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Peter Ushie vs. The State (2018) JSCNLR (Vol. 6), 178 S.C.

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University of Lagos vs. Aigoro (1984) 1 SC 265 at 271.

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Uor vs. Loko (1988) 2 NWLR (Pt. 77) 430;

Sifax Nigeria Limited vs. Migfo Nigeria Limited (2018) JSCNLR (Vol. 6), 275 S.C.

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Sifax Nigeria Limited vs. Migfo Nigeria Limited (2018) JSCNLR (Vol. 6). 275 S.C.

KWARA STATE PILGRIMS WELFARE BOARD
AND
ALHAJI JIMOH BABA

SC. 164/2006

IN THE SUPREME COURT OF NIGERIA
HOLDEN AT ABUJA

FRIDAY, 2ND FEBRUARY, 2018

BEFORE THEIR LORDSHIPS

OLUKAYODE ARIWOOLA	**JUSTICE, SUPREME COURT**
KUMAI BAYANG AKA'AHS	**JUSTICE, SUPREME COURT**
AMINA ADAMU AUGIE	**JUSTICE, SUPREME COURT**
PAUL ADAMU GALINJE	**JUSTICE, SUPREME COURT**
SIDI DAUDA BAGE	**JUSTICE, SUPREME COURT**

APPEAL: Brief writing – Reply brief – Purpose.

CASE LAW: Principles in Godwin Nwankwere vs. Adenwumi Adewunmi (1996) All NLR, p. 179 at 124 – Relevant considerations thereof.

COURT: Approach to adjudication – Whether not to adopt technical approach to justice.

COURT: Interpretation of statutes – Approach thereto – Guiding principles.

STATUTE: Public Officers Protection Act 1990 – S.2(a) thereof – Scope.

STATUTE: Public Officers Protection Law – Application where a public servant is suspended – Order 04118, Civil Service Rules of Kwara State – Whether protection is extended to a suspended public servant who no longer performs his duties as such.

STATUTE: Public Officers Protection Law – Whether not applicable to a public officer where the essence will be to defeat the ends of justice.

STATUTE: Public Officers Protection Law of Kwara State – S. 2(a) thereof – Whether not intended to protect fraudulent public officers – Relevant considerations thereof.

Issue for Determination

Whether the respondent is a public officer entitled to statutory protection from a legal action by the plaintiff/appellant herein, within the context of Section 2(a) of the Public Officers Protection Law of Kwara State Volume 3, Cap 135, of 1994.

Facts of the Matter

This is an appeal against the decision of the Court of Appeal, Ilorin Division delivered on the 15th day of December, 2004, wherein the Court of Appeal allowed the appeal by setting aside the judgment of the trial court with its consequential orders.

The appellant, as plaintiff at the trial court filed the suit leading to the instant appeal at the High Court of Kwara State, sitting in Ilorin. The respondent was, at all material times to this case, a finance clerk with the appellant who was charged with the responsibility of assisting the appellant's accountant in lodgments of money in banks. On 11th April, 1994 both the respondent and appellant's accountant went to the Kwara State Government House at Ilorin to retrieve the appellant's money for lodgment at the United Bank for Africa (UBA), Ilorin branch. The monies were kept in three separate bags containing N683,590.00; N782,550.00 and N 310,201.00 respectively.

The appellant's accountant left the respondent with the monies to attend to other urgent engagements relating to the yearly Hajj operations on the assumption that the respondent would deposit the various sums at the designated bank. The respondent deposited the money but kept the sum of N310,210.00 which, according to him, was not lodged in the designated account of the appellant, as the Bank had heavy transaction on the particular

day.

The day following, the respondent failed to lodge the money. It was subsequently discovered that, the sum of N125,000.00 was missing from the bag containing N310,210.00 which was handed over to the respondent for deposit in the bank. The appellant then instituted this action at the High Court of Justice of Kwara State, sitting in Ilorin. The trial court delivered its judgment on the 2nd of May, 2000 and found in favour of the plaintiff (the appellant herein) and granted the reliefs sought in part.

Being dissatisfied with the judgment of the trial court, the respondent (then as defendant) filed an appeal at the Court of Appeal, Ilorin Division. The Court of Appeal on 15th December,2004 gave judgment in favour of the respondent (as appellant) on the ground that the suit at the trial court was statute barred in view of the provisions of section 2 of the Public Officers Protection Law of Kwara State, Cap 135, Vol. 3, Laws of Kwara State, 1994. The Court of Appeal then allowed the appeal and set aside the judgment of the trial court.

The appellant's displeasure at the judgment of the Court of Appeal led to the instant appeal.

Held:*(Unanimously allowing the appeal)*

1. *Purpose of a reply brief*
   Clearly, a reply brief is meant to cause a reply to new issues (if any) raised in the respondent's brief and not meant to re-appraise or rebuild the appellant's submissions in his or her briefs. See HARKA AIR SERVICES (NIG) vs. KEAZOR, ESQ. (2011) LPELR-1353; LONGE vs. F.B.N PLC 2010) 6 NWLR (Pt. 1189), P. 1; SHUAIBU vs. MAILHODU (1993) 3 NWLR (Pt. 284), 48; and POPOOLA vs. ADEYEMO (1992) 8 NWLR (Pt. 257), 1. *(P 17 ParaS C – E)*

2. *Where the application of the three months rule will defeat the ends of justice.*
   The issue in this appeal goes beyond the three months rule of limitation of action against a public officer. In the context of this appeal, the lower court would have seen a bigger picture of fraud and financial infelicities or breach of public trust on the part of the

respondent, if it had not regarded the issue of limitation of 3 months rule as the most crucial issue to be determined in the appeal. This is because, the lower court anchored its decision on the 3 months limitation without having the benefit of much more vital issues of whether the said protection is intended to be used to defeat the ends of justice. The error of judgment becomes more apparent looking at the last paragraph of page 138 of the records, which contains the judgment of the lower court. In its final remarks, the lower court declared, and I think erroneously, that:

> **"Finally, in this appeal the resolution of the most important issue i.e. issue No. 1 is in favour of the appellant (now respondent) the appeal has succeeded and must therefore be allowed. It is accordingly allowed by me. The judgment of the lower court is hereby set aside with its consequential orders. For the avoidance of any possible doubt, all the reliefs awarded by the lower court are hereby set aside. appeal allowed (emphasis added)."**

The question is, would the Public Officers Protection Law have intended to protect fraudulent public officials? The answer is a capital NO. I'm in accord with appellant that Section 2(a) of the Public Officers Protection Law (supra) ought to be read in consonance with the provisions of Order 04118 of Chapter 4 of Kwara State Civil Service Rules under which the appellantand respondent contractual relationship arose. This is because Order 04118 provides that:

> **"Suspension should not be used as a synonymy for interdiction. It shall apply where a prima facie case (the nature of which is serious) have been established against an officer and <u>it is considered necessary in the public interest that he should forthwith be prohibited</u>**

> **from carrying on his duties. Pending investigation into the misconduct, the State Public Service Commission or the Head of Department (if within his delegated powers) shall forthwith suspend him from the exercise of the powers and functions of his office and from the enjoyment of his salary."***(Pp 18 – 19 Paras C – E)*

3. *The Public Officers Protection Law does not apply to a suspended public servant*

The veil of any protection of the respondent under the Public Officers Protection Law is lifted, removed, suspended or is kept in abeyance once he has been suspended from functioning or exercising the duties of a public officer. Thus, by virtue of the provisions of the order, any staff suspended for any misconduct like in this instance, is prohibited from carrying on his duties as a public officer and shall cease to exercise the powers and functions of his office as a civil servant. This is the clear and unambiguous provisions of the order and ought to be given its fullest effect to avoid defeating the objective of probity in public service. See KOTOYE vs. SARAKI (1994) 7 NWLR (Pt. 357) 414 at 460 at Para H-G. See also ATTORNEY-GENERAL OF ONDO STATE vs. ATTORNEY-GENERAL OF EKITI STATE (2001) 17 NWLR (Pt. 743) 706 at 756 where this court declared that:

> **"It is certainly a cardinal principle of interpretation that where in their ordinary meaning the provisions are clear and unambiguous effect must be given to them without resorting to any aid internal or external. It is the duty of the court to interpret the words of the law maker as used. Those words may be ambiguous, but even if they are, the power and duty of the court to travel outside them on voyage of discovery are strictly limited (see for example Magor and St. Mellon R.D.C vs. NEWPORT (1951) 2 All E.L.R 839, LONDON**

TRNSPORT EXECUTIVE vs. BETTS (1959) AC 231, ATTORNEY-GENERAL OF BENDEL STATE vs. ATTORNEY-GENERAL OF THE FEDERATION & ORS. (1981) 10. S.C. 1, (1981) 12 N.S.C.C. 314.)."

It is not, and cannot be the intention of the law to compensate dishonest public officers with statutory protection that defeats the essence of probity in public service. The question is, would it have been the intention of the Public Officers Protection Law to offer a shield and protect public officers found to have violated public trust? The answer, again, is certainly NO. Doing otherwise would amount to incentivising dishonesty in public service by encouraging potential violators of public trust to benefit and reap the civil fruits of their dishonest behaviour at the expense of national good and public morality. This should never be allowed to happen.
(Pp 19 – 20 Paras F – F)

4. *The Public Officers' Protection Law only protects officers who acted in good faith.*
I wish to make a quick reference to the case of Godwin NWANKWERE vs. JOSEPH ADEWUNMI (supra) to the effect that the law (that is public officers protection law-an adaption of the Public Officers Protection Act), is designed to protect the officer who acts in good faith and does not apply to acts in abuse of office and with no semblance of legal justificationwhatsoever. See also LAGOS CITY COUNCIL vs. S.A.J OGUNBIYI (supra).
(P 20 Paras G – H)

Per Bage (JSC)

"The duty of court, particularly ours as the apex court, is to interpret the statute in accordance with the intention of the law makers. This point is apt in this appeal, as amplified in UGWU vs. ARARUME (2007) 12 NWLR (Pt. 1048) 367 at 498 where this court

stated thus:

> **"A statute, it is always said, is "the will of the legislature" and any document which is presented to it as a statute is an authentic expression of the legislative will.**
>
> **The function of the court is to interpret that document according to the intent of those who made it. Thus, the court declares the intention of the legislature."**

Ours is a court of law and of public policy. We are clear as to the public good behind the public policy intended in the regime of Public Officers Protection Law at the federal and states levels. We are also not unmindful of the intendment of the makers of the law and Order 04118 of Chapter 4 of Kwara State Civil Service Rules under which the appellant and respondent contractual relationship arose. We have reconciled and matched both against the facts and evidence before the court in this appeal. Justice must not be allowed to be "slaughtered" on the altar of technicalities.

This court has declared in several instances that we are not judicial technicians in the workshop of technical justice and the logic of our reasoning is, and as humanly possible, be devoid of technicalities in this case, as in several other previous and up-coming cases. The need to do substantial justice and avoid delving into the error of technicalities is well settled. See for example MAKERI SMELTING CO. LTD. vs. ACCESS BANK (NIG.) PLC (2002) 7 NWLR (Pt. 766) 447 at 476-477 where it was declared that:

> **"The attitude of the court has since changed against deciding cases on mere technicalities. The attitude of the courts now is that cases should always be decided, wherever possible on merit. Blunders must take place from time to time, and it is unjust to hold that because a**

blunder has been committed, the party blundering is to incur the penalty of not having the dispute between him and his adversary determined upon the merits."

See also **AJAKAIYE vs. IDEHIA (1994) 8 NWLR (Pt. 364) 504, ARTRA IND. LTD vs. NBCI (1997) 1 NWLR (pt. 483) 574, DAKAT vs. DASHE (1997) 12 NWLR (Pt. 531) 46, BENSON vs. NIGERIA AGIP CO. LTD (1982) 5 S.C. 1.** *(Pp 20 – 22 Paras H – B)*

Per Bage (JSC)

A number of points have been made that informed our final decision in this appeal. At this stage when respect for probity and public trust is, probably, at its low ebb due to corruption and institutional decadences in public service, it would amount to disservice to the polity if this court allows misplaced or misconceived technicalities to distort public service.

In the final analysis, it is my candid view, based on law and public policy, that no law worth even the piece of papers on which it is printed, if it dignifies corrupt and untrustworthy public servants with statutory protection for committing offences, misconduct and infraction of public interests, good conscience and morality.

In view of the foregoing, and to instill and set an agenda for public probity based on law, the sole issue for determination in this appeal is resolved in favour of the appellant.*(P 20 Paras B – E)*

Per K.B Aka'ahs (JSC)

"My Lord, Bage JSC has dealt in an admirable manner with the main issue in this appeal. I entirely agree with the sentiments expressed in the leading judgment that it cannot be the intention of the law to compensate dishonest public officers with statutory protection as this will affect the essence of probity in the public service and the Public Officers Protection Law (like its counterpart

the Public Officers Protection Act) is designed to protect the officer who acts in good faith and it does not apply to acts in abuse of office. The Supreme Court as a court of law and public policy must be clear on the public good behind the policy intended in the regime of the Public Officers Protection Law. The respondent ought to have been prosecuted for criminal breach of trust in addition to the civil action". *(Pp 23 – 24 Paras H – B)*

5. *The scope of public officers protection Act*
In Hassan vs. Aliyu (2010) 17 NWLR (Pt. 1223) 547 at 591 paras B-D, this court while considering the scope of Section 2(a) of the Public Officers Protection Act, 1990, which is in *pari-materia* with Section 2(a) of the Kwara State Public Officers Protection Law 1994, said:

> **"It is however correct that where a public officer acts outside the scope of his authority or without a semblance of legal jurisdiction, he cannot claim the protection of the provisions of the Public Officers Protection Act."** *(Pp 25 – 26 Paras H – B)*

Per ***Galinje (JSC)***

"The law is settled that it is the duty of the plaintiff to adduce evidence or facts to prove that the officer acted outside the scope of his authority or without semblance of legal jurisdiction. The facts to be produced must exist to enable the court find the absence of semblance of legal jurisdiction, otherwise once it is established that the action was instituted outside the statutory period of three months, the action is time barred and the court will have no jurisdiction to entertain same. In the instant case sufficient evidence was led and parties are in agreement that N310,210.00 was entrusted to the respondent and out of this amount, N125,000.00 was missing. The missing or theft of money was not within the scope of the official duty of the respondent. In other words, the respondent had no legal authority to retain N125,000.00 out of the money that

was given to him to deposit in the bank. Having acted outside the scope of his authority, the respondent had no right of protection under the Public Officers Protection Law of Kwara State. The lower court was therefore wrong to have succumbed to the argument on behalf of the respondent. The law is very clear that the Public Officers Protection Law is used as a shield to protect public officers who act strictly within the confines of their official duties and no more. *(P 26 Paras B – F)*

Nigerian Cases Cited

Ajakaiye vs. Idehai (1994) 8 NWLR (Pt. 364) 504,
Artra Ind. Ltd vs. NBCI (1997) 1 NWLR (pt. 483) 574,
Attorney-General of Bendel State vs. Attorney-General of The Federation & Ors. (1981) 10. S.C. 1, (1981) 12 N.S.C.C. 314.).”
Attorney-General of Ondo State vs. Attorney-General of Ekiti State (2001) 17 NWLR (Pt. 743) 706
Benson vs. Nigeria AGIP CO. LTD (1982) 5 S.C. 1.
Dakat vs. Dashe (1997) 12 NWLR (Pt. 531) 46,
Harka Air Services (Nig) vs. Keazor, Esq. (2011) LPELR-1353;
Hassan vs. Aliyu (2010) 17 NWLR (Pt. 1223) 547
KOTOYE vs. SARAKI (1994) 7 NWLR (Pt. 357) 414 .
Longe vs. F.B.N PLC 2010) 6 NWLR (Pt. 1189), P. 1;
Magor and St. Mellon R.D.C vs. NEWPORT (1951) 2 All E.L.R 839,
Makeri Smelting Co. Ltd. vs. Access Bank (NIG.) PLC (2002) 7 NWLR (Pt. 766) 447 at 476-477
Popoola vs. Adeyemo (1992) 8 NWLR (Pt. 257), 1.
Shuaibu vs. Mailhodu (1993) 3 NWLR (Pt. 284), 748;
Ugwu vs. Ararume (2007) 12 NWLR (Pt. 1048) 367

Foreign Cases Cited

London Transport Executive vs. Betts (1959) AC 231,

Nigerian Statutes Cited
Public Officers Protection Act
Public Officers Protection Law of Kwara State, 1994

Representation
Oludare Akanbi with O.J. David, for the appellant.
T.O.S. Obadeyan, Osah Onyebuchi with D.C. Orike, for the respondent.

DAUDA BAGE, (JSC) (Delivering the Lead Judgment): This is an appeal against the decision of the Court of Appeal, Ilorin Division delivered on the 15th day of December, 2004, wherein the lower court allowed the appeal by setting aside the judgment of the trial court with its consequential orders.

SUMMARY OF FACTS
The appellant, as plaintiff at the trial court filed the suit leading to the instant appeal at the High Court of Kwara State, sitting in Ilorin. The respondent was, at all material time to this case, a finance clerk with the appellant who was charged with the responsibility of assisting the appellant's accountant in lodgments of money in banks. On 11th April, 1994 both the respondent and appellant's accountant went to the Kwara State Government House at Ilorin to retrieve the appellant's money for lodgment at the United Bank for Africa (UBA), Ilorin branch. The monies were kept in three separate bags containing N683,590.00; N782,550.00 and N 310,201.00 respectively.

The appellant's accountant left the respondent with the monies to attend to other urgent engagements relating to the yearly Hajj operations on the assumption that the respondent would deposit the various sums at the designated bank. The respondent deposited the money but kept the sum of N310,210.00 which, according to him, was not lodged in the designated account of the appellant, as the Bank had heavy transaction on the particular day.

The day following, the respondent failed to lodge the money. It was subsequently discovered that, the sum of N125,000.00 was missing from

the bag containing N310,210.00 which was handed over to the respondent for deposit in the bank. The appellant then instituted this action at the High Court of Justice of Kwara State, sitting in Ilorin. The trial court delivered its judgment on the 2nd of May, 2000 and found in favour of the plaintiff (the appellant herein) and granted the reliefs sought in part.

Being dissatisfied with the judgment of the trial court, the respondent (then as defendant) filed an appeal at the Court of Appeal, Ilorin Division. The lower court on 15th December,2004 gave judgment in favour of the respondent (as appellant) on the ground that the suit at the trial court was statute barred in view of the provisions of **section 2** of the **Public Officers Protection Law of Kwara State, Cap 135, Vol. 3, Laws of Kwara State, 1994.** The lower court then allowed the appeal and set aside the judgment of the trial court, as contained at pages 128-144 of the Records.

The appellant's displeasure at the judgment of the court below led to the instant appeal. This appeal was brought pursuant to a notice of appeal filed on the 11th March, 2005 at the Registry of the lower court, and is premised on two grounds.

ISSUES FOR DETERMINATION

The appellant formulated two (2) issues for determination at page 5 of its appellant's brief dated 20th November, 2006 thus:

> **1) Whether the defendant/appellant (now respondent) is entitled to protection under the Public Officers Protection Law of Kwara State, Vol. 3, Cap 135, 1994 as held by the lower court of appeal (Ground 1).**
>
> **2) Whether the failure, refusal and/or neglect of the Court of Appeal to consider other issues properly formulated by the parties before it has occasioned miscarriage of justice against the appellant herein (Ground 2).”**

A On its part, like the appellant, the respondent also formulated two (2) issues at pages 5-6 dated 3rd of October, 2007, thus:

> **"(1) Whether or not the defendant/respondent herein is**
> B **a public officer, entitled to statutory protection from a legal action by the plaintiff/appellant herein, within the context of section 2(a) of the Public Officer Protection Law of Kwara State**
> C **Volume 3, Cap 135, of 1994.**
> **(2) Whether the failure, refusal and/or neglect of the Court of Appeal to consider other issues properly formulated by the parties before it has occasioned**
> D **miscarriage of justice against the appellant herein."**

It is my considered view that all the issues could be summed-up and
E sufficiently answered under one (sole) issue for determination, as the respondent has already adopted issue 2 of the appellant as its issue 2 in its respondent's brief. I am also of the view that a resolution of issue I would naturally determine issue 2, which borders on whether or not a miscarriage
F of justice has been occasioned against the appellant. Therefore, for the purpose of determining this appeal, I have adopted, with slight modification, issue I as formulated by the respondent, thus:

> G **"(1) Whether the respondent is a public officer entitled to statutory protection from a legal action by the plaintiff/appellant herein, within the context of Section 2(a) of the Public Officers Protection Law**
> H **of Kwara State Volume 3, Cap 135, of 1994."**

CONSIDERATION AND RESOLUTION OF THE ISSUE:

The contention of the appellant is that, the lower court gave a wrong
I interpretation of Section 2 of the Public Officers Protection Law of Kwara State, 1994 thus occasioning grave miscarriage of justice to the appellant.

This, the appellant counsel contended, was due to the fact that the lower court failed to advert its attention to the provisions of **Order 04118** of **Chapter 4 of Kwara State Civil Service Rules** under which the appellant and respondent contractual relationship arose. **Order 04118** provides that:

> **"Suspension should not be used as a synonymy for interdiction. It shall apply where a prima facie case (the nature of which is serious) have been established against an officer and it is considered necessary in the public interest that he should forthwith be prohibited from carrying on his duties. Pending investigation into the misconduct, the State Public Service Commission or the Head of Department (if within his delegated powers) shall forthwith suspend him from the exercise of the powers and functions of his office and from the enjoyment of his salary."**

The learned appellant's counsel submits that by virtue of the provisions of the Order, any staff suspended for any misconduct like in this instance, is prohibited from carrying on his duties as a public officer and shall cease to exercise the powers and functions of his office as a civil servant. Counsel submitted that the above provisions is clear and unambiguous and the court ought to have given its original meaning as required by law, citing the decision of this court in **KOTOYE vs. SARAKI (1994) 7 NWLR (Pt. 357) 414 at 460 at Para H-G.**

The learned counsel contended that the cause of action arose on 11th and 12th of April, 1994 and that the respondent had been suspended as far back as 20th June, 1994 as stated in the evidence of PW3 as contained at page 41 of the record of proceedings, and contended that the respondent has ceased to be a civil servant and/or public officer who is entitled to protection of the Public Officers Protection Law since 20th June, 1994 when he was suspended pursuant to order 04118, Chapter 4 of Kwara State Government Civil Service Rule (supra).

The learned counsel for the appellant further relied on the provisions of **Section 54** of the **Interpretation Law, Cap 78, Laws of Kwara State of Nigeria, 1994** to draw home his contention that the word "Public Office" or "Public Department" extends to every office or department performing the duties and functions of a public nature. The learned appellant's counsel, now SAN, submitted that the case of **AIYETAN vs. NIFOR (1987) 3 NWLR (Pt. 59) 48 at 71** relied upon in the judgment of the lower court is not applicable and that the lower court would have arrived at a different conclusion if it had adverted its attention to the case of **PDP vs. INEC (1994) 7 SCNJ, 297 at 370.**

Counsel further submitted that the Public Officers Protection Law (supra) is intended to protect the officers who act in absolute good faith and who at all material time acts within the confines of their public authority and not those who breached the trust like the respondent. Counsel cited the case of **NWANKWERE vs. JOSEPH ADEWUNMI** (1996) All NLR, page 119 at 124, where this court held that **"Law is designed to protect the officer who acts in good faith and does not apply to acts done in abuse of office and with no semblance of legal justification."** The learned counsel to the appellant also relied on the case of **LAGOS CITY COUNCIL (TRADING UNDER THE NAME OF LAGOS CITY TRANSPORT) vs. S.S.J. OGUNBIYI** (1969) All NLR 287 at 289 and prayed this court to resolve issue 1 in favour of the appellant.

On issue 2, the learned senior counsel to the appellant submits that failure, refusal and/or neglect of the Court of Appeal to consider all the issues properly formulated by the parties before it in its judgment has caused a miscarriage of justice against the appellant. This is because, the learned counsel contended, the appellant raised three other issues that were not considered by the Court of Appeal in its decision. Counsel contended that the court are bound to pronounce on all issues properly placed before them, citing the case of **BRAWAL SHIPPING LIMITED vs. F.I. ONWADIKE CO. LIMITED** (2000) 11 NWLR (Pt. 678) 387 at 403-404, **GLOBAL TRANS OCEANIC CO. S.A. vs. FREE ENT. (NIG) LTD** (2001) 5 NWLR (Pt. 706) 426 at 442, Paras C-D.

A In his final submission, the learned counsel prayed this court to allow this appeal in its entirety and set aside the judgment of the lower court. The main contention of the learned counsel for the respondent is that temporary suspension of the respondent does not deny him of protection under the B Public Officer Protection Law (supra), this, counsel pointed out was well considered in the judgment of the lower court per the late Ikongbeh, JCA., at page 141. He contended that even Order 04118 of Chapter 4 of the Kwara State Government Civil Service Rules relied upon by the appellant clearly C recognizes that temporary discountenance of both work and pay of a public officer does not necessarily signify the end of the contract of employment. The learned counsel to the respondent deployed and quoted extensively from the decision of the court below to justify his position.

D Counsel objected to the attempt of the appellant to raise new issues in its paragraphs 3.10 to 3.15 that the respondent acted maliciously and in bad faith to justify why he is not entitled to protection under the law. He contended that same was not covered by the two grounds raised in the E notice of appeal. Counsel cited the case **EMESPO vs. CORONA SHIFAH-RTSGESELLSCHAFT** (2006) 5 SC, page 19 at 29 to 30 and **TIZA vs. BEGHA** (2005) 5 SC (Pt. 11) at 1 per Kalgo, JSC at page 21.

In the alternative, the learned counsel to the respondent submitted by F quoting the phrase of Obaseki, JSC in **EGBE vs. ADEFARASIN** (1985) 1 NWLR (Pt. 3) 549 at 581, thus: **"it does not take good faith to avail a defendant the specie of defence of limitation of action nor does it require malice to deprive him of the defence."** Counsel also quoted G Nnamani, JSC., in **EGBE vs. ALHAJI ABUBAKAR ALAHAJI** (1990) 1 NWLR (Pt. 128) 546 at 584.

On issue two, the learned respondent's counsel acknowledged that the Supreme Court had admonished all court to pronounce on all issues H properly placed before them. However, counsel contended that this is a general rule with exception to the extent that where retrial is ordered or the judgment is considered a nullity, it would not be necessary to consider all issues so submitted. He cited the case of **OKONJI vs. NJOKANMA** I (1991) 7 NWLR (Pt. 202) 131 and **BRAWAL SHIPPING LTD vs. F.I ONWADIKE CO. LTD** (2002) 11 NWLR (Pt. 678) 387 at 403 and

A **ANYADUBA vs. N.R.T.C. LTD** (1992) 5 NWLR (Pt. 243) 535.

In his final submission, the learned counsel for the respondent contended that the lower court correctly arrived at its view by considering only lives issues. Counsel then urged this court to hold that the decision of
B the lower court did not amount to denial of fair hearing or miscarriage of justice, and admonished us to resolve both issues in favour of the respondent and dismiss the appeal by affirming the decision of the lower court.

C I have taken note of the appellant's reply dated 5th March, 2008. In its appellant's reply brief, the appellant merely re-argued or amplified the respondent's submission. Clearly, a reply brief is meant to cause a reply to new issues (if any) raised in the respondent's brief and not meant to re-
D appraise or rebuild the appellant's submissions in his or her briefs. See **HARKA AIR SERVICES (NIG) vs. KEAZOR, ESQ.** (2011) LPELR-1353; **LONGE vs. F.B.N PLC** 2010) 6 NWLR (Pt. 1189), P. 1; **SHUABU vs. MAILODU** (1993) 3 NWLR (Pt. 284), 784; and **POPOOLA vs.**
E **ADEYEMO** (1992) 8 NWLR (Pt. 257), 1.

However, I observed that in its reply on the issue of whether or not the appellant raised new issues bordering on bad faith on the part of the respondent as basis for the submission that he was not covered or protected
F by the Public Officers Protection Law (supra); the learned appellant's counsel contended that new line of argument on an issue is not synonymous with new issues. To buttress his arguments, the learned counsel cited, as persuasive authority, the case of **CEDAL STATIONARIES LTD vs.**
G **IBWA LTD** (2000) 15 NWLR (Pt. 690) 338 at 347, Paras H-B.

The learned counsel for the appellant responded further that, where the defendant/respondent acted in abuse of office that should constitute a defence in favour of the appellant to defeat the claim of the respondent.
H Counsel referred us to the case of **IBRAHIM vs. JUDICIAL SERVICE COMMITTEE** (1998) 12 SCNJ, 255.

