APPEAL FROM THE COURT OF APPEAL TO THE SUPREME COURT ON GROUNDS OF MIXED LAW AND FACT: A RIGHT IN LEGAL LIMBO?

Obinna Innocent Akpuchukwu* and Izunna Isdore Ozuo**

ABSTRACT

Appeals from the decisions of the Court of Appeal lie to the Supreme Court except in certain circumstances established in the Constitution of the Federal Republic of Nigeria 1999 (as amended). However, the Second Alteration of the Constitution and the pronouncement of the Supreme Court in Shittu v PAN Ltd appear to take away the right of appeal of a disgruntled party when the appeal borders on mixed law and fact. This contribution is a reaction to this decision of the Supreme Court and the Second Alteration of the Constitution. The contribution queries the rationale behind the pronouncement and finds that the decision does not constitute a binding precedent in our judicature. The contribution maintains the position that notwithstanding the Second Alteration of the Constitution, appeals on grounds of mixed law and fact from the Court of Appeal to the Supreme Court remain sacrosanct. To achieve this, a positivist analysis of Nigerian legislation as well as case law would be undertaken.

Keywords: *Appeal, Grounds of Appeal, Mixed Law and Fact, Legal Limbo, Court of Appeal, Supreme Court, Constitution.*

INTRODUCTION

An integral part of the adversarial system of adjudication of disputes is the right to challenge the decisions of lower courts/tribunals before a higher court sitting as an appellate court. In Nigeria, the Court of Appeal is largely an intermediate court saddled with the responsibility of hearing appeals from Federal, State and FCT High Courts, including the National Industrial Court, Customary Courts of Appeal, Sharia Courts of Appeal, Court Martials and special tribunals.[1] On the other hand, the Supreme Court is the apex court in Nigeria and has jurisdiction to hear appeals arising from the decisions of the Court of Appeal except in certain circumstances.[2]

However, the extent and scope of the right to approach the Supreme Court on appeal against the decision of the Court of Appeal is somewhat unclear at the moment. This is largely attributable to

* **Partner, Allen & Marylebone, a law firm based in Onitsha, Anambra State, Nigeria. +234 (0)8035105706; Email: innocent.obinna14@gmail.com.**

** **Associate at Aluko & Oyebode. +234 (0)7067579577; Email: deg_isdore@yahoo.com.**

1. See the Constitution of the Federal Republic of Nigeria 1999 (as amended) ('the Constitution'), s 240. Such special tribunals include: The Code of Conduct Tribunal (para 18(4) of the Fifth Schedule to the Constitution); The Competition and Consumer Protection Tribunal (s 55(1) of the Federal Competition and Consumer Protection 2018 - although the Act was signed in February 2019, the citation provision, s 168, preferred 2018 to be used); The Investments and Securities Tribunal (s 295 of the Investments and Securities Act 2007) etc.
2. These circumstances are 1) The Constitution of Federal Republic of Nigeria 1999 (as amended by the Third Alteration Act 2010), s 243(4) which establishes that 'the decision of the Court of Appeal in respect of any appeal arising from any civil jurisdiction of the National Industrial Court shall be final' and 2) The Constitution of Federal Republic of Nigeria 1999 (as amended by the Second Alteration Act 2010 – 'the Second Alteration'), s 246(3) which provides, '[t]he decisions of the Court of Appeal in respect of appeals arising from the National and State Houses of Assembly election petitions shall be final'. See also *Ikenya v PDP* [2012] LPELR-7824 (SC); *Osi v Accord Party* [2016] LPELR-41388(SC); *Madumere v Okwara* [2013] 6-7 SC (part 2) 95.

the Second Alteration of the Constitution and a recent pronouncement of the apex court in *Shittu v PAN Ltd,*[3] which appear to have limited the extent of the right of appeal to the Supreme Court. Specifically, the Court found that the Second Alteration of the Constitution limited appeals from the Court of Appeal to the Supreme Court on grounds of law alone. We shall examine this pronouncement of the apex court vis-à-vis relevant constitutional provisions, decided authorities and rules of interpretation with a view to determining whether the Constitution, particularly the Second Alteration indeed limited the right of appeal from the Court of Appeal to the Supreme Court.

For this purpose, this contribution is divided into three parts. The first part is an examination of the law governing appeals from the Court of Appeal to the Supreme Court. Here, the provisions of the Second Alteration shall be referenced. The second part of this contribution considers the decision of the Supreme Court in Shittu and the pronouncement made therein. In this regard, our reservations concerning the decision of the Court shall be made known. We shall also consider other recent and obviously conflicting decisions of the Supreme Court on the right of appeal when the appeal borders on mixed law and fact. The final part of this work shall discuss the omission of section 233(3) of the Constitution from the Second Alteration and draw lessons from the decision of the Supreme Court in *Skye Bank Plc* v *Victor Anaemem Iwu*,[4] wherein the Court upheld the right of appeal of a dissatisfied litigant against every decision of the National Industrial Court.

