civil proceedings involving questions of Islamic Personal Law with regard to marriage, divorce, family relationship, guardianship of infants, inheritanne wakf, gift or will. It is clear that those items enumerated under section 242 in paragraphs (a) to (c) of sub-section (2) of the 1979 Constitution are the only matters regarding civil appeals from the Area Courts that the Sharia Court of Appeal has jurisdiction to entertain.

All other cases of Muslem Civil appeals, apart from those enumerated above, are to be heard by the High Court of a State.[70] But section 63(1) of the High Court Law (Cap. 49) Laws of Northern Nigeria, 1963 provides that where the High Court would hear appeals from Area Courts on Islamic Civil Law of transaction, it should be constituted by three Judges, two of whom should be Judges of the High Court and One of whom should be a Judge of the Sharia Court of Appeal.

This is in view of the fact that there is a great difference between the Islamic Law/Procedures as applied by the Sharia Court of Appeal and the Common Law/Procedure as applied in the High Court. In order to correct this aromaly, the joint sitting was meant to provide a person learned in Islamic Law with a view to conforming to the rule of justice. However, the Court of Appeal held that the joint sitting was inconsistent with section 238 of the 1979 Constitution and to the extent of the inconsistancy null, void and of no effect.[71] This is due to the fact that the section deals with the constitution of the High Court of a State and it does not include a Sharia Court of Appeal Judge with respect to the exercise of its jurisdiction under the Constitution.

In view of the above development, however, there had been persistent demands from some people particularly the Kadis of the Sharia Court of Appeal in the Northern States for enhancement and enlargment of the jurisdiction of the Sharia Court of Appeal to include all cases tried by the Area Courts where Islamic Law and procedure was applied. In 1976, therefore,

an Area Courts Reform Committee was set up by the Federal Military Government to advise it, among other things, on the jurisdiction of the Sharia Court of Appeal. The committee, thus, recommended to the Government, among others, that the Sharia Court of Appeal law should be amended to confer jurisdiction on the Sharia Court of Appeal to hear appeals in all civil matters emanating from Area Courts where the applicable law is Islamic Law.

Although the Government accepted the recommendation of the committee, it was not implemented until in 1986 under the constitution (Suspension and Modification) (Amendment) Decree No. 26 of 1986 which came into operation on the 20th of November, 1986.[72] The Decre attempts to enlarge the jurisdiction of the Sharia Court by deleting the word "Personal" whereever it occurs after the word "Islamic" under sections 217,223 (1), 226 (a), 241 (3) and 242 of the 1979 Constitution so that the expression now in all the sections is "Islamic Law" instead of "Islamic Personal Law."

The question now raised is whether, by virtue of this decree, the Sharia Court of Appeal can exercise such appellate and supervisory jurisdiction in all civil

proceedings involving questions of Islamic Law which the court is competent to decide irrespective of the fact that section 242 (2) (a) to (d) of the Constitution contains well defined items pertaining to Islamic Personal Law which the Decree left intact? In its judgment the Sharia Court of Appeal of the Plateau and Benue States held that irrespective of the fact that sub-section 2 of section 242 paragraphs (a) - (d) has been left untouched and enumerated only Islamic Personal matters, the real effect of the amendment is in paragraph (e) of sub-section 2 which has enlarged the jurisdiction of the court to entertain any question of Islamic Civil Law provided that the parties to the case have requested the court of first instance to apply the Sharia principles in their matters.[73]

However, the Court of Appeal in a certain case[74] over ruled the above judgment and held a contrary view to the effect that the Decree does not enhance or enlarge the jurisdiction of the Sharia Court of Appeal because sub-section 2 of section 242 defines and delimits the jurisdiction of the court to those matters so enumerated and specified. The court went

on to add that all what has been provided in the Decree is simple the deletion of the word "Personal" wherever it occurs after the word "Islamic" so that the expression in respect of all the sections concerned is "Islamic Law" instead of "Islamic Personal Law". Thus, the amendment does not serve the purpose for which it is intended because it has left untouched the specific jurisdiction of the Sharia Court of Appeal and, therefore, the court's jurisdiction remains limited to those items enumerated under section 242 (2) (a) - (d).

But the bone of contention in this matter is whether section 242 (2) (e) of the Constitution has widened the jurisdiction of the Sharia Court of Appeal to "any other question" of Islamic Law not specified in section 242 (2) (a) - (d). The section provides as follows:-

> 242 (2) For the purpose of sub-section 1 of this section, the Sharia Court of Appeal shall be competent to decide -(e) where all parties to the proceedings (whether or not they are Moslems have requested the court that hears the case in the first instance to determine that case in accordance with Islamic Personal Law, <u>any other question"</u> (underline mine)

It is clear that the expression "any other question" is used in relation to the matters specified in

paragraphs (a) - (d) and, in any view, by deleting the word "Personal" whenever it occurs after the word "Islamic" in the section involved, the intention of the legislature in respect of the Constitutional amendement is to widen the jurisdiction of the Sharia court of Appeal to include "any other question" of Islamic Law civil proceedings not enumerated in section 242 (2) (a) - (d) provided the parties to the proceedings have requested the court of first instance to determine the case in accordance with the principles of Islamic Law.

I hold the above view considering the fact that the legislative history behind the constitutional amendment shows that the intent and purpose of the legislature is to enhance the jurisdiction of the court with a view to conferring jurisdiction on the court to hear appeals in all civil matters enanating from Area Courts where the applicable law is Islamic Law and the Government accepted the recommendation of the Area Courts Reform Committee which formed the basis of the Constitution (Suspension and Modification) (Amendment) No. 26 of 1986.

I would like to resort to the rule of interpretation of statutes in order to justify my position. According to Lord Denning (M.R.) when advocating the Purposive Approach to interpretation held that the effect of the new purposive approach rule to interpretation of the statute is to look at the intention of the legislature and the views of the Minister in order to supply the gaps and stretch the ordinary meaning of the words used and construe the words in accordance with the intention of the legislature.[75]

From the above authority, it would be discernible that the constitutional amendment is meant to extend the jurisdiction of the Sharia Court of Appeal to include matters of Islamic Law not specified in section 242 (2) (a) - (d); by looking at the intention of the legislature and construing the words used as well as considering the legislative history of the decree which point to the fact that by deleting the word 'Personal' whereever it occurs after the word "Islamic" the expression now in all the sections will read "Islamic Law" relating to "any other question" of Islamic Law civil matters.

However, in trying to justify its judgment, the court of Appeal cited section 223 (1) of the1979 Constitution which gives an aggrieved party a right to appeal to the Court of Appeal from the decisions of the Sharia Court of Appeal in any civil proceedings before the latter in matters involving Islamic Personal Law which the Sharia Court is competent to decide.
According to the Court of Appeal, this section permits the Sharia Court of Appeal to determine any matter pertaining to Islamic Personal Law only which could go on appeal to the Court of Appeal otherwise if the Sharia Court decides any case outside the Islamic Personal Law under section 242 an aggrieved party cannot appeal to the court of appeal because the constitution has not made any provision for an appeal from that decision to the Court of Appeal apart from what has been specified as matters involving Islamic Personal Law.

Be that as it may, the decision of the Court of Appeal with regard to the jurisdiction of the Sharia Court of Appeal is now the established law for there id no contrary decision from the Supreme Court of Nigeria and, thus, the decision is binding on all persons in Nigeria and on all actions and proceedings relating thereto.[76]

But, with due respect, I am inclined to agree more with the observation made by Professor Khalid Rashid to the effect that it would have been better and more sensible had the Court of Appeal taken into account the historical background of the constitutional amendment in order to understand properly the intent and purpose of the amending decree. He further said that the failure of the court to take cognisance of the legislative history behind the amendment and the views expressed by the Government in that respect negates one of the cardinal principles of the interpretation of statutes as the amendment was obviously not for mere linguistic improvement but to do away with an anomaly which bordered on injustice. He concluded that the intention of the legislature in the constitutional amendment, taking into consideration all the circumstances of the case, was to enlarge the jurisdiction of the Sharia Court of Appeal by empowering it to hear appeals on other matters of Islamic Law civil proceedings.[77]

3.2.4 Procedure on Appeals:

An aggrieved party may appeal from the decisions of the Area Courts to the Sharia Court of Appeal of a State which can exercise such appellate and supervisory jurisdiction in civil proceedings involving questions of Islamic Personal Law which the court is competent to decide in accordance with the provisions of sub-section 2 of section 242 of the 1979 Constitution.

With regard to practice and procedure, the court is applying the Sharia Court of Appeal Rules, 1960 which came into operation on the 10th day of November, 1960.[78]

The Court has power to hear and appeal brought by aggrieved parties and deal with any other matter whether or not such matters have been included in any published cause list.[79] The aggrieved parties appealing against the decisions of the court below shall enter their appeal in the registry of the Sharia Court of Appeal nearest to the court below and there upon the Registrar of the Appeal Court shall send notice of the appeal to the court below which shall forward to the Sharia Court of Appeal, within one month of the receipt of the notice, a certified copy of the record of proceedings of the case under consideration.[80]

It is to bear in mind that once a person is not satisfied with the order or decision of the court below, he shall enter his appeal in the registry of the Sharia Court of Appeal within thirty days from the date of the decision appealed against.[81] The person entering the appeal shall present it in the form of a petition in writing or the appellant may dictate his prayer to the Registrar or any officer authorised by the court of he may orally state his prayer to the court attaching, as the case may be, a copy of the order or decision appealed against, except if the court directs otherwise.[82]

The appellant is required according to order iv of the rules, to leave his address with the Registrar for the purposes of contacting him or he shall make himself available from time to time or send his agent to act on his behalf. This is in view of the fact that there is a presumption that any communication addressed to the appellant is considered to have been delivered to him unless he can prove otherwise. The court may require the appellant to deposit security for costs, if any, for purposes of processing the petition and record of the case.[83]

It is important to emphasise that the appeal is duly entered when the appellant complies with the order of the court in respect of security for costs and other matters that the Registrar shall request (according to laid down rules) as well as making copies of the record of proceedings and notifying all interested parties in the appeal of the date fixed for hearing thereof and taking all the necessary steps to transmit the record to those concerned.[84]

Generally speaking, at the hearing of the appeal the court shall not re-hear or re-try the case, but it shall go through the record of the case and see whether the case is properly tried at the court below. Where the need arises, however, the court may re-hear or re-try the case in whole or in part and witnesses may be called to adduce evidence with a view to elucidating or amplifying the record of proceedings.

However, before any witness is summoned, the parties must supply the names of the witnesses to the court and the judge presiding shall enter the names in the record.[85] Although only those witnesses whose

names have been supplied to the court shall be head, any party who omits the name of a witness, shall give satisfactory reason for having omitted the name before the witness is heard.[86] The court may order a witness who has been called to give evidence to be compensated for loss of time and other expenses incurred by the witness as a result of his appearance in the court.[87] The court has power to question witnesses who appear before it and the party against whom evidence is given may, through the court, put any necessary question to the witness and the court shall record all questions put to witnesses.[88]

Where it is clear that, at the hearing of an appeal, the presence of a person would affect the administration of justice negatively, the court may order that no member of the public shall have access or remain in the court, at any state of the proceedings unless if the court directs otherwise. But if any person fails to comply with the order of the court in that respect, the court may order for his arrest and ejectment from the court.[89]

When the hearing of an appeal commences, the parties in the appeal or their representatives may address the court in support of their respective cases and they may avail themselves of making references to the record of the case as well as having the opportunity of cross-examining each other. This is to be done according to the principles of Islamic Law and procedure.[90] Thus, once an appeal has been entered, pending the final determination of the case, the court may order a stay of execution of the decision appealed against either on the application of the appellant or on the motion of the court and the court below or any authority concerned shall be notified accordingly.[91] It should be brone in mind that the court will entertain an appeal upon payment of the prescribed fee and no part thereof remains unpaid by the appellant otherwise after thirty days of such fee becoming due, the appeal shall lapse unless the court deems it fit to extend the time on an application which may be made either before or after the appeal has lapsed.[92]

It should be emphasised that where an appeal is to be brought before the court after the expiration of the time limited for such an appeal to be entered,

there shall be an application for enlargement of time by the appellant and, normally, the prescribed period for appeal is thirty days from the date of the decision appealed against.[93] The appellant, when applying for enlargement of time, shall support his application by an affidavit giving good reasons for the application and the grounds of appeal which may help to grant the application. Where the court has given order for enlargement of time, such order shall be annexed to the notice of appeal for onward transmission to all parties concerned and, thereafter, the court may proceed at once to the hearing of the appeal provided the parties are ready.[94]

In a situation in which a date has been fixed for the hearing of the appeal but the appellant or his representative fails to appear on the date fixed, the court may strike out the case, on the application of the respondent otherwise the court may grant adjournment and the date fixed for the resumption of hearing shall be communicated to the appellant.[95] But if the appellant or his representative fails to appear for the second time after he has been duly served in time

or both parties or their representatives fail to appear on the day fixed for hearing, the court may, of its own motion, strike out the case. However, after the striking out of the appeal, the appellant or his representative may, within a period of fifteen days from the date of striking out the appeal. show reasonable grounds for his non appearance as a result of which the court may summon the respondent and proceed to hear the appeal. 97

On the other hand, the non-appearance of the respondent or his representative on the day fixed for the hearing of the appeal and no reasonable grounds adduced for his failure to appear and the court is satisfied that the summons has been duly served on him, the court may hear the appeal and give judgment in his absence. However, if the court is of the opinion that the respondent is not duly served with the summons or if the respondent or his representative gives reasonable ground for his failure to appear and the court is satisfied, the court shall fix another date and issue fresh summons to the respondent. "here the respondent or his representative is absent in a case of maintenance or divorce and their whereabouts are unknown which makes it impossible

impossible to serve the summons on either of them, the court shall proceed to hear the appeal and give judgement accordingly after satisfying itself of the facts that neither of them could be reached.[98]

3.2.5 Judicial Powers of The Sharia Court of Appeal:

The Sharia Court of Appeal being a Superior Court of record has all the inherent powers and sanctions of a court of law and such judicial powers shall extend to all matters between persons or between authority and any person in Nigeria as well as to all actions and proceedings in relation to its prescribed appeallate jurisdiction for the determination of any question as to the civil rights and obligations of such persons.[99]

Thus, order V rule 1 of the Sharia Court of Appeal Rules provides that the court may direct the enforcement of its judgment or order by itself or by directing the court below to enforce such judgment or order. But the court below shall only enforce such judgment when it is accompanied by a certificate under the seal of the Sharia Court of Appeal and the enforcement shall be in line with the terms of the certificate.[100] The judgment or order

of the Court shall be in open court and it may use its discretion in making any order with a view to doing justice provided such order is within the powers and jurisdiction of the Court.[101]

It is proper for the court to make an order with a time fixed for compliance therewith and, moreover, it may direct that any payment of money shall be paid instalmentally.[102] However, before proceeding to execute any order made the court shall bring the terms of the order to the notice of a party affected who has not appeared in the proceedings either personally or by his representative by a formal written order which shall be served on him or his representative.[103] On the other hand, if such a party or his representative has appeared in the proceedings it shall suffice to proceed to execution of the order without formally writing to him or his representative purposely to bring the terms of the order to his notice.[104]

The court has power to allow and fix costs of an appeal at such a time when it deems fit.[105] Although fees shall be charged according to the scale set out in part II of the Second Schedule of the Rules

Rules, the court or a single Judge thereof has power to Order that the fees be reiuce wholly or in part remitted either owing to the poverty of a party or on reasonable grounds as shown on the application of the party to that effect or on the motion of the court as the case may be.[106] The court shall record all its proceelings in books to be kept for that purpose and it is the duty of the Registrar to carry out that responsibility.[107]

It is very important to mention that the administration of justice is always regarded as one of the most important functions of the Sharia Court of Appeal and it is an incumbent duty upon the Judges of the court to establish and maintain justice among the parties appearing before the court. The Judges, therefore, discharge this duty by complying strictly with the principles of Islamic Law and procedure as well as the Sharia Court of Appeal Law and the Rules of Court. But it should be emphasised that the court in the exercise of its appellate jurisdiction has no original or criminal jurisdiction whatsoever beyond it power to deal with contempt. Further, the exercise

exercise of its jurisdiction shall not be contrary to the provisions of the Nigerian Constitution or any law enacted by the House or Assembly of a State in which the court is situated.[108] The decision of the court is subject to further appeal to the Court of Appeal with regard to any question of Islamic Personal Law which the Sharia Court of Appeal is competent to decide.[109]

R E F E R E N C E S:

1. Section 236(1) of the 1979 Constitution

2. Section 142 of the 1954 Constitution

3. Section 3(1) of the Constitution (Amendment) (No.2) Decree of 1976

4. Salako V. Ordia (1958) LL.R. 66, 67

5. Emodi V. Commissioner of Lands (1972)2 E.C.S. IR 47 at 49

6. Sections 40 (1) and 63 (1) of the High Court Law (Northern Nigeria Laws 1963, Cap. 49)

7. Obilade, A.O. (1979) The Nigerian Legal System, (Sweet & Maxwell Ltd; London) 1st Edition, P. 30.

8. States in the Northern Part of Nigeria are Adamawa, Beuchi, Benue, Borno, Jigawa, Kaduna, Kano, Katsina, Kebbi, Kogi, Kwara, Niger, Plateau, Sokoto, Taraba and Yobe.

9. In the Northern States, the Magistrates are called District Court Judges when handling Civil Proceedings.

10. Eastern part of Nigeria has the following States: Abia, Anambra, Akwa-Ibom, Cross-River, Enugu, Imo and Rivers.

11. See Capt. 82 of the 1963 edition of the Laws of Eastern Nigeria.

12. States in the Western part of Nigeria are; Ogun, Ondo, Osun and Oyo.

13. Supra section 239 of the 1979 Constitution

14. Ibid Section 236 (1) and (2)

15. Ibid Section 230 (2)

16. Ibid section 232

17. Obi-Okoye, A. (1980) Essays on Civil Proceedings Vol. 4, first edition (Fourth Dimension Publishing Co. Ltd., Enugu) P.68

18. Supra section 239 of the 1979 Constitution.

19. Order 43 rule 1 of the High Court (Civil Procedure) Rules, 1988

20. Ibid r2 (4)

21. Ibid r (1)

22. Halaby V. Halaby (1951) 13 WACA 170

23. Supra Order 2 rule 2

24. Ibid 043 r3

25. Atlas (Nig.) Ltd V. Rhodes (1961) All NIR 348

26. Supra 043 r4

27. Ibid r5

28. Ibid r5

29. Ibid r6

30. Ibid r7

31. Oranye V. Jibowu (1950)13 WACA 41

32. Ayinla V. S.C.O.A. (1953) 20 N.L.R. 154

33. Supra 043 r10 (1)

34. Ibid (2)

35. Nwachukwu v. Igwe (1970-71) E.C.S.L.R. 106

36. Morawa v. Salako (1957) W.R.N.L.R. 51

37. Supra 043 r 12

38. Ibid r13 (1) - (3)

39. Ibid r 14 (1)

40. Ibid rr 15 and 16

41. Ibid r 17

42. Omagbemi v. Dore Numa (1924) NLR 25

43. Naya v. Wey (1961) All NLR 123

44. Young Jim Fouchse v. Oruwari Henry Braid (1913)2 NLR

45. Dawodu v. Danmole (1962) All NLR 202

46. Supra 043 r18 (a) and (b)

47. G. Gottschalk & Co. v. Muller Dempster & Co. Ltd (1917)3 NLR 16.

48. Enekebe v. Enekebe (1964) N.M.L.R. 42

49. Ariran v. Adepoju (1961) All N.L.R. 722

50. Supra 043 r 19 (1)

51. Ibid (1) - (3)

52. Ibid r 23

53. Ibid r 24 (1) and (2)

54. Ibid (3)

55. Ibid (4)

56. Ibidr25 (1) and (2)

57. Ibid r 27

58. Ladeji v. Akanni W.R.N.L.R. 192

59. Supra 043 r 26

60. Supra Section 6 (3) and (5)

61. Ibid section 242

62. Section 3(3) of the Sharia Court of Appeal Law No. 16 of 1960

63. Hassan Abuja v. Lawan Gana Bizi (CA/J/99/87)

64. Supra section 6 (3) (5)(e) of the 1979 Constitution

65. Ibid section 243

66. Section 54 (a) of the Area Courts (Amendment)

67. Supra section 17 of the Sharia Court of Appeal Law

68. Ibid section 19 (1)

69. Supra section 33 (6) (c) of the 1979 Constitution

70. Ibid section 236 (1) and (2)

71. Malam Ado & Another v. Hajiya Dije (FCA/K/69/82)

72. Sambo M.A. (1988) Sharia in A Multi-Religious State (Its Application and Limitations) paper prepared for the Assembly forum of the Constitutent Assembly, Abuja.