I now turn to answer the issue: **"Whether the respondent is a public officer entitled to statutory protection from a legal action by the**
I **plaintiff /appellant herein, within the context of section 2(a) of the Public Officers Protection Law of Kwara State Volume 3, Cap 135, of**

1994."

It seems the parties are at consensus that there was a third bag containing the sum of N310,210.00 and which bag was in the custody or control of the respondent from which he held back the sum of N125,000.00. The evidence on this issue is settled, and seemingly incontrovertible. This singular act prompted the chain of reactions from the appellant, ranging from suspension to filing of a suit at the High Court of Kwara State. To defeat the suit, the respondent contended that, being a public officer, he is entitled to statutory protection from a legal action from the plaintiff/appellant herein, within the context of section 2(a) of the Public Officers Protection Law of Kwara State Volume 3, Cap 135, of 1994.

The issue in this appeal goes beyond the three months rule of limitation of action against a public officer. In the context of this appeal, the lower court would have seen a bigger picture of fraud and financial infelicities or breach of public trust on the part of the respondent, if it had not regarded the issue of limitation of 3 months rule as the most crucial issue to be determined in the appeal. This is because, the lower court anchored its decision on the 3 months limitation without having the benefit of much more vital issues of whether the said protection is intended to be used to defeat the ends of justice. The error of judgment becomes more apparent looking at the last paragraph of page 138 of the records, which contains the judgment of the lower court. In its final remarks, the lower court declared, and I think erroneously, that:

> **"Finally, in this appeal the resolution of the most important issue i.e. issue No. 1 is in favour of the appellant (now respondent) the appeal has succeeded and must therefore be allowed. It is accordingly allowed by me. The judgment of the lower court is hereby set aside with its consequential orders. For the avoidance of any possible doubt, all the reliefs awarded by the lower court are hereby set aside. appeal allowed (emphasis added)."**

The question is, would the Public Officers Protection Law have intended to protect fraudulent public officials? The answer is a capital **NO.** I'm in accord with appellant that Section 2(a) of the Public Officers Protection Law (supra) ought to be read in consonance with the provisions of Order 04118 of Chapter 4 of Kwara State Civil Service Rules under which the appellant and respondent contractual relationship arose. This is because Order 04118 provides that:

> **"Suspension should not be used as a synonymy for interdiction. It shall apply where a prima facie case (the nature of which is serious) have been established against an officer and it is considered necessary in the public interest that he should forthwith be prohibited from carrying on his duties. Pending investigation into the misconduct, the State Public Service Commission or the Head of Department (if within his delegated powers) shall forthwith suspend him from the exercise of the powers and functions of his office and from the enjoyment of his salary."**

The veil of any protection of the respondent under the Public Officers Protection Law is lifted, removed, suspended or is kept in abeyance once he has been suspended from functioning or exercising the duties of a public officer. Thus, by virtue of the provisions of the order, any staff suspended for any misconduct like in this instance, is prohibited from carrying on his duties as a public officer and shall cease to exercise the powers and functions of his office as a civil servant. This is the clear and unambiguous provisions of the order and ought to be given its fullest effect to avoid defeating the objective of probity in public service. See **KOTOYE vs. SARAKI** (1994) 7 NWLR (Pt. 357) 414 at 460 at Para H-G. See also **ATTORNEY-GENERAL OF ONDO STATE vs. ATTORNEY-GENERAL OF EKITI STATE** (2001) 17 NWLR (Pt. 743) 706 at 756 where this court declared that:

A **"It is certainly a cardinal principle of interpretation that where in their ordinary meaning the provisions are clear and unambiguous effect must be given to them without resorting to any aid internal or external. It is the duty of**
B **the court to interpret the words of the law maker as used. Those words may be ambiguous, but even if they are, the power and duty of the court to travel outside them on voyage of discovery are strictly limited (see for example**
C **Magor and St. Mellon R.D.C vs. NEWPORT (1951) 2 All E.L.R 839, LONDON TRNSPORT EXECUTIVE vs. BETTS (1959) AC 231, ATTORNEY-GENERAL OF BENDEL STATE vs. ATTORNEY-GENERAL OF THE**
D **FEDERATION & ORS. (1981) 10. S.C. 1, (1981) 12 N.S.C.C. 314.)."**

It is not, and cannot be the intention of the law to compensate dishonest
E public officers with statutory protection that defeats the essence of probity in public service. The question is, would it have been the intention of the public officers protection law to offer a shield and protect public officers found to have violated public trust? The answer, again, is certainly NO.
F Doing otherwise would amount to incentivising dishonesty in public service by encouraging potential violators of public trust to benefit and reap the civil fruits of their dishonest behaviour at the expense of national good and public morality. This should never be allowed to happen.

G I wish to make a quick reference to the case of Godwin **NWANKWERE vs. JOSEPH ADEWUNMI** (supra) to the effect that the law (that is Public Officers Protection Law-an adaption of the Public Officers Protection Act), is designed to protect the officer who acts in good
H faith and does not apply to acts in abuse of office and with no semblance of legal justification whatsoever. See also **LAGOS CITY COUNCIL vs. S.A.J OGUNBIYI** (supra).

The duty of court, particularly ours as the apex court, is to interpret
I the statute in accordance with the intention of the law makers. This point is apt in this appeal, as amplified in **UGWU vs. ARARUME** (2007) 12

NWLR (Pt. 1048) 367 at 498 where this court stated thus:

> **"A statute, it is always said, is "the will of the legislature" and any document which is presented to it as a statute is an authentic expression of the legislative will.**
>
> **The function of the court is to interpret that document according to the intent of those who made it. Thus, the court declares the intention of the legislature."**

Ours is a court of law and of public policy. We are clear as to the public good behind the public policy intended in the regime of public officers protection law at the federal and states levels. We are also not unmindful of the intendment of the makers of the law and Order 04118 of Chapter 4 of Kwara State Civil Service Rules under which the appellant and respondent contractual relationship arose. We have reconciled and matched both against the facts and evidence before the court in this appeal. Justice must not be allowed to be "slaughtered" on the altar of technicalities.

This court has declared in several instances that we are not judicial technicians in the workshop of technical justice and the logic of our reasoning is, and as humanly possible, be devoid of technicalities in this case, as in several other previous and up-coming cases. The need to do substantial justice and avoid delving into the error of technicalities is well settled. See for example **MAKERI SMELTING CO. LTD. vs. ACCESS BANK (NIG.) PLC (**2002) 7 NWLR (Pt. 766) 447 at 476-477 where it was declared that:

> **"The attitude of the court has since changed against deciding cases on mere technicalities. The attitude of the courts now is that cases should always be decided, wherever possible on merit. Blunders must take place from time to time, and it is unjust to hold that because a blunder has been committed, the party blundering is to incur the penalty of not having the dispute between him**

and his adversary determined upon the merits."

See also **AJAKAIYE vs. IDEHIA** (1994) 8 NWLR (Pt. 364) 504, **ARTRA IND. LTD vs. NBCI** (1997) 1 NWLR (pt. 483) 574, **DAKAT vs. DASHE** (1997) 12 NWLR (Pt. 531) 46, **BENSON vs. NIGERIA AGIP CO. LTD** (1982) 5 S.C. 1.

A number of points have been made that informed our final decision in this appeal. At this stage when respect for probity and public trust is, probably, at its low ebb due to corruption and institutional decadences in public service, it would amount to disservice to the polity if this court allows misplaced or misconceived technicalities to distort public service.

In the final analysis, it is my candid view, based on law and public policy, that no law is worth even the piece of papers on which it is printed, if it dignifies corrupt and untrustworthy public servants with statutory protection for committing offences, misconduct and infraction of public interests, good conscience and morality.

In view of the foregoing, and to instill and set an agenda for public probity based on law, the sole issue for determination in this appeal is resolved in favour of the appellant. This appeal succeeds and it hereby allowed. The judgment of the Court of Appeal delivered on 15th December, 2004 hereby set aside. The decision of the trial court and its consequential orders dated 2nd May, 2000, is hereby restored.

There shall be no order as to cost.

Sidi Dauda Bage
Justice, Supreme Court

OLU ARIWOOLA, (JSC): I had the privilege of reading in draft the lead judgment of my learned brother **Bage, JSC** just delivered. I agree entirely with the reasoning and conclusion that the appeal is meritorious and should be allowed. I too will allow the appeal.

Appeal allowed.

Olu Ariwoola
Justice, Supreme Court

BAYANG AKA'AHS, (JSC): I read in draft the judgment of my learned brother Sidi Dauda Bage JSC in which he allowed the appeal and set aside the judgment of the Court of Appeal, Ilorin Division, I also agree that the appeal should be allowed.

The respondent was, at all material times a finance clerk with the Kwara State Pilgrims Welfare Board (herein referred to as the "Board" or appellant) and was charged with the responsibility of assisting the accountant to lodge monies into the Board's account in the Bank. On 11th April 1994, the accountant and the respondent went to the Kwara State Government House, Ilorin to retrieve the Board's money for lodgment at the United Bank for Africa (UBA) Plc, Ilorin Branch. The monies were kept in three separate bags containing N683,590.00; N782,550.00 and N310,210.00 respectively. The accountant left the monies with the respondent to attend to urgent engagements concerning the yearly Hajj operations with the understanding that the respondent would deposit the monies into the designated bank. He deposited some of the money but kept back N310,210.00 on the excuse that the Bank had heavy transaction on that particular day. The respondent failed to deposit the money on the following day. It was subsequently discovered that the sum of N125,000.00 was missing from the money. The Board instituted a civil action in the Kwara State High Court, Ilorin for the recovery of the said N125,000.00 when the respondent failed to give any reasonable explanation as to the whereabouts of the missing money. Judgment was entered in favour of the Board. The defendant then appealed against the judgment of the High Court raising the plea that the action was statute barred as the suit was not commenced within 3 months when the cause of action arose contending that the appellant was a public servant in Kwara State and so was entitled to the public officers protection law. The appeal was allowed and the judgment of the High Court was set aside. And this is what prompted the appeal to this court.

My Lord, Bage JSC has dealt in an admirable manner with the main issue in this appeal. I entirely agree with the sentiments expressed in the leading judgment that it cannot be the intention of the law to compensate dishonest public officers with statutory protection as this will affect the

essence of probity in the public service and the Public Officers Protection Law (like its counterpart the Public Officers Protection Act) is designed to protect the officer who acts in good faith and it does not apply to acts in abuse of office. The Supreme Court as a court of law and public policy must be clear on the public good behind the policy intended in the regime of the Public Officers Protection Law. The respondent ought to have been prosecuted for criminal breach of trust in addition to the civil action.

It is for this reason and the more exhaustive reasons contained in the judgment of my learned brother, Bage JSC that I allowed the appeal, set aside the judgment of the court below and restored the judgment of the High Court delivered by Kawu J. (as he then was) on 2nd May, 2000.

K. B. Akaahs
Justice, Supreme Court

ADAMU AUGIE, (JSC): I have had the privilege of reading in draft the judgment just delivered by my learned brother Bage, JSC. For the above reasons and of course the detailed ones carefully set out in the lead judgment, I too, feel that the appeal succeeds and should be upheld. The judgment of the Court of Appeal delivered on 15th December, 2004 is set aside and the decision of the trial court dated the 2nd May, 2000 is hereby restored. No costs awarded.

Amina Adamu Augie, Jsc
Justice, Supreme Court

ADAMU GALINJE, (JSC): I have had the privilege of reading in draft, the judgment just delivered by my learned brother, Bage JSC and I agree with the reasoning contained therein and the conclusion arrived thereat. The facts of this case are elaborately set out in the lead judgment. It is sufficient here to state that the respondent who was a finance clerk in the employment of the appellant was accused of theft of one hundred and twenty five thousand naira (N125,000.00) from the amount of three hundred and ten thousand two hundred and ten naira (N310,210.00) that was entrusted to him to deposit same in the appellant's account at United Bank for Africa (UBA).

The appellant instituted an action against the respondent at the Kwara State High Court to recover the stolen money and got judgment. The respondent herein appealed to the Court of Appeal, Ilorin Division, and it was argued on his behalf that, the action against him was statute barred by virtue of S.2(a) of the Public Officers Protection Law of Kwara State1994 as the said action was not initiated within three months. The lower court in its judgment upheld the argument on the ground that, the respondent being a public officer could not be sued after the expiration of three months as provided by Section 2(a) of the Public Officers Protection Law. It will appear that the lower court did not know or appreciated the purport and the scope of Public Officers Protection Law of Kwara State. Section 2(a) of the Public Officers Protection Law of Kwara State 1994 provides as follows:

> **"2 Where any action, prosecution or other proceeding is commenced against any person for any act done in pursuance of execution or intended execution of any law or of any public duty or authority or in respect of any alleged neglect or default in the execution of any such law, duty or authority, the following provision shall have effect:**
>
> **(a) The action, prosecution or proceeding shall not lie or be instituted unless it is commenced within three months next after the act, neglect or default complained of, or in case of continuance of damage or injury, within three months next after the ceasing thereof…"**

In **Hassan vs. Aliyu (2010) 17 NWLR (Pt. 1223) 547 at 591 paras B-D,** this court while considering the scope of Section 2(a) of the Public Officers Protection Act, 1990, which is in ***pari-materia***with Section 2(a) of the Kwara State Public Officers Protection Law 1994, said:

"It is however correct that where a public officer acts outside the scope of his authority or without a semblance of legal jurisdiction, he cannot claim the protection of the provisions of the public officers protection Act."

The law is settled that it is the duty of the plaintiff to adduce evidence or facts to prove that the officer acted outside the scope of his authority or without semblance of legal jurisdiction. The facts to be produced must exist to enable the court find the absence of semblance of legal jurisdiction, otherwise once it is established that the action was instituted outside the statutory period of three months, the action is time barred and the court will have no jurisdiction to entertain same. In the instant case sufficient evidence was led and parties are in agreement that N310,210.00 was entrusted to the respondent and out of this amount, N125,000.00 was missing. The missing or theft of money was not within the scope of the official duty of the respondent. In other words, the respondent had no legal authority to retain N125,000.00 out of the money that was given to him to deposit in the bank. Having acted outside the scope of his authority, the respondent had no right of protection under the Public Officers Protection Law of Kwara State. The lower court was therefore wrong to have succumbed to the argument on behalf of the respondent. The law is very clear that the Public Officers Protection Law is used as a shield to protect public officers who act strictly within the confines of their official duties and no more.

For these few words and the more detailed reasoning in the lead judgment this appeal shall be and it is hereby allowed. I endorse all the consequential orders made in the lead judgment including order as to costs.

Paul Adamu Galinje
Justice, Supreme Court

LINDA AKITI
AND
PRINCE OLADIMEJI OYEKUNLE

SC. 932/2015

IN THE SUPREME COURT OF NIGERIA
HOLDEN AT ABUJA

FRIDAY, 9 FEBRUARY, 2018

BEFORE THEIR LORDSHIPS

OLABODE RHODES-VIVOUR	**JUSTICE, SUPREME COURT**
MARY UKAEGO PETER-ODILI	**JUSTICE, SUPREME COURT**
CLARA BATA OGBUNBIYI	**JUSTICE, SUPREME COURT**
AMIRU SANUSI	**JUSTICE, SUPREME COURT**
SIDI DAUDA BAGE	**JUSTICE, SUPREME COURT**

ACTION: Interlocutory applications in the Supreme Court – Or. 8 Rule 5 of the Supreme Court Rules 1985 – Procedure thereof.

CONSTITUTIONAL LAW: Right of fair hearing – Applicant denied opportunity of arguing her motion for regularization of process – Applicant's suit dismissed – Whether applicant has not been denied opportunity of fair hearing.

COURT: Supreme Court – Power to restore dismissed appeal – Or. 8 Rule 8(4) of Supreme Court Rules 1985 – Onus on applicant to show exceptional circumstances – How discharged.

COURT: Where court dismissed an action for failure to comply with necessary steps court not aware of pending application for extension of time within which to regularize – Proper approach thereto.

EVIDENCE: Deposition in affidavit – Material depositions – Whether useful

in resolving application – Where material depositions are not denied – Implication.

EVIDENCE: Documentary evidence – Where material facts in an affidavit are supported by documentary evidence – Conclusion thereof.

PRACTICE AND PROCEDURE: Restoring appeal dismissed – Or. 8 Rule 8(4) Supreme Court Rules 1985 – Onus on applicant to show exceptional circumstances – Meaning – How discharged.

PRACTICE AND PROCEDURE: Material depositions in an application denied by a courter affidavit – Implication – Where court is bound to call oral evidence.

PRACTICE AND PROCEDURE: Opposing applications pending – One seeking to dismiss action – The other seeking to regularize it – Proper approach thereto.

Issue for Determination

Whether the Honourable court ought not in the interest of justice to grant the prayer of the appellant/applicant as contained in her motion paper.

Facts of the Matter

By way of a motion on notice filed on 8 March 2017 and brought under Order 8 Rule 8(4) and Order 2 Rule 31 of the Supreme Court Rules, and under the inherent jurisdiction of the court the appellant/applicant seeks the following orders:

1. **An Order restoring this appeal which was dismissed on 13 July 2016.**
2. **An Order extending time within which the appellant/applicant may compile and transmit the**

record of appeal in this appeal against the judgment of the Court of Appeal handed down on 26 March 2015 by the Court of Appeal, Lagos Division.

3. **An Order granting the appellant/applicant 30 days within which to compile and transmit the record of appeal in this appeal.**

The application is supported by a 15 paragraph affidavit deposed to by **Saheed Majiyagbe-Kosoko**, a legal practitioner in Chambers of learned counsel for the appellant/applicant. Annex to it are documents marked.

Exhibit A – Appellant's Motion
Exhibit B – Respondent's counter-affidavit
Exhibit C – Order of court given on 13 July,2016

The grounds on which the application is brought are:

1. **The appeal was fixed for 23 June, 2016 for the respondent's motion to dismiss same;**
2. **Prior to 23 June, 2016 this appellant brought a motion for an order extending time within which it would compile and transmit the record of appeal from the lower court. The appellant also filed a counter-affidavit to the respondent's motion giving reasons why she had not compiled and transmitted the record of appeal.**
3. **That appeal came up in open court on 23 June 2016 and both parties were represented by counsel;**
4. **Due to the fact that the appellant's motion seeking to save the appeal was not ripe for hearing the honourable court adjourned the appeal on that day in open court to 6 March 2017 for the hearing of the pending applications and awarded N50,000 costs against the appellant.**
5. **On 6 March 2017 respondent's counsel informed the honourable court that the appeal had been dismissed in**

Chambers on 13 July, 2016 despite the fact that the respondent filed a counter affidavit to the appellant's motion to extend time to compile and transmit records in 2017;

6. **The appellant/applicant is diligent and desirous in the prosecution of this appeal but delayed in compiling and transmitting the record of appeal because she was intent of exploring the possibility of an amicable settlement; and**
7. **The appellant is desirous of prosecuting the appeal.**

A written brief was filed in support of the motion. Prince Oladimeji Oyekunle, the respondent and a retiree deposed to 7 paragraph counter-affidavit to which is attached exhibit 3A.

A written brief was filed urging the court to dismiss the application.

Held: *(Unanimously allowing the application).*

1. *Material depositions which are not denied are deemed correct*
   I must state that depositions in affidavit on material facts resolve applications in court. Where depositions on material facts in an affidavit in support of an application are not denied by the adverse party filing a counter-affidavit, such facts not denied in the affidavit in support remain the correct position and the court acts on them except they are moonshine. *(Pp 41 – 42 Paras H – A)*

2. *When necessary to resolve conflicting affidavit evidence by calling oral evidence.*
   Material facts in a counter-affidavit not denied by a reply affidavit are the true position. It is only when the affidavit cannot resolve facts that parties are invited to lead evidence in proof of the facts they deposed to see *Akinsete vs. Akindutire (1966) 4 NSCC P. 157 Eboh vs. Oki (1974) 9 NSCC P. 29, National Bank (Nig) Ltd vs. The Are Brothers Nig Ltd (1977) 11 NSCC P. 382. Alagbe vs. Abimbola 1978 2 SC P. 39.*

Paragraphs 3, 4,5 and 6 of the affidavit in support are not denied by the respondent. Depositions in these paragraphs are clear that when this court dismissed the appeal on 13 July 2016 there was pending before this court an application filed on 22 June 2016 for:

1. **An Order extending time within which the appellant/applicant may compile and transmit the record of appeal in this appeal against the judgment of the Court of Appeal handed down on 26 March, 2015 by the Court of Appeal Lagos Division.**
2. **An Order granting the appellant/applicant 30 days within which to compile and transmit the record of appeal.** *(P 42 Paras A – F)*

3. *The relevance of documentary evidence in supporting material facts in an affidavit.*
Where documentary evidence supports depositions in an affidavit such depositions are the correct position of what it seeks to establish. Documentary evidence lends more credence to material facts deposed to in an affidavit. The applicant's motion on notice on 22 June, 2016 for extension of time to compile and transmit the record of appeal exhibited by the applicant in this application documentary evidence, to wit motion on notice filed on 22 June 2016 is conclusive proof that the said motion was pending before the appeal was dismissed on 13 July 2016. *(P 42 Paras F – H)*

4. *Power of Supreme Court to restore dismissed appeal*
I am satisfied that when this appeal was dismissed on 13 July 2016 there was pending before this court a motion for extension of time to regularize the applicant's processes, and it was filed on 22 June 2016. Order 8 Rule 8(4) of the Supreme Court Rules states that:

(4) **An Appellant whose appeal has been dismissed under this rule may apply by notice of motion that his appeal be restored. Any such application may**

be made to the court and the court may where exceptional circumstances have been shown, cause such appeal to be restored upon such terms as it may think fit. *(Pp 42 – 43 Paras H – B)*

5. *The meaning of exceptional circumstance under Or 8 Rule 8(4) of Supreme Court Rules 1985*

What then are exceptional circumstances?

Any fact which if known the judge would not have dismissed the appeal is an exceptional circumstance. For example if at the time of dismissal of the appeal there was before the court an application for extension of time to file relevant processes. If all processes were properly before the court but this was not brought to the attention of the judge due to inadvertence or carelessness of counsel.

In the affidavit in support of the application to restore the dismissed appeal, a detailed deposition of exceptional circumstances must be shown.

The appellant/applicant has deposed to the fact that when this appeal was dismissed on 13 July 2016, there was an application filed on 22 June 2016 for extension of time within which the appellant/applicant may compile and transmit record of appeal. It is well settled that if a court makes an order dismissing an appeal when there is an application for extension of time to regularize the appeal, the court should not hesitate to pronounce its order as null and void. This, the court can do by invoking its inherent jurisdiction to correct the obvious mistake by stating that the appeal is pending, provided application is made to the court as has been done in this case. *(P 43 Paras C – G)*

6. *Approach of court to two applications one seeking to dismiss action and the other seeking to regularize it.*

Where there are two applications before the court, one to dismiss the case for not taking necessary steps and the other (motion filed on 22 June 2016 prior to motion for dismissal) for extension of time, or and

leave to take necessary steps to regularize the suit, the motion which would allow the court to pursue substantial justice would be heard first. This procedure has its roots in common sense, prudence and equity, and if such a procedure is followed cases would be resolved on the merits rather than on technicalities. See ***Consortium M.C. vs. NEPA (1992) 6 NWLR (Pt. 246) P. 132.***

The court should not have dismissed the appeal on 13 July 2016, rather it should have saved the appeal by hearing the application that would have saved the appeal, i.e. the motion filed earlier in time on 22 June 2016. The court dismissed the appeal as a result of an administrative error from the registry, when it sat in chambers and was informed by the registry that the case should be dismissed oblivious of the pending motion filed on 22 June 2016. In such a situation the appeal should be restored to the cause list for hearing on the merits. There is merit in this application. It is hereby ordered that Appeal No. S C.932/2015 dismissed by this court on 13 July 2016 is hereby restored to the cause list for hearing on the merits. *(Pp 43 – 44 Paras G – C)*

7. *Procedure for hearing interlocutory applications in the Supreme Court.*
The procedure for the hearing of interlocutory applications in the Supreme Court is well spelt out in Order 8 Rule 5 of the Supreme Court Rules, 1985 (as amended) and it is thus:-
"Any application under this rule may be considered and determined by the court in chambers without oral arguments."

The above provision on display, one has to see if the appellant/applicant's anchor on a breach of fair hearing, is strong enough in that she was not given a hearing notice before her process was dismissed.*(Pp 46 – 47 Paras G – A)*

8. *Burden on applicant to show exceptional circumstances*
The applicant is herein asking to have her appeal which was dismissed to be restored. To be so entitled the supporting affidavit needs showcase the exceptional circumstances warranting such a

favourable disposition of the court. Going through the whole gamut of the affidavit of the appellant there is to see the explanation for failure to compile the record within the time provided.

The argument put forward by the applicant that she was denied her right of being heard cannot be ignored as she had a pending application to regularize the appeal filed on the 22nd June, 2016 before the appeal was dismissed for failure to transmit record. Even then the touted intention of the applicant for the amicable settlement did not fly off the ground as nothing was done further by her after the initial move and the counter proposal for settlement of the other side, and so that intention therefore remained no more than an attempted move. The point has to be made that an applicant having an opportunity to present his or her case in court, failing to do so loses the right to complain of a denial of fair hearing as fair hearing is not only available to the applicant but also the other party. That being the principle it has to be seen if the applicant lost that right to complain. I rely on JOE Co. Ltd vs. Skye Bank Plc (2009) 6 NWLR (Pt. 1138) 518. *(P 47 Paras A – E)*

9. *Applicant was denied opportunity of fair hearing*

The case of **Olumesan vs. Ogundepo** (1996) 2 NWLR (Pt. 433); **Adeyemi vs. Y.R.S. Ike-Oluwa & Sons Ltd** (1993) 8 NWLR (Pt. 309) 27; **Adigun vs. A.G. Oyo State** (1987) 1 NWLR (pt. 53) 678 at 709; **all of which applicant called in aid and which avail her as those authorities anticipate that an applicant is entitled to the invocation of the principle of fair hearing as the opportunity to move her pending motion was denied her and therefore the exceptional circumstances for which a favourable consideration would be made are available to the applicant.**

The exceptional circumstances expected to persuade the court to restore a dismissed appeal having been established there is basis to grant this application which has merit. I also grant the application and abide by the consequential orders made.
(P 47 Paras F – H)

Per Sanusi (JSC)

The applicant herein, by her motion is asking that her appeal which was dismissed earlier, to be restored. The law is trite, that before an appeal which was dismissed by the court can be restored, the applicant has the heavy task of showing special or exceptional circumstance(s). However, before deciding whether special circumstances were shown my lords, permit me to bring to fore the provisions of Order 8 Rule 4 of the Supreme Court's Rules 1985 under which the applicant inter nalia, hinged her instant application. The rule states as below:

> **Order 8 Rule 4.- "An appellant whose appeal has been dismissed under this rule may apply by notice of motion that the appeal be restored. Any such application may be made to the court and the court may where exceptional circumstances have been shown, cause such appeal to be restored upon such terms as it may think fit"**

In the instant application an averment was made in the supporting affidavit to the motion to the effect that there exists an application filed on 22nd June 2016 for extension of time to compile and transmit record of appeal in this instant appeal. In other words before, the dismissal of the appellant's/applicant's appeal in the chambers by this court on 13/7/2016, unknown to this court at that time, the appellant had taken steps to regularize his appeal although that fact was unfortunately not made known to this court before it proceeded to dismiss her appeal during chambers proceedings. That piece of evidence deposed in the supporting affidavit, was not denied by the respondent in his counted affidavit. To my mind, that deposition by the applicant amounts to special circumstance since the court ought not to have dismissed the appeal, if it had known of the existence of a pending application for extension of time to regularize the appeal.

This court is always every ready to do substantial justice. Its first and foremost aim is always to see that parties before it are given adequate opportunity or level ground to ventilate their case and argue same before it after which it decides it on the merit.

