IN THE COURT OF APPEAL
EKITI JUDICIAL DIVISION
HOLDEN AT ADO EKITI

ON WEDNESDAY THE 5TH DAY OF DECEMBER, 2012

BEFORE THEIR LORDSHIPS:

JIMI OLUKAYODE BADA	-	**JUSTICE, COURT OF APPEAL**
EJEMBI EKO	-	**JUSTICE, COURT OF APPEAL**
MODUPE FASANMI	-	**JUSTICE, COURT OF APPEAL**

CA/EK/17C/2012

BETWEEN:

OJO BOLARINWA THEOPHILOUS - - - **APPELLANT**

AND

FEDERAL REPUBLIC OF NIGERIA - - - **RESPONDENT**

JUDGMENT

(DELIVERED BY EJEMBI EKO, JCA)

On 7th June, 2011 this Appellant filed a Notice of Preliminary Objection at the Federal High Court sitting at Ado-Ekiti where he was defending some allegations of criminal nature in the case No FHC/AD/14c/2010. The Preliminary Objection was set down for hearing on 27th February, 2012. Before the said 27th February, 2012 the Respondent, through their counsel,

filed on 13th July, 2011 Amended Charge containing a total of 11 counts alleging *inter alia* conspiracy to commit fraud, presenting a cheque with intent to defraud the Federal Government of Nigeria of some specified amounts etc. The Appellant is the 6th Accused person on the charge sheet.

On 27th February, 2012, the day set down for the hearing of the Preliminary Objection filed on 7th June, 2011, Mr. Olukotun prosecuting counsel, moved the trial court, orally, to accept the Amended Charge filed on 13th July, 2011. Mr. Oso of counsel to 5th and 7th accused persons vehemently opposed the application. Mr. Obaro of counsel to 6th accused/Appellant adopted "in toto the submissions of the 5th and 7th accused persons" The substance of these protests is that the application to introduce amended charge ought not to have been made orally, but formally. The Ruling, the subject of this appeal, is at pages 348 and 349 of the Record. It is hereby reproduced herein below as follows:-

RULING

(Pp 348 and 349 Record)

I have considered the submissions of the prosecution counsel 5th and 7th accused and of course that of the 6th accused counsel on whether or not the court can accept the application by the prosecuting counsel made orally for the court to accept the amended charge. I am inclined to grant the application to accept the amended charge dated 12th July, 2011 even although no formal application was made by the prosecuting counsel in that respect. I think it will be superfluous to now ask the prosecuting counsel to go back and come formally to ask for an

order of the court to amend the charge. I believe if the defence have any objection that can be made at the appropriate stage or if the defence need time to go the amended charge, that too can be made after the acceptance of the amended charge.

As stated earlier, the amended charge dated 12th July, 2011 and filed on 13th July, 2011 is accepted as the subsisting charge and I so hold.

What is more-the 6th accused counsel submitted that the charge contained in the charge in respect of which he has filed a preliminary objection have been repeated on the face of the amended charge dated 12th July, 2011; in effect learned counsel has suffered no injustice by any nature neither has he been prejudiced in the circumstance. The jurisdiction of this court to determine its jurisdiction on whether the charge is properly before the court has not been foreclosed against the 6th accused person. The application to accept the amended charge dated 12th July, 2011 is hereby accepted and the amended charge shall be the subsisting amended charge before the court for now.

This shall be my ruling.

SIGNED

JUDGE

27th February, 2012

The 6th accused/Appellant, aggrieved by this ruling above, has appealed on 3 grounds of appeal. The grounds of appeal, shorn of their particulars, are herein below reproduced. That is :-

1. *The Learned trial Judge erred in law and such has occasioned of miscarriage of justice when he*

allowed the prosecution's amended charge whereas there is still an unheard subsisting preliminary objection challenging the court's discretion

2. *The Learned trial judge erred in law when he refused to hear and determine the appellant's preliminary objection.*
3. *The Learned trial judge erred in law when he exercised his discretion to grant an amendment of the charge against the appellant, amongst others, before him based on an oral application to that; and notwithstanding the pending preliminary objection before him.*

The preliminary objection, at pages 198 – 202 of the record of appeal, is that the trial Federal High Court -