73. Alh. Salifi Jibrin v. Alh. Umaru Uja & Others BNS/SCA/CV.2/86

74. Hassan Abuja v. Lawan Cana Bizi CA/J/99/87

75. Seaford Court Estates Case (1949) 2 K.B. 481 Also Northern v. Barnet Council (1978)1 WLR 200

76. Supra section 6(6) (b) of the 1979 Constitution

77. Rashid Khlid (1986) Islamic Law in Nigeria (Application and Teaching) Islamic Publication Bureau, Lagos) p. 301.

78. Order 1 Rule 1 of the Sharia Court of Appeal Rules 1960

CHAPTER FOUR

4.0 CIVIL APPEALS IN THE COURT OF APPEAL:

In this chapter, we are going to deal with historical outline of the court of Appeal, applicable legislation, appellate jurisdiction, appeals as of right and appeals with leave. Further, we shall examine the statutory exclusion of juridiction, coram, juriddiction to grant interlocutory relief, the "entering" of appeals, conditions and procedure of appeals, powers of court of Appeal, judgement and orders of the court as weal as review of judgements.

4.1.0 Historical Outline:

The court of Appeal was established by the Federal Court of Appeal Decree No, 43 of 1976 with effect from the 1st of October, 1976. The court functions ad an intermediate court of appeal between the High Courts of the Federation and the Supreme Court and takes appeals from the High Court. Although section 1 of the constitution (Amendment) Decree No.2 of 1976 had vested in the court original jurisdiction to adjudicate on disputes between the Federation and a state or between the states on issues pertaining to legal rights:

section 212 of the 1979 constitution now takes away the original jurisdiction of the court and vests it in the Supreme Court. Thus, the jurisdiction of the Court of Appeal is now exclusively appellate.

The consitution has added courts of co-ordinate status with the High courts from which the courts of Appeal shall hear appeals. These include the Federal High Court, the High Court of a State, the sharia court of Appeal and the Customary Court of Appeal.[1] These courts and all other courts below are absolutely bound by the decisions of the Court of Appeal and the latter is bound by the dicision of the Supreme Court.[2]

It is important to point out that the court of Appeal is a court of co-ordinate jurisdiction with the Supreme Court (1960-1963), the Federal Supreme court (1955-1960) the West African Court of Appeal (1933-1954) and the full court of the first supreme court (1861-1928). These defunct superior courts of record were of co-ordinate jurisdiction with the Court of Appeal and this was the decision of the latter in the

case of Koloko Imports and Exports Co. Ltd. Vs. African continental Bank Ltd;[3] in which the court held that the former supreme Court established by the supreme Court Act 1960 must be taken as its immediate predecessor. Thus, by extension, we could reach the full court of the Supreme Court which was the first intermediate court of appeal between the former supreme court and the privy Council.

According to section 2 of the Court of Appeal (Amend ment) Rules 1984, the word "Federal" has been deleted in all places where the name "Federal" Court of Appeal" appears and, thus, the Federal Court of Appeal Rules, 1981 have been amended accordingly and, henceforth, the court is now called "The Court of Appeal. By virture of section 213 of the 1979 Constitution, the Court is the subordinate of the Supreme Court and the latter haears appeals from the decisions of the former. Never theless, it is important to mention that before the president of the Court of Appeal made rules regulating the practice and procedure of the court in 1981, the court was using the then applicable Supreme Court Rules of 1961.

4.1.1 Applicable Legislation:

As mentioned earlier, the Court of Appeal came into being by virture of Decree No. 43 of 1976, and section 227 of the 1979 constitution has empowered the president of the Court to make rules subject only to any Act of the National Assembly. Thus, in exercise of the powers conferred by section 227 of the Constitution as modified by the Constitution (Suspension and modification) Decree, 1984 and of all other powers enabling him in that behalf, the President of the Court made the Court of Appeal Rules, 1981 which came into force on 1st of July, 1981;[4] purposely to regulate the practice and procedure of the Court.

It should be borne in mind that the provisions of the 1979 Constitution have superseded the provisions of Decree No. 43 of 1976. But since the constitution does not categorically and expressly abrogate the Decree, it is proper to say that those provisions of the Decree which are not inconsistent with the constitution are still in force. This is in line with section 274 (1) of the said constitution which provides that any axisting law which is in conformity to the provisions of the constitution shall have effect.

Section 217 of the Constitution has confirmed the existence of the Court of the Court of Appeal and sub-section 2 (a) and (b) of the same section provides that the court shall consist of a President and such number of Justices not less than 15, of which not less than 3 shall be learned in Islamic Personal law, and not less than 3 shall be learned in Customary Law. The Court sits in seven divisions, namely, Lagos, Ibadan, Benin, Kaduna, Jos, Enugu and Port-Harcourt.

Although, the court of Appeal Rules, 1981 do not make provisions for the filling of briefs of argument by the parties in the appeal, the Court of Appeal (Amendment) Rules, 1984 now requires the filling of briefs in the Court.[5] The 1984 rules have amended the principal rules and inserted a new order 6 and the existing order 6 to the principal rules is now renumbered as order 7. This order 6 contains provisions for the filling of briefs of argument. The rules also repeal the third schedule to the principal rules and replace it by a new third schedule contained in part II of the schedule to the new rules.

The essence of the rules are to enable the Court to do substantial justice between the parties and to avoid a situation in which an appeal may fail due to mere technicalities or procedural errors which have no direct bearing or essence on the actual merits of the appeal. Once the parties in the appeal have fulfilled the terms and conditions laid down by statues for appeal, the court will exercise its appellate jurisdiction and entertain the appeal with a view to doing substantial justice between the parties.[6] For instance, where an intending appellant fails to apply to the trial court for leave to appeal within the time stipulated by statue, the said appellant could make an application under the Court of Appeal Rules for an enlargement of time without necessarily bringing the application first before the trial court.[7] But the practice and procedure of the court shall not be contrary to the provisions ofthe constitution, the court of Appeal Act 1976, as amended, and the rules of Court.

Part II of the amended Court of Appeal act, 1976 has enpowered the court to exercise jurisdiction to her appeals in civil causes or matters.

Section 15 of the Act deals with appeals from interlocutory orders and decisions; and section 16 states the general powers of the court. Section 17 refers to wrong ruling with regard to sufficiency of stamp and section 18 deals with stay of execution which provides that an appeal under part II of the Act shall not automatically operate as stay of execution until the court orders the stay according to the rules of court. It is important to mention that some sections of the 1976 Act have been amended by the Court of Appeal (Amendment) Act 1982. But part II of the principal Act which generally deals with appeals in civil causes or matters has been left unamended.

4.1.2 Appellate Jurisdiction:

The court of Appeal has jurisdiction to hear and determined appeals to the exclusion of any other court of law in Nigeria from the Federal High Court, the state High Court, the sharia Court of Appeal and the Customary Court of Appeal.[18] Moreover, the court has jurisdiction to hear and determine appeals from the decisions of the code of c conduct Tribunal established in the fifth schedule to the Federal constitution and the National Assembly may confer

jurisdiction upon the court in order to hear and determine appeals from any decision of any other court of law or tribunal.[9]

Under section 16 of the court of Appeal Act of 1976, the court has power to exercise appellate jurisdiction in civil matters and has all the powers of the court below for the purpose of re-hearing the case in whole or in part or may remit the case to the court below for such re-hearing, and may give such other directions as to the manner in which the court below shall deal with the case in accordance with the powers of the court.

Moreover, the rules of court have amplified the appellate jurisdiction of the court in the sense that the court has power to draw inferences of fact and to give any judgement and make any order which ought to have been given or made and the court may make any order on such terms as the court thinks just with a view to ensuring the determination on the merits of the real question in controversy between the parties.[10]

Thus, the court in the exercise of its powers of re-hearing under section 16 of the Act and order 1

rule 20(5) is entitled to make any order or give any judgement, as the case may require and to ensure that justice is made between the parties in the appeal. This is to be done by hearing on the printed record and by examination of the whole evidence both oral and documentary tendered before the trial court and forwarded to the Court of Appeal.[11] In other words, the Court of Appeal has to examine the case forwarded to it as a whole.

But would the Court of Appeal going by the provisions of Order 1 Rule 20(5), raise suo motu and decide findings of fact or issues of law decided by the court below and in respect of which neither party in the court of Appeal has complained? Although the court of Appeal is entitled to make any order or give any judgement as the case may require, it has no power whatsoever to deal with an issue which has not been placed before it- there must be before the court a ground of appeal raising the issue directly or on which the issue to be determined is based.[12] This is because of the fact that the determining factor in the exercise of the appellate jurisdiction of the Court as enshrined in the rules of court is "ensuring the determination on the merits of the real question in controversy between the parties ...."

The circumstances under which the court is entitled to interfere with and reverse the findings of fact of the court below are when it is clear that the finding is perverse and contrary to the facts relied upon which is at variance with the exercise of judicial discretion of the Lower Court.[13] Furthermore, the Appeal Court can interfere with a finding of fact of the court below, when the latter has failed to evaluate the ample evidence before it and make proper findings In this respect, the Appeal Court is entitled to evaluate such evidence and make the findings which he court below ought to have made.[14]

From the above explanation, it would be clear that it is not the function of an appellate court to disturb the findings of fact of the court below unless the findings are shown not to be in consonance with reasonableness or it is perverse and the lower Court has failed to make proper use of its judicial discretion.[15] This means that the main business of a trial court is to try cases which deals with trying issues and to decide those issues and thus decide the dispute. The court of Appeal, however, is charged with the responsibility of

over-seeing and reviewing the way the dispute and the issues arriving therefrom were tried - to see whether the trial court has used the correct procedure and/or arrived at the right and proper decision.[16]

The question before the Court of Appeal is: Are the findings of fact made by the trial court right or wrong? Where the trial court has properly evaluated the evidence and findings of fact on such evidence and are correct, the Court of Appeal, therefore, has no power to embark on a fresh appraisal of the same evidence or to disturb the findings of the trial court.[17] The general presumption is that the decision of the court below on the facts stated was right and the onus is on the appellant to rebut the presumption. That is to say that it is the duty of the appellant to satisfy the Appeal Court that the decision of the court below in respect of the case appealed against was wrong and this should be raised in the grounds of appeal.[18]

However, where the court of Appeal is in doubt as to whether the trial court was right or wrong the court is bound to resolve such doubt in favour of the trial court.[19] Thus, it is not the duty of the court of Appeal to raise an issue which the parties have not raised.[20] But where the court decides to raise such an issue because it is material for the determination of the appeal before it, the court should give the parties an opportunity to argue the point before the court decides the matter and takes a decision.[21]

It is to bear in mind that the Court of Appeal has no supervisory and reviewing jurisdiction over the Lower Courts except the jurisdiction to hear appeal brough to it by an appellant in the exercise of his constitutional right of appeal. As stated earlier on, the court is a creature of the constitution and it must exrcise its powers according to the provisions of the Constitution and other statues having direct reference to it.[22] The court, therefore, shall exercise its appellate jurisdiction by reviewing a case on appeal through the records provided by the parties in the appeal[23] with a view to determining the question in dispute between them.[24]

4.1.3 Appeals As of Right:

According to the provisions of the Nigerian constitution, appeals lie to the Court of Appeal as of right in civil proceedings from the decisions of a High court, the sharia Court of Appeal of a state, the Customary Cpurt of Appeal of a state and the code of conduct Tribunal established in the Fifth schedule of the Constitution.[25]

Section 220 (1) of the Constitution provides that appeals as of right from decisions of a lower Court in civil proceedings to the Court of Appeal are as follows:-

a) Final decisions of the High Court sitting at first instance. The words "final decisions" here refer to a situation where the High Court determines the rights of the parties and not merely an issue in the case.[26] In this respect, the court exercise its original jurisdiction.

b) Decisions of the High Court where the ground of appeal involves questions of law alone:

c) Decisions of the High court as it involves the interpretation or application of the constitution;

d) Decisions as to whether or not any of the provisions of chapter IV of the constitution relating to fundemanetal rights has been, is being or is likely, to be contravened with being or is likely, to be contravened with regard to aany person;

e) Decisions on any question as to whether any person has been duly elected to any office under the constitution, to membership of any legislative house or whether the term of any person has ceased or the seat of a person in a legislative house has become vacant;

f) Decisions of the High Court:

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

ii) Where an injunction of the 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 and in any other case as may be prescribed by the legislature.

It would be understood from the above explanation that any person who wants to appeal from the decisions of a High Court as or right, he must make sure that his case falls within the categories mentioned above otherwise this appeal would lie to the Court of Appeal by leave of the High Court or by leave of the Court of Appeal.[27] Furthermore, paragraph (a) above referes to appeal as of right where the High Court exercised original jurisdiction in ordinary suits and the decision is final. But in respect of paragraphs(b) and (f) above, appeals lie as of right where the High Court exercised jurisdiction either at first instance or on appeal over the matters specified in those paragraphs and in both final and interlocutary decisions.[28]

However, section 220 (2) of the Constitution provides that there is no right of appeal from a High Court decicion where the court grants an unconditional leave to defend an action or makes an

order absolute for the dissolution or nulity of marriage in favour of any party who, having had time and opportunity to appeal from the decree nisi but did not do so. Nevertheless, such a p person may appeal by leave under section 221 of the constitution.

With regard to decisions from the Sharia Court of appeal of a State, an appeal lies to the Court of Appeal as of right in any civil proceedings with respect to any question of Islamic Personal Law, which the Sharia court of Appeal is competent to decide.[29]

In respect of decisions from the Customary Court of Appeal of a State, an appeal lies to the Court of Appeal as of right in any civil proceeding which involves any question of Customary law and and such other matters as may be prescribed by the National Assembly.[30] This right of appeal shall be exercised by the party of parties in the appeal.[31]

It should be borne in mind, however, that an appellant's right of appeal as of right does not confer on him unlimited right to argue any ground

of appeal filed in exercise of that right. This is in view of the fact that the right of appeal provided by the constitution is to be exercised "inaccordance with any Act of the National Assembly and rules of court for the time being in force regulating the powers, practice and procedure of the Court of Appeal has a duty to make sure that the subject-matter of an appeal is in line with the rules of court and other statutes in operation.

4.1.4 Appeals with leave:

Appeals lie to the Court of Appeal from the decisions of the High Court by leave of the latter or by leave of the former in all other cases in which there is no appeal as of right. Similarly, any person not being a party to the proceedings but he has an interest in the matter and wishes to appeal therein can do so with leave of the High Court or the Court of Appeal.[36]

There is also an appeal with leave of the High Court or the Court of Appeal from decisions of the High Court made with the consent of the parties or with regard to costs only.[37] The court of Appeal,

however, is reluctant to entertain application for leave in respect of a decision made with the consent of the parties except where the allegation is centred on fraud or lack of jurisdiction.[38] An appeal in respect of costs can only be by leave but such as application can oly be entertained in very exceptional circumstances.[39] This means that leave to appeal can only be granted if it appears necessary in order to avert a substantial miscarriage of justice[40] and this should be whom by arguable points in the proposed grounds of appeal.[41]

An application for leave to appeal with regard to decisions from the Sharia Court of Appeal or the Customary Court of Appeal can be made by a non-party to the proceedings in either of the courts but who claims to have interest in the matter may be entertained.[42]

It is important to mention that an application for leave to appeal must first be made to the Court below[43] except where there are special circumstances which make it impossible or impracticable to apply to the Court below.[44] In this respect, the Court of Appeal may entertain such

an appeal even though not proceded by an application to the court below, from which the appeal is brought. In a situation in which the court below refuses the application for leave to appeal, the applicant may forward the application with a similar prupose within fifteen days after the date of the refusal, to the Court of Appeal.[45] The application shall be by notice of motion supported by affidavit and it shall state the rule under which it is brough as well as the ground for the relief sought.[46]

Further, the application for leave to appeal from a decision of a lower Court to the Court of Appeal shall contain:-

i) Civil form 5 duly completed;

ii) a certified true copy of the appealable judgement;

iii) a copy of the proposed grounds of appeal, and where the court below has refused an application for leave, a copy of the order of such refusal.[47]

Where the application for leave to appeal is against an interlocutory decision of the court below, it shall be done within a period of fourteen days and

if the decision is a final one within a period of three months after the decision of the court below.[48] However, where the application is made in the first instance to the Court below, a further period of fifteen days, from the date of the determination of the application in order to make another application to the Court of Appeal.[49]

After leave to appeal is granted either by the Court below or by the court of Appeal, the appellant shall file a notice of appeal within fourteen days (if the decision is interlocutory) or within three months (if the decision is final).[50]
But in case the application is not heard within the time prescribed and it has been brought within the specified time, if the Court of Appeal is satisfied that there has not been any unreasonable delay in bringing the the application, the court may extend the time to appeal including the granting of leave to appeal.[51]

Where an application for leave to appeal relates to a decision of the High Court in exercise of its appellate jurisdiction, the Court of Appeal may dispose of the application after the consideration of the record of proceedings, if the court is of the opinion that the interest of justice do not require an oral hearing of the application.[52] It is necessary, however, to obtain the leave where it is required, otherwise any appeal filed is incompetent.[53] This is because an appeal shall be deemed to have been brough when the registry of the court below receives the notice of appeal,[54] after granting of the leave to appeal by the court below or by the Court of Appeal.[55] Thus, once leave is granted and the appeal is properly filed as well as subsequent amended grounds of mixed law and facts. But the appellant shall ask for leave to amend the original grounds, and not leave to appeal on the additional grounds.[56]

It is important, however, to emphasise that an application for leave to argue additional grounds is not quite the same as an application for leave

to argue and urge issues not raised in the court below.[57] In the case of the former, an appellant has to apply specifically for leave to argue additional grounds; but in the case of the latter, it is a general rule adopted by the Court of Appeal that an appellant will not be allowed to raise, on appeal, a question whci was not raised or argued in the court below.[58] But this general rule is subject to the demand of justice in the sense that where the question involves substantial points of law - be it substantive or procedural - the Court may entertain, for the first time, issues not raised or argued in the court below, in order to prevent an obvious miscarriage of justice.[59]

4.2.0 Statutory Exclusion of Jurisdiction:

The Court of Appeal being a creature of the constitution, it can only exercise its appellate jurisdiction by virture of the powers granted it by the constitution and other statutes.[60] Thus, the jurisdiction of the court is founded upon and appeal lodged to it by an appellant and such an appeal, in civil proceedings, exists solely by statue which must provide expressly in that respect.[61]

The Court of Appeal, therefore, derives the exercise of its appellate jurisdiction from section 219 of the 1979 constitution, section 16 of the Court of Appeal Act, 1976 and order 1 rule 20 (4) & (5) as well as Order 3 rule 23 of the Court of Appeal Rules 1981 as amended. A prospective appellant, therefore, must comply with the provision of the statute creating the appeal before the court can exercise its appellate jurisdiction to entertain the appeal.[62] In other words, unless the terms and conditions laid down by the statues are fulfilled, the courts jurisdiction to entertain the appeal is excluded.[63]

This, therefore, shows that where the court finds that it has no jurisdiction to entertain an appeal, what ever it does in that respect is in vain and a nullity.[64] However, the practice of the court is that where the jurisdiction of the court is statutorily excluded, the ouster provisions are strictly construed and if they are capable of having two meanings that meaning which preserves the ordinary jurisdiction of the court shall be applied.[65] That is to say that the language of the statute that ousts the jurisdiction of the court will not be extended beyond its least onerous meaning unless clear words are used to justify such an extension.[66]

But it is important to emphasise that even where a court's jurisdiction may appear to have been excluded by a statute, that court has jurisdiction to decide whether or not it has jurisdiction to entertain the matter and such statute ousting its jurisdiction must be construed strictly.[67] Thus, in the case of Grey Vs. Pearson,[68] the court held that in construing such a statute the courts must adhere as rigidly as possible to the express words that are found and to give such words their natural and ordinary meaning. However, Lord Denning MR. advocated another rule of interpretation of statutes known as purposive Approach rule which means that the interpretation of statutes is to look at the intention of the legislature and the view of the Ministers in order to supply the gaps and stretch the Ordinary meaning of the words used and construe the words according to the intention of the legislature.[69]

It would be clear from the above explanation that even though the Court of Appeal may have its jurisdiction ousted by a statute, the court has jurisdiction to construe the ouster provisions in order to find out its legislative intention - what it intended to oust and the extent of the ouster.