It would be rather absurd, for this court to give preference to a motion for dismissal over another motion of regularization of an appeal. It always goes for saving rather than for killing or shutting out a litigant. From all indications the dismissal of the appellant's appeal on 13th July 2016 was apparently as a result of misinformation given to it at the chambers sitting proceedings by the Registry staff which could not be verified from the parties concerned since parties' learned counsel do not normally appear during chambers sittings. The dismissal of the appeal was therefore erroneously made. *(Pp 51 – 52 Paras A – C)*

Nigerian Cases Cited

Adeyemi vs. Y.R.S. Ike-Oluwa & Sons Ltd (1993) 8 NWLR (Pt. 309) 27;
Adigun vs. A.G. Oyo State (1987) 1 NWLR (pt. 53) 678
Akinsete vs. Akindutire (1966) 4 NSCC P. 157
Alagbe vs. Abimbola 1978 2 SC P. 39.
Consortium M.C. vs. NEPA (1992) 6 NWLR (Pt. 246) P. 132.
Eboh vs. Oki (1974) 9 NSCC P. 29,
JOEL Co. Ltd vs. Skye Bank Plc (2009) 6 NWLR (Pt. 1138) 518.
National Bank (Nig) Ltd vs. The Area Brothers Nig Ltd (1977) 11 NSCC P. 382.
Olumesan vs. Ogundepo (1996) 2 NWLR (Pt. 433); +00
The Are Brothers Nig. Ltd. (1977) 11 NSCC 382

Representation

O. AGBEBI for the appellant/applicant.
L.O. FAGBEMI for the respondent.

RHODES-VIVOUR, (JSC) (Delivering the Lead Judgment): By way of a motion on notice filed on 8 March 2017 and brought under Order 8 Rule 8(4) and Order 2 Rule 31 of the Supreme Court Rules, and under the inherent jurisdiction of the court the appellant/applicant seeks the following orders:

1. **An Order restoring this appeal which was dismissed on 13 July 2016.**
2. **An Order extending time within which the appellant/applicant may compile and transmit the record of appeal in this appeal against the judgment of the Court of Appeal handed down 26 March 2015 by the Court of Appeal, Lagos Division.**
3. **An Order granting the appellant/applicant 30 days within which to compile and transmit the record of appeal in this appeal.**

The application is supported by a 15 paragraph affidavit deposed to by **Saheed Majiyagbe-Kosoko**, a legal practitioner in Chambers of learned counsel for the appellant/applicant. Annex to it are documents marked.

Exhibit A – Appellant's Motion
Exhibit B – Respondent's counter-affidavit
Exhibit C – Order of court given on 13 July, 2016

The grounds on which the application is brought are:

8. **The appeal was fixed for 23 June, 2016 for the respondent's motion to dismiss same;**
9. **Prior to 23 June, 2016 this appellant brought a motion for an order extending time within which it would compile and transmit the record of appeal from the lower court. The appellant also filed a counter-affidavit to the respondent's motion giving**

reasons why she had not compiled and transmitted the record of appeal.

10. That appeal came up in open court on 23 June 2016 and both parties were represented by counsel;

11. Due to the fact that the appellant's motion seeking to save the appeal was not ripe for hearing the honourable court adjourned the appeal on that day in open court to 6 March 2017 for the hearing of the pending applications and awarded N50,000 costs against the appellant.

12. On 6 March 2017 respondent's counsel informed the honourable court that the appeal had been dismissed in Chambers on 13 July, 2016 despite the fact that the respondent filed a counter affidavit to the appellant's motion to extend time to compile and transmit records in 2017;

13. The appellant/applicant is diligent and desirous in the prosecution of this appeal but delayed in compiling and transmitting the record of appeal because she was intent of exploring the possibility of an amicable settlement; and

14. The appellant is desirous of prosecuting the appeal.

A written brief was filed in support of the motion. Prince Oladimeji Oyekunle, the respondent and a retiree deposed to 7 paragraph counter-affidavit to which is attached exhibit 3A.

A written brief was filed urging the court to dismiss the application.

At the hearing of the application on 14 November 2017 learned counsel for the appellant/applicant, O. Agbebi Esq., urged the court to grant the application as the record of appeal had been transmitted to this court on 19 May 2017.

Opposing the application learned counsel urged this court not to restore the appeal as the applicant has failed to show exceptional circumstances why the appeal should be relisted. I read the written submissions of counsel.

Both counsel agree that the issue for determination is:

Whether the honourable court ought not in the interest of justice to grant the prayer of the appellant/applicant as contained in her motion paper.

Learned counsel for the appellant observed that on 23 June, 2016 when this appeal was called in open court there were two pending applications.

i. The respondent's motion on notice filed on 8 December, 2015; and
ii. The appellant's motion on notice filed on 22 June, 2016.

He submitted that dismissing the appeal does not serve the interest of justice as the dismissal amounts to a denial of fair hearing of the appellant especially as the appellant was not aware that her appeal had been dismissed in chambers. Reliance was placed on ***Olumesan vs. Ogundepo (1996) 2 NWLR (Pt. 433) p. 628 Adeyemi vs. Y.R.S. Ike-Oluwa & Sons Ltd (1993) 8 NWLR (Pt. 309) P. 27.***

She urged the court to declare the ruling dismissing this appeal on 13 July 2016 a nullity. Opposing the application learned counsel for the respondent observed that the applicant deliberately refused to compile and transmit the record of appeal to this court and not as result of her desire to explore amicable settlement. He submitted that since learned counsel for the appellant has not shown exceptional circumstances why the appeal should be restored as required by law, the application should be dismissed. Reliance was placed on ***J.O.E. Co. Ltd vs. Skye Bank Plc (2009) 6 NWLR (Pt. 1138) P. 518.***

I shall reproduce relevant extracts from the affidavits in order that a clearer picture is seen. Paragraphs 3-14 of the affidavit in support of the application states that:

3. The appeal was fixed for 23 June, 2016 for the respondent's motion to dismiss same.
4. Prior to 23 June, 2016 the appellant brought a

motion for an order extending time within which it would compile and transmit the record of appeal from the lower court. The appellant also filed a counter-affidavit to the respondent's motion giving reasons why she had not compiled and transmitted the record of appeal. A copy of the appellant's motion is hereto attached and marked exhibit A.

5. The appeal came up in open court on 23 June, 2016 and both parties were represented by counsel.

6. Due to the fact that the appellant's motion seeking to save the appeal was not ripe for hearing, the honourable court adjourned the appeal on that day in open court to 6 March, 2017 for the hearing of the pending applications and awarded N50,000 costs against the appellant.

7. On 6 March, 2017 respondent's counsel informed the honourable court that the appeal had been dismissed in chambers on 13 July, 2016 despite the fact that the respondent filed a counter affidavit to the appellant's motion to extend time to compile and transmit records in 2017.

8. A copy of the order of court given on 13 July 2016 is hereto attached and marked exhibit C.

9. The appellant/applicant is diligent and desirous in the prosecution of this appeal but delayed in compiling and transmitting the record of appeal because she was intent of exploring the possibility of an amicable settlement.

10. The appellant is desirous of prosecuting the appeal.

11. The failure of the appellant/applicant in compiling and transmitting the record of appeal within the time limited by the rules of this honourable court was occasioned by the attempts towards settling the dispute out of court by the appellant/applicant and respondent when settlement was attempted.

12. The appellant/applicant herein is a widow and was substituted at the trial court when her husband died.

13. The property which is the subject matter of the dispute is the only property left to the appellant/applicant by her late husband and also serves as her residence.

14. It will be in the interest of justice if this application is granted as the respondent will not be prejudiced thereby.

Relevant extracts from the counter-affidavit is as follows:

3. That the averments in paragraphs 12 and 13 of the affidavit in support of motion are sentimental; the applicant was aware from the beginning that she was building on disputed piece of land, the applicant ignored all available proof I showed to her late husband that the piece of land in dispute belonged to me.

4. That the averments in paragraphs 9, 10 and 11 of the affidavit in support of the motion do not represent the true position.

In further response to the facts in those paragraphs I state as follows:

(a) All the attempts said to have been made by the applicant to settle the dispute are mockery of the intention to settle.

All subsequent paragraphs of the counter-affidavit show futile attempts to settle the matter. I must state that depositions in affidavit on material facts resolve applications in court. Where depositions on material facts in an affidavit in support of an application are not denied by the adverse party filing a counter-affidavit, such facts not denied in the affidavit in support

remain the correct position and the court acts on them except they are moonshine.

Material facts in a counter-affidavit not denied by a reply affidavit are the true position. It is only when the affidavit cannot resolve facts that parties are invited to lead evidence in proof of the facts they deposed to see ***Akinsete vs. Akindutire (1966) 4 NSCC P. 157; Eboh vs. Oki (1974) 9 NSCC P. 29, National Bank (Nig) Ltd vs. The Area Brothers Nig Ltd (1977) 11 NSCC P. 382. Alagbe vs. Abimbola 1978 2 SC P. 39.***

Paragraphs 3, 4,5 and 6 of the affidavit in support are not denied by the respondent. Depositions in these paragraphs are clear that when this court dismissed the appeal on 13 July 2016 there was pending before this court an application filed on 22 June 2016 for:

> **1. An Order extending time within which the appellant/applicant may compile and transmit the record of appeal in this appeal against the judgment of the Court of Appeal handed down on 26 March, 2015 by the Court of Appeal Lagos Division.**
>
> **2. An Order granting the appellant/applicant 30 days within which to compile and transmit the record of appeal.**

Where documentary evidence support depositions in an affidavit such depositions are the correct position of what it seeks to establish. Documentary evidence lends more credence to material facts deposed to in an affidavit. The applicant's motion on notice on 22 June, 2016 for extension of time to compile and transmit the record of appeal exhibited by the applicant in this application. Documentary evidence, to wit motion on notice filed on 22 June 2016 is conclusive proof that the said motion was pending before the appeal was dismissed on 13 July 2016.

I am satisfied that when this appeal was dismissed on 13 July 2016 there was pending before this court a motion for extension of time to regularize the applicant's processes, and it was filed on 22 June 2016.

Order 8 Rule 8(4) of the Supreme Court Rules states that:

A (4) **An Appellant whose appeal has been dismissed under this rule may apply by notice of motion that his appeal be restored. Any such application may be made to the court and the court may where**
B **exceptional circumstances have been shown, cause such appeal to be restored upon such terms as it may think fit.**

C What then are exceptional circumstances?

Any fact which if known the judge would not have dismissed the appeal is an exceptional circumstance. For example if at the time of dismissal of the appeal there was before the court an application for
D extension of time to file relevant processes. If all processes were properly before the court but this was not brought to the attention of the judge due to inadvertence or carelessness of counsel.

In the affidavit in support of the application to restore the dismissed
E appeal, a detailed deposition of exceptional circumstances must be shown.

The appellant/applicant has deposed to the fact that when this appeal was dismissed on 13 July 2016, there was an application filed on 22 June 2016 for extension of time within which the appellant/applicant may
F compile and transmit record of appeal. It is well settled that if a court makes an order dismissing an appeal when there is an application for extension of time to regularize the appeal, the court should not hesitate to pronounce its order as null and void. This, the court can do by invoking its inherent
G jurisdiction to correct the obvious mistake by stating that the appeal is pending, provided application is made to the court as has been done in this case.

My lords, where there are two applications before the court, one to
H dismiss the case for not taking necessary steps and the other (motion filed on 22 June 2016 prior to motion for dismissal) for extension of time, or and leave to take necessary steps to regularize the suit, the motion which would allow the court to pursue substantial justice would be heard first. This
I procedure has its roots in common sense, prudence and equity, and if such a procedure is followed cases would be resolved on the merits rather than on

technicalities. See ***Consortium M.C. vs. NEPA (1992) 6 NWLR (Pt. 246) P. 132.***

The court should not have dismissed the appeal on 13 July 2016, rather it should have saved the appeal by hearing the application that would have saved the appeal, i.e. the motion filed earlier in time on 22 June 2016. The court dismissed the appeal as a result of an administrative error from the registry, when it sat in chambers and was informed by the registry that the case should be dismissed oblivious of the pending motion filed on 22 June 2016. In such a situation the appeal should be restored to the cause list for hearing on the merits. There is merit in this application. It is hereby ordered that Appeal No. S C.932/2015 dismissed by this court on 13 July 2016 is hereby restored to the cause list for hearing on the merits.

Time is extended by 30 days from today for the appellant/application to compile and transmit the record of appeal in this appeal against the judgment of the Court of Appeal delivered on 26 March, 2015 in suit No. CA/L/1095/2011.

Application granted.

Olabode Rhodes-vivour
Justice Supreme Court

PETER-ODILI, (JSC): I agree with the ruling just delivered by my learned brother, Olabode Rhodes-Vivour JSC and to underscore the support for the reasonings, I shall make some remarks.

The application was filed on 8/3/2017 by the appellant/applicant praying for the following orders thus:

1. **An order restoring this appeal which was dismissed on the 13th day of July, 2016.**
2. **An order extending time within which the appellant/applicant may compile and transmit the record of appeal in this appeal against the judgment of the Court of Appeal handed down on the 26th of March, 2015 by the Court of Appeal, Lagos Division per Iyizoba, Abubakar, Obaseki-Adejumo JJCA.**

3. An order granting the appellant/applicant 30 days within which to compile and transmit the record of appeal in this appeal.

The grounds on which this application were predicated are of seven paragraphs and the supporting affidavit is of 15 paragraphs.

There was also filed a written address along with the motion which on the 14th November 2017 date of hearing, learned counsel, Okakunle Agbebi adopted.

The respondent filed a counter affidavit on the 24/4/2017 with a written address in response which L.O. Fagbemi of counsel adopted.

The applicant raised a single issue for determination as follows:

Whether the honourable court ought not in the interest of justice to grant the prayer of the appellant/applicant as contained in her motion paper.

The respondent drafted a sole issue too as follows:

Whether the applicant has shown exceptional circumstances in the affidavit in support of the application why the appeal should be restored as required by law.

The differently crafted issues are really saying the same thing and so it does not matter which one is utilized.

SOLE ISSUE:

The question is really whether the applicant has shown exceptional circumstances for the favourable grant of the application.

Learned counsel for the applicant referred to Order 8 Rule 8 (4) of the Supreme Court Rules in aid of the application contending that she is desirous of pursuing the appeal. That the dismissal is a denial of fair hearing for the appellant especially as she was not aware that the appeal had

A been dismissed. He cited **Olumesan vs. Ogundepo** (1996) 2 NWLR (Pt. 433); **Adeyemi vs. Y.R.S. Ike-Oluwa & Sons Ltd** (1993) 8 NWLR (Pt. 309) 27; **Adigun vs. A.G. Oyo State** (1987) 1 NWLR (Pt. 53) 678 at 709.

That the applicant was not given an opportunity to move her pending
B application filed on the 22nd of June, 2016 before the appeal was dismissed and that the delay in transmitting the records was when she was exploring amicable settlement of the dispute. He cited **Kaduna State Urban Development Board vs. FANZ Construction Ltd** (1990) 4 NWLR
C (Pt.142) 1.

Learned counsel for the respondent stated that the applicant is not entitled to invoke the principle of fair hearing, alleging that it was denied her as applicant was given lots of opportunities to compile the record of
D appeal but failed to do so and the period of over one year elapsed in that regard. That the procedure for hearing of interlocutory applications is well set out in Order 8 Rule 5 of the Supreme Court Rules, 1985 (as amended).

That to restore an appeal that was dismissed the applicant needs
E show exceptional circumstances as provided for in Order 8 Rule 8 (4) of the rules of court and the supporting affidavit is devoid of any such exceptional circumstances upon which the restoration of the appeal can be made. He referred to **Kaduna State Urban Development Board vs. FANZ**
F **Construction Ltd (supra).**

That when a party is given the opportunity to present his case in court but fails to do so he cannot complain of denial of fair hearing as in the case at hand. He cited **J.O.E. Co Ltd vs. Skye Bank Plc** (2009) 6 NWLR (Pt.
G 1138) 518.

The procedure for the hearing of interlocutory applications in the Supreme Court is well spelt out in Order 8 Rule 5 of the Supreme Court Rules, 1985 (as amended) and it is thus:

H

> **"Any application under this rule may be considered and determined by the court in chambers without oral arguments."**

I The above provision on display, one has to see if the appellant/applicant's anchor on a breach of fair hearing, is strong enough in that she was not

given a hearing notice before her process was dismissed.

The applicant is herein asking to have her appeal which was dismissed to be restored. To be so entitled the supporting affidavit needs showcase the exceptional circumstances warranting such a favourable disposition of the court. Going through the whole gamut of the affidavit of the appellant there is to see the explanation for failure to compile the record within the time provided.

The argument put forward by the applicant that she was denied her right of being heard cannot be ignored as she had a pending application to regularize the appeal filed on the 22nd June, 2016 before the appeal was dismissed for failure to transmit record. Even then the touted intention of the applicant for the amicable settlement did not fly off the ground as nothing was done further by her after the initial move and the counter proposal for settlement of the other side, and so that intention therefore remained no more than an attempted move. The point has to be made that an applicant having an opportunity to present his or her case in court, failing to do so loses the right to complain of a denial of fair hearing as fair hearing is not only available to the applicant but also the other party. That being the principle it has to be seen if the applicant lost that right to complain. I rely on **J. O. E. Co. Ltd vs. Skye Bank Plc** (2009) 6 NWLR (Pt. 1138) 518.

The case of **Olumesan vs. Ogundepo** (1996) 2 NWLR (Pt. 433); **Adeyemi vs. Y.R.S. Ike-Oluwa & Sons Ltd** (1993) 8 NWLR (Pt. 309) 27; **Adigun vs. A.G. Oyo State** (1987) 1 NWLR (pt. 53) 678 at 709; all of which applicant called in aid and which avail her as those authorities anticipate that an applicant is entitled to the invocation of the principle of fair hearing as the opportunity to move her pending motion was denied her and therefore the exceptional circumstances for which a favourable consideration would be made are available to the applicant.

The exceptional circumstances expected to persuade the court to restore a dismissed appeal having been established there is basis to grant this application which has merit. I also grant the application and abide by the consequential orders made.

Mary Ukaego Peter-odili
Justice, Supreme Court

BATA OGBUNBIYI, (JSC): I am in full agreement with the lead ruling of my learned brother Rhodes-Vivour, JSC that the application herein is worth the favour of this court.

In the result and in terms of the lead ruling of my learned brother, I too grant the application as prayed.

Clara Bata Ogbunbiyi
Justice, Supreme Court

AMIRU SANUSI, (JSC): The appellant applicant brought a motion on notice pursuant to Order 2 Rule 31 of the Supreme Court Rules and under the inherent jurisdiction of this court.

The said motion filed on 8/3/2017 seeks principally, an order of the court to relist the appeal among other prayers stated in the lead ruling.

The gamut of the application is that the appeal was dismissed while the motion for extension of time to compile and transmit record of appeal was pending. Despite the fact that the respondent filed a counter affidavit to appellant's motion to extend time to compile and transmit record, the appeal was dismissed in chambers. In support of the application is a 15 paragraph affidavit deposed to by one Saheed Majiyaghe-Kosoko a legal practitioner in the firm of Olakunle Agbebi & Co. The application is also supported by several annexure and a written address. In opposing the application, the respondent herein, filed a counter affidavit of seven paragraphs deposed to by the Prince Oladimeji Oyekunle, the respondent himself. The counter affidavit is also supported by one annexure and a written address.

The appellant/applicant in its written address in support of the motion formulated sole issue for determination.

The sole issue queries whether the court ought not, in the interest of justice, to grant the prayers of the appellant/applicant as contained in the motion paper.

The learned counsel to the appellant stated that the appellant is desirous of pursuing her appeal by filing a motion on 22/6/2016, seeking an order of the court to enable her compile and transmit record of appeal. He submitted that the dismissal of the appeal on the 13th of July, 2016, after the

said appeal had already been adjourned in open court on the 23rd June 2016 was not entered in the cause list of justices. He submitted further, that the dismissal amounts to a denial of fair hearing of the appellant as the appellant was not aware that her appeal had been dismissed and no opportunity was given to her to be heard before the appeal was dismissed. He cited the case of OLLEMESAN vs. OGUNDEPO (1996) 2 NWLR (Pt. 433) where it was held that where a person's legal right or obligation are called in to question, he should be accorded full opportunity to be heard before any adverse decision is taken against him with regards to such rights and obligation. He submitted that it will be in the interest of justice to grant the prayers of the applicant as contained in the motion paper as the applicant was substituted at the trial court when her husband died and the property which is subject matter of the dispute, is the only property left to the appellant/applicant by her late husband which also serves as her residence. He then urged the court to hold that the delay in the transmission of the record was as a result of her desire to explore the possibility of an amicable settlement.

The respondent in her written address in opposition to the motion also formulated one issue for determination.

In response to the contention of the appellant that the dismissal of the appeal amounts to a denial of fair hearing, the respondent's counsel submitted that the allegation of denial of fair hearing was misconceived and that the appellant was given the opportunity to compile the record but neglected to make use of same. He argued that the notice of appeal that was dismissed was filed on the 26th day of March, 2015 and dismissed on the 13th July 2016 which is well over a year after the appeal was filed. He submitted that the restoration of an appeal which was dismissed is not automatic and that the applicant must show exceptional circumstances why the appeal should be restored as provided for in Order 8 Rule 8(4) of the Supreme Court Rules. He argued that the affidavit in support of the application is devoid of any exceptional circumstances why the appeal should be restored. He contended further, that the reason given by the applicant for not compiling the record timeously is not cogent enough because it was the same story the applicant narrated in the affidavit in support of the

applicant's motion for extension of time to compile and transmit record filed on the 22nd day of June, 2016 attached as exhibit A in support of his application. He referred to paragraphs 4 and 5 of the counter affidavit where the applicant's claim for settlement of the case out of court was denied. He urged that the applicant could use her unilateral relation to settle the matter as an excuse for her failure to compile and transmit the record as there was no time the applicant brought it to the attention of the court that parties were at one time out of court exploring settlement. He then urged the court to hold that the applicant has not shown exceptional circumstances why the appeal should be restored as required by law and to dismiss the application as lacking in merit.

What could be fathomed from the argument of the applicant's counsel in support of the application is that this court should restore his appeal which had earlier been dismissed as according to him, he had shown special circumstance to warrant him to be obliged with the grant of the prayers she sought in the motion. He felt that refusing to grant the prayers in her motion, tantamounts to denying her her right to fair hearing as enshrined in the Constitution of the Federal Republic of Nigeria 1999 and he relied on Order 8 Rule 8(4) of the Supreme Court Rules and the cases of Olumesan vs. Ogundepo (1996) 2 NWLR (Pt. 433); Adeyemi vs. Y.R.S. Ike-Oluwa & Sons Ltd (1993) 8 NWLR (Pt. 309) 27.

Conversely, the respondent's learned counsel felt otherwise, as he refuted that any right of fair hearing was denied the applicant, because a lot of opportunities were given to her to compile the record of appeal but she failed to do so for more than one good year even though it was an interlocutory application.

I think it is not out of place to reproduce the provisions of Order 8 Rule 5 of the Supreme Court Rules 1985 here which reads thus:

> **"Any application under this Rule may be considered and determined by the court in chambers without oral arguments"**

By the effect of the above quoted rule, it will not be correct for the applicant herein, to say that hearing notice was not given to her before the dismissal of her appeal.

The applicant herein, by her motion is asking that her appeal which was dismissed earlier, to be restored. The law is trite, that before an appeal which was dismissed by the court can be restored, the applicant has the heavy task of showing special or exceptional circumstance(s). However, before deciding whether special circumstances were shown my lords, permit me to bring to fore the provisions of Order 8 Rule 4 of the Supreme Court's Rule 1985 under which the applicant *inter alia*, hinged her instant application. The rule states as below:

> **Order 8 Rule 4.- "An appellant whose appeal has been dismissed under this rule may apply by notice of motion that the appeal be restored. Any such application may be made to the court and the court may where exceptional circumstances have been shown, cause such appeal to be restored upon such terms as it may think fit"**

In the instant application an averment was made in the supporting affidavit to the motion to the effect that there exists an application filed on 22nd June 2016 for extension of time to compile and transmit record of appeal in this instant appeal. In otherwords before, the dismissal of the appellant's/applicant's appeal in the chambers by this court on 13/7/2016, unknown to this court at that time, the appellant had taken steps to regularize his appeal although that fact was unfortunately not made known to this court before it proceeded to dismiss her appeal during chambers proceedings. That piece of evidence deposed in the supporting affidavit, was not denied by the respondent in his counter affidavit. To my mind, that deposition by the applicant amounts to special circumstance since the court ought not to have dismissed the appeal, if it had known of the existence of a pending application for extension of time to regularize the appeal. This court is always every ready to do substantial justice. Its first and foremost aim is always to see that parties before it are given adequate opportunity or

level ground to ventilate their case and argue same before it after which it decides it on the merit.

It would be rather absurd, for this court to give preference to a motion for dismissal over another motion of regularization of an appeal. It always goes for saving rather than for killing or shutting out a litigant. From all indications the dismissal of the appellant's appeal on 13th July 2016 was apparently as a result of misinformation given to it at the chambers sitting proceedings by the Registry staff which could not be verified from the parties concerned since parties' learned counsel do not normally appear during chambers sittings. The dismissal of the appeal was therefore erroneously made.

In the light of the above, I hold the view, that the applicant is her affidavit had shown special circumstances to warrant her to be obliged with the prayers she sought in the motion. In agreeing with the reasoning and conclusion arrived at by my learned brother Rhodes-Vivour JSC, I also find merit in this application. It is hereby ordered my me, that Appeal No. SC 932/2015 which was earlier wrongly dismissed on 13th July 2016, be immediately restored to the cause list for hearing on the merit. I abide by all other consequential orders made in the lead ruling Application granted as prayed.

Amiru Sanusi
Justice, Supreme Court

DAUDA BAGE, (JSC): I have had the benefit of reading in draft the lead judgment of my learned brother **Olabode Rhodes-Vivour, (**JSC), just delivered. I agree entirely with the reasoning and conclusion reached. I do not have anything useful to add. I abide by all the orders contained in the lead judgment.

Sidi Dauda Bage,
Justice, Supreme Court

NDUBUISI DIKE
AND
THE STATE

SC. 692/2014

IN THE SUPREME COURT OF NIGERIA
HOLDEN AT ABUJA

FRIDAY, 9TH FEBRUARY, 2018

BEFORE THEIR LORDSHIPS

OLABODE RHODES-VIVOUR	**JUSTICE, SUPREME COURT**
MARY UKAEGO PETER-ODILI	**JUSTICE, SUPREME COURT**
CLARA BATA OGUNBIYI	**JUSTICE, SUPREME COURT**
AMIRU SANUSI	**JUSTICE, SUPREME COURT**
SIDI DAUDA BAGE	**JUSTICE, SUPREME COURT**

APPEAL: Transmission of record – Party not notified of transmission of record of appeal – Appeal of party dismissed for failure to file brief – Whether party's right of fair hearing not breached thereto.

COURT: Power to set aside judgment – Relevant factors thereto.

EVIDENCE: Unchallenged affidavit evidence – Where the contents of an affidavit are not controverter – Implication.

Issue for Determination

Whether the decision of the court dated 25th March, 2015 dismissing the appellant's appeal in the chambers is not a nullity.

Facts of the matter

The appellant/applicant herein, brought this motion pursuant to Section 6(6) (a) and 36(1) and 6(b) of the Constitution of the Federal Republic of Nigeria as amended; Section 22 of Supreme Court Act; Order 2 Rule 11(1)(3) and (5); Orders 2 Rule 28(1) and 31(1); Order 7 Rule 4(2); Order 7 Rule 4(2); Orders 8 Rules 12(1) (2) and (5) and 16 of Supreme Court Rules 1985 as amended.

In the said motion, the applicant is seeking to be indulged the following orders; namely:

(1) An order of the honourable court enlarging the time within which the appellant/applicant may apply to set aside the decision of this honourable court given on 25th day of March 2015, dismissing appellant's appeal No. Sc 692/2014 Ndubuisi Dike vs. The State suomotu in chambers without any notice, hearing or argument, pursuant to Order 6 Rule 3(2) of the Supreme Court Rules 1985 as amended.

(2) An Order setting aside the decision of the honourable court given on 25th day of March 2015 dismissing appellant's appeal No. SC. 692/2014:- Ndubuisi Dike vs. The State in chambers, pursuant to Order 6 Rule 3(2) of the Supreme Court Rules 1985 as amended for failure to file his brief of argument; and

(3) An order re-entering in the cause list the said appeal N. SC. 692/2014 Ndubuisi Dike vs. The State for hearing and determination on the merit."

In a nut-shell, the applicant filed the motion simply to seek the order of this court to restore his appeal No. SC. 692/2014 which was dismissed by this court while sitting in chambers because of the appellant's/applicant's alleged failure to file brief of the appellant, pursuant to Order 6 Rule 3(3) of the Supreme Court Rules.

In support of the application, is a 28 paragraph affidavit deposed to by one ChikodiOkeorji, a legal practitioner in the law firm of C.C Elele Esq. Also

attached to the application as annexure are a copy of the proposed appellant's brief of argument, an order dismissing the appeal and the appellant/applicant's brief in supporting of the motion.