Lacks the jurisdiction to entertain this criminal action and consequently the said further amended and subsisting charge dated the 23rd May, 2011 (sic) should, therefore, be terminated because of its nullity and invalidity based on the following grounds :-

1. *Counts 1 – 3 and 5 – 7 of the further amended Charge are offences that are prosecutable by the Attorney General of the Federation by virtue of Section 174 of the 199 Nigerian Constitution, whereas, the other counts of the said charge are offences*

only prosecutable by the Federal Inland Revenue Service (Establishment) Act, LFN 2004. The two sets of offences as contained in the same charge sheet cannot be signed by an officer of the Federal Inland Revenue Service.

2. *There is no proof of evidence to show any prima facis case against the 6th accused person/Applicant. The earlier on filed proof of evidence had been withdrawn with the 12th April, 2011 further Amended charge which is supported and they were accordingly struck out by the trial Judge.*
3. *The charges as drafted are designed to spring surprises and actually sprung (sic) surprises on the accused persons, especially the 6th Accused person/applicant. The charge is an abuse of process.*

The pith or fulcrum of the preliminary objection is the challenge to the vires of the prosecutor to raise the charges and prosecute the Appellant thereon. It is a challenge to the prosecutorial powers of the Federal Inland Revenue Service or the Federal Republic of Nigeria to raise and maintain the charges for the purpose of prosecuting the appellant on them. I will come back to this later.

The parties have exchanged briefs. The Respondent in the Respondent's Brief of Argument, filed on 24th October, 2012 but deemed filed on 5th

November, 2012, had at pages 3 – 6 thereof raised notice of preliminary objection to ground 2 of the grounds of appeal and issue No 3 formulated and argued by the Appellant in paragraphs 6.0 – 9.7 of the Appellant's Brief of Argument filed on 21st June, 2012, but deemed filed and served on 3rd July, 2012. I had earlier reproduced the three grounds of appeal shorn of their particulars. The issues formulated by the Appellant for determination of the appeal are as follows:-

1. *Whether, pursuant to Sections 162 and 164 of the Criminal Procedure Act, 2004, the prosecution's oral application to substitute and/or amend her purportedly subsisting charge of 23rd May, 2011 before the court was validly made and whether such substituted charge of 13th July, 2011, upon which the Appellant's plea was taken is void and of no effect.*
2. *Whether the trial court was right to have abandoned and leave (sic) unheard the appellant's pending preliminary objection which challenges its jurisdiction before allowing further steps, that predetermines (sic) the pending motion to be taken.*
3. *In the unlikely event that this court holds that the charge is valid, whether the trial court has jurisdiction to try the appellant considering the preliminary objection of the appellant before the trial court.*

The Appellant, positing on Order 10, Rule 1 of the court of Appeal Rules 2011, has raised a preliminary objection to the Respondent's preliminary objection contained in the Respondent's Brief. The ground for this objection is that the said preliminary objection should have been "filled separately; giving three (3) days notice before the hearing of the appeal" and that it should not have been incorporated in the Respondent's Brief as the Respondent had done.

I have read Order 10 Rule 1 of the Rules of this court, 2011. It says merely that a respondent, intending to rely upon a preliminary objection to the hearing of the appeal, shall give the appellant three clear days notice thereof before the hearing, setting out the grounds of objection. The objector is also enjoined to file such notice with twenty copies thereof with the registry within the same time. I have not seen the words "filed separately" in Order 10 Rule 1 that the Appellant has founded his objection on.

Let me, before coming to the objection, reiterate the powers vested in this court by Order 6 Rules 3 and 6 of the court of appeal Rules 2011 regarding incompetent ground of appeal or an incompetent notice of appeal. By Order 6 Rule 3, an incompetent ground of appeal "may be struck out by the court of its own motion or the application by the Respondent". The power to strike out an incompetent ground of appeal resides in the court by dint of Order 6 Rule 3. See NSIRIM V. NSIRIM (1990) 5 SC (PT. 2) 94 at 104 – 105. Rule 6 of Order 6 empowers the court "to strike out a notice of appeal when an appeal is not competent or for any other sufficient reason". In this court appeals are argued not on the grounds, but on issues formulated in the brief of argument, from the grounds of appeal. See Order 18, Rules 3 (1) and 4(2) of the Rules of this Court, 2011. What I have been trying to demonstrate is

that where either the ground(s) of appeal are incompetent or where the issues purportedly formulated from the grounds of appeal do not actually flow from the grounds of appeal, either or both may be struck out *suo motu* by the court.