THE LAW ON APPEALS FROM THE COURT OF APPEAL TO THE SUPREME COURT ON GROUNDS OF FACT OR MIXED LAW AND FACT

The law is well settled that the jurisdiction of a court to hear an appeal is conferred by the Constitution or the statute that established the court.[5] Thus, a party cannot appeal against the decision of any court unless there is a statute creating such right of appeal.[6] *A fortiori* (with stronger reason), parties cannot by agreement confer jurisdiction on a court to hear an appeal where there is no statute conferring such jurisdiction on that court.[7] The jurisdiction may be conferred by the statute which sets up the lower court providing that appeals from the decision of that court shall lie to a higher court. Where no statutory provision is made for an appeal to lie from the decision of a court, that decision is taken to be final.[8]

It is not only that an appellate jurisdiction should be conferred by statute, but the parties entitled to appeal and the conditions under which they can appeal must be statutorily defined. The appeal may lie as of right or by leave of the lower court or the appellate court itself under some circumstances.[9] There is, therefore, no right of appeal unless it is conferred by statute or the Constitution.[10] To be entitled to exercise a right of appeal, the appellant must come within the provisions of the statute, creating such a right.[11] It is thus proper for an appellate court to raise the issue of the right of appeal

3. [2018] 15 NWLR (part 1641) 195.
4. *[2017] LPELR-42595(SC).*
5. *Enukora v FRN* [2018] LPELR-43822 (SC) *ANPP v Goni* (2012) ALL FWLR (part 623) 1821; *Gafar v The Government of Kwara State* [2007] LPELR-8073 (SC); *Osadebe v A-G Bendel State* [1991] 1 NWLR (part 169) 525.
6. See *Adigun v AG Oyo State* [1987] 2 NWLR (part 56) 197, 230.
7. See *Ukwu v Bunge* [1997] 8 NWLR (part 518) 527; [1997] 57 LRCN; *Gafar v Govt Kwara State* [2007] 4 NWLR (part 1024) 375.
8. See *Mekwunye v Director of Audit* [1967] 1 ALL NLR 225; *Onitiri v Benson* [1960] 5 FSC 150, 154; *Morore v Tayee* [1930] 2 WACA 43, 44.
9. See F Nwadialo, *Civil Procedure in Nigeria* (2nd edn, University of Lagos Press 2000) 772.
10. See *Boardman v Sokoto Native Authority* [1965] 1 ALL NLR 214, 215; *Commissioner of Police v Alburime* [1978] 2 LRN 241; *National Bank v Weide & Co* [1996] 1-10 SCNJ 147, 159 cited in Nwadialo (n 9).
11. See *Adesina Moses v Saibu Ogunlabi* [1975] 4 SC 81. 85; *Adis Ababa v DS Adeyemi* [1976] 12 SC 51, 56.

suo motu since it is crucial to the appeal; and any proceedings leading to a judgment given without jurisdiction is a nullity, however well conducted.[12] If the statute conferring the appellate jurisdiction provides simpliciter that an appeal lies, the provision should be read to mean that the appeal is as of right and not by leave.[13]

In the case of the Supreme Court, its appellate jurisdiction can be found in section 233(1) of the Constitution which provides, '[t]he Supreme Court shall have jurisdiction, to the exclusion of any other court of law in Nigeria, to hear and determine appeals from the Court of Appeal'. Section 233(1) of the Constitution merely confers exclusive jurisdiction on the Supreme Court to hear appeals from the Court of Appeal and does not in any way stipulate whether the right of appeal conferred shall be exercised by a prospective appellant as a matter of right or with leave of the court. To this end, section 233(2) established the instances when an appellant may approach the Supreme Court as a matter of right: section 233(2) of the Constitution provides:

An appeal shall lie from the decisions of the Court of Appeal to the Supreme Court as of right in the following cases -

(a) where the ground of appeal involves questions of law alone, decisions in any civil or criminal proceedings before the Court of Appeal;
(b) decisions in any civil or criminal proceedings on questions as to the interpretation or application of this Constitution;
(c) decisions in any civil or criminal proceedings on questions as to whether any of the provisions of Chapter IV of this Constitution has been, is being or is likely to be, contravened in relation to any person;
(d) decisions in any criminal proceedings in which any person has been sentenced to death by the Court of Appeal or in which the Court of Appeal has affirmed a sentence of death imposed by any other court;
(e) decisions on any question -

    (i) whether any person has been validly elected to the office of President or Vice-President under this Constitution,
    (ii) whether the term of office of President or Vice-President has ceased,
    (iii) whether the office of President or Vice President has become vacant;
    (iv) whether any person has been validly elected to the office of Governor or Deputy Governor under this Constitution,
    (v) whether the term of office of a Governor or Deputy Governor has ceased,
    (vi) whether the office of Governor or Deputy Governor has become vacant; and

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

Prior to the Second Alteration of the Constitution which took place in 2010, section 233 of the Constitution had six subsections, but after the Second Alteration, subsections 3, 4, 5 and 6 of section 233 were omitted or deleted, leaving only subsections 1 and 2. For clarity, the deleted or omitted section 233(3) provided, '*[s]ubject to the provisions of subsection (2) of this section, an*

12. See *National Bank (n 10)*; Nwadialo (n 9).
13. See *Karimu Mabinuori v Samuel Ogunloye* [1970] All NLR 17; [1970] LPELR- 202/1967(SC).

appeal shall lie from the decisions of the Court of Appeal to the Supreme Court with the leave of the Court of Appeal or the Supreme Court'. In the Second Alteration, the entire section 233 was substituted with a new section 233. This new section 233, which introduced appeal from governorship election petition from the Court of Appeal to the Supreme Court[14] came without subsection 3 of the former section 233 of the Constitution. As it stands, the provision that hitherto provided for leave of the Court of Appeal or the Supreme Court in appeals not as of right no longer exist in the Constitution.