For instance, section 6 (3) and (4) of Decree No.10 of 1976 has statutorily excluded the jurisdiction of any court of law from inquiring into the validity of any direction, notice or order given or made under the Decree, enactment or law or the circumstances thereof. Looking at this Decree and the provisions of the 1979 constitution, particularly section 6 (6) (d) of the said constitution which excludes the jurisdiction of Courts from determination of any issue as to the competence of any authority or person to make any law or proceedings in relation to any existing law made between the 15th of January, 1966 and 1st of October, 1979. The supreme Court, therefore, held that the Decree has now become an existing law under section 274 of the 1979 constitution.[70]

It is now a settled law that a statute may seem to oust the jurisdiction of a court but the court has jurisdiction to inquire whether or not its jurisdiction has been statutorily excluded.[71] If the court construes the ouster provisions strictly and discovers that its jurisdiction has been statutorily excluded, it must stop further proceedings in the matter other wise whatever it does in that respect is null and void and of no effect whatsoever.[72]

This means that the court cannot exercise its discretion to cure the defect and entertain the appeal [73] because a statute which is void cannot create a valid right of appeal.[74] Similarly, due to the statutory exclusion of jurisdiction, the court cannot transfer the purported appeal to the court of Court of competemt jurisdiction.[75]

This follows that the court can only exercise its appellate jurisdiction in line with the powers granted by the constitution and other statute to it. This is the reason why, due to the limitation placed upon it, the court, ought to determine, first of all, whether or it has jurisdiction to deal with the matter. If it finds that its jurisdiction has been ousted by a statute, the hearing comes to an end - it may be an abrupt end because everything it does after the finding of lack of jurisdiction, would be a nullity.[76]

4.2.1 Coram:

Coram legally refers to a properly constituted or appropriate court (otherwise known in legal parplance as Coram Judice) is very essential in the exercise of appellate jurisdiction of a court.

Thus, the Court of Appeal is duly and properly constituted, for the purpose of exercising any jurisdiction as directed by the constitution or any other law, if it consists of not less than three justices of the Court.[77]

Where an appeal is from a Sharia Court of Appeal there must be not less than three of the said Justices learned in Islamic personal Law.[78] Similarly, if an appeal is from a Customary Court of Appeal, at least three of the said Justices must be learned in Customary Law.[79] Thus, under section 217 (2) (a) (b) of the 1979 constitution, it is provided that the court of Appeal shall consist of the president of the Court and such number of Justices of the Court not less than 15, of which at least 3 shall be learnediin Islamic Personal Law and not less than 3 shall be learned in Customary law. However, this is subject to any Act the National Assembly may prescribed.

Where the court is duly constituted by having the number of Justices as prescribed by the constitution for the purpose of hearing and determining any appeal this shall not prejudice

a justice who expresses a dissenting opinion different from the other Justices fromdelivering this opinion.[80] But the dissenting opinion delivered will not form part of the judgement or decision of the court delivered by the other Justices. This is because the decision of the court is determined by the opinion of the majority of its members or justices.[81]

The Court of Appeal is enjoined to deliver its decision, after an appeal, in any cause or matter, has been fully heard before it, in writing not latter than three months.[82] This is to be done by each Justice of the Court expressing and delivering his opinion in writing or by stating that he adopts the opinion of any other Justice who delivers a written opinion.[83] But it is not necessary for all those Justices before whom the appeal was heard to be present when a judgement is to be delivered and it is lawful for the opinion of any of them to be pronounced or read by any other Justice and this will have the same force and effect as if the Justice whose opinion is so read has been present and read his opinion himself.[84]

It should be understood that the above situation is only applicable where a court is duly constituted. But assingle justice of the court may exercise any power vested in the court with the exception of the power of final determination of any appeal.[85] However, any order, direction or decision made or given by a single justice may be varied, discharged or reversed by the Court.[86] That is to say that a duly constituted panel of not less 3 Justices of the Court may reverse bhe decision of a single Justice. Further, a single Justice cannot grant leave to appeal;[87] but he can exercise such power when bhe appeal is pending in the court.[88]

4.2.2 Jurisdiction to Grant Interlocutory Relief:

The Court of Appeal has jurisdiction to entertain an application for a grant of interlocutory relief when a plaintiff or applicant makes out a case on the merits that there is a substantial issue to be tried at the hearing due to a violation of the plaintiff's legal right by the defendant and the plaintiff wants the Courts to restrain the deffendant from doing the acts alleged by granting him relief by way of interlocutory injunction.[89]

However, the interlocutory order is not meant, provided there is no appeal, to stifle the main appeal before the court.[90] That is to say that after disposing of the application for an interlocutory injunction, the court can proceed to give such decision upon the appeal as may seem just.

The main aim of interlocutory injunction is to protect the plaintiff against injustice or injury by violation of his right for which he could not get adequate compensation in damages recoverable if the uncertainty surrounding his application were resolved in his favour at the trial. But it is the duty of the court to weigh the need of the plaintiff in respect of the protection he sought vis-a-vis the need of the defendant in order not to deny him the exercise of his own legal rights for which he could not be adequately compensated in view of the plaintiff's undertaking in damages if the uncertainty were resolved in the defendant's favour at the end of the trial by virture of determining the preponderance of evidence.[91]

However, the question now is: how could the court d determine the balance of evidence or the preponderance of evidence in granting an interim injuction? The rule is that a plaintiff seeking an interlocutory injuction must establish a strong prima Facie case for both the existence of his right and the infringement of that right and the infringement of that right. Moreover, the plaintiff has to convince the court that there is every likelihood that he is going to succed in the case. This means that an interim injunction would be granted to a party who shows that he has a prima facie case on the claim of right on which ground the opposing party would be called upon to answer. Thus, it is just and appropriate to the court to intervene otherwise the complainnant's right would be trampled upon by virture of the other party's conduct or action which would render ineffective or nugatory any order or decree of the court.[92]

The governing consideration here is for the court, after the applicant has discharged his burden, to determine whether the applicant has established a probability or a strong prima facie case that he is entitled to the right he prays for and the court ought to intervene to stop the violation of the right in order to maintain the status quo pending

the trial. This means that in maintaining the statutes quo the court should take into consideration the balance of convenience coupled with the fact that any injury to the plaintiff can be cured by payment of damages rather than by granting of injunction.[93]

It is to bear in mind that for an application for interim relief by way of injunction to succeed it is sufficient for the applicant to establish that there is a substantial issue to be tried at the hearing. This is because it is not necessary for the applicant to establish the legal right to a claim as he would do on the merits since at this point in time pleadings have not been filed, no issue joined and no oral evidence adduced.[94]

For instance, it is an established principle of law that in an application for interim relief, it is not necessary to prove proprietary interest in the property to be protected. All that seems to be needed is proof of lawful occupation with the authority of owner.[95]

Be that as it may, the Court of Appeal must confine itself to the only issue or issues raised in an interlocutory appeal and refrain from commenting on the other matters which would appear to have the effect of deciding the substantive case.[96] In otherwords, the courts should confine itself to the only issue or issues relevant to the determination of an interlocutory appeal after satisfying itself that there is a serious question to be tried at the hearing and by virture of the facts before it, there is a probability that the plaintiff is entitled to relief.

4.2.3 Conditions and Procedure of Appeals:

The guiding principle, on appeal, is that the appellant must show that the decision of the court below is wrong. That is to say that the onus is on the party appealing to convince the court that the judgement he is appealing against is wrong otherwise the appeal is bound to fail.[97]

This is in view of the fact that it is an established principle of law that a judgement of a court of law is presumed to be valid until it is proved by a person challenging its validity to be wrong. This means that when a judgement is delivered,

for instance, by the High Court, it is presumed on appeal to be correct until the contrary is shown.[98]

Thus, the procedure to follow by an appellant inorder to discharge the burden is to take all steps necessary to produce the judgement appealed against or its certified copy together with the grounds of appeal, before the Court of Appeal, showing that the decision is wrong. However, according to the rules of courts, it is not the duty of the appellant to produce the judgement - the duty is imposed on the Registrar of the court below.[99]

The law provides that once the appellant has deposited the money for making up and forwarding the record, he has performed his duty. The appellant, therefore, has right to prosecute his appeal in the Court of Appeal thereby having the appeal determined on its merit.[100] The court below is under a constitutional obligation to furnish the appellant with authenticated copies of its decision in order to enable him to prosecute his appeal.[101]

Under 13(1) and (2) of order 3 of the Court of Appeal Rules, 1981, the appellant, having paid the deposits required, it is the duty of the

Registrar of the court below to compile and transmit the record to the court of Appeal. But if by inadvertence, carelessness or negligence of the court below, the judgementof the court is lost or misplaced, the appellant will not be held responsible.

Thus, the Supreme Court held that it was a denial of the appellant's right to prosecute his appeal in the Court of Appeal as a result of which he would be deprived of the opportunity of having the appeal determined on the merits by the court and this was unconstitutional and legally wrongful.[102] The Supreme Court went on to add that the proper procedure for the court of Appeal to follow, in this respect, in order to adhere to constitutionality, was for the court to order for a retrial of the plaintiff's appeal which was consistent with the plaintiff's constitutional rights of appeal so that he might have another opportunity to start all over with a view to restoring his deprived right of appeal.[103]

If an appellant fails to comply with the requirements of appeal as ordered by the Registrar of the court below that would entail the dismissal of the appeal after certificate of non-compliance has been

filed by the Registrar,[104] For instance, where the appellant fails to comply with the requirements of order 3 Rules 10 and 11 to the effect that he shall deposit a sum of money fixed to cover the making up and forwarding of the record of appeal and to give security for the due prosecution of the appeal within such time as the registrar of the court below directs.[105] In otherwords, the failure of the appellant to comply with none of the requirements of the rules may be regarded as a complete absence of vigilance on the part of the appellant.[106]

However, a person whose appeal has been dismissed under order 3 Rule 20 (1) and has a genuine case that warrants restoration of the appeal may apply within the time allowed by the rules of court by notice of motion under order 3 Rule 20(4) to the Court of Appeal which may use its discretion for good and sufficient cause for the restoration of the appeal upon just terms. This is meant to ginger up an appellant who is not sufficiently diligent in prosecuting his appeal.

The registrar's certificate of non-compliance or anything done or ordered to be done by the Registrar with the exception of an act done or ordered to be done by the president of the court of Appeal, can be

challenged by an aggrieved person who may apply to the court of Appeal or a Justice with a view to having the act, order or ruling complained of set aside or varied. The complainant shall bring his application by notice of motion supported by affidavits showing the error and the relief sought. The Court or a justice, after due consideration of the application, may direct make such order as justice of the case so demand.[107] Furthermore, the court has inherent jurisdiction to set aside an erroneous act by the registrar, especially the latter's certificate of non-compliance when there is likelihood of an abuse of its process.[108]

Where an appeal has been dismissed under order 3 Rule 20 (2) and a respondent intends to challenge the decision of the court below to the effect that it should be varied or be affirmed on grounds other than those relied upon by the trial court, then he should proceed under order 3 rule 14 by giving notice of appeal and the provisions of Rule 19 order 3 shall apply in that, on application to the court of Appeal, the time limited for giving notice of appeal may be extended so far as is reasonably necessary in order to allow him to deposit

the sum estimated to cover the cost of the record and for furnishing the security for costs.[109] But if the circumstances of the case so demand and there is no opposition from the other party, the court may waive the requirement of giving notice of appeal under paragraph (2) of Rule 20.[110] On the other hand, if the respondent fails to comply with the requirements he may not be allowed to urge the court to vary or uphold the decision appealed on a different ground other than that relied upon by the court below.[111]

The scope of order 3 Rule 14 which deals with respondent's notice of contention on the appeal that the decision of the court below should be varied or affirmed on grounds other than those relied upon by that court it as follows:-

1. That the respondent intends to retain the judgement of the court below but wants it varied;
2. That the notice which the respondent is required to give must have direct bearing on the appeal;
3. That the respondent should give notice of his intention to contend the appeal to the appellant as well as to all parties to the proceedings who are directly affected by

the contentions of the respondent whether or not such parties have filed their addresses for service.[112]

It is important to emphasiset that such notice must be served on every party who may be affected by such cpmtemtopm withing 15 days in respect of an appeal against an interlocutory order and, in other cases, within one month, after the service of the notice of appeal on the respondent.[113] Hoever, omission to give such notice by the respondent, the court may use its discretion to postpone adjourntthe appeal upon such terms as it thinks fit.[114]

Under order 3 Rule 15 a respondent may file with the Registrar of the Court of Appeal a preliminary objection to the hearing of the appeal after giving the appellant three clear days notice thereof before the hearing, stating the grounds of objection. This is meant to prevent a situtation in which the appellant is taken unawares.[115] Thus, if the repondent fails to comply with this rule, the court has discretion to refuse to listen to the objection or to grant an adjournment with cost to the appellant or may make such other order as the justice of the case demands.[116]

An appellant, with the consent of the parties concerned in the appeal, may withdraw the appeal any time before it is called for hearing. Such with-drawal, after notifying the Registrat of the Court of Appeal and the appeal is consequently struck out, of the appeal under Rule 14 of Order 3.[117] But if the parties to the appeal refuse to give their consent as to the withdrawal of the appeal by the appellant, the appeal shall come on for the hearing in order to determine costs or any outstanding issue between the parties and once the appeal is withdrawn finally, it is considered as being dismissed.[118]

4.3.0 The "Entering" of Appeals and Further Evidence:

An appeal is considered to have been "entered" when the record of appeal is received in the Court of Appeal and it is entered in the cause list in compliance with order 3 Rule 13 (2) of the Court of Appeal Rules, 1981 (as amended). That is to say that the mere giving of a notice of appeal is not sufficient to consider the appeal to have been entered un until the record of appeal has been received in the Court of Appeal and entered in the cause list.[119]

Therefore, once the appeal has been entered, the Court of Appeal becomes seized of the whole proceedings.[120] This means that Order 1 Rule 22 will apply to the effect that all applications in respect of the proceedings as between the parties there to including application for a stay should be made to the Court of Appeal either direct or through the court below. However, before the record of appeal is received in the Court of Appeal, both the Lower Court and appellate court should have concurrent jurisdiction with regard to any application in the proceedings and an appellant has to comply with Order 3 Rule 3, which spells out the rules governing filling of application to the appellate court.

For instance, even though there is a pending appeal, the High Court has jurisdiction to entertain an application to set aside a default judgement obtained in the High Court.[121] This is because of the fact that an appeal is not considered as a stay of execution until the court of appeal orders the stay either conditionally or upon the performance of such conditions as may be imposed according to rules of Court.[122] But any application to the Court of Appeal when the appeal has not been 'entered' cannot be entertained.[123]

Nevertheless, in the case of Ajibade Abina and others Vs. Tika Tore Press Ltd:[124] where the supreme court entertained an application before an appeal had been entered. The court held that the rationale behind order 3 Rule 13 (1) of the Court of Appeal Rules, 1981[125] which deals with transmission of records of appeal was to enable the court before hearing an application for stay, to ensure itself that the application was genuine and that the applicant did not mean to delay or prevent the successful party from reaping the fruits of his judgement. Thus, where all the circumstances of the case warrant, and in the interest of justice, an appellate court can entertain an application for a stay of execution even though no appeal has been entered. This is in line with Order 3 Rule 3(4) where it is provided that under special circumstances which make it impossible or impracticable to apply to the court below, an application may be made direct to the court of Appeal.

However, it is important to emphasise that a discretion to grant or refuse a stay must take into account the competing rights of the parties concerned.

Where such a discretion is based in favour of a party with regard to the stay but does not adequately take into account the other party's equal rights to justice is decretion that has not been judicially exercised. It is the cardinal principle of our law pertaining to civil matters that competing rights of parties are weighed on an imaginary scale, obviously, scale tilts, in good faith, towards the party with preponderance of evidence and, therefore, the discretion is exercised in his favour.

Order 1 Rule 20 (3) of the Court of Appeal Rules, deals with conditions under which further evidence may be received and admitted on hearing an appeal against the decision of a lower Court. The rule requires the appellate court to grant leave to a party to adduce further evidence in respect of matters which have occurred after the date of the trial or hearing on special grounds. Thus, pepple, J.C.A. (as he then was) in the case of Odiase Vs. Omele[126] defined further evidence as that evidence which is complimentary to evidence already adduce at the trial and which may be taken together with it to prove or defeat a claim. He went on to add that a piece of evidence which contradicts the evidence of the applicants at the court below cannot be said to be further evidence but really a sustitutional evidence.

It is clear from the above provision of the rule that if a party has not given evidence at the trial, the appellate court may exercise its discretion whether or not to grant leave to adduce further evidence on appeal. The question is: What constitutes "special grounds" under the rule which the court ought to have taken into consideration before granting leave to adduce further evidence?

The Supreme Court, therefore, held that "special grounds" includes grounds for furtherance of justice and not to rectify the mistakes or negligence of counsel to the appellant in the court below.[127] This means that in special circumstances and in the interest of justice further evidence which was available at the time of the trial or hearing but not adduced at the trial court may be received in the Court of Appeal as the evidence could not have been obtained with reasonable diligence for use at the trial.[128]

Although paragraph (4), Rule 20 of Order 1 gives the court wide powers to draw inferences of fact and to give any judgement and make any order which ought to have been given or made, it is the practice of the court to refuse an application to adduce further evidence which the applicant could have adduced at the trial.[129]

This is in view of the fact that a party should not be allowed to give additional evidence in the Appeal Court in order to improve on his case which he might have done at the trial court,[130] In this respect, Denning, L.J. was quoted to have said that where a party made a mistake at the trial on a most important matter and wished to put it right and his fresh evidence were so convincing that it is capable of being believed then a new trial might be ordered,[131] (then there would be ground for a new trial).

It is to bear in mind that by virtue of the fact that an appellate court has used its discretion to allow a party to adduce further evidence on appeal does not mean that the successful party is deprived of the fruits of his success in obtaining a judgement. In otherwords, once a party has obtained a judgement, he is by law not to be deprived of that judgement unless under special circumstance and on solid grounds.[132] In the case of Namudu Alao and Another Vs. Bello Akanbi and Others[133] it was held that the Court of Appeal should, however, be hesitant in granting leave to a party to adduce additional evidence except as to matters which had occured after the date of the trial or hearing.

