ADAMU ABUBAKAR
(for himself and on behalf of the Family of Alhaji Kawuju Umaru)
Vs.
MICHELIN MOTOR SERVICES LIMITED

SC.142/2014

IN THE SUPREME COURT OF NIGERIA HOLDEN AT ABUJA

FRIDAY 24TH JANUARY 2020

BEFORE THEIR LORDSHIPS

OLABODE RHODES- VIVOUR	**JUSTICE, SUPREME COURT**
KUDIRAT M. O. KEKERE-EKUN	**JUSTICE, SUPREME COURT**
CHIMA CENTUS NWEZE	**JUSTICE, SUPREME COURT**
AMIRU SANUSI	**JUSTICE, SUPREME COURT**
EJEMBI EKO	**JUSTICE, SUPREME COURT**

ACTION:- Limitation thereof —Whether the legal right to enforce an action is not a right in perpetuity —The principle in ***Amadi & Anor Vs. INEC (2012) LPELR —7831.***

ACTION:- Cause of action —How determined —Whether details must be clearly stated in terms of the wrongful act of the defendant in the statement of claim.

ACTION:- Cause of action —Meaning —Whether an action founded on contract must be brought within five years when the cause of action arose in Plateau State.

ACTION:- Limitation —Purpose —Whether to require diligent prosecution of known claims —The principle in ***Sulegrave Holdings Inc. & Ors Vs. F.R.N & Ors (2012) LPELR —15520***

ACTION:- Limitation thereof —How determined —Whether time begins to run when the cause of action accrued.

ACTION:- Limitation thereof —Nature and effect of limitation law —Whether an action which is brought after the prescribed period is statute barred.

ACTION:- Statute barred —How determined —Whether to consider in detail the writ of summons and statement of claim.

ACTION:- Statute barred —When does it arise —Relevant considerations thereof.

ACTION:- Statutes of limitation —Rationale.

EQUITY:- Legal right —A party does not have a perpetual legal right —Whether equity will not allow a party to go to sleep and brings his action whenever he pleases.

PRACTICE AND PROCEDURE:- Pleadings —Limitation law —It is desirable to plead the issue of limitation —Whether it can also be raised without pleadings —Rationale.

STATUTE:- Plateau State limitation law —Section 18 thereof —Nature and purport.

STATUTE:- Limitation law of Lagos State —Nature and purport.

STATUTE:- Limitation law of Plateau State —Section 14 thereof —Nature and purport.

Issue for Determination

Whether the court below was right when it held that the appellant's action is statute barred by virtue of Section 18 of the Plateau State Limitation law (Edict No. 16, 1988)

Fact of the Matter

The appellant as claimant sued the defendant/respondent at the High Court of Plateau State claiming a refundable deposit with bonuses arising out of a dealership contract for the sales of tyres. He also claimed damages and interest thereon.

At the end of trial, judgment was given in favour of the claimant/ appellant. Dissatisfied with the judgment the defendant/respondent appealed to the court of Appeal Jos Division, which found that the suit was statute bared and set aside the decision of the trial court. The claimant/appellant has now appealed to the Supreme Court.

Held: *(Unanimously dismissing the appeal)*

1. *When is an action statute barred.*

When it is said that an action is statute barred, it simply means that the action/claim is barred from being heard and determined by any court by a provision of a statute. It is usually as to time. The bar gives a time limit during which certain actions can be brought t to court. Failure to bring the action within the time stipulated by the statute renders the action invalid and the court without jurisdiction to hear the action/claim. ***(P 11 para C- D)***

2. *Limitation law is an issue of jurisdiction*

It is desirable but not mandatory that limitation law is pleaded. If it is not pleaded, it still can be raised at any stage in the proceedings and in any court for the first time, since it is an issue of jurisdiction. The adverse party must

be put on notice so that he is not taken by surprise. Once an action is found to be caught by the limitation law, the hearing of the suit abates. It can never be revived. When such a suit is struck out by the court it amounts to infantile reasoning to hold that applying the law as it is technical justice. On the contrary it amounts to substantial justice. Counsel is expected to know the law and guide the court to ensure compliance with clear provisions of the statute concerned.
(P 11 para D - E)

3. *The rationale for statute of limitation*
The rational for statute of limitation is simple. A claimant who has slept on his rights is not to be assisted or allowed to bring his action when he likes. A claimant should file his action with diligence and within the time provided by statute. Limitation periods protect a defendant from the injustice of having to face a stale claim. For example, if a claim is brought a long time after the events in question, there is a strong likelihood that evidence which was available earlier may have been lost, and all the memories of witnesses may have faded. A party would not be allowed to take advantage of the limitation law where there is clear evidence of disability, mistake, fraud and in certain cases involving personal injury, death. ***(P11.para F-G)***

4. *The nature and purport of limitation law of Lagos State*
Limitation laws are in all jurisdictions. For example the limitation law, CapL. 67 of Lagos State provides that the following actions shall not be brought after the expiration of six years from the date of which the cause of action accrued-

(a) actions founded on simple contract;
(b) actions founded on quasi contract;
(c) actions to enforce a recognisance.

No person can bring an action to recover land after the expiration of twelve years from when his cause of action accrued. These are a few examples.
(Pp 11-12 para G- A)

5. *How to determine whether an action is statute barred*
To find out whether the claimants clam is caught by the limitation law, first identify the claimants claim, or cause of action and this is done by examining in detail the writ of summons and statement of claim. It would then be easy to find out when the wrong which gave the claimant his cause of action was committed. Compare that date with the date the writ of summons was filed. If the writ of summons was filed outside the period provided for the claimant's claim the

claim is no longer actionable. It is statute barred. The entire exercise spelt

out above can be done without taking evidence.

Applying the above to the facts of this case, the appellant as plaintiff sued the respondent defendant for:

(a) The sum of N4,400,000.00 (Four million, four hundred thousand Naira) only being the refundable deposit the plaintiff has with the defendant.

(b) The sum of N1,936,919,54 (One million, Nine hundred and thirty six thousand Nine hundred and nineteen naira, fifty four kobo) only being 1999 end of year and progress bonuses.

(c) 10% interest per annum therefrom 1999 till final payment of the entire sum.

(d) The sum of N112,500.00 per week as special damages from 1st January 2000 to 26th January 2000 i.e. for 55 weeks.

(e) The cost of this action. ***(P12 para B-E)***

6. Property of respondent was not mentioned in the writ

It is clearly evident that the relationship between the appellant and the respondent is that of a contract for sale of Motor tyres.

And the conflict between the parties arose from the said contractual relationship. That is, it was as a result of the alleged failure of the respondent to pay to the appellant for some consignments or supplies of Motor tyres that led to the refusal of the appellant to further deliver the goods to the respondents. Apart from the sums paid by the respondent to the appellant as deposits, no mention is made either in the writ or statement of claim, of any title document of the respondent's landed property being used as security in the transaction between the parties did not arise from the issue of charge on any property of the respondent……..." ***(P p 12-13 para G-A)***

7. Appellant's action is founded on simple contract.

After detailed review of the statement of claim it is clear that the appellant entered into a contract with the respondent to sell its tyres. This was a dealership/distributorship contract. A term in the contract was that the appellant was to pay to the respondent a refundable deposit and was entitled to bonuses as the years rolled by. The appellant demanded for his refundable deposit and bonuses, but the respondent refused to pay/return the sums claimed by the appellant. This is clearly a breach of contract if the facts are correct. The appellant's action is founded in simple contract. ***(P 13 para B-C)***

8. The nature and purport of Section 14

Learned counsel for the respondent's argument is that the plaintiff's claim is

covered by Section 14 and not Section 18 of the Plateau State Limitation Law (Edict No. 16 of 1988). It reads:

"14 (1). No action shall be brought to recover-

(a) any principal sum of money secured by a mortgage or other charge on property; or

(b) proceeds of the sale of land; after the expiration of the sale of land; after the expiration of ten years from the date on which right to receive the money accrued.

(2) No foreclosure action in respect of mortgage property shall be brought after the expiration of ten years from the date on which the right to foreclose accrued: provided that if, the mortgage was in possession of the mortgaged property alter that date, the right to foreclose on the property which was in his possession shall be treated as having accrued for the purposes of this subsection until the date on which his possession discontinued.

(3) The right to receive any principal sum of money secured by a mortgage or other charge and the right to foreclose on the property subject to the mortgage or charge shall not be deemed to accrue so long as that property comprises any future interest or any life insurance policy which has not matured or been determined.

(P 13 para D-G)

9. The nature and purport of Section 18 Plateau State Limitation Law

Section 14 of the Plateau State Limitation Law (Edict No. 16 of 1988) is not applicable, rather Section 18 (supra.) is relevant and applicable.

When should claims in contract be filed in court in Plateau State?

Section 18 of the Plateau State Limitation Law (Edict No.16 of 1988) states that:

> **"No action founded on contract, tort or any other action not specifically provided for in parts (i) and (ii) of this edict shall be brought after the expiration of five years from the date on which the cause of action accrued……"** ***(P p 14-15 para G-A)***

10. The meaning of "Cause of Action"

In Plateau State an action founded in contract which the appellant's claim happens to be must be brought within five years from when the appellant had a

cause of action.

A cause of action means the factual situation which entitles one person to obtain a remedy from another person in court. Any act on the part of the defendant which gives the claimant a cause of complaint is a cause of action.

Put in another way a cause of action is the fact or combination of facts which give rise to a right to sue and it consists of two elements:

(a) the wrongful act of the defendant which gives the plaintiff his cause of complaint, and
(b) the consequent damage.

So, when facts establishing a civil right or obligation and facts establishing infraction of a trespass on those rights and obligations exist side by side, a cause of action is said to have accrued. See Thomas Vs. Olufosoye (1986)1 NWLR (Pt.18) p.669; Adimora Vs. Ajufo (1988) 3 NWLR (Pt.80) p.1; Afolayan Vs. Ogunrinde (1990) 1 NWLR (Pt.127) p . 369; UWazuruonye Vs. Gov of Imo State & 2 Ors (2012) IISC p.133. ***(P15 para B-D)***

11. How to determine cause of action

A cause of action is thus a fact, once proved would entitle a claimant to remedy against the defendant.

The claimant must show in his pleadings the wrongful act of the defendant to establish cause of action.

These averments must be detailed, especially as to dates and the date on which his cause of action accrued. The defendant is expected to join issues with the claimant. It is desirable that the defendant pleads the limitation law relied on, but if he does not plead it, he is at liberty to raise it at any stage of the proceedings and even on appeal for the first time. This is because the court has no jurisdiction to hear any action taken after the specified period.

The claimant averred to detailed facts to show how he got a cause of action. He also averred to further facts that his cause of action accrued in 1999.

In response the defendant averred as follows:

> **"13(d) The defendant also pleads limitation with respect to the claim for bonus and states the particulars that the claim relates to bonus for the year 1999, much more than 5 years prior to the commencement of the suit."** ***(P 15 para E-G)***

12. Time begins to run from the date the cause of action accrues.

The parties are ad idem on when the cause of action accrued. The claimant's action accrued in 1999. Time begins to run from the date the cause of action accrues.

In determining the period of limitation, all that the court has to do is to

examine the pleadings to see when the cause of action arose and compare that date with when the writ of summons was filed. If the time on the writ of summons is beyond the period provided by the limitation law, then the action is statute barred. See Mulima & Anor vs. Usman & 3 Ors (2014) 1-2 SC (Pt. III) p. 126; Okenwa vs. Military Gov. Imo State (1996) 6 NWLR (Pt. 455) p. 394; Egbe Vs. Adefarasin (No.2) (1987) 1 NWLR (Pt. 47) p. 1 F.R.I.N Vs. Gold (2007) 11NWLR (Pt. 1044) p. 1. ***(P p15-16 para H-A)***

13. *Equity will not allow a party to go to sleep and bring his action whenever he pleases.*

That is to say the appellant as claimant filed his action after eight years instead of within five years, counting from 1999. Counsel and litigants must be reminded that it is the well laid down position of the law that once the claimant's legal right is established he must have a remedy. Such a right is not a perpetual right. . He must act timeously. The law and indeed equity would not allow him to go to sleep and bring his action at any time, or when he feels obliged to do so. His right of action is limited by statute and in this case the Plateau State Limitation Edict No.16 of 1988. The appellant's action is statute barred by virtue of Section 18 of that Law. ***(P 16 para C-D)***

14. *The purport and effect of a statute of limitation*

The purport and effect of a statute of limitation, such as the Plateau State Limitation Edict No. 16 of 1988 is that where the statute prescribes a period within which an action should be brought, legal proceedings cannot validly be brought or instituted after the expiration of the prescribed period. An action brought after the prescribed period is said to be statute-barred. ***(P 16 para F-G)***

15. *The legal right to enforce an action is not a right in perpetuity.*

It was held in Amadi & Anor. Vs INEC (2012) LPELR - 7831 (SC) at 31-32 D-E, that the essence of a limitation law is that the legal right to enforce an action is not a right in perpetuity, but a right generally limited by statute.

Consequently, where the action is bought outside the prescribed period, the court is divested of jurisdiction to entertain the matter, as it is no longer a live issue. See also: Egbe Vs. Adefarasin (1987) 1 NWLR (Pt.47)1; Hassan Vs. Aliyu (2010) 17 NWLR (Pt.1223) 547. ***(Pp 16-17 para G-A)***

16. *The purpose of the limitation law*

It was further held in Sulegrave Holdings Inc. & Ors. Vs. F.R.N (2012) LPELR -15520 (SC) @ 36 A-D, that the purpose of a limitation law is to require diligent prosecution of known claims, thereby providing predictability and finality in legal affairs.

The applicable provision of the Plateau State Limitation Law (Edict

NO.16 of 1988) is Section 18 thereof, which provides:

> **"No action founded on contract, tort or any other action not specifically provided for in parts (i) and (ii) of this edict shall be brought after the expiration of <u>five years from the date on which the cause of action accrued</u> .....**

Section 14 of the Law is inapplicable to the facts of this case, there being no pleading relating to a mortgage or charge. ***(P 17 para A-C)***

17. Section 14 is not applicable

The appellant, in order to avoid the full force of Section 18 had submitted, wrongly, that it is Section 14 of the said limitation law, and not Section 18 that applies to his case. Section 14 of the Law No. 16 applies only in respect or relation to dispute for recovery of any principal sum of money secured by mortgage or other charged on property, foreclosure action; et al which is not the issue in this appeal. Between the appellant and the respondent there was no mortgage transaction to warrant the plea or resort to Section 14 of the Limitation Law No. 16, 1988 of Plateau State, as the appellant has, resort to Section 14 was clearly diversionary and unavailing. ***(P 18 para D-E)***

Representations:
K. AINA for the appellant, C. Obiadi with him.
E.O. OKORO for the respondent, S.M. Danlani, E. I. Nbigwe, with him.

OLABODE RHODES- VIVOUR, JSC (Delivered the lead judgment): The respondent is a company engaged in the manufacture of tyres, while the appellant is a businessman. In 1989 the appellant entered into a dealership contract with the respondent. That is to say the appellant became a motor tyre dealer/distributor.

According to the terms of the contract the appellant was to pay and he paid a refundable deposit which was retained by the respondent. In the course of the contract a dispute arose as to whether the appellant was indebted to the respondent and whether the respondent was right to withhold the refundable deposit and bonuses to offset part of the indebtedness. In 1999 the appellant demanded for the refundable deposit and bonuses. The respondent was unyielding and communicated his refusal to the appellant in its letter dated 26th July, 1999.

Aggrieved by the attitude of the respondent the appellant as claimant filed suit No: PLD/J/153/2007 before a Plateau State High Court. His claim against the respondent/defendant was for:

(a) The sum of N4,400,000.00 (Four million, four hundred thousand Naira) only being the refundable deposit the plaintiff has with the defendant.

(b) The sum of N1,936,91954 (One million, Nine hundred and thirty six thousand, nine hundred and nineteen naira fifty four kobo) only being 1999 end of year and progress bonuses.

(c) 10% interest per annum therefrom 1999 till final payment of the entire sum.

(d) The sum of N112,500.00 per week as special damages from 1st January 2001 to 26 January 2001 i.e. for 55 weeks.

(e) The cost of this action.

A similar dealership contract was executed by the respondent with Alhaji Abubakar Baba Umar. He also sued the respondent on identical facts. That was suit No: PLD/J/152/2007. His appeal would be addressed in SC.141/2014.

Dakyen CJ Plateau State sitting in Jos presided. His lordship ordered both suits consolidated, and in a considered judgment delivered on 1st June 2011, His lordship found in favour of the claimant's as follows:

"The plaintiff in suit No: PLD/J/152/07 is awarded the reliefs in his paragraph 15 (a) (b) and (c). With regards to claim in paragraph 15 (d) and (e) I decline to award same, having regard to the fact that the plaintiffs in this suit had kept the business in abeyance alter the death of Alhaji Kawuje.

The plaintiff in suit No:PLD/J/153/07. The plaintiff succeeds and is entitled to reliefs in his paragraph 15(a), (b) and (c) of his statement of claim. For the same reasons in respect of suit No: PLD/JI52/07 I also decline to award reliefs (d) and (e) of the plaintiffs paragraph 15 of the statement of claim."

Dissatisfied with the judgment of the trial court the respondent filed an appeal. The appeal was heard by the Court of Appeal, Jos Judicial Division. On 27th June, 2013 judgment was delivered. The court found that both suits were statute barred and declined to address other issues. The courts reasoning was that it would amount to a futile academic exercise. The concluding paragraph of the judgment reads as follows:

"In consequence of the absence of competence and jurisdiction of the trial court to adjudicate upon both actions, I hold that the judgments of the trial court being appealed herein cannot be saved.

This appeal is meritorious and hereby allowed. In essence, the judgment of the trial court delivered on 7th June, 2011 in suit No: PLD/J/152/2007 is hereby declared a nullity and set aside……"

This appeal is against that judgment. The consolidated suits were heard in the High Court as PLD/J/152/2007 and in the Court of Appeal as CA/J/179/2011. The suits are being heard individually in the Supreme Court.

Briefs were filed and exchanged by counsel, learned counsel for the appellant Mr. Kehinde Aina relied on amended appellant's brief, while learned counsel for the respondent, Mr. E.O. Okoro relied on respondent's brief.

Mr. Kehinde Aina learned counsel for the appellant presented a sole issue for consideration. It reads:

> **"Whether or not, in view of Section 14 of the Plateau State Limitation Edict No16, 1988 the appellant's action is not statute barred and the lower court has jurisdiction to hear and determine the appellant's action.**

Learned counsel for the respondent, Mr. E.O. Okoro in his own sole issue for consideration also asks the same question.

> **Whether the court below was right when it held that the appellant's action is statute barred by virtue of Section 18 of the Plateau State Limitation law (Edict No. 16, 1988)**

The issue formulated by the respondent shall be considered in resolving this appeal. It reads:

> **Whether the court below was right when it held that the appellant's action is statute barred by virtue of Section 18 of the Plateau State Limitation Law (Edict No 16, 1988).**

Learned counsel for the appellant Mr. K. Aina observed that to decide whether this suit is statute barred, Section 14 and not Section 18 of the Plateau State Limitation Law (Edict No. 16 of 1988) should be considered. He further observed that by the provisions of Section 14 supra the appellant had ten years to file his claim from when his cause of action arose against the respondent. He submitted that the Court of Appeal was wrong to rely on Section 18 supra and declare the appellants action statute barred. Reliance was placed on: **UBA Plc Vs. Abdullahi (2003) 2 NWLR (Pt. 807) p. 359 J.K.K Ltd Vs. Gov. of Lagos State (2014) 5 NWLR (Pt. 1399) p. 151; Lawan Sanda Vs. Kukawa LG & Anor (1991) 2 NWLR (Pt. 174) p. 379; Adekoya Vs. FHA (2008) 11 NWLR (Pt. 1099) p. 539.**

He urged this court to allow this appeal, set aside the decision of the Court of Appeal and restore the judgment of the trial court by entering judgment in favour of

the appellant in terms of the appellant's claim since the action was filed within ten years as provided by section 18 (supra).

Learned counsel for the respondent observed that the appellant's claim was purely founded on breach of contract by the respondent who refused to return the refundable deposit and to pay the bonus under the Dealership/Distributor contract with the respondent.

He submitted that the applicable provision of the Plateau State Limitation Law (Edict No 16 of 1988) is Section 18 and not Section 14.

He urged this court to resolve the sole issue against the appellant and dismiss the appeal for lacking in merit.

The question which arises from the sole issue for determination is whether or not the plaintiff/appellant's action is statute barred?

When it is said that an action is statute barred, it simply means that the action/claim is barred from being heard and determined by any court by a provision of a statute. It is usually as to time. The bar gives a time limit during which certain actions can be brought t to court. Failure to bring the action within the time stipulated by the statute renders the action invalid and the court without jurisdiction to hear the action/claim.

It is desirable but not mandatory that limitation law is pleaded. If it is not pleaded, it still can be raised at any stage in the proceedings and in any court for the first time, since it is an issue of jurisdiction. The adverse party must be put on notice so that he is not taken by surprise. Once an action is found to be caught by the limitation law, the hearing of the suit abates. It can never be revived. When such a suit is struck out by the court it amounts to infantile reasoning to hold that applying the law as it is technical justice. On the contrary it amounts to substantial justice. Counsel is expected to know the law and guide the court to ensure compliance with clear provisions of the statute concerned.

The rational for statute of limitation is simple. A claimant who has slept on his rights is not to be assisted or allowed to bring his action when he likes. A claimant should file his action with diligence and within the time provided by statute. Limitation periods protect a defendant from the injustice of having to face a stale claim. For example, if a claim is brought a long time after the events in question, there is a strong likelihood that evidence which was available earlier may have been lost, and all the memories of witnesses may have faded. A party would not be allowed to take advantage of the limitation law where there is clear evidence of disability, mistake, fraud and in certain cases involving personal injury, death.

Limitation laws are in all jurisdictions. For example the limitation law, CapL. 67 of Lagos State provides that the following actions shall not be brought after the expiration of six years from the date of which the cause of action accrued:

(a) actions founded on simple contract;
(b) actions founded on quasi contract;

(c) actions to enforce a recognisance.

No person can bring an action to recover land after the expiration of twelve years from when his cause of action accrued. These are a few examples.

To find out whether the claimants clam is caught by the limitation law, first identify the claimants claim, or cause of action and this is done by examining in detail the writ of summons and statement of claim. It would then be easy to find out when the wrong which gave the claimant his cause of action was committed. Compare that date with the date the writ of summons was filed. If the writ of summons was filed outside the period provided for the claimant's claim the claim is no longer actionable. It is statute barred. The entire exercise spelt out above can be done without taking evidence.

Applying the above to the facts of this case, the appellant as plaintiff sued the respondent defendant for:

> **(a) The sum of N4,400,000.00 (Four million, four hundred thousand Naira) only being the refundable deposit the plaintiff has with the defendant.**
> **(b) The sum of N1,936,919,54 (One million, Nine hundred and thirty six thousand Nine hundred and nineteen naira, fifty four kobo) only being 1999 end of year and progress bonuses.**
> **(c) 10% interest per annum therefrom 1999 till final payment of the entire sum.**
> **(d) The sum of N112,500.00 per week as special damages from 1st January 2000 to 26th January 2000 i.e. for 55 weeks.**
> **(e) The cost of this action.**

After examining the writ of summons and statement of claim this is what the Court of Appeal said:

> **"From the facts averred to in the writ of summons and statement of claim of the respondents, it is clearly evident that the relationship between the appellant and the respondent is that of a contract for sale of Motor tyres.**
>
> **And the conflict between the parties arose from the said contractual relationship. That is, it was as a result of the alleged failure of the respondent to pay to the appellant for some consignments or supplies of Motor tyres that led to the refusal of the appellant to further deliver the goods to the respondents. Apart from the sums paid by the respondent to the appellant as deposits,**

> **no mention is made either in the writ or statement of claim, of any title document of the respondent's landed property being used as security in the transaction between the parties did not arise from the issue of charge on any property of the respondent……..."**

After detailed review of the statement of claim it is clear that the appellant entered into a contract with the respondent to sell its tyres. This was a dealership/distributorship con-

tract. A term in the contract was that the appellant was to pay to the respondent a refundable deposit and was entitled to bonuses as the years rolled by. The appellant demanded for his refundable deposit and bonuses, but the respondent refused to pay/return the sums claimed by the appellant. This is clearly a breach of contract if the facts are correct. The appellant's action is founded in simple contract.

The Court of Appeal was correct in its findings. In order to pay the refundable deposit the appellant approached UBA PLC for a loan. He was successful. He had to deposit his title documents with UBA PLC as collateral for the loan (i.e. the sums paid to the respondent by UBA PLC).

Learned counsel for the respondent's argument is that the plaintiff's claim is covered by Section 14 and not Section 18 of the Plateau State Limitation Law (Edict No. 16 of 1988). It reads:

"14 (1). No action shall be brought to recover-

(c) any principal sum of money secured by a mortgage or other charge on property; or

(d) proceeds of the sale of land; after the expiration of the sale of land; after the expiration of ten years from the date on which right to receive the money accrued.

(2) No foreclosure action in respect of mortgage property shall be brought after the expiration of ten years from the date on which the right to foreclose accrued: provided that if, the mortgage was in possession of the mortgaged property alter that date, the right to foreclose on the property which was in his possession shall be treated as having accrued for the purposes of this subsection until the date on which his possession discontinued.

(3) The right to receive any principal sum of money secured by a mortgage or other charge and the right to foreclose on the property subject to the mortgage or charge shall not be deemed to accrue so long as that property comprises any future interest or any life insurance policy which has not matured or been determined.

(4) Subject to subsections (5) and (6) of this section, no action

to recover (a) money payable in respect of proceeds of the sale of land; or (b) arrears of interest payable in respect of any sum of money secured by a mortgage or other charge; or (c) damages in respect of such arrears, shall be brought after the expiration of ten years from the date on which such money becomes payable or interest becomes due.

(5) Where (a) a prior mortgage or other encumbrance has been in possession of the property charged; and (b) an action is brought within one year of the discontinuance of that posses-

sion by a subsequent encumbrance; the subsequent encumbrance may recover by that action all the arrears of interest which fell due during the period of possession by the prior encumbrance or damages in respect to those arrears notwithstanding that the period exceeds ten years.

(6) Where —

(a) The property subject to the mortgage or charge comprises any future interest or life insurance policy,
AND

(b) It is the term of the mortgage or charge that arrears of interest shall be treated as part of the principal sum of money secured by the mortgage or charge; the interest shall not be treated as becoming due before the right to recover the principal sum of money has accrued or is treated as having accrued.

We have examined the appellant's submissions and the cases he relies on which we do not find relevant. It must be observed that nowhere in the appellant's pleadings was mortgage or charge even remotely averred to and the facts averred to do not support such an action. The issue in controversy between the parties does not arise from mortgage or charge. The appellant's pleading, reveals that he sued the respondent for refundable deposits and bonuses. This is a clear case of breach of contract.

How the appellant got the money to pay for the refundable deposit is a private transaction between the appellant and UBA PLC. The respondent is not a party to that transaction and UBA PLC is not a party to this transaction. The appellant's claim has nothing to do with sums of money secured by a mortgage or charge on property and proceeds of sale of land.

Section 14 of the Plateau State Limitation Law (Edict No. 16 of 1988) is not applicable, rather Section 18 (supra.) is relevant and applicable.

When should claims in contract be filed in court in Plateau State?

Section 18 of the Plateau State Limitation Law (Edict No.16 of 1988) states that:

"No action founded on contract, tort or any other action not specifically provided for in parts (i) and (ii) of this edict shall be brought after the expiration of five years from the date on which the cause of action accrued……."

In Plateau State an action founded in contract which the appellant's claim happens to be must be brought within five years from when the appellant had a cause of action.

A cause of action means the factual situation which entitles one person to obtain a remedy from another person in court. Any act on the part of the defendant which gives the claimant a cause of complaint is a cause of action.

Put in another way a cause of action is the fact or combination of facts which give rise to a right to sue and it consists of two elements -

(a) the wrongful act of the defendant which gives the plaintiff his cause of complaint, and
(b) the consequent damage.

So, when facts establishing a civil right or obligation and facts establishing infraction of a trespass on those rights and obligations exist side by side, a cause of action is said to have accrued. See Thomas Vs. Olufosoye (1986) 1 NWLR (Pt.18) p.669; Adimora Vs. Ajufo (1988) 3 NWLR (Pt.80) p.1; Afolayan Vs. Ogunrinde (1990) 1 NWLR (Pt.127) p.369; UWazuruonye Vs. Gov of Imo State & 2 Ors (2012) IISC p.133.

A cause of action is thus a fact, once proved would entitle a claimant to remedy against the defendant.

The claimant must show in his pleadings the wrongful act of the defendant to establish cause of action.

These averments must be detailed, especially as to dates and the date on which his cause of action accrued. The defendant is expected to join issues with the claimant. It is desirable that the defendant pleads the limitation law relied on, but if he does not plead it, he is at liberty to raise it at any stage of the proceedings and even on appeal for the first time. This is because the court has no jurisdiction to hear any action taken after the specified period.

The claimant averred to detailed facts to show how he got a cause of action. He also averred to further facts that his cause of action accrued in 1999.

In response the defendant averred as follows:

"13(d) The defendant also pleads limitation with respect to the claim for bonus and states the particulars that the claim relates to bonus for the year 1999, much more than 5 years prior to the commencement of the suit."

The parties are ad idem on when the cause of action accrued. The claimant's action

accrued in 1999. Time begins to run from the date the cause of action accrues.

In determining the period of limitation, all that the court has to do is to examine the pleadings to see when the cause of action arose and compare that date with when the writ of summons was filed. If the time on the writ of summons is beyond the period provided by the limitation law, then the action is statute barred. See **Mulima & Anor vs. Usman & 3 Ors (2014) 1-2 SC (Pt. III) p. 126; Okenwa Vs. Military Gov. Imo State (1996) 6 NWLR (Pt. 455) p. 394; Egbe Vs. Adefarasin (No.2) (1987) 1 NWLR (Pt. 47) p. 1 F.R.I.N Vs. Gold (2007) 11NWLR (Pt. 1044) p. 1.**

The cause of action accrued in 1999 while the writ of summons was filed on 30th April 2007.

That is to say the appellant as claimant filed his action after eight years instead of within five years, counting from 1999. Counsel and litigants must be reminded that it is

the well laid down position of the law that once the claimant's legal right is established he must have a remedy. Such a right is not a perpetual right. . He must act timeously. The law and indeed equity would not allow him to go to sleep and bring his action at any time, or when he feels obliged to do so. His right of action is limited by statute and in this case the Plateau State Limitation Edict No.16 of 1988. The appellant's action is statute barred by virtue of Section 18 of that Law.

In the light of all that I have saying there is no merit in this appeal.

The judgment t of the Court of Appeal is affirmed.

No order on costs.

Olabode Rhodes-Vivour
Justice Supreme Court

KUDIRAT MOTONMORI OLATOKUNBO KEKERE-EKUN, (JSC): I have had the benefit of reading before now, the judgment of my learned brother, OLABODE RHODES-VIVOUR, JSC just delivered. I agree with him entirely that the appellant's action at the trial court was in respect of an alleged breach of contract between him and the respondent in respect of a dealership contract. The parties are *ad idem* that the cause of action accrued in 1999. The record shows that the suit was filed on 30/4/2007, about eight years later.

The purport and effect of a statute of limitation, such as the Plateau State Limitation Edict No. 16 of 1988 is that where the statute prescribes a period within which an action should be brought, legal proceedings cannot validly be brought or instituted after the expiration of the prescribed period. An action brought after the prescribed period is said to be statute-barred.

It was held in **Amadi & Anor. Vs INEC (2012) LPELR - 7831 (SC) at 31-32 D-E,** that the essence of a limitation law is that the legal right to enforce an action is not a right in perpetuity, but a right generally limited by statute.

Consequently, where the action is bought outside the prescribed period, the court is divested of jurisdiction to entertain the matter, as it is no longer a live issue. See also: **Egbe Vs. Adefarasin (1987) 1 NWLR (Pt.47)1; Hassan Vs. Aliyu (2010) 17 NWLR**

(Pt.1223) 547. It was further held in **Sulegrave Holdings Inc. & Ors. Vs. FRN & Ors (2012) LPELR -15520 (SC) @ 36 A-D,** that the purpose of a limitation law is to require diligent prosecution of known claims, thereby providing predictability and finality in legal affairs.

The applicable provision of the Plateau State Limitation Law (Edict NO.16 of 1988) is Section 18 thereof, which provides:

> **"No action founded on contract, tort or any other action not specifically provided for in parts (i) and (ii) of this edict shall be brought after the expiration of five years from the date on which the cause of action accrued .....**

Section 14 of the Law is inapplicable to the facts of this case, there being no pleading

relating to a mortgage or charge.

I agree with my learned brother, that the appellant's claim, founded on breach of contract, was statute-barred having been filed outside the 5 years prescribed by the limitation law. I agree with the sound reasoning and conclusion that the appeal lacks merit. It is accordingly dismissed. The judgment of the lower court is affirmed.

I make no order for costs.

Kudirat Motonmori Olatokunbo Kekere-Ekun,
Justice Supreme Court

CHIMA CENTUS NWEZE, (JSC): I had the advantage of reading, before now, the draft of the leading judgement which my Lord, Rhodes-Vivour, JSC, just delivered. I agree with His Lordship that this appeal is devoid of merit and deserves to be dismissed.

Appeal dismissed.

Chima Centus Nweze
Justice, Supreme Court

EJEMBI EKO, (JSC): Section 18 of the Plateau State Limited Law No. 16, 1988 provides expressly that no action founded on contract shall be brought after the expiration of five years from the date on which the cause accrued. The provisions are clear and unambiguous.

The appellant, as the plaintiff at the trial court, founded his claims on the refusal of the respondent, as the defendant, to pay, on his demand for refund, the refundable deposit as agreed in the contract he was enforcing. The action was therefore founded on breach of contract by the defendant.

The respondent, refusing to pay the refundable deposit, made its refusal to pay very clear in the letter dated 26th, July 1999. The right to the cause of action summarised in the following five claims the appellant made against the respondent at the trial court, to wit-

a. **the sum of N4,4000,000.00 (Four Million, Four Hundred Thousand Naira) only being the refundable deposit the plaintiff has with the defendant.**
b. **the sun of N 1,936,919.54 (One Million, Nine Hundred and Thirty-Six Thousand, Nine Hundred and Nineteen naira Fifty Four Kobo) only being 1999 end of year and progress bonuses.**
c. **10% interest per annum therefrom 1999 till final payment of the entire sum.**
d. **the sum of N 112,500.00 per week as special damages from 1st January 2000 to 26th January 2001 i.e. for 55 weeks.**
e. **the costs of this action,**

accrued to the appellant from the said refusal to pay which was duly communicated to the

appellant on 26th July, 1999. The five (5) years period for the purpose of the limitation, calculated from the said 26th July, 1999, ends in July 2004. The suit commenced in 2007 was clearly statute barred, and right to enforce the cause of action extinguished against the appellant, as the plaintiff.

The appellant, in order to avoid the full force of Section 18 had submitted, wrongly, that it is Section 14 of the said limitation law, and not Section 18 that applies to his case. Section 14 of the Law No. 16 applies only in respect or relation to dispute for recovery of any principal sum of money secured by mortgage or other charged on property, foreclosure action; et al which is not the issue in this appeal. Between the appellant and the respondent there was no mortgage transaction to warrant the plea or resort to Section 14 of the Limitation Law No. 16, 1988 of Plateau State, as the appellant has, resort to Section 14 was clearly diversionary and unavailing.

The judgment just delivered in this appeal by my learned brother, OLABODE RHODE5-VIVOUR, JSC, represents my views in the appeal. I hereby endorse and adopt it, including all the orders made therein.

Appeal dismissed.

Ejembi Eko *Justice Supreme Court*

CENTRAL BANK OF NIGERIA

Vs.

RAHAMANIYYA GLOBAL RESOURCES LTD.

SC.632/2017

IN THE SUPREME COURT OF NIGERIA HOLDEN AT ABUJA

FRIDAY, 17TH JANUARY, 2020

BEFORE THEIR LORDSHIPS

MARY UKAEGO PETER-ODILI JUSTICE, SUPREME COURT
MUSA DATTIJO MUHAMMAD JUSTICE, SUPREME COURT JOHN INYANG OKORO JUSTICE, SUPREME COURT PAUL ADAMU GALUMJE JUSTICE, SUPREME COURT UWANI MUSA ABBA AJI JUS

COURT: Federal High Court —Exclusive jurisdiction —Whether tied to matters enumerated under S. 251(1) of CFRN —The principle in ***Wema Securities and Finance Plc. Vs. Nigeria Agricultural Insurance Corporation (2015) 16 NWLR (Pt. 1484) 93 at 130-131***

COURT: Federal High Court —Jurisdiction thereof —The principle in ***NEPA Vs.***

Edegbero (2002) 18 NWLR (Pt.798) 79.