Held: *(Unanimously granting the application)*

1. *Where contents of an affidavit are not challenged*
The law is trite, that where an affidavit filed in support of an application was not denied or countered by way of counter affidavit, the averments deposed to in such affidavit are deemed admitted and the court is duty bound to act on them once the facts deposed to therein were put before the court as in this instant case. See Bello vs. A.G Lagos State (2007) 2 NWLR (Pt. 1017); A.G. Ondo State vs. A.G. Ekiti State (2001) 17 NWLR (Pt. 743) 706. This court is therefore entitled to deem and do hereby deem all the averments in the affidavit supporting the instant application as portraying the correct position of things that happened in this instant case. In fact, the attitude of the respondent right from the outset by not caring to file any counter to the affidavit served on it and for its failure to appear in court to defend the present motion clearly implies that it had not the intention to oppose the setting aside of this court's earlier judgment dismissing the appeal of the appellant/applicant in limine or suo motu.*(Pp 62 – 63 Paras H – B)*

2. *Relevant factors for setting aside court's own judgment*
Ordinarily, the Supreme Court or any court for that matter, rarely sets aside or disturb its own judgment because once delivered, such judgment remains final till infinity. However, the Supreme Court or even any court of law has inherent power and jurisdiction to set aside its own judgment or decision in appropriate cases or circumstances. Some of the circumstances that will entitle a court to set aside its own judgment, include the followings:

(a) Where the judgment was obtained by fraud or deceit either in the court or of one or more of the parties and in such case an application in that regard can be brought

before the court without leave.

(b) When the judgment is a nullity in such case a person affected by such order is entitled ex debitojustitae to have it set aside.

(c) When it is obvious that the court was misled into giving such judgment under a mistaken belief that the parties consented to it.

(d) Where in a cross-appeal, the respondent's cross appeal was not considered in the judgment.

(e) Where judgment was given in the absence of jurisdiction, and

(f) Where the procedure adopted was such as to deprive the decision or judgment of the character of a legitimate adjudication.

See **Igwe vs. Kalu** (2002) 14 NWLR (Pt. 787) 435. *(Pp 63–64 Paras D–B)*

Per Sanusi (JSC)

"In the present case, it is not in doubt that this court dismissed the appeal of the appellant on the mistaken belief that the appellant/applicant did not file its brief of argument as it was informed by the registry staff which turns out to be totally false. Therefore, this is a clear example of a case in which this court is entitled to exercise its jurisdiction and power to set aside the judgment it had delivered on 25/3/2015 dismissing the appeal mistakenly. The order setting aside the judgment given on 25/3/2015 is hereby granted pursuant to Order 6 Rule 3 (2) of Supreme Court Rules 1999. The application therefore succeeds and it is hereby granted and is ordered as prayed as elucidated below:

A. Time is extended to today within which the appellant/applicant may apply to set aside the judgment of this court earlier given on 25th day of March 2015 dismissing the appellant's/applicant's Appeal No. Sc.

692/2014- Ndububisi Dike Vs. The State, suomotu in chambers without notice of hearing served or taking of argument, pursuant to Order 6 Rule 3(2) of Supreme Court Rules 1999 as amended.

B. The judgment given by this honourable court on 25th of March 2015 dismissing the appellant's/applicant's Appeal No. SC. 692//2014 Ndubuisi Dike Vs. The State given in chambers pursuant to Order 6 Rule 3(2) of the Supreme Court Rules 1999 for failure to file appellant's brief of argument is hereby set aside and vacated, and

C. It is hereby ordered that the appeal No. SC. 692/2014 – Ndubuisi Dike vs. The State, be restored or relisted in this court's cause list immediately and the registry should give convenient date for the hearing of the appeal on the merit.

Application succeeds and is accordingly granted".
(Pp 64 – 65 Paras B – A)

Per Rhodes Vivour

"The brief facts are that this court dismissed the appeal of the appellant on the mistaken belief that the appellant did not file an appellant's brief.

Once the court is satisfied that those are the facts, the courts would have inherent jurisdiction to reverse the order of dismissal and restore the appeal on the cause list. By so doing courts take full responsibility for their mistakes and correct them so that litigants would on no account be badly affected by mistakes of counsel or the court. *(P 65 Paras C – E)*

3. *Relevant considerations in an application to set aside judgment*
Per Sanusi

"It is to be reiterated that the guiding principles in an application such as the present for extension of time to apply to set aside a

judgment or order of court made in the absence of a party were cast in stone so to speak in the case of Williams vs. Hope Rising Voluntary Funds Society (1982) 1 & 2 SC 73 at 74 (Reprint). The conditions include placing before the court sufficient materials or reasons showing good cause for being absent at the hearing and/or for not taking the required legal step in accordance with the time stipulated in the rules of court, to enable the court exercise its discretion in favour of the appellant's application.

In the case at hand, the applicant had stated in very clear terms the reasons for the delay in taking the steps of filing or bringing the application to set aside the decision of 25/3/2015 timeously and well presented in the supporting affidavit particularly paragraphs 3, 5, 6, 8, 9, 10 – 20 wherein were deposed that neither the applicant who has been in prison custody nor his counsel was served with the notice that the record of appeal was ready for collection before it was forwarded to the Supreme Court nor was appellant or counsel served with the said record or that notice of appeal had been listed for hearing and subsequent dismissal in chambers for failure to file the brief of argument within the stipulated time. Again portrayed in the depositions of the supporting affidavit is the fact that the applicant was not notified of what happened at the chambers sitting and applicant only became aware when someone sent by his counsel to inquire about the date for the hearing of the applicant's motion for extension of time to regularize applicant's brief already filed after the hearing and dismissal in chambers. The situation is clearly against the rules of court, Order 6 Rule 3 (2) and Order 9 Rule 12(1) and 13(1) of the Supreme Court Rules.

The situation that was thrown up is against the well settled principle of law that in the process of adjudication in a court of law, service of process of court on the party to be effected, the appellant/applicant in this case is a *sine qua non* to the assumption of jurisdiction of the court. It follows that failure to serve the relevant process where the service is required as in the case at hand is in a

breach of applicant's right to fair hearing and a fundamental defect going into the root of the proceedings and therefore rendered the proceedings or judgment or order a nullity. The situation is all the more poignant where the respondent did not file a counter affidavit which translates to an admission of the averments in the supporting affidavit leaving the court no option than to accept what the applicant averred as the true and correct state of affairs. See Achuzie vs. Ogbonnah (2016) 11 NWLR (Pt. 1522) 59 at 72; Idisi vs. Ecodril & 3 Ors (2016) 12 NWLR (Pt. 1527) 355 at 376-377.
(Pp 74 – 75 Paras G – H)

4. *Appellant not notified of transmission of record*
The situation on ground needs no long story as clearly, the fair hearing right of the appellant/applicant was breached when he was not notified with the hearing notice or the record of appeal or that the record was even ready for collection and so the applicant effectively kept in the dark must be granted his right to be heard and the proceedings which led to his appeal's dismissal was a nullity and nothing can change that. This is because what the court did was without jurisdiction. See OKafor vs. A.G. Anambra State (1991) 6 NWLR (Pt. 200) 659;Okoye vs. Nigeria Construction & Furniture Company (NCFC) Ltd (1991) 6 NWLR (Pt. 199) 501 at 538.
(Pp 75 – 76 Paras H – B)

Nigerian Cases Cited

A.G. Ondo State vs. A.G. Ekiti State (2001) 17 NWLR (Pt. 743) 706.
Achuzie vs. Ogbonnah(2016) 11 NWLR (Pt. 1522) 59 at 72;
Bello vs. A.G Lagos State (2007) 2 NWLR (Pt. 1017);
Idisi vs. Ecodril& 3 Ors(2016) 12 NWLR (Pt. 1527) 355.
Igwe vs. Kalu (2002) 14 NWLR (Pt. 787) 435.
OKafor vs. A.G. Anambra State (1991) 6 NWLR (Pt. 200) 659;
Okoye vs. Nigeria Construction & Furniture Company (NCFC) Ltd (1991) 6 NWLR (Pt. 199) 501.
Williams vs. Hope Rising Voluntary Funds Society (1982) 1 & 2 SC 73 (Reprint)

Nigerian Statutes cited

Supreme Court Act Section 22

The Constitution of the Federal Republic of Nigeria as amended Section 6(6) (a) and 36(1) and 6(b)

Representation

CHIKODI OKEORJI for the appellant/applicant.

Respondent absent and not represented.

AMIRU SANUSI, (JSC) (Delivering the Lead Judgment): The appellant/applicant herein, brought this motion pursuant to Section 6(6) (a) and 36(1) and 6(b) of the Constitution of the Federal Republic of Nigeria as amended; Section 22 of Supreme Court Act; Order 2 Rule 11(1)(3) and (5); Orders 2 Rule 28(1) and 31(1); Order 7 Rule 4(2); Orders 8 Rules 12(1) (2) and (5) and 16 of Supreme Court Rules 1985 as amended.

In the said motion, the applicant is seeking to be indulged the following orders; namely:

(1) An order of the honourable court enlarging the time within which the appellant/applicant may apply to set aside the decision of this honourable court given on 25th day of March 2015, dismissing appellant's appeal No. Sc 692/2014 – Ndubuisi Dike vs. The State suo motu in chambers without any notice, hearing or argument, pursuant to Order 6 Rule 3(2) of the Supreme Court Rules 1999 as amended.

(2) An Order setting aside the decision of the honourable court given on 25th day of March 2015 dismissing appellant's appeal No. SC. 692/2014:- Ndubuisi Dike vs. The State in chambers, pursuant to Order 6 Rule 3(2) of the Supreme Court Rules 1999 as amended for failure to file his brief of argument; and

(3) An order re-entering in the cause list the said appeal N. SC. 692/2014 – Ndubuisi Dike vs. The State for

hearing and determination on the merit."

In a nut-shell, the applicant filed the motion simply to seek the order of this court to restore his appeal No. SC. 692/2014 which was dismissed by this court while sitting in chambers because of the appellant's/applicant's alleged failure to file brief of the appellant, pursuant to Order 6 Rule 3(3) of the Supreme Court Rules.

In support of the application, is a 28 paragraph affidavit deposed to by one ChikodiOkeorji, a legal practitioner in the law firm of C.C Elele Esq. Also attached to the application as annexure are a copy of the proposed appellant's brief of argument, an order dismissing the appeal and the appellant/applicant's brief in supporting of the motion.

In arguing this motion, the applicant formulated a lone issue for determination which reads thus:

"Whether the decision of the court dated 25th March, 2015 dismissing the appellant's appeal in the chambers is not a nullity".

The learned counsel to the applicant submitted that the principle guiding an application for extension of time to apply to set aside a judgment or order of court made in absence of a party were articulated in the case of **WILLIAMS vs. HOPE RISING VOLUNTARY FUND SOCIETY** (1982) 1 and (1982) 2 SC 73 at 74, include placing sufficient materials or reasons showing good cause for being absent at the hearing or for not taking the required legal step(s) in accordance with the time stipulated by the rules of court. He argued that the reasons given by the applicant are contained in paragraphs 3, 4, 5, 6, 9, 10, 11, 12, 13,14, 15, 16, 17, 18, 19 & 20 of the affidavit in support of this application, wherein, it deposed that neither the appellant/applicant nor his counsel was served with notice that the record of appeal in this appeal was ready for collection before it was forwarded to this court nor was the appellant or his counsel served with the record of appeal or notice that the appeal has been listed for hearing or dismissal in chamber for failure to file brief. He stated that the appellant went further to

narrate how his counsel became aware of the forwarding of the record of appeal to the Supreme Court and immediately filed its brief of argument not knowing that the appeal had already been dismissed without notice to him or his counsel. He submitted that the process of adjudication in a court of law requires service of process on the party to be affected and that it is a condition precedent to the assumption of jurisdiction by the court. He submitted further, that failure to serve relevant process where service is required is a breach of a party's right to fair hearing. He quoted Order 7 Rules 2(2)(1), 41(e) 4(2) and 8(1)) of the Supreme Court Rule. He also quoted Order 14 Rules1-4 of the Court of Appeal rules and Order 3 Rule 13(3) of the Court of Appeal Rules 2 of the Court of Appeal Rules. He cited the case of **CONSORTIUM MC vs. NEPA**(1992) 6 NWLR (Pt. 246) and submitted that where there is notice from the registrar of the court below to the appellant notifying him of the readiness of the record of appeal for collection, it appears to him that time will start to run as held in (Consortium's case (supra). He submitted that right to fair hearing is very sacrosanct and divine and as old as creation and that such right cannot be lightly taken away from a citizen. He argued that the appellant's case falls within the recognized exceptions in that the judgment sought to be set aside is a nullity for having been entered in breach of applicant's fundamental right to fair hearing. He urged the court to hold that this is a proper case for which this court will set aside its own decision for being given without jurisdiction and in breach of the appellant's right to fair hearing.

It is important to note that the respondent in this application did not file any counter affidavit in opposition to all the prayers sought in the application. Also, when the motion came up for hearing before us on 16th of November 2017, the respondent was absent and was also not represented by any counsel, despite the fact hearing notice was duly served on him to appear for the case on that day. The law is trite, that where an affidavit filed in support of an application was not denied or countered by way of counter affidavit, the averments deposed to in such affidavit are deemed admitted and the court is duty bound to act on them once the facts deposed to therein were put before the court as in this instant case. See **Bello vs. A.G Lagos State** (2007) 2 NWLR (Pt. 1017); **A.G. Ondo State vs. A.G. Ekiti State**

(2001) 17 NWLR (Pt. 743) 706. This court is therefore entitled to deem and do hereby deem all the averments in the affidavit supporting the instant application as portraying the correct position of things that happened in this instant case. In fact, the attitude of the respondent right from the outset by not caring to file any counter affidavit served on it and for its failure to appear in court to defend the present motion clearly implies that he had not the intention to oppose the setting aside of this court's earlier judgment dismissing the appeal of the appellant/applicant in limine or suomotu.

Now coming to the fulcrum of the application at hand, which is for setting aside of the order of this court dismissing the appellant's/applicant's appeal, I think there is an exceptional reason to justify the grant of the prayers sought, for reason that I will advance presently.

Ordinarily, the Supreme Court or any court for that matter, rarely sets aside or disturb its own judgment because once delivered, such judgment remains final till infinity. However, the Supreme Court or even any court of law has inherent power and jurisdiction to set aside its own judgment or decision in appropriate cases or circumstances. Some of the circumstances that will entitle a court to set aside its own judgment, include the followings:

(a) Where the judgment was obtained by fraud or deceit either in the court or of one or more of the parties and in such case an application in that regard can be brought before the court without leave.

(b) When the judgment is a nullity in such case a person affected by such order is entitled ex debitojustitae to have it set aside.

(c) When it is obvious that the court was misled into giving such judgment under a mistaken belief that the parties consented to it.

(d) Where in a cross-appeal, the respondent's cross appeal was not considered in the judgment.

(e) Where judgment was given in the absence of jurisdiction, and

(f) Where the procedure adopted was such as to deprive the decision or judgment of the character of a legitimate adjudication.

See **Igwe vs. Kalu** (2002) 14 NWLR (Pt. 787) 435.

In the present case, it is not in doubt that this court dismissed the appeal of the appellant on the mistaken belief that the appellant/applicant did not file its brief of argument as it was informed by the registry staff which turns out to be totally false. Therefore, this is a clear example of a case in which this court is entitled to exercise its jurisdiction and power to set aside the judgment it had delivered on 25/3/2015 dismissing the appeal mistakenly. The order setting aside the judgment given on 25/3/2015 is hereby granted pursuant to Order 6 Rule 3 (2) of Supreme Court Rules 1999. The application therefore succeeds and it is hereby granted and is ordered as prayed as elucidated below:

A. Time is extended to today within which the appellant/applicant may apply to set aside the judgment of this court earlier given on 25th day of March 2015 dismissing the appellant's/applicant's Appeal No. Sc. 692/2014- Ndububisi Dike vs. The State, suo motu in chambers without notice of hearing served or taking of argument, pursuant to Order 6 Rule 3(2) of Supreme Court Rules 1999 as amended.

B. The judgment given by this honourable court on 25th of March 2015 dismissing the appellant's/applicant's Appeal No. SC. 692//2014 Ndubuisi Dike vs. The State given in chambers pursuant to Order 6 Rule 3(2) of the Supreme Court Rules 1999 for failure to file appellant's brief of argument is hereby set aside and vacated, and

C. It is hereby ordered that the appeal No. SC. 692/2014 – Ndubuisi Dike vs. The State, be restored or relisted in this court's cause list immediately and

the registry should give convenient date for the hearing of the appeal on the merit.

Application succeeds and is accordingly granted.

Amiru Sanusi
Justice, Supreme Court

RHODES-VIVOUR, (JSC): I have had the benefit of reading in draft the leading ruling of my learned brother **Sanusi, JSC**. I agree with his lordship reasoning and conclusion. The brief facts are that this court dismissed the appeal of the appellant on the mistaken belief that the appellant did not file an appellant's brief.

Once the court is satisfied that those are the facts, the courts would have inherent jurisdiction to reverse the order of dismissal and restore the appeal on the cause list. By so doing courts take full responsibility for their mistakes and correct them so that litigants would on no account be badly affected by mistakes of counsel or the court.

For these brief reasons as well as those more fully given by my learned brother **Sanusi JSC** I, too grant the application. Application succeeds.

Olabode Rhodes-vivour
Justice, Supreme Court

PETER-ODILI, (JSC): I have had the privilege of reading the draft ruling of my learned brother, AmiruSanusi JSC which he graciously made available to me. I agree with the decision he delivered and to underscore the support I have for the reasoning, I shall make some remarks.

By a motion on notice filed on the 2/11/2016, the appellant/applicant prays the court for the reliefs which I shall set out hereunder and thus:

(1) An order of the honourable court enlarging the time within which the appellant/applicant may apply to set aside the decision of this honourable court given on 25th day of March 2015, dismissing appellant's

Appeal No. SC/692/2014 – Ndubuisi Dike vs. The State, suomotu, in chambers without any notice, hearing or argument. Pursuant to Order 6 Rule 3 (2) of the Supreme Court Rules 1999 as amended.

(2) An order setting aside the decision of the honourable court given on 25th day of March, 2015 dismissing appellant's appeal, Appeal No. SC. 692/2014; Ndububisi Dike vs. The State in chambers pursuant to Order 6 Rule 3 (2) of the Supreme Court Rules 1999 as amended, for failure to file this brief of argument.

(3) An order re-entering or restoring in the Cause List the said Appeal No. SC/692/2014 – Ndubuisi Dike vs. The State, for hearing and determination on the merits.

The grounds upon which this application is made were elaborately set out as follows:

i. The appeal is a criminal appeal in which a sentence of death was imposed on the appellant/applicant.

Since the arraignment of the appellant at the Magistrate Court on 7th January 2010 (See page 4 record of appeal) and later High Court on 12th January, 2011. See pages 30 and 31 records) and his conviction by the trial high court on 25/1/2012 and affirmation of the conviction by the Court of Appeal on 11/7/2014, the appellant has been in detention at the Federal Prisons Umuahia, later Aba and following his conviction, at Federal Prisons Port Harcourt, Rivers State, with the result that he has no access to the registry of the Court of Appeal.

ii. Further to paragraphs (i) & (ii) above, the Registrar of the Court of Appeal upon completing preparation or compilation of the record of appeal under Order 7 Rule 2 (1) Supreme Court Rules 1999, proceeded to

forward/transmit the record to the Supreme Court without:

(a) Notification to the appellant or his counsel that the record of appeal had been compiled and was ready for collection as mandatorily enjoined by Order 7 Rule 2 (2) (i) Supreme Court 1999 and Order 14 Rule 4 (2) and 4(2) (b) Court of Appeal Rules 2011.

(b) Serving the appellant or his counsel with copy of the record of appeal as required by Order 7 Rule 8 Supreme Court Rules 1999 and Order 14 Rule 1 and 4 (2) Court of Appeal Rule 2011.

(c) Certifying in and or transmitting a certificate that the appellant has been served with the record of appeal in accordance with Order 7 Rule 2 (2) (i) and Order 14 Rule 4 (1) (2) (a), Court of Appeal Rules 2011 as well as indicating in the said certificate, the date of service of the record of appeal on the appellant as mandatorily required by Order 7 Rule 4 (1) Supreme Court Rules.

(d) Any notice that the record of appeal had been forwarded to the Registrar of the Supreme Court as mandatorily enjoined by Order 7 Rule 4 (2) of the Supreme Court Rules.

iii. Upon the appellant's counsel becoming aware (through his own independent inquiry) that the record of appeal had been transmitted to the Supreme Court by the registrar of the Court of Appeal, he immediately prepared and filed the appellant's brief of argument at the Supreme Court on 29/10/2015, and out of the abundance of caution also filed a motion for enlargement of time to file appellant's brief and paid the penalty (fees) for late filing of the brief.

iv. At all times material to the filing of the appellant's brief together with a motion for extension of time on 29/10/2015, the appellant and his counsel did not know that the appeal had been listed, heard ex-parte and dismissed in the chambers because no hearing notice of the listing and hearing or the dismissal of the appeal was

ever served on the appellant or his counsel up to this day.

v. Further to grounds (i) (v) above, the listing, fixture, hearing and dismissed of the appeal in chambers without service on the appellant (buy registrar of the Court of Appeal) of the notice of readiness of the records for collection or service of the records or notice of transmission of the record of appeal to the Supreme Court as required by Order 7 Rules 2 (2) (i), 4(1) (e), 4 (2) and 8 (1) of the Supreme Court Rules:

(a) denied or robbed the Supreme Court of the jurisdiction to hear or dismiss the appeal in chambers at the time it did in that conditions precedent to activating the jurisdiction of the honourable Supreme Court under Order 6 Rule 3 (2) of the Supreme Court Rules was not complied with, and also.

(b) breached appellant's right to fair hearing under Section 36 of the 1999 Constitution.

vi. Further to paragraphs (I) – (VI) above, the proceedings, order or decision of the Supreme Court dismissing the appellant/applicant's appeal on 25th March 2015 was, in the circumstance a nullity.

The accompanying 28 paragraph affidavit supporting the application which was deposed to by ChikodiOkeorji Esq., legal practitioner in the chambers of C. C. Ekele Esq. of the legal firm representing the appellant/applicant. Some salient parts of this deposition shall be recast for further clarity as follows:

3. I am aware that this appeal relates to the offence of murder in which the life and liberty of the appellant is involved following the sentence of death passed on him by the High Court Abia State and affirmed by the Court of Appeal, Owerri Division.

4. That since the arraignment of the appellant at the Magistrate Court on 7/1/2010 and later High Court on 12/12/2011 he has been in prison custody Umuahia, later Aba and following his conviction and sentence of death, he was transferred from Federal Prison Aba to Federal Prisons Port Harcourt where he has no access to the registry of the Court of Appeal.

5. That I am aware that because of the nature of this case, namely, that the deceased whose death is the subject matter of this murder charge is a brother of full blood with the appellant, all members of appellant's family who would have been of assistance to the appellant in prosecuting this appeal, distanced or dissociated themselves from him for fear of being misunderstood or victimized, with the result that the appellant was abandoned.

6. That it is under this state of abandonment that an Evangelist Pastor involved in prison ministry in the person of Pastor Evangelist Mrs. N. Anyanwu volunteered ex gratia to assist the appellant in the prosecution of this appeal by paying for compilation of the records of appeal from the Court of Appeal to the Supreme Court and in this regard sought our assistance to conduct the appeal.

7. I am aware that this appeal is being conducted pro bono by us.

8. That we became aware for the first time that the record of appeal in this appeal was ready when Evangelist Pastor Mrs. Anyanwu (who has been assisting the appellant in the conduct of the appeal), brought to us on or about 18/9/2015 a copy of the records, gratuitously collected by her from the Court of Appeal registry.

9. That upon receipt of the said records from her on 18/9/2015, we immediately embarked on an inquiry at the registry of the Court of Appeal Owerri to confirm when the records was transmitted to the Supreme Court.

10. That our said inquiries at the Court of Appeal registry revealed to us for the first time that the record was transmitted to the Supreme Court on or about 27/10/2014 without any notice by the registrar of Court of Appeal to us or the appellant that the record of appeal was ready for collection or service of copy of the records on the appellant or on us, as appellant's counsel or notice that the record had been forwarded to the Supreme Court as required by Order 7 Rule 2 (2) (i), 4 (i) (e), 4 (2) and Rule 8 (1) of the Supreme Court Rules and Order 14, Rule 1, Rule 4 (1), Rule 4 (2), Rule 4 (1) (a) and (b) of the Court of Appeal Rules 2011.

11. That upon receiving the said record about 18/9/2015 from the evangelist helper and confirming from the registry of the Court of Appeal that the record had been transmitted without notice to appellant or to us, we quickly prepared the appellant's brief of argument, and out of the abundance of caution also prepared a motion for extension of time.

12. That on 29/10/2015, we filed the appellant's brief of argument and out of the abundance of caution, equally filed a motion for enlargement of time as well as paid the default fees (penalty) for late filing of the brief and thereafter served same the respondent.

Attached as Exhibits 1, 2, 3 and 4 respectively are the appellant's brief, motion for enlargement of

A time, receipt for filing including the penalty fees and endorsement (evidence) of service of the brief on the respondent.

13. That on the 19th day of October 2016, our B ChikodiOkeorji Esq. went to the registry of the Supreme Court to confirm whether a date had been fixed for the hearing of appellant's motion for enlargement of time to file appellant's brief of C argument and in the process of searching for the file, the registrar of this court informed him for the first time that appellant's appeal had been listed, heard and dismissed in chambers on 25/3/2015 D pursuant to Order 6, Rule 3 (2) of the Supreme Court Rules 1999.

14. Consequently, Mr. Okeorji applied for and obtained a copy of the order of dismissal. Attached E as Exhibit 5 is CTC of the said order of this court made on 25/3/2015.

15. That at all times material to the dismissal of the appeal in chambers, and even thereafter up to date F of this motion, neither the appellant nor ourselves as his counsel, had been notified about the dismissal or determination of the said appeal in accordance with Order 9 Rules 12(1) and 13(1) of the Supreme G Court Rules to enable us or appellant become aware of the proceedings of 25/3/2015 or result of his appeal.

16. That at all times material to the filing of the H appellant's brief on 29/10/2015, neither the appellant nor we, as his counsel, had notice or knowledge from the registry of the Supreme Court or elsewhere that the said appeal had, indeed, been I listed, heard in chambers and dismissed by the Supreme Court otherwise we could not have

proceeded to file the appellant's brief and even pay the penalty (default) fees for late filing.

17. That our inability to file the appellant's brief of argument soon after transmission/forwarding of the record of appeal to this court arose from the fact that neither the appellant nor we (as his counsel) were served with the record of appeal by the registrar of the Court of Appeal nor were we served any notice of readiness of the record for collection or notice of the forwarding or transmission of the records of appeal to the Supreme Court by the Court of Appeal registrar as mandatorily required by Order 7, Rule 2 (i), 4 (1) (e), 4 (2) and 8 (1) of the Supreme Court Rules and Order 14 Rules 1, 4 (1), (2) 2(a) and (b) of the Court of Appeal Rules.

18. That besides, neither the appellant nor ourselves as his counsel, were given any hearing notice (before hearing of the appeal) that his appeal had been listed for dismissal/hearing in chambers pursuant to Order 6, Rule 3 (2) of the Supreme Court Rules 1999.

19. That I verily believe in the peculiar circumstance of the non service by the registrar of the Court of Appeal, of the record of appeal on the appellant or his counsel, or service of notice of the readiness of the record of appeal for collection or notice of forwarding to the Supreme Court of the record of appeal, that the jurisdiction of the Supreme Court was wrongly, improperly or invalidly activated at the time the appeal was listed, heard and dismissed in chambers as necessary conditions precedent to the listing or hearing and dismissal of the appeal were not complied with, thereby rendering the decision of the Supreme Court in the appeal a

nullity.

20. That I also verily believe that the dismissal of the appellant's appeal in the circumstance was in breach of his right to fair hearing under Section 36 of the 1999 Constitution of Nigeria as amended.

21. That I verily believe that the dismissal in chambers of appellant's appeal in the peculiar circumstance of this case as shown in paragraphs 3-20 of this affidavit without a hearing or hearing notice was done in error which error has occasioned on the appellant grave injustice of affirming the death sentence on him without a hearing of his appeal on the merits.

22. That it is my earnest belief that this is a case where the Supreme Court will graciously exercise its powers to set aside its order dismissing the appeal and re-enter the appeal to the cause list for hearing on the merits.

23. That neither the appellant nor his counsel was aware of the dismissal of his appeal until the said October 19, 2016 and thus he could not make this application within the time allowed by the rules of this court.

24. That the appeal involves a sentence of death (Capital Punishment) on the appellant and thus there is need to hear the appeal on the merits in the interest of justice.