From the above principles enunciated, it would be clear that the scope of the Rule for admitting further evidence is as follows:-

1. That the adduction of further evidence is in furtherance of justice:
2. That the evidence sought to be adduced could not have been obtained with reasonable diligence for use at the trial but it was available at the time of trial;
3. That if such evidence were to be adduced it would have an important effect on the whole case; and
4. That the evidence is so convincing that apparently it is capable of being believed.[134]

4.3.1 Powers of the Court of Appeal:

The court of Appeal has powers to make any order necessary with a view to determining the real question in controversy in the appeal. This includes powers to amend any defect or error in the record of appeal and may direct the court below to inquire into any aspect of the case and the court shall have full jurisdiction over the whole proceddings as if the proceedings had been instituted in the court of Appeal as court of first instance.[135]

In other words, the court of Appeal shall have all the powers and duties as to amendment and otherwise of the court below, in relation to an appeal in civil matters as well as other issues pertaining to a reference made to an official or special referee.[136] However, a single justice of the court of Appeal may exercise any power vested in the court with the exception of the power to decide a case finally. Thus any aggrieved party may appeal to the court in order to vary, discharge or reverse any decision made by a single Justice.[137] The court, therefore, is duly constituted with powers of hearting and determining any appeal if it consists of a minimum number of three Justice.[138]

Under Order 3 Rule 23, the court of Appeal shall have power to give any judgement or make any order which the trial court ought to have made. The rule goes on to add that such powers may be exercised on any aspect of the proceedings in relation to the appeal whether or not the appellant or the respondent or any of the parties there to may have asked for a particular aspect of the decision to be reversed or varied. This means that the court has powers to dismiss the appellant's appeal or give judgement in his favour or give order of re-hearing of the whole suit.[139] However, where an order of re-hearing would entail extensive amendments to the writ and pleadings,

the Appeal Court would strike out the suit so that the Plaintiff may commence fresh proceedings.[140]

But where a court of trial clearly evaluates the evidence and appraises the facts in the case before it, the court of Appeal has no power to substitute its won views for the viewssof the trial court.[141]

Bello, J.S.C. (as he then was), on the other hand, held, among others, that where there is ample evidence and the trial judge failed to evaluate it and make correct findings, the court of Appeal has power to evaluate that evidence and make proper findings unless the matter affects the credibility of witnesses in which case a re-trial may be ordered.[142] This is because the court of Appeal does not see and hear evidence from the witness, it is the trial court that has seen and assessed the witness thereby forming impression and evaluating their evidence.[143]

Where a court of trial wrongly admits inadmissible evidence or wrongly rejects admissible evidence, and it appears that this has led to a substatial miscarriage of justice the court of Appeal may order a re-trial of case.[144]

Similarly, the court of Appeal has power under Rule 23 of Order 3 to enter a judgement of dismissal of the appellant's case if on the evidence of the case that would be the proper judgement that the court of trial ought to have entered.[145] This shows that the Rules has given the court wide powers which should be exercise with a view to seeing that justice is done in the case irrespective of the fact that any of the parties there to has asked for that decision or not.

4.3.2 Judgment and Orders:

According to the rules of Court, the judgment of the court of Appeal shall be rponounced in open court, on a date to be announced by the Registrar and all the parties to the appeal shall be notified accordingly.[146] When a judgment is being delivered, all counsel who have been duly notified in that respect shoul be present in the court otherwise their absence will be regarded as an act of distespect to the Court.[147] In this respect, the judgement of the court is embodied in an order and the court below shall have a certified copy of the order.[148]

It is pertinent, at this juncture, to state that section 258, susection (1) of the 1979 constitution

provides that all the courts established under it which include the court of Appeal, shall deliver theri decisions in writing not later than three months after the conclusion of evidence and final addresses. Thus, all parties to the cause or matter determined shall be furnished with duly anthenticated copies of the decision on the date of the delivery thereof. However, the constitution (suspension and modification) Amendment Decree No.17 of 1985 was promulgated in order to remove hardship and injustice in the event of unavoidable circumstances that t makes it impossible and impraticable to deliver the judgment within 3 months after the concluson of evidence and final address. This means that the decision of the court shall not be set aside on the ground of no-compliance with the provision of the constitution with regard to the delivery of judgment.

It is important to emphasise that it is the duty of eabh Justice of the Court of Appeal to express and deliver his opinion in writing or he may concur in writing with a written opinion delivered by any other Justice. But it is not enjoined upon all the Justices who hear the case to be present during the delivery of judgment, in which case another Justice may pronounce or read the opinion of a co-justice.[149] Thus, the opinion expressed by the majority members of the court shall be the decision of the court.[150]

According to Order 5 Rule 3, if the court has decided an issue and delivered a judgement in that respect, then the court cannot review that judgment except to correct any clerical mistake or some error arising from any accidental slip or ommission or to correct the record in order to bring it into harmony with the order which the Judge obviously meant or intended. The rule goes on to add that once a judgment or order correctly represents what the court decided then it shall not be varied nor shall a substitution be allowed with regard to the operative and substantive part of the judgment.

The Court of Appeal, therefore, has an inherent power to correct, vary or modify its own order with a view to representing what the court had intended to record.[151] But the court has no power to correct its own mistake of law even though apparent on the face of the order.[152] In this respect, an aggrieved party may appeal against the judgment to the supreme Court.[153] This is in view of the fact that once a court has finally determined a case it becomes *functus officio*[154] and such judgmenttcan only be reviewed or corrected by a higher court on appeal.[155]

It is to bear in mind that for any review of the judgment or order to be done within the appellate jurisdiction, the aggrieved party may apply to the court when the error is discovered. But this does not mean that undue delay will deprive the party of the right to have that review done unless there is an intervening action taken by either party based upon the judgment as recorded which will consequently cause injustice to the other party or third party if the application to correct the error will be effected.[156]

The Court of Appeal or the court below or any other court which has been seized of the matter may enforce the judgment of the court of Appeal as the court may direct.[157] Such direction given to another court to enforce the judgment should come from the presiding Justice in form of a certificate through the Registrar to such other court which should comply with the terms of the certificate and enforce the judgment accordingly.[158] The Registrar of the Court of Appeal is enjoined to notify the Registrar of the Court below the decision of the appellate court in relation to the appeal with all the orders or directions given in that respect.[159] Finally, as the appeal has been disposed of, all exhibits and documents forming part of the record of the court below shall be returned, if possible, to the Registrar of the court below.[160]

R E F E R E N C E:

1. Section 219 of the 1979 constitution.
2. Ibid section 213.
3. FCA/L/26/77 decided on the 13th April, 1977
4. Section 4, the Court of Appeal (Amendment) Rules, 1984.
5. Order 6 of the Court of Appeal (Amendment) Rules, 1984
6. Onitiri Vs. Benson 5 FSC 150.
7. Order 3 Rule 4(1) the Court of Appeal Rules, 1981 (as amended).
8. Supra Section 219 of the 1979 Constitution.
9. Ibid Section 225 (1) and (2)
10. Supra Olr 20 (4) and (5) of the Court of Appeal Rules
11. Jadesimi Vs. Okotie Eboh (1986) 1 NWLR 264
12. Chief Frank Ebba Vs. Chief Warri Ogodo & Anor(1984).
13. Shell B.P. Petroleum Development Co. of Nig. Ltd. Vs. His Highness pere Cole & Ors (1978)3 S.C. 188.
14. Onowan & Anor V. Iserhein (1976)1 NMLR 263
15. Ntiaro Vs. Akpam 3 NLR 9 at P. 10
16. Igboko Oroke Vs. Chuku Ede (1964) NNLR 118 at 119-120
17. Egonu Vs. Egonu (1978) 11/12 S.C. 11 P. 129
18. Folorunso Vs. Adeyemi (1975)1 NMLR 128.
19. Akinyola & Anor V. Eyiyola & Ors. (1968) NMLR 92 at P. 85
20. Inua V. Ntah (1981) All NLR 596.
21. Kuti V. Balogun (1978)1 S.C. 53
22. Chief P.U. Ejowhomu V. Edok-Eter Mandilas Ltd. (1986)5 NWLR (part 39) 33

23. Akibu V. Opalaye & Anor (1974) All NLR (part 11) 344 at 456.

24. Akintola V. Solano (1986)2 NWLR 598.

25. Supra Sections 220,223,224 and 225 of the 1979 constitution.

26. Western steel Works Ltd. V. Iron & Steel Workers Union (1986)3 N.W.L.R. (Part 30)P.617.

27. Supra Section 221 (1) of the 1979 Constitution

28. Obi-Okoye, A. (1980) Essays on Civil proceedings P.63

29. Supra Section 223 (1) of the Constitution.

30. Ibid Section 224 (1)

31. Ibid (2) (a)

32. Ibid Section 225 (1)

33. See paragraph 20 (4) of part 1 of the fifth Schedule to the 1979 constitution.

34. Supra sections 222 (b), 223 (2) (b) and 224(2) (b) of the Constitution.

35. Ibid section 221 (1)

36. Ibid Section 222 (a)

37. Ibid section 220 (2) (c).

38. Godpower Nweke and Anor V. Nigeria Agip Oil Co.

39. Ka Ltd. (1976) 9 - 10 S.C. 101

39. Karikari V. Agyekum 11 (1955) 3 W.L.R. 125

40. Obed Boardman Vs. Sokoto N.A. (1965) N.M.L.R. 329.

41. Amuda Adeojo V. Awotorebo and Anor. (1975)1 N.M.L.R. 51

42. Supra Sections 223(2) (a) and 224 (2) (a) of the Constitution.

43. Ojosipe V. John Dada Ikabala and others (1972)1 All N.L.R. (part oI) 128.

44. Supra orde 3 r 3 (4)

45. Ibid (3)

46. Ibid (1)

47. Ibid (7)

48. Section 25 (2) (a) of the court of Appeal Act, 1976

49. Ibid (3)

50. Supra 03 r3 (5)

51. Ibid (6)

52. Supra section 221 (2) of the 1979 constitution.

53. Yekini Onigbeden and another V. Ishola Balogun and another (1975)1 All NLR (part1) 233.

54. Supra 02 r5

55. Ibid r3 (5)

56. Chief Ebenezer Adote & Others Vs. Sunmola Kadiri Owodunni & another (1986)5 NWLR (Part 46) 942.

57. Musa Opoola Adio and another V. the State (1986) 2 NWLR (part 24) 588.

58. K. Akpene V. Barclays Bank of Nigeria Ltd. & Another (1977)1 S.C. 47

59. Shonekan V. Smith (1964) All NLR 168 at 173

60. Ejowhomu V. Edok - Eter Ltd (1986)5 NWLR 33

61. Mekwunye V. Director of Audit W.N. (1967)1 All N.L.R. 225

62. Ogunmola V. Igbo 7 W.A.C.A. 137

63. Moore V. Tayee 2 W.A.C.A. 43. Also Onitiri V. Benson 5 F.S.C. 150.

64. Itaye & others V. Ekaidere & Others (1978)9 & 10 S.C. 35

65. Anisminic V. Foreign compensation commission (1969)2 A.C. 147 at P. 170

66. Halsbury laws of England, 4th Edition, Vol.10 Paragraph 720.

67. Barclays Bank of Nigeria Ltd. V. Central Bank of Nigeria (1976) 6 S.C. 175 at P. 189

68. 1857 6HL CAS 61.

69. Seaford Court Estates case (1949) 2 K.B. 481 also the case of Northem V. Barnet Council (1978)1 NLR 220

70. F.S. Uwaifo V.A.G. of Bendel State & Others (1982) 7 S.C. 124 at 213

71. C.O. Sode and Others V. Attorney-General of the Federation of Nig. and others (1986)2 NWLR (part 24) 573.

72. Supra Itaye and others V. Ekaidere and others.

73. Eke V. Midwest of Nig. Development corporation, S.C. 22/68 of 15/11/68

74. The Council of Millinuray of Ibadan V. Adamo Ukum (1967) 1 All NLR 213.

75. Ige V. Obiwate (1967)1 All N.L.R. 276

76. Supra Uwaifo V. A.G. Bendel State & Others.

77. Supra Section 226 of the 1979 constitution.

78. Ibid (a)

79. Ibid (b)

80. Supra section 9, court of Appeal Act

81. Supra section 258 (3) of the constitution.

82. Ibid (1)

83. Ibid (2)

84. Supra section 11 of the Court of Appeal Act.

105. Supra 03 r 20 (1)

106. Chief S.B. Bakare V. Ado Ibrahim and Anor. (1971) N.M.L.R. 50

107 Supra 03r17

108. C.O. Akindolire V. Felicia T. Akindolire (1977)NCHR 83

109. Supra 03r20 (2)

110. Ayidele James V. Mid-Motors (Nigeria) Ltd. (1978) 11 & 12 S.C. 31

111. Mustafa Ali V. Isamatu Otanioku (1974) 4 W.S.C.A. 184 at 191.

112. Lagos City Council V Emmanuel Ayodeji Ajayi (1970) 1 All NLR 291 at 295-6

113. Supra 03 r 14 (4)

114. Ibid (6)

115. Nwajebo V. Alabua and another (1974) 1 All N.L.R. (Part 2) 445

116. Supra 03 r 15 (3)

117. Ibid r18 (1-3)

118. Ibid (4-5)

119. Muazu Yola V. Fari Maigyaran Agogo (1975) 1 N.M.L.R. 445

120. Ajibade Aina and others V. Tika tore Press Ltd (1968) 1 All NLR 210

121. Akinrola V. Bassey CCHCJ/6/76/1633.

122 Supra Section 18 of the Court of Appeal Decree 1976.

123 Koloko Imports & Exports Ltd. V. Africa Continental Bank Ltd. (1977) NCHR 14

124. (1968) 1 All NLR 218.

125. This is the same with order 7 Rule 12(2) of the Old Rules

126. (1985) 3 N.W.L.R. 82 at 87

127. Ali V. Allen (1966) 1 All NLR 101

128. Asaboro V. Aruwaji and Another (1974) 1 All NLR 140 at 146

129 Enekebe V. Enekebe (1964) N.M.L.R. 42

130. Igboko Oroke V. Chuku Ode (1964) N.M.L.R. 118

131. Ladd V. Marshall (1954) 1 W.L.R. 1489

132. Vaswani Trading Co. V. Saralakh & Co. (1972) 12 S.C. 77. Also Supra Enekebe V. Enekebe

133. 1986 5 N.W.L.R. 1043 at 1044

134. Edie Mand Leeder V. Naacy Ellis (1953) A.C. 52

135. Supra Section 16 of the Court of Appeal Decree 1976

136. Supra 01 R 20 (1) of the Court of Appeal Rules

137. Supra Section 10 (b) of the Court of Appeal Decree

138. Ibid Section 9

139. Bata Nigeria (Sales) Ltd. V. Brigadier Martin Adamu (1976) N.M.L.R. 172

140. Chief Ekpere and others V. Chief Odaka Aforije and others (1972) 1 All N.L.R. (part 1) 220

141. Victor Woluchem & Others V. Chief Gudi & Others (1981) 5 S.C. 291 at 326

142. Shell B.P. Petroleum Development Co. of Nigeria Ltd. V. Pere Cole and others (1978) 3 S.C. 183 at 194

143. Chief Frank Ebba V. Chief Warri Ogodo & Anor (1984) 4.S.C. 84

144. Peter Ezeani and others V. Nneli Ezene and others (1935) 2 W.A.C.A. 343

145. Abdul Hamid Ojo V. Primate E.O. Adejobi and Others (1978) 3 S.C. 65

146. Supra 05 R 1 (1) of the Court of Appeal Rules.

147. Ibid (2).

148. Ibid Rule 2 (1) and (2)

149. Supra section 258 (2) of the 1979 Constitution

150. Ibid (3)

151. Ashinyanbi and others V. Adeniyi (1967)1 All N.L.R. 82

152. Minister of Lagos Affairs, Mines and Power and another V. Akin-Olugbade and others (1974)1 All NLR (Part 2) 226 at 235

153. Adigun V. All General of Oyo State(No.2) (1987)2 NWLR 197

154. Supra section 15 of the 1979 constitution.

155. Arcon V. Dr. Fassasi (1987)3 NWLR (Part 59) 42

156. Tak Ming co. V. Yee Sang Metal Suppliers Co. (1973)1 WLR 3000

157. Supra 05 R 4

158. Ibid R 5

159. Ibid R.7

160. Ibid R8

CHAPTER FIVE

5.0 CIVIL APPEALS IN THE SUPREME COURT:

In this chapter, we shall examine, briefly, the history of the Supreme Court, applicable legislation, appellate jursidiction and commencement of proceedings. Further, we shall deal with notice of appeal, right of appeal, appeal with leave, appeal out of time, record of appeal as well as filing of briefs. The analysis will include jurisdiction pertaining to interlocutory and final decisions, powers of the Supreme Court as well as orders and review of the court's judgement.

5.1.0. Historical Outline:

The Supreme Court is the last court of appeal and the highest court for Nigeria and, thus, its decisions are final and conclusive,[1] provided there is no legislation to the contrary. The main function of the court is to put finality to the law and an end to litigation which should be rested in justice. The court receives appeals from the Court of Appeal on all classes of matters except where leave is required under sub-section (3) of section 213 of the

1979 Constitution.

Historically, the Supreme Court of Nigeria came into being in 1960 as a Court of Appeal, but functioned as an intermediate Court of Appeal between the High Court and the Privy Council.[2]

However, under the 1963 Constitution the Supreme Court was made the final court of appeal for Nigeria. But prior to the enactment of the 1963 Constitution, appeals from the Supreme Court lay to the West African Court of Appeal which was the full court of the Supreme Court of Sierra Leone from where appeals lay to the Privy Council in London. But in 1933 appeals from the then Supreme Court lay only to the West African Court of Appeal.[4]

In 1955, by virtue of the Nigeria (Constitution) Order in Council of 1954 the Supreme Court of Nigeria ceased to exist as a court original jursidiction and, consequently, the West African Court of Appeal ceased to exercise jursidiction in Nigeria. Thus, a new intermediate Court of Appeal known as the Federal Supreme Court was established for Nigeria.[5] This new court heard appeals from the High Courts of each Region. Appeals lay from the Federal Supreme Court to the Privy Council.

However, on attainment of indpendence in 1960, the Federal Supreme Court was renamed the Supreme Court of Nigeria.[6] This court received appeals from the High Court and further appeals lay to the Privy Council. But appeals to the Privy Council were abolished in 1963 and, henceforth, the Supreme Court became the final Court of Appeal for Nigeria.[7]

It is important to emphasise that earlier courts such as the Supreme Court of 1960, the Federal Supreme Court, the West African Court of Appeal and the full court were intermediate courts of appeal and subordinate to the Privy Council. But the 1963 Supreme Court became the final Court of Appeal and took the place of the Privy Council. This means that if any of the earlier courts mentioned had existed under the 1963 Constitution, appeals would have lain from it to the Supreme Court, which is the highest Court of Appeal in Nigeria since 1st October, 1963 and, thus, it becomes a court of co-ordinate jurisdiction with the Privy Council. That is to say that the decisions of the Privy Council up to September, 1963 and of the Supreme Court from that date are binding on all other courts in Nigeria.

Thus, the Supreme Court has been at the apex of the hierarchy of courts in Nigeria and it has been the final authority on propositions of law in the country. According to Eso JSC; this finality is final forever unless there is a legislation to the contrary -a legislation ad hominien.[8]

5.1.1 Applicable Legislation:

The Supreme Court of Nigeria was created by virtue of the 1963 Constitution which made it the final Court of Appeal in Nigeria.[9] However, the applicable legislations that give the court appellate jursidiction are the 1979 Constitution, the Supreme Court Act 1960 and the Rules of the Supreme Court Act 1960 and the Rules of the Supreme Court, 1985 as well as any other legislation to be enacted by the appropriate authority.