The Appellant relied heavily on MOYOSORE V. GOVERNOR, KWARA STATE (2012) 5 NWLR (PT. 1292) 242 for his insistence that Order 10 Rule 1 of the Rules of this court, 2011 contemplates a separate notice of preliminary objection, and not a Notice of Preliminary Objection incorporated in the Respondent's Brief, as done by this Respondent. In this MOYOSORE case the Notice of Preliminary Objection was incorporated in the Respondent's Brief of Argument. The Respondent did not pay for the filing of the Notice of Preliminary Objection. He paid only for the filing of the Respondent's Brief. It was on this ground that Mbaba, JCA held, at page 270 of the Report, that " the respondent could not establish the filing of the preliminary objection pursuant to order 10 rule 1" and went further to state that:-

> *It is the filing fee that vests legitimacy or validity on a court process, except where such fees are waived as in the case of official process filed by government or department of government"*

The MOYOSORE case therefore is not a good authority for the position of the Appellant in his objection to the Respondent's Preliminary objection to the Respondent in this appeal. The practice of incorporating the Notice of preliminary objection in the Respondent's Brief is not illegal nor is it prohibited by the Rules of this Court. As stated by Rhodes - Vivour JSC in DAKOLO V. REWANE – DAKOLO (2011) 6 NWLR (PT. 1272) 22 at 41E, it is "now an accepted practice, as it obviates the necessity of filing a separate

notice of preliminary objection" The practice is economical. A notice of preliminary objection can be incorporated in the respondent's brief, as this Respondent has done. See ADENIYI V. AKINTAN (2011) 5 NWLR (PT. 1241) 554 at 563D. The only proviso or caveat is: the respondent must pay filing fee for the Notice of preliminary objection incorporated in the respondent's brief, unless such filing fees are waived. See MOYOSORE'S case (Supra). Order 12 Rule 2 of the exant Rules of this Rules of this court exempts the Respondent from paying filing fees.

The Appellant's objection to the Respondent's notice of preliminary objection incorporated into the Respondent's Brief of Argument is not on any strong wicket. Appellant's counsel had read into order 10, Rule 1 the word"separately", and by so doing imported into the rule what clearly was not contemplated or intended. The cardinal principle of interpretation is that it is not permitted, while interpreting or construing any provision of a statute, to import extraneous matters into a statutory provision in order to give it a different meaning or interpretation from what the Lawmaker intended it to be. In other words, nothing must be added, by way of a gloss, to the provisions and nothing must be taken away from the provisions. See UNIPETROL V. E.S.B.I.R (2006) ALL FWLR (PT. 317) 413 at 423. On this note, therefore, I hereby dismiss the Appellant's objection to the Respondent's notice of Preliminary Objection contained in the Respondent's Brief of Argument.

The Respondent's objection to ground 2 of the grounds of appeal is on the ground that the said ground of appeal does not arise from, nor is it based on the decision of the lower court. I had earlier on reproduced the ruling the subject of this appeal. The Respondent further complains that issue 3, which

I earlier reproduced also, is not related to and it does not flow from any of the grounds of appeal.

It is trite law that a ground of appeal should be raised only in respect of a live issue or issues in controversy in the judgment appealed. It is a complaint of the appellant against the decision of the lower court. Therefore, valid ground of appeal is the one that arises from matters that were raised and canvassed at the court the appeal emanates. See IWUOHA V. NIPOST (2003) 8 NWLR (PT.823) 308 at 337; SALAMI V. MOHAMMED (2000) 9 NWLR (PT. 673) 469 at 478.