COURT: Federal High Court —Jurisdiction thereof —What determines —Whether it is not only where the Federal Government or its agency is a party but the facts and circumstances of each case —The principle in ***Adetayo Vs. Ademola (2010) 4 (Pt. 1) MJSC 107 at 119-120.***

COURT: Federal High Court —Jurisdiction thereof —Whether still presents a vexed and problematic issue.

COURT:- Jurisdiction —Source thereof —Whether derived from the statute creating the court.

COURT:- Jurisdiction thereof —Bank/Customer's relationship —Whether it belongs to the exclusive jurisdiction of the state High Court —The principle in ***Savannah Bank of***

Nig. Plc Vs. Central Bank of Nig. (2009) 6 NWLR (Pt. 1137)237.

COURT:- Jurisdiction thereof —Fundamental nature thereto —Whether determines the competence of court to adjudicate on a matter

COURT:- Jurisdiction thereof —Whether determined by the plaintiff's statement of claims.

COURT:- Land cases —Jurisdiction thereto —Whether it is only State High Courts by virtue of S. 39(1) of Land Use Act that can only entertain land dispute.

STATUTE:- CFRN 1999 —Interpretation thereof —Whether the court is to adopt the broad and liberal approach.

STATUTE:- CFRN 1999 as amended —Section 251(1) thereof —Nature and purport.

Issue for Determination

"Whether in the light of Section 251 (1) of the 1999 Constitution of the Federal Republic of Nigeria, (as amended,) the learned justices of the lower court erred in law when they held in the lead judgment that, the trial court lacked jurisdiction to have entertained suit No.SS/99/2014."

Facts of the Matter

The plaintiff sued the defendant at the Sokoto State High Court, seeking some declaratory reliefs and injunctive, in respect of property situated at Central Bank of Nigeria Staff Quarters. He also claimed damages for trespass, perpetual injunction against the defendant in respect of the said property.

However in addition to filling a memorandum of appearance, the defendant/respondent filed a preliminary objection challenging the jurisdiction of the trial court. The preliminary objection was dismissed by the trial court, which decision was confirmed by the Court of Appeal. Consequently, both parties joined issues on their pleadings and the matter went to full trial.

At the close of trial, the court granted all the reliefs claimed by the plaintiff and dismissed the Counter Claim of the defendant.

Aggrieved by the decision of the trial court, the respondent filed an appeal to the Court of Appeal, which allowed the appeal. The plaintiff/appellant further appeals to the Supreme Court.

Held: *(Unanimously allowing the appeal)*

1. The issue of jurisdiction of the Federal High Court is still problematic

My Lords, this appeal turns on the vexed issue of the exclusive jurisdiction of

the Federal High Court as nominated to it in Section 251 of the 1999 Constitution of the Federal Republic of Nigeria (as amended) vis - a - vis that of the State High Court as donated by Section 272 of the same Constitution and other Acts of the National Assembly particularly Section 39(1) (a) of the Land Use Act, 1978.

Although this court has in a plethora of authorities considered similar issues, it appears the issue is far from being resolved. ***(P 33 para C- D)***

2. Issue of jurisdiction is fundamental; it raises the question competence of the court to adjudicate on a matter.

The law is indeed well settled that the issue of jurisdiction is fundamental in any proceeding and consequently raises the question of competence of the court to adjudicate in the matter. It follows therefore that where a court is devoid of jurisdiction to entertain a case, such proceedings becomes a nullity *ab initio* no matter how well conducted and decided. Jurisdiction is the live wire of adjudication which should be determined at the earliest opportunity. See Madukolu & Ors Vs. Nkemdilim & Ors (1962) 2 SCNLR 341; Skenconsult (Nig) Ltd Vs. Ukey (1981) 1 SC 6; Goldmark (Nig) Ltd Vs. lbafon Co. Ltd (2012) 10 NWLR (Pt. 1308) page 291; Nigerian Union of Road Transport Workers & Anor Vs. Road Transport Employers Association of Nigeria & Ors (2012) 10 NWLR (Pt. 1307) 170. ***(P 33 para E- F)***

3. Jurisdiction of a court is determined by plaintiff's statement of claim

It is also well settled in law that in cases initiated vide a writ of summons and a statement of claim, such as the present case, the jurisdiction of the court is determined by the plaintiff's statement of claim. See Emeka Vs. Okadigbo (2012) 18 NWLR (Pt. 1331) page 55; Adeyemi Vs. Opeyori (1976) 9 - 10 SC 3191 51; Tukur Vs. Government of Gongola State (1989) 4 NWLR (Pt. 117) 517 and Orthopedic Hospital Management Board Vs. Garba (2002) 14

NWLR (Pt. 788) 538 at 563. Put differently, the position of the law is that where pleadings are filed in a suit as in this case, the question of jurisdiction is determined by the plaintiff's statement of claim and not the defendant's statement of defence. See Izenkwe Vs. Nnadozie (1953) 14 WACA 361. ***(P 33 para G-H)***

4. Jurisdiction of any court is derived from the statute creating the court

Guided by the above position of the law, the plaintiff/appellant's claims at the trial court as earlier reproduced in this judgment shall determine whether or not the court below was right in its decision that the said claims of the plaintiff/appellant fell within the ambit of Section 251 (1) of the 1999 Constitution which confers exclusive jurisdiction on the Federal High Court to entertain the matter as against the State High Court wherein the matter was determined. The law is trite that the jurisdiction of any court is derived from the

statute creating the court or from any other statute specifically conferring such jurisdiction on the court. The statutes in contention in this appeal are the provision of Section 251 (1) (p), (q) (r) of the 1999 Constitution and the provision of Section 39 of the Land Use Act 1978 entrenched in the provision of Section 315 (5) thereof. ***(P 34 para B - C)***

5. The nature and purport of S. 251(1) of CFRN 1999 as amended

Section 251 (1) provides as follows:-

> **"Notwithstanding anything to the contrary contained in this Constitution and in addition to such other jurisdiction as may be conferred upon it by an Act of the National Assembly, the Federal High Court shall have and exercise jurisdiction to the exclusion of any other court in civil causes and matters -**
>
> **(p) the administration or the management and control of the Federal Government or any of its agencies;**
>
> **(q) subject to the provision of this constitution, the operation and interpretation of this constitution in so far as it affects the Federal government or any of its agencies;**
>
> **(q) any action or proceeding for a declaration or injunction affecting the validity of any executive or administrative action or decision by the Federal Government or any of its agencies. "** ***(P 34 para E - G)***

6. It is a fact and circumstances of a case that determine the jurisdiction of the Federal High Court

In considering these provisions of the constitution, this court, per Mohammed, JSC held in the case of Adetayo Vs. Ademola (2010) 4 (Pt. 1) MJSC 107 at 119 - 120 and I totally agree and adopt as follows:-

"On the face of these provisions of the constitution, it appears that impression has been created that the Federal High Court has exclusive original jurisdiction to the exclusion of all other courts in Nigeria in any civil causes or proceedings in which the Federal Government or any of its agencies is a party. However, a very close, careful and proper interpretation or construction of the provisions would show that this is not necessarily the true position. This is because in my view, it is the facts and circumstances of each case that will determine whether or not it is a case within or outside the exclusive jurisdiction of the Federal High Court." *(P p 34-35 para G - B)*

7. How the court should interpret the constitution

The law is trite that in the interpretation of constitution, the court is to adopt the broad and liberal approach. Where the words used in the constitution are clear and unambiguous, they ought to be given their ordinary meaning. See Mohammed Vs. Olawunmi (1990) 2 NWLR (Pt. 133) 458, Rabiu Vs. State (1980) 2 NCLR 293; Aqua Ltd Vs. Ondo State Sports Council (1988) 4 NWLR (Pt. 91) 622; Ishola Vs. Ajiboye (1994) 6 NWLR (Pt. 352) 506. *(P 35 para D - E)*

8. Exclusive jurisdiction of Federal High Courts is tied to matters enumerated under Section 251(1) of CFRN

In construing the import of the above provisions, this court, per Nweze, JSC held in the case of Wema Securities and Finance Plc. Vs. Nigeria Agricultural Insurance Corporation (2015) 16 NWLR (Pt. 1484) 93 at 130 - 131 as follows:-

***"*In my humble view, while it rightly found that the respondent is an agency of the Federal Government FMBN Vs.Olloh (supra); Idoniboye-Odu Vs. NNPC (supra); its conclusion that the mere presence of that agency of the Federal Government robbed the trial court of jurisdiction must rankle all liberal constitutional jurisprudence and juridical exegetes. As indicated above, prior to the 1979 Constitution, Section 7 of the Federal High Court Act, Cap 134, LFN, 1990, set out the limited jurisdiction of the Federal High Court. Section 251 (1) (supra) now delineates the jurisprudence of that court … and circumscribe it ..... to only eighteen items…. Such matters are, exclusively reserved for the Federal High court.... In effect, the drafts person, deliberately itemized the matters which are intended to be under the exclusive jurisdiction of that court or simply put, therefore, that court is a court of enumerated jurisdiction and, a**

fortiori, its exclusive jurisdiction is expressly tied to those items enumerated there-under..... As such, in the exercise of its said exclusive jurisdiction, that court (the Federal High Court) can only orbit within the universe of those -enumerated issues and to others as may be conferred upon it by an Act of the National Assembly..... However, actions on simple contract are not included in those items enumerated above, Adelekan Vs. Eue-Line NV (2006) 12 NWLR (Pt. 993) 33 at 52; as such, the court cannot arrogate to itself a jurisdiction only exercisable by the trial court or a State High Court ……on such simple contractual matters as the one which. the appellant tabled before the trial court."
(Pp 35 - 36 para E - B)

9. It is only State High Court that have exclusive jurisdiction to entertain proceedings in respect of land

My Lords, I hold the view that in the light of the provision of Section 39 (1) of the Land Use Act, 1978, it is the State High Courts that have exclusive jurisdiction to entertain proceedings in respect of land disputes. It is instructive to note that the Land Use Act, 1978 was promulgated specifically to deal with the control and management of land in Nigeria. The said Section 39 (1) of the Land Use Act provides as follows:-

> **"The High Court shall have exclusive jurisdiction in respect of the following proceedings:-**
>
> **(a) proceedings in respect of any land the subject of a statutory right of occupancy grated by the Governor or deemed to be granted by him under this Act; and for the purposes of this paragraph, proceedings includes proceedings for a declaration of title to statutory right of occupancy;**
>
> **(b) proceedings to determine any question as to the persons entitled to compensation payable for improvements on land under the Act.**
>
> **(2) All laws, including Rules of court relating to the practice and procedure of the High Court shall apply in respect of proceedings to which this section relates and the law shall have effect with such modifications as would enable effect to be given to the provisions of this section. "**

It is quite clear from the above provision that it is the State High Court which has exclusive jurisdiction to determine dispute in land matters partic-

ularly where such dispute relate to declaration of title to a statutory right of occupancy and not the Federal High court. The National Assembly has not yet conferred any additional jurisdiction in land matters on the Federal High Court. The Federal High Court can therefore not assume jurisdiction over matters relating to land disputes where there is no statute conferring such jurisdiction on it.
(Pp 36-37 para E-A)

Per Inyang Okoro (JSC)
"I have noticed that appeals on issue of jurisdiction of the Federal High Court under Section 251(1) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) constitute a substantial fraction of the appeals before this court inspite of all the pronouncements this court, and even the Court of Appeal have made and yet the issue is far from being resolved. I wish to propose the

point that since it appears that the court is unable to streamline the issue of jurisdiction to the satisfaction of parties, the legislature should make a definite amendment of the constitution streamlining in unmistakable terms the matters which should go to the Federal high Court and such matters which shall be entertained by the State High Courts. Such amendment would go a long way in guiding both litigants and the courts in mathematical clarity which court has jurisdiction to entertain which matter. ***(P 37 para C - D)***

Per Odili (JSC)
"Indeed, the thrust of this appeal stemming from the background relates to the statutory interpretation of Section 251 (1) of the 1999 Constitution of Nigeria and in that interpretation, the subject matter of the action is a factor to be considered in determining the jurisdiction of a court especially the trial court being the point in the process, from where the appellate courts would derive their own vires. It follows that in determining the exclusivity of the Federal High Court in an action or proceedings the subject matter as well as the parties must be considered together."

The situation above stated is all the more crucial since where the Federal Government or any of its agencies such as the appellant is a party to a suit, unless the subject matter of the suit relates to one of the specified matters upon which the exclusive jurisdiction is conferred in the Federal High Court by Section 251 (1) (a) (s) CFRN, the Federal High Court will lack jurisdiction to entertain the matter and it is the State High Court that will have jurisdiction in such matters. See Madukolu Vs. Nkemdilim (1962) 2 All NLR 587; Diamond Bank Vs. Ugochukwu (2010) 2 SCNJ 359; Agbule Vs. Warri Refinery (2012) 12 SCNJ 783; Bwemoh Vs. Akande (2017) 1 SCNJ 207.

Again to be said is that in the determination of the question whether a court has jurisdiction or not recourse must be made to the statute that created the court. Throwing more light to that statement, the Supreme Court

held in Adetayo Vs. Ademola (2010) 4 SCNJ 32 thus:

> **"The law is trite that jurisdiction of any court is derived from the statute creating the court from any other statute specifically conferring such jurisdiction on the court."**

See also Oloruntoba - Oju Vs. Abdul-Raheem (2009) 6 SCNJ 1 at 29.
(P 39 para B - F)

10. The nature and purport of S. 251(r) of CFRN

In the matter at hand, the jurisdiction of the Federal High Court to hear and determine actions involving the Federal Government or any of its agencies is in

issue and the relevant statute which created the Federal High Court is the 1999 Constitution of the Federal Republic of Nigeria as amended thus recourse must be made to the constitution. I shall for clarity refer and quote the relevant section of the constitution for our purpose.

Section 251 (1) provides thus:

> **"Notwithstanding anything to the contrary contained in this constitution and in addition to such other jurisdiction as may be conferred upon it by an Act of the National Assembly, the Federal High Court shall have and exercise jurisdiction to the exclusion of any court in civil cases and matters where;**
>
> **(p) The administration or management and control of the Federal Government or any of its agencies;**
>
> **(q) subject to the provisions of this constitution, the operation and interpretation of this constitution in so far as it affects the Federal Government or any of its agencies;**
>
> **(r) any action or proceeding for a declaration or injunction affecting the validity of any executive or administrative action or decision by the Federal Government or any of its agencies;**
>
> **Provided that nothing in the provision of paragraph (p), (q) and (r) of this subsections shall prevent a person from seeking redress against the Federal Government or any of its agencies in an action for damages, injunction or specific performance where the action is based on any enactment, law or equity."** ***(P p 39 - 40 para F - C)***

11. *State High Court has jurisdiction to entertain customer/bank relationship*

A further illumination on the requirement when determining the jurisdiction of the Federal High Court was made effectively by the Supreme Court in the case of Federal Mortgage Bank of Nigeria limited Vs. P. N. Olloh (2002) 4 SC (Pt.11) 117 as follows:-

> **"Even if the appellant were to be regarded as a Federal Government agency, it must be recognized that it is a bank by definition and by virtue of the proviso to Section 230 (1) (d) of the 1979 Constitution as amended (now Section 251) (1) (d) of the 1999 Constitution). The State High Court has jurisdiction to entertain the action against the appellant bank being a cause founded on a customer/bank relationship."** ***(P 40 para F - G)***

12. How to determine the jurisdiction of the Federal High Court

The law is that in determining whether or not a matter is within the exclusive jurisdiction of the Federal High Court regard must be had to the plaintiffs claims as contained in the writ of summons and statement of claim.

The appellant's claim before the trial court is principally based on trespass as contained in paragraph 15 of the statement of claim herein under reproduced as follows:

1. **A declaration that the plaintiff is the owner and entitled to club house, fuel dumb, generator and generator house and large portion of;**
2. **Undeveloped land at the Central Bank of Nigeria Staff Quarter (Bada Estate) along Birnin Kebbi Road, Sokoto.**
3. **The sum of Ten Million Naira damages for trespass on the said land by the defendant.**
4. **An order of perpetual injunction restraining the defendant, its servants, agents, privies whosoever or howsoever called from drilling or further drilling, construction, selling, mortgaging, leasing of any other dealing with all the large portion of undeveloped land, club house, Generator and Generator house, fuel dumb at Central Bank of Nigeria Staff Quarters, Bado Estate, along Birnin Kebbi Road, Sokoto.**
5. **Cost of this action.**
6. **Such further and other orders as the court may deem fit to make in the circumstances.**

The claims of the appellant before the trial court have shown that the Sokoto State High Court has jurisdiction to entertain the matter. See Adetayo Vs. Ademola (2010) 15 NWLR (Pt.1215) 169 at 190, per Mohammed JSC at pages 191 - 192 said thus:-

"Apply this provision to the claims of the plaintiffs/ appellants in the instant case although the claims indeed include declaration and injunction, there is nothing being claimed that relate or affect the validity of any executive or administrative action or decision of the federal government or any of its agencies".
(Pp 40-41 para H - F)

13. The principles of jurisdiction of the Federal High Court
The case of NEPA Vs. Edegbero (2002) 18 NWLR (Pt.798) 79 per Tobi JSC has settled whatever confusion as to what to do or what path to trod wherein the Supreme Court stated as follows:-

"As I indicated above, another important area of the subject matter of litigation. In my view, for the Federal High Court to have exclusive jurisdiction, the matter must be a civil matter arising from the administration, management and control of the federal government or any of its agencies. The matter must arise from the operation and interpretation of the Constitution.

And finally, the matter must arise from any action or proceeding or injunction affecting the validity of any executive or administrative actions or decisions by the Federal Government or any of its agencies." ***(Pp 41-42 para G - B)***

14. Appellant's claim at High Court was outside the ambit of S. 251(1) of CFRN
It is clear indeed that the provisions of Section 251 (1) of the 1999 Constitution being plain, clear and straight to the point which has to be given its ordinary meaning by way of interpretation and which has not made room for jurisdiction in the Federal High Court in land matters as that is the exclusive preserve of the State High Court or High Court of the Federal Capital Territory.

A look at the appellant's claims at the trial High Court shows that the matter was outside the ambit of Section 251 (1) CFRN and the matters therein specified.

I agree with learned counsel for the appellant that the dispute in this matter emanated from a simple contract of sale which cannot translate to a process stemming from or arising in the course of an administration or management and control of the Federal Government.

Stated differently, once the cause of action is not within the confines of Section 251 (1) CFRN, there is no interloping into those provisions so as to donate jurisdiction to the Federal High Court as if to say that in all cases where the Federal Government or any of its agencies is a party, the Federal High Court must have jurisdiction no matter the nature of the plaintiff's claim. See Onuorah Vs. K. R. P. C. Ltd. (2005) 6 NWLR (Pt.921) 393, Kakih

Vs. PDP (2014) 15 NWLR (Pt.1430) 374 at 414. ***(P 42 para C- F)***

15. Nature and purport of S. 251(1) 1999 of CFRN
Section 251 of the 1999 Constitution (as amended) states:"

> **"(1) Notwithstanding anything to the contained in this constitution and in addition to such other jurisdiction as may be conferred upon it by an Act of the National Assembly, the Federal High Court shall have and exercise Jurisdiction to the exclusion of any other court in civil causes and matters- (a) relating to the revenue of the**

> **Government of the Federation in which the said Government or any organ thereof or a person suing or being sued on behalf of the said Government is a party; …(g) any admiralty Jurisdiction, including shipping and navigation on the River Niger or River Benue and their effluents and on such other inland waterway as may be designated by any enactment to be an international waterway, all Federal Ports, (including the constitution and powers of the ports authorities for Federal ports) and carriage by sea……(s) such other jurisdiction civil or criminal and whether to the exclusion of any other court or not as may be conferred upon it by an Act of the National Assembly…..(3) 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 subsection (1) of this Section."** ***(Pp 43 - 44 para G - C)***

16. Only State High Court have jurisdiction on land cases under S. 39(1) of CFRN 1999.
The relevant Sections in this respect are Sections 39, 41 and 42 respectively which states- "JURISDICTION OF HIGH COURTS AND OTHER COURTS". On the jurisdiction of the High Courts, by section 39(1), the High Court shall have exclusive jurisdiction in respect of the following proceedings- (a) proceedings in respect of any land the subject of a statutory right of occupancy granted by the Governor or deemed to be granted by him under this Act; and for the purposes of this paragraph, proceedings includes proceedings for a declaration of title to a statutory right of occupancy; (b) proceedings to determine any question as to the persons entitled to compensation payable for improvements on land under the Act. (2) All laws, including rules of court, regulating the practice and procedure of the High Court shall apply in respect of proceedings to which this section relates and the laws shall have effect with such modifications as would enable effect to be given to

the provisions of this Section 41. ***(P p 44-45 para G - A)***

Representations:
Abdulkadir Mustapha for the appellant.
F. E. Okotete with R. T. Mustapha and Adah Usman for the respondent.

JOHN INYANG OKORO, JSC (Delivering the lead judgment): The appellant in this appeal was the plaintiff at the Sokoto State High Court in Suit No. SS/99/2014, whereby in a writ of summons and statement of claim dated 3rd November, 2014, it claimed in paragraph 15(1) - (5) thereof against the respondent who was defendant as follows:-

(1) A declaration that the plaintiff is the owner and entitled to the club-house, fuel dump, generator and generator house and large portion of undeveloped land at the Central Bank of Nigeria Staff Quarters (Bado Estate) along Birnin Kebbi Road, Sokoto.
(2) The sum of ten million naira damages for trespass on the said land by the defendant.
(3) An order of perpetual injunction restraining the defendant, its servants, agents, privies, whosoever or howsoever called from drilling or further drilling, construction, selling, mortgaging, leasing or any dealings with all the large portion of undeveloped land, club-house, generator and generator house, fuel dump at Central Bank of Nigeria Staff Quarters (Bado Estate) along Birnin Kebbi Road, Sokoto.
(4) Cost of the action
(5) And any other order or orders that the court may deem fit to make in the circumstances.

Upon being served with the court's processes, the respondent filed its memorandum of appearance together with a notice of preliminary objection challenging the jurisdiction of the trial court to entertain the suit. On 19/5/2015, the learned trial judge took arguments from counsel and overruled the preliminary objection. That decision was appealed against by the respondent but the court below dismissed same for lacking in merit.

Subsequent to the decision of the court below, the learned trial judge resumed hearing of the suit on the merit. Both parties joined issues in their pleadings. At the hearing of the suit, the appellant called a total of 3 witnesses in proof of its case while the respondent called 2 witnesses. At the close of hearing, the learned trial judge in his considered judgment delivered on 7/6/2016, granted all the reliefs

sought by the appellant and dismissed the respondent's counter-claim.

Aggrieved by the judgment of the learned trial judge, the respondent filed appeal No. CA/S/l07 at the court below vide its notice of appeal dated 8/6/2016 and another filed on 4/7/2016. At the court below, learned counsel adopted their respective briefs of argument on 16/2/2017. The court below allowed the appeal and set aside the decision of the learned trial judge on the ground that the Sokoto State High Court lacked jurisdiction to entertain the suit instituted by the appellant in view of Section

251(1) (p), (q) and (r) of the 1999 Constitution (as amended).

Piqued by the decision of the court below, the appellant has now filed this appeal before the Supreme Court, vide notice of appeal dated 05/06/2017. The appellant nominated a lone issue for determination as follows:

"Whether in the light of Section 251 (1) of the 1999 Constitution of the Federal Republic of Nigeria, (as amended,) the learned justices of the lower court erred in law when they held in the lead judgment that, the trial court lacked jurisdiction to have entertained suit No.SS/99/2014."

On the part of the respondent, a lone issue was also distilled for determination as follows:-

"Whether by virtue of Section 251(1) (p) (q) (r) of the 1999 Constitution of the Federal Republic of Nigeria (as amended), the learned justices of the Court of Appeal were lawfully right when they held in the lead judgment that the trial court lacked jurisdiction to have entertained suit No.SS/99/2014. "

It is glaring that this lone issue nominated for determination by both parties are similar as they both centre on whether or not the court below was right in its decision now on appeal that the trial court had no jurisdiction under Section 251(1) (r) of the 1999 Constitution to entertain the plaintiff/appellant's action claiming principally a declaration of title to a portion of land. As ancillary to the main relief, the plaintiff/appellant further claimed damages for trespass on the land and an order of perpetual injunction restraining the defendant from further trespassing on the land.

The circumstances surrounding the facts that gave rise to the dispute between the parties is that by the Daily Trust National Newspaper of 13th June, 2007 admitted in evidence as Exhibit P1, the plaintiff advertised and invited the general public to bid for sale of the plaintiff's residential houses in 18 locations across the country. The defendant participated in the bid wherein the plaintiff's Senior Staff Central Bank of Nigeria Quarters, Bado was sold to the defendant through public bidding. It is however the case of the plaintiff that apart from the Senior Staff Central Bank of Nigeria Quarters. Bado no other property was included in advertisement dated

13/6/2007. The bone of contention between the parties was therefore, whether apart from the senior staff quarters of Bado Estate sold to the defendant by the plaintiff the club house, generator and generator house, fuel dump and the large portion of undeveloped land were included. The learned trial judge found in favour of the plaintiff. However, that decision was set aside by the court below on the ground of lack of jurisdiction hence this appeal.

In his argument, the learned counsel for the appellant submitted that the subject matter of an action is a factor to be considered in determining jurisdiction of a

court. He commended the case of **Madukolu Vs. Nkemdilim (1962) 2 All NLR 587**. Learned counsel submitted further that even where the Federal Government or any of its agencies is a party to a suit, unless the subject matter of the suit relates to one of the specified matters upon which exclusive jurisdiction is conferred on the Federal High Court by Section 251(1) (a) - (s) of the 1999 Constitution, the Federal High Court will lack jurisdiction to entertain the matter. Counsel cited **Federal Mortgage Bank of Nigeria Ltd Vs. P. N. Olloh (2002) 4 SC (Pt. 11) 117.**

Learned counsel further submitted that in determining whether or not a matter is within the exclusive jurisdiction of the Federal High Court, regard must be had to the plaintiffs claim as contained in the writ of summons and statement of claim. It is the contention of learned counsel that the principal claim of the appellant as contained in paragraph 15 of its statement of claim is based on trespass. Counsel submitted that it is therefore legally wrong to hold that Sokoto State High Court has no jurisdiction to entertain the matter. Learned counsel relied heavily on the decision of this court in **Adetayo Vs.Ademola (2010) 15 NWLR (Pt. 1215) 169 at 190 and NEPA Vs. Odegbero (2002) 18 NWLR (Pt. 798) 79.** Counsel also made a point that the dispute in this matter emanated from a simple contract of sale which cannot be portrayed as having arisen in the course of an administration or management and control of the Federal Government. Learned counsel concluded on this issue by observing that the appellant's claim at the trial court fell outside the ambit of Section 251 (1) of the 1999 Constitution and the matters specified therein. Counsel supported this point with **Onuorah Vs. K. R. P. C. Ltd (2002) 18 NWLR (Pt. 921) at 393.**

On his part, learned counsel for the respondent submitted that in the determination of the question whether a court has jurisdiction or not, recourse must be made to the statute that created the court. Counsel submitted that the jurisdiction of the Federal High Court to hear and determine matters involving the Federal Government or any of its agencies is in issue in this appeal and the relevant statute which created the Federal High Court is the 1999 Constitution of the Federal Republic of Nigeria (as amended). Learned counsel relied on **Adetayo Vs. Ademola (supra).**

Counsel submitted that drawing from the above provision of the Constitution and the combined reading of sections 1(1) and 40 of the Central Bank of Nigeria Act, 2007 the respondent is an agency of the Federal Government. In support of this argument, learned counsel relied heavily on **Savannah Bank of Nigeria Plc Vs. Central Bank of Nigeria (2009) 6 NWLR (Pt. 1137) 237.** Therefore, that the facts

leading to this suit in the trial court and the subject matter comes within the ambit and confines of section 251 (1) (p), (q), ®.

Learned counsel further submitted that the claim of the appellant arose out of an administrative directive given to it by the Federal Government to dispose of its assets in Sokoto and as such the Federal High Court pursuant to Section 251 (1) (p) is the proper court to entertain the suit. He submitted that the import of Section 251 (1), (q) is that the Federal High Court has jurisdiction to entertain and determine any matter concerning the operation and interpretation of the 1999 Constitution in so far as it

affects the Federal Government or any of its agencies. Counsel pointed out that the implication of Section 251 (1) (r) is that the Federal High Court has jurisdiction to hear a matter where it involves an action or proceeding for declaration or injunction affecting the validity of any executive or administrative action or decision of the Federal Government or any of its agencies. In support of this position, counsel cited the following cases **Gassol Vs. Turari (2013) 3 SCNJ 277 page 294 - 295; Oloruntoba-Oju Vs. Abdul Raheem (supra); Agbule Vs. Warri Refinery (2012) 12 SCNJ 783 Ratio 10 page 810 and Inegbedion Vs. Selo-Ojemen (2013) 1 SCNJ 243 Ratio 15, pages 30 - 31.**

Counsel concluded by submitting that once an agency of the Federal Government is involved and the requirements of section 251 (1) (p), (q), (r) of the Constitution has been met, the Federal High Court has and can exercise jurisdiction to the exclusion of any other court.

My Lords, this appeal turns on the vexed issue of the exclusive jurisdiction of the Federal High Court as nominated to it in Section 251 of the 1999 Constitution of the Federal Republic of Nigeria (as amended) vis - a - vis that of the State High Court as donated by Section 272 of the same Constitution and other Acts of the National Assembly particularly Section 39(1) (a) of the Land Use Act, 1978.

Although this court has in a plethora of authorities considered similar issues, it appears the issue is far from being resolved.

This appeal stems from the judgment of the Court of Appeal, Sokoto Division, delivered on 17th March, 2017 wherein the court below set aside the judgment of the trial court on the lone issue of lack of jurisdiction on the part of the trial court.

The law is indeed well settled that the issue of jurisdiction is fundamental in any proceeding and consequently raises the question of competence of the court to adjudicate in the matter. It follows therefore that where a court is devoid of jurisdiction to entertain a case, such proceedings becomes a nullity *ab initio* no matter how well conducted and decided. Jurisdiction is the live wire of adjudication which should be determined at the earliest opportunity. See **Madukolu & Ors Vs. Nkemdilim & Ors (1962) 2 SCNLR 341; Skenconsult (Nig) Ltd Vs. Ukey (1981) 1 SC 6; Goldmark (Nig) Ltd Vs. lbafon Co. Ltd (2012) 10 NWLR (Pt. 1308) page 291; Nigerian Union of Road Transport Workers & Anor Vs. Road Transport Employers Association of Nigeria & Ors (2012) 10 NWLR (Pt. 1307) 170.**

I t is also well settled in law that in cases initiated vide a writ of summons and a

statement of claim, such as the present case, the jurisdiction of the court is determined by the plaintiff's statement of claim. See **Emeka Vs. Okadigbo (2012) 18 NWLR (Pt. 1331) page 55; Adeyemi Vs. Opeyori (1976) 9 - 10 SC 3191 51; Tukur Vs. Government of Gongola State (1989) 4 NWLR (Pt. 117) 517 and Orthopedic Hospital Management Board Vs. Garba (2002) 14 NWLR (Pt. 788) 538 at 563.** Put differently, the position of the law is that where pleadings are filed in a suit as in this case, the question of jurisdiction is determined by the plaintiff's statement of claim and not the defendant's statement of defence. See **Izenkwe Vs. Nnadozie (1953) 14 WACA**

361.

I have already stated elsewhere in this judgment that the claim of the plaintiff/appellant in this case is hinged principally on a declaration of title to a portion of undeveloped land at the Central Bank of Nigeria Staff Quarters (Bado Estate) along Birnin Kebbi Road Sokoto. Ancillary to that is a claim to damages for trespass on the land and an order for perpetual injunction restraining the defendant/respondent from further trespass on the land.

Guided by the above position of the law, the plaintiff/appellant's claims at the trial court as earlier reproduced in this judgment shall determine whether or not the court below was right in its decision that the said claims of the plaintiff/appellant fell within the ambit of Section 251 (1) of the 1999 Constitution which confers exclusive jurisdiction on the Federal High Court to entertain the matter as against the State High Court wherein the matter was determined. The law is trite that the jurisdiction of any court is derived from the statute creating the court or from any other statute specifically conferring such jurisdiction on the court. The statutes in contention in this appeal are the provision of Section 251 (1) (p), (q) (r) of the 1999 Constitution and the provision of Section 39 of the Land Use Act 1978 entrenched in the provision of Section 315 (5) thereof.

While D. B. Samba, J. of the Sakata State High Court found that he had jurisdiction to entertain the suit, the learned justices at the court below held a different view. My duty in this appeal is to determine which of the courts below was right. At this point, I shall reproduce and consider the import of Section 251 (1) (p) (q) (r) of the 1999 Constitution vis - a - vis Section 39 of the Land Use Act 1978. Section 251 (1) provides as follows:

> **"Notwithstanding anything to the contrary contained in this Constitution and in addition to such other jurisdiction as may be conferred upon it by an Act of the National Assembly, the Federal High Court shall have and exercise jurisdiction to the exclusion of any other court in civil causes and matters -**
>
> **(p) the administration or the management and control of the Federal Government or any of its agencies;**
>
> **(q) subject to the provision of this constitution, the operation and interpretation of this constitution in so far as it affects the Federal government or any of its agencies;**
>
> **(q) any action or proceeding for a declaration or injunction af-**

fecting the validity of any executive or administrative action or decision by the Federal Government or any of its agencies. "

In considering these provisions of the constitution, this court, per Mohammed, JSC held in the case of **Adetayo Vs. Ademola (2010) 4 (Pt. 1) MJSC 107 at 119 - 120** and I totally agree and adopt as follows:-

"On the face of these provisions of the constitution, it appears that impression has been created that the Federal High Court has exclusive original jurisdiction to the exclusion of all other courts in Nigeria in any civil cause or proceedings in which the Federal Government or any of its agencies is a party. However, a very close, careful and proper interpretation or construction of the provisions would show that this is not necessarily the true position. This is because in my view, it is the facts and circumstances of each case that will determine whether or not it is a case within or outside the exclusive jurisdiction of the Federal High Court."

In applying the above provisions of the constitution, I hold the considered view that for an argument to be sustained as touching any action or proceeding within the ambit of Section 251 (1) (p) (q) and (r) such action must relate to or affect the validity of any executive or administrative action or decision of the Federal Government or any of its agencies. The law is trite that in the interpretation of constitution, the court is to adopt the broad and liberal approach. Where the words used in the constitution are clear and unambiguous, they ought to be given their ordinary meaning. See **Mohammed Vs. Olawunmi (1990) 2 NWLR (Pt. 133) 458, Rabiu Vs. State (1980) 2 NCLR 293; Aqua Ltd Vs. Ondo State Sports Council (1988) 4 NWLR (Pt. 91) 622; Ishola Vs. Ajiboye (1994) 6 NWLR (Pt. 352) 506.**

In construing the import of the above provisions, this court, per Nweze, JSC held in the case of Wema Securities and Finance Plc. Vs. Nigeria Agricultural Insurance Corporation (2015) 16 NWLR (Pt. 1484) 93 at 130 - 131 as follows:

***"*In my humble view, while it rightly found that the respondent is an agency of the Federal Government FMBN Vs.Olloh (supra); Idoniboye-Odu Vs. NNPC (supra); its conclusion that the mere presence of that agency of the Federal Government robbed the trial court of jurisdiction must rankle all liberal constitutional jurisprudence and juridical exegetes. As indicated above, prior to the 1979 Constitution, Section 7 of the Federal High Court Act, Cap 134, LFN, 1990, set out the limited jurisdiction of the Federal High Court. Section 251 (1) (supra) now delineates the jurisprudence of that court ..... and circumscribe it ..... to only eighteen items….**

Such matters are, exclusively reserved for the Federal High court.... In effect, the drafts person, deliberately itemized the matters which are intended to be under the exclusive jurisdiction of that court or simply put, therefore, that court is a court of enumerated jurisdiction and, a fortiori, its exclusive jurisdiction is expressly tied to those items enumerated

there-under..... As such, in the exercise of its said exclusive jurisdiction, that court (the Federal High Court) can only orbit within the universe of those -enumerated issues and to others as may be conferred upon it by an Act of the National Assembly..... However, actions on simple contract are not included in those items enumerated above, Adelekan Vs. Eue-Line NV (2006) 12 NWLR (Pt. 993) 33 at 52; as such, the court cannot arrogate to itself a jurisdiction only exercisable by the trial court or a State High Court ……on such simple contractual matters as the one which. the appellant tabled before the trial court."