It is true that once a court is established all its inherent powers adhere and attach to it, and these powers are inmate in it, which means that they are not subject of specific grant by the constitution or by legislation. The powers are, therefore, reasonably necessary for the administration of justice. But it is important to emphasise that no court has inherent power to hear an appeal and, thus, any appellate power is traceable to a specific legislation or statute. The Supreme Court, in this respect, cannot be an exception.[10]

Under the 1979 Constitution, the Supreme Court is the Court of final resort for Nigeria and the court shall consist of the Chief Justice of Nigeria and such number of Justices of the court not exceeding 15.[11] The Constitution further provides that 5 Justices of the Court sit to hear appeals while 7 Justices sit to hear Constitutional matters.[12]

It is important to bear in mind that appeals in civil proceedings exist solely by statute and all appeals are heard by virtue of express provision to that effect.[13] This shown that the parties concerned in an appeal, the right of appeal, the time within which to appeal, the manner and conditions in which to exercise the right of appeal and all practice and procedure relating to appeals are provided for in the legislative provisions governing appeals.

The Constitution, therefore, has conferred upon the Chief Justice of Nigeria the powers to make rules for regulating the practice and procedure of the Supreme Court.[14] Thus, the current Rules being applied to appeals in the Supreme Court, as mentioned earlier on, are the Supreme Court Rules, 1983 which came into force on 1st April, 1985.

But non-compliance with the rules does not automatically prevent further prosecution of the appeal. It depends on the Court to issue appropriate directions as it thinks right and as the justice of the case may require, either to dismiss the appeal for want of due prosecution or as to how the non-compliance may be remedied so that the appeal shall proceed.[15]

Section 213 of the 1979 Constitution allows the Supreme Court to receive appeals from the Court of Appeal and section 22 of the Supreme Court Act, 1960 prescribes the general powers of the court. Thus, an appeal is regarded as being "brought" when the notice of appeal has been filed in the Court of Appeal[16] and it is said to be "entered" when the record is received and entered in the caused list of the Supreme Court.[17]

For successful commencement of proceedings, the appellant shall comply with the requirements of Order 7 Rule 3 and Order 8 Rules 2 and 2 and 5. On the other hand, the respondent who wishes to raise any point at the hearing, must comply with the provisions of Order 8 Rule 3 (3).

Order 2 Rule 31 prescribes the principles under which a party can apply to the Supreme Court for an enlargement of time within which to appeal. Order 7 Rules 7, 8 and 12 states

that once the appellant has filed a notice of appeal, the Registrar of the Court of Appeal shall start to prepare the record of appeal because the Supreme Court cannot hear the appeal in the absence of the record.

Order 6 Rules 3, 5, 8 and 9 provides for filing of briefs of argument by the parties to an appeal. These briefs are meant to emphasise and clarify the grounds of appeal and to assist in the administration of justice.

The powers of the Supreme Court are very wide and enshrined in section 26 of the Supreme Court Act and Order 8 Rule 12 of the Supreme Court Rules. These powers include all the powers and duties of the Court which tries the case as well as all other related matters pertaining to the appeal. Thus, the Supreme Court, in the exercise of its general powers, must ensure that no miscarriage of justice or substantial wrong is done to any party in the appeal.[18] Section 22 and 33 of the Supreme Court Act have empowered the Court to order for the production of any document or any other material that will assist in the proceedings of the court. Similarly, it has power to compel a compellable witness to appear before it for further examination and refer an issue, where

appropriate, to a referee for an inquiry and report.

With regard to the judgements of the Court, section 258(1) of the 1979 Constitution provides that every judgement of the court is embodied in an order and it is delivered in open court in writing not later than three months after the conclusion of evidence and final addresses. However, the Constitution (Suspension and Modification) Amendment Decree No.17 of 1985 was promulgated with regard to section 258(1) of the Constitution to the effect that in an event of unavoidable circumstances that make it impossible and impracticable to deliver the judgement within the prescribed period, provided there is no miscarriage of justice, the decision or judgement of the court shall not be set aside or treated as a nullity solely on the grounds of non-compliance with the provisions of the Constitution.

Order 8 Rule 16 provides that, Ordinarily, the Supreme Court cannot review its judgements or Orders once given and delivered. In essence, the court cannot overrule, itself in the same case but it may overrule its previous decision in a subsequent and entirely different case.

5.1.2 Appellate Jurisdiction:

The appellate jurisdiction ofthe Supreme Court is founded upon a constitutional provision which provides that the court shall have jurisdiction to hear and determine appeals from the Court of Appeal.[19] This means that the main function of the Supreme Court, as an appellate court, is to inquire into the way disputes have been determined by the Court of Appeal.[20] Thus, it is not the duty of the Supreme Court to try cases.[21]

Aniagolu, J.S.C.: enuciated the appellate jurisdiction as follows:

> "The jurisdiction of the Court of Appeal (or any other appellate court) is founded upon an appeal lodged to it by a complainant otherwise called an appellant. The court of Appeal is not a court of first instance when determining an appeal, it only embarks upon that determination when proceedings are initiated by a complainant lodged to it by an appellant. Until it is awakened into action from its sleep by such a complaint, it remains a contended tiger sleeping in its lair."22

From the above quotation, it would be clear that the attitude of the Supreme Court in its appellate capacity is that when an issue is not placed before it, it has no business or jurisdiction whatever to deal with it.[23] Thus, where the Supreme Court has no jurisdiction to hear a case or to inquire into an appeal, everything it does, after becoming aware of the fact

that it has no jurisdiction, would be a nullity.[24] This means that the hearing of an appeal does not permit an appellate court to enquire into disputes but to enquire into ways the disputes have been tried and settled.

Generally speaking, the Supreme Court, when determining an appeal, will not allow any fresh evidence which was not tendered or raised in the court below to be raised on appeal unless in exceptional cases which could not, by the exercise of reasonable diligence, have been raised or obtained for use at the trial, for instance, the interpretation of an instrument or the issue of jurisdiction which an appellate court may allow to be raised.[25]

The reason for disallowing fresh evidence to be raised on appeal is that each party, at the trial court, must make the whole of his case and call his witnesses there. Thus, the trial court had the advantage of seeing and hearing the witnesses as well as being in a better position to judge the credibility of the witnesses.[26]

The question now is, How would the Supreme Court, in the exercise of its appellate jurisdiction, interfere with the finding of fact by the court below?

This question was answered in the case of Onowan & Anor V. Iserhein[27] where it was held that the Supreme Court would only interfere with finding of fact of the court below if it was satisfied, on the evidence before it, that the finding was wrong and could not ordinarily have been based on the evidence. In otherwords, the court must come to an affirmative conclusion that the finding is wrong. But it is the duty of the appellant to displace the general presumption that the finding of the court below was right.[28]

Thus, the Supreme Court could not ordinarily interfere with the findings of facts of the court below unless there is ample evidence shown by the appellant that the Lower Court has failed to evaluate the facts and make correct findings on the issue. However, in a matter where the credibility or reliability of witnesses is at stake, the proper course to be taken by the court is to make an order for a retrial.[29] But where the court below fails to evaluate the evidence before it properly or misconceives the matter in question and could not justify any finding it makes with reliable and convincing authority, the Supreme Court will interfere with the finding of fact of the court below.

Under the general powers of the Supreme Court as provided in section 22 of the Supreme Court Act, the court in the exercise of its appellate jurisdiction has all the powers of the court below for the purpose of re-hearing the case in whole or in part or may remit the case to the court below for such re-hearing, and may give such other directions as to the manner in which the lower court shall deal with the case in accordance with the powers of the court.

It would be clear from the above analysis that the Supreme Court, in the exercise of its appellate jurisdiction has powers to interfere with a case which has been wrongly determined by the court below, but what would be the re-action of the court in a situation in which the award of damages by the lower court is either excessive or inadequate?

It is, therefore, an established principle of the Supreme Court that where the award of damages is based on some wrong principles of law, i.e. if the damages awarded are either excessive or inaquate, the court has powers to substitute the sum awarded by reducing or increasing it to such sum as appears to the court proper. But it must be emphasised that for the Supreme Court to proceed to make an assessment of damages, it must be sa that there is sufficient material before it to enable

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otherwise the case has to be remitted to the trial court to assess damages.[31]

Coker, JSC, (as he then was) said that as far as the assessment of damages is concerned the rule requires anyone asking for special damages to prove strickly that he did suffer such special damages as he claimed.[32] This means that the person claiming should establish his entitlement to that type of damages by credible evidence which would convince the court that he indeed is entitled to an award under that head otherwise the general rule of evidence as to proof by preponderance or weight in civil cases usually operates. That is to say that the strict proof required in assessing damages is more than such proof as would readily lead itself to quantification and the nature of proof should be dictated by the peculiar circumstances of the available evidence.[33]

The essence of appellate jurisdiction, therefore, is to enable the court to do substantial justice between the parties by drawing inferences of fact from available

from available evidence and to give any judgement and make any order which ought to have been made or given so that the real question in controversy will be determined on the merits.

5.1.3. *Commencement of Proceedings:*

An appeal to the Supreme Court is commenced by filing in the registry of the Court of Appeal a Notice of Appeal containing the grounds of appeal which the appellant proposes to argue at the hearing of the appeal within fourteen days in an interlocutory decision, and three months in a final decision.[34]

The notice of appeal shall be in civil Form 12 and the appellant shall comply strictly with the provisions of Order 8 Rule 2 of the Supreme Court Rules, 1985. This is to avoid the notice of appeal or the grounds of appeal being struck out for any defect or non-compliance with the Rules.

According to Order 8 Rule 2 (1), all appeals shall be by way of re-hearing and shall be brought by notice of appeal to be filed in the registry of the court below which shall set forth the grounds of appeal, state whether the whole or part only of the decision of the court below is complained of specifying such part. Moreover, the notice shall state the exact nature of the relief sought and the names and addresses

of all parties directly affected by the appeal and shall be accompanied by a sufficient number of copies for service on all such parties. An address for service shall also be endorsed on the notice.

It is important to point out that any ground of appeal that alleges a mis-direction or error in law must clearly set out the necessary particulars and the nature of the error or misdirection complained of. This is in view of the fact that the duty of the Supreme Court is to inquire into the way in which disputes have been tried and decided and not to inquire into disputes or to try cases.[35]

In accordance with the Rules of court, an appeal is deemed to have been "brought" when the notice of appeal has been filed in the Court of Appeal.[36] Further, the appeal is said to be "entered" when the record of appeal is received and entered in the cause list of the Supreme Court in compliance with the laid down rules.[37] This shows that it is not the giving of the notice of appeal that constitutes the entering of the appeal.[38]

In other word, the notice of appeal is given in the Court of Appeal while the appeal is entered in the Supreme Court and thereafter, all applications pertaining to the appeal shall be made in the Supreme Court and not in the Lower Court except those expressly provided in Order 7 Rule 21 of the Supreme Court Rules,[39] But before the entering of the appeal, both the court below and the Supreme Court have jurisdiction to entertain any interlocutory application on the matter in the sense that if the application is refused in the lower court then it should be forwarded to the Supreme Court.

It is important to bear in mind that all applications to the Supreme Court shall be made by motion supported by affidavit and they shall state the rules under which they are brought and the grounds of the relief sought.[40]

It is essential to understand that every appeal is a re-hearing or a re-consideration of the whole case on the printed evidence. Therefore, only a party to the proceedings has the right to appeal. That is to say that a party to the suit can be made an appellant or be made a respondent to the appeal if he is directly affected in the matter. But an interested person who is not a party except by virtue of his interest in the matter can, with the leave of the

Court of Appeal or the Supreme Court, appeal.[41]

Moreover, a party can give instructions to bring an appeal in his name.[42]

With regard to a deceased party's interest in a suit which has not been transmitted on the death of the said party to another person, the latter cannot, on his own application be substituted as a party to the appeal in place of the deceased. In otherwords, a proper person may cubetitute a deceased party to such appeal for the purposes of prosecuting or defending the appeal. However, before the substitution, the court must be satisfied of the transmission of the deceased party's interest in the subject matter to the person applying to be substituted.[43]

It must be emphasised that it is the duty of the appellant when the Supreme Court is hearing the appeal, to show, on the evidence before the court, that the decision of the court below is worng.[44] But a party will not be allowed to improve on his case in the court if he has not made it in the trial court as expected of him.[45]

Although, the Supreme Court hears argument of parties or of counsel on their behalf by way of submission as regards the decision of the court below either to set it aside, uphold or amend, generally speaking, the Supreme Court will not allow additional evidence to be called for the purposes of an appeal when such evidence might have been tendered, by the exercise of reasonable diligengence, at the time of the trial.[46] However, a question that involves substantial points of law (substantive or procedural) may be allowed to be added provided it will not involve further evidence that could affect the decision.[47]

Thus, the appellant should bear in mind that his argument should be limited to the grounds of appeal filed. These grounds of appeal should, prima facie, show good cause why the appeal should be heard. This is done by good and substantial grounds of appeal because they are regarded as the soul of appeal. Therefore, it is an abuse of the process of court to file an appeal without the grounds of appeal. However, where the grounds are filed, they should not include any question which was not before the trial court.[48]

The grounds of appeal, where necessary, shall contain all particulars of the issue so as not to take the respondent by surprise. But any of the grounds may be abandoned at the hearing provided that an abandoned ground cannot be resuscitated during the hearing of the appeal.[49]

Additional grounds of appeal may be filed and argued if leave of the court is granted and the respondent is given due notice. The application in that respect should be made before or at the hearing by motion supported with affidavit. However, an informal application may be made orally at the hearing to argue additional grounds. Further, the Supreme Court allows a ground of appeal that deals with a misdirection in law or on facts and these facts should be essential to the findings of the court.[50]

Thus, the appellant should indicate in the grounds of appeal that there was no evidence to support the findings of the trial court or the decision is against the weight of evidence by specifying the particular findings in regard to which the trial court erred and what the appellant would lose if the decision was accepted.[51]

However, if the respondent wiwhes to raise any point at the hearing, he must serve a notice to that effect on the appellant specifying the grounds of the contention and the type of order he would ask the court to make.[52] Thus, Order 8 Rule 3 (3) of the Supreme Court Rules, 1985 provides as follows:-

> Except with the leave of the court, a respondent shall not be entitled, on the hearing of the appeal, to contend that the decision ofthe court below should be varied upon grounds not specified in a notice given under this rule, to apply for any relief not so specified or to support the decision ofthe court below upon any ground not relied upon by that ccurt or specified in such a notice.

It is very important to emphasise that for successful commencement of proceedings, the appellant shall comply with the requirements of Rule 3 of Order 7 and Rules 2 and 5 of Order 8, otherwise the appeal will be dismissed by the Supreme Court with or without costs.

5.2.0 Right of Appeal:

Before the Supreme Court can exercise its appellate jurisdiction to entertain an appeal, as of right, an appellant must comply with the Constitutional provisions that prescribes how an appeal lies to the court in civil proceedings from the decisions of the court of Appeal, otherwise leave of the Court of Appeal or the Supreme Court must be obtained. This is in view of the fact that unless the Constitutional requirements are fulfilled, the Supreme Court is without jurisdiction to entertain the appeal and the court cannot exercise its inherent power or discretion to cure the defect with a view to entertaining the appeal.[53]

Thus, before a right of appeal is conferred on an appellant, his case must fall within the categories listed by the Constitution[54] as follows:-

a) That the grounds of appeal must involve question of law alone;

b) That the decisions appealed against must pertain to the interpretation or application of the constitution.

c) That the appeal must relate to fundamental rights under Chapter IV of the Constitution;

d) That the issues of appeal must involve elected offices created by the Constitution which affect the membership of or seat of a person in the legislative houses;

e) That the appeal must relate to such other cases as may be prescribed by any law in force in any state.

It would be clear from the above constitutional provision that a prospective appellant who desires his appeal to be heard must confrom to the requirements as laid down by the constitution or statute creating the appeal and the rules regulating the appeal before he can be entitled to exercise the right of appeal under the law.

However, any statutory provision creating an appeal must not be contrary to the provisions of the constitution especially those that expressly stipulate that leave must be obtained before appeal is heard. This is because such a provision conferring the right of appeal or transfer of the appeal contrary to the express provision of the constitution is null and void and of no effect.[55]

It is important to emphasise that a statute may confer right of appeal competently but lacks the power to regulate the procedure for the exercise of the right. For instance, Federal or State Legislature can confer right of appeal to the Supreme Court but cannot prescribe rules governing the appeal.[56]

This is in view of the fact that the constitution has conferred the power to make rules governing appeals on the Chief Justice of Nigeria.[57]

It would be observed that section 213 of the Constitution that provides for appeals as of right does not distinguish between interlocutory and final decisions. The section just uses the term "decisions". However, section 227(1) of the same Constitution comes to the rescue by providing that the word "decision" means " .... in relation to a court, any determination of that court and includes judgement, decree, order or recommendation"

From the above constitutional definition of the word "decision" it is clear that whether the decision of the court below is final or interlocutory as far as it is the determination of that courtand falls within any of the categories listed in section 213, an appellant can appeal to the Supreme Court direct without frist applying to the Courtof Appeal. But an appellant who has agreed to a consent judgement cannot exercise right of appeal.[58] Similarly, an appellant who is dissatisfied with the terms on which he was granted stay of execution, has no right of appeal.[59]

Where the right of appeal is not exercised within the stipulated time, it is the Supreme Court that has the power to enlarge the time.[60] But if the statute creating the appeal as of right makes no provision for enlargement of time within which to appeal, irrespective of whether or not the rules contain enlargement provision, the court cannot enlarge the time.[61]

A prospective appellant should bear in mind that every appeal as of right in civil proceedings in the Supreme Court shall be originated by a Notice of Appeal containing the grounds of appeal which the appellant proposes to argue at the hearing of the appeal. Thus, the appellant must follow civil form 12 and to comply strictly with the provisions of Order 8 Rule 2 of the Supreme Court Rules, otherwise the appeal will be struck out for non-compliance with the Rules.

5.2.1. Appeal with Leave:

An appeal lies from the Court of Appeal to the Supreme Court with leave of the Court of Appeal or the Supreme Court in any decision of the Court of Appeal not falling within any of the categories mentioned under section 213(2) of the 1979 Constitution or any other applicable law relating to appeal as of right. Thus, section 213(3) of the Constitution provides as follows:

> Subject to the provisions of sub-section(2) of this section, an appeal shall lie from the decisions of the Court of Appeal to the Supreme Court with leave of the Court of Appeal or the Supreme Court.

It is clear from the above stated constitutional provision that in civil proceedings an application for leave to appeal shall be made in the first instance to the Court of Appeal and if it is refused, then an application be made for such leave to the Supreme Court within fifteen days after the date of the refusal.[62] But where there are exceptional circumstances that make it impossible or impracticable to first of all apply to the Court of Appeal for leave to appeal, in the interest of justice, an application can be made for such leave to the Supreme Court direct without first applying to the Court of Appeal.[63] However, the mere refusal of the Court of Appeal to grant leave to appeal is not a special circumstance.[64]

Where the applications for leave are made in the court of Appeal, such applications are governed by the rules of practice in the Court of Appeal.