Notably, the appellate jurisdiction of the Supreme Court cannot be found in the Supreme Court Act. In essence, it is only the Constitution that is relevant as far as the substantive issue of the appellate jurisdiction of the Supreme Court is concerned and no other statute. As can be seen from section 233(2) of the Constitution, ordinary civil or criminal appeal[15] that borders on fact alone or mixed law and fact cannot be brought as of right. Such appeals were brought with the leave of the Supreme Court or the Court of Appeal. Without the requisite leave to appeal, the appeal would be adjudged incompetent and struck out by the Supreme Court.[16] Similarly, where at least one of the grounds involves a question of law alone and the other grounds border on fact alone or mixed law and fact, the appeal would not be struck out but the grounds on fact alone or mixed law and fact filed without the requisite leave of court would be adjudged incompetent and the issues raised therefrom struck out.[17] Now, has this position changed? Put differently, has appeal to the Supreme Court in other cases (for instance, in cases of fact alone or mixed law and fact) not mentioned in section 233(2) been abrogated? What follows is an attempt to answer this poser.

THE PRONOUNCEMENT OF THE SUPREME COURT IN *SHITTU* V *PAN LTD*, RESERVATIONS AND OTHER CONFLICTING AUTHORITIES

In *Shittu*, the appellant filed a suit against the respondent, his former employer in April 1996. However, the suit was struck out for want of diligent prosecution on 20 September 1996. The appellant later brought a motion on 21 February 2001, seeking to relist the suit. In a considered ruling, the learned trial Judge dismissed the motion seeking, *inter alia,* an order relisting the suit. The appellant dissatisfied with the decision of the trial court appealed to the Court of Appeal, challenging the dismissal of his motion. The Court of Appeal affirmed the decision of the trial court and equally dismissed the appeal.

Further dissatisfied with the decision of the Court of Appeal, the appellant appealed to the Supreme Court; and briefs of argument were exchanged between the parties. Learned Counsel to the respondent in his brief of argument argued a preliminary objection wherein he contended that the appeal was incompetent on the basis that all three grounds of appeal were questions of mixed law

14. Before the advent of the First and Second Alteration, the decision of the Court of Appeal on a governorship election petition was final. See the Constitution, s 233(3) (now extinct); *Umanah v Attah* [2006] 9 SC 151; *Awuse v Odili* [2005] 16 NWLR (part 952) 515; *Amgbare v Sylva* [2007] LPELR-8089(CA).
15. By ordinary civil appeal or criminal appeal we mean appeals on issues/subject not contemplated in s 233(2). For instance, an appeal that borders on the election of a governor of a state is as of right from the Court of Appeal to the Supreme Court and it is immaterial that the grounds found in the Notice of Appeal are of fact alone or mixed law and fact.
16. *Ajibade v Pedro* [1992] 5 NWLR (part 241) 257; *Oshatoba v Olujitan* [2000] LPELR-2797(SC); *Eze v PDP* [2018] LPELR-44907(SC); *State v Odomo* [2018] LPELR-46339(SC) *Organ v NLNG Ltd* [2013] LPELR-20942(SC).
17. *Ajibade v Pedro* [1992] 5 NWLR (part 241) 257; *Oshatoba v Olujitan* [2000] LPELR-2797(SC); *Eze v PDP* [2018] LPELR-44907 (SC); *State v Odomo* [2018] LPELR-46339(SC) *Organ v NLNG Ltd* [2013] LPELR-20942(SC).

and fact or facts alone and no prior leave of the Supreme Court nor the Court of Appeal was obtained. *Per contra*, the appellant argued that the grounds of appeal were questions of law alone and therefore prior leave of either the Court of Appeal or the Supreme Court was not required.

His Lordship Bode Rhodes-Vivour, JSC, after examining the three grounds of appeal upheld the preliminary objection of the respondent held:

> Applying all that I have been saying grounds 1, 2, and 3 contained in the notice of appeal question the learned trial Judge's discretion. Discretion is an issue of fact and law. They are grounds of mixed law and fact. They are caught by section 233(3) of the Constitution and are hereby struck out on the preliminary objection of Mr O Tolani. There is no other ground to sustain the appeal. Preliminary objection succeeds. Appeal struck out.
>
> I must observe that there is now in existence the 1999 Constitution of the Federal Republic of Nigeria, as altered by the First, Second and Third Alteration Acts, 2010. By the Alterations, there is no longer section 233(3) of the Constitution. That is to say, the Supreme Court now can only hear appeals where the grounds of appeal involve questions of law. See section 233(1) & (2) of the Constitution. The Supreme Court no longer has jurisdiction to hear appeals where the ground of appeal involves questions of mixed law and facts. Appeals on grounds of mixed law and facts ends at the Court of Appeal.[18]

The other learned Justices of the Supreme Court, especially Okoro, Sanusi, and Bage JJSC agreed with the order striking the appeal for being incompetent as no leave of the Court, nor the Court of Appeal was sought before the notice of appeal was filed. However, these other learned Justices of the Supreme Court did not make any comments on whether an appeal on grounds of fact alone or mixed law and fact terminates at the Court of Appeal.

This pronouncement of the Supreme Court which was handed down in June 2018, to the best of the authors' knowledge, appears to be the only judicial authority on this issue – that is, whether appeals on grounds of fact alone or mixed law and fact cannot be filed at the Supreme Court. This notwithstanding, it is our conviction that the pronouncement in *Shittu* cannot be taken as the position of the Supreme Court on the point for the following reasons:

The pronouncement constitutes a classic case of an *obiter dictum*

In defining the term *obiter dicta*, the Supreme Court in *Buhari* v *Obasanjo*[19] had this to say:

> Those who are familiar with the doctrine of *obiter dicta* will know their limit in jurisprudence. They are not conclusive authority; they are to be regarded as statements by the way. They arise when a judge thinks it is desirable to express an opinion on some points, though not in issue or necessary to the case before him; this makes *obiter dicta* not to have a binding effect or weight on the case.