On the 16th November, 2017 date of hearing, learned counsel for the applicant, ChikodiOkeorji adopted the process including a written address filed along with the motion on notice. He crafted a single issue which is thus:

Having regard to the failure of the registrars of the Court of Appeal and the Supreme Court to comply with mandatory conditions precedent contained in Order 7 Rule 2 (2) (i), 4 (1) (e), 4 (2) & 8 (1) Supreme Court Rules 1999 and Order 14 Rules 1, 4 (1), 4 (4), 4(2) (a) & (b), Court of Appeal Rules 2011 and the nature of this appeal involving a sentence of death, whether the decision or order of this honourable court given on 25th March, 2015, dismissing appellant's appeal in chambers, pursuant to order 6 Rule 3 (2) of the Rules of this court, is not a nullity *ab initio* for lack of jurisdiction and breach of appellant's right to fair hearing and thus liable to be set aside and the appeal re-entered for hearing on the merits.

Respondent was absent and not represented though served on the 8th November, 2017. There was no response to the address of appellant's counsel and even no counter affidavit.

Canvassing alongside the question he raised, learned counsel submitted that the decision of this court dismissing appellant's appeal on the 25th day of March 2015 is a nullity in that it was given without jurisdiction and in breach of appellant's right to fair hearing and so should be set aside, the appeal to be relisted for a hearing on the merit as appellant had already filed his brief without knowing of the dismissal of the appeal in chambers. He cited numerous judicial authorities. The respondent filed nothing.

It is to be reiterated that the guiding principles in an application such as the present for extension of time to apply to set aside a judgment or order of court made in the absence of a party were cast in stone so to speak in the case of **Williams vs. Hope Rising Voluntary Funds Society** (1982) 1 & 2 SC 73 at 74 (Reprint). The conditions include placing before the court sufficient materials or reasons showing good cause for being absent at the hearing and/or for not taking the required legal step in accordance with the time stipulated in the rules of court, to enable the court exercise its discretion in favour of the appellant's application.

In the case at hand, the applicant had stated in very clear terms the reasons for the delay in taking the steps of filing or bringing the application to set aside the decision of 25/3/2015 timeously and well presented in the supporting affidavit particularly paragraphs 3, 5, 6, 8, 9, 10 – 20 wherein were deposed that neither the applicant who has been in prison custody nor his counsel was served with the notice that the record of appeal was ready for collection before it was forwarded to the Supreme Court nor was appellant or counsel served with the said record or that notice of appeal had been listed for hearing and subsequent dismissal in chambers for failure to file the brief of argument within the stipulated time. Again portrayed in the depositions of the supporting affidavit is the fact that the applicant was not notified of what happened at the chambers sitting and applicant only became aware when someone sent by his counsel to inquire about the date for the hearing of the applicant's motion for extension of time to regularize applicant's brief already file after the hearing and dismissal in chambers. The situation is clearly against the rules of court, Order 6 Rule 3 (2) and Order 9 Rule 12(1) and 13(1) of the Supreme Court Rules.

The situation that was thrown up is against the well settled principle of law that in the process of adjudication in a court of law, service of process of court on the party to be effected, the appellant/applicant in this case is a *sine qua non* to the assumption of jurisdiction of the court. It follows that failure to serve the relevant process where the service is required as in the case at hand is breach of applicant's right to fair hearing and a fundamental defect going into the root of the proceedings and therefore rendered the proceedings or judgment or order a nullity. The situation is all the more poignant where the respondent did not file a counter affidavit which translates to an admission of the averments in the supporting affidavit leaving the court no option than to accept what the applicant averred as the true and correct state of affairs. See **Achuzie vs. Ogbonnah** (2016) 11 NWLR (Pt. 1522) 59 at 72; **Idisi vs. Ecodril& 3 Ors** (2016) 12 NWLR (Pt. 1527) 355 at 376-377.

The situation on ground needs no long story as clearly, the fair hearing right of the appellant/applicant was breached when he was not notified with the hearing notice or the record of appeal or that the record

A was even ready for collection and so the applicant effectively kept in the dark must be granted his right to be heard and the proceedings which led to his appeal's dismissal was a nullity and nothing can change that. This is because what the court did was without jurisdiction. See **Okaforvs. A.G.**
B **Anambra State** (1991) 6 NWLR (Pt. 200) 659; **Okoye vs. Nigeria Construction & Furniture Company (NCFC) Ltd** (1991) 6 NWLR (Pt. 199) 501 at 538.

From the foregoing, the applicant has manifestly shown that the only
C way to go is for this court to retrace its steps and do the right thing. In line with the lead ruling, I see a lot merit in this application which I grant as I abide by the consequential orders made.

Mary Ukaego Peter-odili
D ***Justice, Supreme Court***

BATA OGUNBIYI, (JSC): I read in draft the lead ruling of my learned brother Sanusi, JSC just delivered. I agree that the application herein has
E merit and should be granted.

My brother has considered adequately, the merit of the application and I do not wish to over flog same.

I therefore, also grant the application in terms of the orders made
F herein.

Clara Bata Ogunbiyi
Justice, Supreme Court

G **DAUDA BAGE, (JSC):** I have had the benefit of reading in draft the lead ruling of my learned brother **Amiru Sanusi,** JSC, just delivered. I agree entirely with the reasoning and conclusion reached. I do not have anything useful to add. The application has merit and it is accordingly granted as
H prayed.

Sidi Dauda Bage,
Justice, Supreme Court

I

NIGERIA LABOUR CONGRESS
AND
1. FEDERAL GOVERNMENT OF NIGERIA
2. ATTORNEY-GENERAL OF THE FEDERATION

SC. 133/2008

IN THE SUPREME COURT OF NIGERIA
HOLDEN AT ABUJA

FRIDAY, 2ND FEBRUARY, 2018

BEFORE THEIR LORDSHIPS

OLUKAYODE ARIWOOLA	**JUSTICE, SUPREME COURT**
KUMAI BAYANG AKA'AHS	**JUSTICE, SUPREME COURT**
AMINA ADAMU AUGIE	**JUSTICE, SUPREME COURT**
PAUL ADAMU GALINJE	**JUSTICE, SUPREME COURT**
SIDI DAUDA BAGE	**JUSTICE, SUPREME COURT**

ACTION: Academic issue – Implication – Whether an academic issue means an or irrelevant issue.

ACTION: Commencement of action – Originating process not signed by known legal practitioner – Whether irregularity does rob court of jurisdiction.

STATUTE: Ss 2(1) and S. 24 of Legal Practitioners Act – Purport and significance – Failure to comply – Implication.

STATUTES: Interpretation – Principles relevant thereto.

Issue for Determination

Whether the process with which this appeal is originated, that is the notice of appeal filed at the lower court, at pages 308-318 of the record is nullity having been prepared and signed by falana & falana chambers, which is

not a legal practitioner authorised by law to appear or act before the supreme court or any other court."

Facts of the Matter

By a motion dated the 29th day of June, 2016, brought pursuant to Order 2 Rule 9 of the Supreme Court Rules, 1985 (as amended) and Sections 2(1) and 24 of the Legal Practitioners Act, CAP 207, Laws of the Federation of Nigeria, and under the inherent jurisdiction of this court, the respondents' counsel informed this court, that the respondents shall at the hearing of this appeal raise a preliminary objection to the jurisdiction of this honourable court to hear this appeal and shall; pray this court for: **"AN ORDER STRIKING OUT THIS APPEAL FOR WANT OF JURISDICTION".** The other relief sought in the said motion is the usual omnibus relief by way of such further order or orders as this honourable court shall deem fit to make in the circumstances of this case.

The basis of the respondents' preliminary objection is stated as follows, that:

> **"1. The statement of defence and counterclaim filed by the appellant at pages 10-14 of the record, appellant's notice of appeal to the court below at pages 195-208 of the record, appellant's notice to this honourable court at pages 308-318 of the record are nullities having been prepared and signed by Falana&Falana Chambers, which is not a legal practitioner authorized by law to appear or act before the Supreme Court or any other court."**
>
> **"2. The appeal is academic, hypothetical and speculative."**

Held: (*Unanimously striking out the appeal).*

1. *Academic issue does not mean a bad issue or irrelevant issue*
I note, for (personal) reasons of jurisprudential advancement, that being "academic" does not necessarily mean an issue is bad or

vitiated. The logic or reasoning of it might become relevant for other (future) purposes of advancing the law and its jurisprudence. We all are products of "Academic Exercises" at one point or the other in the history of our legal education as lawyers, and later as Jurists. And "Academic Exercise" continue to be relevant at those professional trainings, conferences and others. More particularly instructive is the fact that I am writing this ruling with the inspirations of "Academic Exercise" derived at our on-going 2017 Judges' Conference. *(P 90 Paras E – G)*

2. *Where process was signed by Falana&Falana chambers*
The relevant facts are provided at page 312 of the records. After signing the appellant's notice of appeal, there is a signature which purports to be that of a counsel by name "FALANA & FALANA CHAMBERS" with bold inscription, "appellants" counsel of TY Danjuma Street (Opposite Kebbi State Government House, Asokoro, Abuja).

The issue in this preliminary objection is a question of documentary evidence that requires no conjecture. The contention of the leaned counsel to the appellant at page 2 of its amended reply to the respondent's notice of preliminary objection dated 1st June, 2016 and filed 9th June, 2016, is that, quoting him:

> **"In the instant appeal, no evidence is required to find out who signed the notice of appeal among the lawyers in Falana&Falana Chambers. A mere cursory look at the notice of appeal shows that it was signed by Femi Falana who is the legal practitioner whose signature is sufficiently legible to admit of no confusion or controversy."***(Pp 90 – 91 Paras G – C)*

Per Baje (JSC)

"This argument is out of context, with respect to the learned counsel. This is less than satisfactory attempt to interpret or alter the documentary evidence. The name "FEMI FALANA" is one that judicial notice may be taken, having attained a positive notoriety,

particularly in human rights advocacies in this country and beyond. The name "FEMI FALANA" is contained in the list of legal practitioners and not that of FALANA & FALANA CHAMBERS. On the face of the document (the notice of appeal), there is nothing to show the name of any registered legal practitioner in Nigeria including that of Chief Femi Falana, SAN. Using the phraseology of the counsel, it is apparent that "… "IN THE INSTANT APPEAL, NO EVIDENCE IS REQUIRED TO FIND OUT WHO SIGNED THE NOTICE OF APPEAL AMONG THE LAWYERS IN FALANA AND FALANA CHAMBERS," because none is, as a matter of fact indicated. No name at all. This omission, is in my considered opinion, and given the circumstances of this appeal, is fatal". *(P 91 Paras D – G)*

3. *Effect on jurisdiction where process not signed by a legal practitioner*
In the case of BRAITHWAITE vs. SKYE BANK (Supra), this court had made it abundantly clear while restating the earlier position in OKAFOR vs. NWEKE (supra) that the court's jurisdiction will become frozen once the originating or initiating processes in the action is signed or issued by a non-cognizable legal practitioner under the Legal Practitioners Act. This is because, it is now settled law that court processes, as in the instant appeal, must be signed by a person who is enrolled to practice law in this country as a Legal Practitioner under the Legal Practitioners Act. Chief Femi Falanawho jointly own and runs the FALANA & FALANA with his wife is a cognizable legal practitioner of note, so also his wife. No amount of logical inference or analogical advocacies would justify the fact that "FALANA & FALANA CHAMBERS" is a cognizable legal practitioner in Nigeria by virtue of the provisions of the Legal Practitioners Act. *(Pp 91 – 92 Paras G – B)*

4. *The purpose of S. 2(1) and 24 of Legal Practitioners' Act*
I wish to restate the position of this court, per Fabiyi, JSC, that the purpose of the provisions of sections 2(1) and 24 of the Legal Practitioners Act is to ensure that only legal practitioners whose name is on the Roll of the Supreme Court should sign court process.

For emphasis, I quote the provisions of the Act, thus:

> **"2. (1) Subject to the provisions of this Act, a person shall be entitled to practise as a barrister and solicitor if, and only if, his name is on the roll.**
>
> **24. In this Act, unless the context otherwise requires, the following expressions have the meanings hereby assigned to them respectively, that is to say- "the appeal committee" means the Appeal Committee of the Body of Benchers established by section 12 of this Act; "the association" means the Nigeria Bar Association; "the Attorney-General" means the Attorney-General of the Federation; "the bar council" has the meaning assigned to it by section 1 of this Act; "the Benchers" means the Body of Benchers established by section 3 of this Act; "the president of the association" means the person for the time being holding office as president of the association in accordance with the constitution of the association; "the Chief Justice" means the Chief Justice of Nigeria; "the disciplinary committee" has the meaning assigned to it by section 10 of this Act; "legal practitioner" means a person entitled in accordance with the provisions of this Act to practise as a barrister or as a barrister and solicitor, either generally or for the purposes of any particular office or proceedings ; "Prescribed" means prescribed by rules of court; "Public service of the Federation" has the same meaning as in the constitution of the Federal Republic of Nigeria" "qualifying certificate" has the same meaning as in the Legal Education (Consolidation) Act; "The registrar" means the Chief Registrar of the Supreme Court; "The roll"**

> **has the meaning assigned to it by subsection (1) of section 23 of this Act, and cognate expressions shall be construed accordingly; "Rules of court" means rules of court made by the Supreme Court; "Warrant" means a warrant issued by the Chief Justice under section 2 of this Act."**

(Pp 92 – 93 Paras B– E)

5. *The principles guiding interpretation of statutes*

The above provisions is clear and not in any way ambiguous. We have stated times without number, that the law is settled that express written provision of the law must be given its literary meaning irrespective of flowery embellishments in counsel's written argument. See **CALABAR vs. CENTRAL CO-OPERATIVE, THE RIFT AND CREDIT SOCIETY LIMITED & 2 ORS vs. BASSEY EKPONG EKPO (Supra) where Onnoghen, JSC (as he then was, now CJN) at page 29, lines 40-45, stated thus:**

> **"It is settled law that where the words of a statute or constitution are clear and unambiguous, they call for no interpretation, the duty of the court in such a circumstance being to apply the words as used by the legislature."**

This court, also in the case AG FEDERATION vs. ABUBAKAR 2007 20 W.R.N. Ratio 6, per Akintan, JSC restated the position as follows:

> **"It is necessary to say something about the general principle of interpretation of statutes, including constitutions. The generally accepted rule of construction is that it is to be assumed that the words and phrases of technical legislation are used in their technical meaning if they have acquired one, and**

> **otherwise in their ordinary meaning. Phrases and sentences are to be construed according to the rules of grammar. If there is nothing to modify, alter or qualify the language which the statute contains, it must be construed in the ordinary and natural meaning of the words and sentences. This approach is regarded as 'literal interpretation' or characterized as the 'positivist approach'…"** *(Pp 93 – 94 Paras F – D)*

6. *The purport of S.2 (1) and 24 of Legal Practitioners Act.*

In my view, the above provisions are clear. It is not within the contemplation of provisions of section 2(1) and section 24 of the Legal Practitioners Act that persons other than those listed in the Roll of the Supreme Court and listed as solicitors and advocates of the Supreme Court of Nigeria should sign originating processes or any court process whatsoever.

I'm in total agreement with the learned counsel to the respondents that this is a matter of law and that validity of originating processes in any proceedings is fundamental to the jurisdiction or competence of the suit. Thus, failure to commence or originate a suit, in this instant, an appeal, with valid processes, like a notice of appeal, goes to the root of the jurisdictional competence of the Court to hear and determine the substantive appeal. See BRAITHWAITE vs. SKYE BANK, a restatement of OKAFOR vs. NWEKE (Supra); where this court held that:

> **"The decision in OKAFOR vs. NWEKE was based on a substantive law- an Act of the National Assembly i.e. the Legal Practitioners Act. It is not based on Rules of Court. According to Oguntade, JSC, at page 534 of the judgment on OKAFOR vs. NWEKE. It would have been quite another matter if what is in issue is a mere compliance with court rules…. Per Fabiyi JSC, at page 21."** *(Pp 94 – 95 Paras E – B)*

Per Bage (JSC)

"Clearly, the word "FALANA & FALANA" is a clear breach of the provisions of the Legal Practitioners Act. The breach does not only get at the root of the appeal, but it gets to the root and uproots this appeal and snaps it off the list of pending appeals that should continue to receive the attention of this court. It is not something that could be swept under the carpet irrespective of the standing of the supposed counsel, least persons whose names are not in the Roll of the Supreme Court may issue court processes arbitrarily.

I wish to state that the law office of Chief AfeBabalola, SAN & Co. on behalf of which the learned counsel for the respondents filed the preliminary objection being considered had also been a victim. This is well captured and duly acknowledged at pages 9-10 of the respondents' brief where the preliminary objections is argued. In ALAWIYE vs. OGUNSANYA (Supra), Paras A-B, this court, irrespective of what Chief AfeBabalola, SAN, submitted that:

> **"… I am minded to observe as I have held herein that the materials consisting of the instant court processes to wit: the writ of summons, the statement of claim and the notice of cross-appeal, the initiating processes as filed in this matter and as signed and issued by "Chief AfeBabalola, SAN & Co" a non-cognizable Legal Practitioner as laid before this court, have formed the integral part of the record of appeal transmitted to this court…. In other words, is to the effect that all the critical materials to enable this court envincingly determine this matter are before this court. Indeed these initiating process as I have outlined above are purportedly initiating processes in this matter, meaning in effect that the proceedings before the two lower courts including their respective decisions have been predicated on the said fatally defective initiating**

processes. And once these processes have been voided as being nullities it must follow logically that the said decisions of the two courts must necessarily be voided as also being nullities. And I so find."
(Pp 95 – 96 Paras B – B)

Per Buge (JSC)

"In closing, the law, in my view, is settled on this issue to warrant dissipation of precious judicial time, efforts and labour. Pages 308-312 of the records speak for itself as to the fact that the notice of appeal was not signed by any known cognizable legal practitioner as required by the Legal Practitioners Act. In view of this, this court lacks jurisdiction to proceed to the substantive appeal, although we would have loved to do so. Not for the lack of willingness to proceed on our own part, but for the fact that the appellants have made it legally and practically impossible for this court to proceed beyond this point, for reasons stated above.

The next issue to add, without restating the obvious, is that the appeal has by implication of the above become hypothetical, speculative and moot. It is like saying the obvious. Why "being academic" is not to be perceived as being negative, for reasons stated above, this appeal is frozen, ice-covered and incapable of proceeding. It is imaginary and no longer real. Not only because the subject matter has been overtaken by events- as the position of the law would have been stated vis-à-vis the standing of the parties as to the issues in the appeal- but because doing otherwise would itself perpetrate a breach of the law, the Legal Practitioners Act.

In view of the foregoing, I hold that the preliminary objection of the respondents succeed on both grounds raised therein. This court lacks jurisdiction to proceed to hear the substantive appeal. The appeal is hereby struck-out. *(P 96 Paras C – H)*

Nigerian Cases Cited

A.G.F vs. Abubakar
AG FEDERATION vs. ABUBAKAR *2007 20 W.R.N.*
Alawiye vs. Ogunsanya
Braithwaite vs. Sky Bank Plc
Calabar Central Co-operative vs. Bassey Ekpoag Eko
Famfa Oil Ltd vs. A.G.F
First Bank of Nigeria vs. Alhaji Maiwada
Min. of Works and Transport Adamawa State vs. Yakubu
Obianwuna Ogbuayinwa vs. Okudo
Okafor vs. Nweke
Oketade vs. Adwunmi
Olareiye vs. Ogunsanya
Sande vs. Abdulahi
SLB Consortium Ltd vs. NPC

Nigerian Statutes cited

The Legal Practitioners Act Section 2(1) and section 24

Representation

Olusola Egbeyinka, for the appellant.
T. Babalola with Ademola Abimbola, and Francis Mamah, for the respondents.

DAUDA BAGE, (JSC) (Delivering the Lead Judgment): By a motion dated the 29th day of June, 2016, brought pursuant to Order 2 Rule 9 of the Supreme Court Rules, 1999 (as amended) and Sections 2(1) and 24 of the Legal Practitioners Act, CAP 207, Laws of the Federation of Nigeria, and under the inherent jurisdiction of this court, the respondent's counsel informed this court, that the respondents shall at the hearing of this appeal raise a preliminary objection to the jurisdiction of this honourable court to hear this appeal and shall; pray this court for: **"AN ORDER STRIKING OUT THIS APPEAL FOR WANT OF JURISDICTION".** The other relief sought in the said motion is the usual omnibus relief by way of such

A further order or orders as this honourable court shall deem fit to make in the circumstances of this case.

The basis of the respondents' preliminary objection is stated as follows, that:

B

> **"1. The statement of defence and counterclaim filed by the appellant at pages 10-14 of the record, appellant's notice of appeal to the court below at**
> C **pages 195-208 of the record, appellant's notice to this honourable court at page 308-318 of the record are nullities having been prepared and signed by Falana & Falana Chambers, which is**
> D **not a legal practitioner authorized by law to appear or act before the Supreme Court or any other court."**
> **"2. The appeal is academic, hypothetical and**
> E **speculative."**

I will now proceed, without further ado, to resolve the issue raised in the respondent's objection.

F

CONSIDERATION AND DETERMINATION OF THE PRELIMINARY OBJECTION

By the notice of preliminary objection, the respondents have clearly
G evinced an intention, an option that exist for the benefit of a party who do desires, to first and foremost have the preliminary point of law issue raised, decided one way or the other before the main appeal. The competence of this appeal is challenged on the ground that:

H

> **"The statement of defence and counterclaim filed by the appellant at pages 10-14 of the record. Appellant's notice of appeal to the court below at pages 195-208 of the record,**
> I **appellant's notice to this honourable court at page 308-312 of the record are nullities having been prepared and**

signed by Falana & Falana Chambers, which is not a legal practitioner authorized by law to appear or act before the Supreme Court."

The respondent's complaint is premised on this fact. The respondents had placed reliance on the decisions of this court in **OKAFOR vs. NWEKE** (2007) 1 NWLR (Pt. 1043) at 521 and **OKETADE vs. ADEWUNMI (2010) 8 NWLR** (Pt. 1195) at 63 in arguing that this appeal is defective and incompetent. The learned counsel to the respondents contended that this instant case is on all fours with **BRAITHWAITE vs. SKYE BANK PLC** (2013) 5 NWLR (Pt. 1346) at 1, **ALAWIYE vs. OGUNSANYA** (2013) 5 NWLR (Pt. 1348) 570; **FIRST BANK OF NIGERIA vs. ALHAJI MAIWADA** (2013) 5 NWLR (Pt. 1348) 444, **OKAFOR vs. NWEKE** (supra) and**SLB CONSORTIUM LIMITED vs. NPC** (2011) 9 NWLR (Pt. 1252) at 312-336.

Counsel submitted that the instant appeal is fatally defective as initiated and stressed further, that this court has held that it is now settled law that once it is established that an action was commenced by defective initiating processes (originating processes not signed by a legal practitioner authorised to practice law in Nigeria) it is a fundamental issue that goes to the root of the action robbing the court of jurisdiction to entertain the action and the action must be terminated or struck-out in ***liminie.*** For this proposition, the learned counsel relied on **BRAITHWAITE vs. SKYE BANK AND ALAWIYE vs. OGUNSANYA** (supra).

On the second ground, the learned counsel to the respondents contended that this appeal is liable to be struck-out in ***liminie*** being devoid of life issue, hypothetical and speculative. Counsel cited the case of **MINISTRY OF WORKS AND TRANSPORT ADAMAWA STATE vs. YAKUBU (2013) 6** NWLR (Pt. 1351) 481 at 497. Counsel further submits that, assuming without conceding that the appeal is competent, it is still academic and spent as events have since overtaken the issue sought to be determined. In closing, the learned counsel to the respondents urged this court to strike out this appeal in ***liminie*** for want of jurisdiction for being academic, hypothetical, moot and speculative.

In opposing this viewpoint, the appellant contended that the appeal is not incompetent or invalidated by virtue of the omission of specific name of counsel listed and licensed to file processes and appear before this court. Counsel for the appellant contended that the signature of the counsel is sufficiently legible and does not need to print or type his name below the signed portion of the notice of appeal. The learned counsel for the appellant submitted that no evidence is required to find out who signed the notice of appeal, as mere cursory look at the notice of appeal shows it was signed by Femi Falana who is the legal practitioner, whose signature is sufficiently legible to admit of no confusion or controversy.

The learned counsel to the appellant submitted in the alternative that, assuming this court agrees with the respondents that failure to type the name of the appellant's counsel is fatal to this appeal, this court has an established practice of not penalizing a litigant for the negligence of or error on the part of his counsel. The learned appellant counsel cited the case of **FAMFA OIL LIMITED vs. ATTORNEY-GENERAL OF THE FEDERATION (**2003) WRN 1 at 9, per Belgore, JSC **SAUDE vs. ABDULLAHI (1989)** 4 NWLR (Pt. 116) 387 at 424 per Karibe Whyte, JSC as well as **OBIANWUNA OGBUAYINWA vs. OKUDO** (Unreported) Suit NO. SC/1988, delivered on 6th July, 1990.

The learned appellant's counsel contended that the respondent has taken steps by not opposing the appellant's motion for departure from the rules to compile records, which was granted in chambers by this court. Thus, having taken steps, and not having raised its objection timeously, the respondents cannot challenge the notice of appeal at this stage of the proceedings. Counsel relied and quoted extensively from the decision of this Court in **SAUDE vs. ABDULLAHI** (Supra).

The learned counsel submitted in conclusion that, having not been misled, there is no legal justification for granting the prayer of the respondents for the dismissal of this appeal in view of the fact that signature of the appellant's counsel on the notice of appeal is legible. According to the learned counsel for the appellant, since the name of the counsel who signed the notice is sufficiently legible, the instant case is distinguishable from the case of **OKAFOR vs. NWEKE** (Supra). According to the learned

appellant's counsel, since the respondent has taken steps and having not shown that they suffered any miscarriage of justice as a result of the alleged irregularity complained of, counsel urged this court to dismiss the preliminary objection and proceed to hearing the substantive appeal.

With the above background analysis, I now proceed to determine the issue in the objection. The relevant point and issue, for the purpose of this appeal and the preliminary objection is:

> **"whether the process with which this appeal is originated, that is the notice of appeal filed at the lower court, at pages 308-318 of the record is nullity having been prepared and signed by falana & falana chambers, which is not a legal practitioner authorised by law to appear or act before the supreme court or any other court."**

This sole issue is capable of resolving or determining this preliminary objection as to whether it "… **is academic, hypothetical and speculative".** I note, for (personal) reasons of jurisprudential advancement, that being "academic" does not necessarily mean an issue is bad or vitiated. The logic or reasoning of it might become relevant for other (future) purposes of advancing the law and its jurisprudence. We all are products of "Academic Exercises" at one point or the other in the history of our legal education as lawyers, and later as Jurists. And "Academic Exercise" continue to be relevant at those professional trainings, conferences and others. More particularly instructive is the fact that I am writing this ruling with the inspirations of "Academic Exercise" derived at our on-going 2017 Judges' Conference.

The relevant facts are provided at page 312 of the records. After signing the appellant's notice of appeal, there is a signature which purports to be that of a counsel by name **"FALANA & FALANA CHAMBERS"** with bold inscription, "appellants" counsel of TY Danjuma Street (Opposite Kebbi State Government House, Asokoro, Abuja).

The issue in this preliminary objection is a question of documentary evidence that requires no conjecture. The contention of the leaned counsel

to the appellant at page 2 of its amended reply to the respondent's notice of preliminary objection dated 1st June, 2016 and filed 9th June, 2016, is that, quoting him:

> **"In the instant appeal, no evidence is required to find out who signed the notice of appeal among the lawyers in Falana & Falana Chambers. A mere cursory look at the notice of appeal shows that it was signed by Femi Falana who is the legal practitioner whose signature is sufficiently legible to admit of no confusion or controversy."**

This argument is out of context, with respect to the learned counsel. This is less than satisfactory attempt to interpret or alter the documentary evidence. The name **"FEMI FALANA"** is one that judicial notice may be taken, having attained a positive notoriety, particularly in human rights advocacies in this country and beyond. The name **"FEMI FALANA"** is contained in the list of legal practitioners and not that of **FALANA & FALANA CHAMBERS.** On the face of the document (the notice of appeal), there is nothing to show the name of any registered legal practitioner in Nigeria including that of **Chief Femi Falana, SAN.** Using the phraseology of the counsel, it is apparent that "… **"IN THE INSTANT APPEAL, NO EVIDENCE IS REQUIRED TO FIND OUT WHO SIGNED THE NOTICE OF APPEAL AMONG THE LAWYERS IN FALANA AND FALANA CHAMBERS,"** because none is, as a matter of fact indicated. No name at all. This omission, is in my considered opinion, and given the circumstances of this appeal, is fatal.