They should state the rule under which they are brought and the grounds for the relief sought. But if the applications are made in the Supreme Court they shall be by notice of motion supported by affidavit. They shall state the rules under which they are brought and the grounds for the relief sought. The applications shall have certified copies of the judgements attached to them and all the parties affected shall be served with the notice.[65]

It is important to bear in mind that the grant of leave to appeal is a judicial discretion. Therefore, for the application to succeed, it must show, prima facie, that there is an error which ought to be corrected and that the appeal will be argued. In view of this, the court will exercise its judicial discretion to grant the leave to appeal if it is convinced that the application is necessary in order to avert injustice.[66]

Thus, the contents of the application shall be accurate, precise and brave. They shall state the material facts of the case including a direct, decisive and concise argument in support of the grounds relied upon. The applicant shall include in the contents the questions that he would like the court to consider and all legislative enactments relevant to the application.[67]

Where leave to appeal is granted by the Supreme Court or by the Court of Appeal, the appellant shall file a notice of appeal.[68] Once the notice is filed in the Registry of the Court of Appeal, such an appeal shall be deemed to have been brought.[69] Although only a party to the proceedings has the right to appeal, a person who is not a party but has shown to have an interest in the matter can, with leave of the Court of Appeal or the Supreme Court, appeal against the judgement.[70] But the Supreme Court can dispose of an application for leave to appeal after considering the record of proceedings and if it is of the opinion that the interest of justice do not require hearing of the application and, moreover, it will not serve any useful purpose.[71]

Be that as it may, the Supreme Court Act has prescribed fourteen days against an interlocutory decision and three months against a final decision within which to give notice of application for leave to appeal. But the Supreme Court may extend the periods prescribed as far as civil cases are concerned.[72]

Thus, in elucidating the above statute, Bello, JSC. (as he then was) said that where a leave is required to be obtained, a party must not only file his application for leave to appeal within the period prescribed by the statute but must also file his notice and grounds of appeal after having obtained the leave within the same period.[73]

5.2.2. Appeal Out of Time:

A party who is unable to apply for an appeal within the prescribed period, can apply to the Supreme Court for an appeal out of time. This is inview of the fact that it is the Supreme Court that has the power to grant an extension of time within which to appeal in appropriate cases. Such a party applying for an enlargement of time must comply with Order 2 Rule 31 of the Supreme Court Rules, 1985.

Thus, every application for an enlargement of time within which to appeal shall be made to the Supreme Court by notice of motion supported by affidavit and on notice to all other parties affected. The applicant shall disclose good and substantial reasons for his inability to appeal within time. This is because the Supreme Court usually grants such an application on exceptional circumstances. In otherwords, the applicant shall give genuine and valid reasons in the affidavit

filed in support of the application as to why the application was made out of time.[74] The court also takes into consideration the lenght of time that has gone by.[75]

Therefore, it is the duty of the applicant to explain to the satisfaction of the court, the reasons for the delay for the whole period. This is in view of the fact that the court, in most cases, grants the extension where the delay is not unreasonably long or deliberately caused by the party seeking the leave to appeal out of time.[76]

Therefore, it is the duty of the applicant to explain to the satisfaction of the court, the reasons for the delay for the whole period. This is in view of the fact that the court, in mose cases, grants the extension where the delay is not unreasonably long or deliberately caused by the party seeking the leave to appeal out of time.[76]

Further, the applicant must show, in his proposed grounds of appeal that he has good cause why the appeal should be heard. In other words the grounds of appeal shall expressly and, prima facie, show that there is good and substantial cause for the appeal.

For instance, the Supreme Court may grant the application for an extension of time to appeal where it is shown that the failure to appeal within time was due to an error in law which was ostensibly difficult to understand, fathom or comprehenced.[77] Similarly, where a party shows that his appealing out of time is due to the fact that he was not served with the hearing notice and that the judgement came to his notice after the expiration of the time to file an appeal,[78]

The Supreme Court had also granted an extension of time to appeal on the ground that the failure to appeal within time was caused by the negligence or inadvertence of the counsel acting for the party seeking the leave to appeal out of time.[79]

5.2.3 Record of Appeal:

Once the appellant has filed a Notice of Appeal, the Registrar of the Court of Appeal shall start to prepare the Record of Appeal.[80] This is in view of the fact that the Supreme Court cannot hear the appeal in the absence of the record.[81]

The Registrar of the Courtof Appeal, therefore, must make sure that he transmits the Record of Appeal to the Supreme Court within 6 months from the date the appellant files the Notice of Appeal.[82]

However, it is essential for the appellant to comply with the requirements for the preparation and transmission of the record to the Supreme Court. Thus, the Registrar of the Court of Appeal shall disclose the amounts to be paid including the security required which the appellant shall comply with within a period not exceeding 14 days from the date ordered by the Registrar. But the amount for security shall not exceed twice the costs awarded by the court. The appellant should bear in mind that an extension of time to comply with these requirements can only be granted by the Supreme Court not the Registrar of the Court of Appeal.[83]

The Record shall consist of all documents as provided under Order 7 Rule 2(2) of the Supreme Court Rules. In addition, it shall include:-

a) a certificate of service of the Notice of Appeal;

b) a certificate that the conditions imposed have been fulfilled, namely, the costs of the record and the security for costs;

c) ten copies of the Record of Appeal for the use of the Justices of the Supreme Court;

d) the docket or case file containing all papers and exhibits in connection with the appeal;

e) a certificate indicating the date of service of the records of appeal on the parties.

There upon, the Registrar of the Courts of Appeal shall notify all parties affected in the appeal and whose addresses for service have been filed that the record of appeal has been transmitted to the Supreme Court whose Registrar will enter the appeal in the cause list.

In order to save time and quicken the process of compiling the record of appeal to the Supreme Court, the Rules of the Supreme Court provide that the appellant, and not the Registrar of the Court of Appeal, can prepare the record in the following matters:-

a) an interlocutory decision made by the Court of Appeal;

b) a decision made by the Court of Appeal even though it is final but it is a decision on an interlocutory decision of a High Court;

c) a decision made by the Court of Appeal affirming or reversing an order for summary judgement;

d) a decision made by the court of Appeal concerning the liberty of a person or the custody of an infant or where an injunction or the appointment of a receiver is granted or refused or matters relating or connected with the winding up of companies, decree nisi in a matrimonial cause or matters affecting Government revenue either of the Federation or a State and in other cases as the court may allow in its discretion.[84]

In preparing the record of appeal with regard to any of the above matters, the appellant can prepare the record at the time of filing his Notice of Appeal or within 14 days after the notice has been filed. In forwarding the record to the Supreme Court, it must contain the following:-

a) the index;

b) Office copies of documents and proceedings which the appellant considers relevant to the appeal;

c) Office copy of the order for leave to appeal, if any, and

d) a copy of the Notice of Appeal.

The appellant has to send the compiled record of appeal to the respondent. Where however, the respondent is dissatisfied with the record and felt that there are some documents which ought to be included, he may file those documents within 7 days of the receipt of the appellant's record of appeal. An affidavit should be filed in order to verify that all the documents sent are correct and authentic. Moreover, certified true copies of the documents should be lodged with the Registrar of the Supreme Court.

In the absence of a challenge from any of the parties to the appeal, the record of appeal is conclusive and binding on the parties. Where, however, a party cahllenges the record on the grounds of it being incorrect or apparent mistake, he has to satisfy the appeal court that what was recorded is wrong.[85]

If the court is satisfied that there is bona fide mistake in the record, it may correct the record. But in a situation in which the issues are serious, an affidavit may be required so that the court may consider taking oral evidence to determine the issue.[86]

5.2.4 Filing Of Briefs:

Filing of briefs of argument is made in the Supreme Court by the parties to an appeal. Thisis in view of the fact that oral argument at the hearing is allowed only on thebasis ofthe written briefs filed.

But a party who has not filed his brief of argument is only entitled to oral hearing by leave of the Supreme Court.[87]

It is important to point out that the oral argument at the hearing is meant to emphasise and clarify the written brief.[88]

Thus, where the appellant has failed to file his written brief and there is no leave of the court sought in order to dispense with the requirement, the court will not hear the appellant's appeal. This means that he is not entitled to a hearing, oral or written, because he has not fulfiled the conditions necessary for the hearing of the appeal court. The court, therefore, will not be competent or has no jurisdiction to hear him.[89]

In otherwords, the right to be heard having not been earned cannot be exercised and there is no question of the breach of a non-existent right. It was held in a certain case that a party who has failed or neglected to submit his brief or case to the court for consideration cannot complain of a denial of hearing.[90] This is because the failure or neglect to file the brief perse tantamounts to an abandonment of the appeal.[91]

Where there is no filing of brief of argument and no extension of time is sought, the applicant's only remedy is to seek the leave of the court for an extension of time to do so.[92] But the court has the powers to dismiss an appeal in chambers without hearing argument in those cases where it is clearly unnecessary to hear argument or where the appellant cannot insist on being heard.[93]

According to the laid down rule, an appellant is required to file in the Supreme Court his brief of argument not later than ten weeks of the receipt of the record of appeal.[94] The rules further require that the brief so filed shall be a succinct statement of the appellant's argument in support of his grounds of appeal.

The respondent, however, after service on him of the appellant's brief of argument shall file in the Supreme Court and serve on the appellant his own brief within eight weeks.[95] This means that where the respondent has not filed any brief, the appeal can proceed without allowing his counsel, even though present, to be heard unless leave of the court is granted.[96]

However, the rule empowers a respondent to apply to the Supreme Court for the dismissal of appeal for want of prosecution ofthe appeal of an appellant who has failed to file his brief within the time prescribed or within such time as extended by the Court.[97]

It is important to bear in mind that briefs of argument are meant to emphasise and clearify the grounds of appeal. Thus, the briefs are not meant to summarise the judgement of

the judgement of the Lower Court but to assist in the administration of Justice by making the work of the court and the counsel involved in the appeal simpler so that the appeal will be disposed of quickly for justice delayed is justice denied.

5.3.0. Jurisdiction pertaining to interlocutory Decision:

The Supreme Court will exercise its appellate jurisdiction to hear appeal in an interlocutory decision where the nature of the application relating to the appeal does not aim at finally determining the claim or claims in dispute between the parties, but only deals with an issue in the appeal.[98] Thus, an interlocutory decision is a decision that is not final. This type of decision is generally not appealable as of right. That is to say that an appeal, in this respect, may be only be leave and the time within which to appeal may be shorter.[99]

The Supreme Court, therefore, will consider whatever judgement or order the Court of Appeal gives which does not finally determine the rights of the parties as the judgement on an interlocutory appeal.

According to section 31 (2) (a) of the Supreme Court Act, 1960 an appellant must file his notice of

appeal or notice of application for leave to appeal where it is an interolcutory appeal, within foruteen days of the decision appealed against. Therefore, where leave is required, a party must not only file his application for leave to appeal within the period prescribed but must also file his notice and grounds of appeal after having obtained the leave within fourteen days of the decision appealed against.[100]

Where the leave is obtained in respect of an order appealed against and which has not been finally disposed of, the determing factor is not whether the court below has finally determined the issue before it but rather whether or not the court of Appeal has finally determined the rights of the parties in the claim before it.[101].

Thus, when the Supreme Court is considerating an interlocutory decision, if confines itself to the only issue or issues relevant to the determination of the appeal and does not comment on other matters which would appear to have the effect of deciding the substantive case itself.[102]. This means that the court will refrain from determining the rights of the parties in the case.[103].

It is important to bear in mind that in controlling proceedings during the pendency of appeal, once an appeal has been entered and until it has seized of the whole proceedings as between the parties thereto and every application therein shall be made to the Supreme Court and not to the Court of Appeal, except if there is a contrary provision in the rules of the Supreme Court. However, in the absence of anu legislation, an application in that respect, may be filed in the Court of Appeal for transmission to the Supreme Court.[104]

5.3.1. Jurisdiction Pertaining to Final Decision:

A decision of the court is considered as being final when the dispute between the parties is finally disposed of[105] or when the rights of the parties in the claim before the court are finally determined.[106]

A final decision, therefore, is appealable to the Supreme Court as of right and the grounds of appeal, in this respect, are the grounds of law.[107] In this regard, the Court of Appeal may merely express its opinion in a matter by referring to it under the Constitution or other enactments for purposes of the appeal which, in essence, is being regarded as a final decision.[108]

According to Halsbury's Laws of England,[109] four tests have been given inorder to ascertain the finality or otherwise of the decisions of courts.

These are as follows:-

a) did the outcome of the decision made in favour of a party determine the main dispute?

b) was the application made upon an application in respect of which the main dispute would have been decided?

c) Does the decision of the court as made in respect of the case, determine the dispute?

d) Where the decision in question is reversed, would the action have to go on?

When the above stated questions are properly answered, where the decision of the court as made determines the disputes, the effect is that it has decided the substantive case and determined the rights of the parties in the dispute, as a result of which, it has become a final decision. But where the decision of the court merely touches an issue in the subject-matter of the case and when the order is reversed, the action or the case has to go on, the decision is regarded as an interlocutory one.

Therefore, the ideal approach is to consider both the nature of the application, and the nature of the order made with a veiw to determining whether an order or judgement is interlocutory or final. Thus, where the judgement of the court of Appeal finally determines the rights of the parties or finally determines the claim or claims in dispute between the parties, that judgement will be properly regarded as a fianl decision.

5.3.2. Powers Of The Supreme Court:

The general powers of the Supreme Court are enshrined in section 26 of the Supreme Court Act, 1960 and Order 8 Rule 12 of the Supreme Court Rules, 1985. These powers are very wide and include all the powers and duties of the court which tries the case as well as all other related matters to the case under appeal.[110]

In the exercise of its appellate jurisdiction, the Supreme Court has the power to order the production of any documents or any other material that will assist in the proceedings of the court. Moreover it has power to compel a witness to appear before it for further examination if he is a compellable witness as well as having the power to refer an issue, in appropriate circumstances, to a reference for enquiry and report.[111]

It is important to emphasise that the exercise of the general powers by the Supreme Court in respect of a pending appeal could be made irrespective of the fact that there was no notice of appeal or respondent's notice given with regard to any particular party in the appeal or that the ground of appeal did not specify whether to affirm or vary the decision of the court below. In essence, the Supreme Court exercises its general powers on the consideration that such order being made is to ensure that no miscarriage or justice or substantial wrong done to any party in the appeal.[117].

With regard to the powers of the Supreme Court to order for a new trial either generally or on any issue where the circumstances of the case require, the order could be made pursuant to an application for a new trial or to set aside a verdict or finding or judgement of the court of Appeal.[118]

However, the Supreme Court will only make an order or orders for a new trial if it is satisfied that substantial wrong or miscarriage of justice has occured. This means that the court is not bound to order a new trial for the purpose of misdirection or for wrongful admission or rejection of evidence.[119].

It is to bear in mind that only that aspect of the appeal that deals with substantial wrong or mis-carriage of justice that will be ordered for a new trial.[120] For instance, where the Supreme Court could make an order for a new trial in respect of assessment of damages awarded by the court below on the ground of being excessive or inadquate, it may, in lieu therefore, re-assess the damages itself or by substituting the sum awarded for such amount as appears just or proper.[121].

It is also important to point out that where the Registrar of the Court of Appeal or that of the Supreme Court acts contrary to the Rules and/or the Act of the Supreme Court, the aggrieved party may file a motion on notice to those affected or concerned, supported by affidavit setting out the complaint and the relief sought. Thus, a Justice of the Supreme Court may hear the application in chambers and, consequently, may set aside or vary the order or such other order as justice of the case requires.[122].

5.3.3. Judgement Of The Supreme Court:

Every judgement ofthe Supreme Court is embodied in an order[123] and it is delivered in open court in writing not later than 3 months after the conclusion of evidence and final addresses and to supply duly authenticated copies of the judgement to all parties.[123] Thus, each Justice of the Supreme Court who hears the appeal shall express and deliver his opinion in writing or he may simply state in writing that he agrees with the opinion of any other Justice who delivers the judgement or written opinion.[124]

The judgement of the court, therefore, is determined by the express views of the majority of the Justices.[125] But would it be correct to say that any judgement of the court which has not been delivered in writing within three months after the conclusion of hearing is unconstitutional, null and void?

To rescue and normalise the situation in an event of unavoidable circumstances that make it impossible and impracticable to deliver the judgement within the prescribed period, the Constitution (Suspension and Modification) Amendment Decree[126] was promulgated with regard to section 258(1) of the 1979 Constitution. The rationale behind the promulgation of the Decree is to remove the hearship and injustice

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to be encountered in the event of inevitable inability to comply with the requirement of the above section of the Constitution.

The amendment enacts the following sub-sections:- (4) That provided there is no miscarriage of justice, the decision of a court shall not be set aside or treated as a nullity solely on the ground of non-compliance with the provisions of the Constitution; (5) That as soon as hearing in a case has been done and the case determined but it has been observed that there was non compliance with the provision of section 258(1) of the Constitution, the person presiding at the sitting of the court shall send a report on the case to the chairman of the Advisory Judicial Committee who shall keep the Committee informed for appropriate action.

Be that as it may, if a judgement is to be pronounced in open court, the Registrar of the Supreme Court shall give notice to the parties to the appeal.[127] Also where a reversed judgement is to be delivered and the counsel concerned in the case are duly notified, it will amount to an act of disrespect to the court if the counsel fail to attend the court to take the judgement.[128]

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Thus, any judgement given by the Supreme Court may be enforced by the court or by the court below or by any other court which has been seised of the matter, as the Supreme Court may direct.[129] But where judgement of the Supreme Court on the same subject matter conflict, it is the last in time that will prevail and this constitutes estoppel per rem judicats between them.[130] Howevever, any directive given by the Supreme Court to another courts to enforce the judgement of the Supreme Court shall be in compliance with the certificate issued by the Supreme Court to that effect.[131]

It is very important to bear in mind that once a court has finally determined a case it becomes functus officio. With regard to the Supreme Court, its final order or judgement is fianl forever.[132] This means that no court has the jurisdiction to review its final order or judgement including the Supreme Court. But where such judgement is by a Lower Court it can only be reviewed or corrected by a higher court on appeal.[133]

5.3.4 Review Of Judgement And Orders:

Ordinarily, the Supreme Court cannot review its judgements or orders once given and delivered.[134] It is also a fact that the power to review a judgement is an exercise of appellate jurisdiction which can only be conferred by statute.[135]

However, it is important to distinguish between the power of the court to overrule its previous decision and the power to review its decision given in the same case.

According to Oputa J.S.C. where the previous decision or decisions of the Supreme Court were wrong and the court was satisfied that the decision was erroneous, the court would be ready to depart from and overrule its previous decision. He added that it would be better for the court to admit an established mistake and correct same rather than persevere in error.[136]

The guiding principles for departing from previous decisions have been succinctly stated by Bello, JSC. (as he then was) as follows:-

> that the attitude of the Court on the question at issue may be stated thus that the court will not adhere to the rule of stare decisis but will depart from its previous decisions if such decision is inconsistent with the provisions of the constitution or if it is erroneously reached per incurian and will, if followed, perpetuate harship and considerable injustice or it will cause temporary disturbance of rights acquired under it or will continue to fetter the exercise of judicial discretion, of a court. 137.

However, it is important to emphasise that the Supreme Court has not laid down a hard and fast rule with a view to departing from a previous decision. Each case, therefore, will be decided on its special facts and circumstances in order to avoid perpetuating injustice. In otherwords, the Supreme Courts is ready to change or re-consider its previous decision if it is satisfied that the decision is erroneous or wrong or that it was given per incurian or that it has become a vehicle of injustice,[138] otherwise the court will stand by the decision so that it will not disturb settled points and to have respect for the court's judgements.

It is to bear in mind that there is no provision in the 1979 Constitution that deprives the Supreme Court of any jurisdiction to depart from and overrule its previous decision. In this respect, Irekefe, JSC: (as he then was) said:

> that no jurisdiction of this court no matter the size of the panel should be sacrosanct if it is clearly shown later to have been based on an erroneous consideration either of fact or law. 139.