18. 4907 (SC); *State v Odomo* [2018] LPELR-46339(SC) *Organ v NLNG Ltd* [2013] LPELR-20942(SC).
19. (SC) 18 [E]- [F] (Belgore JSC).

Thus, an *obiter dictum* must be distinguished from the *ratio decidendi* of a case. In explaining the meaning of the term *ratio decidendi* and distinguishing it from the term *obiter dictum*, the Supreme Court in *Wagbatsoma* v *FRN*[20] stated:

> Karibi-Whyte JSC in *Savannah Bank of Nigeria Ltd* v *PASTA Ltd* [1987] 1 SC 198; 278-279 offered the following invaluable guides: In determining the ratio decidendi of a case, it is safer to consider the claim before the Court and the issue which the Court was called upon to decide. Thus, the reasons given by the Court for deciding the claim before it is the ratio decidendi which the Court is obliged to follow in subsequent cases and will not lightly depart from unless to avoid the perpetuation of errors...Accordingly, opinions in the judgment which are not part of the material facts even where relevant to the determination of the case do not constitute part of the ratio decidendi and are not binding... In *Omisore* v *Aregbesola* [2015] 15 NWLR (part 1482) 205, this Court [*per* Nweze JSC] explained: In Legal Theory, an obiter dictum, in contradistinction to the ratio decidendi of a case, is a Judge's passing remarks which do not reflect the reasoning of the Court or ground upon which a case is decided.

From the above pronouncements, it is very clear that it is the *ratio decidendi* of a case and not the *obiter dictum* that is the binding decision of the court. The *obiter dictum*, being a passing remark, is not binding and cannot translate into a judicial precedent. Indeed, Edozie JSC stated clearly in *AIC Limited* v *Nigeria National Petroleum Corporation*[21] that *obiter dictum* does not embody the resolution of the court.[22] In the instant case, the issue as to whether there exists a right of appeal to the Supreme Court on grounds of fact or mixed law and fact was not canvassed before the court. It was not part of the issues for determination in the main appeal, nor the preliminary objection argued before the apex court. The dictum by His Lordship, Rhodes-Vivour, JSC was clearly a remark made in passing. Indeed, the remark was made after the court had struck out the appeal.

The remark never formed part of the reasoning of the court. It was not in issue, and it was never addressed by the parties. Being a passing remark, it would be observed, with the greatest respect to the Law Lord, that there was no engaging or in-depth analysis of the omission of section 233(3) in the Second Alteration of the Constitution. It is ordinarily expected that before the Supreme Court would arrive at a binding decision in a novel issue bordering on the interpretation and application of the Constitution, the Court, knowing the far-reaching effect the decision would have, will dedicate sufficient energy, intellect and resources in analyzing the issue before coming to a decision. This is especially so where the decision has the likelihood of limiting individual right of appeal guaranteed under the Constitution. Certainly, we hold the view that the pronouncement, with respect, is neither binding nor 'persuasive'.

To further buttress the fact that the statement was an *obiter dictum,* the court raised the issue *suo motu* and made the remark without hearing from the parties. If it was intended to form part of the *ratio decidendi* of the case, the court in line with the principle of fair hearing would have asked the parties to address it on the issue. This is because the law is well settled that where a court raises an

20. [2018] LPELR-43722(SC) 17 [B]- 21 [D] **(**Nweze JSC**).**
21. [2005] 1 NWLR (part 937) 563.
22. See *Coker v UBA* [1997] 2 NWLR (part 490) 641, 658; See also Isdore Izunna Ozuo, 'Police Prosecution at the High Court Not Certain: A Review of *FRN v Osahon*' (2015) 5 African Journal of Law and Criminology 94.

issue *suo motu*, the court has a bounden duty to allow parties to address it on the issue before coming to a decision on it, and where the court proceeds to decide such issue without first inviting the parties to address it, the decision would be declared a nullity, for constituting a violation of the parties' right to fair hearing guaranteed under section 36(1) of the Constitution of the Federal Republic of Nigeria 1999 (as amended).[23] Furthermore, only His Lordship, Bode Rhodes-Vivour, JSC made a pronouncement on the issue in the said case. The other four Justices who sat on the panel made no pronouncement thereon. It is, therefore, our conviction that the pronouncement constitutes an *obiter dictum* which cannot be relied upon by the Court of Appeal in refusing a prospective appellant leave to appeal its decision when the ground of appeal involves questions of fact alone or mixed law and fact.

The Supreme Court did not sit as a full court while deciding the case

The issue as to whether an appeal lies to the Supreme Court on grounds of fact alone or mixed law and fact is a constitutional issue that requires a seven-man panel of the Supreme Court (full court) in accordance with section 234 of the Constitution. For clarity, section 234 of the Constitution (as amended) provides:

> For the purpose of exercising any jurisdiction conferred upon it by this Constitution or any other law, the Supreme Court shall be duly constituted if it consists of not less than five Justices of the Supreme Court;
> Provided that where the Supreme Court is sitting to consider an appeal brought under section 233(2)(b) or (c) of this Constitution, or to exercise its original jurisdiction in accordance with section 232 of this Constitution, the Court shall be constituted by seven Justices.[24]