In the case of **BRAITHWAITE vs. SKYE BANK** (Supra), this court had made it abundantly clear while restating the earlier position in **OKAFOR vs. NWEKE** (supra) that the court's jurisdiction will become frozen once the originating or initiating processes in the action is signed or issued by a non-cognizable legal practitioner under the Legal Practitioners Act. This is because, it is now settled law that court processes, as in the instant appeal, must be signed by a person who is enrolled to practice law in

this country as a Legal Practitioner under the Legal Practitioners Act. Chief Femi Falana who jointly own and runs the FALANA & FALANA with his wife is a cognizable legal practitioner of note, so also his wife. No amount of logical inference or analogical advocacies would justify the fact that **"FALANA & FALANA CHAMBERS"** is a cognizable legal practitioner in Nigeria by virtue of the provisions of the Legal Practitioners Act.

I wish to restate the position of this court, per Fabiyi, JSC, that the purpose of the provisions of sections 2(1) and 24 of the Legal Practitioners Act is to ensure that only legal practitioners whose name is on the Roll of the Supreme Court should sign court process. For emphasis, I quote the provisions of the Act, thus:

> **"2. (1) <u>Subject to the provisions of this Act, a person shall be entitled to practise as a barrister and solicitor if, and only if, his name is on the roll.</u>**
>
> **24. In this Act, unless the context otherwise requires, the following expressions have the meanings hereby assigned to them respectively, that is to say- "the appeal committee" means the Appeal Committee of the Body of Benchers established by section 12 of this Act; "the association" means the Nigeria Bar Association; "the Attorney-General" means the Attorney-General of the Federation; "the bar council" has the meaning assigned to it by section 1 of this Act; "the Benchers" means the Body of Benchers established by section 3 of this Act; "the president of the association" means the person for the time being holding office as president of the association in accordance with the constitution of the association; "the Chief Justice" means the Chief Justice of Nigeria; "the disciplinary committee" has the meaning assigned to it by**

section 10 of this Act; "legal practitioner" means a person entitled in accordance with the provisions of this Act to practise as a barrister or as a barrister and solicitor, either generally or for the purposes of any particular office or proceedings ; "Prescribed" means prescribed by rules of court; "Public service of the Federation" has the same meaning as in the constitution of the Federal Republic of Nigeria" "qualifying certificate" has the same meaning as in the Legal Education (Consolidation) Act; "The registrar" means the Chief Registrar of the Supreme Court; "The roll" has the meaning assigned to it by subsection (1) of section 23 of this Act, and cognate expressions shall be construed accordingly; "Rules of court" means rules of court made by the Supreme Court; "Warrant" means a warrant issued by the Chief Justice under section 2 of this Act."

The above provisions is clear and not in any way ambiguous. We have stated times without number, that the law is settled that express written provision of the law must be given its literary meaning irrespective of flowery embellishments in counsel's written argument. See **CALABAR vs. CENTRAL CO-OPERATIVE, THE RIFT AND CREDIT SOCIETY LIMITED & 2 ORS vs. BASSEY EKPONG EKPO** (Supra) where Onnoghen, JSC (as he then was, now CJN) at page 29, lines 40-45, stated thus:

> **"It is settled law that where the words of a statute or constitution are clear and unambiguous, they call for no interpretation, the duty of the court in such a circumstance being to apply the words as used by the legislature."**

A This court, also in the case **AG FEDERATION vs. ABUBAKAR** 2007 20 W.R.N. Ratio 6, per Akintan, JSC restated the position as follows:

> **"It is necessary to say something about the general**
> B **principle of interpretation of statutes, including constitutions. The generally accepted rule of construction is that it is to be assumed that the words and phrases of technical legislation are used in their technical**
> C **meaning if they have acquired one, and otherwise in their ordinary meaning. Phrases and sentences are to be construed according to the rules of grammar. If there is nothing to modify, alter or qualify the language which**
> D **the statute contains, it must be construed in the ordinary and natural meaning of the words and sentences. This approach is regarded as 'literal interpretation' or characterized as the 'positivist approach'…"**

E

In my view, the above provisions are clear. It is not within the contemplation of provisions of section 2(1) and section 24 of the Legal Practitioners Act that persons other than those listed in the Roll of the
F Supreme Court and listed as solicitors and advocates of the Supreme Court of Nigeria should sign originating processes or any court process whatsoever.

I'm in total agreement with the learned counsel to the respondents
G that this is a matter of law and that validity of originating processes in any proceedings is fundamental to the jurisdiction or competence of the suit. Thus, failure to commence or originate a suit, in this instant, an appeal, with valid processes, like a notice of appeal, goes to the root of the jurisdictional
H competence of the Court to hear and determine the substantive appeal. See **BRAITHWAITE vs. SKYE BANK,** a restatement of **OKAFOR vs. NWEKE** (Supra); where this court held that:

> I **"The decision in OKAFOR vs. NWEKE was based on a substantive law- an Act of the National Assembly i.e. the**

Legal Practitioners Act. It is not based on Rules of Court. According to Oguntade, JSC, at page 534 of the judgment on OKAFOR vs. NWEKE. It would have been quite another matter if what is in issue is a mere compliance with court rules…. Per Fabiyi JSC, at page 21."

Clearly, the word "FALANA & FALANA" is a clear breach of the provisions of the Legal Practitioners Act. The breach does not only get at the root of the appeal, but it gets to the root and uproots this appeal and snaps it off the list of pending appeals that should continue to receive the attention of this court. It is not something that could be swept under the carpet irrespective of the standing of the supposed counsel, least persons whose names are not in the Roll of the Supreme Court may issue court processes arbitrarily.

I wish to state that the law office of Chief Afe Babalola, SAN & Co. on behalf of which the learned counsel for the respondents filed the preliminary objection being considered had also been a victim. This is well captured and duly acknowledged at pages 9-10 of the respondents' brief where the preliminary objections is argued. In **ALAWIYE vs. OGUNSANYA** (Supra), Paras A-B, this court, irrespective of what Chief Afe Babalola, SAN, submitted that:

"… I am minded to observe as I have held herein that the materials consisting of the instant court processes to wit: the writ of summons, the statement of claim and the notice of cross-appeal, the initiating processes as filed in this matter and as signed and issued by "Chief AfeBabalola, SAN & Co" a non-cognizable Legal Practitioner as laid before this court, have formed the integral part of the record of appeal transmitted to this court…. In other words, is to the effect that all the critical materials to enable this court envincingly determine this matter are before this court. Indeed these initiating

process as I have outlined above are purportedly initiating processes in this matter, meaning in effect that the proceedings before the two lower courts including their respective decisions have been predicated on the said fatally defective initiating processes. And once these processes have been voided as being nullities it must follow logically that the said decisions of the two courts must necessarily be voided as also being nullities. And I so find."

In closing, the law, in my view, is settled on this issue to warrant dissipation of precious judicial time, efforts and labour. Pages 308-312 of the records speak for itself as to the fact that the notice of appeal was not signed by any known cognizable legal practitioner as required by the Legal Practitioners Act. In view of this, this court lacks jurisdiction to proceed to the substantive appeal, although we would have loved to do so. Not for the lack of willingness to proceed on our own part, but for the fact that the appellants have made it legally and practically impossible for this court to proceed beyond this point, for reasons stated above.

The next issue to add, without restating the obvious, is that the appeal has by implication of the above become hypothetical, speculative and moot. It is like saying the obvious. Why "being academic" is not to be perceived as being negative, for reasons stated above, this appeal is frozen, ice-covered and incapable of proceeding. It is imaginary and no longer real. Not only because the subject matter has been overtaken by events- as the position of the law would have been stated vis-à-vis the standing of the parties as to the issues in the appeal- but because doing otherwise would itself perpetrate a breach of the law, the Legal Practitioners Act.

In view of the foregoing, I hold that the preliminary objection of the respondents succeed on both grounds raised therein. This court lacks jurisdiction to proceed to hear the substantive appeal. The appeal is hereby struck-out.

Sidi Dauda Bage,
Justice, Supreme Court

A **OLU ARIWOOLA, (JSC):** I had the privilege of reading in draft the lead judgment of my learned brother **Bage, JSC** just delivered. I agree entirely with the reasoning and conclusion that the appeal is unmeritorious and should be struck out. I too will strike out the appeal.

B Appeal struck out.

Olu Ariwoola
Justice, Supreme Court

C **ADAMU GALINJE, (JSC):** I have had the privilege of reading in draft, the judgment just delivered by my learned brother Bage JSC and I agree with the reasoning contained therein and the conclusion arrived thereat.

The issue of who is competent to issue and sign documents filed in **D** the court registry in this by the appellant nor by a person authorized to practice Law in Nigeria. Accordingly this appeal shall be and it is hereby struck out.

Paul Adamu Galinje
E ***Justice, Supreme Court***

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H

I

NIGERIAN NATIONAL PETROLEUM CORPORATION :: AND SAMFADEK & SONS LIMITED

SC. 108/2005

IN THE SUPREME COURT OF NIGERIA HOLDEN AT ABUJA

FRIDAY 16TH FEBRUARY, 2018

BEFORE THEIR LORDSHIPS

MUSA DATTIJO MUHAMMAD	**JUSTICE, SUPREME COURT**
AMINA ADAMU AUGIE	**JUSTICE, SUPREME COURT**
EJEMBI EKO	**JUSTICE, SUPREME COURT**
PAUL ADAMU GALINJE	**JUSTICE, SUPREME COURT**
SIDI DAUDA BAGE	**JUSTICE, SUPREME COURT**

EVIDENCE: Burden of proof – Burden of introducing prima facie evidence – Where an applicant fails to introduce "prima facie" evidence in proof of an issue he alleges – Implication – Whether the respondent has no burden of denying any assertion that was not proved.

JUDGMENT AND ORDERS: Where hot set aside – Effect – Whether valid and subsisting.

LEGAL PRACTITIONERS: Error of counsel – The general rule that mistake of counsel should not be visited on the litigant – Whether there are exceptions thereto – Relevant considerations thereof.

LEGAL PRACTITIONERS: Inadvertence of counsel – Application of principles thereof – Whether rule cannot be applied to foist injustice on another party.

LEGAL PRACTITIONERS: Strategic blunders – Failure of strategy – Where the strategy adopted by a counsel fails – Whether the client and counsel would take full responsibilities thereof – Whether inadvertence of counsel is inapplicable.

PRACTICE AND PROCEDURE: Application for extension of time – Reason for delay – Inadvertence of counsel – Onus on party who alleges – Relevant considerations thereof.

PRACTICE AND PROCEDURE: Application for extension of time within which to appeal to the Supreme Court – Or. 2 Rule 31 of Supreme Court Rules – Onus on applicant – How discharged.

PRACTICE AND PROCEDURE: Application for extension of time within which to appeal – Reason for delay – Inadvertence of counsel – A question of fact – Onus on applicant to adduce sufficient evidence of such inadvertence – S. 132 of Evidence Act 2011.

PRACTICE AND PROCEDURE: Remitance of case for rehearing – Where the Court of Appeal remitted a case for rehearing – Party did not appeal against decision – Party rather applied to the trial court to decline jurisdiction – Propriety of procedure thereof.

Issue for Determination

Whether the applicant has adduced sufficient evident to explain his inability to appeal after 21 yrs to enable the court exercise its discretion in this application for extension of time to appeal.

Facts of the Matter

This application, argued on 28th November, 2017, was filed on 6th April, 2017. It prays for two principal reliefs, to wit:

1. **An order for extension of time within which the appellant/applicant may appeal against the judgment of the Court of Appeal, Lagos Division in the appeal No. CA/L/214/93 delivered on the 27th May, 1996.**
2. **An order granting leave to the appellant/applicant to rely on the records of appeal and the amended appellant's brief of argument filed in this appeal.**

In the unanimous decision of the Court of Appeal in the appeal No. CA/L/214/93 on 27th May, 1996 (per Uwaifo, Ayoola & Pats-Acholonu, JJCA as they were then) more than 21 years before this instant application, a consequential order was made remitting the case No. ID/1532/89 to the trial judge, Oduneye, J. of Lagos State High Court.

> **For compensation due the 2nd Respondent (Samfadek and Sons Ltd) under the (Oil Pipelines) Act to be properly addressed. The parties are at liberty to adduce evidence for the purpose of assessment of such compensation.**

This was not appealed, at least then. This is the order the appellant/applicant now, by this application, wants to appeal within another appeal (the instant appeal SC.108/2005) before this court against the subsequent decisions of the Court of Appeal in appeals Nos. CA/L/178/98 & CA/L/214/99. I will come anon to this.

In obedience to the order of remittance made on 27th May, 1996, in the appeal No. CA/L/214/93, Oduneye J. resumed the proceedings in the suit No. ID/1532/89, with all the parties, including the appellant/applicant, participating in the proceedings to determine the "compensation due to the 2nd respondent" (Samfadek & Sons Ltd.) under the Oil Pipeline Act. Final judgment on that very narrow question was delivered by Oduneye, J. on 20th November, 1998. The appellant/applicant herein, the Nigerian National Petroleum Corporation (NNPC) was ordered to pay N24,000,000.00 as compensation under the Oil Pipelines Act.

Before the final judgment, and in the proceedings of the trial court before Oduneye J., following the order of the Court of Appeal on 27th May, 1996, the appellant/applicant herein, brought an application dated 30th May, 1997 praying "that the trial court should decline the re-hearing of the matter." It was contended in the application, ostensibly inviting the trial court not to submit to the superior order of the Court of Appeal, that:

9. in the interest of Justice the matter should not be re-tried by the honourable court.
10. this hon. court has already heard too much on the merit of this case.
11. this court has already made its decision on the issue raised in the pleadings and evidence.
12. in the interest of justice this hon. court should decline jurisdiction to re-hear the case.

The learned trial judge, Oduneye, J., in his ruling delivered on 13th June, 1997 dismissed the application. He granted the appellant/applicant leave on 25th July, 11997, to appeal his decision of 13th June, 1997 – 42 days after the Ruling. It appears that the notice of appeal filed on 15th August, 1997, at pages 56 and 57 of the record, directed at "the ruling of Hon. justice J. A. Oduneye, J dated 13th June, 1997 and 25th July, 1997", was purportedly filed in pursuance of the leave granted on 25th July, 1997 by Oduneye, J. That notice of appeal appears to be the foundation of the appeal No. CA/L/178/98.

Meanwhile, NNPC did not appeal the order of the Court of Appeal made on 27th May, 1996 in the appeal No. CA/L/214/93 remitting the case back to Oduneye, J. to hear the parties and determine the proper compensation due to SAMFADEK & SONS LTD., the respondent, under the Oil Pipelines Act. In compliance with that order, Oduneye J., in the suit No. ID/1532/89 proceeded in the proceedings and delivered his final decision on 20th November, 1998. The NNPC appeal against the final decision of Oduneye J. delivered on 20th November, 1998 is the appeal No. CA/L/214/99. This appeal and the earlier interlocutory appeal No. CA/L/178/98 were heard together.

The Court of Appeal (coram: Ogebe, Aderemi and Galadima, JJCA, as they were then) delivered judgment in the appeals No. CA/L/178/98 and CA/L/214/99 on 3rd December, 2003. The decision of Oduneye J., including the N24,000,000.00 assessed as compensation due to SAMFADEK & SONS LTD under the Oil Pipelines Act, was affirmed. This decision prompted the instant appeal No. SC.108/2005, now before us.

Briefs have been filed and exchanged. And just as the appeal was to be heard, NNPC, the appellant, had brought forth this instant application. The hearing of the appeal, fixed earlier, was thus smothered or muzzled by this application.

The application prays, *inter alia,* for "an order for extension of time within which the appellant/applicant may appeal against the judgment of the Court of Appeal, Lagos Division in the appeal No. CA/L/214/93 delivered on the 27th May, 1996."

Held: *(Unanimously dismissing the application)*

1. *Conditions which an applicant must fulfill in an application for extension of time within which to appeal.*
Order 2 Rule 31 of the rules of this court obligates the applicant in an application for extension of time within which to appeal, firstly; to set forth, in the supporting affidavit, "good and substantial reasons for failure to appeal within the prescribed period", and in addition to establish that the proposed grounds of appeal "*prima facie* show good cause why the appeal should be heard." The applicant, citingIKENTA BEST (NIG) LTD vs. A.G. RIVERS STATE (2008) 2 3 SC (Pt.1) 128, (2008) LPELR 1476 (SC), is no doubt aware that he is enjoined, in order to succeed, to meet the simultaneous existence of the two conditions. *(P 111 Paras F – H)*

2. *Failure to appeal after 21 years is evidence of inordinate delay*
Failure to appeal after over 21 years *prima facie* is evidence of inordinate delay and crass indiligence. The only reason adduced by the instant applicant for the delay, in appealing the Court of Appeal

decision delivered on 27th May, 1996 in the appeal No. CA/L/214/93, is the unparticularised or non specific and nebulous inadvertence of counsel. The bare faced averment in paragraph 10 (b) of the supporting affidavit runs thus:

> **That the appellant's counsel appealed the sister decision in appeal No. CA/L/178/98 & CA/L/214/99 but inadvertently omitted to file as separate a notice of appeal against the judgment in Appeal No. CA/L/214/93.**

The decision in the Appeal No. CA/L/214/93, being the genesis of the final judgment of the trial court delivered on 20th November, 1993, in the suit No. ID/1532/89 from which appeals Nos. CA/L/178/98 and CA/L/214/99 sprang, could not have been a sister appeal of the two subsequent appeals No. CA/L/178/98 & CA/L/214/99.
(Pp 111 – 112 Paras H – D)

3. *The burden of proving inadvertence of counsel lies on the applicant*
In any case, inadvertence of counsel is a matter of fact. The question is: what and which facts constitute this blanket or misty inadvertence of counsel pleaded by the applicant? The burden of proving the alleged inadvertence of counsel lies on this applicant. He has to prove the existence of such inadvertence of counsel, resulting in this crass indiligence or inordinate delay to appeal a decision after over 21 years, in order to succeed in this application: Section 132 of the Evidence Act, 2011. The burden of first proving the existence or non-existence of the alleged inadvertence of counsel lies on this applicant, who would fail if no evidence at all were produced on either side: Section 133 Evidence Act. The burden of first introducing this "*prima facie* evidence" as Nnamani, JSC, calls it, in DURU vs. NWOSU (1989) 20 NSCC 1 at 10 – 11, falls on the applicant. The reason is obvious: what is alleged without proof can be denied without proof. The respondent has no burden of

disproving any assertion of fact, requiring proof, that is not proved. It is only when a party, who has the initial burden of leading evidence on a particular issue, does so *prima facie* that he throws the burden of rebutting that evidence on the defendant or respondent to refute or rebut: ESEIGBE vs. AGHOLOR (1993) 9 NWLR (Pt.316) 128 (SC) at 144. *(P 112 Paras D – I)*

Per Eko (JSC)

"I do not accept that paragraph 10(b) of the supporting affidavit, averring that the reason for delay was the nebulous inadvertence of counsel, can be taken to have established, satisfactorily, "good and substantial reasons for the delay." Accepting this reason will ultimately expose the courts to deluge of applications to revive and resurrect stale matters in the archives of our courts. That definitely contravenes the age old policy that there must be end to litigation.

It was averred in paragraph 4 of the supporting affidavit that NNPC timeously instructed their solicitors to appeal the decision of the Court of Appeal delivered on 27th May, 1996 remitting the case No. ID/1532/89 back to Oduneye, J. for hearing and determination on the narrow issue of the proper compensation payable to SAMFADEK & SONS LTD. There was no appeal against that order of 17th May, 1996. Applicant's counsel, in a move or strategy that is both novel and disingenuous, if not bizarre, applied to the trial court (coram: Oduneye, J.) to decline jurisdiction to re-hear the matter remitted to it by order of the Court of Appeal. Which had neither been appealed nor set aside. The efficacy of that order was not in doubt. A Judgment or order of court remains binding until set aside by a competent court: ROSSEK vs. ACB LTD (1993) LPELR – 2955 (SC). The application was overruled. That prompted the lodging of Appeal No. CA/L/178/98". *(P 114 Paras A – F)*

4. *Applicant has filed irregular processes which has resulted in confusion*
As can be seen from page 159 of the record, which the applicant seeks leave to use in the event of our granting him the extension of time within which to appeal the order made in appeal No. CA/L/214/93, the appellant/applicant had abandoned appeal No. CA/L/178/98. The respondent had drawn the attention of the Court of Appeal to the confusion the appellant had introduced into this appeal by filing notices of appeal dated 1st August, 1998 and 15th June, 1999. The Court of Appeal found as a fact that:

> **the notice of appeal dated 1st August, 1997 and filed on 5th May, 1998 is directed against the two rulings of the trial court delivered on 13th June, 1997 and 25th July, 1997 respectively. The notice relevant to the present appeal is the one dated 15th June, 1999 let in by the application dated 7th February, 2000. It is even clear from the body of that notice that it is directed against the judgment of 20th November, 1998.**

From the processes the two appeals purportedly argued at the Court of Appeal bore CA/L/178/98 and CA/L/214/99. In actuality, Appeal No. SC.108/2005 stems from the appeal No. CA/L/214/99; not appeal No. CA/L/178/98 (which has not been heard).
(Pp 113 – 114 Paras F – C)

5. *Application will not serve any useful purpose as the order intended to be appealed has been accomplished*
Apart from the applicant's failure to make out any good and substantial reasons for failure to appeal the decision of 27th May, 1996 in the appeal No. CA/L/214/93 within the prescribed period, the grant of the instant application will not serve the ends of justice. It will also cause confusion. The order of the Court of Appeal made on 27th May, 1996 has been accomplished with the hearing of the suit No. ID/1532/89 on the narrow issue of compensation and its final

decision on it delivered on 20th November, 1998. The appellant/ applicant participated in it and in the appeal No. CA/L/214/99 emanating therefrom. *(P 114 Paras C – E)*

Per Eko (JSC)

"The underlying mischief, albeit ulterior purpose, for this application is what Kayode Sofola, SAN stated under his hand in paragraph 4 of the grounds for the reliefs sought. That is:

> **4. This application is necessary for the hearing of the instant appeal on its merits in the interest of justice.**

There is no interest of justice, and none will be served, with a party and or his counsel bringing an application seeking equitable remedy which application merely seeks to cause confusion or to confuse issues. I agree with Mr. Kasunmu, of counsel for the respondent, that this application has been brought merely to stifle the hearing of the appeal No. SC.108/2005. The conduct of the applicant does not warrant my granting this application. *(P 114 Paras F – H)*

6. *Exceptions to the rule that inadvertence of counsel should not be visited on the litigant.*

There are exceptions to the rule that inadvertence or error of Counsel should not be visited on the litigant. In ASORE vs. LEMOMU (1994) 7 NWLR (Pt.356) 284, cited with approval in OKWELUME vs. ANOLIEFO (1996) 1 NWLR (Pt.425) 468 at 481, it was held that the failure or inadvertence of counsel to file notice of appeal within 30 days was fatal. This court had, in ASORE case, indulged the appellant additional 30 days to file his appeal. His counsel filed the appeal on the 34th day, four days outside the time extended for them to appeal.

Where there has been a failure of strategy or tactic on the part

of the counsel, as in the instant case, the litigant, his client, cannot escape such blunders committed by his counsel; for if the strategy had worked, both the counsel and his client took full credit. Accordingly, they must also take full responsibility for the failure of the strategy: BELLO AKANBI vs. ALAO (1998) all NLR 424 at 440; 401, 444. Neither mischief, ineptitude nor strategic blunders are envisaged by the rule that inadvertence of counsel should not be visited on the litigant, his client. The rule cannot be applied to foist injustice on another party: AKANBI vs. ALAO (supra). Nor will the rule apply in a clear case of abuse of court's process, as in the instant case.

It is unjust to grant this application. Accordingly, the application is hereby refused. The respondent is entitled to costs, and taking the conduct of this litigation by the appellant/applicant's counsel into consideration costs assessed at N500,000.00 and payable by Kayode Sofola & Associates, a law firm headed by Kayode Sofola, SAN, shall be and are hereby awarded in favour of the respondent. It is time stakeholders in administration of justice in this country realized that justice delayed by unnecessary tricks and gimmicks by all concerned correlatively affects the growth of commerce and the economy. *(Pp 114 – 115 Paras H – E)*

7. *A party who wants to avail himself of the concept of inadvertence of counsel must show that he acted promptly in giving instruction to his counsel.*

The only reason for the applicant's failure to file the appeal within the prescribed period is the usual inadvertence of counsel as deposed to at paragraph 10 (b) of the supporting affidavit.

In Ahmed vs. Trade Bank Plc (1996) 3 NWLR (Pt. 437) 445, it was held that the concept that the sin of Counsel should not be visited on the litigant is without doubt a judicial expedience and although convenient must not be jeopardized by indiscriminate applications. Hence to be able to sustain the concept, the applicant needs to show that he acted promptly in giving instruction to his

solicitor to file the appeal, but that the inadvertence or negligence of the solicitor caused the delay. It is also the Law that even when the applicant acted promptly in instructing his counsel, he is still expected to ensure that the counsel carried out the instruction. This is so because the litigant who fails to ascertain if his counsel has taken the necessary steps to bring his appeal is as well negligent.

For 21 years the applicant slept over its right to appeal. It surely has an uphill task of convincing this court that it gave instruction to its Counsel to appeal against the decision of 27th May, 1996 and counsel failed to do so. Mere instruction to counsel is not sufficient. The appellant must show that it took some steps to ensure that the counsel complied with the instruction. Applicant has not shown in the supporting affidavit that it took some measures to ensure that its counsel complied with its instruction. The applicant has failed to give good and substantial reasons for its failure to file its appeal within the prescribed period. *(Pp 116 – 117 Paras D – A)*

Nigerian Cases Cited

Ahmed vs. Trade Bank Plc (1996) 3 NWLR (Pt. 437) 445,
Asore vs. Lemomu (1994) 7 NWLR (Pt.356) 284
Bello Akanbi vs. ALAO (1998) all NLR 424
Eseigbe vs. Agholor (1993) 9 NWLR (Pt.316) 128 (SC)
Ikenta Best (NIG) LTD vs. A.G. Rivers State (2008) 2 3 SC (Pt.1) 128, (2008) LPELR 1476 (SC),
Okwelume vs. Anoliefo (1996) 1 NWLR (Pt.425) 468
Rossek vs. ACB LTD (1993) LPELR 2955 (SC).

Representation

Opeyemi Atawo, (Esq.), for the Appellant/Applicant.
A. B. Kasunmi, (Esq.), for the Respondent.

EJEMBI EKO, (JSC) (Delivering the Lead judgment): This application, argued on 28th November, 2017, was filed on 6th April, 2017. It prays for two principal reliefs, to wit:

> **3. An order for extension of time within which the appellant/applicant may appeal against the judgment of the Court of Appeal, Lagos Division in the appeal No. CA/L/214/93 delivered on the 27th May, 1996.**
>
> **4. An order granting leave to the appellant/applicant to rely on the records of appeal and the amended appellant's brief of argument filed in this appeal.**

In the unanimous decision of the Court of Appeal in the appeal No. CA/L/214/93 on 27th May, 1996 (per Uwaifo, Ayoola & Pats-Acholonu, JJCA as they were then) more than 21 years before this instant application, a consequential order was made remitting the case No. ID/1532/89 to the trial judge, Oduneye, J. of Lagos State High Court.

> **For compensation due the 2nd Respondent (Samfadek and Sons Ltd) under the (Oil Pipelines) Act to be properly addressed. The parties are at liberty to adduce evidence for the purpose of assessment of such compensation.**

This was not appealed, at least then. This is the order the appellant/applicant now, by this application, wants to appeal within another appeal (the instant appeal SC.108/2005) before this court against the subsequent decisions of the Court of Appeal in appeals Nos. CA/L/178/98 & CA/L/214/99. I will come anon to this.

In obedience to the order of remittance made on 27th May, 1996, in the appeal No. CA/L/214/93, Oduneye J. resumed the proceedings in the suit No. ID/1532/89, with all the parties, including the appellant/applicant, participating in the proceedings to determine the "compensation due to the

A 2nd respondent" (Samfadek & Sons Ltd.) under the Oil Pipeline Act. Final judgment on that very narrow question was delivered by Oduneye, J. on 20th November, 1998. The appellant/applicant herein, the Nigerian National Petroleum Corporation (NNPC) was ordered to pay N24,000,000.00 as
B compensation under the Oil Pipelines Act.

Before the final judgment, and in the proceedings of the trial court before Oduneye J., following the order of the Court of Appeal on 27th May, 1996, the appellant/applicant herein, brought an application dated 30th May,
C 1997 praying "that the trial court should decline the re-hearing of the matter." It was contended in the application, ostensibly inviting the trial court not to submit to the superior order of the Court of Appeal, that:

D
9. in the interest of Justice the matter should not be re-tried by the honourable court.

10. this Hon. court has already heard too much on the merit of this case.

E
11. this court has already made its decision on the issue raised in the pleadings and evidence.

12. in the interest of justice this Hon. court should decline jurisdiction to re-hear the case.