Further, it is important to emphasise that there are other instances that would make the Supreme Court to depart from its decision in a previsous case in the sense that the reasons given must show new factors which had not been touched upon in the earlier proceedings and also the arguments should show new developments in the country particularly those that have some bearing to the Constitution.[140] But before the court can overrule its previous decision, a full court of a seven member panel of the court must be constituted to consider the matter.[141]

On the other hand, can the Supreme Court reverse itself in the same case? The court has consistently refused to make itself an appeal court over itself and also the court has categorically pointed out that it does not posses any jurisdiction or power whatsoever, (Constitutional, Statutory, or Inherent) to review a judgement it had given in that same case.[142]

Where the judgement or order of the court correctly carries out the intention of the judgement and it happens that the court has come to an erroneous decision either in regard to fact or law, recourse must be had to an appeal to the extent to which an appeal is available. But in respect of the Supreme Court's judgment, once it has been given and delivered, the decision has become final for all ages irrespective of the fact that the error complained of is procedural or it goes to jurisdiction. This is because there is no Court of Appeal above the Supreme Court and; thus, whatever decision arrived at stands forever.

The Rules of the Supreme Court, therefore, have forbidden any review of any judgement except to correct slips and typographical errors and to truly convey the meaning of the orders of the court.[143] Thus, any judgement or order given which respresents the intention of the court, it shall not be varied in order to give a different meaning.

It would be clear from the above explanation that the Supreme Court has no jurisdiction under the 1979 Constitution, the Supreme Court Act, 1960 and the Rules of Supreme Court, 1985 under its inherent jurisdiction or powers to entertain an application for re-entering an appeal.

Thus, Eso JSC; Said:-

> The decision of the Supreme Court is final, final in the sense of real finality in so far as the particular case before the court is concerned. It is final forever, except there is legislation to the contrary and it has to be a legislation adhominien.145

In a nutshell, the Supreme Court cannot overrule itself in the same case but it may overrule its previous decision in a subsequent and entirely different case without altering the rights, privileges or detriment to the parties concerned, arising from the original case.

The Supreme Court, therefore, in the course of discharging its main duty of adjudication if it expresses its decision which it intends to give in the matter in writing and delivers it, it brings to an end the adjudicatory process because the court has no power to alter the judgement in order to convey a different intention.

R E F E R E N C E S:

1. Section 213 and 215 of the 1979 Constitution.
2. Supreme Court Act, No.12 of 1960.
3. Section 120 of the 1963 Republican Constitution.
4. Supreme Court Ordinance No. 46 of 1933.
5. The Federal Supreme Court Act No. 27 of 1955.
6. Supreme Court Act No. 12 of 1960.
7. Section 120 of the Constitution of Nigeria, Act No.20 of 1963.
8. Adigun V. A.G. of Oyo State (1987)2 NWLR (pt.56) 197 at 214 - 215.
9. Section 111 of the 1963 Constitution.
10. Supra Adigun V.A.G. of Oyo State.
11. Supra Section 210(1) and (2) of the 1979 Constitution.
12. Ibid Section 214.
13. Mekwunye V. Director of Audit (W.N.) (1967)1 All NLR 225.
14. Supra Section 216 of the 1979 Constitution.
15. Supra Order 8 Rule 8(3) of the Supreme Court Rules, 1985.
16. Ibid 02R30
17. Ibid 07 R 12(2)
18. Ibid 08 R 12(5)
19. Supra Section 213(1) of the 1979 Constitution
20. Section 22 of the Supreme Court Act, No.12 of 1960.
21. Igboke Oroke V. Chukou Ede (1964) NNLR 118.
22. Chief P.U, Ejowhomu V. Edok-Eter Mandilas Ltd (1986)5 NWLR 39.

23. Chief Ebba V. Chief Ogodo & Anor (1984) S.C. P.99

24. Itaye and Ors. V. Ekandere and Ors. (1978)9-10 S.C

25. Alhaji Adisa & Anor V. Solel Boneh (Nig.) Ltd. (1975)1 N.M.L.R. 364. Also Obikoya V. Registrar of Companies (1975)4 S.C. 31 at 34.

26. Loeb V. Nasser 3 WAA.C.A. 227 at 228.

27. (1976)1 NMLR 263.

28. Kojo V. Bonsie 14 WACA 242 at 243.

29. Oladipo Maja V. Learndro Stocca (1968) NMLR 179.

30. Supra Order 8 Rule 13(4) of the Supreme Court Rules, 1985. Also Mutual Aids Society, V. Akerele (1965)1 All NLR 336.

31. Ejowhomu V. Edok-Eter Ltd. (1986) NWLR. 25

32. Oshinjinrin and Others V. Elias and Others (1970)1 All N.L.R. 153 at 156.

33. E.K. Odulaja V. A.E. Hadded (1973) A:: NLR 191.

34. Supra Section 31 of the Supreme Court Act.

35. Supra Igboke Oroke V. Chuku Ede.

36. Supra 02 R 30.

37. Ibid 07 R 12(2).

38. Ogunreme V. Dada (1962)1 ALL NLR 663

39. Abina V. Tika-Tore Press (1968)1 ALL NLR 210.

40. Ojosipe V. Ikabala & Ors. (1972)1 ALL NLR (pt.1) p. 128. Also Ojora V. Odunsi (1964)1 All NLR 55.

41. Supra Section 213(5) of the 1979 Constitution. Also Oloko V. Arogbo (1968) NMLR 68.

42. Jarmakani Transport Ltd. V. Alh. Kalla (1965)1 NLR 77.

43. Mbahu V. Mbanu (1961)1 All NLR 652.

44. Agbomagbe Bank Ltd. V. C.F.A.O. (1966)1 All NLR 140.

45. Chikoya V. Registrar of Companies (1975)4 S.C.31 at 34.

46. Obikoya V. Laguda (1964)1 All NLR 160.

47. Fachora and Anor. V. Gbadebo and Ord. (1978)3 S.C. 219 at 247.

48. Barclays Bank V. Abubakar (1977)10 S.C. 13.

49. Odiase and Anor. V. Agbo and Ors (1972)1 All NLR 170.

50. Mora and Ors. V. Nwalusi and Ors (1962)1 All NLR 681.

51. Adegan and Anor. V. Aira (1964)1 All NLR 127.

52. Supra 08 R 3(1). Also Kahinde V. Ogunbunmi and Ors. (1968) N.M.L.R. 37.

53. Eke V. Midwest Nig. Development Corporation, S.C. 22/68 of 15/11/68.

54. Supra Section 213 (2) of the 1979 Constitution.

55. Onigbeden & Anor. V. Balogun (1975)1 All NLR (pt.1) p.233.

56. The Council of University of Ibadan V. Adamolekun (1967)1 All NLR 213.

57. Supra Section 216 of the 1979 Constitution.

58. Nigeria Water Resources Development Ltd. V Jaiyesimi (1963)1 All NLR 215.

59. Oyeti V. Soremekun (1963)1 All NLR 349.

60. Ojora V. Odunsi (1964)1 All NLR 55.

61. Ude V. Ikemefuna and Ors. (1968)1 All NLR 257.

62. Supra 02 R 28 (3).

63. Ibid (4)

64. Ojosipe V. Ikabala and Ors (1972)1 All NLR 128.

65. Supra 02 R 28 (1).

66. Adeojo V. Awotorebo & Anor. (1975)1 NMLR 54.

91. Supra 06 R 3(1) and (2)

92. Ibid R9.

93. Ibid R3(3).

94. Ibid R 5(1).

95. Ibid (2)

96. Ibid R 9 (1).

97. Ibid.

98. Isaacs & Sons V. Salbstein & Anor. (1961)2 K.B. 139, 146.

99. Supra Section 31(2) (a) of the Supreme Court Act, 1960. Also section 1609, Halsbury's Laws of England, 3rd edition P.745.

100. Amudipe V. Arijodi (1978) 9-10 S.C. 27.

101. Alaye of Effon V. Fasan (1958)3 F.S.C. 68.

102. Petroleum Equalisation Fund Management Board V. Grenigas Ltd; (1986)5 N.W.L.R. (p.t 39) p.132 at 176.

103. Automatic Telephone & Electric Co. Ltd V. F.M.G. (1981)1 All NLR.

104. Supra 08 R 11.

105. Ude V. Agu (1961)1 All NLR 65

106. Western Steel Works Ltd. V. Iron & Steel Workerks Union (1986)1 N.W.L.R. (pt. 30) 617.

107. Supra Section 213 (3) of the 1979 Constitution.

108. Akintola V. Aderemi (1962)1 All NLR 461.

109. Supra 3rd Edition. Vol.22 P.743.

110. Supra 08 R12(1). Also Abdul Ojo V. E. Enekebe (1964) N.M.L.R. 42.

111. Supra Sections 22 and 33 of the Supreme Court Act, 1960.

112. Supra 08 R 12(3).

113. Ibid (2).

114. Ibid (4).

115. Supra Section 10 of the Supreme Court Act.

116. Akerele V. Alapata (1973) NLR 138.

117. Supra 08 R 12 (5).

118. Ibid R 13(1).

119. Ibid (2).

120. Ibid (3).

121. Ibid (4).

122. Supra Alero Jadesimi V. Okotie-Eboh & Others.

123. Supra Section 258(1) of the 1979 Constitution.

124. Ibid (2).

125. Ibid (3).

126. No.17 of 1985.

127. Supra 08 R 14 (1).

128. Ibid (2).

129. Ibid R 17

130. Sosan V. Ademuyiwa (1986)3 NWLR (pt.27) 241 at 242-3.

131. Supra 08 R 18.

132. Supra Section 15 of the 1979 Constitution

133. ARCON V. Dr. Fassassi (1987)3 NLLR (pt.59)42.

134. Supra 08 R 16. Also Ogbu V. Urum (1984)4 S.C.I

135. Sodiende Bros. Ltd V. A.C.B. Ltd. (1962)6 S.C. 137.

136. Federal Civil Service Commission & Others V. J.O. Olaoye (1989)2 NWLR (pt.106)p.653.

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137. Chief Dominic Onuorah Ifegue V. Livinus Mbadugha & Anor. (1974)5 S.C. 45

138. Supra Adigun V. A.G. (Oyo State)

139. Ibid pp. 43 - 44.

140. Ibid P. 50

141. Supra Federal Civil Service Commission & Ors. V J.O. Olaoye

142. Supra Adigun & Ors V. A.G. (Oyo State).

143. Supra 08 R 16.

144. T.A. Yonwuren & Ors. V. Modern Signs Nig. Ltd. (1985)1 NWLR 244 (pt.2).

145. Supra Adigun V. A.G. (Oyo State) at 235.

CHAPTER SIX

CONCLUSION:

In this chapter, we shall summarise what we have discussed in the previous chapters, make some observations in respect of the practices and proceedings of appeals in our courts in civil matters and finally give some suggestions with the hope that justice will be administered to all manner of people in accordance with the provisions of the law applicable to appeals.

6.1 SUMMARY:

Courts exercising appellate jurisdiction in civil matters in Nigeria may reverse, vary or confirm the decisions of the lower courts. In this respect, appeals in civil matters involve proceedings in which no one is accussed of any offence. But the appellant must comply with the conditions for the exercise of his right of appeal as well as having the duty to show that the decision of the lower courts is wrong.[1]

The appellate courts are hierarchically graded in the sense that the higher a court stands in hearing appeals the greater is its authority and the weight of its decision is binding on the lower court. Thus, at the Federal

at the Fderal level, there are the Supreme Court and court of Appeal. The former hears appeals from the later. Similarly, the court of Appeal hears from the State High Courts, State Sharia Courts of Appeal and the Customary Court of Appeal of a State. At the State level, the appellate courts are the Sharia Court of Appeal, the Customary Court of Appeal, the High Court which has powers of appeal over certain subordinate courts and the Upper Area Courts.

The Supreme Court is the highest court of appeal in Nigeria and it was established in 1963 by the Constitution of the Federation.[2] It was a court of co-ordinate jurisdiction with the Prioy Council up to September, 1963, However, the decisions of the Supreme Court, as of now, are binding on all other courts in Nigeria because it is the highest and the last court of appeal.[3] In order to exercise its appellate jurisdiction in civil matters the court shall be duly constituted if it consists of not less than five Justices while seven Justices sit to hear constitutional matters.

The court has wide powers which include all the powers and duties of the court that tries the case.[4] The court has the power to draw inferences from proved

proved facts and to give any judgement as well as make such further order as the circustances of the case may required.[5] However, the court has no power to review its judgement or orders[6], although, it has inherent jurisdiction to correct any clerical mistake or error that distorts its judgement or order with a view to giving effect to its meaning or intention.[7]

The judgement of the Court is delivered in open court in writing not later than three months after taking of evidence has been concluded and final addresses.[8] But where the court, due to circumstances beyond its control, is unable to deliver its judgement within three months after the conclusion of evidence and final addresses, the decision of the court will not be set aside or treated as a nullity except that the ppresiding Judge shall send a report to that effect to the Chairman of the Advisory Judicial Committee who will notify the committee for appropriate section.[9]

Decree No.43 of 1976 established the Court of Appeal and the court hears appeals from the Sharia Court of Appeal, the High Court and the Customary Court of Appeal and all these courts are bound by the decisions of the Court of Appeal.[10]

The court was formerly called the Federal Court of Appeal, but the word 'Federal' has been deleted in all places with regard to the functions of the court and the Federal Court of Appeal Rules, 1981 have been amended accordingly and, thus, the court is now called "The Court of Appeal".[11]

For the exercise of its appellate jurisdiction, the court shall be duly constituted if it consists of not less than three Justice of the court learned in the respective cases before the court.[12] Thus, once the parties in the appeal have fulfilled the terms and conditions as stipulated in statues with respect to the appeal, the court will exercise its appellate juridiction and entertain the appeal with a view to doing substantial justice between the parties.[13] in accordance with the powers granted it by the constitution and other statutes.

The court, therefore, would interfere with and reverse the findings of fact of the lower court, when it is clear that the finidings are perverse and contrary to the facts relied upon and the court below has failed to make proper use of its jidicial discretion.

In this respect, the court has the power to evaluate such evidence and make the findings which the court below ought to have made with a view to determining the real question in controversy in the appeal.[14]

Thus, the court has the power to give any judgement or make any other which the Lower Court has failed to make and this power may be exercised on any aspect of the proceedings in relation to the appeal. That is to say that the court has powers to dismiss the appellant's appeal, or give judgement in his favour or give order of re-hearing of the whole suit.[15]

The decisions of the court shall be delivered in writing not later than three months after the conclusion of evidence and final addresses. Once the court has finally determined a case it becomes Functus officio (i.e. the order or final judgement is final for ever). This means that the court has no jurisdiction to review its final order - such order or judgement can only be reviewed or corrected by the Supreme Court on appeal.[16]

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As regards the appellate jurisdiction of the High Court, appeals from the District Courts (in the Northern States) and the Magistrate's Courts (in the Southern States) as well as other subordinate courts as may be provided by any written law lie to the High court. This is in view of the fact that the court has minimal jurisdictional limits which enable it to exercise its appellate jurisdiction as may be conferred upon it by law.[17]

Any aggrieved party, therefore, may appeal to the court in any civil case or matter from a decision, judgement or order of a Magistrate, District or subordinate Court Judge or any Tribunal or Board as may be provided in an enactment provided such enactment is not inconsistent with provisions of the constitution.[18] The judgement or order of the court in respect of an appeal shall be complied with by the Lower Court.[19]

The Sharia Court of Appeal is a suprior court of record[20] and it has appellate and supervisory jurisdiction in civil proceedings with respect to Islamic Personal Law.[21] It hears appeals from Upper Area Courts.

The court was established in 1960 to replace the Muslem Court of Appeal.[22] The court is duly constituted if it consists of at least two Kadis of the Court.[23] Although the House of Assembly of the State has been empowered to make rules for the practice and the proceedure of the court,[24] the applicable legislation is the Sharia Court of Appeal Law No.16 of 1960 and in the exercise of its appellate jurisdiction the court shall administer, observe and enforce the observance of the principles and provisions of the Moslem Law of the Maliki School as customarily interpreted at the Area Court where the trial at first instance took place, the provisions of the Sharia Court of Appeal, 1960 the provisions of the Area Court Law with regard to Moslem Personla Law in civil matters as well as the principles of natural justice, equity and good conscience.[25]

In order to enhance and enlarge the jurisdiction of the court, Decree No.26 of 1986 was promulgated to the effect that the word "personal" whenever it occurs after the word "Islamic" shouldbe deleted so that the expression

in all the section of the 1979 Constitution dealing with the court should read "Islamic Law". However, the Court of Appeal held that the Decree did not enhance or enlarge the jurisdiction of the court beyond what has been specified in section 242 (2) of the Constitution.[26]

An aggrieved party may appeal from the decision of the Area Courts to the Sharia Court of Appeal in civil matters involving questions of Islamic Personal Law and such appeal shall be entered in the registry of the appellate court nearest to the court below within thirty days from the date of the decision appealed against.[27] The court being a Superior Court of record has all inherent powers and sactions of a court of law,[28] and may direct the enforcement of its judgment or order by itself or by directing the Lower Court to enforce such judgement or order. In order to do justice amongst the parties appearing before it, the court strictly applies the principles of Islamic Law and procedure as well as the Sharia Court of Appeal Law and the Rules of Court.

The Customary Court of Appeal of a State shall exercise appellate and supervisory jurisdiction in civil proceedings involving questions of Customary

Law only.[29] The House of Assembly of a State that establishes the court has been empowered to make laww for the exercise of its appellate jurisdiction in civil matters and in the absence of the House of Assembly, the Judicial Advisory Committee may prescribe laws for the court,[30] The court is established in any state that requires it and it hears appeals from the decisions of Customary Courts in that State in Customary matters only.[31]

The court can be duly constituted to exercise its appellate jurisdiction when it has at least two or more Judges to hear appeals.[32] Thus, any party aggrieved by a decision or order of Customary Court, may, within thirty days of the date of such decision or order appeal to the Customary Court of Appeal of the State by notifying the Lower Court in writing of his intention to do so. The judgement or order of the Appeal Court is binding on the Lower Court.

The Upper Area Court operates mainly in the Northern States of Nigeria and it has appellate jurisdiction with regard to appeals from Area Courts in all civil causes and matters.[33] The court deals with appeals from Area Courts in the light of native law and custom applicable in the court of trial.[34]

If a party is aggrieved by a decision or order of any Area Court may give notice of appeal either in the Lower Court or the Appeal Court, which has power to examine the record of proceedings of the lower court relative to the matter on appeal before it:[35] and it shalll decide all matters according to substantial justice without undue regard to technicalities.[36] In reviewing or deciding a case on appeal, the Upper Area Court may quash the proceedings of an Area Court where it is considered desirable and order a retrial of such a case before the court of 1st instance or before any other court of competent jurisdiction.[37] Thus, the decision of the court is binding on the Lower Court.

6.2 OBSERVATIONS:

It is legally true that an appeal court when exercising its appellate jurisdiction could interefere with and reverse the findings of fact of the court below when the later has failed to make proper use of its judicial discretion. Thus, the appeal court has power to evaluate such evidence and make the findings which the court below ought to have made. In practice, however, the need for the impartial application of the rules of appeal is not duly administered in that spirit of impartiality which it requires because of some

complexities, caprices and injustices being perpetrated when hearing appeals. We shall examine this situation as follows:-

1. Misuse of Judicial Power: It is apparently a misuse of judicial power for an appeal court to order for re-opening of a case where there is no appeal against a decision of the Lower Court.[38] This is in view of the fact that it is legally wrong for an appellate court to determine a legal opinion on a case before it is brought to the court just to satisfy the whims of those concerned. It is unfortunate to observe that some appeal courts interfere with the decisions of the lower courts without such decisions being brought on appeal before the court or without adducing any convincing reasons for re-opening of the case or after a very long period of a lower court's judgement.