Applying the above position to the instant appeal, it does not seem to me that Section 251 (1) of the 1999 Constitution is a blanket provision which automatically confers jurisdiction on the Federal High Court once the Federal Government or any of its agencies is a party in any proceeding. It does appear that matters which do not relate to or affect the validity of any executive or administrative decision are outside the purview or contemplation of Section 251 (1) of the 1999 Constitution.

The claims of the plaintiff/appellant in the instant case are for declaration of title to land, damages for trespass and injunction to protect its possession of the land. The executive and administrative action or decision of the Federal government and its agency, the Central Bank of Nigeria is not in any way the subject of the action.

My Lords, I hold the view that in the light of the provision of Section 39 (1) of the Land Use Act, 1978, it is the State High Courts that have exclusive jurisdiction to entertain proceedings in respect of land disputes. It is instructive to note that the Land Use Act, 1978 was promulgated specifically to deal with the control and management of land in Nigeria. The said Section 39 (1) of the Land Use Act provides as follows:-

"The High Court shall have exclusive jurisdiction in respect of the following proceedings:-

(a) proceedings in respect of any land the subject of a statutory right of occupancy grated by the Governor or deemed to be granted by him under this Act; and for the purposes of this paragraph, proceedings includes proceedings for a declaration of title to statutory right of occupancy;

(b) proceedings to determine any question as to the persons entitled to compensation payable for improvements on land under the Act.

be given to the provisions of this section. ”

It is quite clear from the above provision that it is the State High Court which has exclusive jurisdiction to determine dispute in land matters particularly where such dispute relate to declaration of title to a statutory right of occupancy and not the Federal High court. The National Assembly has not yet conferred any additional jurisdiction in land matters on the Federal High Court. The Federal High Court can therefore not assume jurisdiction over matters relating to land disputes where there is no statute conferring such jurisdiction on it.

I have found no provision in either Section 251 (1) (p) (q) and (r) of the 1999 Constitution or section 39 of the Land Use Act 1978 conferring jurisdiction on the Federal High Court to entertain proceedings for declaration of title to land. The lone issue in this appeal therefore is resolved in favour of the appellant and against the respondent.

I have noticed that appeals on issue of jurisdiction of the Federal High Court under Section 251(1) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) constitute a substantial fraction of the appeals before this court inspite of all the pronouncements this court, and even the Court of Appeal have made and yet the issue is far from being resolved. I wish to propose the point that since it appears that the court is unable to streamline the issue of jurisdiction to the satisfaction of parties, the legislature should make a definite amendment of the constitution streamlining in unmistakable terms the matters which should go to the Federal high Court and such matters which shall be entertained by the State High Courts. Such amendment would go a long way in guiding both litigants and the courts in mathematical clarity which court has jurisdiction to entertain which matter.

From all I have said above, I find that this appeal has merit and it is accordingly allowed. The decision of the court below is hereby set aside and the decision of the trial court is restored.

Appeal Allowed. No order as to costs.

John Iyang Okoro
Justice, Supreme Court

MARY UKAEGO PETER-ODILI (JSC): I agree with the judgment just delivered by my learned brother, John Inyang Okoro JSC and to underscore the support I have in the reasonings from which the decision came about, I shall make some comments.

This is an appeal against the judgment of the Court of Appeal, Sokoto Division or court below or lower court, Coram: Hussein Mukhtar, Mohammed L. Shuaibu, Frederick O. Oho JJCA which lower court allowed the appeal against the decision of the trial court delivered on the 7th June 2016 in favour of the appellant for all the reliefs sought.

Respondent being aggrieved approached the court below which allowed the ap-

peal and the appellant dissatisfied has come before the Supreme Court.

The facts leading to this appeal are well set out in the lead judgment and I shall not repeat them except when any reference to any party thereof becomes necessary.

On the 21st day of October, 2019 date of hearing, learned counsel for the appellant Abdulkadir Mustapha Esq. adopted the brief of argument filed on 18/8/2017 in which was crafted a sole issue for determination which is as follows:-

> **Whether in the light of Section 251 (1) of the 1999 Constitution of Nigeria, as amended, the learned justices of the lower court erred in law when they held in the lead judgment that the trial court lacked jurisdiction to have entertained Suit No. SC.99/2014.**

Learned counsel for the respondent, F. E. Okotete Esq. adopted the brief of argument filed on 21/9/2017 in which was formulated a single issue for determination, viz:-

> **Whether by virtue of Section 251 (1), (p), (q), (r) of the 1999 Constitution of Nigeria as amended, the learned Justices of the Court of Appeal were lawfully right when they held in the lead judgment that the trial court lacked jurisdiction to have entertained Suit No. SC. 99/2014.**

Learned counsel for the appellant submitted that what is for determination is the interpretation of Section 251 (1) of the 1999 Constitution and in it is related, the determination of the jurisdiction of a Court. He cited **Madukolu Vs. Nkemdilim (1962) 2 All NLR 587; Federal Mortgage Bank of Nigeria limited Vs. P. N. Olloh (2002) 4 SC (Pt.11) 117.**

That the appellant's claim before the trial court is principally based on trespass and so the proper court for the adjudication is the Sokoto State High Court and not the Federal High Court. He referred to Adetayo Vs. Ademola (2010) 15 NWLR (pt.1215) 169 at 190, 191 - 192.

For the appellant, it was further contended that there is no definite provision that confers automatic and exclusive jurisdiction on the Federal High Court in every action by or against the Federal Government regardless of the subject matter including contact. It was cited the case of **NEPA Vs. Edegbero (2002) 18 NWLR (Pt.798) 79; Onuorah *Vs.* K. R. P. C. Ltd. (2002) 18 NWLR (P.921) 393; Kakih Vs. PDP (2014) 15 NWLR (Pt.1429) 374 at 141.**

Learned counsel for the respondent stated that the appellant is an agency of the Federal Government and all the facts leading to this suit at the trial court and subject matter come within the ambit and confines of Section 251 (1), (p) (q), (r) CFRN and therefore within the exclusive jurisdiction of the Federal High Court. He cited **Savannah Bank of Nigeria Plc Vs. CBN (2009) 6 NWLR (Pt.1137) 237** etc.

The stance of the appellant briefly is that the suit was not one of those caught by Section 251 (1) of the 1999 Constitution upon which the matter was in the exclusive

adjudicatory domain of the Federal High Court. That position is disagreed with by the respondent who contends that the appellant as an agent of the Federal Government has its matter whether as plaintiff or defendant has to be tried by the Federal High Court and not the State High Court such as the Sokoto State High Court.

Indeed, the thrust of this appeal stemming from the background relates to the statutory interpretation of Section 251 (1) of the 1999 Constitution of Nigeria and in that interpretation, the subject matter of the action is a factor to be considered in determining the jurisdiction of a court especially the trial court being the point in the process, from where the appellate courts would derive their own vires. It follows that in determining the exclusivity of the Federal High Court in an action or proceedings the subject matter as well as the parties must be considered together.

The situation above stated is all the more crucial since where the Federal Government or any of its agencies such as the appellant is a party to a suit, unless the subject matter of the suit relates to one of the specified matters upon which the exclusive jurisdiction is conferred in the Federal High Court by Section 251 (1) (a) (s) CFRN, the Federal High Court will lack jurisdiction to entertain the matter and it is the State High Court that will have jurisdiction in such matters. See **Madukolu Vs. Nkemdilim (1962) 2 All NLR 587; Diamond Bank Vs. Ugochukwu (2010) 2 SCNJ 359; Agbule Vs. Warri Refinery (2012) 12 SCNJ 783; Bwemoh Vs. Akande (2017) 1 SCNJ 207.**

Again to be said is that in the determination of the question whether a court has jurisdiction or not recourse must be made to the statute that created the court. Throwing more light to that statement, the Supreme Court held in Adetayo Vs. Ademola (2010) 4 SCNJ 32 thus:

> **"The law is trite that jurisdiction of any court is derived from the statute creating the court from any other statute specifically conferring such jurisdiction on the Court."**

See also Oloruntoba - Oju Vs. Abdul-Raheem (2009) 6 SCNJ 1 at 29.

In the matter at hand, the jurisdiction of the Federal High Court to hear and determine actions involving the Federal Government or any of its agencies is in issue and the relevant statute which created the Federal High Court is the 1999 Constitution of the Federal Republic of Nigeria as amended thus recourse must be made to the constitution. I shall for clarity refer and quote the relevant section of the constitution for our purpose.

Section 251 (1) provides thus:

> **"Notwithstanding anything to the contrary contained in this constitution and in addition to such other jurisdiction as may be conferred upon it by an Act of the National Assembly, the Federal High Court shall have and exercise jurisdiction to the exclusion of**

any court in civil cases and matters where;

(p) The administration or management and control of the Federal Government or any of its agencies;

(q) subject to the provisions of this constitution, the operation and interpretation of this constitution in so far as it affects the Federal Government or any of its agencies;

(r) any action or proceeding for a declaration or injunction affecting the validity of any executive or administrative action or decision by the Federal Government or any of its agencies;

Provided that nothing in the provision of paragraph (p), (q) and *(r)* of this subsections shall prevent a person from seeking redress against the Federal Government or any of its agencies in an action for damages, injunction or specific performance where the action is based on any enactment, law or equity."

Then the Central Bank of Nigeria Act, 2007 Section 1 (1) provides thus:-

"There is established for Nigeria, a body known as the 'CENTRAL BANK OF NIGERIA' which is further reinforced by the provision of Section 40 of the same Act which provides, "the Bank may Act generally as agent for the Federal Government",

There is no gainsaying that a community reading of the two Sections situates the appellant is an agency of the Federal Government of Nigeria. **See Savannah Bank of Nigeria Plc Vs. Central Bank of Nigeria (2009) 6 NWLR (Pt.1137) 237.**

A further illumination on the requirement when determining the jurisdiction of the Federal High Court was made effectively by the Supreme Court in the case of Federal Mortgage Bank of Nigeria limited Vs. P. N. Olloh (2002) 4 SC (Pt.11) 117 as follows:-

"Even if the appellant were to be regarded as a Federal Government agency, it must be recognized that it is a bank by definition and by virtue of the proviso to Section 230 (1) (d) of the 1979 Constitution as amended (now Section 251) (1) (d) of the 1999 Constitution). The State High Court has jurisdiction to entertain the action against the appellant bank being a cause founded on a customer/bank relationship."

The law is that in determining whether or not a matter is within the exclusive

jurisdiction of the Federal High Court regard must be had to the plaintiffs claims as contained in the writ of summons and statement of claim.

The appellant's claim before the trial court is principally based on trespass as contained in paragraph 15 of the statement of claim herein under reproduced as follows:-

1. **A declaration that the plaintiff is the owner and entitled to club house, fuel dumb, generator and generator house and large portion of;**
2. **Undeveloped land at the Central Bank of Nigeria Staff Quarter (Bada Estate) along Birnin Kebbi Road, Sokoto.**
3. **The sum of Ten Million Naira damages for trespass on the said land by the defendant.**
4. **An order of perpetual injunction restraining the defendant, its servants, agents, privies whosoever or howsoever called from drilling or further drilling, construction, selling, mortgaging, leasing of any other dealing with all the large portion of undeveloped land, club house, Generator and Generator house, fuel dumb at Central Bank of Nigeria Staff Quarters, Bado Estate, along Birnin Kebbi Road, Sokoto.**
5. **Cost of this action.**
6. **Such further and other orders as the court may deem fit to make in the circumstances.**

The claims of the appellant before the trial court have shown that the Sokoto State High Court has jurisdiction to entertain the matter. See Adetayo Vs. Ademola (2010) 15 NWLR (Pt.1215) 169 at 190, per Mohammed JSC at pages 191 - 192 said thus:-

> **"Apply this provision to the claims of the plaintiffs/ appellants in the instant case although the claims indeed include declaration and injunction, there is nothing being claimed that relate or affect the validity of any executive or administrative action or decision of the federal government or any of its agencies".**

From the foregoing, it is clear that the respondent was unable to show how the declaration as contained in the appellants statement of claim can affect the validity of any action or decision of the appellant, the federal government or any of its agencies. Again, to be said is that there is no provision that confers automatic and exclusive jurisdiction on the Federal High Court in every action by or against the federal government irrespective of the subject matter. The case of NEPA Vs. Edegbero (2002) 18 NWLR (Pt.798) 100 - 101 per Tobi JSC has settled whatever confusion as to what to

do or what path to trod wherein the Supreme Court stated as follows:-

> **"As I indicated above, another important area of the subject matter of litigation. In my view, for the Federal High Court to have exclusive jurisdiction, the matter must be a civil matter arising from the administration, management and control of the federal government or any of its agencies. The matter must arise from the operation**

and interpretation of the Constitution.

And finally, the matter must arise from any action or proceeding or injunction affecting the validity of any executive or administrative actions or decisions by the Federal Government or any of its agencies."

It is clear indeed that the provisions of Section 251 (1) of the 1999 Constitution being plain, clear and straight to the point which has to be given its ordinary meaning by way of interpretation and which has not made room for jurisdiction in the Federal High Court in land matters as that is the exclusive preserve of the State High Court or High Court of the Federal Capital Territory.

A look at the appellant's claims at the trial High Court shows that the matter was outside the ambit of Section 251 (1) CFRN and the matters therein specified.

I agree with learned counsel for the appellant that the dispute in this matter emanated from a simple contract of sale which cannot translate to a process stemming from or arising in the course of an administration or management and control of the Federal Government.

Stated differently, once the cause of action is not within the confines of Section 251 (1) CFRN, there is no interloping into those provisions so as to donate jurisdiction to the Federal High Court as if to say that in all cases where the Federal Government or any of its agencies is a party, the Federal High Court must have jurisdiction no matter the nature of the plaintiff's claim. See **Onuorah Vs. K. R. P. C. Ltd**. **(2005) 6 NWLR (Pt.921) 393, Kakih Vs. PDP (2014) 15 NWLR (Pt.1430) 374 at 414.**

In conclusion, there is no running away from the fact that based the foregoing and the better reasoned lead judgment that this appeal is meritorious and is allowed by me. I set aside the decision of the Court of Appeal and restore the judgment of the trial High Court.

Appeal allowed. I abide by the consequential orders made.

Mary Ukaego Peter-Odili
Justice, Supreme Court

MUSA DATTIJO MUHAMMAD, (JSC): I read in advance the lead judgment of my learned brother JOHN INYANG OKORO JSC just delivered. I agree with his lordship's reasoning and conclusion therein that the appeal being meritorious be allowed.

Adopting the lead judgment as mine, I also allow the appeal.

Musa Dattijo Muhammad
Justice, Supreme Court

UWANI MUSA ABBA AJI, (JSC): My lord J. I. Okoro, JSC, advanced to me a copy of the draft judgment just delivered. I have no difference or dissension to the reasoning and conclusion reached by him in allowing the appeal.

The appellant crafted this issue for determination:

Whether in the light of section 251(1) of the 1999 Constitution of Nigeria, as amended, the learned justices of the lower court erred in law when they held in the lead judgment that the trial court lacked jurisdiction to have entertained suit No SC. 99/2014.

The appellant's claim before the trial court contained in its statement of claim reads:

1. **A declaration that the plaintiff is the owner and entitled to club house, fuel dumb, generator and generator house and large portion of;**
2. **Undeveloped land at the Central Bank of Nigeria Staff Quarter (Bado Estate) along Birnin Kebbi Road, Sokoto.**
3. **The sum of Ten Million Naira damages for trespass on the said land by the defendant.**
4. **An order of perpetual injunction restraining the defendant, its servant, agents, privies, whosoever or howsoever called from drilling or further drilling, construction, selling, mort-gaging, leasing of any other dealing with all the large portion of undeveloped land, club house genera tor and generator house, fuel dumb at Central Bank of Nigeria Staff Quarters, Bado Estate, along Birnin Kebbi Road, Sokoto.**
5. **Cost of this action**
6. **Such further and other orders as the court may deem fit to make in the circumstance.**

This is an appeal against the judgment of the lower court which allowed the appeal against the decision of the trial court in favour of the appellant for all the reliefs sought.

Dissatisfied, the respondent appealed to the lower court which allowed the appeal, hence the appeal by the appellant. Section 251 of the 1999 Constitution (as amended) states:"

"(1) Notwithstanding anything to the contained in this constitution and in addition to such other jurisdiction as may be conferred upon it by an Act of the National Assembly, the Federal

High Court shall have and exercise Jurisdiction to the exclusion of any other court in civil causes and matters -(a) relating to the revenue of the Government of the Federation in which the said Government or any organ thereof or a person suing or being sued on behalf of the said Government is a party; ……(g) any admiralty Jurisdiction, including shipping and navigation on the River Niger or River Benue and their effluents and on such other inland waterway as may be designated by any enactment to be an international waterway, all Federal Ports, (including the constitution and powers

of the ports authorities for Federal ports) and carriage by sea…….(s) such other jurisdiction civil or criminal and whether to the exclusion of any other court or not as may be conferred upon it by an Act of the National Assembly….. (3) 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 subsection (1) of this Section."

There is no doubt that the appellant is an agency of the Federal Government of Nigeria but the plank of the matter is on declaration of title and trespass to the land of the respondent by the appellant.

By a close examination of the entire provisions of Section 251 of the 1999 Constitution prescribing the jurisdiction of the Federal High Court to the exclusion of all other courts, there is nothing therein specifically conferring jurisdiction in that court in causes or matters concerning land disputes. Although the section also indicated that the National Assembly may confer additional jurisdiction to the court, there is no indication that such Act of the National Assembly had been promulgated conferring additional jurisdiction to the court to entertain causes and matters on land disputes. If any such additional jurisdiction had been given, the most relevant statute to examine in search for it in my view, is the Land Use Act because jurisdiction of the Federal High Court to entertain land matters cannot be inferred by implication in the construction of Section 251 of the 1999 Constitution, the meaning of which is quite clear and plain as no causes or matters in land dispute are mentioned therein. The courts conferred with jurisdiction to entertain disputes between Nigerians in exercising their right to acquire and use land under the Act are clearly specified therein. The relevant Sections in this respect are Sections 39, 41 and 42 respectively which states- "JURISDICTION OF HIGH COURTS AND OTHER COURTS". On the jurisdiction of the High Courts, by section 39(1), the High Court shall have exclusive jurisdiction in respect of the following proceedings- (a) proceedings in respect of any land the subject of a statutory right of occupancy granted by the Governor or deemed to be granted by him under this Act; and for the purposes of this paragraph, proceedings includes proceedings for a declaration of title to a statutory right of occupancy; (b) proceedings to determine any

question as to the persons entitled to compensation payable for improvements on land under the Act. (2) All laws, including rules of court, regulating the practice and procedure of the High Court shall apply in respect of proceedings to which this section relates and the laws shall have effect with such modifications as would enable effect to be given to the provisions of this Section 41.

It is quite clear from the provisions of the above Sections of the Land Use Act with specific powers arid jurisdiction in respect of land matters specified therein conferred on State High Court, that the Federal High Court is not one of the Courts conferred with jurisdiction to entertain any dispute in land matters. In fact, the purpose which Sections 39, 41 and 42 of the Land Use Act are designed to serve are very clear. In other words, while the State High Court has exclusive jurisdiction over lands in urban areas by

virtue of Section 39(1) of the Land Use Act, that court shares jurisdiction with only the area courts and customary courts or other courts of equivalent jurisdiction by virtue of both the jurisdiction of the State High Court under Section 272 of the 1999 Constitution and the jurisdiction conferred on the area courts and customary courts by virtue of Section 41 of the Act. As there is nothing in these Sections 39, 41 and 42 of the Land Use Act that conferred any jurisdiction on the Federal High Court to entertain land causes or matters, I entirely agree with the court below that the Federal High Court has no jurisdiction to hear and determine any dispute on declaration of title to land. See Per MOHAMMED, J.S.C in **ADETAYO & ORS Vs. ADEMOLA & ORS (2010) LPELR- 155(SC).** Same issue also came before this court in **EMEJURU & ANOR Vs. ABRAHAM & ORS (2018) LPELR- 46330(SC),** wherein it was decided that that the Federal High Court does not have jurisdiction in land matters or declaration of title to land and trespass thereto.

The appellant's appeal must therefore succeed and is hereby allowed. I also abide by the consequential orders made.

Uwani Musa Abba Aji
Justice, Supreme Court

CHIEF PETER OGUEBIE

Vs.

FIRST BANK OF NIGERIA PLC INSPECTOR GENERAL OF POLICE

SC.177/2007

IN THE SUPREME COURT OF NIGERIA HOLDEN AT ABUJA

FRIDAY, 17TH JANUARY, 2020

BEFORE THEIR LORDSHIP

MARY UKAEGO PETER-ODILI	**JUSTICE, SUPREME COURT**
MUSA DATTIJO MUHAMMAD	**JUSTICE, SUPREME COURT**
JOHN INYANG OKORO	**JUSTICE, SUPREME COURT**
PAUL ADAMU GALUMJE	**JUSTICE, SUPREME COURT**
UWANI MUSA ABBA AJI	**JUSTICE, SUPREME COURT**

ACTION:- Declaratory —Whether a party must succeed on the strength of his case and not on the weakness of the defence.

COURT:- Proof —Where a document is not tendered before court —Whether court cannot make use of such document.

EVIDENCE:- Burden of proof —When is a defendant obligated to lead evidence in proof —Whether it is when plaintiff has discharged the initial burden of proof —S. 133 of the Evidence Act considered.

EVIDENCE:- Burden of proof —Where a party asserts a fact —Whether he has the onus of proving that fact.

EVIDENCE:- Burden of proof —Where appellant alleges that he was arrested and detained based on petition —Appellant failed to tender the petition nor prove its contents in court —Whether appellant has failed to establish that his arrest and detention was in fact sequel to the petition.

EVIDENCE:- Notice to produce —Service thereof —Where a party serves notice to produce on the adverse party —Whether the party served is not obligated to produce the

document rather it enables the party serving to adduce secondary evidence.

PARTIES:- Civic responsibility —A party who makes a report to the police perform his civic responsibility —Whether he cannot be held culpable unless his report is found to be baseless and malafide.

PRACTICE AND PROCEDURE:- Abandoned defence —Where defendant rests his case on that of plaintiff —Whether he has abandoned his statement of defence —Implication thereof —The principle in ***Akanbi Vs. Alao (1989) SC 1.***

PRACTICE AND PROCEDURE:- Evidence elicited under cross examination —Where evidence elicited under cross examination, supports the case of the adverse party —Whether such evidence can be relied upon by the adversary without calling evidence in support of his pleadings.

PRACTICE AND PROCEDURE:- No case submission —Where a defendant makes a no case submission —Whether he must have been taken to have admitted the facts of the case as stated by the plaintiff.

WORDS AND PHRASES:- Instigate —Meaning.

Issue for Determination

"Whether the plaintiff/appellant proved that the respondent bank instigated his arrest and detention, against the backdrop of his pleadings and evidence adduced in support."

Facts of the Matter

The appellant and his wife as plaintiffs commenced an action against the defendant at the Enugu State High Court claiming damages for instigating their arrest and detention

by the police.

At the trial court, the appellants as Plaintiffs and the first defendant filed and exchanged pleadings, while the second defendant did not file any pleadings and was not represented in the trial.

At the trial, the first respondent did not call evidence in proof of his pleadings but relied on the case of the plaintiffs. The plaintiffs/ appellants alleged, that certain sum of money was fraudulently withdrawn from the account of a company domiciled, in the first respondent's bank. The plaintiff as Managing Director of the Company complained in writing to the 1st respondent who did not reply.

The plaintiffs/appellants were requested to surrender the cheque books of the company to the 1st respondent for verification. In the process the 1st respondent petitioned the 2nd respondent who allegedly arrested and detained the plaintiffs/appellants and these were the cause of action in the suit.

At the end of trial, in which only the plaintiffs/appellants gave evidence, the trial court delivered judgment in their favour.

Consequently, the 1st respondent/appellants appealed to the Court of Appeal, which allowed the appeal and set aside they judgment of the trial court.

The plaintiffs/appellants have now appealed to the Supreme Court.

Held: *(Unanimously dismissing the appeal* ***Mary Peter-Odili (JSC) dissenting***

1. *Onus of prove in civil cases.*
Firstly, the law is settled that whoever asserts must prove. The appellant who desires the judgment of the court as to 1st respondent's liability for the petition it wrote and "instigated" the 2nd respondent to arrest and detain him must prove the existence of the petition as well as the instigation same engendered. This is the requirement of Sections 131 and 132 of the Evidence Act 2011. See also MOMOH & ORS Vs. UMORU & ORS (2011) LPELR - 8130 (SC) 8.
(P 58 para C - D)

2. *When a defendant is obligated to lead evidence in proof*
By Section 133 of the same Act, the 1st respondent herein being the defendant would only be obligated to lead evidence if the appellant, the plaintiff in the instant case, has discharged the initial burden of proof. See Mbanefo Vs. Agbu & Anor (2014) LPELR - 22147 (SC) and Interdrill (Nig) Ltd & Anor Vs. UBA PLC (2017) LPELR - 41907 (SC). ***(P 58 para D - E)***

3. *The purport of service of notice to produce*
Secondly, learned appellant's counsel must further be reminded that service of notice to produce a document on an adverse party does not place on the party served the obligation to produce the document. The service of the notice to produce only entitles the party serving the notice, pursuant to Section 91 of the Evidence Act 2011, to adduce secondary evidence of the document

in question. Thus the service of the notice does not absolve the person serving the notice the burden of producing the document and/or proving its content. It is not the principle that a court, where an adverse party served with notice to produce and fails or refuses to, will invoke Section 149(d) of the Evidence Act of the Evidence Act against the defaulting party. See Buhari Vs. Obasanjo (2005) 2 NWLR (Pt. 910) 241; UBN Vs. ADRISU (1999) 7 NWLR (Pt. 609) 105 and Nweke Vs. State (2017) LPELR - 42103 (SC). *(P 58 para E - F)*

4. Appellant conceded that he did not produce "petition" in court

In the case at hand where the appellant asserts that his arrest and detention by the 2nd respondent was "instigated" by the 'petition" the 1st respondent wrote on him, for the latter to be liable, the content of the petition must be proved at

least by secondary evidence of same. Yet under cross examination the appellant, inspite of insisting that it was the 1st respondent who by a petition "instigated" his arrest and detention by the 2nd respondent conceded that he has not produced the petition in court to enable the court determine if there was any element of instigation in it. The appellant also agreed that the 2nd respondent is empowered to investigate fraud cases and even interrogate him in order to find out the truth. This evidence certainly takes the bottom off the appellant. *(P 58 para F - G)*

5. Effect of evidence elicited under cross examination

It is settled that evidence elicited from the cross examination of a party or his witness(es) by his adversary which supports the case of the adversary, the adversary may entirely rely upon such evidence, without calling evidence in support or proof of his pleadings to establish his own case. The evidence elicited by the adverse party under cross examination being supportive of his case, becomes his evidence. See Adeosun Vs. Governor Ekiti State (2012) 4 NWLR (1291) 581 at 602 and M.T.N. NIGERIA Communication Ltd Vs. Corporate Communication Investment Ltd (2019) LPELR - 47042 (Sc).

In the case at hand the answers the appellant provided while being cross-examined shows clearly that the "petition" he vehemently hinges his claim as having been 1st respondent's "instigation" for his arrest and detention does not in fact exist. Parties have joined issues on the existence and otherwise of the petition. The 1st respondent is entitled to rely on the answers provided by the appellant on the petition to prove the facts in dispute between them. See Adeosun Vs. Governor Ekiti State (2012) 4 NWLR (Pt. 1291) 581 at 602 and Omisore & Anor Vs. Aregbesola & Ors (2015) LPELR - 24803 (SC).

(P 58 para A - C)

6. *Appellant failed to establish that his arrest and detention was sequel to the petition*

From the evidence elicited by the 1st respondent's counsel while cross examining the appellant, it is manifest that the appellant has failed to establish that his arrest and detention was in fact sequel to the "instigation" contained in the "petition" purportedly written by the 1st respondent to the 2nd respondent. The lower court's interference with the trial court's decision that is not borne out by the evidence on record, learned respondent's counsel is right, is not perverse. See Atolagbe Vs. Shorun (1985) LPELR - 592 (SC) and FRN VS. Iweka (2011) LPELR - 9350 (SC). ***(P 58 para D - E)***

Held: Mary Peter-Odili (JSC) dissenting

1. *The Implication where a defendant has elected to call no evidence in a case*

This is because pleadings are not self propelling in the absence of evidence in proof of the pleadings. The situation as I have ttempted to communicate is well

enunciated by this court in the case of Akanbi Vs. Alao (1989) SC page 1 at 38 per Karibi - Whyte JSC thus:-

> **"The peculiar circumstances of this case, is clearly disclosed from the fact that counsel to the defendants who had the authority of the defendants at all times material to this case made a no case submission at the close of the case of the plaintiffs, relied on the case of the plaintiffs for that of the defendants and offered no evidence. It is well settled that in such a circumstances where the defendant has elected not to call evidence, he must be taken as admitting the facts of the case as stated by the plaintiffs and must stand on his submission and is bound……Hence in this case the defendants shall be taken as having abandoned their defence."** ***(P 65 para B - D)***

2. *Effect where defendant rest his casa on that of plaintiff*

The fall out of what the 1st respondent's counsel had done when he opted to call no evidence to prove the facts averred in his statement of defence is that he abandoned his defence and chose to do the case without any defence. Therefore, the court would not look at the statement of defence earlier filed since it has been abandoned by the defence himself and so the statement of claim is deemed admitted and no contest to it available. Craie JSC in Akanbi Vs. Alao (supra) at page 20 stated it as it is when he said:-

> **"I bear in mind that the defendant's counsel also announced that he was resting his case on that of the plaintiff and counsel must be understood to be saying either:-**
>
> **(a) That the plaintiff has not made out any case for the defendants to answer.**

(b) That the defendants have a complete answer in law to the plaintiff's case.

The learned jurist, Craig JSC went further to elucidate at page 20 thus:

> **"In my experience, a decision not to call evidence has always been regarded as a legal strategy and not mistake. If the strategy succeeds, then it enhances the case of that party; nut if it fails, such a litigant cannot ask for leave to adduce further evidence in order to repair his damaged case."** ***(Pp 65-66 para D - A)***

3. Respondent made some crucial admission

A recourse to what transpired at the trial court would show that the respondents had admitted that they instigated the appellant's arrest with the testimony of appellant as PW1 to the effect that 1st respondent had instigated

his arrest and tendered Exhibit "F" being his solicitor's letter to the 1st respondent demanding for an apology over her act of instigating his arrest. This was not controverted or denied in the circumstance, therefore, it was admitted. See Oshodi Vs. Eyifunmi (2000) 7 SC (Pt. 11) page 145 at 190; Okukuje vs. Akwido (2001) 1 SC Pt. 11 page 80 at 139; Adesola Vs. Abidoye (1999) 10-12 SC 109 at 125; Bello Vs. Farmers Supply Company Ltd. (1998) 10 NWLR (Pt. 568) 64.

That facts and evidence as borne on the record make it difficult to appreciate or even to follow the reasoning of the court below when it held thus:-

> **"…. that there was no basis whatsoever for the trial judge to find as a fact that the appellant instigated the arrest of the 1st respondent."**

Again the Court of Appeal went further to hold as follows:-

> **"In this easel the 1st respondent's claim rested entirely on a petition which according to his pleading was written by the appellant to the police. Paragraph 6 of the statement of claim reads: "That to the plaintiff's chagrin and consternation, the next thing that happened was their arrest by the agents of the 2nd defendant as they would learn later, the 1st defendant had instigated the arrest by her written petition to the 2nd defendant that the plaintiffs were the prime suspects of the crime —the plaintiffs shall rely on the petition at the trial, they give the 2nd defendant notice to produce the same at the trial". See page 162 of the record.** ***(P 66 para A - F)***

4. A court does not make a case for a party

Again the court below had stated as shown at page 162 of the record thus:-

> **"It is a fundamental principle of law that it is the duty of whoever pleads a fact to establish that fact by evidence. The onus of proof lies on a plaintiff to establish his case whether or not the defendant leads evidence ".**

What seems to have played out at the court below is that court's strenuous attempt to do what the respondents were unwilling to do for themselves and the gaping void was what the court below set out to fill. This being a procedure strange to our jurisprudence as a court does not make a case for a party or enter into the arena of the dispute as the court's duty is limited or confirmed to what the parties have brought to the court and no more. The court is not permitted to go outside the materials made available by parties on either side and in this

instance, the 1st respondent had not called any evidence in defence and so deemed to have admitted all that the appellant averred in his statement of claim. It therefore beats all reasoning from what the court below set out to carry out the unassigned commission of filling the gaps that the respondent's strategy has provided. See Yusuf Vs. Oyetunde (1998) 9 - 10 SC page 123 at 137; Abdulsalam Vs. Salawu (2002) 6 SC (Pt.11) 196 at 199; Section 75 of the Evidence Act Cap. 112 Laws of the Federation 1990; Okonkwo Vs. Ogbogu (1996) 5 NWLR (Pt. 449) 420. ***(P p 66 - 67 para F - B)***

5. 1st respondent deemed to have admitted those facts averred by the appellant

All the paragraphs in the statement of claim including those above quoted were not denied by the 1st respondent as he chose to make a no case submission at the end of the case of the plaintiff, therefore, 1st respondent is deemed to have admitted those facts in the case stated by the appellant. It is no excuse that it was counsel and not the 1st respondent herself who made the choice or took that route of defence as counsel to the defendants had the authority of the defendants at all times material to make the no case submission at the close of case of the plaintiff and thereby relied on what had been put forward by the plaintiffs for that of the defence and so offered no evidence of its own and taken as having abandoned their defence. See Akanbi &. Ors, Vs. Mamudu Alao & Anor. (1989) 5 SC 1 page 38. ***(P 69 para D - E)***

6. The decision of the Court of Appeal was perverse

Indeed, the position taken by the trial court is what the law has prescribed. The learned counsel for the 1st defendant formulated two issues for determination in a civil suit where the plaintiff had asserted certain facts and the defendants did not dent traverse or refused to admit those facts and gone

further to abandon its statement of defence, therefore no issues were joined with the plaintiff and so there was no material upon which the findings and decision of the Court of Appeal could be founded upon. See Nwabuoku Vs. Onwordi (2002) FWLR (Pt. 123) 337; Oshodi Vs. Eyifunmi (2000) 7 SC (Pt.11) 145 at 173 —174.
(P 69 para F - G)

7. The meaning of to instigate
To instigate is to intentionally aid or facilitate by any act or illegal omission the doing of that thing. See NJOVENS Vs. THE STATE (1973) ALL NLR 371. The police are empowered to investigate any criminal allegation. They may take any action they deem fit to take upon investigation. They may arrest, detain, and prosecute an alleged offender. See Section 4 of the Police Act, Section 10 of the Criminal Code; Section 20 of the Criminal Procedure Act. See also Section 35(1)(c) of the 1999 Constitution of the Federal Republic of Nigeria as amended. In the legitimate discharge of their duties, they cannot be sued in court. ***(P 71 para B - C)***

8. A citizen cannot be punish for performing his civic responsibility
The law is well settled that a citizen's civic responsibilities include reporting crimes and perceived or suspected criminal acts either to his person or to the person of a fellow citizen, and such a citizen, after making such complaints to the appropriate security agencies, cannot be held culpable for performing his civic responsibility, unless at the conclusion of the investigations of the complaints he made, it is found that they were baseless and made mala fide. See FAJEMIROKUN Vs. COMMERCIAL BANK NIG LTD & ANOR (2009) 5 NWLR (Pt. 1135) 588 SC; (2009) LPELR-1231 (SE) PG.9-10, PARAS F - G.
(P 71 para C - D)

9. Admission by an adverse party is not a proof to a party's case
It is not the law that a person becomes culpable and liable to pay damages for making a report to the police.

Admission by an adverse party is not a proof of a party's case. Every plaintiff must succeed on the strength of his case and not on the weakness or admission of the other party. ***(P 71 para D - E)***

10. A court cannot make use of a document not before it
A court also cannot make use of a document not before it. If the petition was tendered and admitted in evidence, it would have strengthened the case of the appellant, the level of instigation, its enormity and the malicious intent would have been read into it. Indeed, he could not prove that the 1st respondent instigated the 2nd respondent to effect his arrest, detention and odious treatment. If it was a normal report or compliant made by the 1st respondent to the 2nd respondent to carry out its statutory duties, the petition

or complaint would have also revealed it and the respondents would not have been so liable for the instigation. ***(P 98 para E - F)***

Representations
Chuma Oguejiofor with C. Okibe and A. T. Nwaka, for the appellant.
A.O. Okpalah with Uchenna Uche, for the 1st respondent. Registrar: 2nd respondent served.