F

The learned trial judge, Oduneye, J., in his ruling delivered on 13th June, 1997 dismissed the application. He granted the appellant/applicant (herein after called NNPC) leave on 25th July, 1997, to appeal his decision of 13th
G June, 1997 – 42 days after the Ruling. It appears that the notice of appeal filed on 15th August, 1997, at pages 56 and 57 of the record, directed at "the ruling of hon. justice J. A. Oduneye, J dated 13th June, 1997 and 25th July, 1997", was purportedly filed in pursuance of the leave granted on 25th July,
H 1997 by Oduneye, J. That notice of appeal appears to be the foundation of the appeal No. CA/L/178/98.

Meanwhile, NNPC did not appeal the order of the Court of Appeal made on 27th May, 1996 in the appeal No. CA/L/214/93 remitting the case
I back to Oduneye, J. to hear the parties and determine the proper

compensation due to SAMFADEK &SONS LTD., the respondent, under the Oil Pipelines Act. In compliance with that order, Oduneye J., in the suit No. ID/1532/89 proceeded in the proceedings and delivered his final decision on 20th November, 1998. The NNPC appeal against the final decision of Oduneye J. delivered on 20th November, 1998 is the appeal No. CA/L/214/99. This appeal and the earlier interlocutory appeal No. CA/L/178/98 were heard together.

The Court of Appeal (Coram: Ogebe, Aderemi and Galadima, JJCA, as they were then) delivered judgment in the appeals No. CA/L/178/98 and CA/L/214/99 on 3rd December, 2003. The decision of Oduneye J., including the N24,000,000.00 assessed as compensation due to SAMFADEK & SONS LTD under the Oil Pipelines Act, was affirmed. This decision prompted the instant appeal No. SC.108/2005, now before us, my Lords. The appeal is ripe for hearing. Briefs have been filed and exchanged. And just as the appeal was to be heard, NNPC, the appellant, had brought forth this instant application. The hearing of the appeal, fixed earlier, was thus smothered or muzzled by this application.

The application prays, *inter alia,* for "an order for extension of time within which the appellant/applicant may appeal against the judgment of the Court of Appeal, Lagos Division in the appeal No. CA/L/214/93 delivered on the 27th May, 1996." Order 2 Rule 31 of the rules of this court obligates the applicant in an application for extension of time within which to appeal, firstly; to set forth, in the supporting affidavit, "good and substantial reasons for failure to appeal within the prescribed period", and in addition to establish that the proposed grounds of appeal "*prima facie* show good cause why the appeal should be heard." The applicant, citing **IKENTA BEST (NIG) LTD vs. A.G. RIVERS STATE (2008) 2 – 3 SC (Pt.1) 128, (2008) LPELR – 1476 (SC),** is no doubt aware that he is enjoined, in order to succeed, to meet the simultaneous existence of the two conditions.

Failure to appeal after over 21 years *prima facie* is evidence of inordinate delay and crass indiligence. The only reason adduced by the instant applicant for the delay, in appealing the Court of Appeal decision delivered on 27th May, 1996 in the appeal No. CA/L/214/93, is the

unparticularised or non specific and nebulous inadvertence of counsel. The bare faced averment in paragraph 10 (b) of the supporting affidavit runs thus:

> **That the appellant's counsel appealed the sister decision in appeal No. CA/L/178/98 & CA/L/214/99 but inadvertently omitted to file as separate a notice of appeal against the judgment in Appeal No. CA/L/214/93.**

The decision in the Appeal No. CA/L/214/93, being the genesis of the final judgment of the trial court delivered on 20th November, 1993, in the suit No. ID/1532/89 from which appeals Nos. CA/L/178/98 and CA/L/214/99 sprang, could not have been a sister appeal of the two subsequent appeals No. CA/L/178/98 & CA/L/214/99.

In any case, inadvertence of counsel is a matter of fact. The question is: what and which facts constitute this blanket or misty inadvertence of counsel pleaded by the applicant? The burden of proving the alleged inadvertence of counsel lies on this applicant. He has to prove the existence of such inadvertence of counsel, resulting in this crass indiligence or inordinate delay to appeal a decision after over 21 years, in order to succeed in this application: Section 132 of the Evidence Act, 2011. The burden of first proving the existence or non-existence of the alleged inadvertence of counsel lies on this applicant, who would fail if no evidence at all were produced on either side: Section 133 Evidence Act. The burden of first introducing this "*prima facie* evidence" as Nnamani, JSC, calls it, in **DURU vs. NWOSU (1989) 20 NSCC 1 at 10 – 11,** falls on the applicant. The reason is obvious: what is alleged without proof can be denied without proof. The respondent has no burden of disproving any assertion of fact, requiring proof, that is not proved. It is only when a party, who has the initial burden of leading evidence on a particular issue, does so *prima facie* that he throws the burden of rebutting that evidence on the defendant or respondent to refute or rebut: **ESEIGBE vs. AGHOLOR (1993) 9 NWLR (Pt.316) 128 (SC) at 144.**

I do not accept that paragraph 10(b) of the supporting affidavit, averring that the reason for delay was the nebulous inadvertence of counsel, can be taken to have established, satisfactorily, "good and substantial reasons for the delay." Accepting this reason will ultimately expose the courts to deluge of applications to revive and resurrect stale matters in the archives of our courts. That definitely contravenes the age old policy that there must be end to litigation.

It was averred in paragraph 4 of the supporting affidavit that NNPC timeously instructed their solicitors to appeal the decision of the Court of Appeal delivered on 27th May, 1996 remitting the case No. ID/1532/89 back to Oduneye, J. for hearing and determination on the narrow issue of the proper compensation payable to SAMFADEK & SONS LTD. There was no appeal against that order of 17th May, 1996. Applicant's counsel, in a move or strategy that is both novel and disingenuous, if not bizarre, applied to the trial court (Coram: Oduneye, J.) to decline jurisdiction to re-hear the matter remitted to it by order of the Court of Appeal. Which had neither been appealed nor set aside. The efficacy of that order was not in doubt. A Judgment or order of court remains binding until set aside by a competent court: **ROSSEK vs. ACB LTD (1993) LPELR – 2955 (SC).** The application was overruled. That prompted the lodging of appeal No. CA/L/178/98.

As can be seen from page 159 of the record, which the applicant seeks leave to use in the event of our granting him the extension of time within which to appeal the order made in appeal No. CA/L/214/93, the appellant/applicant had abandoned appeal No. CA/L/178/98. The respondent had drawn the attention of the Court of Appeal to the confusion the appellant had introduced into this appeal by filing notices of appeal dated 1st August, 1998 and 15th June, 1999. The Court of Appeal found as a fact that:

> **the notice of appeal dated 1st August, 1997 and filed on 5th May, 1998 is directed against the two rulings of the trial court delivered on 13th June, 1997 and 25th July, 1997**

respectively. The notice relevant to the present appeal is the one dated 15th June, 1999 let in by the application dated 7th February, 2000. It is even clear from the body of that notice that it is directed against the judgment of 20th November, 1998.

From the processes the two appeals purportedly argued at the Court of Appeal bore CA/L/178/98 and CA/L/214/99. In actuality, Appeal No. SC.108/2005 stems from the appeal No. CA/L/214/99; not appeal No. CA/L/178/98 (which has not been heard).

Apart from the applicant's failure to make out any good and substantial reasons for failure to appeal the decision of 27th May, 1996 in the appeal No. CA/L/214/93 within the prescribed period, the grant of the instant application will not serve the ends of justice. It will also cause confusion. The order of the Court of Appeal made on 27th May, 1996 has been accomplished with the hearing of the suit No. ID/1532/89 on the narrow issue of compensation and its final decision on it delivered on 20th November, 1998. The appellant/applicant participated in it and in the appeal No. CA/L/214/99 emanating therefrom.

The underlying mischief, albeit ulterior purpose, for this application is what Kayode Sofola, SAN stated under his hand in paragraph 4 of the grounds for the reliefs sought. That is

5. This application is necessary for the hearing of the instant appeal on its merits in the interest of justice.

There is no interest of justice, and none will be served, with a party and or his counsel bringing an application seeking equitable remedy which application merely seeks to cause confusion or to confuse issues. I agree with Mr. Kasunmu, of counsel for the respondent, that this application has been brought merely to stifle the hearing of the appeal No. SC.108/2005. The conduct of the applicant does not warrant my granting this application.

There are exceptions to the rule that inadvertence or error of Counsel should not be visited on the litigant. In **ASORE vs. LEMOMU (1994) 7 NWLR (Pt.356) 284,** cited with approval in **OKWELUME vs.**

ANOLIEFO (1996) 1 NWLR (Pt.425) 468 at 481, it was held that the failure or inadvertence of counsel to file notice of appeal within 30 days was fatal. This court had, in **ASORE** case, indulged the appellant additional 30 days to file his appeal. His counsel filed the appeal on the 34th day, four days outside the time extended for them to appeal.

Where there has been a failure of strategy or tactic on the part of the counsel, as in the instant case, the litigant, his client, cannot escape such blunders committed by his counsel; for if the strategy had worked, both the counsel and his client took full credit. Accordingly, they must also take full responsibility for the failure of the strategy: **BELLO AKANBI vs. ALAO (1998) all NLR 424 at 440; 401, 444.** Neither mischief, ineptitude nor strategic blunders are envisaged by the rule that inadvertence of counsel should not be visited on the litigant, his client. The rule cannot be applied to foist injustice on another party: **AKANBI vs. ALAO** (supra). Nor will the rule apply in a clear case of abuse of court's process, as in the instant case.

It is unjust to grant this application. Accordingly, the application is hereby refused. The respondent is entitled to costs, and taking the conduct of this litigation by the appellant/applicant's counsel into consideration costs assessed at N500,000.00 and payable by Kayode Sofola & Associates, a law firm headed by Kayode Sofola, SAN, shall be and are hereby awarded in favour of the respondent. It is time stakeholders in administration of justice in this country realized that justice delayed by unnecessary tricks and gimmicks by all concerned correlatively affects the growth of commerce and the economy.

Ejembi Eko,
Justice, Supreme Court.

DATTIJO MUHAMMAD, (JSC): I read in draft the lead ruling of my learned brother ***EJEMBI EKO JSC*** with whose reasoning and conclusion I agree that the application to which the ruling relates is devoid of merit. His lordship has clearly demonstrated why in his ruling and it is needless for me to restate the obvious in dismissing the unmeritorious application for extention of time to allow the applicant to appeal more than twenty one years after he should have done so. I adopt the lead ruling as mine in

dismissing the application and abide by the consequential orders reflected in the said ruling as well.

Musa Dattijo Muhammad,
Justice, Supreme Court.

ADAMU AUGIE, (JSC): I had a preview of the lead ruling judgment delivered by my learned brother - **Eko, JSC,** and I agree entirely with his reasoning and conclusions.

Amina Adamu Augie, Jsc
Justice, Supreme Court.

ADAMU GALINJE, (JSC): I have had the privilege of reading in draft the ruling just delivered by my learned brother Eko, JSC and I agree with the reasoning contained therein and the conclusion arrived thereat. The only reason for the applicant's failure to file the appeal within the prescribed period is the usual inadvertence of counsel as deposed to at paragraph 10 (b) of the supporting affidavit.

In **Ahmed vs. Trade Bank Plc (1996) 3 NWLR (Pt. 437) 445,** it was held that the concept that the sin of Counsel should not be visited on the litigant is without doubt a judicial expedience and although convenient must not be jeopardized by indiscriminate applications. Hence to be able to sustain the concept, the applicant needs to show that he acted promptly in giving instruction to his solicitor to file the appeal, but that the inadvertence or negligence of the solicitor caused the delay. It is also the Law that even when the applicant acted promptly in instructing his counsel, he is still expected to ensure that the counsel carried out the instruction. This is so because the litigant who fails to ascertain if his counsel has taken the necessary steps to bring his appeal is as well negligent.

For 21 years the applicant slept over its right to appeal. It surely has an uphill task of convincing this court that it gave instruction to its Counsel to appeal against the decision of 27th May, 1996 and counsel failed to do so. Mere instruction to counsel is not sufficient. The appellant must show that it took some steps to ensure that the counsel complied with the instruction. Applicant has not shown in the supporting affidavit that it took some

measures to ensure that its counsel complied with its instruction. The applicant has failed to give good and substantial reasons for its failure to file its appeal within the prescribed period.

For this short comment and the more detailed reasoning in the lead ruling, this application shall be and it is hereby dismissed. I abide by the consequential orders made in the lead ruling including order as to costs.

Paul Adamu Galinje,
Justice, Supreme Court.

DAUDA BAGE, (JSC): I have had the benefit of reading in draft the lead ruling of my learned brother **Ejembi Eko, JSC,** just delivered. I agree entirely with the reasoning and conclusion reached. The application is without merit and it is hereby refused. I abide by all the orders contained in the ruling.

Sidi Dauda Bage,
Justice, Supreme Court.

OCHONOGOR ALEX
AND
FEDERAL REPUBLIC OF NIGERIA

SC. 613/2017

IN THE SUPREME COURT OF NIGERIA
HOLDEN AT ABUJA

ON FRIDAY, THE 9TH DAY OF FEBRUARY, 2018

BEFORE THEIR LORDSHIPS

MUSA DATTIJO MUHAMMAD	**JUSTICE, SUPREME COURT**
KUDIRAT M. O. KEKERE-EKUN	**JUSTICE, SUPREME COURT**
JOHN INYANG OKORO	**JUSTICE, SUPREME COURT**
CHIMA CENTUS NWEZE	**JUSTICE, SUPREME COURT**
EJEMBI EKO	**JUSTICE, SUPREME COURT**

COURT: No case submission – Where court spent so much time in considering sufficiency of evidence – Whether amounts to a sheer waste of time.

COURT: Jurisdiction – Criminal jurisdiction – Whether it is the enabling law vis-à-vis the charge before the court which determine the criminal jurisdiction of the court.

COURT: Jurisdiction – Criminal jurisdiction of the Federal High Court – How determined – Ss 251(1) and 251(3) of CFRN 1999 – Relevant considerations thereof.

COURT: No case submission – Approach thereto – Whether court not to express any opinion on the evaluation of evidence or credibility of witness – Relevant considerations thereof.

CRIMINAL LAW AND PROCEDURE: No case submission – How determined – Principles thereof.

STATUTE: Administration of Criminal Justice Law of Lagos State – Section 260(2) – Nature, purport and imperatives – Relevant considerations thereof.

Issue for Determination

1. **Whether the Court of Appeal was not right in upholding the decision of the High Court of Lagos State that it had the jurisdiction to entertain the information contained in Charge No. ID/120C/2012 bordering on the offences of obtaining money by false pretence under the advance fee fraud and other fraud related offences Act, 2006; forgery, uttering and conspiracy under Sections 467 and 468 of the Criminal Code, Cap C17, Volume 2, Laws of Lagos State, Nigeria, 2003?**
2. **Whether the Court of Appeal was wrong in holding that having regard to the information and the proof of evidence filed along with the information, a *prima facie* case is disclosed against the appellant to warrant his trial?**

Facts of the Matter

At the High Court of Lagos State, a nine count information was preferred against the appellant here and others. Sometime in 2014, precisely, on October 28, 2014, the prosecution filed an amended information. As he did with regard to the earlier information, the appellant sought for an order quashing the charge preferred against him an application that was dismissed on February 17, 2016. Having unsuccessfully challenged the said ruling of High Court [throughout this judgment, simply, called "the trial court"] at the Court of Appeal, Lagos Division, [hereinafter referred to as "the lower court"], the appellant has, now, approached this court, urging it to set aside the decision of the lower court.

Held: *(Unanimously dismissing the appeal)*

1. *While the Federal High Court has exclusive civil jurisdiction under S. 251(1) of CFRN it has no exclusive criminal jurisdiction over these matters under S. 251(3)*

In *Okey Nwosu vs. FRN* (supra), this court laid the arguments, such as were canvassed by the appellant's counsel in this case, to rest. In the said *Okey Nwosu vs. FRN* (supra), this court dealt with the interface between Sections 251 (1); 251 (3) and 272 of the Constitution in these appetizing words:

In criminal law and the administration of criminal justice, the determination of jurisdiction will be taken in the light of the enabling law setting out the jurisdiction vis-à-vis the charge preferred against the accused [person]. Section 272 of the Constitution is also relevant. The *charge before the court is what determines its jurisdiction.*

While Section 251 (1) of the Constitution confers exclusive jurisdiction in civil matters in respect of items listed as (a) (s), *Section 251 (3) does not however confer exclusive jurisdiction on the Federal High Court in Criminal causes and matters listed in subsection (1). By the use of the phrase 'the Federal High Court shall also have and exercise jurisdiction' can only mean that other courts apart from the Federal High Court can exercise jurisdiction also in respect of criminal matters relating to matters listed in Section 251 (1).* The phrase 'to the exclusion of any other court is omitted deliberately.

Per C. C. Nweze (JSC)

"Section 251 of the 1999 Constitution as amended, Section 7 of the Federal High Court Act which is *ipsisima* (sic) *verba* to it, Section 272 of the Constitution which provide for the jurisdictions of the State High Court and the trial court, respectively, are not self-executing. It is true that the sections have spelt out instances when the Federal

High Court and the trial court may assume jurisdiction. The provisions however remain dormant until the National Assembly and the Lagos State House of Assembly make laws in their respective areas of competence to create offences by virtue of which the courts would exercise jurisdiction. The 1999 Constitution in Section 4 (6) vests legislative powers of a State of the Federation in the House of Assembly of the State. By subsection 7 of the same section, the Assembly is empowered to make laws for the peace, order and good government of the State and any part thereof with respect to any matter not included in the exclusive legislative list and any other matter with respect to which it is empowered in accordance with the provisions of the Constitution. Thus where as in the instant case the Lagos State House of Assembly competently makes laws creating offences in respect of which courts in the state may assume jurisdiction, the jurisdiction as vested abides.

The jurisdiction of the trial court as spelt out under Section 272 of the 1999 Constitution *operates subject to the restriction placed on it by Section 251 (2) and (3) of the same Constitution. The latter subsection vests criminal jurisdiction in the Federal High Court regarding all the items for which the court is conferred exclusive civil jurisdiction under Section 251 (1)….*
***[FRN vs. Okey Nwosu* supra at 290].**

These authoritative pronouncements ought to stem the sort of submissions that prompted the judgment of the lower court culminating to this appeal. It is hoped that counsel would, in future, properly advise their clients to take their trials and not resort to these kinds of professional shenanigans only designed to delay the proceedings at the trial court. A word is enough for the wise".
(Pp 133 – 134 Paras C – H)

2. *Principles applicable in a no-case application*

By way of preliminary remarks, I note that in considering a no-case submission, the court's duty is finite: it is only to determine whether the prosecution has made out a *prima facie* case, that is, whether there is admissible evidence linking the defendant with the offence

with which he is charged. Hence, it neither involves the evaluation of evidence nor the consideration of the credibility of the witnesses.
(P 136 Paras A – B)

3. Proper approach of court to ruling on a no case submission

In its ruling, the trial court must, with considerable circumspection, endeavour to avoid the temptation of delving into the exercise of evaluation of evidence or the consideration of the credibility of witnesses, *State vs. Emedo* [2001] 12 NWLR (Pt 726) 131; *Ekpo vs. State* (2001) 7 NWLR (Pt 712) 292; *Odido vs. State* [1995] 8 NWLR (Pt. 369) 88; *Dadoh vs. State* [1977] 5 Sc 197. This must be so for *prima facie* case is not the same with proof of a crime which is determined after the close of trial, *Abacha vs. State* [2001] 3 NWLR (Pt. 699) 35.

As such, it would be overreaching itself if it embarks on the evaluation of evidence or dissipates valuable judicial energy in the assessment of the credibility of the witnesses, *Daboh vs. State* [1977] 5 SC 197; *Abacha vs. State* [2001] 3 NWLR (Pt. 699) 35; *Ohwovoriole vs. FRN* [2003] 2 NWLR (Pt. 803) 176; [2003] 1 SC (Pt. 1) 1; (2003) LPELR-SC. 392/2001; *Ajiboye vs. State* [1994] 8 NWLR (Pt. 364) 587; *Ekwunugo vs. FRN* [2008] 15 NWLR (Pt. 1111) 630; [2008] 7 SC 196; *Tongo vs COP* (2007) LPELR-SC.105/2000; *Abacha vs. State* [2001] 3 NWLR (Pt. 699) 35 etc.

A survey of all binding authorities would reveal that where a no-case submission is made, the court is not expected to volunteer any opinion on the evidence, *Daboh vs. Satte* [1977] 5 SC 197; *Abacha vs. State* [2001] 3 NWLR(Pt. 699) 35; *Ohwovoriole vs. FRN* [2003] 2 NWLR (Pt 803) 176; [2003] 1 SC (Pt. 1) 1; (2003) LPELR-Sc.392/2001; *Ajiboye vs. State* [1994] 8 NWLR (Pt 364) 587; *Ekwunugo vs. FRN* [2008] 15 NWLR (Pt. 1111) 630; [2008] 7 SC 196; *Tongo vs. COP* (2007) LPELR-Sc.105/2000; *Abacha vs. State* [2001] 3 NWLR (Pt. 699) 35 etc.

The rationale for this inviolable prescription is that, in such a situation, the duty of the trial court is limited to a finding whether,

***prima facie*, on the evidence adduced, the appellant had been linked with the alleged offence. Thus, in considering the defendant's submission that he had no case to answer, the court had no obligation to determine the question whether the evidence could sustain the conviction, *R vs. Ogucha* (1959) 4 FSC 64; *Ekpo vs. State* [2001] 7 NWLR (Pt. 712) 292; *Odido vs. State* [1995] 8 NWLR (Pt 369) 88; *Abacha vs. State* [2001] 3 NWLR (Pt. 699) 35; *Ubanatu vs. COP* [1997] 7 NWLR (Pt. 616) 512.**

Learned counsel for the appellant would appear to rate two dissimilar concepts in our accusatorial jurisprudence, namely, *prima facie* case and proof beyond reasonable doubt, equiponderantly. With profound respect, this sort of fallacious obfuscation of settled concepts must be dissipated without much ado. Ever since Abbot FJ, in *Ajidagba vs. Police* (1958) 3 FSC 5, approvingly, adopted the definition of the phrase *"prima facie:* case from the Indian decision in *her Singy vs. Jitendranathsen* (1931) I.L. R. 59 Calc 275, Subsequent decisions have consistently, endorsed it.

It, simply, comes to this: evidence discloses a *prima facie* case when it is such that if un-contradicted and if believed, will be sufficient to prove the case against the defendant, *Ohwovoriole vs. FRN* [2003] 2 NWLR (Pt. 803) 176; [2003] 1 SC (Pt 1) 1; (2003) LPELR-Sc. 392/2001' *Ajiboye vs. State* [1994] 8 NWLR (Pt. 364) 587; *Ekwunugo vs. FRN* [2008] 15 NWLR (Pt. 1111) 630; [2008] 7 Sc 196; *Tongo vs Cop* (2007) LPELR-Sc.105/2000, *Abacha vs. State* [2001] 3 NWLR (Pt 699) 35; *Daboh vs. State* [1977] 5 SC 197.
(Pp 136 – 137 Paras B – F)

4. Appellant was hasty in his preliminary application in view of S. 260(2) of the ACJL of Lagos State

As indicated earlier, the appellant was so anxious to filibuster the proceedings before the trial court that, even before the prosecution opened its case, his counsel had taken up the question of the non-disclosure of a *prima facie* case. With respect, the appellant should exercise patience until the prosecution has opened and closed its

case. The reason is simple. Section 260 (2) of the ACJL of Lagos State has altered the position under the old Law when *Ikomi vs. State* (supra) and *Abacha vs. State* (supra) were decided.

The section provides that "[a]n objection to the sufficiency of evidence disclosed in the proof of evidence attached to the information *shall not be raised before the close of prosecution's case,"* In effect, the appellant's No case submission was, hastily, done. *(Pp 137 – 138 Paras F – A)*

5. No need to consider sufficiency of evidence in a no case application

Both the trial court and the lower court wasted precious time considering the question whether the evidence could sustain the conviction. That was sheer waste of time, *R. vs. Ogucha* (supra); *Ekpo vs. State* (supra); *Odido vs. State* (supra); *Abacha vs. State* (supra); *Ubanatu vs. COP* (supra).

I find no merit in this issue. I hereby enter an order dismissing this appeal. The appellant shall return forthwith to the trial court for the continuation of his trial thereat. *(P 138 Paras A – C)*

Per Kekere-Ekun (JSC)

"The issue as to whether the Federal High Court has exclusive jurisdiction to try criminal matters arising from or connected with the matters set out in Section 251(1) of the 1999 Constitution or by virtue of sub-section (3) thereof *vis a vis* the High Court of a state has been pronounced upon in numerous decisions of this court. The issue was dealt with extensively in F.R.N. vs. Okey Nwosu (2016) 17 NWLR (Pt. 1541) 226 where it was held that Section 251(1) (a) – (s) and sub-section (3) thereof does not confer exclusive jurisdiction on the Federal High Court in criminal causes and matters arising from the items listed in sub-section (1) and that the phrase "*to the exclusion of any other court*" employed in Section 251(1) is deliberately omitted from Section 251(3), which simply provides that "*the Federal High Court shall also have and exercise jurisdiction*

and powers in respect of criminal causes and matters in respect of which jurisdiction is conferred by sub-section (1) of this section."

It is hoped that legal practitioners would acquaint themselves with the extant position of the law on this issue so that valuable judicial time and energy is not wasted on beating a dead horse. This issue is no longer a crutch on which to lean in an attempt to derail the proceedings before the trial court.

With regard to the second issue for determination, I agree with my learned brother that the appellant has been rather hasty and has put the cart before the horse. The issue as to whether the information filed discloses a *prima facie* case against the defendant has been another means by which proceedings before the trial court have been delayed. Section 260(2) of the Administration of Criminal Justice Law (ACJL) of Lagos State has effectively nipped this practice in the bud by providing that the sufficiency of the evidence in the proof of evidence attached to the information shall not be raised before the close of the prosecution's case. The issue having been raised even before the prosecution had opened its case was clearly premature. I agree with my learned brother that Section 260(2) of the ACJL of Lagos State has altered the position in Ikimi vs. The State (1986) 3 NWLR (Pt. 28) 340 and Abacha vs. The State (2001) 3 NWLR (Pt. 699) 35". *(Pp 138 – 139 Paras H – H)*

Per Eko (JSC)

"The issue of jurisdiction vociferously canvassed in this appeal is the same issue canvassed and decided upon in F.RN. vs. OKEWU (2016) 17 NWLR (Pt. 1541) 266 and many other decisions of this court following the decision of the Full Panel of this Court in A.G, ONDO STATE vs. A.G, FEDERATION & ORS (2002) 9 NWLR (Pt. 772) 222 (SC). Only recently, in **ONTARIO OIL & GAS NIG. LTD vs. F.R.N** No. SC. **518/2015 of 26th January, 2018 this court, on the principle of *stare decis* re-affirmed the *ratio decendendi;* in A.G. ONDO STATE vs. A.G. FEDERATION (supra) as regards this same point being canvassed in this appeal under issue 1. The issue has**

since been settled. Thus, an attempt to re-open it ostensibly for another panel to render a contrary view is an irritating abuse of process. I think, and I so hold firmly, that this appeal, particularly on issue I canvassed herein, is frivolous and a gross abuse of court's process.

An appeal is said to be frivolous when there is no legal basis for bringing it; and it is only brought, as this interlocutory appeal has been, to delay the proceedings at the trial court. According to Black's Law Dictionary 9th ed, an appeal, filed purposely to avoid payment of the judgment debt or to frustrate the judgment creditor and induce him to settle, is a frivolous appeal. This instant interlocutory appeal has all the characteristics of a frivolous appeal, having been brought, for the purpose only, to frustrate and delay the trial of the criminal case pending against the appellant at the trial court.

In view of the numerous decisions previously rendered, which authoritatively declared the stance of this court on the issue being canvassed in this appeal as issue 1, I should now think that there is no law supporting the point being now canvassed in this appeal under Issue 1 by the appellant. The appeal on the said issue is clearly premised on frivolity and recklessness; and that is what makes the appeal on that issue vexatious and an abuse of the court's process. I am reinforced on this point by the decision of this court in R – BENKAY NIG. LTD vs. CADBURY NIG. LTD (2012) LPELR – 7820 (SC). The employment of judicial process by a party, not only to irritate and annoy his opponent, but also the efficient and effective administration of justice is an abuse of the process of the court: SARAKI vs. KOTOYE (1992) 9 NWLR (Pt. 264) 156 at 188.