The complaint in ground 2 of the grounds of appeal is that the learned trial judge refused to hear and determine the appellant's preliminary objection. This is a very serious charge or indictment. I have read the proceedings of 27th February, 2012, including the Ruling, at pages 346 – 349 of Record. The only issues raised and canvassed at the lower court that day were all about the propriety of admitting the amended charge on oral, as opposed to formal, application. The issue of the trial court hearing the preliminary objection of the 6th accused/Appellant filed on 7th June, 2011 – at pages 198 – 202 of the Record, was neither canvassed nor raised. The court nonetheless in the ruling expressed an opinion that –

> *If the defence have any objection that can be made at the appropriate stage or if the defence need time to go (through) the amended charge, that can be made after the acceptance of the amended charge.*

I agree with the Respondent, that ground 2 of the grounds of appeal, as presently couched did not arise or flow directly from the proceedings or

the Ruling of 27th February, 2012, the subject of this appeal. The said ground 2 of the grounds of appeal is incompetent having not been raised from the proceedings the subject of this appeal. See G.T.B. PLC V. FADLO INDDUSTRY LTD (2007) 7 NWLR (PT. 1033) 307. It is, accordingly, struck out. Issue 2 formulated for determination of the appeal, among others, has apparently been formulated from this ground 2. The said issue 2 therefore suffers the same incompetence. An issue formulated from no valid ground of appeal is an incompetent issue. See OKONYIA V. IKENGAH (2001) 2NWLR (PT. 697) 336. Issues must flow directly from valid ground(s) appeal. They cannot be formulated from nowhere or in vacuo. See IHEANCHO V. EJIOGU (1995) 4 NWLR (PT. 389) 324; PORT HARCOURT CITY LG V. EKEOHA (2008) ALL FWLR (PT. 422) 1174 at 1192. Issue 2 formulated by the Appellant is accordingly, struck out since it was formulated from no valid ground of appeal.

Respondent also complains that issue 3 formulated by the Appellant does not arise nor has it been formulated from any complaint contained in the grounds of appeal. The law on this is quite clear: an issue for determination must arise from a complaint contained in the ground(s) of appeal, otherwise it is incompetent. See UKIRI V. GECO-PRAKLA (NIG) LTD (2010) 544 at 555; BALIOL (NIG) LTD. NAVCON (NIG) LTD (2010) 16 NWLR (PT. 1220) 619 at 627 .

The issue of the trial court having or lacking the jurisdiction to try the appellant, considering the pending preliminary objection of the appellant, filed on 7th June, 2012, still pending before the trial court was not canvassed or raised and was not ruled upon by the trial court on 27th February, 2012. Even where the court failed or refused to decide on an issue canvassed and

raised, when it is established that the issue was canvassed and raised but the court swept it under the carpet and made no comment on it; that could justify a ground of appeal from which an issue for determination could be formulated at the appellate court. See SULU GAMBARI V. MAHMUD (2008) 14 NWLR (PT. 1107) 209 in which IWUOHA V. NIPOST (Supra) and SALAMI V. MOHAMMED (Supra) were relied upon.

It appears to me that the Appellant think, albeit erroneously, that he can surreptitiously invite this court to invoke its jurisdiction under Section 15 of the Court of Appeal, Act, 2004 by formulating a bogus issue for determination that has no nexus with any existing and valid ground of appeal. The Record clearly shows that he never made any effort to move his preliminary objection on 27th February, 2012 and he was not allowed to. Nobody stopped him from moving the subsisting preliminary objection. The duty to move any motion in court inheres in the applicant. The only way the Appellant could have invoked the discretion of the court in respect of his motion or preliminary objection was to move the motion or preliminary that was pending. See AYANBOYE V. BALOGUN (1990) 5 NWLR (PT. 151) 392 at 413; THE STATE V. ONAGORUWA (1992) 2 NWLR (PT. 221)33 at 58.

Issue 3, as it is, and I am in complete agreement with the Respondent on this, is not formulated from any ground of appeal. Issue for determination is a point that has arisen in the proceedings, including the decision of the court below, which forms the basis of the litigation or dispute at the appellate court and which requires the resolution by the appellate court. See UNITY BANK PLC V. BOURI (2008) 7 NWLR (PT. 1086) 372. There is no ground of appeal out of which this issue 3 has been formulated. The whole purpose of grounds of appeal is to give notice to the other side of the

case they are going to meet at the appeal court. See NIPC LT V. THOMPSON OR. LTD (1969) ALL NLR 134. It is all about *audi alteram partem* guaranteed by Section 36(1) & (6) of the constitution, 1999, as amended.