MUSA DATTIJO MUHAMMAD, JSC (Delivering the lead judgment): This is an appeal against the judgment of the Court of Appeal, sitting at Enugu, the lower court, delivered on the 22nd day of May 2007, allowing the appeal of the respondent herein against the decision of the Enugu State High Court, the trial court, dated 6th day of June 2006 in favour of the appellant herein. As plaintiffs, the appellant and his wife commenced the instant suit claiming against the respondents, the defendants, jointly and severally the sum of one hundred million naira (N100,000,000.00k) damages for

the instigation of their arrest and detention that caused them public odium, scorn and trauma more particularly between the period of February to July 2005 when the matter was being investigated by the police.

The appellant and the 1st respondent filed and exchanged pleadings at the trial court. The 2nd respondent neither filed any defence in the suit nor was he represented by counsel inspite of his being served. In addition to his statement of claim, the appellant further relied on his reply to the 1st respondent's statement of defence. He led evidence in proof of his pleadings. The 1st respondent led no evidence in support of his pleadings and chose, instead, to rely on the case made out by the plaintiff/appellant.

The case of the plaintiff/appellant is that, as chairman of Petrus Ogu Nigeria Ltd, he issued a cheque out of the latter's current account at Enugu Main Branch of the 1st defendant/respondent for the sum of N10.3 million naira in favour of Mainland Resources Company Ltd; that the cheque was dishonoured; that using nine different cheques purported to be the cheques of Petrus Ogu Nigeria Ltd, the sum of N6,910,000 was fraudulently withdrawn from the company's account, that on 7th day of January 2005 he wrote a letter to the defendant/respondent, Exhibit A, complaining of the fraudulent withdrawals from the account of Petrus Ogu Nigeria Ltd to which there was no reply; that on the 9th February 2005 the plaintiff/appellant again wrote the 1st defendant/respondent, Exhibit B, a further complaint on the wrongful withdrawals from the account of Petrus Ogu Nigeria Ltd. By Exhibit C, 1st defendant/respondent's response to appellant's 2nd letter of complaint, Exhibit B, the appellant was requested to surrender all the original cheques of Petrus Ogu Nigeria Ltd to the bank for investigation purposes; that in compliance, the cheques were released vide Exhibit D. Thereafter, on account of the 1st defendant/respondent's petition to the 2nd defend-

ant/respondent, the plaintiff/appellant further avers, he was arrested and detained at the Alagbon close police station between the 24th and 29th March 2005 and investigation ensued up to July 2005. Given his travails, appellant's hypertension worsened; that police investigation exonerated him but indicted one Ajike Obay, a staff of the 1st respondent, for the fraud in the account of Petrus Ogu Nigeria Ltd. The 1st respondent, on receiving the report of the investigation reimbursed Petrus Ogu Nigeria Ltd the sum it was defrauded. Exhibit E attests to this fact. Appellant's request, through his counsel, for unreserved apology for the embarrassment caused him by his arrest and detention at the instance of the 1st respondent, Exhibit F, inspite of the latter's acknowledgement of receipt thereof, Exhibit G, was not acted upon. 1st respondent's persistent refusal to apologise to the appellant necessitated the institution of the instant suit.

It is significant to restate that at trial only the appellant gave evidence. The 1st respondent chose not to call any witness in support and proof of its pleadings but rather made a no case submission resting its case on that of the appellant.

In its judgment delivered on 6th day of June 2006 in favour of the plaintiff/appellant, the trial court found merit in appellant's claim and awarded him

the sum of Nl0,000,000.00k against the defendants /respondents jointly and severally.

Dissatisfied, the 1st defendant/respondent appealed to the lower court. The court allowed the appeal. In allowing the appeal, the court at pages 163,-164 of the record, inter-alia held:

> **"There was no basis whatsoever for the trial judge to find as a fact that the appellant instigated the arrest of the 1st respondent. That finding is perverse as it is not supported by any credible evidence. If the petition had been tendered it would have enabled the trial court and this court to know from its content whether the appellant actually instigated the police to arrest the 1st respondent.**
>
> **In the final analysis I am firmly of the view that the 1st respondent failed to prove his claim before the court and his claim ought to have been dismissed. The trial court made a grave error in giving judgment in favour of the 1st respondent." (Underlining supplied for emphasis).**

Aggrieved by the foregoing decision, the plaintiff has appealed to this court by his notice filed on the 11th day of June 2007 containing five grounds.

Parties, except the 2nd defendant/respondent, had filed and exchanged their briefs, including the appellant's reply brief to the 1st respondent which, at the hearing of the appeal were adopted and relied upon as their respective arguments.

In the appellant's brief settled by C. Chuma Oguejiofor Esq, the two issues presented as arising for the determination of the appeal read:-

"Whether a fact already admitted by a party still has to be proved against him and whether having also already admitted that he instigated the 2nd respondent to arrest the appellant, the afore-said appellant needed to tender the 1st respondent's petition against him to the police to prove that the same 1st respondent had actually instigated his arrest. (Grounds 1 and 2).

Whether the hearing before the court below conformed with the tenets of natural justice in particular fair hearing and whether the plaintiff/appellant did prove his case upon a preponderance of evidence as to be entitled to the judgment made and or entered in his favour by the trial court. (Grounds 2 and 3)."

The more apposite lone issue formulated in the brief of the 1st respondent settled by A. Ben Anachebe Esq, reads:-

"Whether the plaintiff/appellant proved that the respondent bank instigated his arrest and detention, against the backdrop of his pleadings and evidence adduced in support."

Indeed the question the appeal raises is whether the appellant had proved his case and that the lower court is wrong to have held otherwise.

It is argued by learned appellant's counsel that the appellant has copiously pleaded that it was the 1st respondent that instigated the 2nd respondent to arrest him. Paragraphs 1, 6, 13, 15, 17 and 18 of appellant's statement of claim filed on 15th September 2005 are cited. Learned counsel further submits that though the 1st respondent joined issues with the appellant by its statement of defence dated 18/10/2005, in choosing to rely on the appellant's case rather than calling evidence to prove its pleadings has abandoned its case. The 2nd respondent, on the other hand, though served with the processes, never contested the case up till now. Referring to Section 75 of the Evidence Act 1990 (Section 123 of the 2011 Act) and **AKANBI Vs. ALAO 1989 5 SC 1 at 38,** learned counsel contends that it is trite that where, as in the instant case, a party rests his case on that of his opponent and calls no evidence to prove his case he is for all intent and purposes deemed to have abandoned its case. The 1st respondent, it is argued, have not denied appellant's pleadings that it instigated the 2nd respondent to arrest him. Instead, while the 2nd respondent filed no defence at all, the 1st respondent who filed one abandoned same. A party's pleadings that have neither been denied nor controverted, learned counsel further argues, are deemed admitted. He further relies on **OGUEJIOFOR Vs. OSAKA, (2000) 3 SC 1 at 8** and **ODIBA Vs. MUEMUE (1999) 6 SC 158 at**

162, OSHODI Vs. EYIFUNMI (2000) 7 SC (Pt. II) page 145 at 190, ADESOLA Vs. ABIDOYE (1999) 10 - 12 SC 109 at 125 and **OKUKUFE Vs. AKWODO (2001) 1 SC (Pt. II) 80 at 139** to insist that the lower court's finding at page 163 of the record of appeal, that the tendering of the 1st respondent's petition is critical to the proof of appellant's clam, given the overwhelming evidence to the contrary, is perverse. The duty of evaluating evidence led by parties, it is argued, is that of the trial court and once it is creditably done, an appellate court cannot interfere to reach a different conclusion. The lower court's erroneous holding, concludes learned appellant's counsel, with the resolution of the issues the appeal raises against the respondents, be set aside.

In arguing the appeal, learned 1st respondent's counsel posits that appellant's case hinges on the petition written by the 1st respondent to the 2nd respondent asserting the appellant to be a shot prime suspect in the fraud perpetrated in the accounts of Petrus Ogu Nigeria Ltd domiciled with the 1st respondent. In paragraph 6 of his statement of claim in particular, the appellant avers that his arrest and detention by the 2nd respondent is instigated by the 1st respondent following the petition to the 2nd respondent. Appellant's failure to tender the very petition by virtue of which he claims, it is contended, is fatal. The appellant has, in the course of cross-examination

conceded, without any explanation, his omission to tender the said petition. The appellant is duty bound to discharge the initial burden of proof the law places on him. Where he has not, the law entitles the 1st respondent, even where it has filed its statement of defence to rest its case on that of the appellant.

Given the pleadings and evidence relied upon by the appellant, the lower court is right to have interfered as the trial court is not allowed to speculate as to the content of the purported 1st respondent's petition. Learned counsel refers to **BRITISH-AMERICAN INS CO LTD Vs OMOLOYO (1991) 2 NWLR (Pt. 176) 72, KOKU Vs. KOKU (1992) 8 NWLR (Pt. 616) 616 at 721** and **BAGBEGBIN Vs. ORIARE (2001) 5 NWLR (Pt 707) 628.** Further relying on the decisions in **MBANEFO Vs. ODU (1935) 2 WACA 336, EWO ANI (2004) 3 NWLR (Pt. 861) 610** and **UBN PLC Vs. SCPOK (NIG) LTD (1998) 1 NWLR (Pt. 578) 439,** learned counsel justifies 1st respondent's strategy of making a no case submission in opposing appellant's claim that has not in the least been proved. The decision in **AKANBI Vs. ALAO** the appellant asserts supports his case, it is argued, does not. It goes against the appellant who has failed to lead evidence in proof of the 1st respondent's instigation of his arrest by to 2nd respondent.

The trial judges wrong conclusion following his wrong application of the principle enunciated in **BRICK & STONE (NIG) LTD Vs. ACB LTD (1992) 3 NWLR (Pt. 229) 260,** learned counsel further submits fully warrants the lower court's interference with his perverse decision. By **MOGAJI Vs. ODOFIN (1978) 4 SC 91, NWANKPU Vs. EWULU (1995) 5 NWLR (Pt. 407) 269** and **ADEBAYO Vs. ADUSEI (2004) 4 NWLR (Pt. 862) 44,** it is submitted, appellant's unproved claim must fail. Had the appellant established the fact that the petition to the 2nd respondent was written by the 1st

respondent, the extra fact that the petitioner was negligent in doing so will also have become necessary. The appellant, it is contended, has not only failed to prove that the 1st respondent did in fact "petition" the 2nd respondent but that his arrest and detention was the result of the negligent petition rather than the decision of the 2nd respondent in the discharge of his statutory duty. Citing **TOTOR Vs. AWEH (2000) 2 NWLR (Pt. 644) 309, GBAJOR Vs. OGUNBUREGUI (1961) ALL NLR 583, OWOMEYO Vs. FLOUR MILLS LTS (1995) NWLR (Pt. 421) 622 at 630, DARAMOLA Vs. AG (ONDO STATE) 7 NWLR (Pt. 665) 440** and **OKOCHI Vs. ANIMKWOI (2003) 18 NWLR (Pt.851) 1** learned counsel concludes that appellant having not in the least proved his case is undeserving of the success accorded by the trial courts. He urges the resolution of 1st respondent's lone issue against the appellant and the dismissal of the appeal.

On being served with the 1st respondent's brief of argument, the appellant filed his reply brief thereto. Therein, it is argued that the appellant had served the 2nd respondent in whose custody the petition was, notice to produce same. The trial court by virtue of Section 149 of the Evidence Act, it is submitted, is entitled to presume that had the petition written to the 2nd respondent by the 1st respondent been produced, it would have been unfavourable to them. Learned counsel cites **PHARMACISTS**

BOARD OF NYERN Vs. ADEGBESOTE (1986) 3 NWLR (Pt. 44) 707.

Finally, it is contended, it is not open to the 1st respondent to rely on evidence elicited through the cross-examination of the appellant in defending the claim. In the circumstance the 1st respondent found himself, having not pleaded the very facts he cross examined the appellant upon, he cannot rely on such facts by other means. **KUTI & ANOR Vs. JIBOWU & ANOR (1972) 6 SC 147** and **DINA Vs. NNN LTD (1986) 2 NWLR (Pt. 22) 353** are commended to the court. Learned counsel maintains that his appeal has merit and that same be allowed.

In resolving the lone issue the appeal raises, it is instructive to state those trite principles of law the trial court seems to have ignored but which the lower court fully appreciated in arriving at its decision the appellant herein urges should be over turned.

Firstly, the law is settled that whoever asserts must prove. The appellant who desires the judgment of the court as to 1st respondent's liability for the petition it wrote and "instigated" the 2nd respondent to arrest and detain him must prove the existence of the petition as well as the instigation same engendered. This is the requirement of Sections 131 and 132 of the Evidence Act 2011. See also **MOMOH & ORS Vs. UMORU & ORS (2011) LPELR - 8130 (SC) 8.** By Section 133 of the same Act, the 1st respondent herein being the defendant would only be obligated to lead evidence if the appellant, the plaintiff in the instant case, has discharged the initial burden of proof. See **MBANEFO Vs. AGBU & ANOR (2014) LPELR - 22147 (SC)** and **INTERDRILL (NIG) LTD & ANOR Vs. UBA PLC (2017) LPELR - 41907 (SC).**

Secondly, learned appellant's counsel must further be reminded that service of notice to produce a document on an adverse party does not place on the party served the obligation to produce the document. The service of the notice to produce only entitles the party serving the notice, pursuant to Section 91 of the Evidence Act 2011, to adduce secondary evidence of the document in question. Thus the service of the notice does not

absolve the person serving the notice the burden of producing the document and/or proving its content. It is not the principle that a court, where an adverse party served with notice to produce and fails or refuses to, will invoke Section 149(d) of the Evidence Act of the Evidence Act against the defaulting party. See **BUHARI Vs. OBASANJO (2005) 2 NWLR (Pt. 910) 241; UBN Vs. ADRISU (1999) 7 NWLR (Pt. 609) 105** and **NWEKE Vs. STATE (2017) LPELR - 42103 (SC).**

In the case at hand where the appellant asserts that his arrest and detention by the 2nd respondent was ”instigated” by the ’petition” the 1st respondent wrote on him, for the latter to be liable, the content of the petition must be proved at least by secondary evidence of same. Yet under cross examination the appellant, inspite of insisting that it was the 1st respondent who by a petition ”instigated” his arrest and detention by the 2nd respondent conceded that he has not produced the petition in court to enable the court determine if there was any element of instigation in it. The appellant also agreed that the 2nd respondent is empowered to investigate fraud cases and even interrogate him in order to find out the truth. This evidence certainly takes the bottom off the appellant.

It is argued by learned appellant’s counsel that because the 1st respondent has

abandoned his pleadings and rested his case on that of the appellant he is deemed, inspite of the evidence elicited from the appellant under cross examination, to have admitted the claim. I disagree.

It is settled that evidence elicited from the cross examination of a party or his witness(es) by his adversary which supports the case of the adversary, the adversary may entirely rely upon such evidence, without calling evidence in support or proof of his pleadings to establish his own case. The evidence elicited by the adverse party under cross examination being supportive of his case, becomes his evidence. See **ADEOSUN Vs. GOVERNOR EKITI STATE (2012) 4 NWLR (1291) 581 at 602** and **M.T.N. NIGERIA COMMUNICATION LTD Vs. CORPORATE COMMUNICATION INVESTMENT LTD (2019) LPELR - 47042 (SC).**

In the case at hand the answers the appellant provided while being cross-examined shows clearly that the ”petition” he vehemently hinges his claim as having been 1st respondent’s ”instigation” for his arrest and detention does not in fact exist. Parties have joined issues on the existence and otherwise of the petition. The 1st respondent is entitled to rely on the answers provided by the appellant on the petition to prove the facts in dispute between them. See **ADEOSUN Vs. GOVERNOR EKITI STATE (2012) 4 NWLR (Pt. 1291) 581 at 602** and **OMISORE & ANOR Vs. AREGBESOLA & ORS (2015) LPELR - 24803 (SC).**

From the evidence elicited by the 1st respondent’s counsel while cross examining the appellant, it is manifest that the appellant has failed to establish that his arrest and detention was in fact sequel to the ”instigation” contained in the ”petition” purportedly written by the 1st respondent to the 2nd respondent. The lower court’s interference with the trial court’s decision that is not borne out by the evidence on record, learned respondent’s counsel is right, is not perverse. See **ATOLAGBE Vs. SHORUN (1985) LPELR - 592 (SC)** and **FRN VS. IWEKA (2011) LPELR - 9350 (SC).** The decision endures and the unmeritorious appeal is hereby accordingly dismissed. Parties are

ordered to bear their respective costs.

Musa Dattijo Muhammad
Justice, Supreme Court

MARY UKAEGO PETER-ODILI, (JSC): I agree with the judgment just delivered by my learned brother, Musa Dattijo Muhanlmad JSC and to register the support I have in the reasonings from which the decision came about, I shall make some comments.

This is an appeal against the judgment of the Court of Appeal, Enugu Division or Court below or Lower court, Coram: J. O. Ogbebe JCA (as he then was), S. Denton-West, J. O. Bada JJCA, delivered on 22/5/2007 which allowed the appeal from the trial High Court's judgment of 6/6/2006.

FACTS BRIEFLY STATED

The appellant is a businessman based at Enugu, he is the Chairman/Managing Director of a Limited Liability Company known as Petrus Ogu Nig. Limited.

Petrus Ogu Nig. Ltd maintained a company current account No.1402030002905 with the 1st respondent's Okpara Avenue Branch Enugu, the appellant had noticed some unlawful withdrawals from that account totaling N6,910,000.00, the appellant was the person who detected the unlawful withdrawals and he immediately informed the 1st respondent by his letter - Exhibit "A" dated 7/1/2005.

In the aforesaid Exhibit 'A', the appellant had further informed the 1st respondent that one Ejike Obayi a staff of the 1st respondent had facilitated the fraud by identifying the criminals who were responsible for the unauthorized/unlawful withdrawals as known to him and upon which identification or recommendation the unlawful payments were then made.

The appellant was surprised when despite the effluxion of more than 1 month after he had written Exhibit 'A' to the 1st respondent, she still had not reacted to the same; he got compelled to write *yet* another letter, Exhibit 'B' dated 9/2/2005, he had threatened to engage the services of his solicitors if the 1st respondent would persist in her indolence and not do anything in the circumstances about the withdrawals.

The 1st respondent requested for the appellant's cheque books, this she did vide her letter of 11/2/2005 to the appellant, he had obliged them without much ado, in a rather very bizarre manner, the next thing that happened was that rather than have her staff Mr. Ejike Obayi who was fingered by the appellant for the fraudulent acts arrested, the 1st respondent turned round and instigated the police (2nd respondent) to arrest and detain the appellant and the wife from 24/3/2005 - 29/3/2005 at the Alagbon Close Police Station, Lagos.

The investigation of the matter had lasted and or spanned through a period of 5 months from March - July 2005, the appellant and the wife within that period paid countless visits to the Police Station before the police finally came out with their investigation report exonerating the appellant and the wife and indicting Ejike Obayi the same person who had been fingered as the main culprit in the matter by the appellant earlier on.

That by the time the investigation had finally ended, the appellant and his wife were already hypertensive, meanwhile the police had in their report also recommended that the aforesaid sum of N6,910,000.00 withdrawn from the account be paid back to the appellant's company account i.e. Petrus Ogu Nig. Ltd. Current account supra, this was done by the 1st respondent.

Appellant expected that seeing that they had instigated the appellant's arrest together with his wife who had nothing to do with the day to day running of the company and that they were later exonerated completely from the crime that the 1st respondent would apologize to them for their wrongful action, but they did no such thing and thereby compelling the appellant to write formally to the 1st respondent vide his counsel's letter dated 31/8/2005, Exhibit 'F', the 1st respondent had replied the letter by theirs of 7/9/2005 Exhibit "G" promising to look into the issues raised in Exhibit "F'', they never did.

The appellant and the wife got to seek redress against the respondents at the High Court Enugu by their claim and statement of claim dated 14/9/2005 filed on 15/9/2005, the appellant's wife had later applied to withdraw from the suit while the appellant alone continued with the same.

The appellant had testified as PW1 in the proceedings at the trial court while his brother one Emeka Oguebie testified as PW2, after he closed his case, counsel for the 1st respondent opted to rest his case on the appellant's while the 2nd respondent was never in court nor did he defend the case against him, counsel for the appellant and the 1st respondent submitted their written arguments and on the 6/6/2006 the trial court had entered judgment in favour of the appellant in the sum of N10,000,000.00 against the respondents jointly and severally with cost of N5,000.00.

The 1st respondent had appealed against the judgment to the court below which had on the 22/5/2007 allowed her appeal in the following terms "Accordingly I allow this appeal and set aside the judgment of the trial court. In its place, I dismiss the 1st respondent's claim in the court below with costs of N5,00.00 in favour of the appellant before that court. The appellant is also entitled to costs of N7,500.00 against the 1st respondent in this appeal."

On the 21st October, 2019 date of hearing, learned counsel for the appellant, Chuma Oguejiofor Esq. adopted the brief of argument filed on 9/7/07 reply brief filed on 17/9/2007 and an additional authority. He formulated two issues for determination from the grounds of appeal, viz:-

1. **Whether a fact already admitted by a party still has to be proved against him and whether having also already admitted that he instigated the 2nd respondent to arrest the appellant, the aforesaid appellant needed to tender the 1st respondent's petition against him to the police to prove that the same 1st respondent had actually instigated his arrest. (Grounds 1 and 2).**
2. **Whether the hearing before the court below conformed with**

the tenets of natural justice in particular fair hearing and whether the plaintiff/appellant did prove his case upon a preponderance of evidence as to be entitled to the judqment made and or entered in his favour by the trial court. (Grounds 2 and 3).

Learned counsel for the 1st respondent adopted the brief of argument filed on 31/7/07 though settled by A. Ben Anachebe Esq. and distilled a sole issue for determination which is as follows:-

Whether the plaintiff/appellant proved that the respondent Bank instigated his arrest and detention, against the backdrop or his

pleadings a no evidence adduced in support.

The single issue of the respondent is apt for my purpose in the determination of this appeal and I shall use it.

SOLE ISSUE:

Whether the plaintiff/ appellant proved that the respondent bank instigated his arrest and detention against the backdrop of his pleadings and evidence adduced in support.

Advancing the position of the appellant, learned counsel referred the court to the fact that 1st respondent as defendant in the court of trial had filed a statement of defence which he later abandoned by choosing to rely on the case of the appellant and 1st respondent again called no evidence. That 2nd respondent did not contest the case from inception till appeal at the court below and even at the Supreme Court despite service of the processes on him. That the implication of a party resting his case on that of his opponent without calling any evidence is taken as having abandoned his defence and admitted all his adversary averred in his statement of claim. He cited Akanbi Vs. Alao (1989) 5 SC 1 at 38; Oguejiofor Vs. Osaka (2000) 3 SC 1 at 8; Odiba Vs. Muemue (1999) 6 SC at 162.

Learned counsel for the appellant submitted that the hearing at the court below did not conform with the basic tenets of fair hearing as it related to the appellant. This is so because the lower court had singled out paragraph 6 of the statement of claim to show that the failure by the appellant to tender the petition of the 1st respondent to the police was fatal to his case, the same court ignored other aspects of the same statement of claim which if it had also been considered would have led to a different decision than the setting aside of the trial court's judgment. He cited NBN Ltd Vs. U. C. Holdings Ltd. (2004) 3 NWLR (Pt.881) 436; Jolayemi Vs Alaoye (2004) 12 NWLR (Pt.887) 322 etc.

He concluded by stating that the court below was in error in holding that the decision of the trial court in entering judgment in favour of the appellant was perverse and not supported by any credible evidence.

For the 1st respondent, learned counsel submitted that evident from the pleadings paragraph 6, the alleged instigation arose from the Bank's petition to the police but that the evidence in chief of the appellant did not allege or mention the word instigation except for where he said, "The 1st defendant instigated my arrest by their Petition to the Inspector General of Police".

That from the facts, pleadings and evidence adduced by the appellant, the failure of the appellant to tender the petition as exhibit was fatal to the case of appellant. He cited British -**American Ins. Co. Ltd Vs. Omolayo (1991) 2 NWLR (Pt.176) 721; Koku Vs. Koku (1992) 8 NWLR (Pt.161) 762, Barngbegbin Vs. Oriare (2001) 5**

NWLR (Pt. 707) 628.

That in the absence of the essential proof of instigation as pleaded by the appellant, the respondent bank was constrained to abandon the statement of defence and enter a no case submission since the minimal burden of proof of the appellant's pleadings had not been discharged by the appellant. He relied on **Mbanefo Vs. Odu (1935) 3 WACA 336; Ewo Vs. Ani (2004) 3 NWLR (Pt.861) 610 etc.**

For the respondent, it was further contended that the trial court did not evaluate the evidence before him adduced in cross-examination and had hastily concluded that the appellant's evidence was undiscredited and so the court below appropriated deduced the flow and came to its decision upsetting the judgment of the trial court. He cited **Adebayo Vs. Adusei (2004) 4 NWLR (Pt.862) 44; Mogaji Vs.Cadbury Nig. Ltd. (1985) 2 NWLR (Pt.7) 393; Nwokoro Vs. Nwosu (1994) 4 NWLR (Pt.337) 172.**

Learned counsel for the respondent urged the court to affirm the judgment of the Court of Appeal and dismiss the appeal given the deliberate withholding by the appellant of the police petition on which he was relying in proof of the alleged instigation against the 1st respondent. That the judgment of the trial court cannot be sustained as it was devoid of any evaluation of evidence elicited in cross-examination which resoundingly revealed reasonable cause for the bank's police petition, as concurred even by the appellant himself.

In reply on points of law, learned counsel for the appellant had pointed out that at paragraph 6 of the statement of claim of the appellant, the appellant had given the 2nd respondent notice to produce the petition which was in his custody. He cited Section 149 (D) of the Evidence Act; **Pharmacists Board of Nigeria Vs. Adegbesote (1986) 3 NWLR (Pt.44) 707**.

That 1st respondent had abandoned his pleadings and did not lead any evidence at the trial and so any evidence that was elicited during cross-examination but which was not pleaded by the party seeking to use it goes to no issue. He cited **Kuti Vs. Anor. Vs. Jibowu & anor. (1972) 6 SC 147; Dina Vs. N.N.N. Ltd. (1986) 2 NWLR (Pt. 22) at 353.**

He concluded that the 1st respondent cannot put up a submission against the finding of fact of a trial judge which he had not appealed against and so learned counsel for 1st respondent's contention on the lack of evaluation of the evidence of PW1 and PW2 cannot be given any serious consideration since he had not appealed against any of the findings. He cited **Biariko Vs. Edeh (2001) 4 SC (Pt.11) 96 at 116.**

In a nutshell, the stance of the appellant is that the court below was in error in holding that the decision of the trial court in entering judgment in favour of the appellant in this matter was perverse and not supported by any credible evidence and that the appellant's failure to tender the petition written to the police (2nd respondent) led to a total collapse of the case of the said appellant.

The countering position of the 1st respondent is that the court below acted properly in its decision while that of the trial court was made in error being benefit of

any visible evaluation of the totality of evidence.

The peculiar presentations in this appeal with regard to the beginning of the suit would throw more light with exactitude the situation on ground. I shall refer to some relevant paragraphs of the statement of claim of the now appellant thus:-

> **Paragraph 1: "The 1st plaintiff is a businessman and resides in Enugu within the court's jurisdiction, the 2nd plaintiff is his wife, on or about March 2005, the 1st defendant had instigated the 2nd defendant by a written petition in that regard to arrest and detain the plaintiffs".**
>
> **Paragraph 6: That to the plaintiffs' chagrin and consternation, the next thing that happened was their arrest by the agents of the 2nd defendant, as they would [earn later, the 1st defendant had instigated the arrest by her written petition to the 2nd defendant that the plaintiffs were the prime suspects of the crime - the plaintiffs shall rely on the petition at the trial, they give the 2nd defendant notice to produce the same at the trial.**
>
> **Paragraph 13: That what the plaintiffs find most bizarre till date is how they would be put through double jeopardy by the 1st defendant - they lost fund in their company's account and then on top of that after the 1st plaintiff had complained, were arrested at the behest of the same 1st defendant with whom the money was entrusted.**
>
> **Paragraph 17: That it is manifest that defendants acted in bad faith and recklessly in instigating and or arresting the plaintiffs as chronicled above, that partly explains why they have not seen need to apologised to them till date.**
>
> **Paragraph 18: The plaintiffs sustained damages as a result of the defendants' wrongful act(s) that include the instigation of the arrest and detention of the plaintiffs."**

The 1st respondent had initially filed a statement of defence dated 19/10/2005 but which he had later abandoned by choosing to rely on the case of the appellant, he also did not

call any evidence at the trial to prove the averments contained in his aforesaid statement of defence, the 2nd respondent on his own part never contested the case from inception till date, despite service of the processes on him.

No one dares contest the right of counsel to conduct the case of his client as he sees fit and so when learned counsel for 1st respondent chose the route of strategy in not

calling any evidence to defend their case, it was his place to do so. The rider to that mode of defence in resting the case of the defence on the case put forward by the opponent as was the case in the matter in hand, he is taken for all purposes as having abandoned his defence and by implication admitted all that his opponent had averred in his statement of claim and by implication abandoned his statement of defence. This is because pleadings are not self propelling in the absence of evidence in proof of the pleadings. The situation as I have attempted to communicate is well enunciated by this court in the case of **Akanbi Vs. Alao (1989) SC page 1 at 38** per Karibi - Whyte JSC thus:-

> **"The peculiar circumstances of this case, is clearly disclosed from the fact that counsel to the defendants who had the authority of the defendants at all times material to this case made a no case submission at the close of the case of the plaintiffs, relied on the case of the plaintiffs for that of the defendants and offered no evidence. It is well settled that in such a circumstances where the defendant has elected not to call evidence, he must be taken as admitting the facts of the case as stated by the plaintiffs and must stand on his submission and is bound……Hence in this case the defendants shall be taken as having abandoned their defence."**

The fall out of what the 1st respondent's counsel had done when he opted to call no evidence to prove the facts averred in his statement of defence is that he abandoned his defence and chose to do the case without any defence. Therefore, the court would not look at the statement of defence earlier filed since it has been abandoned by the defence himself and so the statement of claim is deemed admitted and no contest to it available. Craie JSC in **Akanbi Vs. Alao (supra) at page 20** stated it as it is when he said:-

> **"I bear in mind that the defendant's counsel also announced that he was resting his case on that of the plaintiff and counsel must be understood to be saying either:-**
> **(a) That the plaintiff has not made out any case for the defendants to answer.**
> **(b) That the defendants have a complete answer in law to the plaintiff's case.**

The learned jurist, Craig JSC went further to elucidate at page 20 thus:

"In my experience, a decision not to call evidence has always been regarded as a legal strategy and not mistake. If the strategy succeeds, then it enhances the case of that party; nut if it fails, such a litigant cannot ask for leave to adduce further evidence in order

to repair his damaged case."

A recourse to what transpired at the trial court would show that the respondents had admitted that they instigated the appellant's arrest with the testimony of appellant as PW1 to the effect that 1st respondent had instigated his arrest and tendered Exhibit "F" being his solicitor's letter to the 1st respondent demanding for an apology over her act of instigating his arrest. This was not controverted or denied in the circumstance, therefore, it was admitted. See **Oshodi Vs. Eyifunmi (2000) 7 SC (Pt. 11) page 145 at 190; Okukuje vs. Akwido (2001) 1 SC Pt. 11 page 80 at 139; Adesola Vs. Abidoye (1999) 10-12 SC 109 at 125; Bello Vs. Farmers Supply Company Ltd. (1998) 10 NWLR (Pt. 568) 64.**

That facts and evidence as borne on the record make it difficult to appreciate or even to follow the reasoning of the court below when it held thus:-

"…. that there was no basis whatsoever for the trial judge to find as a fact that the appellant instigated the arrest of the 1st respondent."

Again the Court of Appeal went further to hold as follows:-

"In this easel the 1st respondent's claim rested entirely on a petition which according to his pleading was written by the appellant to the police. Paragraph 6 of the statement of claim reads: "That to the plaintiff's chagrin and consternation, the next thing that happened was their arrest by the agents of the 2nd defendant as they would learn later, the 1st defendant had instigated the arrest by her written petition to the 2nd defendant that the plaintiffs were the prime suspects of the crime —the plaintiffs shall rely on the petition at the trial, they give the 2nd defendant notice to produce the same at the trial". See page 162 of the record.

Again the court below had stated as shown at page 162 of the record thus:-

"It is a fundamental principle of law that it is the duty of whoever pleads a fact to establish that fact by evidence. The onus of proof lies on a plaintiff to establish his case whether or not the defendant leads evidence ".

What seems to have played out at the court below is that court's strenuous attempt to do

what the court below set out to fill. This being a procedure strange to our jurisprudence as a court does not make a case for a party or enter into the arena of the dispute as the court's duty is limited or confirmed to what the parties have brought to the court and no more. The court is not permitted to go outside the materials made available by parties on either side and in this instance, the 1st respondent had not called any evidence in defence and so deemed to have admitted all that the appellant averred in his statement of claim. It therefore beats all reasoning from what the court below set out to carry out the unassigned commission of filling the gaps that the respondent's strategy has provided. See **Yusuf Vs. Oyetunde (1998) 9 - 10 SC page 123 at 137; Abdulsalam Vs. Salawu (2002) 6 SC (Pt.11) 196 at 199;** Section 75 of the Evidence Act Cap. 112 Laws of the Federation 1990; **Okonkwo Vs. Ogbogu (1996) 5 NWLR (Pt. 449) 420.**

The learned trial judge had held as seen at page 71 of the record as follows:-

> **"As I said earlier, the 1st defendant led no evidence or tendered any document in support of its averment, its counsel vigorously and extensively cross-examined the plaintiff's witnesses. The learned counsel was not able to either discredit or contradict the witnesses. I had the opportunity of observing the PW1 and PW2 while they gave their respective testimonies in this court. Each of them appeared to me as a witness of truth. I therefore believe their evidence. And consequently make the following findings of facts."**
>
> **1. That the plaintiff was arrested by the 2nd defendant on the instigation of the 1st defendant".**

The earlier parts of the statement of claim to which the evidence evaluated, assessed and conclusions reached by the learned judge as shown above as hereunder quoted thus: -

> **Paragraph 1: "The 1st plaintiff is a businessman and resides in Enugu within the court's jurisdiction, the 2nd plaintiff is his wife, on or about February 2005, the 1st defendant has instigated the 2nd defendant by a written petition in that regard to arrest and detain the plaintiffs.**
>
> **Paragraph 6: That to the plaintiffs' chagrin and consternation, the next thing that happened was their arrest by the agents of the 2nd defendant, as they would learn later, the 1st defendant had instigated the arrest by her written petition to the 2nd defendant that the plaintiffs were the prime suspects of the crime —the plaintiffs shall rely on the petition at the trial, they give the 2nd defendant notice to produce the same at the trial.**

Paragraph 7: The 2nd plaintiff protestation that she was not involved in the day to day management of the company's affairs did not deter her arrest and investigation which spanned through a period of about 5 months —March —July 2005.

Paragraph 8: That these months were the most excruciating and painful the plaintiffs have endured on earth, they paid endless visits to the Polcie Station or office at Lagos, meanwhile the 1st defendant's staff did not help matters especially one Mrs. Chinweze who told anybody that eared to listen the plaintiffs had duped the bank of the sum of N6,910.00".

Paragraph 9: The 1st plaintiff had done business with banks and indeed with the 1st defendant for more than 20 years, he is modestly worth not less than N1 billion and a high chief of his town Amichi Anambra state, never in his life has he been accused of any untowardly act much more fraud, the same goes for the 2nd plaintiff who is a graduate with degrees in two different disciplines."
Paragraph 10: That by the time the investigation was concluded in July 2005, both plaintiffs were hypertensive and have remained on medicaments till date.

Paragraph 11: It is worthy of note also that for the period January —July 2005 when the investigation ended, the 1st defendant had unilaterally frozen the plaintiffs above mentioned current account so that not even a kobo was withdrawn from the same, in effect, the plaintiffs did nto utilize the fund for any business transaction.

Paragraph 12: That ultimately at the end of the investigation, the plaintiffs were exculpated and or found innocent of the allegation leveled against them by the 1st defendant to have fraudulently effected the withdrawals from the account totaling N6,910,000.00 on the contrary, the 1st defendant's staff including one Ejike Obayi were found to be the author and perfectos of the crime, he has since been dismissed from the 1st defendant's employment.

Paragraph 13: That what the plaintiffs find most bizarre till date is how they would be put through double jeopardy by the 1st defendant —they lost fund in their company's account and then one top of that after the 1st plaintiff had complained, were

arrested at the behest of the same 1st defendant with whom the money was entrusted.