I think it is time the Bar addressed this intrapersonal crisis in order to arrest the altruistic conduct of its members resorting to what my learned brother calls "these kinds of professional shenanigans only designed to delay proceedings at the trial court". *(Pp 140 – 141 Paras (G – H)*

Nigerian Cases Cited

A.G, Ondo State vs. A.G, Federation & ORS (2002) 9 NWLR (Pt. 772) 222 (SC).
Abacha vs. State [2001] 3 NWLR (Pt 699) 35;
Abacha vs. The State (2001) 3 NWLR (Pt. 699) 35".
Ajiboye vs. State [1994] 8 NWLR (Pt 364) 587;
Ajidagba vs. Police (1958) 3 FSC 5,
Daboh vs. State [1977] 5 SC 197
Ekpo vs. State (2001) 7 NWLR (Pt 712) 292;
Ekwunugo vs. FRN [2008] 15 NWLR (Pt. 1111) 630; [2008] 7 SC 196;
F.R.N vs. OKEWU (2016) 17 NWLR (Pt. 1541) 266
F.R.N. vs. Okey Nwosu (2016) 17 NWLR (Pt. 1541) 226
Ikimi vs. The State (1986) 3 NWLR (Pt. 28) 340
Odido vs. State [1995] 8 NWLR (Pt 369) 88;
Ohwovoriole vs. FRN [2003] 2 NWLR (Pt 803) 176; [2003] 1 SC (Pt. 1) 1; (2003) LPELR-Sc.392/2001;
Ohwovoriole vs. FRN [2003] 2 NWLR (Pt. 803) 176; [2003] 1 SC (Pt 1) 1; (2003) LPELR-Sc. 392/2001'
Ohwovoriole vs. FRN [2003] 2 NWLR (Pt. 803) 176; [2003] 1 SC (Pt. 1) 1; (2003) LPELR-SC. 392/2001;
R BENKAY NIG. LTD vs. CADBURY NIG. LTD (2012) LPELR 7820 (SC).
R vs. Ogucha (1959) 4 FSC 64;
SARAKI vs. KOTOYE (1992) 9 NWLR (Pt. 264) 156 at 188
Singy vs. Jitendranathsen (1931) I.L. R. 59 Calc 275
State vs. Emedo [2001] 12 NWLR (Pt 726) 131;
Tongo vs COP (2007) LPELR-SC.105/2000;
Ubanatu vs. COP [1997] 7 NWLR (Pt. 616) 512.

Nigerian Statutes Cited

The 1999 Constitution as amended, *S. 251(1);* Section 272;
The Administration of Criminal Justice Law (ACJL) of Lagos State Section 260(2)
The Federal High Court Act Section 7
The Criminal Code, Cap C17, Volume 2, Laws of Lagos State, Nigeria, 2003?

A Sections 467 and 468

Representation

Ebun-Olu Adegboruwa Esq., with him, Ademola Owolabi, Esq., Kingsley
B Izimah, Esq., for the appellant.
Rotimi Jacobs SAN with him Adebisi Adeniyi, Esq., Leke Atolagbe, Esq., J.O. Adeyemi Esq., for the respondent.

C **CHIMA CENTUS NWEZE, (JSC) Delivering the Lead Judgment):**

At the High Court of Lagos State, a nine count information was preferred against the appellant here and others. Sometime in 2014, precisely, on October 28, 2014, the prosecution filed an amended
D information. As he did with regard to the earlier information, the appellant sought for an order quashing the charge preferred against him an application that was dismissed on February 17, 2016. Having unsuccessfully challenged the said ruling of High Court [throughout this
E judgment, simply, called "the trial court"] at the Court of Appeal, Lagos Division, [hereinafter referred to as "the lower court"], the appellant has, now, approached this court, urging it to set aside the decision of the lower court.

F He seeks the court's determination of the two issues which he framed thus:

1. **Whether the Court of Appeal was right when it held**
G **that the Lagos High Court can exercise criminal jurisdiction in this matter considering that the subject matter of Charge No. ID/120C/2012 which borders on admiralty operation, oil and gas, revenue**
H **of the Federal Government?**
2. **Whether the lower court was right to hold that the information and proof of evidence in this case have disclosed a *prima facie* case against the appellant to**
I **warrant his trial thereon?**

A

On behalf of the respondent, the following two issues were presented for the determination of the appeal, viz:

B

1. **Whether the Court of Appeal was not right in upholding the decision of the High Court of Lagos State that it had the jurisdiction to entertain the information contained in Charge No. ID/120C/2012**

C

bordering on the offences of obtaining money by false pretence under the advance fee fraud and other fraud related offences Act, 2006; forgery, uttering and conspiracy under Sections 467 and 468 of the

D

Criminal Code, Cap C17, Volume 2, Laws of Lagos State, Nigeria, 2003?

2. **Whether the Court of Appeal was wrong in holding that having regard to the information and the proof of evidence filed along with the information, a *prima facie* case is disclosed against the appellant to**

E

warrant his trial?

Upon my intimate reading of the principal complaints in the notice and

F

grounds of appeal, I am of the humble view that the two issues of the respondent, neatly, capture the appellant's grouse against the lower court's judgment. They would, therefore, be adopted in the disposal of this appeal.

G

ARGUMENTS ON THE ISSUES

ISSUE ONE

Whether the Court of Appeal was not right in upholding the decision of the High Court of Lagos State that it had the jurisdiction to entertain

H

the information contained in Charge No ID/120C/2012 bordering on the offences of obtaining money by false pretence under the Advance Fee Fraud and Other Fraud Related Offences Act, 2006; forgery, uttering and conspiracy under Sections 467 and 468 of the Criminal

I

Code, Cap C17, Volume 2, Laws of Lagos State, Nigeria, 2003?

APPELLANT'S SUBMISSIONS

At the hearing of this appeal on November 15, 2017, learned counsel for the appellant adopted and relied on the brief and reply filed on November 15, 2017. With regard to the first issue, it was contended that Section 251 of the Constitution confers exclusive jurisdiction on the Federal High Court in respect of causes and matters specified therein. He, also, referred to Section 251(1) (a) (g) and (n) in support of the contention that only the said court can exercise jurisdiction in matters under the said sections, citing Section 251 (3).

Learned counsel canvassed the view that Section 251 (supra) confers exclusive jurisdiction, civil and criminal, with respect to all the items therein. He maintained that Section 272 is dependent on Section 251, *Oke vs. Oke* (1974) 1 All NLR (Pt. 1) 443; *LSDPC vs. Foreign Finance Corporation* [1987] 1 NWLR (Pt.50) 413; *Aqua Ltd vs. Ondo State Sorts Council* [1988] 4 NWLR (Pt 1170) 517; *Idehen vs. Idehen* [1991] 6 NWLR (Pt. 198) 382; *Labiyi vs. Anretiola* [1992] 8 NWLR (Pt 2580 139. He, also, cited decisions that defined the word "exclusive".

It was, further, contended that, by virtue of Section 251 (1) and (3) (supra), trial of matters, whether civil or criminal, that border on admiralty operation; oil and gas; revenue of the Federation, can only be determined by the Federal High Court. He maintained that crime cannot be committed without a subject matter. In his view, it cannot be correct that the Administration of Criminal Justice Act [ACJL] has, generally, defined the offence of stealing and thus anyone alleged to have stolen anything at all can be arraigned before the High Court of Lagos State.

Learned counsel observed that the criminal code, equally, contains a general definition of stealing. According to him, since the Criminal Code, applicable to the Federal High Court, contains the offence of stealing, all items in Section 251 (supra) can only be tried by the Federal High Court, *FRN vs. Ibori* [2014] 13 NWLR (Pt. 1423) 168. In his view, the Lagos High Court has no such jurisdiction over the matters.

He contended that the intendment of the Constitution was to divest the State High Court of jurisdiction in matters relating to mines and

minerals, including Oil Fields, Oil Mining, geographical surveys; natural gas as well as revenue of the Federal Government. He submitted that the Lagos High Court does not share concurrent jurisdiction with the Federal High Court, *Araka vs. Egbue* [2003] 17 NWLR (pt. 848) 1, 21; also, Section 8 (1) of the Federal High Court Act.

He urged the court to hold that the trial court does not possess the requisite jurisdiction in matters under Section 251 (supra), *NNPC and Anor vs. Orhiowosele and Ors* [2013] (sic) NWLR (Pt. 1371) 224-226.

RESPONDENT'S ARGUMENTS

On his part, learned senior counsel for the respondent, Rotimi Jacobs, SAN, adopted the respondent's brief field on September 26, 2017. He, first, referred to pages 1634-1636 of the record for the view of the lower court that the trial court has the jurisdiction to hear and determine the matter. He pointed that this court can only disturb the above findings and conclusion of the lower court with that of the trial court if they are perverse.

He drew attention to the decision of this court in *FRN vs. Okey Nwosu* [2016] 17 NWLR (Pt. 1541) 226, 304-305; 290-291. He explained that, even under the 1999 Constitution, the extent of the limited jurisdiction of the Federal High Court in criminal matters has not been tampered with, citing *Queen vs. Owoh* [1962] NSCC 416' *The State vs. Williams* [1978] NSCC 38; *Akwule vs. The Queen*[1963] NSCC 157.

Citing Section 286 of the Constitution, he contended that the State High Court may be conferred with the power, by an Act of the National Assembly, to try federal offences, Section 286 (1) (b) (c) and (2) of the Constitution; *AG, Ondo State vs. AG, Federation* [2002] 9 NWLR (pt. 772) 222, 308. In his submission, the intention of the Constitution is not to confer exclusive jurisdiction on the Federal High Court to try Federal offences; also, Section 174 of the Constitution.

He canvassed the view that, on the contrary, the Constitution set out to create federal courts for federal civil natters; an intention not expressed with regard to criminal matters. He maintained that, from the provisions of Section 2 (1) of the Criminal Code Act, the Criminal Code, scheduled to the Act, is partly a state law and partly a federal law to the extent specified in

subsection 2 of the section.

He pointed out that the offences contained in the information filed against the appellant are the offences of forgery, uttering and conspiracy under Sections 467 and 468 of the Criminal Code and obtaining money by false pretence under the Advance Fee Fraud and Other Fraud Related Offences Act, a mere reproduction of Section 419 of the Criminal Code. In his submissions, these sections of the Criminal Code are outside the sections outlined in the laws of the Federation. Accordingly, the Federal High Court cannot rely on Section 7(4) of the constitutive Act to exercise jurisdiction in respect of the offences prescribed under Sections 419, 467 and 468 of the Criminal Code Law of Lagos State. He urged the court to dismiss the appeal.

APPELLANT'S REPLY

In the reply brief, counsel cited *Eze vs. FRN* [1987] (sic) (Pt. 51) 506; *Mandara Vs. AG. Federation* [1984] 4 SC 8. In his submission, the use of the phrase "notwithstanding" makes it cogent irrespective of all other legislation in the Constitution, *Garba vs. Mohammed and Ors* (2016) LPELR-4061 (SC).

Without inviting the court to overrule its recent decision on Section 251 (1) and (3) *[FRN vs. Okey Nwosu,* supra], he devoted paragraphs 1.02 1.08, of the reply brief to arguments that fly in the face of *ratio decidendi* in the said *FRN vs. Okey Nwosu* (supra). He canvassed the view that where the proof of evidence fails to disclose an offence known to law, it would be quashed, *Abacha vs. State* [2012] 11 NWLR (Pt. 779) 437; *Ohwovoriole vs. FRN* [2003] 2 NWLR (Pt. 803) 176.

RESOLUTION OF THE ISSUE

My Lords, in *Abubakar and Anor vs. Usman and Ors* (2017) LPELR-41915 (SC) 7-16; B-E, I expressed the view that:

> **…it is rather strange that [counsel] opted to bother this court with this appeal woven around the propriety of appealing against the judgment of the lower court in ….a**

A **question that has been, adequately, addressed in the judgments [of this court]…..**

Although I am tempted to do so, I refuse to entertain the
B **misgiving that [counsel's] agitation of this same question in this appeal was a deliberate attempt to put the consistency of this court's reasoning to test.**

C This would appear to be the situation in this case. In *Okey Nwosu vs. FRN* (supra), this court laid the arguments, such as were canvassed by the appellant's counsel in this case, to rest. In the said *Okey Nwosu vs. FRN* (supra), this court dealt with the interface between Sections 251 (1); 251 (3)
D and 272 of the Constitution in these appetizing words:

In criminal law and the administration of criminal justice, the determination of jurisdiction will be taken in the light of the enabling law setting out the jurisdiction vis-à-vis the charge preferred against the
E accused [person]. Section 272 of the Constitution is also relevant. The *charge before the court is what determines its jurisdiction*

While Section 251 (1) of the Constitution confers exclusive jurisdiction in civil matters in respect of items listed as (a) – (s), *Section*
F *251 (3) does not however confer exclusive jurisdiction on the Federal High Court in Criminal causes and matters listed in subsection (1). By the use of the phrase 'the Federal High Court shall also have and exercise jurisdiction' can only mean that other courts apart from the Federal High*
G *Court can exercise jurisdiction also in respect of criminal matters relating to matters listed in Section 251 (1).* The phrase 'to the exclusion of any other court is omitted deliberately. *[FRN vs. Okey Nwosu,* supra 304; italics supplied for emphasis]

H According to the court:

Section 251 of the 1999 Constitution as amended, Section 7 of the Federal High Court Act which is *ipsisima* (sic) *verba*
I **to it, Section 272 of the Constitution which provide for the jurisdictions of the State High Court and the trial court,**

respectively, are not self-executing. It is true that the sections have spelt out instances when the Federal High Court and the trial court may assume jurisdiction. The provisions however remain dormant until the National Assembly and the Lagos State House of Assembly make laws in their respective areas of competence to create offences by virtue of which the courts would exercise jurisdiction. The 1999 Constitution in Section 4 (6) vests legislative powers of a State of the Federation in the House of Assembly of the State. By subsection 7 of the same section, the Assembly is empowered to make laws for the peace, order and good government of the State and any part thereof with respect to any matter not included in the exclusive legislative list and any other matter with respect to which it is empowered in accordance with the provisions of the Constitution. Thus where as in the instant case the Lagos State House of Assembly competently makes laws creating offences in respect of which courts in the state may assume jurisdiction, the jurisdiction as vested abides.

The jurisdiction of the trial court as spelt out under Section 272 of the 1999 Constitution *operates subject to the restriction placed on it by Section 251 (2) and (3) of the same Constitution. The latter subsection vests criminal jurisdiction in the Federal High Court regarding all the items for which the court is conferred exclusive civil jurisdiction under Section 251 (1)…. [FRN vs. Okey Nwosu* supra at 290].

These authoritative pronouncements ought to stem the sort of submissions that prompted the judgment of the lower court culminating to this appeal. It is hoped that counsel would, in future, properly advise their clients to take their trials and not resort to these kinds of professional shenanigans only designed to delay the proceedings at the trial court. A word is enough for the wise. I find no merit in the tenuous and misleading submissions on this issue.

ISSUE TWO

Whether the Court of Appeal was wrong in holding that having regard to the information and the proof of evidence filed along with the information, a *prima facie* case is disclosed against the appellant to warrant his trial?

APPELLANT'S SUBMISSIONS

On this issue, counsel cited *Ikomi vs. State* [1986] 3 NWLR (Pt. 28) 340 and *Abacha vs. State* [2012] 11 NWLR (Pt. 779) 437. He submitted that there is nothing linking the appellant with the offences charged. He, equally, devoted paragraphs 2.00 2.09 of the reply brief to this issue.

RESPONDENT'S ARGUMENTS

Rotimi Jacobs, SAN, for the respondent, prayed in aid Section 260 (2) of the ACJL of Lagos State. He pointed out that the appellant never allowed the prosecution to open its case before the issue of non-disclosure of *prima facie* case canvassed. He submitted that, by Section 260 (2) (supra), *Ikomi vs. State* (supra) and *Abacha vs. State* (supra) are now inapplicable in respect of information preferred at the High Court of Lagos State.

He cited pages 1641-1643 of the record. He contended that *prima facie* simply means that there is ground for proceeding with the trial. He explained that, as the Head of the Financial Control of the fourth defendant, the appellant qualifies as one of the directing minds of the company. He referred to an avalanche of documents submitted to the PPPRA: documents which were not genuine, pages 304, 338, 371 and 377 of the proof of evidence; the appellant's admission, page 59 of Vol 1 of the record; the appellant's statements, pages 32-59 of Vol 1 of the record.

He explained that the appellant and the other defendants were charged under Section 1 (3) of the Advance Fee Fraud and Other Related Offences Act, 2006. He, also, cited Section 10 of the same Act. He opined that having to Section 10 (supra), the prosecution of offences under the Act is not limited to body corporate. He, finally, submitted that the appellant and the other defendant qualify as parties to the offence under Sections 7

and 8 of the Criminal Code of Lagos State.

RESOLUTION OF THE ISSUE

By way of preliminary remarks, I note that in considering a no-case submission, the court's duty is finite: it is only to determine whether the prosecution has made out a *prima facie* case, that is, whether there is admissible evidence linking the defendant with the offence with which he is charged. Hence, it neither involves the evaluation of evidence nor the consideration of the credibility of the witnesses.

In its ruling, the trial court must, with considerable circumspection, endeavour to avoid the temptation of delving into the exercise of evaluation of evidence or the consideration of the credibility of witnesses, *State vs. Emedo* [2001] 12 NWLR (Pt 726) 131; *Ekpo vs. State* (2001) 7 NWLR (Pt 712) 292; *Odido vs. State* [1995] 8 NWLR (Pt. 369) 88; *Dadoh vs. State* [1977] 5 Sc 197. This must be so for *prima facie* case is not the same with proof of a crime which is determined after the close of trial, *Abacha vs. State* [2001] 3 NWLR (Pt. 699) 35.

As such, it would be overreaching itself if it embarks on the evaluation of evidence or dissipates valuable judicial energy in the assessment of the credibility of the witnesses, *Daboh vs. State* [1977] 5 SC 197; *Abacha vs. State* [2001] 3 NWLR (Pt. 699) 35; *Ohwovoriole vs. FRN* [2003] 2 NWLR (Pt. 803) 176; [2003] 1 SC (Pt. 1) 1; (2003) LPELR-SC. 392/2001; *Ajiboye vs. State* [1994] 8 NWLR (Pt. 364) 587; *Ekwunugo vs. FRN* [2008] 15 NWLR (Pt. 1111) 630; [2008] 7 SC 196; *Tongo vs COP* (2007) LPELR-SC.105/2000; *Abacha vs. State* [2001] 3 NWLR (Pt. 699) 35 etc.

A survey of all binding authorities would reveal that where a no-case submission is made, the court is not expected to volunteer any opinion on the evidence, *Daboh vs. Satte* [1977] 5 SC 197; *Abacha vs. State* [2001] 3 NWLR(Pt. 699) 35; *Ohwovoriole vs. FRN* [2003] 2 NWLR (Pt 803) 176; [2003] 1 SC (Pt. 1) 1; (2003) LPELR-Sc.392/2001; *Ajiboye vs. State* [1994] 8 NWLR (Pt 364) 587; *Ekwunugo vs. FRN* [2008] 15 NWLR (Pt. 1111) 630; [2008] 7 SC 196; *Tongo vs. COP* (2007) LPELR-Sc.105/2000; *Abacha vs. State* [2001] 3 NWLR (Pt. 699) 35 etc.

The rationale for this inviolable prescription is that, in such a

A situation, the duty of the trial court is limited to a finding whether, *prima facie*, on the evidence adduced, the appellant had been linked with the alleged offence. Thus, in considering the defendant's submission that he had no case to answer, the court had no obligation to determine the question
B whether the evidence could sustain the conviction, *R vs. Ogucha* (1959) 4 FSC 64; *Ekpo vs. State* [2001] 7 NWLR (Pt. 712) 292; *Odido vs. State* [1995] 8 NWLR (Pt 369) 88; *Abacha vs. State* [2001] 3 NWLR (Pt. 699) 35; *Ubanatu vs. COP* [1997] 7 NWLR (Pt. 616) 512.

C Learned counsel for the appellant would appear to rate two dissimilar concepts in our accusatorial jurisprudence, namely, *prima facie* case and proof beyond reasonable doubt, equiponderantly. With profound respect, this sort of fallacious obfuscation of settled concepts must be
D dissipated without much ado. Ever since Abbot FJ, in *Ajidagba vs. Police* (1958) 3 FSC 5, approvingly, adopted the definition of the phrase *"prima facie:* case from the Indian decision in *her Singy vs. Jitendranathsen* (1931) I.L. R. 59 Calc 275, Subsequent decisions have consistently, endorsed it.

E It, simply, comes to this: evidence discloses a *prima facie* case when it is such that if un-contradicted and if believed, will be sufficient to prove the case against the defendant, *Ohwovoriole vs. FRN* [2003] 2 NWLR (Pt. 803) 176; [2003] 1 SC (Pt 1) 1; (2003) LPELR-Sc. 392/2001' *Ajiboye vs.*
F *State* [1994] 8 NWLR (Pt. 364) 587; *Ekwunugo vs. FRN* [2008] 15 NWLR (Pt. 1111) 630; [2008] 7 Sc 196; *Tongo vs Cop* (2007) LPELR-Sc.105/2000, *Abacha vs. State* [2001] 3 NWLR (Pt 699) 35; *Daboh vs. State* [1977] 5 SC 197.

G As indicated earlier, the appellant was so anxious to filibuster the proceedings before the trial court that, even before the prosecution opened its case, his counsel had taken up the question of the non-disclosure of a *prima facie* case. With respect, the appellant should exercise patience until
H the prosecution has opened and closed its case. The reason is simple. Section 260 (2) of the ACJL of Lagos State has altered the position under the old Law when *Ikomi vs. State* (supra) and *Abacha vs. State* (supra) were decided.

I The section provides that "[a]n objection to the sufficiency of evidence disclosed in the proof of evidence attached to the information

shall not be raised before the close of prosecution's case," In effect, the appellant's No case submission was, hastily, done.

Both the trial court and the lower court wasted precious time considering the question whether the evidence could sustain the conviction. That was sheer waste of time, *R. vs. Ogucha* (supra); *Ekpo vs. State* (supra); *Odido vs. State* (supra); *Abacha vs. State* (supra); *Ubanatu vs. COP* (supra).

I find no merit in this issue. I hereby enter an order dismissing this appeal. The appellant shall return forthwith to the trial court for the continuation of his trial thereat. Appeal dismissed

Chima Centus Nweze
Justice, Supreme Court

COUNSEL

Ebun-Olu Adegboruwa Esq., with him, Ademola Owolabi, Esq., Kingsley Izimah, Esq., for the appellant.

Rotimi Jacobs SAN with him Adebisi Adeniyi, Esq., Leke Atolagbe, Esq., J.O. Adeyemi Esq., for the respondent.

DATTIJO MUHAMMAD, (JSC): Having read in draft the just delivered lead judgment of my lead brother **CHIMA CENTUS NWEZE JSC** and being in complete agreement with the reasoning and conclusion therein, I adopt same to dismiss the unmeritorious appeal. I abide by the consequential orders made in the lead judgment as well.

Musa Dattijo Muhammad
Justice, Supreme Court

KEKERE-EKUN, (JSC): I have read in draft the judgment of my learned brother, CHIMA CENTUS NWEZE, JSC just delivered. I agree entirely with the reasoning and conclusion that the appeal is devoid of merit.

The issue as to whether the Federal High Court has exclusive jurisdiction to try criminal matters arising from or connected with the matters set out in Section 251(1) of the 1999 Constitution or by virtue of sub-section (3) thereof *vis a vis* the High Court of a state has been

pronounced upon in numerous decisions of this court. The issue was dealt with extensively in **F.R.N. vs. Okey Nwosu (2016) 17 NWLR (Pt. 1541) 226** where it was held that Section 251(1) (a) – (s) and sub-section (3) thereof does not confer exclusive jurisdiction on the Federal High Court in criminal causes and matters arising from the items listed in sub-section (1) and that the phrase "*to the exclusion of any other court"* employed in Section 251(1) is deliberately omitted from Section 251(3), which simply provides that *"the Federal High Court shall also have and exercise jurisdiction and powers in respect of criminal causes and matters in respect of which jurisdiction is conferred by sub-section (1) of this section."*

It is hoped that legal practitioners would acquaint themselves with the extant position of the law on this issue so that valuable judicial time and energy is not wasted on beating a dead horse. This issue is no longer a crutch on which to lean in an attempt to derail the proceedings before the trial court.

With regard to the second issue for determination, I agree with my learned brother that the appellant has been rather hasty and has put the cart before the horse. The issue as to whether the information filed discloses a *prima facie* case against the defendant has been another means by which proceedings before the trial court have been delayed. Section 260(2) of the Administration of Criminal Justice Law (ACJL) of Lagos State has effectively nipped this practice in the bud by providing that the sufficiency of the evidence in the proof of evidence attached to the information shall not be raised before the close of the prosecution's case. The issue having been raised even before the prosecution had opened its case was clearly premature. I agree with my learned brother that Section 260(2) of the ACJL of Lagos State has altered the position in **Ikimi vs. The State (1986) 3 NWLR (Pt. 28) 340** and **Abacha vs. The State (2001) 3 NWLR (Pt. 699) 35.**

I agree with him that there is no merit in this appeal. I hereby dismiss it and order the appellant to return to the trial court for the continuation of his trial.

Kudirat M. O. Kekere-Ekun

A ***Justice, Supreme Court***

INYANG OKORO, (JSC): I was obliged in draft a copy of the judgment of my learned brother, Chima Centus Nweze, JSC just delivered. His Lordship has meticulously and quite efficiently resolved all the salient
B issues submitted for the determination of this appeal. I have nothing useful to add. I rather adopt both his reasoning and conclusion as mine. Issue of jurisdiction has been a recurring decimal in our courts and inspite of a plethora of literature and judicial authorities on the matter, it is observed
C more in the breach.

Be that as it may, I agree that this appeal is devoid of merit and is hereby dismissed. I abide by all consequential orders made in the lead judgment.

D Appeal dismissed.

John Inyang Okoro
Justice, Supreme Court

E **EJEMBI EKO, (JSC):** I read in draft the judgment just delivered by my learned brother, C.C. NWEZE, JSC. It represents my views in this appeal, and I hereby adopt it, including all the consequential orders made therein.

When the legal practitioners repeat and submit the same issue on
F which this court had previously authoritatively pronounced and declared the law on one begins to wonder whether the law reports serve any useful purpose anymore. But how long can the courts tolerate this attitude, reminiscent of the French Bourbons, who learnt nothing and who forgot
G everything?

The issue of jurisdiction vociferously canvassed in this appeal is the same issue canvassed and decided upon in **F.RN. vs. OKEWU** (2016) 17 NWLR (Pt. 1541) 266 and many other decisions of this court following the
H decision of the Full Panel of this Court in **A.G, ONDO STATE vs. A.G, FEDERATION & ORS** (2002) 9 NWLR (Pt. 772) 222 (SC). Only recently, in **ONTARIO OIL & GAS NIG. LTD vs. F.R.N** No. SC. 518/2015 of 26th January, 2018 this court, on the principle of ***stare decis*** **re-
I affirmed the *ratio decendendi;*** in A.G. ONDO STATE vs. A.G. FEDERATION (supra) as regards this same point being canvassed in this

appeal under issue 1. The issue has since been settled. Thus, an attempt to re-open it ostensibly for another panel to render a contrary view is an irritating abuse of process. I think, and I so hold firmly, that this appeal, particularly on issue I canvassed herein, is frivolous and a gross abuse of court's process.

An appeal is said to be frivolous when there is no legal basis for bringing it; and it is only brought, as this interlocutory appeal has been, to delay the proceedings at the trial court. According to Black's Law Dictionary 9th ed, an appeal, filed purposely to avoid payment of the judgment debt or to frustrate the judgment creditor and induce him to settle, is a frivolous appeal. This instant interlocutory appeal has all the characteristics of a frivolous appeal, having been brought, for the purpose only, to frustrate and delay the trial of the criminal case pending against the appellant at the trial court.

In view of the numerous decisions previously rendered, which authoritatively declared the stance of this court on the issue being canvassed in this appeal as issue 1, I should now think that there is no law supporting the point being now canvassed in this appeal under Issue 1 by the appellant. The appeal on the said issue is clearly premised on frivolity and recklessness; and that is what makes the appeal on that issue vexatious and an abuse of the court's process. I am reinforced on this point by the decision of this court in **R BENKAY NIG. LTD vs. CADBURY NIG. LTD** (2012) LPELR 7820 (SC). The employment of judicial process by a party, not only to irritate and annoy his opponent, but also the efficient and effective administration of justice is an abuse of the process of the court: **SARAKI vs. KOTOYE** (1992) 9 NWLR (Pt. 264) 156 at 188.

I think it is time the Bar addressed this intrapersonal crisis in order to arrest the altruistic conduct of its members resorting to what my learned brother calls "these kinds of professional shenanigans only designed to delay proceedings at the trial court".

I find no substance in this appeal which I regard as frivolous and vexatious. It is accordingly dismissed.

Ejembi Eko