From all I have been saying, Appellant's issue 3 is incompetent. It is a accordingly, hereby, struck out. The preliminary objection of the Respondent on ground 2 of the grounds of appeal and Appellant's issue 3 is hereby sustained. Issue 2 and 3 formulated by the Appellant, having been struck out; only issue 1 formulated by the Appellant now remains for consideration.

Appellant's issue 1 appears to have been distilled from grounds 1 and 3 of the grounds of appeal. It is all about the propriety of the trial court allowing the prosecutor to apply orally to substitute and/or amend an existing charge.

The courts are enjoined to always follow the rules of procedure laid down by law on or in respect of any matter before them. See AFROCON (NIG) LTD. V. CO-OPASS OF PROFF INC. (2003) 1 SC (PT. 3) 1 at 8. Section 35 (1) of the constitution is emphatic when its provision it states that "No person shall be deprived of (his) liberty save – in accordance with a procedure prescribed by Law". The procedure guiding the proceedings the subject of this appeal is the procedure laid down in the Criminal procedure Act.

As submitted by the Respondent, the Appellant's contention is not as to the power of the prosecution to amend the charge if and when the need arises. The contention of the Appellant, as could be gleaned from paragraph 4.9 of the Appellant's Brief, is that "Prosecution cannot just amend the charge(s) before the court without first making a formal application to that effect". In other words, the point of objection of the Appellant is that the

admission or acceptance of the amended charge upon a mere oral application of the prosecution on 27th February, 2012 offends the law. The parties relied on Sections 162, 163 and 164 (4) of the Criminal Procedure Act, 2004 for their respective contentions. It all boils down to the interpretation of these sections, which are herein below reproduced:-

> 162. *When a person is arraigned or tried on an Imperfect charge or erroneous charge, the court may permit or direct framing of a new charge or add to or otherwise alter the original charges.*
>
> *163. Any court may later or add to any charge at any time before judgment is given or verdict returned and every such alteration or addition shall be read and explained to the accused.*
>
> *164. Where (4) where a charge is so amended a note of order for amendment shall be endorsed on the charge and the charge shall be treated for the purpose of all proceedings in connection with as having been filed in the amended form.*

Section 162 CPA appears more relevant to the powers of the prosecutor as regards amendment of an imperfect charge when a person is

arraigned or being tried. The prosecutor under section 162 CPA cannot unilaterally amend or alter the charge and place it in the proceedings without leave of court. The court has discretion in the matter. It "may permit or direct the framing of a new charge or add to or otherwise alter the original charges". The operative words are "may permit or direct the framing" of the new or amended charge. In my considered view once the court has taken cognizance of a charge, it cannot be altered or amended without leave of court. The words "may permit" underscores the need for the leave of court to be sought. Section 163 CPA seems to vest more powers on the court either *suo motu*, or upon application, to alter or amend the charge at any time before judgment. The difference between sections 162 and 163 CPA is that under section 162 CPA the initiative is from the prosecution, while under section 163 CPA both the court and the prosecution can initiate the amendment. The word "direct" in section 162 CPA connotes the third party, the prosecutor, to be directed.

Either under Section 162, or Section 163, of the CPA whenever it behooves the prosecution to amend the charge they must seek leave of court. The contention of the Appellant in this appeal is that leave cannot be sought orally. The CPA does not say that this application for leave cannot be made orally. Bob Osamor: Fundamentals of Criminal Procedure Law in Nigeria 2004 *ed* at page 216 says, and I agree: -

> *When the accused person has pleaded guilty to the charge, the prosecutor can – amend or alter the charge but he must apply to the court, orally or in writing, for leave or consent to amend.*

His authority for this view is the Supreme Court case of UGURU V. THE STATE (2002) 9 NWLR (PT. 771) 90; (2002) 4 SC (PT.2) 13; also cited by the Respondent in his brief of argument. The prosecutor's, oral application to amend the charge after the pleas of the accused persons had been taken was brought under S.163 Criminal Procedure Law (*in pari materia* with S. 163 CPA) in the UGURU case. He sought to add two more accused persons to the charge. The Supreme Court affirmed the procedure of oral application and adjudged it to be proper. The substance of the UGURU decision, per Kalgo JSC's lead judgment, is that the prosecutor does not need to seek court's permission or leave to amend the charge. He however, must apply to "the court to accept the amendment pursuant to Section 163 (ibid) and the court after hearing the parties may or may not accept or allow the amendment". Accepting or refusing the amendment lies within the absolute discretion of the court.