Paragraph 14: On 13/7/2005, the entire sum of N6,910,000.00 was restored to the account of the plaintiff's company based on the finding of the police exonerating them from the crime —at the trial, the plaintiffs shall rely on the statement of account of Petrus Ogu Nig. Ltd. evidencing that.
Paragraph 15: That they very least the plaintiffs had expected from the defendants especially the 1st defendant was an apology for the hardship they had accused them, but alas that never came.

Paragraph 16: The plaintiff then wrote to the 1st defendant by their counsel's letter of 31/8/2005 demanding formally for the apology which till date still never came —at the trial the plaintiffs shall rely on a copy of the letter and hereby give the 1st defendant notice to produce the original."

All the paragraphs in the statement of claim including those above quoted were not denied by the 1st respondent as he chose to make a no case submission at the end of the case of the plaintiff, therefore, 1st respondent is deemed to have admitted those facts in the case stated by the appellant. It is no excuse that it was counsel and not the 1st respondent herself who made the choice or took that route of defence as counsel to the defendants had the authority of the defendants at all times material to make the no case submission at the close of case of the plaintiff and thereby relied on what had been put forward by the plaintiffs for that of the defence and so offered no evidence of its own and taken as having abandoned their defence. See **Akanbi &. Ors, Vs. Mamudu Alao & Anor. (1989) 5 SC 1 page 38.**

Indeed, the position taken by the trial court is what the law has prescribed. The learned counsel for the 1st defendant formulated two issues for determination in a civil suit where the plaintiff had asserted certain facts and the defendants did not dent traverse or refused to admit those facts and gone further to abandon its statement of defence, therefore no issues were joined with the plaintiff and so there was no material upon which the findings and decision of the Court of Appeal could be founded upon. See **Nwabuoku Vs. Onwordi (2002) FWLR (Pt.123) 337; Oshodi Vs. Eyifunmi (2000) 7 SC (Pt.11) 145 at 173 —174.**

For a fact, the situation has been well cut out by the circumstances on ground and that in summary that the Court of Appeal took a perverse route and if there was a case for the interference of a higher court, this is it. The conclusion is that the appeal has merit and is allowed as I set aside the judgment of the court below while restoring the well founded decision of the trial High Court.

Appeal allowed as I abide by the consequential orders made.

Justice, Supreme Court

JOHN INYANG OKORO, (JSC): I have had a preview of the lead judgment just delivered by my learned brother, **Musa Dattijo Muhammad, JSC.** I am in complete agreement with him that this appeal has no merit.

Having calmly gone through the record before this court, I hold a considered view that the "petition" upon which this appellant's case, and failure to produce same in court is fatal to the case of the appellant.

As afore stated, I wholly endorse the reasons and conclusion adumbrated in the leading judgment in dismissing this appeal. I also make no order as to costs.

Appeal dismissed.

John Inyang Okoro
Justice, Supreme Court.

PAUL ADAMU GALINJE, (JSC): I have had the advantage of reading in draft, the judgment just delivered by my learned brother, MUSA DATTIJO MUHAMMAD, JSC and I agree that this appeal lacks merit and it is accordingly dismissed by me as well. I endorse the consequential order made as to costs.

Paul Adamu Galumje
Justice, Supreme Court

UWANI MUSA ABBA AJI, (JSC): My learned brother M. D. Muhammad, JSC, obliged me in draft a copy of the lead judgment just delivered to which I consent that this appeal is devoid of merit and ought to be dismissed. My learned brother has exhaustively dealt with the salient issues submitted by the parties for the determination of this appeal. Both the reasoning and the conclusion accord with mine and I hereby adopt same as mine.

The appellant as plaintiff sued the respondents as defendants for the instigation of their arrest following fraudulent dealings and withdrawals from the appellant's current account number 1402030002905, which they reported to the respondents themselves making them as the prime suspects. After conclusion, the trial court gave judgment in the sum of N10million in favour of the appellant. On appeal, the lower court set it aside, holding that the appellant failed to prove his claim against the respondents by not tendering in evidence the petition written against the appellant to the 2nd respondent, and awarded a paltry sum of N7,500.00. Dissatisfied, the appellant has appealed.

ISSUE:

Whether the appellant proved that the respondent bank instigated his arrest and detention against the backdrop of his pleadings and evidence adduced in support.

The fulcrum of the appellant's case against the respondents is the petition written to the

2nd respondent at the instance of the 1st respondent. This was pleaded by the appellant in his statement of claim, yet he failed to present same or tender in evidence.

To instigate is to intentionally aid or facilitate by any act or illegal omission the doing of that thing. See **NJOVENS Vs. THE STATE (1973) ALL NLR 371.** The police are empowered to investigate any criminal allegation. They may take any action they deem fit to take upon investigation. They may arrest, detain, and prosecute an alleged offender. See Section 4 of the Police Act, Section 10 of the Criminal Code; Section 20 of the Criminal Procedure Act. See also Section 35(1)(c) of the 1999 Constitution of the Federal Republic of Nigeria as amended. In the legitimate discharge of their duties, they cannot be sued in court.

The law is well settled that a citizen's civic responsibilities include reporting crimes and perceived or suspected criminal acts either to his person or to the person of a fellow citizen, and such a citizen, after making such complaints to the appropriate security agencies, cannot be held culpable for performing his civic responsibility, unless at the conclusion of the investigations of the complaints he made, it is found that they were baseless and made mala fide. See **FAJEMIROKUN Vs. COMMERCIAL BANK NIG LTD & ANOR (2009) 5 NWLR (Pt. 1135) 588 SC; (2009) LPELR-1231 (SE) PG.9-10, PARAS F - G.** It is not the law that a person becomes culpable and liable to pay damages for making a report to the police.

Admission by an adverse party is not a proof of a party's case. Every plaintiff must succeed on the strength of his case and not on the weakness or admission of the other party. A court also cannot make use of a document not before it. If the petition was tendered and admitted in evidence, it would have strengthened the case of the appellant, the level of instigation, its enormity and the malicious intent would have been read into it. Indeed, he could not prove that the 1st respondent instigated the 2nd respondent to effect his arrest, detention and odious treatment. If it was a normal report or compliant made by the 1st respondent to the 2nd respondent to carry out its statutory duties, the petition or complaint would have also revealed it and the respondents would not have been so liable for the instigation.

The 1st respondent therefore cannot be held liable for reporting to the 2nd respondent a case for its investigation. Besides, the appellant has not been able to prove his case. This appeal therefore fails and is hereby dismissed.

Uwani Musa Abba Aji
Justice, Supreme Court

DELPHINE ZIKERE OKONKWO

Vs.

AMAKA EZEAKU & ANOR.

SC.281/2011

IN THE SUPREME COURT OF NIGERIA

HOLDEN AT ABUJA

FRIDAY, 17TH JANUARY, 2020

BEFORE THEIR LORDSHIPS

MARY UKAEGO PETER-ODILI JUSTICE, SUPREME COURT
MUSA DATIIJO MUHAMMAD JUSTICE, SUPREME COURT
JOHN INYANG OKORO JUSTICE, SUPREME COURT
PAUL ADAMU GALUMJE JUSTICE, SUPREME COURTUWANI
MUSA ABBA AJI JUSTICE, SUPREME COURT

COURT:- Appellate court —Issues for determination —Where consideration of one issue will be sufficient to dispose of an appeal —Whether an appellate court is not under any obligation to consider all other issues formulated by the appellant.

COURT:- Appellate court —Jurisdiction thereof —Where ground of appeal does not attack the decision of the appeal —Whether an appellate court lacks jurisdiction to consider the appeal.

PRACTICE AND PROCEDURE:- Appeal —Formulation of issues for determination —Purpose —Whether to enable the parties to narrow down the issue or issues in controversy —The principle in ***Obaro Vs. Hassan (2013) All FWLR (Pt. 687) 677.***

PRACTICE AND PROCEDURE:- Appeal —Ground of appeal —Whether must be substantial and not directed against the obiter dictum of the judgment —The principle in ***Nwankwo Vs. E.D.C.S.U.A (2007) 5 NWLR (Pt. 1027) 377.***

PRACTICE AND PROCEDURE:- Appeal —Grounds of appeal —Where a ground does not attack the ratio decidendi —Whether such ground is incompetent and liable to be struck out.

PRACTICE AND PROCEDURE:- Appeal —Grounds of appeal —Whether must be directed against relevant part of the judgment and not merely against obiter dictum —The principle in ***Nwankwo Vs. E.D.C.S. U.A (2007) 5 NWLR (Pt. 1027) 377.***

PRACTICE AND PROCEDURE:- Appeal —Issues for determination —Approach of appellate court thereto —Whether court is at liberty to consider effective issues for determination or suo motu formulate their own issue.

PRACTICE AND PROCEDURE:- Appeal —Issues for determination —Where a respondent formulates issues for determination without a cross appeal or Respondent's notice —Whether such issues must have bearing on the grounds of appeal —The principle in ***Chami Vs. UBA Plc (2010) 6 NWLR (Pt. 1191) 474 at 496.***

Issue for Determination

"Whether failure of the Court of Appeal to distinguish and address the issue in controversy between the parties by not considering issues 1 & 2 raised by the appellant (as 1st respondent in the Court of Appeal) in her respondent's brief of argument did not occasion a miscarriage of justice; and as a corollary what Wight (Sic, weight) should the court attach to an uncontroverted affidavit after the decease (Sic), death of the maker".

Fact of the Matter

The plaintiff/appellant filed an originating summons at the High Court of Enugu State whereby she sought some declaratory reliefs in relation to marital status of the 1st respondent to late Chief John Chukwunweike Okonkwo SAN.

The originating summons was accompanied by a fifteen paragraphs affidavit, whereby she stated that based on an affidavit filed by late Chief John Chukwunweike Okonkwo SAN, the 1st respondent, was not married under Customary Law to the deceased and therefore has no entitlement to his estate.

The 1st respondent filed counter affidavit. At the end of trial, the trial court granted all the reliefs of the appellant. The respondents appealed to the Court of Appeal Enugu Division which allowed the appeal and set aside the decision of the trial court.

Consequently, the appellant has now appealed to the Supreme Court.

Held: *(Unanimously dismissing the appeal)*

1. Issues formulated by respondent must have bearing on the grounds of appeal

However, where a respondent choses to formulate issues different from the ones formulated by the appellant, those issues must arise and be based on the grounds of appeal contained in the appellant's notice of appeal. See Chami Vs. UBA PLC (2010)6 NWLR (Pt.1191)474 at 496 where Onnoghen JSC (as he then was) stated the position of the law very clearly in the following words: -

"It is settled law that where a respondent filed neither a cross appeal nor respondents notice, he does not have an unbridled freedom to raise issues for determination which have no bearing or relevance to the ground(s) of appeal filed." ***(P 80 para E - F)***

2. Approach by appellate court to formulation of issues for determination

On whether the lower court was bound to consider those issues formulated by the appellant at the lower court, this court has in a number of cases held

that appellate courts are at liberty to choose which issues when resolved can completely determine the appeal, or formulate issues other than those formulated by the parties, if they are of the opinion that the issues formulated by the parties cannot effectively and fully determine the appeal. In other words, judges who sit to hear appeals are at liberty and have the power to adopt or even formulate issues that are in their view would determine the real questions in the appeal. See Ikegwuoha Vs. Ohawuchi (1996)3 NWLR (Pt.435)146, Aduku Vs. Adejoh (1994)5 NWLR (Pt.346) 582; Egwa Vs. Egwa (2007)1 NWLR (Pt.1014)71 at 86 paras 4, Obaro Vs. Hassan (2013) All FWLR (Pt.687)677, Musa Sha (Jnr.) & Anor Vs. Darap Kwam & Ors. (2000) FWLR (Pt.11)1798; UBA PLC & Anore Vs. Bouari (2008) All FWLR (Pt.416) 1825.
(Pp 80 - 81 para G - A)

3. *A grounds of appeal must be substantial and not directed against obiter dictum of the judgment*
In Nwankwo Vs. E.D.C.S.U.A. (2007) 5 NWLR (Pt.1027)377 at 402 paragraph C - E, Onnoghen JSC (as he then was) held: -

> **"It is settled Law that a ground of appeal is basically a highlight of the error of law or fact or mixed law and fact made by the court in the decision sought to be set aside in the appeal. It is the sum total of the reason(s) why the decision on appeal is considered by learned counsel for the appellant to be wrong and liable to be set aside. It follows therefore that for a ground of appeal to be capable of achieving the purpose of setting aside the decision appealed against, it has to be very substantial and must relate to the ratio of the decision, not directed at the obiter dictum of the court or in the judgment." *(P 82 para C - E)***

4. *Grounds of appeal must not be directed against obiter dictum*
In the same judgment, Mukhtar, JSC (as he then was) at page 395 paragraph B - C held:

> **"Grounds of appeal are meant to attack findings of a court that have bearing on the case put up by a litigant. In other words, it should be**

> **related to a decision of the court and certain complaints an appellant rely on to succeed in setting aside a decision, the <u>ratio decidendi</u> of a judgment, not just observations and passing remarks of a judge in the course of writing a judgment." See Akibu Vs. Oduntan (2000)13 NWLR (Pt.685)446, Iloabachie Vs. Iloabachie (2000)5 NWLR (Pt.656)178, Erivo Vs. Obi (1993) 9 NWLR (Pt.315)60; Ishola Vs. Ajiboye (1998)1 NWLR (Pt.532)71.*(P 82***

para C - G)

5. *An incompetent ground is one which attacks a decision not made by the court*
Grounds of appeal are the complaints of the appellant on the judgment against which the appeal lies. For them to be competent, they must be related to the decision against which the appeal lies, and should constitute a challenge to the ratio of the decision on appeal. Where the grounds of appeal as formulated do not arise from the judgment and purports to raise an attack on issues not decided by the judgment appealed against, they are incompetent and liable to be struck out. See Onafowokan Vs. Wema Bank PLC (2011)12 NWLR (Pt.1260)24 at 38 paras' D - E. Ojemen Vs. Momodu (1983)1 SCNLR 188.
(P 83 para G - A)

6. *Issue in controversy was not a ground of appeal at lower court*
A look back in time at the Lower court proceedings will show that what the Lower court did was to adopt a method in what it considered a narrow point in the dispute being whether the affidavit under interpretation and the alleged separation which was controverted dissolved the marriage of the deceased and the 1st respondent thereby disbarring her as beneficiary of the estate.

It needs be brought up that this issue now made much by the appellant on the none consideration of Issue 3 at the court below was not a point found in the grounds of appeal at that Lower court and that court handled the matter as it sought fit in line with the guideline laid out. ***(P 88 para C - D)***

7. *The main purpose of formulation of issues for determination*
This court in Obaro Vs. Hassan (2013) All FWLR (Pt.687) 677 at 693 0 694 in which Ariwoola JSC stated as follows:-

> **"Generally, it is settled that the main purpose of the formulation of issues for determination is to enable the parties to narrow down the issue or issues in controversy in the grounds of Appeal filed. This is in the interest of accuracy, clarity and brevity. The court is therefore at liberty to reformulate the issues for determination in order to give it precision and clarity and achieve substantial justice in the resolution of the matter in controversy." See Musa Sha (Jnr.) & Anor. Vs. Darap Kwam &**

> **Ors. (2000) FWLR (Pt. II) P.1798, UBA Plc & Anor, Vs. Bouari (2008) All FWLR (Pt.416) P.1825.** ***(P 88 para E - F)***

8. *Appellate court is not under obligation to consider all other issues*

In keeping with the policy stance of this court, it has to be reiterated that an appellate court which is of the view that a consideration of one issue is enough to dispose of the appeal is not under obligation to consider all other issues posed since the resolution of the one issue or any other has effectively settled the main dispute and there is no point in wasting further time going into the other issues which would not change the course of events already settled by the earlier consideration and ruling in the said deciding issue or issues. See 7Up Bottling Co. Ltd. Vs. Abiola & Sons Bottling Co. Ltd. (2001) FWLR (Pt.70) 1611.
(Pp 88-89 para G - A)

9. *Effect where grounds of appeal does not attack the decision of the court.*
Where the ground(s) of appeal does not attack the ratio of the decision being appealed against, the appeal is incompetent and the appellate court is bereft of the jurisdiction to consider and determine the incompetent appeal. See CHIEF TIMOTHY AGBAKA & ORS Vs. CHIEF JEREMIAH AMADI & ANOR (1998) LPELR - 231 (SC) and UMANAH Vs. NDIC (2016) LPELR - 42556 (SC). ***(P 89 para F - G)***

Per Okoro (JSC)
"The law is settled that a court has unfettered discretion to re-arrange or formulate issues for determination by the parties to meet the justice of a case. See Plateau State Health Services Management Board Vs. Inspector Philip Fitoka Goshwe (2013) 2 NWLR (pt 1338) 383; Awojugbagbe Light Industries Ltd. Vs. P. N. Chinukwe & Anor (1995) 4 NWLR (Pt .390) 379, (1995) 4 SCNJ 1; Latunde & Anor Vs. Bella Lajinfin (1989) 5 SC 59, (1989) 5 SCNJ 59, (1989) 3 NWLR (Pt. 108) 177; Unity Bank of Nigeria Plc & Anor Vs. Edward Bouari (2008) 2 SCM 193 at 240, (2008) 7 NWLR (Pt. 1086) 372. In the case of African International Bank Ltd Vs. Integrated Dimensional System Ltd (2012) 17 NWLR (Pt. 1328). This court per Ariwoola, JSC pronounced as follows:-

> **"So long as it will not lead to injustice to the opposite side, appellate courts possess the power and in the interest of justice to reject, modify or reframe any or all issues formulated by parties."**

Applying the afore position of the law to the instant appeal, I make bold to say that learned counsel to the appellant was in error to submit that the appellant's issues 1 and 2 were not considered by the learned justices of the court below simply because they elected an approach which would resolve the real question

in the appeal.

As rightly stated by my learned brother, Paul Adamu Galumje, JSC in the lead judgment, there is nothing in the affidavit deposed to by late Mr.

John Chukwunweike, SAN on 15th June, 1998 which attaches the properties of the deceased. The courts have found that there is no evidence showing that the marriage contracted under native law and custom between the deceased and the respondent had been dissolved inspite their separation for about seventeen years before the death of the deceased. As such there exists no law presently which would deprive the respondent from partaking in the sharing of the Estate of the deceased." ***(Pp 90-91 para E - B)***

10. Lower court narrowed issues for consideration and took them together

The new issue herein was not part and parcel of the grounds of appeal before the lower court. The main issue herein is whether the said issues 1 and 2 were considered by the court below. The point here by the appellant is misplaced since the lower court narrowed down the issues for consideration and took them together. This accords with the decision of this court. The purpose of issues for determination is to identify what is in issue in the grounds of appeal to be argued, the issues in a number of grounds of appeal which involved the same issue could be formulated in one issue and argued together. See DOKUN AJAYI LABIYI Vs. ALHAJI MUSTAPHA MOBERUAGBA ANRETIOLA & ORS (1992) 8 NWLR (PART 258) 139; SANUSI Vs. AYOOLA (1992) 9 NWLR (PART 265) 275; UGO Vs. OBIEKWE (1989) 1 NWLR (PART 99) 566.

(Pp 91-92 para G - A)

Representations:

Ikeazor Akaraiwe (Esq.), with B. E. Uwaokhenye and T. E. Iyoha Osagie, for the appellant.

Fidelis Mbadugha (Esq.), and I. Ezeubigie for the 1st respondent's.

Attorney-General, Enugu State for the 2nd respondent.

PAUL ADAMU GALINJE, JSC (Delivering the lead judgment): Upon an application for issuance of originating summons filed on the 20th December 2006 by the appellant, who was the plaintiff at the High Court of Enugu State against the respondents herein, the registrar High Court of Enugu State issued an originating summons on the 8th of March, 2007 in which the appellant posed four questions and urged the court to grant the following orders:

"a). THAT affidavit deposed to by Mr. John Chukwunweike Okonkwo SAN, (deceased) at the registry of the Enugu High Court on the 15th day of June, 1998 to the effect that the plaintiff herein was his only wife carries the full force of Law, and

b). THAT said affidavit was notice to the whole world with respect to the marital status of said Mr. John Chukwunweike Okonkwo SAN under native law and custom.

c). THAT the affidavit aforesaid operated to determine effectively the purported rights of the 1st defendant vis a vis the Estate of said Mr. John Chukwunweike Okonkwo SAN (deceased); that is to say, that the 1st defendant is not entitled to the estate aforesaid;

d). THAT in the light of the foregoing, the 2nd defendant is restricted to confine itself in the administration of estate of said Mr. John Chukwunweike Okonkwo SAN to his intentions as expressed with respect to his marital status as revealed in the affidavit in issue".

The originating summons was accompanied by a fifteen paragraphs affidavit deposed to by the appellant.

Annexed to the affidavit is affidavit of marriage, marked Exhibit A. In support of the originating summons, Mr. Ikeazor Akaraiwe then learned counsel for the appellant filed plaintiffs address on the 8th of March, 2007. The 1st and 2nd respondents learned counsel each filed a counter affidavit and written address. Learned counsel for the appellant filed replies to the 1st and 2nd respondents' written address.

Issues having been joined, the matter was set down for hearing. Learned counsel for the parties adopted their respective written addresses. In a reserved and considered judgment, delivered on the 24th July 2007, Umezulike C. J. found for the appellant herein and granted all the orders she sought. The 1st respondent was not satisfied with the judgment of the trial court. Being aggrieved she appealed to the Court of Appeal, Enugu Division (henceforth to be referred to as "the lower court") and submitted two issues for determination of the appeal. The appeal was heard. In a reserved and well considered judgment delivered on the 14th April, 2011, the two issues were resolved in favour of the 1st respondent herein, who was the appellant at the lower court, and the appeal was allowed. The judgment of the trial court was set aside.

This appeal is against the decision of the lower court. The appellant's notice of appeal dated 27th June, 2011 and filed on the 28th of June, 2011 contains one ground of appeal. This sole ground of appeal, without its particulars reads as follows:-

"The Court of Appeal Enugu Division misdirected itself thus occasioning a miscarriage of justice when it held that:

"Issues nos. 1 & 2 as raised by the 1st respondent (now appellant) are covered by the appellant's issue no.2."

From this ground of appeal, Mr. Ikeazor Akaraiwe, learned counsel for the appellant

formulated one issue for determination of this appeal in the following words: -

> **"Whether failure of the Court of Appeal to distinguish and address the issue in controversy between the parties by not considering issues 1 & 2 raised by the appellant (as 1st respondent in the Court of Appeal) in her respondent's brief of argument did not occasion a miscarriage of justice; and as a corollary what Wight (Sic, weight) should the court attach to an uncontroverted affidavit after the decease (Sic), death of the maker".**

Mr. Fidelis Mbadugha, learned counsel for the 1st respondent formulated one issue for determination of this appeal and it reads thus:

> **"Whether the appellant is right that the issue 1 & 2 raised in the court below in the respondent's brief were not considered in the judgment under appeal".**

Before I consider the submissions of learned counsel on either side, it is pertinent to set out the brief facts of this case as found by the lower court. The 1st respondent was married to Mr. Johnny Okonkwo, a Senior Advocate of Nigeria by Native Law and Custom some times in 1976 and they had one female child. Subsequently in 1988 the couple separated and remained so till the husband died on the 25/4/2005. There is no evidence that the said marriage was formally dissolved in accordance with the native law and custom under which they got married. During the period of the separation, Johnny Okonkwo SAN got married to the appellant herein in 1992 under the Native Law and custom of the Nibo Community, the appellant's community in Anambra State. They had two children, a male and a female from the union. Upon the death of Johnny Okonkwo SAN without a will, his estate was placed under the management of the office of the Administrator General/Public Trustee, Ministry of Justice, Enugu State, the 2nd respondent in this appeal. The 1st respondent standing on her marriage with the deceased, which had not been formally dissolved, sought to partake in the distribution of the estate of the deceased as managed by the 2nd respondent. Johnny Okonkwo SAN, in 1998 had sworn to an affidavit wherein he deposed inter alia that the appellant was his lawful wife under Native Law and Custom of Nibo town and that he had no other wife. Based on the said affidavit, the appellant commenced a suit by way of originating summons and claimed the relief, I have set out elsewhere in this judgment.

In his argument, learned counsel for the appellant made reference to the two issues formulated by the 1st respondent herein at the court of appeal and the three issues formulated by the appellant at the lower court and submitted that the lower court was wrong when it held thus:-

> **"To my mind, the appellant's issue no.1 is similar to the 1st respondent's**

issue no.1, while issues nos. 1 and 2 as raised by the 1st respondent is covered by the appellant's issue no.2"

Learned counsel submitted that the 1st and 2nd issues raised by the 1st respondent (now appellant before this court) are not covered by the 2nd issue as formulated by the 1st respondent at the lower court. Learned counsel made extensive submission on the choice of issues for the determination of the appeal by the lower court and further submitted that the issue which the lower court was to resolve by its judgment is fixed at the pleadings and in order for the court to formulate the issues for determination it must have recourse to the issues joined at the pleadings to know what is the life wire and the bone of contention between the parties. According to the learned counsel, the Court of Appeal having failed to consider the issues joined at the pleadings by the parties, the Supreme Court should set aside the judgment of the Court of Appeal, since that court did not consider or make any comment on issue No.3, raised by the appellant as respondent before it.

The appellant, who was the respondent at the lower court, had no cross appeal before the lower court. The 1st respondent herein who was the appellant at the lower court formulated issues from her grounds of appeal, and the appellant herein as respondent at the lower court was only required to formulate issues from the grounds of appeal which were filed and argued in the 1st respondent's brief of argument. The appellant's duty as respondent was to reply to the appellant's issues for determination since he had no grievances to settle. However, where a respondent choses to formulate issues different from the ones formulated by the appellant, those issues must arise and be based on the grounds of appeal contained in the appellant's notice of appeal. See **Chami Vs. UBA PLC (2010)6 NWLR (Pt.1191)474 at 496** where Onnoghen JSC (as he then was) stated the position of the law very clearly in the following words: -

"It is settled law that where a respondent filed neither a cross appeal nor respondents notice, he does not have an unbridled freedom to raise issues for determination which have no bearing or relevance to the ground(s) of appeal filed."

On whether the lower court was bound to consider those issues formulated by the appellant at the lower court, this court has in a number of cases held that appellate courts are at liberty to choose which issues when resolved can completely determine the appeal, or formulate issues other than those formulated by the parties, if they are of the opinion that the issues formulated by the parties cannot effectively and fully determine the appeal. In other words, judges who sit to hear appeals are at liberty and have the power to adopt or even formulate issues that are in their view would determine the real questions in the appeal. **See Ikegwuoha Vs. Ohawuchi (1996)3 NWLR (Pt.435)146, Aduku Vs. Adejoh (1994)5 NWLR (Pt.346) 582; Egwa Vs. Egwa (2007)1 NWLR (Pt.1014)71 at 86 paras 4, Obaro Vs. Hassan (2013) All FWLR**

(Pt.687)677, Musa Sha (Jnr.) & Anor Vs. Darap Kwam & Ors. (2000) FWLR (Pt.11)1798; UBA PLC & Anore Vs. Bouari (2008) All FWLR (Pt.416) 1825. I

therefore find nothing wrong with the procedure adopted by the lower court in the selection of which issue or issues that was or were capable of resolving the question or questions in the appeal. Now the sole ground of appeal that was raised in the appellant's notice of appeal has been reproduced elsewhere in this judgment. It appears to me that the said ground of appeal neither relates to the decision against which this appeal lies nor does it constitute a challenge to the ratio of the decision on appeal. Learned counsel for the appellant has clearly spelt out the ratio of the decision of the lower court at page 10 paragraph 4.10 of the appellant's brief of argument in the following words:-

> **"It is submitted further that while the issue in controversy between the parties was whether the 1st respondent (appellant in the Court of Appeal) was entitled to partake in the distribution of the deceased person's estate in the light of Exhibit A, the Court of Appeal directed attention to whether the marriage between the deceased, Johnny Okonkwo SAN and the 1st respondent had been dissolved."**

The appellant's desire to inherit the properties of the deceased was based solely on the fact that she was his wife. Exhibit A merely acknowledged that the appellant was the only wife of the deceased, but did not allocate any property to her. For the avoidance of doubt, I reproduce Exhibit A hereunder as follows: -

> **AFFIDAVIT OF MARRIAGE**
> **I John Chukwunweike male Legal Practitioner, Senior Advocate of Nigeria, Nigeria citizen, Christian, make oath and state as follows:-**
> **1. That I know Delphine Ifesinachi Zikere Okonkwo (nee Ekwunife).**
> **2. That the said Delphine Ifesinachi Zikere Okonkwo is my lawful wife having been married in accordance with the Native law and custom of Nibo Town - her town.**
> **3. That I have no other wife except her.**
> **4. That all the customary rites with regard to the said marriage were duly performed to the satisfaction of all the parties concerned.**
> **5. That she has the right to regard herself as my lawful wife in all circumstances.**
> **6. That I swear to this affidavit truly and conscientiously believing same to be true and correct to the best of my knowledge and for record purposes."**

There is nothing in this affidavit that expropriated the properties of the deceased, senior lawyer to the appellant. Her claim to his properties was hinged on the fact that she was a wife to the deceased. The 1st respondent's claim to a share of the properties of the deceased was also based on the fact that she remained a wife to Mr. Johnny Okonkwo

SAN up to the time he died. So despite the existence of Exhibit A which gave no properties to anybody, the issue of who were the wives of the deceased had to be settled. That is what the lower court did and the appellant's notice of appeal was not directed at the decision of the court, but the choice of which issue to determine the appeal by the lower court.

In Nwankwo Vs. E.D.C.S.U.A. (2007) 5 NWLR (Pt.1027)377 at 402 paragraph C - E, Onnoghen JSC (as he then was) held: -

> **"It is settled Law that a ground of appeal is basically a highlight of the error of law or fact or mixed law and fact made by the court in the decision sought to be set aside in the appeal. It is the sum total of the reason(s) why the decision on appeal is considered by learned counsel for the appellant to be wrong and liable to be set aside. It follows therefore that for a ground of appeal to be capable of achieving the purpose of setting aside the decision appealed against, it has to be very substantial and must relate to the ratio of the decision, not directed at the obiter dictum of the court or in the judgment. "**

In the same judgment, Mukhtar, JSC (as he then was) at page 395 paragraph B - C held:-

> **"Grounds of appeal are meant to attack findings of a court that have bearing on the case put up by a litigant. In other words, it should be related to a decision of the court and certain complaints an appellant rely on to succeed in setting aside a decision, the ratio decidendi of a judgment, not just observations and passing remarks of a judge in the course of writing a judgment." See Akibu Vs. Oduntan (2000)13 NWLR (Pt.685)446, Iloabachie Vs. Iloabachie (2000)5 NWLR (Pt.656)178, Erivo Vs. Obi (1993) 9 NWLR (Pt.315)60; Ishola Vs. Ajiboye (1998)1 NWLR (Pt.532)71.**

Grounds of appeal are the complaints of the appellant on the judgment against which the appeal lies. For them to be competent, they must be related to the decision against which the appeal lies, and should constitute a challenge to the ratio of the decision on appeal. Where the grounds of appeal as formulated do not arise from the judgment and purports to raise an attack on issues not decided by the judgment appealed against, they are incompetent and liable to be struck out. **See Onafowokan Vs. Wema Bank PLC**

(2011)12 NWLR (Pt.1260)24 at 38 paras' D - E. Ojemen Vs. Momodu (1983)1 SCNLR 188.

The sole ground of appeal as contained in the appellant's notice of appeal is incompetent as it is not related to the decision of the court and constitute a challenge to the ratio of the decision against which this appeal is brought. It is clear from the decision of the lower court that the ratio of that decision was that the marriage between Johnny Okonkwo SAN and the 1st respondent in this appeal was not dissolved in accordance

with the Native law and custom under which it was contracted before the death of Johnny Okonkwo SAN, as such the 1st respondent was entitled to partake in the sharing of the Estate of Johnny Okonkwo SAN. The sole ground of appeal is accordingly struck out for being incompetent and the appeal is hereby dismissed.

I make no order as to costs.

Paul Adamu Galumje,
Justice, Supreme Court.

MARY UKAEGO PETER-ODILI, (JSC): I am in agreement with the judgment just delivered by my learned brother, Paul Adamu Galumje JSC and to register the support in the reasoning from which the decision emanated, I shall make some remarks.

This is an appeal against the judgment of the Court of Appeal, Enugu Division or lower court or court below on the 14th day of April 2011, Goram: M. L. Tsaiya, Abdu Aboki and Samuel C. Oseji JJCA.

The appellant as plaintiff in the High Court commenced a suit by way of ordinary writ of summons, which was later replaced with originating summons dated 8th day of March 2007 before the Chief Judge of Enugu State in which she urged the honourable court to determine the following questions:-

1) **Whether the said affidavit deposed to by Mr. John Chukwunweike Okonkwo SAN (deceased) at the registry of the Enugu High Court on the 15th day of June 1998 to the effect that the plaintiff herein was his only wife did not carry the force of law;**
2) **Whether the said affidavit was not sufficient notice to the whole world with respect to the marital status of said Mr. John Chukwunweike Okonkwo SAN under native law and custom.**
3) **Whether the said affidavit did not determine effectivelythe purported rights of the 1st defendant vis-a-vis the Estate of said Mr. John Chukwunweike Okonkwo SAN (deceased);**
4) **Whether the 2nd defendant (the Administrator / Public Trustee Enugu State) ought not to restrict itself to the expressed intention of said Mr. John Chukwunweike Okonkwo SAN with respect to his marital status as revealed in the affidavit in issue in the handling of his estate.**

In consequence of the above, the honourable court was urged to make the following orders:-

a. **That the affidavit deposed to by Mr. John Chukwunweike Okonkwo SAN (deceased) at the registry of the Enugu High Court on the 15th day of June 1998 to the effect that the**

plaintiff herein was his only wife carries the full force of law; and

b. That said affidavit was notice to the whole world with respect to the marital status of said Mr. John Chukwunweike Okonkwo SAN under native law and custom;

c. That the affidavit aforesaid operated to determine effectively the purported rights of the 1st defendant vis-a- vis the Estate of said Mr. John Chukwunweike Okonkwo SAN (deceased); that is not entitled to the estate aforesaid;

d. That in the light of the foregoing, the 2nd defendant hand over administration of the estate of said Mr. John Chukwunweike Okonkwo SAN to the plaintiff as revealed by his affidavit with respect to his marital status aforesaid.

In pursuance of the orders sought, the appellant filed a 15 paragraph affidavit in support of originating summons with one annexure - an affidavit deposed to by J.C. Okonkwo SAN titled "AFFIDAVIT OF MARRIAGE" marked 'Exhibit A" - as well as a written address as provided for in the Enugu State High Court Rules.

The respondents as well filed their counter affidavits to the originating summons together with written addresses as provided for under the High Court Rules of Enugu State.

The High Court of Enugu State of Nigeria presided over by the Chief Judge Hon. Justice I. A. Umezulike OFR delivered its judgment on the 24th day of July 2007 and made all the orders sought for by the plaintiff, now appellant.

The 1st defendant now 1st respondent dissatisfied with the judgment of the Enugu High Court appealed to the court below which found for her by allowing the appeal and setting aside the judgment of the trial High Court.

FACTS:

ABCDEFGH

The 1st respondent was married to Mr. Johnny Okonkwo, a Legal Practitioner and Senior Advocate of Nigeria by native law and custom on the 18th day of September 1976 and they had one child. They separated in 1988 and remained separated till Mr. Okonkwo SAN died on the 25th day of April 2005 a total of seventeen (17) years. These facts not only stood uncontroverted in the affidavit in support of origination summons as well as both counter-affidavits by the two defendants, now respondents, but were expressly admitted in paragraph 6 of the 1st respondent's counter- affidavit as 1st defendant in the High Court.

In the interim, Mr. J. C. Okonkwo SAN got married to the appellant in 1992 according to the native law and custom of the appellant's Nibo Community and they had two children together.

On the 18th day of September, 1988, ten (10) years after his separation from the 1st respondent, Mr. J. C. Okonkwo SAN deposed to an affidavit where he categorically stated that he had no other wife except the appellant in this appeal. That affidavit was

annexed to the affidavit in support of originating summons as Exhibit A which is quoted hereunder, viz:-

"AFFIDAVIT OF MARRIAGE"

I, John Chukwunweike Okonkwo, Male, Legal Practitioner, Senior Advocate of Nigeria, Nigerian citizen, Christian, make oath and state as follows:-

1. **That I know Delphine Ifesinachi Zikere Okonkwo (nee Ekwunife).**
2. **That the said Delphine Ifesinachi Zikere Okonkwo is my lawful wife having been married in accordance with the native law and custom of Nibo Town - her town.**
3. **THAT I HAVE NO OTHER WIFE EXCEPT HER.**
4. **That all the customary rites with regard to the said marriage were duly performed to the satisfaction of all the parties concerned.**
5. **THAT SHE HAS THE RIGHT TO REGARD HERSELF AS MY LAWFUL WIFE IN ALL CIRCUMSTANCES. (Emphasis mine).**
6. **That I swear to this affidavit truly and conscientiously believing same to be true and correct to the best of my knowledge and for record purposes.**

Signed

_____

Deponent

Upon the demise of J. C. Okonkwo SAN intestate, management of his estate was taken over by the office of the Administrator- General/Public Trustee, Ministry of Justice, Enugu (2nd defendant in the High Court).