As reproduced earlier on in this paper, section 233(2)(b) of the Constitution deals with appeals to the Supreme Court on questions as to the interpretation or application of the Constitution. If the apex court had intended the case to reflect the Court's position on the issue, the Court would have ensured that it sat as a full-court (seven Justices). Where the apex court sits with a five-man panel of Justices (as in the case under review) and hands down a decision bordering on the interpretation or application of the Constitution, that decision would be one given without jurisdiction.[25] Thus, the apex court is known to reconstitute its panel when it is called upon to interpret such serious constitutional issues.[26]

The pronouncement runs contrary to *ratio decidendi* of the case

It would be recalled that the appellant's appeal was struck out on the ground that the leave of the Court of Appeal nor the Supreme Court was not first sought and obtained before pursuing the grounds of appeal which border on mixed law and fact. In other words, the appeal would have been heard on the merit had the appellant obtained the requisite leave of court. The implication,

23. See *Kuti v Balogun* [1978] 1 SC 53, 60 (Rhodes Vivour JSC); *Stifling Eng (Nig) Ltd v Yahaya* [2005] 11 NWLR (part 935) 181, *Omokuwajo v FRN* [2013] 9 NWLR (part 1359) 300; *Omoniyi v Alabi* [2015] 6 NWLR (part 1456) 572.
24. Emphasis added.
25. See *Madukolu v Nkemdilim* [1962] 2 SCNLR 341, where the apex court held that for a court to have jurisdiction to decide a matter, the court must be properly constituted as to the requisite number of Judges/Justices, and no member is disqualified for one reason or the other.
26. Another instance when a full court convenes is when the court is called upon to overrule its previous decision. See *Idehen v Idehen* [1991] 6 NWLR (part 198) 382; *Akintokun v LPDC* [2014] LPELR 33941(SC).

therefore, is that the pronouncement of His Lordship that the Court of Appeal is the final court when issues of mixed law and fact are involved contradicts the very basis of the decision. To be sure, the pronouncement as to whether a right of appeal exists at all ought to precede whether a leave of court was sought. Whether leave of court is required to pursue the appeal presupposes that the right of appeal exists in the circumstances. This is because if there is no right of appeal from the Court of Appeal to the Supreme Court when the ground of appeal involves a question of fact alone or mixed law and fact, then the issue of whether the leave of court was sought or not cannot arise. The pronouncement, with respect, is akin to putting the cart before the horse. It contradicts or attacks the *ratio* of the case and cannot be relied on in any circumstances.

Discordant voices – Other Supreme Court decisions on appeal on mixed law and fact

The Second Alteration of the Constitution took effect in 2010. Between the year 2010 and the present, there has been a number of decisions of the apex court which considered an appeal to the Supreme Court with leave on grounds of fact or mixed law and fact. Although none of these authorities dwelt on the issue of whether or not, there still exists a right of appeal to the apex court on grounds of fact or mixed law and fact, albeit with leave of court, these authorities centred on the competence of a ground of appeal questioning fact alone or mixed law and fact filed without leave of either the Court of Appeal or the Supreme Court, thereby suggesting that the right of appeal with leave of court on ground of fact alone or mixed law and fact is still sacrosanct.

For instance, in *Utoo* v *APC (decided in 2018),*[27] the Supreme Court, while upholding the preliminary objection challenging the competence of the appeal filed by the appellant in the matter had this to say:

> In conclusion, I am of the considered view that the preliminary objection has merit and is consequently sustained. Appellant having appealed on facts and/or mixed law and facts needed the leave of either the lower Court or of this Court before filing the notice of appeal or even after filing same which appellant failed to do. In the circumstance, the notice of appeal filed 6 January 2017 is incompetent and is hereby struck out and the appeal dismissed.

Furthermore, in *Ozomgbachi* v *Amadi (also decided in 2018),*[28] a similar pronouncement was made when the Supreme Court stated as follows:

> I agree with Dr Ikpeazu, SAN, of Counsel to the 2nd Respondent in the appeal No SC.292/2017 and 1st Respondent in the appeal No SC.293/2077 that the grounds of appeal in respect of which he objected to are incompetent. They, not being grounds involving questions of law alone, require leave first sought and obtained before their filing in this Court. Leave of Court, first sought and obtained is what validates those grounds of appeal (on facts or mixed law and facts) and issues raised therefrom. The said grounds of appeal and the issues raised therefrom are incompetent without leave first sought and obtained. That is the effect of section 233(3) of the 1999 Constitution, as amended. The following cases aptly demonstrate what I am saying: *KTP LTD* v *G & H (NIG) LTD* [2005] 13 NWLR (part 943) 680 (SC); *OJEMENI* v *MOMODU* [1933] 1

27. [2018] LPELR-44352(SC) 25 (Onnoghen CJN) (emphasis added).
28. [2018] LPELR-45152(SC) (Ejembi Eko JSC) (emphasis added).

> SCNLR 188, 205; *MAIGORO* v *GARBA* [1999] 10 NWLR (part 624) 555, 568; *EKUNOLA* v *CBN* [2013] 15 NWLR (part 1377) 224, 260. Appellant's issues 2 and 4 (Appeal No SC.292/2017) and 4 (Appeal No SC.293/2017 affected by the foregoing and being incompetent are hereby, struck out like the grounds of appeal from which they were raised.