It must be emphasised that an appellate court could only interfere with a decision of the lower court where the latter had not made the necessary finding or it is on record that the finding is wrong and could not ordinarily have been based on the evidence and the appellate court is satisfied, as shown on the record, that it can make its own findings.[39]

2. Competency of Court To Entertain Appeal:- It is very essential for an appeal court to fulfil all conditions precedent before entertaining an appeal. For instance, before such court is competent to hear an appeal, firstly, it must be properly constituted with regard to members and qualifications of Judges who will hear the appeal and none of them is disqualified for any other reasons, accondly, the matter of consideration before the court must be a case within its jurisdiction; thirdly, the case is brought before the court by due process of law which has fulfilled all conditions precedent to the exercise of such jurisdiction.

However, some of the appeal courts do not bother to comply or to see that all the conditions necessary to the exercise of appellate jurisdiction are fulfilled before determining legal opinions on an appeal. It is essential for the competence of the court that all these conditions are present before there is a valid exercise of jurisdiction.[40]

3. Calling of Fresh Witnesses And Evidence:- It is improper for an Appeal Court to call fresh witnesses who have not been called by the trial court. This is in view of the fact that any judgement passed on the fresh evidence is null and void,[41] because that would be unfair to the trial judge and might create a dangerous precedent.

Although in special circumstances and in the interest of justice, an appellate court may receive fresh evidence which was available at the time of the trial or hearing but not adduded at the trial or such evidence could not have been obtained for use at the trial by the exercise of reasonable diligence,[42] it is genealy improper to allow an appellant to adduce further or fresh evidence in order to enable him to improve on his case at the trial.

4. Filing of Briefs:- Some appellate courts insist that written briefs must be filed in the courts before parties are allowed to argue their appeals even where the parties are not legally represented. This is not the position of the law.

The law provides that where a brief is filed which is not inaccordance with the rules, the effect is that no brief has been filed and, thus, the party concerned will not be heard in oral argument except by the leave of the court.[43]

However, where parties are not legally represented, the appellate court can waive compliance with the rules relating to the filing of briefs and allow the parties to argue the appeal orally.[44] Moreover, appeal courts should not insist on the presentation of briefs in a situation in which a counsel has just been briefed about the case especially on the day of the hearing of the appeal and it is impracticable for him to prepare and file briefs in respect of the appeal, thus, the counsel should be allowed to address the court orally.[45] The principle is that where a party has not filed his brief of argument, he is entitled to oral hearing by leave of the court in order to assist in the administration of justice by stating the reasons upon which the argument is to be based so that the points will be clarified and the appeal would be disposed of as quickly as possible.

5. Grounds of Appeal:- Grounds of appeal are meant to give notice to the Respondent of the errors complained of and any issue not raise in the grounds is clerly not before an appellate court.[46]

It has been observed, however, that some appellate courts do allow parties to rely on Omnibus grounds and argue any ground in support of an appeal as if parties have unlimited rights to raise any issue in the appeal, no matter how improper that issue is raised before the court.

Moreover, in some instances, an appeal may be incompetent before an appellate court but the court may allow the existing grounds to be amended in order to suit the whimsical view of a party. It must be emohasised, however, that where an appeal is not competent before the court, no amendment can validly take place and it is trite law that omnibus ground is mmaterial in an appeal espcially where it is against the decision of an appeal court.[47] and it does not confer unlimited rights on a party to argue any ground of appeal. Thus, where an appellant

intends to amend his original grounds, he should ask for leave to amend such grounds, and not leave to appeal on the additional grounds, although an appellate court has the discretion andindeed the duty to refuse the appellant's prayer for leave, where the justice of the circumstances so demands, to argue a ground of appeal filed.[48]

6. Assessment of Islamic and Customary Laws on Appeal:- Sharia Courts of Appeal apply Islamic Law in civil matters and procedure whereas Customary Courts of Apeeal apply Customary Civil Law and Procedure. Our observation, however, indicates that civil procedures in these courts are becoming increasingly formalised in the sense that English rules of interpretation of procedent are witthingly or unwittingly being introduced in the civil procedures of the courts particularly with regard to the Customary Courts of Appeal. For instance, counsel appearing in the courts prepare their grounds of appeal and base their arguments and submissions on the principles of English rules and procedure. The consequence of this development would be the ousting

ousting or bastardising the Islamic and Customary practices and procedures thereby defeating the purposes of establishing the courts.

This dangerous trend is also visible in the Upper Area Courts which exercise appellate jurisdiction in Islamic and Customary Procedures in civil matters. This is a very undersirable development because the prodominant indigenous population of the area concerned will be denied their fundamental human rights if the clearly defind code of Islamic procedures or Customary procedures will be outsted or hmastrung by the English rules of procedure.

It is to bear in mind that the duty of the Appeal Courts is not to interfere with the Muslem law or any other Customary procedure or to apply unreservedky English rules of procedure and evidence but to consider whether the decisions of the Lower Courts had resulted in a miscarriage of justice or was in conflict with the provisions of the Constitution of Nigeria otherwise the Appeal Courts are required to protect, safeguard and guarantee the purity of Isamic Law or any other Customary procedure which has clear and defined procedural formula. This means that once a judgment arrived

at is in accordance with the established Islamic or Customary procedural formula, the appeal courts are required to approach appeals from Lower Courts in the light of the Muslem Law or Customary procedure as applied in the Court from which the appeal came.[49]

7. Appeals to High Court and Sharia Court of Appeal in Islamic Civil Matters:- Both Upper Area Courts and Area Courts, in most cases, apply Islamic Law in civil cases within their jurisdiction and cite authorities from Islamic books. The Islamic civil laws which these courts apply cover Islamic civil laws which these courts apply cover Islamic personal law and Islamic civil law of transactions (i.e. Mu'amalat). Appeala against the decisions of the Area Courts in respect of Islamic personal law go to the Sharia Court of Appeal whereas appeals in Islamic Law of transactions lie to the High Court where the Judges are not learned in Islamic Law.

This is apparently an injustice because if a court whose Judges are not learned in the law applied in a case and such Judges are to handle such cases especially on appeal, it will lead to a gross miscarriage of justice.

In most cases, the High Court Judges, wittingly or unwittingly apply principles of English law or Customary law procedures in dealing with Islamic cases thereby ousting or distorting the well established Islamic procedure as being followed in civil matters including the Islamic rules for the admission of evidence and the form of trial for both Upper Area Courts and Area Courts from which the appeal came.

This is very unjust because in administering justice on Muslems according to Islamic law, it must be made clear that both the substantive Islamic Law as well as the Islamic law practice and procedure must be applied as laid down in the Shari'ah and the Judge who is to apply the law must be learned in Islamic law and procedure. Moreover, for such a Judge to be qualified to apply Islamic law, he must be male, Muslem, learned and God-fearing otherwise any judgement he passes, would not only be unjust but also a nullity.

8. Powers of Appellate Courts:- It has been observed that some appellate courts tend to regard any civil appeal proceeding before them as an invitation to a retrial. Furthermore, the courts seem to confuse a situation in which an interlocutory decision is required from a final one.

Although an appellate court in the exercise of its jurisdiction in civil matters may reverse, vary or confirm the decision of the court below, it is not its business to re-open dispute by trying cases again. The powers of appeal courts, in this respect, are to see whether trial courts have used correct procedures to arrive at right decisions. Thus, an appellate court will only interfere where the necessary finding has not been made or where it is satisfied on the evidence before it that the finding is wrong, and could not ordinarily have been based on the evidence.

With regard to final and interlocutory decisions, some appellate courts have shown tendencies to confuse the two issues in the sense that when appeals are before them for

interlocutory decisions, they determine them on final bases. This is wrong because where a lower court makes a decision partaining to an issue or issues in the case before it which does not finally determine the rights of the parties, it is an interlocutory decision. But where the lower court finally determines the rights of the parties and not merely an issue in the case, it is a final decision. Thus, an appellate court should try and differentiate between the two issues and pass judgement accordingly.

7.3 Suggestions:

In the light of what we have highlighted with regard to our observations, we put forward the following suggestions in the hope that they may help in the application of the proper rules of appeal thereby removing the complexities and injustices associated with appeals so that appeal courts may administer justice in the spirit of impartiality and avoid miscarriage of justice.

1. Interpretation of Constitution and Statute:
   It has long been an established practice in courts that in the interpretation of an anactment, the courts should construe the enactment in such a way as to implement rather than defeat the

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legislative intention. This means that the courts should avoid a construction which would reduce the legislation to futility and they should bear in mind that legislation is made only for the purpose of bringing an effective result. Therefore, in order to bring an effective respect in the interpretation of a provision in a constitution or a relevant legislation, it is very important to refer to the historical antecedents of the provision and when it is qualified by some other considerations, it should not be read or interpreted in isolation.[50]

This means that courts of law especially appeal courts should interprete and construe constitutional or statutory provisions liberally having regard to the history and reasons behind the enactment. This is in view of the fact that in finding out what the legislature means, it is very important to take into consideration the surrounding circumstance that would serve as a useful guide in

arriving at a decision which is in line with the intention of the legislature. However, where the provisions or words construed are clear and unambiguous, they best declare the intention of the Constitution or legislation in respect of the provisions construed.

We are of the view that it is the duty of an appellate court to bear in mind that where there are alteration in the provisions of subsequent legislation or significant omissions with respect to a particular matter with a view to effecting a change in the law, the provisions conferring the change should be construed liberally in order not to defeat the obvious ends of the legislation.

According to Sir Udoma, J.S.C in the case of Rabiu V. The state[51] said:

> .... that the function of the constitution (Decree) is to establish a framework and principles of government, broad and general in terms, intended to apply to the varying conditions which the development of our several communities must involve, ours being a plural, dynamic society, and therefore, mare technical rules of interpretation of statutes are to some extent inadmissible in a way so as to defeat the principles of government enstrined in the Constitution and in response to the demands of justice, lean to the broader interpretation.....

Thus, the decision arrived at by the Court of Appeal in the case of Abuja V. Bizi [52] with respect to the Constitution (Suspension and Modification) (Amendment) Decree, No.26 of 1986, which aimed at extending the jurisdiction of the Sharia Court of Appeal to handle all cases of Islamic Civil Law leaves much to be desired. This is because the court has failed to take into cognisance the history and reasons which led to the amendment of the constitution. The court, therefore, construed the enactment in a narrower sense thereby defeating the obvious ends the Decree was designed to serve.

It is worthwhile, at this juncture, to give the genesis of the Decree which was promulgated as a result of series of agitations and dissatisfaction by Muslems who felt that it was improper for High Court Judges who where not learned in Islamic Law and procedure to handle appeals on Islamic Civil Law of transactions. In order to correct the anomaly, a reform committee was set up in 1976 by the then Federal Military Government and in its report to the Government, it recommended, among other things, as follows:-

The Sharia Court of Appeal Lwa should be amended to confer jurisdiction on the Sharia Court of Appeal to hear appeals in all civil matters emanating from Area Courts where the applicable law is Islamic Law.

Thus, Decreed No.26 of 1986 was promulgated with a view to allowing all cases of Islamic Civil Law to go on appeal to Sharia Courts of Appeal. However, the Court of Appeal interpreted the Decree in a narrower sense and said that the jurisdiction of the Sharia Court of Appeal still remains limited to those items enumerated under section 242(2) (a)(b) (c) and (d) of the 1979 Constitution. This judgement, obviously, has defeated the intention of the legislature by not extending the jurisdiction of the Sharia Courts of Appeals to cover all cases of Islamic civil Law thereby allowing the anomaly and injustice being experienced by Muslems to continue irrespective of the fact that there is nothing in the text of the Decree or in the Constitution to indicate that the narrower interpretation as applied by the Court of Appeal would best serve the purposes and objects of the Decree. We hope the Supreme Court, sooner or later would redress or correct the anomaly whenever the case goes on appeal to the court.

2. Additional Evidence:

An appeal court should be very hesistant in granting leave to a party to adduce additional evidence because that would be unjust except for the furtherance of justice and with regard to matters which had occured after the date of the trial or hearing.[53]

Generally speaking, the grant an application for leave to adduce additional evidence would tantamount to injustice because it would be unfair to the trial judge but in the interest of justice the court should carefully study all the issues involved in the case and make a dispassionate appraisal of the materials placed before it by both parties especially where the acts of commission or omission of others, including counsel for the parties could not, by reasonable diligence have made it possible for the evidence to be adduced at the trial.

In the light of the above situation, the Appeal Court should have an overall consideration of all the issues involved and the propriety in that eventuality of admitting additional evidence and, if in the opinion of the court, the trial judge might have reached a different decision if it had heard that evidence, it would be fair and relevant to indicate the actual position of things and should not reverse the decision of the trial court but order a retrial.

However, it would be more pertinent to suggest further that after carefully studying all the issues involved in the case including all available evidence and where it becomes apparent that there won't be any fundamental difference between the decision reached by the learned trial judge and what would be the conclusion by virtue of the new evidence, the Appeal Court should not order for a retrial merely because there is additional evidence to be heard.

The established principle in admitting additional evidence is that Appeal Courts are required to always exercise their powers in that respect judicially and in the furtherance of justice so that a case of this nature should be determined on its merits. In otherwords, mere procedural irregularities should not be a hinderance in admitting additional evicence,[54] rather the court should always look at the special circumstances of the case and in the interest of justice as well as dispassionately appraising the materials placed before it, by both parties, and then admit additional evidence which was available at the time of the trial or hearing but not adduced at the trial court due to one reason or the other.[55]

It is also pertinent, at this juncture, to draw the attention of appellate courts to the fact that written briefs of argument to summarise the judgements of lower courts or the account of the proceedings or the facts of the case but rather they are reasons upon which arguments are to be based with a view to assisting in the administration of justice by making the work of the appeal courts and the counsel involved simpler, so that appeals will be disposed of as quickly as possible.

Furthermore, in a situation in which counsel has just been briefed about a case especially on the day of hearing of the appeal and it is not possible for him to prepare and file his briefs in respect of the appeal, the appeal court should allow him to address the court orally.[56] As stated earlier that the inability of an appellant to file his briefs or argument is not an out right abandonment of the appeal. The rules, therefore require that where an appellant is in a position to file his brief but has not done so within the time prescribed, the only remedy is to

seek the leave of the court for an extension of time to do so. The court, however, should insist that the briefs so filed should be a succinct statement of appellant's argument in support of his grounds of appeal.

4. Technicalities

The duty of an Appeal Court is to see whether or not trial courts have used correct procedures in arriving at decisions. That is to say that the Appeal Court should always exert efforts towards inquiring into the way in which disputes have been tried and decided. Thus, if the court is satisfied that substantial justice has been done, it should not upset the decision of the Lower Court solely by reason of defective technicalities.

For instance, where an appellant files in time the notice of appeal and paid the fees as required by the statute but fails to supply a copy of the notice to the court below for service on the respondent. In this situation, the respondent has not been put on notice, which means that one of the conditions of appeal has not been fulfilled. Thus, we are of the view that instead of outrightly

treating the application as a nullity and consequently striking out the appeal, the Appeal Court should grant an application for an extension of time in order to enable the appellant fulfil the condition flouted.

It is true that appeals in civil proceedings exist solely by statute and they are entertained in accordance with express provisions as stated in the statute and, unless expressly otherwise provided in the statute, it is the appeallate court to determine its rules with regard to the appeal. In this respect, once a prospective appellant comes within the provision of the statute creating the appeal and he has exercised the right of appeal created by that statute according to the terms and conditions laid down by the statute we, therefore, suggest that appeal courts should not allow mere technicalities or procedural matters to interfere with a system that promotes the cause of justice.

Thus, it is an incontrovertible fact that notice of appeal is essentially the foundation of the appeal and on the ground of it being defective or incompetent the court may strike it out.

This is in view of the fact that the incompetence or defectiveness in relation to the notice tantamounts to a failure to enter an appeal which means that there is no appeal before the court, However, taking into consideration the nature of our society being a plural and dynamic one, and, thus, unnecessary adherence to undue regard to technical rules at the expenses of the demands of justice which the Appeal Courts are designed to serve, enforce and protect, it is really out of focus with the needs of time to insist that defective notice is incurable and connot be amended.

In order not to defeat the obvious ends of justice and by virtue of the reasons given above, we are of the view that any defective notice should be cured by amendment. In other words, it is strongly suggested that any defective notice of appeal should be allowed to be cured by the leave of court unless if it substantially contradicts the laid down rules or procedures.

R E F E R E N C E S:

1. Folorunso v. Adeyemi (1975) 1 NMLR 128
2. Act No. 20 of 1963.
3. Section 215 of the 1979
4. Order 8 rule 12 of the Supreme Court Rules 1985.
5. Ibid 08 r 12 (2)
6. Ibid 08 r 16
7. Asiyanbi and Ors. v. Adeniyi (1967)1 All NLR 82
8. Supra Section 258 (1) of the 1979 Constitution.
9. Ibid Section 258 (1), See also (Suspension and Modification) Amendment Decree No.17 of 1985
10. Supra Section 213 of the 1979 Constitution. See also Ayayi V. The State (1980) L.R.N. 260 at 263.
11. Section 2 of the Court of Appeal (Amendment) Rules, 1984.
12. Supra Section 226 of the Constitution.
13. Onitiri V. Benson 5 F.S.C. 150
14. Shell B.P. Petroleum Development Co. of Nig. Ltd. V. Pere Cole & Others (1978) 2 S.C. 188
15. Bata Nigeria (Sales) Ltd. V. Brigadier Martin Adamu (1976) N.M.L.R.
16. Adigun V. Attorney General of Oyo State (No.2) (1987)2 NWLR 199.
17. Supra Section 236(1) of the Constitution.
18. Ibid.
19. The Unified Civil Procedure Rules of the High Court 1988.

20. Supra Section 6 (3) pf the Constitution.
21. Ibid Section 242
22. Sharia Court of Appeal Law, No. 16 of 1960.
23. Supra Section 243 of the Constitution
24. Ibid Section 6 (3) (5) (e)
25. Supra Section 14 Sharia Court of Appeal Law.
26. Hassan Abuja V. Lawan Gana Bizi (CA/J/99/87).
27. Order III rule 2 Sharia Court of Appeal Rules 1960.
28. Supra Section 6 (6) (a) of the Constitution.
29. Supra Section 247 (1) of the Constitution.
30. Ibid (2)
31. Ibid (7)
32. Patrick Okhae V. The Governor of Bendel State and Others (1990)4 NWLR 327 at 357
33. Section 53 of the Area Court Edict, 1968.
34. Order 1 rule 1 (3) of the Area Court (Civil Procedure Rules, 1971).
35. Supra Section 60 of the Edict.
36. Ibid Section 61.
37. Ibid Section 59(1) (b).
38. Akande V. Atanda (1990) 1 I.L.R. P. 94 C.A
39. Ajadi V. Okenihum (1985)1 NWLR 484.
40. Modukolu & Or. V. Nkemdilim (1962) 1 All N.L.R.S. 87.
41. Yan Katako V. Gwammaja (1990) 1 I.L.R. p.4 C.A.

42. Odiase V. Omele (1985)3 N.W.L.R. 82.

43. Bioku V. Light Machine (1985)5 N.W.L.R. 42

44. Talle V. Bakari (1990) 1 I.L.R. p.80 C.A

45. Shehu V. Karifi (1990)1 I.L.R. p. 51 C.A

46. N.I.P.C Ltd. V. Thompson Organisation (1969)
N.M.L.R. 99.

47. Supra Shehu V. Karfi.

48. Ejiofodomi V. Okonkwo (1982) 11 S.C. 74.

49. Alh. Amadu John Holt V. Momodu Okah Idah (1956)
N.R.N.L.R. 81

50. Awolowo V. Sarki (1966)1 All N.L.R. 178.

51. (1980) 8 -11 S.C. 130.

52. Supra CA/J/99/87.

53. Asaboro V. Aruwaji and Another (1974)1 All NLR 140
at 146

54. Ahmadu V. Salawu (1974)1 All NLR (pt.11)p. 318 at
324.

55. Supra Asaboro V. Aruwaji and Another.

56. Supra Shehu V. Karfi.

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