The 1st respondent who had been separated from Mr. J. C. Okonkwo SAN for seventeen years aforesaid sought to partake in the distribution of his estate as managed by the said Administrator - General/Public Trustee, Ministry of Justice, Enugu (the 2nd defendant in the High Court). It was this desire to partake in the distribution of the deceased's estate that led the appellant to seek interpretation of the 1st respondent's rights via-a-vis Exhibit A.

The appellant as plaintiff in the High Court asserted that the 1st respondent's daughter for Jonny Okonkwo SAN is entitled to partake in her deceased father's estate, an assertion, which was upheld by the High Court. In other words, Ogechukwu Okonkwo, daughter of both the deceased Johnny Okonkwo SAN and the 1st respondent is a full partaker in her deceased father's estate.

The hearing of the appeal was on the 22nd October, 2019 at which learned counsel for the appellant, I. A. Akaraiwe Esq. adopted the brief of argument filed on 25/8/2015 and deemed filed on 21/3/18 wherein was crafted a single issue for determination, viz:-

> **Whether failure of the Court of Appeal to distinguish and address the issue in controversy between the parties by not considering issues 1 and 2 raised by the appellant (as 1st respondent in the Court of Appeal) in her respondent's brief of argument did not occasion a miscarriage of justice; and as a corollary what weight should the court attach to an uncontroverted affidavit after the decease of the maker.**

F. C. Mbadugha Esq. of counsel for the respondent adopted the brief of argument filed on 26/6/2017 and deemed filed on 22/10/2019 and formulated a sole issue for determination as follows:-

> **Whether the appellant is right that the issues 1 and 2 raised in the court below in the respondent's brief were not considered in the judgment under appeal.**

The 2nd respondent was absent and not represented, though served on 16/10/19.

Clearly, either way the sole issue amounts to the same question but that drafted by the respondent being simply done I shall make use of it.

SOLE ISSUE:

> **Whether the appellant is right that the issues 1 and 2 raised in the**

> **court below in the respondent's brief were not considered in the judgment under appeal.**

Learned counsel for the appellant submitted that the issue in controversy at the trial court was whether the 1st respondent/appellant in the court below was entitled to partake in the distribution of the deceased persons' estate in the light of Exhibit A.

That whereas Issues Nos. 1 and 2 of the appellant (1st respondent in the court below) brief of argument submitted that the deceased Mr. J. C. Okonkwo SAN intended by his affidavit, Exhibit A to oust his estranged wife Amaka Ezeaku (1st respondent) from the distribution of his estate, Issue No.2 of the 1st respondent (appellant in the court below) submitted that an affidavit simpliciter was incapable of dissolving the marriage.

That the Court of Appeal failed to consider the issues joined at the pleadings of the parties this warranting the Supreme Court set aside the decision of the lower court. He cited **Mrs. Jarin Adebite Vs. Chief M. K. Ogunfaola & Anor. (1990) 4 NWLR (Pt.146) 578 at 578, 570.**

Learned counsel for the appellant contended that Exhibit A, the affidavit of Johnny Okonkwo SAN, now deceased was not successfully challenged or contradicted

and so was cogent and reliable plus the fact of the 17 years separation to operate to oust the 1st respondent from the distribution of the deceased person's estate and the Supreme Court should uphold the stance of the appellant.

For the respondent, it was submitted that the issues for determination are meant to narrow the area of dispute between the parties to a suit and in an appellate court to enable the court understand from which area of the judgment the party rests his complaint. That the appellant herein was the respondent in the court below and had no complaint against the judgment of the trial court at the court below and appellant had not filed an appeal at the come below. He cited **Obara Vs. Hassan (2013) All FWLR (Pt.687) 677 at 693 - 694.**

That the court below considered all the points raised by the parties which are relevant and important towards the just determination of the dispute between the parties. He cited **7up Bottling Co. Ltd Vs. Abiola & Sons Bottling Ltd. (2001) FWLR (Pt.70) 1611.**

The point pushed up by the appellant in brief is that the appeal be allowed and the decision of the court below set aside while the judgment of the trial court is restored. The reason for the position being that a deserted wife did not have equity in the matrimonial home, the said wife having no rights against the husband.

Taking a contrary position the respondent stated that the said affidavit of the deceased, John C. Okonkwo SAN is neither a decree nor order of court of any competent jurisdiction to be the ouster of the 1st respondent from the marriage between her and the deceased, that is a document capable of dissolving the said marriage.

The situation on ground is that the area of dispute is narrow, bringing two main questions to the burner, firstly, whether an affidavit was an instrument that can be

interpreted by a court under an originating summons as envisaged by the rules of court, precisely Order 3, Rule 5 of the Enugu State High Court Rules, Secondly, whether the marriage between the appellant and Mr. J. C. Okonkwo SAN under native law and custom in which the parties separated for about seventeen years together with the affidavit of J. C. Okonkwo that appellant was his only wife and by that affidavit vested the 1st respondent as a wife for the purpose of distribution of the estate of late J. C. Okonkwo.

It needs be brought to the fore that appellant herein was the respondent in the court below and had no complaint against the judgment of the trial court at the Court of Appeal. Stated simply and differently is that the appellant did not appeal to the Court of Appeal, rather it was respondent who appealed as appellant seeking the interpretation of the import of the affidavit and its effect in the matter of the beneficiaries of the estate of the deceased intestate. The appellant herein was the respondent at the court below and now raises the issue that the court below did not attend to issue 3 in that court.

A look back in time at the Lower court proceedings will show that what the Lower court did was to adopt a method in what it considered a narrow point in the dispute being whether the affidavit under interpretation and the alleged separation which was controverted dissolved the marriage of the deceased and the 1st respondent thereby disbarring her as beneficiary of the estate.

It needs be brought up that this issue now made much by the appellant on the none consideration of Issue 3 at the court below was not a point found in the grounds of appeal at that Lower court and that court handled the matter as it sought fit in line with the guideline laid out by this court in **Obaro Vs. Hassan (2013) All FWLR (Pt.687) 677 at 693 0 694** in which Ariwoola JSC stated as follows:-

> **"Generally, it is settled that the main purpose of the formulation of issues for determination is to enable the parties to narrow down the issue or issues in controversy in the grounds of Appeal filed. This is in the interest of accuracy, clarity and brevity. The court is therefore at liberty to reformulate the issues for determination in order to give it precision and clarity and achieve substantial justice in the resolution of the matter in controversy." See Musa Sha (Jnr.) & Anor. Vs. Darap Kwam & Ors. (2000) FWLR (Pt. II) P.1798, UBA Plc & Anor, Vs. Bouari (2008) All FWLR (Pt.416) P.1825.**

In keeping with the policy stance of this court, it has to be reiterated that an appellate court which is of the view that a consideration of one issue is enough to dispose of the appeal is not under obligation to consider all other issues posed since the resolution of the one issue or any other has effectively settled the main dispute and there is no point in wasting further time going into the other issues which would not change the course of events already settled by the earlier consideration and ruling in the said deciding issue

or issues. See **7Up Bottling Co. Ltd. Vs. Abiola & Sons Bottling Co. Ltd. (2001) FWLR (Pt.70) 1611.**

Even then in spite of what I have said above, the lower court had given attention and consideration to the said issue 3 and I quote from the record thus:-

> **"For the 1st respondent, it was contended in her issues 2 and 3 which arose from Grounds 2 and 3 of the grounds of appeal and also covered by appellant's Issue no. 2 that a marriage whether statutory or customary in which the parties have lived apart continuously for 17 years cannot be said to confer advantages on the surviving party in respect of the distribution of the Estate of the deceased in the absence of a will categorically stating so."**

It can be seen that the appellant is economical with what transpired at the court below and there is really nothing on which the processes at the Court of Appeal culminating in its judgment can be faulted.

This appeal lacks merit as can be seen from the foregoing and the well articulated reasoning in the lead judgment.

Appeal is hereby dismissed by me as I abide by the consequential orders made.

Mary Ukaego Peter-Odili

Justice, Supreme Court

MUSA DATTIJO MUHAMMAD, (JSC): Having read in advance the lead judgment of my learned brother PAUL ADAMU GALUMJE JSC just delivered, I entirely agree with his reasoning and conclusion therein that a competent appeal is one founded on a ground(s) of appeal which relates to the decision against which the appeal is brought. Where the ground(s) of appeal does not attack the ratio of the decision being appealed against, the appeal is incompetent and the appellate court is bereft of the jurisdiction to consider and determine the incompetent appeal. See **CHIEF TIMOTHY AGBAKA & ORS Vs. CHIEF JEREMIAH AMADI & ANOR (1998) LPELR - 231 (SC)** and **UMANAH Vs. NDIC (2016) LPELR - 42556 (SC).**

The instant appeal which is founded on lone incompetent ground of appeal is incompetent and stands struck out. It is for this and the fuller reasons contained in the lead judgment that I also discountenance the appeal and abide by the consequential orders made in the lead judgment.

Musa Dattijo Muhammad
Justice, Supreme Court

JOHN INYANG OKORO, (JSC): This is appeal against the judgment of the Court of Appeal, Enugu Division delivered on 14th April, 2011 wherein the decision of the learned trial Judge was set aside and this appeal of the respondent to that court was

allowed. Aggrieved by the said judgment, the appellant has approached this court vide her notice of appeal filed on 28th June, 2011 wherein the appellant nominated a sole issue for determination as follows:-

> **"Whether failure of the Court of Appeal to distinguish and address the issue in controversy between the parties by not considering issues 1 and 2 raised by the appellant (as 1st respondent in the Court of Appeal) in her respondent's brief of argument did not occasion a miscarriage of justice; and as a corollary what weight (sic, weight) should the court attach to an uncontroverted affidavit after the deceased (sic) death of the maker.**

On the respondent's side, one issue was equally formulated as follows:-

> **"Whether the appellant is right that the issue 1 and 2 raised in the court below in the respondent's brief were not considered in the judgment under appeal."**

Without repeating the submissions on both sides which had already been beautifully summarized in the lead judgment, it appears to me that the bone of contention between the parties in this appeal is whether in view of the affidavit deposed to by Mr. John

Chukwunweike Okonkwo, SAN (deceased) at the registry of the Enugu High Court on 15th June, 1998 the respondent is entitled to the estate of the said Mr. John Chukwunweike Okonkwo, SAN (deceased).

The law is settled that a court has unfettered discretion to re-arrange or formulate issues for determination by the parties to meet the justice of a case. See Plateau State Health Services Management Board Vs. Inspector Philip Fitoka Goshwe (2013) 2 NWLR (pt 1338) 383; Awojugbagbe Light Industries Ltd. Vs. P. N. Chinukwe & Anor (1995) 4 NWLR (Pt .390) 379, (1995) 4 SCNJ 1; Latunde & Anor Vs. Bella Lajinfin (1989) 5 SC 59, (1989) 5 SCNJ 59, (1989) 3 NWLR (Pt. 108) 177; Unity Bank of Nigeria Plc & Anor Vs. Edward Bouari (2008) 2 SCM 193 at 240, (2008) 7 NWLR (Pt. 1086) 372. In the case of African International Bank Ltd Vs. Integrated Dimensional System Ltd (2012) 17 NWLR (Pt. 1328). This court per Ariwoola, JSC pronounced as follows:-

> **"SO long as it will not lead to injustice to the opposite side, appellate courts possess the power and in the interest of justice to reject, modify or reframe any or all issues formulated by parties."**

Applying the afore position of the law to the instant appeal, I make bold to say that learned counsel to the appellant was in error to submit that the appellant's issues 1 and 2

were not considered by the learned justices of the court below simply because they elected an approach which would resolve the real question in the appeal.

As rightly stated by my learned brother, **Paul Adamu Galumje,** JSC in the lead judgment, there is nothing in the affidavit deposed to by late Mr. John Chukwunweike, SAN on 15th June, 1998 which attaches the properties of the deceased. The courts have found that there is no evidence showing that the marriage contracted under native law and custom between the deceased and the respondent had been dissolved inspite their separation for about seventeen years before the death of the deceased. As such there exists no law presently which would deprive the respondent from partaking in the sharing of the Estate of the deceased.

The decision of the Court of Appeal is hereby affirmed. This appeal is accordingly dismissed for lacking in merit. I also make no order as to costs.

John Inyang Okoro
Justice, Supreme Court

UWANI MUSA ABBA AJI, (JSC): My lord **Paul Adamu Galumje, JSC,** obliged me with a copy of the draft judgment just delivered. I am in agreement with the reasoning and conclusion reached by him in dismissing the appeal.

The 1st respondent married Mr. Johnny Okonkwo, a legal practitioner and SAN, by native law and custom on 18/9/1976, which marriage produced a child. They thereafter separated in 1988 and remained separated until the demise of Mr. Okonkwo on 25/4/2005, after 17 years.

In the meanwhile, Mr. Okonkwo, SAN, got married to the appellant in 1992 ac-

cording to native law and custom of the appellant's Nibo community and had 2 children together. On 18/9/1988, ten (10) years after the separation with the former wife (1st respondent), the deceased deposed to an affidavit where he stated that he had no other wife except the appellant in this appeal. While his estate was being managed by the Administrator General/Trustee, Ministry of Justice, Enugu, the 1st respondent sought to be joined in the distribution of the estate. This caused the appellant to sue seeking for the interpretation of the right of the 1st respondent to partake vis-a-vis Exhibit A. The issue for consideration is:

> **Whether the appellant is right that the issues 1 and 2 raised in the court below in the respondent's brief were not considered in the judgment under appeal.**

The new issue herein was not part and parcel of the grounds of appeal before the lower court. The main issue herein is whether the said issues 1 and 2 were considered by the court below. The point here by the appellant is misplaced since the lower court narrowed down the issues for consideration and took them together. This accords with the decision of this court. The purpose of issues for determination is to identify what is in issue in the grounds of appeal to be argued, the issues in a number of grounds of

appeal which involved the same issue could be formulated in one issue and argued together. See **DOKUN AJAYI LABIYI Vs. ALHAJI MUSTAPHA MOBERUAGBA ANRETIOLA & ORS (1992) 8 NWLR (PART 258) 139; SANUSI Vs. AYOOLA (1992) 9 NWLR (PART 265) 275; UGO Vs. OBIEKWE (1989) 1 NWLR (PART 99) 566.**

What happened at the lower court was to sum and lump up the issues together for consideration and not what the appellant is alleging in his brief. For this, this issue is resolved against the appellant.

The appellant's appeal fails and is hereby dismissed. I also abide by the consequential orders made.

Uwani Musa Abba Aji
Justice, Supreme Court

MR. ADISA ADEOGUN & ANOR.

Vs.

DR. ADETUNJI OLUKAYODE AKINYEMI

SC.552/2015

IN THE SUPREME COURT OF NIGERIA HOLDEN AT ABUJA

FRIDAY, 17TH JANUARY, 2020

BEFORE THEIR LORDSHIP

MARY UKAEGO PETER-ODILI JUSTICE, SUPREME COURT
MUSA DATTIJO MUHAMMAD JUSTICE, SUPREME COURT
JOHN INYANG OKORO JUSTICE, SUPREME COURT
PAUL ADAMU GALUMJE JUSTICE, SUPREME COURT
UWANI MUSAABBAAJI JUSTICE, SUPREME COURT

ACTION:- Cause of action —Meaning —The principle in ***Elabonjo & Anor Vs. Dawodu (2006) 6-7 SC***

ACTION:- Cause of action —Meaning —The principle in P. N Udoh Trading Company Ltd. Vs. Sunday Abere & Anor. (2001) 5 SC (Pt.11) 65.

ACTION:- Commencement thereof —Originating summons proceedings —Nature and purpose —Whether cannot be used to commence hostile proceedings —The principle in ***Hon. Justice Raliat-Elelu-Habeeb & Anor Vs. Attorney General of the Federation & 2 Ors, (2012) 2 SC. (Pt.1) 145.***

ACTION:- Commencement thereof —Originating summons —Nature and purpose —Whether can be employed to commence an action where issue involved is one of construction of a written law.

ACTION:- Commencement thereof —Originating summons —Whether propriate where it involves construction of statute —The principle in ***Hon. Justice Raliat-Elelu-Habeeb & Anor Vs. Attorney General of the Federation & 2 Ors, (2012) 2 SC. (Pt.1) 145.***

ACTION:- Pendency thereof —When a matter is said to be pending in court —Whether when any proceeding can be taken in respect of it.

ACTION:- Pendency thereof —When is an action said to be pending in court —Implication thereof —The principle in ***Kassim Vs. Herman Ebert (1966) (Vol.4) NSCC***

ACTION:- Representative action —Whether there must be a common interest between the person representing and the person represented.

COURT:- Courts of coordinate jurisdiction —Whether a judge cannot overule another judge or sit on appeal over decision of another judge.

COURT:- Findings thereof —Whether such findings persist until they are set aside on appeal.

PRACTICE AND PROCEDURE:- Appeal —Brief writing —Reply brief —Nature and purport.

PRACTICE AND PROCEDURE:- Appeal —Concurrent findings —Attitude of Supreme Court thereto —Whether will interfere only under special circumstances.

PRACTICE AND PROCEDURE:- Appeal —Issues for determination —Whether must relate to or be derived from a ground or grounds of appeal.

PRACTICE AND PROCEDURE:- Representative action —Where defendant did not obtain leave to defend —Whether such failure will not vitiate the action.

Issues for Determination

(i) Whether the appellant is bound by the decision of Olorunnimbe J. in suit No. 1/339/88.

(ii) Whether the action by the plaintiff against the respondent (sic) is statute barred.

(iii) Whether the action was properly instituted by way of originating summons.

Facts of the Matter

The plaintiff sued the defendant at the Lagos State High Court claiming some declaratory and injunctive reliefs in relation to a statutory right of occupancy. He also claimed against the defendant One Hundred Thousand Naira damages for trespass as well as perpetual injunction.

In defending the action, the defendant traced his interest to a larger piece of land which included the land in dispute.

At the end of trial, the trial court gave judgment in favour of plaintiff/respondent.

However the plaintiff later brought an application for an order of possession which was omitted in the original suit. The appellant then brought an application to be joined as a party, interested in the relief of possession sought by the plaintiff. His application for joinder was dismissed.

The appellant's two appeals to the Court of Appeal were allowed and the ruling of the trial Court set aside.

However, a fresh action for possession was commenced against the appellant in which judgment was given against him.

Aggrieved the appellant appealed to the Court of Appeal Lagos Division, which dismissed the appeal. The appellant has further appealed to the Supreme Court.

Held: *(Unanimously dismissing the appeal)*

1. The reply brief is a rehash of arguments contained in brief of argument.

It is instructive to outrightly observe that the arguments in appellants' reply brief are a rehash of the arguments contained in their brief of argument. The reply brief would have been purposeful if the respondent had raised in his brief an issue of law that had not been dwelt upon by the appellants in their brief of argument to make a reply to such issue necessary. In the instant case appellants' reply brief that is not aimed at answering any new point arising from the respondent's brief is unnecessary. A reply brief is never intended for extending the scope of the arguments in the appellants brief. See Cameroon Airlines Vs. Mr. Mike E. Otutuizu (2011) LPELR - 827 (SC) and NIDOCCO Vs. Gbajabiamila (2013) LPELR - 20899 (SC). ***(P 108 para C - D)***

2. Findings of court persist until they are set aside on appeal.

Answers to the foregoing queries raised under appellants' 1st issue can be found only by reviewing Olorunnimbe J's judgment in suit No. 10/339/88. Learned appellants' counsel contends that this is feasible given the fact that in appeals Nos. CA/L/578/06 and CA/L/579/06 the lower court has set-aside Adeyinka J's finding that appellants are bound by Olorunnimbe J's decision since Chief Arowolo had defended the action in representative capacity, appellants have become entitled to challenge respondent's efforts at recovering possession of the land in dispute.

It must be stressed that Olorunnimbe J's judgment as well as the lower court's judgment in appeals No. Ca/L/578/06 and CA/L/579/06 have all not been appealed against. It is long settled that findings of courts persist until they are set-aside on appeal. See DANIEL Vs. FRN (2015) LPELR - 24733 (SC), IDIOK Vs. STATE (2008) LPELR - 1423, ONWE & ORS Vs. NWAOGBUINYA (2001) LPELR - 2709 (SC), OPARA Vs. DOWEL SCHLUMBERGER (NIG) LTD & ANOR (2006) LPELR - 2746 (SC) and TUKUR Vs. GOVT OF TARABA STATE (1997) LPELR - 3273 (SC). ***(P 108-109 para H -B)***

3. Failure to obtain order for leave will not vitiate the action

Learned appellants' counsel must be reminded that the adjectival laws of the trial court in relation to representative actions are rules of convenience and same are not allowed to frustrate proceedings. Thus, where leave of court is not obtained for a defendant to defend the suit in representative capacity, failure to obtain the order will not vitiate the action.

Once there is evidence, and the judgment of Olorunnimbe J is unquestionably a conclusive one, that a defendant, such as Mr. Arowolo, appears to possess representative capacity and presumably acts upon the authority of the persons he represents, the appellants herein and Olarokun family members, the appellate courts will not set aside the trial court's judgment on the

objection that leave had not been sought and obtained from the court. See WIRI & OR Vs. UCHE & ORS (1980) 12 SC I, CHIEF GORDON JOE YOUNG JACK & ORS Vs. CHIEF R.I.T WHYE & ORS (2001) LPELR - 1586 and MR. NEWMAN IGHEDO & ORS Vs. POWER HOLDING COMPANY NIGERIA PLC (2018) LPELR - 43863 (SC). *(P 111 para A - B)*

4. *There must be common interest for an action to lie in a representative capacity.*
It must be remembered that for an action to lie in representative capacity, the plaintiff or the defendant, as the case may be, must have common interest and common grievance with those he represents in the suit. The relief claimed or the outcome of the litigation must also be beneficial to the plaintiff or defendant along with those either of them represents. See DURBAR HOTEL PLC Vs. MR. ABELLA ITUOUGH & ORS (2016) LPELR - 42560 (SC) and OBIODE & ORS Vs. UKPE OREWERE & ORS (1982) LPELR - 2179 (SC). *(P 111 para C - D)*

5. *A judge cannot over rule another judge or sit on appeal over the decision of another judge.*
It is evident from the record of appeal that Chief Arowolo had defended the respondent's claim in suit ID/339/88 in representative capacity. Whether or not Olorunnimbe J had rightly allowed Chief Arowolo to defend the claim in representative capacity is a matter to be settled by an appellate court and at the instance of the appellants. It is not competent for a judge to overrule the decision given by another judge or sit in judgment over the decision of a brother judge. See Christopher Emordi & Ors Vs. Akunma Right Kwentoh & Ors (1996) LPELR - 1135 (SC) Akporue & Anor Vs. Okei (1973) 12 SC 137 and Shell Petroleum Company Nigeria Ltd Vs. Chief Tigbar (2009) LPELR.
(P 111 para E - F)

6. *When a matter is said to be pending in court*
I cannot agree more with the lower court. The principle indeed is that limitation period against a suit abates as long as the matter is pending before a court. A matter is said to be pending in court when any proceeding can be taken in it.
(P 113 para A - B)

7. ***The principle in Kassim Vs. Herman Ebert (1966) (Vol. 4) NSCC; (1966) ALL NLR 54; (1966) NWLR 75 at 76,***
In Kassim Vs. *Herman Ebert (1966) (Vol. 4) NSCC; (1966) ALL NLR 54; (1966) NWLR 75 at 76,* the issue before this court was whether a suit brought

within time and struck remains a pending cause that can be relisted without being caught by limitation time. The plaintiff had sued for a debt before it was statute barred. Unable to file his statement of claim, his counsel obtained an order striking out the claim with liberty to apply for relisting without payment of further summons fess. Order to relist was subsequently sought and obtained. The defendant objected on appeal that when the suit was relisted the claim, then being more than six years old, had become statute barred and could not be revived. The judge, learned counsel to the defendant contended, could not have the suit relisted. In dismissing the defendant's appeal the court inter-alia held:-

> **"When therefore the learned judge on 31st May, 1963 ordered that the case be struck out with liberty to apply for it to be relisted, the case, in our view, still subsists until an order is made for it to be put on the hearing or case list. It is our view therefore that it is a pending cause which has been relisted in this case. As Lord Jessel, M.R., put it in Re Clagett's Estate, Fordham Vs. Clagett (1882) 20 Ch.D. 637 at 653, 'A cause is said to be pending in a court of justice when any proceeding can be taken in it. That is the test. If you can take any proceeding it is pending.**
>
> **We therefore find it difficult to see how the claims can be said to be statute barred, and we think the learned trial judge was right to have rejected this plea."*(P 113 B - F)***

8. Respondent suit was properly commenced.

I entirely agree with learned counsel to the respondent that the instant suit has been properly commenced. The issue in the suit does not raise any conflict of facts such that pleadings would be ordered for the purpose of calling oral evidence to resolve such conflict. The simple task before the trial court was the construction of Olorunnimbe J's judgment in deciding whether or not the respondent was entitled to the possession of the land he was declared to be the owner. Authorities on this are legion. Both sides in the appeal have appositely

cited many making it needless to further dwell on the point. *(P 114 para D - E)*

Per Odili (JSC)

"It is clear that the judgment of Olorunnimbe J. was not appealed even though the appellants were well aware of the judgment which they ignored alongside the interlocutory injunction ordered against them. Also to be said is that the execution of the ruling of Adeyinka J. granting possession to the respondent was put in abeyance during the pendency of Appeals CA/L/579/06 and CA/L/578/06 and the stay of execution of the ruling of Adeyinka J. The

facts explained why the judgment of Olorunnimbe J. put in abeyance pending the outcome of the appeals CA/L/579/06 and CA/L/578 so as not to confuse issues.

It is apparent that the narrative pushed forward by the appellants who had appealed the judgment in Suit No. ID/339/88 and the fact that nothing has been shown in the appeal herein to the contrary to change the status of the judgment of Suit No. ID/446M/2013 and the Court of Appeal judgment now appealed against which along with what came out of the high court judgment appealed at the court below became concurrent findings and judgment of two courts below. ***(Pp 120-121 para G - A)***

9. Supreme Court will only interfere with concurrent findings under special circumstances

The situation of those concurrent judgments take the mind of the court to the policy stance of this court, which is that when concurrent findings of facts of two lower courts are presented as at now, this court or any appellate court for that matter is loath to interfere with those findings of fact. That attitude stands rock solid and the appellate court including this apex court would only make an exception upon the show of special circumstances such as there being a miscarriage of justice or serious violation of some principles of law or procedure or the findings are erroneous like error in substantive or procedural law. See Chief Jacob Cleopas Biariko & Ors, Vs. Chief A. M. Edeh-Ogwuile & Ors, (2001) 4 SC (Pt.11) 96 at 116-117 per Onu JSC. ***(P 121 para B - C)***

10. Issue or issues for determination must relate to or be derived from a ground or grounds of appeal

In fact what the appellants are seeking to get this court to enter into is what clearly is outside the realm of this appeal. Firstly, nowhere in the judgments in Appeal CA/L/578/06 and CA/L/579/06 did the Court of Appeal interfere with the judgment of Olorunnimbe J. in suit No. ID/339/88 and any way, the Court of Appeal could not since the grounds of appeal did not contain any such grievances and follow up reliefs. The implication is that this court cannot through any back door style go into such matters which were neither before the court below nor could have travelled herein. This is because the general rule is

that issue or issues for determination must relate to or be derived from a ground or grounds of appeal otherwise they would be incompetent and liable to be discountenanced or struck out. Hence Appeals CA/L/578/06 and CA/L/579/06 confined their judgments in those appeals to only what came out from the grounds of appeal. See Shell PDC Nig. Ltd Vs. Edamkue & Ors, (2009) 6-7 SC 74 at 86. ***(P 121 para D - E)***

11. Failure to obtain leave to sue in a representative capacity is not fatal

The appellants are urging this court to accept that the respondent as plaintiff in Suit ID/339/88 did not seek prior court order to sue the defendant in a representative capacity and so the appellants could therefore not be bound by the judgment that came out from that suit. That position of the appellants is well out of place as the court cannot strike out or dismiss an action or render the outcome of a judgment or ruling of no effect and upset the judgment merely because leave was not obtained to sue in a representative capacity. In other words, failure to obtain the leave of court to sue in a representative capacity is not fatal so as to vitiate the proceedings. See Dr. Augustine Mozie & 6 Ors, Vs. Chike Mbamalu & 2 Ors. (2006) 7 SC (Pt.11) 154 at 163; Oyewole Vs. Lasisi (2000) 14 NWLR (Pt.687) 342.

On whether Suit No. LD/446M/2013 ought not to have been commenced by originating summons when the subsisting judgment of Olorunnimbe J. in suit No. 10/339/88 was not appealed against by the appellants.

It is recalled that the court below in tackling the appeal before it had summarized the facts in contention in Suit No. ID/339/88 and held that the appellants were parties to the said suit and so bound by the judgment of Olorunnimbe J, which judgment was kept in abeyance while the appeals of the same appellants in CA/L/578/06 and CA/L/579/06 against the order of possession granted to the respondent by Adeyinka J. as well as the stay of execution of the order by Justice O. A. Williams. That court below had held that the prayers of the respondent seeking enforcement of the judgment of Olorunnimbe J. in ID/339/88 was not contentious and that the respondent had correctly commenced suit No. ID/446M/2013 to enforce the judgment of Olorunnimbe J. by way of summary proceedings for possession within the law in question under Order 53, rules 3 (a) (b) and (c) of the Lagos State (Civil Procedure Rules 2012 which in short is originating summons procedure, needing no issuance of a writ of summons. ***(P p121- 122 para F - B)***

12. Originating summons may be employed to commence an action where issue involved is one of construction of a written law.

The following judicial authorities seem to have the current one in mind in regard to the appropriateness of the suit under originating summons procedure. See the case of Festus Keyamo Vs. House of Assembly Lagos State and Ors,

(2002) 12 SC (Pt.I) P.190 at P.191, where it was held that" the law is well settled that originating summons may be employed to commence an action where the issue involved is one of the construction of a written law, instrument, deed, will or other document or some question of pure law is involved or where there is unlikely to be any substantial dispute or issues of fact between the parties".

(P 122 para C - D)

13. Originating summons cannot be used to commence hostile proceedings.

This decision was again affirmed by the Supreme Court in the case of Hon, Justice Raliat- Elelu - Habeeb & Anor Vs. Attorney General of the Federation & 2 Ors, (2012) 2 SC. (Pt.1) 145 at PP.211/212 per M. Mohammed JSC (as he then was) thus:-

> **"The law is indeed well settled that originating summons procedure for initiating action is not suitable and therefore not available for action involving hostile proceedings where the facts are seriously in dispute as the case in Adebayo Doherty and Anor. Vs. Richard Ade Doherty (1968) NMLR 241. This court has decided in many cases some of which are Keyamo Vs. L.S.H.A (2002) 12 SC (Pt.1) 196; (2002) 18 NWLR (Pt.799) 605 at 613 and Pam Vs. Mohammed (2008) 5-6 SC (Pt.1) 83; (2008) 16 NWLR (Pt.1112) 1 at 51, that originating summons can be used in matters that involve the interpretation of contracts, documents, Constitution and other statutes where matters or facts are not in dispute."** ***(P 122 para E - G)***

14. Originating process is convenient where it involves construction of statute

The Supreme Court went on in Elelu-Habeeb Vs. A. G. Federation (supra) per Mohammed JSC (as he then was) thus:-

> **"In the present case, the real issues raised are centered around the interpretation of the provisions of the 1999 Constitution prescribing the procedure for exercising disciplinary proceedings dealing with the exercise of powers under the same constitution to remove a Chief Judge of a state from office. I entirely agree that the two courts below were on very firm ground that the action at the trial court was correctly, and rightly began by originating summons procedure."** ***(P p122- 123 para H - A)***

15. The meaning of cause of action.

In the case of P. N. Udoh Trading Company Ltd. Vs. Sunday Abere & Anor. (2001) 5 SC (Pt.11) 65, the Supreme Court held thus :-

> **"Cause of action has been defined by courts to mean a combination of facts and circumstances giving rise to the right to file a claim in court for a remedy. It includes all those things which are necessary to give a right of action and every material fact which is material to be proved to entitle the plaintiff to succeed. See Patkun Industries Ltd Vs. Niger Shoes Ltd (1988) 12 SC (Pt. ii) 1; (1988) 5 NWLR (Pt.93) 138; Ibrahim Vs. Osim (1987) 4 NWLR (Pt.67) 965; Bello Vs. A. G. Oyo State (1986) 5 NWLR (Pt.45) 828. The cause of action arises as soon as the combination of the circumstances mentioned above accrued or**

happened, and it is the act on the part of the defendant which gives the plaintiff his cause of complain". ***(P 122 para F - G)***

16. Meaning of cause of action

In the case of Elabanjo & Anor. Vs. Dawodu (2006) 6-7 SC P.24 at P. 43 which is on all fours with the case of Udoh Trading Company Ltd. Vs. Sunday Abere & Anor. supra, it was held at P. 43 that "Cause of action had been defined by courts to mean a combination of facts and circumstances giving rise to the right to file a claim in court for remedy. It includes all things which are necessary to give a right of action and every material fact which has to be proved to entitle the plaintiff to succeed". (Underlining mine). ***(Pp 122-123 Para H - A)***

Representations:
G.O. ALABI (Mrs.), for the appellants.
Oladele Ajikanju, for the respondent.

MUSA DATTIJO MUHAMMAD, JSC(Delivering the lead judgment): This is an appeal against the judgment of the Court of Appeal, Lagos Division, hereinafter referred to as the lower court, delivered on the 25th day of June 2015, in appeal No. CA/L/457/2014, affirming the decision of the Lagos State High Court, O. O. Femi-Adeniyi J presiding, in Suit No. LO/446M/2013. The affirmed judgment of the Lagos State High Court, hereinafter referred to as the trial court, was delivered on the 10th day of March 2014.

Aggrieved by the lower court's judgment, the appellants have further appealed to this court on a notice filed on the 26th June 2015 containing seven grounds.

The facts of the case that brought about the appeal are hereinafter briefly stated.

The respondent herein, as plaintiff, commenced Suit No. ID/339/88 at the trial court against one chief Arowolo seeking:-

"1. A declaration that the plaintiff is entitled to the statutory right of occupancy on and over the land situate, lying and being at Olayiwola Street, Oko-Oba, near Abule- Egba in Ikeja Local Government Area of Lagos State which is more particularly described and delineated on the attached to the Deed of Conveyance dated 23rd day of March 1978 and registered as No. 60 at page 60 in volume 1715 of the Lands Registry in the office at Lagos.

2. N100,000 damages for trespass committed by the defendant on the plaintiff's sold land at Dlayiwola Street, Oko-Oba.

3. An order of perpetual injunction restraining the defendant by themselves, their servants, workmen, privies or agents or otherwise however from trespassing on the said land or disturbing or otherwise interfering with the plaintiff's right over the land."

In defending the action, the defendant traced his interest to a larger piece of land that included the land in dispute to the Olarokun family and that the family had sold the land in dispute to one Miss Olufolafunmi Adesina on 3rd April 1077 for N100,000.00k. He further pleaded that Miss Adesina had erected a foundation on the said land at a cost of N100,OOO,OOk which the plaintiff/respondent, Dr. Adetunji Olukayode Akinyemi, demolished during the pendency of his suit before the court. It is the defendant's further case that he is an Oba and a descendant of the Olarokun family; that Mr. Frederick Ephraim Williams the plaintiff claims to be his predecessor in title never had title to the land and that Mr. Williams whose land is at Ifako and not Agege, has been defeated in a previous case.

Neither Miss Olufolafunmi Adesina nor the appellants herein was made a party by the plaintiff/respondent in the suit. The defendant also made no reference to either of the two in his statement of defence.

The trial into the matter progressed and by 7th May 1991 when the plaintiff/respondent, on discovering that the appellants herein had trespassed and commenced construction on the land in dispute, sought the trial court's leave to join alleged trespasser to the suit. The appellants resisted the joinder on the grounds that trial had commenced and that the plaintiff has not claimed any relief against them. In a ruling dated 25th June 1993, the plaintiff/respondent's application for the joinder of the appellants was dismissed. The ruling has not been appealed against.