Notably, the appeals in the two cases (*Utoo and Ozomgbachi)* cited above were filed at the Supreme Court about seven years after the Second Alteration came into effect. However, references were still made to section 233(3) of the Constitution by both the Counsel and the Court. In these two cases, as well as so many other cases that came after 2010, neither the Court nor the Counsel averted their minds to the fact that the section 233(3) no longer exist in the Constitution! Presumably, the references to this now extinct section were done in forgetfulness and same may largely be due to the poor circulation of our updated laws. The authors are not aware of any coherent copy of the Constitution embodying all the amendments up to the Fourth Alteration. It is quite unfortunate that most of the copies of the Constitution available in various bookshops in the Courts across the country still contain the repealed provisions. This contribution is obviously not a forum to discuss whether government printers are still functional. However, this digression is necessary to understand the unfortunate scenario whereby ten years into a new era ('the Constitution of the Federal Republic of Nigeria (Second Alteration) Act 2010'), reliance is still placed on a repealed provision in the Constitution by both the Counsel and courts. It is therefore commendable that His Lordship Rhodes-Vivour, JSC, pointed out the omission of section 233(3) in the Second Alteration. Nevertheless, we do not share his views on the effect of that omission.

THOUGHTS ON THE OMISSION OF SECTION 233(3) OF THE CONSTITUTION IN THE SECOND ALTERATION

It must be borne in mind that the now-repealed section 233(3) of the Constitution did not confer appellate jurisdiction on the Supreme Court. The appellate jurisdiction of the Supreme Court can be found in section 233(1) which establishes that appeals lie to the Supreme Court from the Court of Appeal. Before now, sections 233(2) and (3) served to direct litigants whether to pursue their appeal as of right or with leave of court. Section 233(2) is clear when a dissatisfied party can approach the court as of right. The implication is that when a party cannot approach the court as of right, then the party requires leave of court. The former section 233(3) which stated that leave is required in other cases was merely saying the obvious. The section need not be in the Constitution before it is determined that leave of court is required when an appeal cannot lie as of right.

It is our respectful position that any contrary interpretation would render section 233(1) of the Constitution redundant. Appeal from the Court of Appeal to the Supreme Court on a ground which involves fact alone or mixed law and fact was not conferred by the repealed section 233(3). No, such ground of appeal falls squarely within the provision of section 233(1) which stipulates, without distinction as to the nature of the appeal, that Supreme Court hears appeals from the Court of Appeal. The omission of section 233(3) does not, therefore, derogate from this right to approach the apex court from the Court of Appeal.

By the controversial interpretation of His Lordship in *Shittu*, it would mean that appeal cannot lie to the Supreme Court with leave. Put differently, any appeal to the Supreme Court must be as of right and the court cannot entertain any appeal with leave. This cannot be. Such an interpretation would render other provisions in other statutes meaningless. In fact, it would defeat not only the provision

of section 233(1) of the Constitution but other provisions in the Supreme Court Act and the Supreme Court Rules.[29] For instance, sections 21, 27 and 30 of the Supreme Court Act contemplate a scenario where an appeal lies to the Supreme Court with leave of the court. So also Order 2 Rules 8, 28(2), 31(2), 32(3) and Order 6 Rule 1 of the Supreme Court Rules. The position of His Lordship, with respect, is therefore not maintainable.

If anything, the purpose of former section 233(3) was to inform litigants that the leave to appeal can be gotten from the Court of Appeal or the Supreme Court. Besides stipulating that the leave can be gotten from the Court of Appeal or the Supreme Court, it is submitted that the former section 233(3) served no useful purpose in the Constitution. Its removal, therefore, does not affect the appellate jurisdiction of the Supreme Court to hear appeals from the Court of Appeal in cases where a party cannot appeal to the Court as of right. What is more, the now-extinct section 233(3) which directed a prospective appellant to approach the Court of Appeal or the Supreme Court for leave was clearly a procedural provision whose purpose has been covered in the Supreme Court Act and the Supreme Court Rules. It is, therefore, possible that the framers of the Second Alteration intentionally omitted the section as there was no need for its inclusion in the first place. Simple logic demands that if there are stipulated instances where appeals lie as of right, it follows that in other instances not so stipulated, appeals ought to lie with leave.

Further, the finality of the Court of Appeal decision must be expressly stated in the Constitution. It cannot be implied. For instance, decisions of the Court of Appeal on appeals from National and State Houses of Assembly Election Tribunal are final. This provision is clearly contained in section 246(2) of the Constitution.[30] Also, the decisions of the Court of Appeal in respect of civil appeals emanating from the National Industrial Court are stated in the Constitution to be final.[31] Without the instances clearly stated in the Constitution that the decision of the Court of Appeal shall be final, the Court of Appeal remains an intermediate court and its decisions are appealable to the apex court in the land.

Finally, it would seem to us that the purpose of the new section 233 brought about by the Second Alteration is to introduce appeals from Court of Appeal to the Supreme Court in an election petition involving a governor or his deputy and nothing more. Given that we have not seen the *Travaux preparatoires*[32] of the amendment, it may be difficult to ascertain the intention of the framers of the alteration. It may even be argued that section 233(3) was unintentionally omitted in the Second Alteration. Concededly, if the framers of the Second Alteration intended to limit appeal – from the Court of Appeal to the Supreme – to instances[33] found in section 233(2), then the draftsperson did