Section 164 (4) CPA is not relevant for this appeal, as it deals with post amendment steps the trial court must take. The question in this appeal is: whether the application to the court to accept the amended charge must be in writing or whether it could be made orally. The requirement of formal or written application is not in either Section 162 or Section 163 CPA. The court cannot, in its interpretative jurisdiction, read into the statutory provisions, or subtract therefrom, words not contemplated, intended or used by the lawmaker. The basic canon of interpretation or construction of statutory provisions remains that what is not expressly prohibited by a statute is impliedly permitted. Accordingly, since oral application to the court to accept the amended charge is not prohibited by either Section 162 or 163 CPA, such oral application is therefore impliedly permitted. It is not within the

court's interpretative jurisdiction or powers to construe a statute to mean what it does not mean, nor to construe it not to mean what it means. That is why courts refuse to interpret a statute by putting a gloss on its provisions by importing extraneous matters into the provisions.

On this issue, I think I have so far demonstrated beyond doubt that the contention of the appellant to the effect that the prosecutor cannot apply orally to the court to accept the amended charge is untenable. The issue is accordingly resolved against the Appellant. The appeal is accordingly dismissed. The Ruling of the trial court appealed, that is the ruling of 27th February, 2012 is hereby affirmed. The parties are hereby ordered to go back to the trial court to continue in the proceedings in FHC/14C/2010.

Finally, it appears the grouse of the Appellant that has actively actuated this appeal is that since 8th June, 2010 when the prosecutor filed this charge, the proceedings had been a ding-dung affair. It has been all motions without movement. The prosecution has consistently been bringing applications for amendment of the charge without the court holding their breeches to thwart the antics of the prosecution. Every judge is the master his court. If he does not firmly place his feet on ground to prevent the mischievous antics of a party, the other party might go away with an unfortunate impression that the court is condoning the mischief. I say no more.

EJEMBI EKO
JUSTICE, COURT OF APPEAL

COUNSEL APPEARANCES:

T.O.S Gbadeyan Esq with Mathew Obaro, Esq, O.E Alaofin Esq and Rotimi Atolagbe Esq for the Appellant
Adebisi Adeniyi Esq for Respondent

CA/EK/17C/2012
JIMI OLUKAYODE BADA, J.C.A

I had a preview of the Lead Judgment of my Learned brother, EJEMBI EKO, J.C.A just delivered.

My Lord has dealt with the issues in this appeal in a very lucid form. I agree with My Lord's reasoning and conclusion. I adopt the Judgment as mine.

The appeal is unmeritorious and it is dismissed by me.

JIMI OLUKAYODE BADA
JUSTICE, COURT OF APPEAL

CA/EK/ 17/2012
MODUPE FASANMI, J.C.A.

I have read in draft the judgment just delivered by my learned brother Ejembi Eko, J.C.A.

Respondent filed his preliminary objection embedded in his brief 3 clear days before the hearing of the appeal. It is therefore unnecessary to file a formal application. See **Dakolo v. Rewane Dakolo (2011) 6 N.W.L.R. Part 1272 page 22 at 41E.** Appellant has not been taken by surprise. His objection is hereby overruled.

There is nothing in the ruling appealed against suggesting that the learned trial Judge refused to hear the Appellant's notice of preliminary objection at the lower court. Ground of appeal must attack the ratio of the judgment to be valid. **See Saraki v. Kotoye (1992) 11/12 SCNJ 26 at 43**. Ground 2 and issue 3 of the Appellant are therefore incompetent and are accordingly struck out.

For this and fuller reasons contained in the lead judgment I agree with the reasoning and conclusion that the appeal lacks merit. The ruling of the lower court delivered on the 27th of February 2012 is hereby affirmed.

MODUPE FASANMI
JUSTICE, COURT OF APPEAL