At the end of trial, I.A. Olorunnimbe J. presiding, the court on the 23rd day of April 1998 found merit in plaintiff's claim and entered judgment in his favour.

Not having prayed for possession of the property the court declared him entitled to, the plaintiff/respondent subsequently approached the court for an order of possession of the land in dispute.

The 1st appellant herein, by his motion dated 17th October 2000, prayed the court for an order joining him as the 2nd defendant/interested party in the action for possession instituted by the successful plaintiff in suit No. ID/399/88 against Chief Arowolo. The latter defended the suit in representative capacity. On the 19th day of November 2002, A. F. Adeyinka J. dismissed the 1st appellant's application for leave to join the suit as 2nd defendant/interested party he found unmeritorious.

His lordship on the 19th day of April 2004 at the end of respondent's suit for the possession of the land in dispute ordered as follows:-

> **"Pursuant to the judgment of the 23rd day of March 1998, the plaintiff shall recover from the defendant possession of the land situate at Olayiwola Street, Oko-Oba near Abule-Egba, Agege Local Government Area of Lagos State more particularly described and delineated on the survey pan attached to the Deed of Conveyance dated 23rd March 1978 and registered as No. 60 at Page 60 in volume 1715 Lands Registry Lagos."**

Appellants' two appeals to the lower court against the trial court's ruling per Adeyinka J were allowed on 5th April 2013 and 4th February 2014 respectively and the ruling set aside.

On the 13th June 2013, the respondent by way of originating summons commenced the instant suit No. LD/446/2013 against the appellants and *"*every other person in occupation of the property in dispute" at the trial court with Femi Adeniyi J. presiding. The appellants were sued as defendant/judgment debtors. The appellants opposed the claim for possession on the grounds that they were not a party to suit No. ID/339/88 wherein Olorunnimbe J. entered judgment in respondent's favour; that the present action is statute barred; that he has better title to the land in dispute and that respondent's originating summons is most inappropriate for commencing his action. Femi Adeniyi J on the 10th March 2014 found merit in respondent's action and granted him possession of the land in dispute on the ground that the appellants herein are privy to Jimoh Arowolo, the defendant in suit No. ID/339/88 decided in favour of the respondent by Olorunnimbe J. on 23rd April 1998.

Aggrieved by the decision, the appellants appealed against same on the 9th June 2014. The lower court on the 14th May 2015 dismissed the appeal and affirmed the trial court's judgment.

The appellants have further appealed to this court vide their notice filed on 26th May 2015 containing seven grounds.

In the appellants' brief settled by Miss G. O. Numa three questions are distilled for the determination of the appeal thus:-

(i) Whether the appellant is bound by the decision of Olorunnimbe J. in suit No. 1/339/88.

(ii) Whether the action by the plaintiff against the respondent (sic) is statute barred.

(iii) Whether the action was properly instituted by way of originating summons.

The three similar but differently numbered issues distilled by the respondent as arising for the determination of the appeal are:-

(i) Whether or not the subsisting judgment of the High Court of Lagos State delivered by Olorunnimbe J in suit No. 10/339/88 on 23rd April 1990 is binding on the Appellant despite the Court of Appeal's decisions in Appeals Nos. CA/579/06 and CA/578/06 delivered on 5th April 2013 and 4th February 2014 respectively?

(ii) Whether or not suit No. LD/446M/2013 ought not to have been commenced by originating summons when the subsisting judgment of Olorunnimbe J. aforesaid in Suit No. 10/339/88 was never appealed against by the appellants?

(iii) Whether the action of the respondent in Suit No.

ID/446M/2013 is statute barred.

On the 1st issue, learned appellants' counsel contends that the concurrent findings of the two lower courts that the decision in suit No 10/399/88 binds the appellants is erroneous for many reasons. The two courts have held that chief Arowolo had defended the suit in representative capacity. The courts further held that the appellants who had traced their title to the Arowolo family have common interest with the defendant in the said suit. The appellants being privy, it is further submitted, the courts have concurrently concluded they cannot relitigate the matter.

Firstly, it is argued, nothing on record shows either the plaintiff or the defendant in suit No. 10/399/88 as having sought and obtained leave of court, in compliance with rule 14 of Order 14 of the Lagos State High Court Rules, before suing or defending respondent's claim in the suit. Indeed Chief Arowolo who does not have common interest with the appellants, it is further argued, could not have represented them in defending respondent's claim in the suit. Evidence on record shows clearly that the Arowolo family had sold and divested itself of title to the land in dispute. Reliance is placed on **AD-ELEKE Vs. AKANJI (1994) 4 NWLR (Pt. 341) 715 at 730, 731** and **AMUDA Vs. AJOBO (1995) 7 NWLR (Pt. 406) 170.**

Further arguing the issue, learned appellants' counsel submits that the two courts have by their finding that appellants are bound by the Olorunnibe J's decision in suit No. 10/399/88 ignored the full impact of the court's refusal to join the appellants in the suit it determined. The practical effect of the court's dismissal of the respondent's application for the joinder of the appellants in the suit, it is submitted, is that not being parties before the court they cannot be lawfully bound by the judgment of the court. The law is settled, it is further submitted, that the court as presided over by Olorunnibe J. lacks the jurisdiction to decide the fate of the appellants who were not a party to the action before him. Learned counsel cites in support the decisions in **YUSUF Vs. OBASANJO (200s) 15 NWLR (Pt. 956) 96** and **BABATOLA Vs. ALADEJANA (2001) 12 NWLR (Pt. 728) 597 at 615.**

The two courts, it is further contended, ignored appellants success in their appeals Nos. CA/L/578/06 and CA/L/579/06 against the judgment of Adeyinka J. In essence the success, it is argued, means that Adeyinka J's finding to the effect that the appellants are bound by the judgment of Olorunnimbe J because same was defended in representative capacity, has been negated. This entitles the appellants, it is further argued, to challenge respondent's recovery of possession of the land in question. The courts are wrong in their concurrent findings that the appellants who were never parties could be treated as such in the suit tried by Olorunnimbe J. The lower court's decisions in the two appeals, it is submitted, have not been appealed against by the respondent.

On the whole it is urged that the Issue be resolved in favour of the appellants.

On the 2nd issue, it is contended by learned appellants' counsel that the lower court's decision that the suit that brought about the instant appeal, commenced by the respondent before Femi Adeniyi J, two months after the Court of Appeal had set aside the decision of Adeyinka J, is not statute barred is perverse. Referring to pages 358 - 360 of

the record of appeal, learned counsel submits that apart from incorrectly evaluating the facts on record the lower court also failed to apply correct principles of law to the facts as wrongly found by it. The issue the lower court was to consider while determining whether or not respondent's suit was statute barred is when the cause of action arose and whether time could be suspended once it had begun to run. The lower court is wrong in its computation of time as to whether the suit was statute barred, by beginning from 5th April 2013 when the Court of Appeal delivered its judgments in appeals No. CA/L/548/06 setting aside Adeyinka J's judgment. The actual date the respondent filed his action, it is argued, was in 1992 when he sought to join the appellants in the suit before Olorunnimbe J. In respondent's application seeking to join the appellants as co-defendants to the suit, learned appellants counsel submits, it was averred that time began to run against the respondent when he discovered that the appellants had trespassed unto the land. That was the time when, it is argued, with breach of his rights, respondent's cause of action arose. By the time the respondent commenced the suit before Femi Adeniyi J. on 13th June 2013, it is contended, his right of action was well outside the twelve year limitation period prescribed under Section 16(2) of the limitation law of Lagos State and therefore not actionable. The principle is, learned counsel submits further, once time begins to run for the purpose of limitation, it does not stop running. Relying on the views of the authors of the Modern Law of limitation by T. Prime and G. P. Scanlan, pages 37 - 38 Charles worth on negligence 5th Edition, paragraph 1156 **OGBAH Vs. BEN DE DIVISIONAL UNION (2001) FWLR (Pt. 63) 25 at 44, OJO Vs. BANJO (1979) 2 LRN 396** and **WILLIAMS Vs. WILLIAMS (2008) 10 NWLR (Pt. 1095) 364** learned appellants counsel emphasizes that once time has begun to run it does not abate. The lower court's reliance on its earlier decisions in **SIFAX NIG LTD & ORS Vs. MIGFO NIG LTD** and **UNONGO Vs. AKU & ORS** in arriving at its decision that respondent's suit before Femi Adeniyi J was not caught by statute of limitation, it is submitted, is erroneous. Learned counsel prays that the issue be resolved against the respondent too.

Under the 3rd issue, learned counsel contends that the originating summons procedure Order 53 of the Lagos State High Court Rules provides for is for non-contentious matters. The procedure does not envisage the vigorous defence the appellants mounted which resulted in the filling of conflicting affidavits that ideally necessitates the calling of oral evidence. The failure of the trial court to call for oral evidence from the parties in proof or defence of respondent's claim remains fatal to the decision of the trial court. The lower court, further submits learned appellants' counsel, is wrong in its affirmation of the trial court's decision arrived at inspite of the hindrance. Learned counsel relies **FALOBI Vs. FALOBI (1976) 9 - 10 SC 1, C. U. MBOJI & SONS LTD Vs. AHUNANYA (2000) 8 NWLR (Pt. 669) 498, ANATOGU Vs. ANATOGU (1997) 9 NWLR (Pt. 579) 49** and **KEYAMO Vs. HOUSE OF ASSEMBLY, LAGOS STATE (2002) 18 NWLR (Pt. 799) 600 at 613.**

Notwithstanding the inappropriateness of the originating summons the respondent commenced the action with, the appellants, it is further contended, did not testify in the suit before Olorunnimbe J. The concurrent decisions of the two courts that appellants are

bound by the decision in suit No. 10/339/88 in which they were not parties, learned counsel submits, is manifestly erroneous. Appellants' right to fair hearing, learned counsel insists, has been compromised. The action that brought about the appeal being statute barred and the originating summons procedure being inappropriate in prosecuting such contested claim, the concurrent decisions of the two courts below, concludes learned appellants' counsel, being misconceived and perverse cannot persist. He urges that the appeal be allowed and the decisions set-aside.

Replying to appellants' arguments under the 1st issue common to both, learned respondent's counsel states that appeals Nos. CA/L/578/06 and CA/L/579/06 were purely against the ruling of Adeyinka J delivered on 19th April 2004 which granted possession of the land in dispute pursuant to the judgment of Olorunnimbe J in suit No. ID/339/88 delivered on 23rd April 1998. The success of the appellants in the two appeals only affected the judgment of Adeyinka J which the lower court set - aside in the two appeals. The judgment of Olorunnimbe J in suit No. 10/339/88, it is stated, has neither been interfered with nor set - aside by the Court of Appeal in any of the two appeals. It follows that the judgment of Olorunnimbe J that was not affected by the appeals and the stay of execution on the basis of the appeals, it is further stated, is merely put on hold. It is evident from the record of appeal pages 266, 267, 346, 347 and 349 - 350, argues learned respondent's counsel, that suit No. 10/339/88 as decided by Olorunnimbe J was instituted against Chief Arowolo in representative capacity and that he defended the action in that capacity as well. The appellants therefore, it is contended, are privy to suit No. 10/399/88. The appellants, who were also aware when the suit was being prosecuted by the respondent, chose to deliberately ignore the suit and fall in contempt of the interlocutory order made against them. All these facts, explains learned counsel, show why Olorunnimbe J's judgment binds the appellants pending the final outcome of their appeals to the Court of Appeal. Citing **CHIEF JACOB CLEOPAS BIARIKO & ORS Vs. CHIEF A. M. EDEH - OGWUILE & ORS (2001) 4 SC (Pt. 11) 96 at 116 -**

117 and **SPDC NIG LTD Vs. EDAMKWE & ORS (2009) 6- 7 SC 74 at 86,** learned counsel urges that appellants' argument that this court set - aside the concurrent decisions of the courts below they failed to demonstrate are perverse be ignored. Appellants' assertion in paragraphs 3.4 and 3.5 of their brief that the practical effect of the decision of the Court of Appeal in appeals Nos. CA/L/578/06 and CA/L/579/06 is that since the appellants were never parties in suit No. 10/339/88 could not have been treated as such by Olorunnimbe J is not supported by evidence on record which shows the appellants as being privy to Chief Arowolo the defendant therein. The false contention, learned counsel submits, must also be discountenanced.

Appellants have wrongly also insisted, further submits learned respondent's counsel, that because none of the parties in No. 10/339/88 sought and obtained leave of the court for the suit to sue or have same defended in representative capacity, the decision in the suit does not stand. Leave to either prosecute or defend a suit in that capacity, it is argued, is unnecessary. Learned counsel submits that an appellate court will not set - aside a trial court's decision simply because of failure by any of the parties to the suit to obtain leave to either prosecute or defend the claim in representative capacity: **DR.**

AUGUSTINE MOZIE & 6 ORS Vs. CHIKE MBAMALU & 2 ORS (2006) 7 SC (Pt. 11) 154 at 163 and **OYEWOLE Vs. LASISI (2000) 14 NWLR (Pt. 687) 342.** On the whole, it is urged, appellants are and should be held bound by the decision in 10/339/88 notwithstanding their success in appeals Nos. CA/L/578/06 and CA/L/579/06 to the Court of Appeal. The issue, learned counsel submits, be resolved against the appellants.

On respondent's 2nd issue, appellants' 3rd, learned respondent's counsel submits that the lower court's finding that the respondent's resort to Order 53 rules 3(a) (b) and (c) of the Lagos State High Court (Civil Procedure) Rules 2012 is beyond reproach as well. There were no fresh issues between the parties, it is argued, that would have necessitated the issuance of a writ of summons in the matter. Learned counsel cites **FESTUS KEYAMO Vs. HOUSE OF ASSEMBLY OF LAGOS STATE** (supra) and **HON. JUSTICE RALIAT ELELU - HABEEB & ANOR Vs. AG FEDERATION & 2 ORS (2012) 2 SC (Pt. 1) 145 at 211 - 212** in support of his submission and prays that the issue be resolved against the appellants.

On respondent's 3rd issue, appellants' 2nd, learned respondent's counsel argues, contrary to the contention in paragraphs 4.4 to 4.11 of the appellants' brief, that respondent's suit No 10/464M/2013 is not statute barred. The judgment delivered by Olorunnimbe J in suit No. ID/339/88 on 23rd of April 1998, it is submitted, has not been appealed against. The appellants herein by their appeals No. CA/L/578/06 and CA/L/579/06 and the stay of execution of the judgment, it is argued, merely put the judgment in favour of the respondent in abeyance.

For the purpose of determining whether or not the instant suit is statute barred, it is submitted, time is computed after the determination of appellants' appeals Nos. CA/L/578/06 and CA/L/579/06 and the order of injunction thereon set-aside thereby removing the bar placed on the respondent. Accordingly, it is submitted, respondent's

cause of action in suit No. ID/446M/2013 arose after the lower court's determination of appellants' appeal on 5th April 2013 and not earlier than that date. Respondent's right of action for the purpose of enforcing the judgment in suit ID/399/88, it is further argued, was only possible after the bar placed on that right by appellants' two appeals was removed. Learned counsel urges that this court so find by virtue of its decision, inter-alia in **PATKUN INDUSTRIES LTD Vs. NIGER SHOES LTD (1988) 12 SC (Pt. 11) 1, IBRAHIM Vs. OSIM (1987) 4 NWLR (Pt. 67) 965, BELLO Vs. AG OYO STATE (1986) 5 NWLR (Pt. 45) 828** and **ELABANJO & ANOR Vs. DAWODU (2006) 6 - 7 SC 24 at 43.** He asks further that on so finding this Court resolves the issue against the appellants and consequentially dismiss the appeal.

It is instructive to outrightly observe that the arguments in appellants' reply brief are a rehash of the arguments contained in their brief of argument. The reply brief would have been purposeful if the respondent had raised in his brief an issue of law that had not been dwelt upon by the appellants in their brief of argument to make a reply to such issue necessary. In the instant case appellants' reply brief that is not aimed at answering any new point arising from the respondent's brief is unnecessary. A reply brief is never intended for extending the scope of the arguments in the appellants brief. See **CAMEROON AIRLINES Vs. MR. MIKE E. OTUTUIZU (2011) LPELR - 827 (SC)** and

NIDOCCO Vs. GBAJABIAMILA (2013) LPELR - 20899 (SC). Accordingly appellants' reply brief shall and is hereby discountenanced.

The appeal shall be determined on the basis of the issues distilled by the appellants. The issues shall be resolved in the order the appellants numbered and argued them in their brief of argument.

ARE THE APPELLANTS BOUND BY THE JUDGMENT IN SUIT NO. ID/339/88?
By their 1st issue, the appellants have argued that they are not bound by the decision in suit No. ID/399/88 delivered by Olorunnimbe J on 23rd of April 1998. They contend that neither the respondent herein nor the defendant at the trial court in the said suit sought and obtained leave of the court to commence or defend the action in representative capacity; that their rights are not similar to or common with the rights of the defendant in suit No. ID/339/88 to warrant the suit being defended by chief Arowolo on their behalf; that the Olarokun family having sold the land and divested itself of any interest, and the appellants who still has interest in the land in dispute cannot be rightly said to have common interest with Chief Arowolo who as the representative of the Olarokun family no longer have any interest in the land that not being parties in the suit the Olorunnimbe J lacked the jurisdiction of determining appellants rights without hearing them out.

Answers to the foregoing queries raised under appellants' 1st issue can be found only by reviewing Olorunnimbe J's judgment in suit No. 10/339/88. Learned appellants' counsel contends that this is feasible given the fact that in appeals Nos. CA/L/578/06 and CA/L/579/06 the lower court has set-aside Adeyinka J's finding that

appellants are bound by Olorunnimbe J's decision since Chief Arowolo had defended the action in representative capacity, appellants have become entitled to challenge respondent's efforts at recovering possession of the land in dispute.

It must be stressed that Olorunnimbe J's judgment as well as the lower court's judgment in appeals No. Ca/L/578/06 and CA/L/579/06 have all not been appealed against. It is long settled that findings of courts persist until they are set-aside on appeal. See **DANIEL Vs. FRN (2015) LPELR - 24733 (SC), IDIOK Vs. STATE (2008) LPELR - 1423, ONWE & ORS Vs. NWAOGBUINYA (2001) LPELR - 2709 (SC), OPARA Vs. DOWEL SCHLUMBERGER (NIG) LTD & ANOR (2006) LPELR - 2746 (SC)** and **TUKUR Vs. GOVT OF TARABA STATE (1997) LPELR - 3273 (SC).**

At pages 246 - 247, the trial court commenced its findings in respect of the respondent's application for possession of the land in respect of which the trial court in suit No. 10/339/88 adjudged the respondent to be the owner. The court enthused as follows:-

> **"I can distil from the facts and contents of the exhibits attached to the affidavits that the defendants are allegedly in occupation of land over which the claimant had been adjudged owner in Suit No. ID/339/88 between the claimant herein and one Chief Jimoh Arowolo who was sued as representative of the Olarokun Family. The 1st defendant and his wife had purchased land from the Olarokun family as evidenced by Exhibits CA3 and CA4 and had ob-**

tained their respective certificate of occupancy on the 15th day of May 1995 and 20th day of June 1995 (Exhibit CA1 and CA2) during the pendency of Suit No. ID/339/88./1

At pages 247 - 248 of the record of appeal Adeniyi J has held:-

"In suit No. ID/339/88, the defendant had stated that the land in dispute had been in his family since 1834 and formed part of a larger parcel of land. He testified further that he had sold the two plots to either Adeyemi or Adesina in 1977. The 1st defendant herein has averred that he bought his land and his wife's land directly from the Iloti Onikosi family branch of Ola Arokun family. There is no such evidence given in ID/339/88 that substitute branches within the Olarokun family represented by the defendant therein had sold to any person, the 1st defendant herein inclusive….

In any event, the Iloti Olukosi branch of Olarokun family through whom the 1st defendant claims, are part of the larger Olarokun

family land, as testified to by Chief Arowolo.

The 1st defendant herein, as I have found, has not disputed that the land on which an order for possession is sought herein, is the same as the land in 10/339/88. The 1st defendant claims his interest through a sub branch of the Olarokun family, the adjudged trespassers in ID/339/88. <u>The decision in that case has not been challenged</u>." (Underling supplied for emphasis).

The trial court concluded as follows:-

<u>"I am therefore satisfied that the defendants herein, having not disputed the identity of the land or challenged the decision in that case, and in the absence of any pending appeal, and being privies to the defendant in ID/339/88 are bound by the decision therein. 1 am further satisfied that the issue of title is not in dispute in the instant proceedings having been settled in Suit No. 10/339/88."(Underlining supplied for emphasis).</u>

In affirming the foregoing the lower court held thus:-

"In the circumstance, there is no doubt that the appellant having been held by the lower court to be bound by the judgment delivered by Olorunnimbe J. in Suit No. 10/339/88 on the 23rd day of April 1998 wherein the respondent was granted his claims to the land in dispute, the appellant cannot now seek to reargue the merit of the

said judgment or the ruling that subsequently followed on 19-11-2002 (sic) in his brief of argument. <u>The only option open to him is to appeal against same which until set aside on appeal remains binding and subsisting</u>." (Underlining supplied for emphasis).

The concurrent findings of the two courts that the appellants are bound by the decision in suit No. ID/339/88 cannot be faulted.

I entirely agree with learned respondent's counsel that the evidence on record clearly shows that chief Arowolo, the defendant in suit 10/399/88, was sued and he defended the action in representative capacity. The extant rules of procedure of the trial court entitle the defendant to defend a suit in representative capacity. Those he represents, who disapprove of his representation may seek to be allowed to defend the suit directly. In the case at hand, the appellants who were aware of the proceedings in suit No. ID/339/88 and even opposed respondent's application to be joined as a party in the proceedings, it is too late for them to raise the very query they refused to raise before Olorunnimbe J subsequently before Adeniyi J or still before the lower court and more

so here.

Learned appellants' counsel must be reminded that the adjectival laws of the trial court in relation to representative actions are rules of convenience and same are not allowed to frustrate proceedings. Thus, where leave of court is not obtained for a defendant to defend the suit in representative capacity, failure to obtain the order will not vitiate the action.

Once there is evidence, and the judgment of Olorunnimbe J is unquestionably a conclusive one, that a defendant, such as Mr. Arowolo, appears to possess representative capacity and presumably acts upon the authority of the persons he represents, the appellants herein and Olarokun family members, the appellate courts will not set aside the trial court's judgment on the objection that leave had not been sought and obtained from the court. See **WIRI & OR Vs. UCHE & ORS (1980) 12 SC I, CHIEF GORDON JOE YOUNG JACK & ORS Vs. CHIEF R.I.T WHYE & ORS (2001) LPELR - 1586** and **MR. NEWMAN IGHEDO & ORS Vs. POWER HOLDING COMPANY NIGERIA PLC (2018) LPELR - 43863 (SC).**

It must be remembered that for an action to lie in representative capacity, the plaintiff or the defendant, as the case may be, must have common interest and common grievance with those he represents in the suit. The relief claimed or the outcome of the litigation must also be beneficial to the plaintiff or defendant along with those either of them represents. See **DURBAR HOTEL PLC Vs. MR. ABELLA ITUOUGH & ORS (2016) LPELR - 42560 (SC) and OBIODE & ORS Vs. UKPE OREWERE & ORS (1982) LPELR - 2179 (SC).**

It is evident from the record of appeal that Chief Arowolo had defended the respondent's claim in suit ID/339/88 in representative capacity. Whether or not Olorunnimbe J had rightly allowed Chief Arowolo to defend the claim in representative capacity is a matter to be settled by an appellate court and at the instance of the appellants. It is not

competent for a judge to overrule the decision given by another judge or sit in judgment over the decision of a brother judge. See **CHRISTOPHER EMORDI & ORS Vs. AKUNMA RIGHT KWENTOH & ORS (1996) LPELR - 1135 (SC) AKPORUE & ANOR Vs. OKEI (1973) 12 SC 137** and **SHELL PETROLEUM COMPANY NIGERIA LTD Vs. CHIEF TIGBAR (2009) LPELR.**

Since the decision in suit 10/339/88 is still extant the findings therein persist to bind the appellants. Their 1st issue is therefore resolved against them.

IS RESPONDENT'S ACTION AGAINST THE APPELLANTS STATUTE BARRED?

The learned appellants' counsel has argued that by the time the respondent approached Adeniyi J to commence the instant matter the twelve year limitation prescribed under Section 16 (2) of the limitation law of state has expired.

Learned respondent's counsel opined to the contrary. He submits that time does not run during the pendency of the appeals pursued by the appellants against the judgment of Adeyinka J. The lower court at pages 358 - 360 per Oseji JCA, found merit

in the respondent's argument on this issue and held:-

> **"I have carefully perused the record of appeal with particular reference to the time interval between the original judgment of Olorunnimbe J. delivered in 1998 the Ruling of Adeyinka C.J. granting the order of possession ex parte in 19- 4-2004; the judgment of this court delivered on 5-4-2013 as well as the originating summons initiating the instant suit and unfortunately failed to observe any justification for the appellant's stance that the action for recovery of possession subsequently filed on 17-6-13, two months after the decision of this court setting aside an earlier decision of the lower court simply on the ground that the appellant ought to be put on notice is caught by the statute of limitation.**
>
> **What is more, it is on record that the said appellant sought to be joined in the application ex parte for possession in No. ID/339/88 but this was refused by the lower court which in its wisdom found that there was no need for such joinder given that the defendant therein was sued in a representative capacity which duly covered the interest of the appellant and the application was brought after judgment had been delivered. There was never an appeal against the said ruling. The respondent had earlier in the main suit sought also to join the appellant who opposed same successfully even though he continued to build on the land.**
>
> **On the whole it is my humble view that the respondent from the onset never slept over his right of action to recover possession of**

the land in dispute as per the order of the lower court to justify the claim that the instant suit is statute barred given that no interval between one suit/application on the other spanned more than two tears as against the 12 years limitation period prescribed by section 16 of the limitation Law of Lagos State.

The appellant had also challenged the holding of the lower court that the pendency of the appeal in this court between 2006 and 2013 and the grant of stay of execution by the lower court put the time for the respondent to exercise his right of action for recovery of possession in abeyance.

I indeed cannot but agree with the stance of the lower court given that the time lag between when the appellants filed the appeal in 2006 and when judgment was delivered on 2013 is not within the control of the respondent."

I cannot agree more with the lower court. The principle indeed is that limitation period against a suit abates as long as the matter is pending before a court. A matter is said to be pending in court when any proceeding can be taken in it.

In **KASSIM. Vs. HERMAN EBERT (1966) (Vol. 4) NSCC; (1966) ALL NLR 54; (1966) NWLR 75 at 76,** the issue before this court was whether a suit brought within time and struck remains a pending cause that can be relisted without being caught by limitation time. The plaintiff had sued for a debt before it was statute barred. Unable to file his statement of claim, his counsel obtained an order striking out the claim with liberty to apply for relisting without payment of further summons fess. Order to relist was subsequently sought and obtained. The defendant objected on appeal that when the suit was relisted the claim, then being more than six years old, had become statute barred and could not be revived. The judge, learned counsel to the defendant contended, could not have the suit relisted. In dismissing the defendant's appeal the court inter-alia held:-

"When therefore the learned judge on 31st May, 1963 ordered that the case be struck out with liberty to apply for it to be relisted, the case, in our view, still subsists until an order is made for it to be put on the hearing or case list. It is our view therefore that it is a pending cause which has been relisted in this case. As Lord Jessel, M.R., put it in Re Clagett's Estate, Fordham Vs. Clagett (1882) 20 Ch.D. 637 at 653, 'A cause is said to be pending in a court of justice when any proceeding can be taken in it. That is the test. If you can take any proceeding it is pending.

We therefore find it difficult to see how the claims can be said to be statute barred, and we think the learned trial judge was right to

have rejected this plea."

We are bound by the foregoing.

In the instant case, appellants have argued that respondent's suit No. 10/446/2013 commenced outside the statutory period, is statute barred. We must recall that so soon after the judgment in suit 10/339/88 in favour of the respondent, a decision held earlier in this judgment to bind the appellants, the respondent filed a suit before Adeyinka J to recover possession of the land in dispute.

The appellants, whose application to be joined to the respondent's suit for the recovery of possession was dismissed, felt aggrieved with Adeyinka J's judgment that

ordered possession in respondent's favour, appealed against the decision. After almost seven years of filing their appeal, Adeyinka J's judgment granting possession to the respondent, following appellants' success in their two appeals, was nullified by the Court of Appeal. The court held that the appellants, having been excluded from the proceedings before Adeyinka J, were not accorded fair hearing.

The suit that brought about the instant appeal was filed so soon after the two appeals wherein the lower court nullified the decision of Adeyinka J. The two courts below concurrently found that during the pendency of the appeals against Adeyinka J's judgment, time against the respondent's suit for recovery of possession had ceased to run. Authorities on the issue do not support appellants' plea that the instant suit be struck out because same has been caught up by statutory limitation. Appellants have failed to demonstrate that the concurrent decisions of the two lower courts are perverse.

Accordingly their 2nd issue is also resolved against them.

WAS THE INSTANT SUIT PROPERLY COMMENCED BY ORIGINATING SUMMONS?

I entirely agree with learned counsel to the respondent that the instant suit has been properly commenced. The issue in the suit does not raise any conflict of facts such that pleadings would be ordered for the purpose of calling oral evidence to resolve such conflict. The simple task before the trial court was the construction of Olorunnimbe J's judgment in deciding whether or not the respondent was entitled to the possession of the land he was declared to be the owner. Authorities on this are legion. Both sides in the appeal have appositely cited many making it needless to further dwell on the point.

In resolving the last issue against the appellants too, I find no merit in the appeal and hereby dismiss same. I affirm the concurrent decisions of the two courts below. Respondent is entitled to costs put at N500,000.00k (Five hundred thousand naira) payable by the appellants.

Musa Dattijo Muhammad, Justice, Supreme Court.

MARY UKAEGO PETER-ODILI, (JSC): I am in agreement with the judgment just delivered by my learned brother, Musa Dattijo Muhammad JSC and to register the support I have in the reasonings from which the decision was arrived at, I shall make

some comments.

This is an appeal from a decision of the Court of Appeal or lower court or court below, Lagos Division, Coram: Samuel Chukwudumebi Oseji, J. B. Nimpar and J. Y. Tukur JJCA which allowed the appeal in part, setting aside the consequential order of the trial High Court per Adeyinka

BACKGROUND FACTS:

The facts of this suit are that on the 23rd of March 1998, the High Court of Lagos State, Ikeja Division as per Olorunnimbe, J. (as he then was) delivered a judgment in Suit No. ID/339/88 in favour of the respondent (as plaintiff) against one Chief Jimoh Arowolo in

a representative capacity (as defendant) who also defended same in a representative capacity as contained at Pp.9-15 of the record of appeal as follows:-

i) **A declaration of Statutory Right of Occupancy over the land in dispute which is contained in the Survey Plan attached to the Deed of Conveyance dated 23/3/1978 and registered as No. 60 at page 60 in volume 1715 of the land registry in the office at Lagos.**
ii) **Award of damages in the sum of N50,000.00.**
iii) **An order restraining the defendant whether by himself, his servants, agents and privies from further acts of trespass and or disturbing the plaintiff or otherwise interfering with the plaintiff's right over the land.**

Whilst the aforesaid suit was under trial at the High Court of Lagos State, Ikeja Judicial Division, the respondent (as plaintiff) discovered that the 1st appellant (then a defendant at the lower court) was constructing a building on the land in dispute.

The 1st appellant haven destroyed the plaintiff's (now respondent's) structures on the land in dispute, the respondent (then plaintiff) then sought a court order to join the appellant in the suit but he registered. Meanwhile, the 1st appellant continued the building being constructed on the land in dispute despite an order of Interlocutory Injunction ordered by the trial court on the 15th June 1988, vide page 14 of the records of appeal, which the 1st appellant ignored and disrespected.

It is also during the pendency of the aforesaid Interlocutory Injunction that the 1st appellant and his wife (Mrs. Adisa Adeogun) split the parcel of land into two portions and obtained the Certificates

of Occupancy at PP.64-78 of the records of appeal; in disregard to the said Inter-locutory Injunction mentioned above.

After the judgment in respect of the reliefs contained in paragraph 1.01 (i), (ii). (iii) above was delivered in favour of the respondent, the 1st appellant by an application dated 10th October 2000 before Hon. Justice A. F. Adeyinka (as he then was) of the Lagos State High Court, sought to be joined as a second defendant to the already concluded suit No. ID/339/88 in which judgment was delivered on the 23rd April 1998, the aforesaid application for joinder was on the 19th November 2002, dismissed by the Honourable

Justice Adeyinka, on the grounds that the 1st appellant was bound by the judgment in the said Suit No. ID/339/88 which had been instituted against Chief Jimoh Arowolo (the 1st appellant's predecessor-in-title) in a representative capacity, which was also defended by Chief Jimoh Arowolo in that capacity, vide Pp.16-23 of the records of appeal.

On the 19th of April 2004, Hon. Justice A. F. Adeyinka gave a consequential order for possession of the aforesaid parcel of land to the respondent (then plaintiff) consequent upon the judgment delivered by Olorunnimbe J. on the 23rd of March 1998,

in the said Suit No. ID/339/88. This was because the plaintiff did not originally include "possession" in the writ of summons, vide Pp.24- 25 of the records of appeal.

At Pp.130 to 135 of the records of appeal, containing the appellants' prayers for the stay of execution of the consequential order of possession made by Hon. Justice Adeyinka on the 19th April 2004, also granted by Hon. Justice O. A. Williams of the Ikeja Division of the High Court on 12th July 2004.

In reply to paragraphs 1.8 and 1.9 of the appellants' brief of argument, it is not in dispute that the 1st appellant and his wife, Mrs. Adisa Adeogun appealed against the ruling of the Hon. Justice Adeylnka of 19th April 2004 through Appeals Nos. CA/L/579/06 and CA/L/578/06, the grounds of appeal thereon whereas said above, strictly based on the consequential order of possession granted to the respondent by the honourable court on 19th April 2004, and not the substantive judgment of Olorunnimbe, J. aforesaid.

Even though the Court of Appeal gave judgment in favour of the 1st appellant and his wife in both appeal i.e. CA/L/579/06 and CA/L/578/06, the Court of Appeal merely set aside the consequential order of possession as per the prayers of the appellants without more.

On the 22nd October, 2019 date of hearing, learned counsel for the appellants, Mrs. G.O. Alabi adopted the brief of argument settled by Seyi Sowemimo SAN and filed on 17/11/2015 and a reply brief filed on 8/3/2016. For the appellant, three issues were raised for determination which are thus:-

1. **Whether the appellant is bound by the decision of Olorunnimbe J. in Suit No. ID/339/88.**
2. **Whether the action by the plaintiff against the respondent is statute barred.**
3. **Whether the action was properly instituted by way of originating summons.**

Learned counsel for the respondent, Oladele Ajikanju adopted his brief of argument filed on 18/1/2016 and identified three issues for determination which are as follows:-

(i) Whether or not the subsisting Judgment of the High Court of Lagos State delivered by Olorunnimbe J. in Suit No. ID 1339/88 on 23rd April 1998 is binding on the appellants despite the Court of Appeal decisions in Appeals Nos.

CA/579/06 and CA/578/06 delivered on 5th April 2013 and 4th February 2014 respectively?

(ii) Whether or not Suit No. ID/446M/2013 ought to have been commenced by originating summons when the subsisting judgment of Olorunnimbe, J. aforesaid in Suit No. ID/339/88 was never appealed against by the

appellant?

(iii) Whether the action of the respondent in Suit No.ID 44M/2013 is statute barred (Underlining mine)

The issues on either side are really similar though craftly differently and so which ever used, would come to the same point. For ease of reference, I shall utilise the three formulated by the appellants and altogether.

ISSUES 1-3:

i. Whether the appellant are bound by the decision of Olorunnirnbe, J. in suit No. ID/339/88.

ii, Whether the action by the plaintiff against the respondent is statute barred.

iii. Whether the action was properly instituted by way of originating summons.

For the appellants, it was submitted that the court below was not correct in holding that the appellants were technically party to the suit before Olorunnimbe J. because the defendant in that suit was sued in a representative capacity and he defendant defended the suit in that capacity. He stated that the appeals in CA/L/578/06 and CA/L/579/06 were in substance appeals against the judgment of Adeyinka J. That the substance of both appeals was that Adeyinka J. was wrong in holding that the 1st appellant and his wife were bound by the judgment of Olorunnimbe J. in a representative capacity and therefore disentitled from opposing the respondent's ex-parte application for recovery of possession.