29. The law remains that it is better for a thing to have effect than to be made void. This is captured in the latin maxim: *ut res magis valeat quam pereat*. See also *NURTW v RTEAN* [2012] 10 NWLR (part 1307) 170.
30. See the Constitution, s 246(3) which establishes, '[t]he decisions of the Court of Appeal in respect of appeals arising from the National and State Houses of Assembly election petitions shall be final'.
31. See s 243(4) which provides, 'the decision of the Court of Appeal in respect of any appeal arising from any civil jurisdiction of the National Industrial Court shall be final'.
32. Literally, preparatory works. It constitutes the materials used in preparing the ultimate form of an agreement or statute. Travaux preparatoires contain the various documents including reports of discussions, hearings and floor debates that were produced during the drafting of a Statute, treaty or an agreement. Travaux preparatoires of a statute are usually recorded so that it can be used later in order to interpret that particular statute. This is a secondary form of interpretation and is used to clarify the intent of the makers of the statute or treaty. UseLegal, 'Travaux Preparatoires, Law and Legal Definition' (*UseLegal*) <https://definitions.uslegal.com/t/travaux-preparatoires/> accessed 21 November 2020.
33. We make this assumption because a careful study of the Second Alteration would reveal that s 233 sub-ss (4), (5), and (6) were also omitted. Interestingly, s 233(6) hitherto governed instances where an interested party may apply for leave to appeal against the decision of the Court of Appeal. The omission invariably means that an interested party who was not a party to the decision at the Court of Appeal can no longer appeal the decision of the Court of Appeal to the Supreme Court.

not do a good job. A definite pronouncement of the Supreme Court on the issue is therefore needed to put it to rest. However, reliance cannot be placed on *Shittu* to argue that appeals on fact alone or mixed law and fact cannot be pursued up to the Supreme Court. It is salutary to conclude this contribution with lessons from the 2017 widely circulated decision of the Supreme Court in *Skye Bank Plc.*[34]

Lessons from *Skye Bank Plc* v *Victor Anaemem Iwu*

The decision of the full panel of the Supreme Court supports the position canvassed in this contribution. In that case, the respondent commenced an action against the appellant at the National Industrial Court ('trial court') wherein he sought several reliefs bordering on termination of his employment. After the exchange of pleadings, the appellant filed a notice of preliminary objection challenging the jurisdiction of the court to entertain the matter. The trial court did not find merit in the application and consequently made an order dismissing the notice of preliminary objection. Disgruntled by the decision of the trial court, the appellant appealed to the Court of Appeal seeking to upturn the decision of the trial court. On his part, the respondent filed an objection challenging the jurisdiction of the Court of Appeal to entertain the appeal. This challenge to the Court of Appeal's jurisdiction to entertain the appeal prompted the appellant to file an application beseeching the Court of Appeal to refer to the Supreme Court the issue of whether it had jurisdiction to entertain an appeal from the trial court as the issue being a constitutional one involved a substantial question of law.[35] The referral was particularly relevant in view of the conflicting decisions of the Court of Appeal on the point[36] and the somewhat 'unclear' provisions of the Third Alteration Act, which establish as follows:

> 243(2) An appeal shall lie from the decision of the National Industrial Court as of right to the Court of Appeal on questions of fundamental rights as contained in Chapter IV of this Constitution as it relates to matters upon which the National Industrial Court has jurisdiction.
>
> 243(3) An appeal shall only lie from the decisions of the National Industrial Court to the Court of Appeal as may be prescribed by an Act of the National Assembly; Provided that where an Act or Law prescribes that an appeal shall lie from the decisions of the National Industrial Court to the Court of Appeal, such appeal shall be with the leave of the Court of Appeal.

34. *Skye bank* (n 4).
35. The referral was made possible by virtue of the Constitution, s 295(3) which provides, 'where any question as to the interpretation or application of this constitution arises in any proceedings in the Court of Appeal and the court is of opinion that the question involves a substantial question of law, the court may, and shall if any party to the proceedings so requests, refer the question to the Supreme Court which shall give its decision upon the question and give such directions to the Court of Appeal as it deems appropriate'.
36. The following cases held that all decisions of the National industrial Court are appealable to the Court of Appeal: *Local Government Service Commission, Ekiti State v Jegede* [2013] LPELR-21131(CA); *Local Government Service Commission, Ekiti State v Bamisaye* [2013] LPELR-20407(CA); *Local Government Service Commission, Ekiti State v Olamiju* [2013] LPELR-20409(CA) and *Local Government Service Commission, Ekiti State v Asubiojo* [2013] LPELR-20403 (CA). On the other hand, the following decisions held that only fundamental rights matters and criminal matters are appealable to the Court of Appeal from the National Industrial Court: *Coca-Cola Nig Ltd v Akinsanya* [2013] 18 NWLR (part 1386) 225 and *Lagos Sheraton Hotels and Towers v HPSSA* [2014] 114 NWLR (part1426) 45.

The Court of Appeal found merit in the application and consequently referred the issue of its jurisdiction to the Supreme Court. At the apex court, the questions formulated and referred from the Court of Appeal read thus:

1. Whether the Court of Appeal as an appellate Court created by the Constitution of the Federal Republic of Nigeria, 1999 (as amended) has the jurisdiction to the exclusion of any other Court of law in Nigeria to hear and determine all appeals arising from the decisions of the National Industrial Court of Nigeria?
2. Whether there exists any constitutional provision which expressly divested the Court of Appeal of its appellate jurisdiction over all decisions on civil matters emanating from the National Industrial Court of Nigeria?
3. Whether the Court of Appeal's jurisdiction to hear civil appeals from the decisions of the National Industrial Court of Nigeria is limited to only questions of Fundamental rights?

The Supreme Court found the first question submitted by the Court of Appeal to be all-encompassing and held that a decision on the question sufficiently answers the second and third questions. Consequently, the Supreme Court opted to deal with the first question.

In delivering the lead judgment, Nweze JSC unequivocally held that the Court of Appeal has jurisdiction to entertain appeals emanating from all the decisions of the National Industrial Court. The learned Justice of the Supreme Court advanced many reasons for this position. Firstly, the Court rejected the argument of the respondent that the right of appeal from the decision of the National Industrial Court can only be exercised in fundamental right cases or criminal cases as found in section 243(2) and (4). In rejecting this argument, the Supreme Court held that the Court of Appeal derives its appellate jurisdiction over all the Courts catalogued in section 240 of the Constitution. The Court went on to say, 'it would be anathematic to construe any other section or sections [and here, I have section 243(2) - (3) in mind] in such a manner as to render the above provisions of section 240 [on the appellate jurisdiction of the Lower Court over the National Industrial Court] superfluous or redundant…' Interestingly, section 240 of the Constitution is to the Court of Appeal what section 233(1) is to the Supreme Court. In other words, and as argued above, the appellate jurisdiction of the Supreme Court is derived from section 233(1) of the Constitution and not section 233(2) which merely gave instances when the right of appeal can be exercised as of right and not with leave. It follows therefore that the right of appeal consecrated by section 233(1) of the Constitution cannot be taken away or rendered redundant by implication occasioned by the omission of section 233(3) from the Second Alteration.

Secondly, the Court in holding that appeals lie from any decision of the National Industrial Court to the Court of Appeal affirmed a rule of interpretation to the effect that:

> A narrow interpretation that would do violence to its provisions [the provisions of the Constitution] and fail to achieve the goal set by the Constitution must be avoided. Thus, where alternative constructions are equally open, the construction that is consistent with the smooth working of the system, which the Constitution, read as a whole, has set out to regulate, is to be preferred, *Dapianlong* v *Dariye* [2007] 8 NWLR part 1036) 239.

Certainly, the pronouncement in the *Shittu* case to the effect that appeals on grounds of fact alone or mixed law and fact terminate at the Court of Appeal was obviously a narrow interpretation of the Constitution. This narrow interpretation would obviously wreak havoc on the established system if upheld and applied by the courts.

Thirdly, the apex court held that the finality of a lower court in respect of a matter before it cannot be implied. Such must be expressly stated in the law. To this end, Mary Peter-Odili JSC held:

> Since there is no express provision both in the Constitution and the Act, that the National Industrial Court shall be a final Court in any matter before it, it follows that under no circumstance shall the National Industrial Court exercise the act of finality in a matter before it. A Court of law can only be expressly made a final Court by the statute that created it or by any other law where necessary. No Court can be a final Court by mere implication.[37]

There is no better expression on the finality of a court than the above. The Court of Appeal cannot be a final court on grounds of appeal involving questions of fact or mixed law and fact when it is not so stated in the Constitution or the statute that established the Court, the Court of Appeal Act. It seems therefore that the pronouncement in the *Shittu* case made the Court of Appeal a final court by implication. This is because there is no provision in the Constitution or any Act enacted by the National Assembly that supports the view taken by his Lordship in the *Shittu* case that '[a]ppeals on grounds of mixed law and facts ends at the Court of Appeal'. The pronouncement, to our minds, is of doubtful validity.

Finally, the Supreme Court in affirming the Court of Appeal's jurisdiction over every decision of the National Industrial Court declared:

> If the draftsperson intended sections 243(2) - (3) to wield or exert such a revolutionary impact, she/he would have said so in provisions that would have rendered sections 240 and 243(4) nugatory. I am, therefore, bound to jettison that approach for, in the American- Nigerian construct of constitutional interpretation, the draftsperson has never been known as an exponent of contrarieties or contradictory results, *Awolowo* v *Shagari* [1979] LPELR-653(SC) 46-47…. In effect, sections 243(2) and (3) cannot validly, strip litigants of the rights, expressly, conferred on them by sections 240 and 243(4) without an express provision to wreak that kind of, unjustifiable, denudation of the latter right, that is, the right in section 240 and 243(4), *Gassol* v *Tutare* [2013] LPELR -20232(SC).

Similar to the above erudite pronouncement, it is contended that omission of section 233(3) and the presence of section 233(2) in the Second Alteration cannot operate to take away the right of appeal established in 233(1). An interpretation that supports such exposition would definitely yield contradictory results and such may impact negatively on the Nigerian jurisprudence. The decision of the apex court in *Skye Bank Plc* may well direct our mind as to the position the Supreme Court may take when it is invited to consider the issue raised in the *Shittu* case. Indeed, the *Skye Bank* case

37. Emphasis added.

is a pointer to the fact that the Supreme Court leans in favour of a right of appeal and not otherwise. We can only hope that when the opportunity presents itself, the Court will uphold the rights of litigants to challenge every decision of the Court of Appeal until a contrary provision is expressly legislated in the Constitution.

CONCLUSION

In the final analysis, the authors take the view that, notwithstanding the deletion of section 233(3) from the Constitution, nothing has really changed regarding appeals to the apex court.[38] In the absence of an express provision in the Constitution taking away the right of appeal to the Supreme Court, the Constitution must be interpreted liberally to protect the exercise of that right. The mere omission in the present Constitution of the hitherto express provision on appeal to the Supreme Court with leave of court is not sufficient to necessitate the inference that that right has been taken away. The *dictum* of Rhodes-Vivour, JSC in *Shittu*, being an *obiter dictum*, does not constitute binding precedent on the issue; more so when the apex did not sit as a full court in the case, consistent with the provisions of the Constitution on the quorum of the apex court when sitting over issues bordering on an interpretation of the Constitution. The right of appeal from the Court of Appeal to the Supreme Court on grounds of fact alone or mixed law and fact remains sacrosanct until the full court of the Supreme Court interprets the Second Alteration and comes out with a contrary position, or the Constitution is amended to abrogate this right.

38. For possible exception, see the opinion expressed in (n 33).