Learned counsel for the appellants stated on that the court below failed to appreciate the full import of the refusal by Olorunnimbe J. to join the appellants to the proceedings in the case before him. The practical effect of which ruling was that the 1st appellant was not a party to that suit and could not be thereafter heard in relation to those claims or be bound by the judgment therein as he was not before the court. Also that he could not be treated as a party thereafter and so the court lacked the competence to investigate any allegation against him. He cited **Yusuf Vs. Obasanjo (2005) 18 NWLR (Pt.956) 96; Babatola Vs. Aladejana (2001) 12 NWLR (Pt.728) 597 at 615.**

On the issue of the limitation of action, learned counsel for the appellants contended that the time stated to run against the appellant once Olorunnimbe J. refused the joinder at the High Court by which date the respondent was aware of the adverse claims of the appellants to the land in dispute but chose not to pursue them by a separate suit. He cited **Homfray Vs. Scroope (1849) QD 509, Smith Vs. Hill (1746) 1 Wlls 134; Ogbah**

Vs. Bendel Divisional Union (2001) FWLR (Pt.63) 25 at 44; Ojo Vs. Banjo (1979) 2 LRN 396; Williams Vs. Williams (2008) 10 NWLR (Pt.1095) 364.

That as a rule, a person cannot be added as a defendant or substituted as a party to the suit after the expiration of the limitation period. He relied on Lucy Vs. W. T.

Henley's Telegraph Works Co. Ltd. (1920) 1 QB 393; Kamouh Vs. Associated Electrical Industries International Ltd. (1980) QB 199 and Lift Vs. Peasley (1980) 1 All ER 623.

Learned counsel for the appellants submitted that the court below erred in law in upholding the originating summons procedure adopted by the respondent in initiating the suit as there were clear contentious matters which need resolution by oral evidence. He cited **Keyamo Vs. House of Assembly Lagos State (2002) 18 NWLR (Pt.799) 605 at 613;** Order 53 of the High Court Rules.

That the issues raised in the rival contentions of the parties could not have been properly resolved on the basis of an originating summons when the appellants did not testify in the case before Olorunnimbe J. as they were not a party thereto and so the holding that they were bounded by that judgment and the failure by the court to call oral evidence in the present case is a denial of appellants' constitutional right to fair hearing.

Canvassing the position of the respondent, learned counsel submitted that it is clear that the appellants' appeal in Nos. CA/L/579/06 and CA/L/s78/06 were based purely and strictly on the ruling of the court delivered by Adeyinka J. on the 19th April 2004 granting possession to the respondent, consequent upon the judgment of Olorunnimbe J. in Suit No. ID/339/88 delivered on the 23rd of April 1998.

That it is germane that the judgments of the court below in CA/L/579/06 and CA/L/578/06 only set aside the ruling of the High Court of Lagos per Adeyinka J. That nowhere in the said judgments of the lower court was the judgment of Olorunnimbe J. in Suit No. ID/339/88 set aside nor interfered with by the Court of Appeal. Therefore the subsisting judgment of the High Court put in abeyance during the pendency of appeals CA/L/579/06 and CA/L/578/06 and the order for stay of execution.

It was further submitted that the action in Suit No. ID/339/88 at the Lagos High Court per Olorunnimbe J. was instituted against Chief Jimoh Arowolo in a representative capacity which he also defended in that capacity. Also that the 1st appellant and wife were privies of Chief Jimoh Arowolo and these seen in the record where Femi Adeniyi J. of the High Court of Lagos in Suit No, ID/446M/13 made reference thereto.

He contended that it is apparent that the appellants did not appeal the judgment of Olorunnimbe J. nor was the fact that they were not aware of the respondent's action in Suit No. ID/339/88 from the onset up to the subsisting judgment of the court disputed. Also that appellants chose to deliberately ignore same, plus be in contempt of an interlocutory injunction ordered against them.

That the originating summons procedure utilised before Olorunnimbe J. was proper in the resolution of the dispute between the parties.

That the judgment delivered by Olorunnimbe J. on 23rd April 1998 was never appealed against by the 1st appellant and which judgment remained intact all along but

merely put in abeyance by the 1st appellant and his wife (Mrs. Adeogun) at the time they appealed the consequential order of possession by Adeyinka J. on 19th April 2004 though Appeals Nos. CA/L/579/06 and CA/L/578/06 which were followed by an order

of stay of execution of the said order of possession.

That Section 16 (2) (a) of the Lagos State Limitation Law, 2003 did not apply to Suit No. IO/446M/2013 which is not statute barred.

In summary, the appellant's counsel contends that both courts below predicated their judgments on the basis that the 1st appellant and his wife were parties to the suit before Olorunnimbe J. and Adeyinka J. in a representative capacity as can be seen in the judgments delivered in Suit Nos. CA/L/579/06 and CA/L/578/06. That the facts instead establish that the latest action before Femi Adeniyi was clearly statute barred and mis-conceived and wrongly decided.

On the other hand, the respondent's position is that the appeal is unmeritorious and the concurrent judgments of the two lower courts should be affirmed.

It is not farfetched to see that the appellants' appeals in Nos. CA/L/579/06 and CA/L/578/06 were based on the ruling of the High Court per Adeyinka J. of the 19th April 2004 granting possession to the respondent sequel upon the judgment of Olorunnimbe J. in Suit No. 10/339/88 delivered on the 23rd of April 1998.

Of note is that the judgments of the Court of Appeal in CA/L/579/06 and CA/L/578/06 only set aside the ruling of the High Court of Lagos State delivered by Adeyinka J. only and no other. Therefore, the judgment of Olorunnimbe J. was not part of the appeals aforesaid and so that High Court judgment of Olorunnimbe J. remained subsisting and untouched by the appeals.

Again not in dispute is that the action in No. ID/339/88 of Lagos High Court before Olorunnimbe J. was commenced against Chief Jimoh Arowolo in a representative capacity and defended in that capacity with the 1st appellant and wife who were privies of Chief Jimoh Arowolo. That point was highlighted in the record of appeal at pages 267/270 wherein Justice Femi Adeniyi of the Lagos State in her judgment in Suit No. ID/446M/13 as seen particularly at pages 266 and 267 stated thus:-

> **"I can distil from the facts and contents of the exhibits attached to the affidavits that the defendants are allegedly in occupation of land over which the claimant had been adjudged owner in Suit No. IO/339/88 between the claimant herein and one Chief Jimoh Arowolo who was sued as representative of the Olarokun Family. The 1st defendant and his wife had purchased land from the Olarokun family as evidenced by Exhibits CA3 and CA4 had obtained their respective certificates of Occupancy on the 15th day of May 1995 and 20th day of May 1995 *Exhibits CA1 and CA2 during the pendency of Suit No. ID/339/88.**
>
> **The 1st defendant was very well aware of the pendency of Suit No. ID/339/88 as the claimant had unsuccessfully applied to join him as a defendant to that action in March 1993 (Exhibit AOA6). He**

however, chose to oppose the joiner and the court upheld his objection. After judgment had been entered for the claimant in Suit No. 10/339/88, and upon the claimant's application in that suit for an order of possession, ex-parte, the 1st defendant and his wife applied to be allowed to be heard on the ex-part application but their application were refused. They both appealed against the decision. The 1st defendant's appealed was successful in Appeal No. CA/l/579/06 but his wife's appeal in Appeal No. CA/l/578/06 was yet to be determined". Furthermore, in upholding the aforesaid judgment of the High Court of Lagos State delivered by Femi Adeniyi, J. in Suit No. ID/446Ml/2013, Oseji, JCA in Appeal No. CA/L/457/2014 at pp.347 to 376 of the records of appeal, particularly at Pp.349-350, held: "The appellant's case was that he and his wife purchased two plots of land measuring 456.928 sq. metres and 517 sq. metres respectively at Olayiwola Street, Oko-Oba, Agege, Lagos from the Iloti-Onlkosi family branch of the Ola-Arokun family vide receipts of purchase. They subsequently obtained certificates of occupancy on each of the two plots of land. One in his name and the other in the name of his wife Alhaja Ajoke Adisa Adeogun in 1995. A two storey building of the six flats was erected by them on the wife's land with the C of O No.11/11/1995Q dated 20/6/1995 in the name of his wife. Sometime in 1998, the respondent obtained a judgment for declaration of title against one Chief Jimoh Arowolo in Suit No. ID/339/88.

The respondent had sought to join the appellant as a patty in the said suit but the application was refused. Based said judgment in ID/339/88 respondent by a motion ex-parte sought for and obtained an order for recovery of possession of the two plots of land. The appellant and his wife filed separate notice of appeal against the said order which appeals were allowed by this court on the ground that the respondent ought to have put the appellant on notice. The respondent then filed the originating summons seeking to recover possession of the plots of land".

It is clear that the judgment of Olorunnimbe J. was not appealed even though the appellants were well aware of the judgment which they ignored alongside the interlocutory injunction ordered against them. Also to be said is that the execution of the ruling of Adeyinka J. granting possession to the respondent was put in abeyance during the pendency of Appeals CA/L/579/06 and CA/L/578/06 and the stay of execution of the ruling of Adeyinka J. The facts explained why the judgment of Olorunnimbe J. put in abeyance pending the outcome of the appeals CA/L/579/06 and

CA/L/578 so as not to confuse issues.

It is apparent that the narrative pushed forward by the appellants who had appealed the judgment in Suit No. ID/339/88 and the fact that nothing has been shown in the appeal herein to the contrary to change the status of the judgment of Suit No. ID/446M/2013 and the Court of Appeal judgment now appealed against which along with what came out of the high court judgment appealed at the court below became concurrent findings and judgment of two courts below.

The situation of those concurrent judgments take the mind of the court to the policy stance of this court, which is that when concurrent findings of facts of two lower courts are presented as at now, this court or any appellate court for that matter is loath to interfere with those findings of fact. That attitude stands rock solid and the appellate court including this apex court would only make an exception upon the show of special circumstances such as there being a miscarriage of justice or serious violation of some principles of law or procedure or the findings are erroneous like error in substantive or procedural law. See **Chief Jacob Cleopas Biariko & Ors, Vs. Chief A. M. Edeh-Ogwuile & Ors, (2001) 4 SC (Pt.11) 96 at 116-117** per Onu JSC.

In fact what the appellants are seeking to get this court to enter into is what clearly is outside the realm of this appeal. Firstly, nowhere in the judgments in Appeal CA/L/578/06 and CA/L/579/06 did the Court of Appeal interfere with the judgment of Olorunnimbe J. in suit No. ID/339/88 and any way, the Court of Appeal could not since the grounds of appeal did not contain any such grievances and follow up reliefs. The implication is that this court cannot through any back door style go into such matters which were neither before the court below nor could have travelled herein. This is because the general rule is that issue or issues for determination must relate to or be derived from a ground or grounds of appeal otherwise they would be incompetent and liable to be discountenanced or struck out. Hence Appeals CA/L/578/06 and CA/L/579/06 confined their judgments in those appeals to only what came out from the grounds of appeal. See **Shell PDC Nig. Ltd Vs. Edamkue & Ors, (2009) 6-7 SC 74 at 86.**

The appellants are urging this court to accept that the respondent as plaintiff in Suit ID/339/88 did not seek prior court order to sue the defendant in a representative capacity and so the appellants could therefore not be bound by the judgment that came out from that suit. That position of the appellants is well out of place as the court cannot strike out or dismiss an action or render the outcome of a judgment or ruling of no effect and upset the judgment merely because leave was not obtained to sue in a representative capacity. In other words, failure to obtain the leave of court to sue in a representative capacity is not fatal so as to vitiate the proceedings. See **Dr. Augustine Mozie & 6 Ors, Vs. Chike Mbamalu & 2 Ors. (2006) 7 SC (Pt.11) 154 at 163; Oyewole Vs. Lasisi (2000) 14 NWLR (Pt.687) 342.**

On whether Suit No. LD/446M/2013 ought not to have been commenced by originating summons when the subsisting judgment of Olorunnimbe J. in suit No. 10/339/88 was not appealed against by the appellants.

It is recalled that the court below in tackling the appeal before it had summarized the facts in contention in Suit No. ID/339/88 and held that the appellants were parties to the said suit and so bound by the judgment of Olorunnimbe J, which judgment was kept in abeyance while the appeals of the same appellants in CA/L/578/06 and CA/L/579/06 against the order of possession granted to the respondent by Adeyinka J. as well as the stay of execution of the order by Justice O. A. Williams. That court below had held that the prayers of the respondent seeking enforcement of the judgment of Olorunnimbe J. in ID/339/88 was not contentious and that the respondent had correctly commenced suit No. ID/446M/2013 to enforce the judgment of Olorunnimbe J. by way of summary proceedings for possession within the law in question under Order 53, rules 3 (a) (b) and (c) of the Lagos State (Civil Procedure Rules 2012 which in short is originating summons procedure, needing no issuance of a writ of summons.

The following judicial authorities seem to have the current one in mind in regard to the appropriateness of the suit under originating summons procedure. See the case of Festus Keyamo Vs. House of Assembly Lagos State and Ors, (2002) 12 SC (Pt.I) P.190 at P.191, where it was held that" the law is well settled that originating summons may be employed to commence an action where the issue involved is one of the construction of a written law, instrument, deed, will or other document or some question of pure law is involved or where there is unlikely to be any substantial dispute or issues of fact between the parties". This decision was again affirmed by the Supreme Court in the case of **Hon, Justice Raliat- Elelu - Habeeb & Anor Vs. Attorney General of the Federation & 2 Ors, (2012) 2 SC. (Pt.1) 145 at PP.211/212** per M. Mohammed JSC (as he then was) thus:-

> **"The law is indeed well settled that originating summons procedure for initiating action is not suitable and therefore not available for action involving hostile proceedings where the facts are seriously in dispute as the case in Adebayo Doherty and Anor. Vs. Richard Ade Doherty (1968) NMLR 241. This court has decided in many cases some of which are Keyamo Vs. L.S.H.A (2002) 12 SC (Pt.1) 196; (2002) 18 NWLR (Pt.799) 605 at 613 and Pam Vs. Mohammed (2008) 5-6 SC (Pt.1) 83; (2008) 16 NWLR (Pt.1112) 1 at 51, that originating summons can be used in matters that involve the interpretation of contracts, documents, Constitution and other statutes where matters or facts are not in dispute."**

The Supreme Court went on in Elelu-Habeeb Vs. A. G. Federation (supra) per Mohammed JSC (as he then was) thus:-

> **"In the present case, the real issues raised are centered around the interpretation of the provisions of the 1999 Constitution**

> **prescribing the procedure for exercising disciplinary proceedings dealing with the exercise of powers under the same constitution to remove a Chief Judge of a state from office. I entirely agree that the two courts below were on very firm ground that the action at the trial court was correctly, and rightly began by originating summons procedure."**

In respect of the question as to whether respondent's suit in ID/446M/2013 is statute barred and the simple answer is that the suit is not statute barred. The reason is that the judgment of Olorunnimbe J. of 23/4/1998 was deliberately kept in abeyance by the 1st appellant and his wife at the time they pursued their appeal against the consequential order of possession by Adeyinka J. on 19th April 2004 though the much talked of Appeals CA/L/579/06 and CA/L/578/06, followed by the stay of Execution Order.

Therefore the computation of time within which the respondents instituted suit No. ID/446M/2013 to enforce the judgment of Olorunnimbe J. was after the conclusion of Appeal No. CA/L/579/06 on 5th April 2013. It is wrong of the appellants to seek to change the historical journey of the suits so as to hamper the progress of the respondent which by appellants action was kept in the cooler to await the outcome of the appeals. The Court of Appeal was correct when it held that the cause of action in suit No. ID/446M/2013 was correct when it held that the cause of action in suit No. ID/446M/2013 was commenced only after the removal of the bar placed on the respondents right of action to enforce the judgment of Olorunnimbe J. delivered on 23/4/1998.

Some judicial authorities dealing with the subject on cause of action would be helpful for use here.

In the case of P. N. Udoh Trading Company Ltd. Vs. Sunday Abere & Anor. (2001) 5 SC (Pt.11) 65, the Supreme Court held thus :-

> **"Cause of action has been defined by courts to mean a combination of facts and circumstances giving rise to the right to file a claim in court for a remedy. It includes all those things which are necessary to give a right of action and every material fact which is material to be proved to entitle the plaintiff to succeed. See Patkun Industries Ltd Vs. Niger Shoes Ltd (1988) 12 SC (Pt. ii) 1; (1988) 5 NWLR (Pt.93) 138; Ibrahim Vs. Osim (1987) 4 NWLR (Pt.67) 965; Bello Vs. A. G. Oyo State (1986) 5 NWLR (Pt.45) 828. The cause of action arises as soon as the combination of the circumstances mentioned above accrued or happened, and it is the act on the part of the defendant which gives the plaintiff his cause of complain".**

In the case of **Elabanjo & Anor. Vs. Dawodu (2006) 6-7 SC P.24 at P. 43** which is on all fours with the case of Udoh Trading Company Ltd. Vs. Sunday Abere & Anor. supra,

it was held at P. 43 **that** "Cause of action had been defined by courts to mean a

combination of facts and circumstances giving rise to the right to file a claim in court for remedy. It includes all things which are necessary to give a right of action and every material fact which has to be proved to entitle the plaintiff to succeed". (Underlining mine).

The question as to respondent's action being statute barred does not arise in the circumstance and is resolved against the appellants. In all this appeal has no leg to stand on and that from the foregoing and the better reasoned lead judgment, I dismiss this appeal as I abide by the consequential orders made.

Mary Ukaego Peter-Odili
Justice, Supreme Court

JOHN INYANG OKORO, (JSC): I have had the priviledge of reading the draft of the judgment just read by my learned brother, Musa Dattijo Muhammad, JSC in the appeal. I entirely agree with his conclusion that this appeal be dismissed with cost as assessed in the lead judgment. I have found no reason to differ in the reasoning leading to the conclusion.

I wholly adopt them as mine. The appellant has been unable to show that the concurrent findings of the two lower courts were perverse, therefore this appeal must fail. The appeal is accordingly dismissed by me. I abide by the cost as assessed in the lead judgment.

Appeal dismissed.

John Iyang Okoro *Justice, Supreme Court.*

PAUL ADAMU GALUMJE, (JSC): I have had the advantage of reading in draft the judgment just delivered by my learned brother, MUSA DATTIJO MUHAMMAD, JSC and I agree with the reasoning contained therein and the conclusion arrived thereat. For the same reasoning in the lead judgment which I adopt as mine, this appeal shall be and it is hereby dismissed by me as well. I endorse all the consequential orders made in the lead judgment including order as to costs.

Paul Adamu Galumje,
Justice, Supreme Court

UWANI MUSA ABBA AJI, (JSC): I have had a preview of the reasons for judgment given by my learned brother, M. D. MUHAMMAD, JSC. I agree entirely with the reasoning and conclusions reached therein affirming the concurrent findings of the two lower courts and dismissing the appeal.

On 23/3/1998, the High Court of Lagos State gave judgment in favour of the respondent as plaintiff, who sued one Jimoh Arowolo in a representative capacity as defendant, for a declaration of statutory right of occupancy over the land in dispute. However, no order for possession was made. The 1st appellant who was constructing a

structure in the said land sought to be joined after the delivery of the said

judgment in favour of the respondent. The trial court refused and held that he was bound by the judgment of 23/4/1998, been a predecessor in title. On 19/4/2004, an order for possession was made in favour of the respondent (plaintiff). The 1st appellant therefore appealed the ruling on the order for possession in favour of the respondent. Thus, the appeal was against the grant of consequential order of possession to the respondent and not against the substantive judgment.

ISSUES:

1. **Whether the appellant is bound by the decision of Olorunnimbe J in suit No ID/339/SS.**
2. **Whether the action by the plaintiff against the respondent is statute barred.**
3. **Whether the action was properly instituted by way of originating summons.**

The appellants' appeal is against the concurrent decisions of the two courts below.

This court most often will not ordinarily disturb concurrent finding of facts made by the High Court and the Court of Appeal unless a substantial error apparent on the face of the record of proceedings is shown or when such findings are perverse. Going through the record and the detailed and well-evaluated judgment of my learned brother, it is my conclusion that I have no duty to interfere with the decision of the two lower courts.

I without hesitation dismiss the appeal and equally endorse the order as to costs awarded.

Uwani Musa Abba Aji
Justice, Supreme Court

ABCDEFGH

Judgements of the Supreme Court of Nigeria Law Report
17th January, 2020

OLUWATUYI EBENEZER

Vs.

THE STATE

SC.600 /2016

IN THE SUPREME COURT OF NIGERIA
HOLDEN ATABUJA

FRIDAY, 17TH JANUARY, 2020

BEFORE THEIR LORDSHIPS

MARY UKAEGO PETER-ODILI — **JUSTICE, SUPREME COURT**
MUSA DATTIJO MUHAMMAD — **JUSTICE, SUPREME COURT**
JOHN INYANG OKORO — **JUSTICE, SUPREME COURT**

PAUL ADAMU GALUMJE JUSTICE, SUPREME COURT
UWANI MUSA ABBA AJI JUSTICE, SUPREME COURT

CRIMINAL LAW AND PROCEDURE:- Criminal cases —Proof thereof —Whether lies on the prosecution who must prove its case beyond reasonable doubt —The principle in ***Nweze Vs. The State (2017) LPELR —42344 (SC).***

CRIMINAL LAW AND PROCEDURE:- Identification —Conditions thereto —The principle in ***R Vs. Turnbull (1976) All ER 549.***

CRIMINAL LAW AND PROCEDURE:- Identification —Duty on court thereto —Whether court must satisfy itself that the evidence prove beyond reasonable doubt that the accused before the court was the person who actually committed the offence.

CRIMINAL LAW AND PROCEDURE:- Identification —Where identification is poorly conducted —Whether the trial court should return a verdict of not guilty —The principle in ***Osuagwu Vs. State (2016) LPELR —40836 (SC).***

CRIMINAL LAW AND PROCEDURE:- Identification parade —Essence thereof —Whether to identify that the person charged with the offence is the same person who committed the offence.

CRIMINAL LAW AND PROCEDURE:- Identification parade —How conducted —The principle in ***Alabi Vs. State (1993) 7 NWLR (Pt. 307)511.***

CRIMINAL LAW AND PROCEDURE:- Identification parade —When essential —Relevant considerations thereof.

CRIMINAL LAW AND PROCEDURE:- Identification parade —Where an accused is identified in an identification parade without a previous statement made to the police on the nature of identification —Whether such identification is faulty and cannot be allowed to stand.

CRIMINAL LAW AND PROCEDURE:- Identification parade —Whether identification parade based on scraggy or perfunctory evidence cannot be allowed to stand.

CRIMINAL LAW AND PROCEDURE:- Identification parade —Whether it is not a sine qua non in all cases of identification.

CRIMINAL LAW AND PROCEDURE:- Identification parade —Where identification parade is doubtful —Whether it cannot be the basis for conviction of the accused by a reasonable tribunal.

EVIDENCE:- Circumstantial evidence —Nature thereof —Whether circumstantial evidence required to sustain conviction must be very strong.

EVIDENCE:- Proof in criminal cases —Where the commission of crime is involved in any civil or criminal matter —Whether must be proved beyond reasonable doubt —S. 135 of Evidence Act considered.

PRACTICE AND PROCEDURE:- Judgment writing —Whether there is no hard and fast rule about the judgment writing style of a judge.

Issues for Determination

1. **Were the learned justices of the court below right in pre-judging the main issue, in the substantive suit at an introductory stage of the judgment.**
2. **Was the court below right in its decision that there was no need for an identification parade as PW1 identified appellant alongside the other two accused persons as one of the persons who robbed them as well as unequivocally placed him at the crime scene.**
3. **Was the court below right in affirming the conviction of appellant even when there was no independent evidence linking**

him to the commission of the offence armed robbery.

Fact of the Matter

The appellant and three others were charged at the High Court of Ekiti State on a two count charge of Armed Robbery contrary to Section 1(2) (a) of the Robbery and Firearms (Special Provision) Act, Cap R.11 of the Laws of the Federation of Nigeria, 2004.

It was alleged that the accused/appellant while armed, robbed one Honourable Justice Agbelusi Michael of his valuables in his residence.

At the end of trial, the trial court found the accused guilty as charged. His appeal to the Court of Appeal was dismissed hence this further appeal to the Supreme Court.

Held: *(Unanimously allowing the appeal)*

1. There is no hard and fast rule about the judgment writing style of a judge

It needs be reiterated that there is no hard and fast rule about the judgment writing style of a judge. What is expected is that a judgment contains certain specifics as summary of facts, evaluation of evidence, issues for determina-

tion and reason for the decision, the style in the writing of the judgment is really not important. See Mogaji Vs. Odofin (1978) NSCC 275; Inakoju Vs. Adeleke (2007) 4 NWLR (Pt.1025) 423. ***(P 138 para C - D)***

2. *There was no bias or pre-judgment by the court below*

Everything considered the requirements expected in a valid judgment are present in the case at hand and what the appellant is holding onto to depict bias is clearly a statement taken out of context and even not fully from the text of the very content of what the learned appellate justice said. Indeed, the statement at page 7 of the full judgment is not the evidence of pre-judgment nor was it harmful in the fair hearing rights of the appellant as all the requirements of a proper and valid judgment were in place. The method or style in judgment writing of the learned leading justice may not be the model to set a proforma but there is not fault about it, when the full text of what the judge said is taken into consideration.

I agree with learned attorney general for the respondent that it is much ado about nothing on this issue of bias or pre-judgment on the part of the court below. The issue one is resolved against the appellant. ***(P 138 para D - E)***

3. *Court must satisfy dentify its self on identification of accused*

It is well settled in law that whenever a court is faced with identification evidence, it must ensure and be satisfied that the evidence proves beyond reasonable doubt that the accused before the court was the person who actually committed the offence with which he is charged. It is for this important reason

that there ought not to be a doubtful identification of a culprit. ***(P 139 para C - D)***

4. *Identification parade is not a must for identification in all cases*

Though it is known and trite in law that identification parade is not a must for identification in all cases where there has been a momentary encounter with a victim of a crime, especially where there are other pieces of evidence leading conclusively to the identity of the perpetrator of the offence. In the case at hand, there seems to be some missing links from which a rock solid identification can be said to have been made. See Ikemson Vs. The State (1989) 3 NWLR (Pt.110) 455; R Vs. Turnbull (1976) (1976) All ER 549; Maikudi Aliyu Vs. The State (2007) All FWLR (Pt.388) 1123; Alabi Vs. State (1993) 7 NWLR (Pt.307) 511.
(P 139 para D - E)

5. *What conditions to be considered in identification*

See R Vs. Turnbull (1976) All ER 549; Ikemson Vs. The State (supra); Maikudi Aliyu Vs. The State (2007) All FWLR (Pt.388) 1123, to mention a few, that whenever any of these situations occur, it is vital that a proper identification parade takes into account the following:

a. the description of the accused given to the police shortly after the commission of the offence;
b. the opportunity the victim had of observing the accused; and
c. the features of the accused noted by the victim and communicated to the police which marks the accused from other persons. ***(P p141-142 para G - A)***

6. How identification parade is conducted

The circumstances surrounding the identification of the appellant as one of the robbers are such as brought the guidelines enunciated by this court per Onu JSC in Alabi Vs. State (1993) 7 NWLR (Pt.307) 511 applicable. It is as follows:-

> **"This court has so amply demonstrated in the above cases how to conduct effective identification that it cannot be said of the instant case that what indeed was mounted at the identification parade, if at all as held and as evinced in the evidence of PW1, was a spontaneous one carried out at a most auspicious moment and at the earliest opportunity. See Lawrence Ogbodi Obidika Vs. The State (1977) 2 SC 21; Matthew Orimoloye Vs. The State (1984) 10 SC 138 at 142 and Okputu Obiode & Ors Vs. The State (1971) 1 All NLR 35 at 39; Cf. Zekeri Abudu Vs. The State (1985) 1 NWLR (Pt.1) 55; Anyanwu Vs. The State (1986) 5 NWLR (Pt.43) 612 and Mbenu Vs. The State**

> **(supra). It was Philimore, J. in John Smith Vs. Evans (1908) 1 Cr. App. R 203 at page 204 who in an analogous case castigated the police and remarked: "…… such methods as were resorted to in this case make the particular identification nearly valueless and police authorities ought to know that this is not the right way to identify."**
> ***(P 142 para B - E)***

7. Identification parade based on scraggy or a perfunctory evidence cannot be allowed to stand

Clearly a below standard identification process was conducted in this instance as elicited from the testimony of PW1 which brought out the fact that the appellant was not arrested at the scene of crime, rather he was apprehended just like eight others at an uncompleted building under construction

after the PW1 had made a report at the police station. The nine persons were then lined up for the PW1 to identify whoever. This style is below what is expected where a man could through the process be sent to the gallows to await the hangman to execute him at anytime. The grave situation produces the necessity and nothing less than logical thinking based on cogent and admissible evidence in which facts leading to his conviction especially the identification are clearly found and the legal inference carefully drawn. It can hardly be permitted to stand if the evidence is founded on scraggy reasoning or a perfunctory performance which the current situation of a cloudy identification has turned out to be. See Ogoala Vs. The State (1991) 2 NWLR (Pt.175) 509; Ndidi Vs. State (2007) 13 NWLR (Pt.1052) 633; Nwosu Vs. State (1986) 4 NWLR (Pt.35) 348 at 359.
(Pp 142 - 143 para F - A)

8. The nature and purport of S. 135 of Evidence Act, 2011

The guiding section of the Evidence Act is reproduced hereunder and thus:-
Section 135 of Evidence Act, 2011 which provides thus:

> **"If the commission of a crime by a party to any proceeding is directly in issue in any proceeding civil or criminal, it must be proved beyond reasonable doubt" .... The section in (2) further provides as follows: "The burden of proving that any person has been guilty of a crime or wrongful act is, subject to Section 139 of this act, on the person who asserts it, whether the commission of such act is or is not directly in issue in the action". *(P 143 para B - C)***

9. The burden of proof in criminal cases is squarely on the prosecution who must prove its case beyond reasonable doubt

By the above provision of the Evidence Act, it is the duty of the prosecution to prove the guilt of the appellant. The Supreme Court in Nweze Vs. The State (2017) LPELR-42344 (SC) restated the principle of the burden of proof/onus in

criminal cases when it held thus:-

> **"Section 135 (2) of Evidence Act and Section 36 (5) of the Constitution of the Federal Republic of Nigeria 1999 has placed the burden of proof in criminal cases squarely on the prosecution, who must prove its case beyond reasonable doubt and a general duty to rebut the presumption of innocence constitutionally guaranteed to the accused person. This burden does not shift". *(P 143 para D - E)***

10. Reasonable doubt has to be resolved in favour of appellant

In this instance, the conditions in the evidence of the PW1, the absence of the needed corroboration, the shaky identification have propelled the con-

clusion that the prosecution has fallen short of the burden on it thereby producing reasonable doubt which has to be resolved in favour of the appellant. See Ateji Vs. The State (1976) 2 SC 79 at 93-94; Opayemi Vs. The State (1985) 2 NWLR (Pt.5) 101; Njoku Vs. The State (1993) NWLR (Pt.299) 272. ***(P 144 para A - B)***

11. A doubtful identification cannot be the basis of a conviction by a reasonable tribunal

I must emphasize that in a case like this where the identification of the appellant is made without the necessary identification parade, the identification of the accused becomes doubtful and same cannot be the basis of his conviction by a reasonable tribunal. See IKEMSON Vs. THE STATE (1989) LPELR - 1473 (SC) and NDUKWE Vs. STATE (2009) LPELR -1979 (SC). ***(P 144 para E - E)***

12. Effect where identification is poor

In OSUAGWU Vs. STATE (2016) LPELR - 40836 (SC) this court has restated the principle thus:-

> **"It is settled principle under our criminal justice system that where an identification is poor, as in the instant case, the trial court should return a verdict of not guilty unless there is another evidence which goes to show the correctness of such identification."**

In the case at hand notwithstanding the absence of the evidence other than the defective identification of the appellant by PW1, both courts below proceeded to convict the appellant. Concurrent as their findings are, being perverse, this court must interfere and ensure that justice is done. See JAMES AFOLABI Vs. THE STATE (2016) LPELR - 40300 (SC) and AMADI Vs. AG IMO STATE (2017) LPELR - 42013 (SC). ***(P 144 para F - H)***

13. Appellant guilt was not proved beyond reasonable doubt

The contradiction in PWI's evidence renders same unreliable.

In the circumstance of this case, it is wrong of the two courts below to conclude that the prosecution had satisfied the requirement of Section 135(2) of the Evidence Act as well as Section 36(5) of the 1999 Constitution as amended of proving the guilt of the appellant beyond reasonable doubt. ***(P 145 para A-B)***

14. When an identification parade is essential

The law is settled that identification parade is not a sine qua non to a conviction for a crime alleged. However it is essential in the following circumstanc-

es:-

1. **Where the victim did not know the accused before and his first acquaintance with him was during the commission of the offence,**
2. **Where the victim or witness was confronted by the offender for a very short time; and**
3. **Where the victim, due to time and circumstances, might not have had the opportunity of observing the features of the accused.** ***(P 145 para D - E)***

15. Failure to give particulars in a statement before identification parade is fatal

However, for the victim to identify the offender, he must have made statement to the police, stating by what means he will identify the accused. Failure to give particulars with which he will identify the accused before the conduct of the identification parade is fatal to the prosecution's case. See Attah Vs. State (2010) 10 NWLR (Pt. 1201) 190. ***(P 145 para F - G)***

16. The essence of an identification parade

The essence of identification parade is to show that the person charged with the offence is the same person who committed the offence. Where identification parade is poorly conducted, the trial court should return a verdict of not guilty.

A person charged with offence can only be convicted in absence of proper identification parade where there is evidence which goes to support the correctness of the identification. See Archibong Vs. The State (2004) 1 NWLR (Pt. 855) 488.

In the instant case, there is no evidence that the appellant was lined up with other physically similar persons before they were shown to the victim. Also, as my learned brother Peter-Odili, JSC has found out, PWI did not state in writing how the accused person would be identified, before the identification parade. Clearly the identification parade was poor, as such the trial court had no reason to return a verdict of guilt, especially where there is no other evidence in support of the correctness of the identification. ***(P p145 - 146 para G - A)***

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17. Onus on prosecution in criminal case

The prosecution has a bounden duty in all criminal trials to prove its case beyond reasonable doubt especially in a charge of armed robbery such as the present case. In this instance therefore, the prosecution has to establish on this standard of proof beyond reasonable doubt the following requisite ingredients of the offence of armed robbery, thus: a. That there was robbery or series of robberies. b. That the robbery was an armed robbery carried out

with firearms or offensive weapons. c. That the person charged with the offence was one of the robbers or implicated therein. The method of carrying out the proof can be any or a combination of the methods, viz: i. Confessional statement of the accused. ii. Circumstantial evidence linking the accused to the crime iii. Evidence of an eye-witness. See Per PETER-ODILI, JSC in ORISA Vs. STATE (2018) LPELR-43896(SC). ***(Pp 146-147 para H - B)***

18. The nature of circumstantial evidence required to sustain conviction
Although circumstantial evidence can be used to convict an accused person, it must be very strong. The appellant's conviction was founded not on direct evidence but the circumstantial evidence of identification parade. It is salient to state that since the appellant was not previously known by the victim or PW1, the court must apply caution in convicting the appellant on faulty identification. The case of the respondent is fraught with inconsistencies to pin down the appellant as one of those who committed the armed robbery. The courts of this country have consistently held that whenever the case against an accused depends wholly or substantially on the correctness of the identification of the accused which the latter alleges to be mistaken, the judge should warn himself of the special regard for caution before convicting the accused in reliance on correctness of the identification. See Per ONU, JSC in ALABI Vs. STATE (1993) LPELR- 397(SC). ***(P 147 para C - D)***

Representations:
Mazi Afam Osigwe for appellant and with him are Uche Amulu, Abas Sanni Hannatu Bahagu.
Olawale Fapohunda (Attorney General, Ekiti State) and with him are Julius Ajibade DPP, Olufemi Onipede ACLD, Ayodeji Jayeola PLD, Ibironke Odetola PLD for respondent.

MARY UKAEGO PETER-ODILI, JSC (Delivering the lead judgment): This is an appeal against the judgment of the Court of Appeal, Ado-Ekiti Division or court

below or lower court, Coram: Ayobode Lokulo Sodipe, Fatima Omoro Akinbami and Boloukuromo Moses Ugo JJCA, delivered on 29th December, 2015.

Appellant with three other accused persons were arraigned before the High Court of Ekiti State holden at Ado Ekiti on a two count charge contrary to Section 1 (2) (a) of the Robbery and Firearms (Special Provision) Act CAP R.11 of the Laws of the Federation of Nigeria, 2004.

FACTS BRIEFLY STATED:

The particulars of the offences with which appellant and three other accused persons were charged are that on July 15th 2012, while armed with guns robbed one honourable Justice Agbelusi Michael of three Nokia Handsets, a signed cheque of N90,000.00 and then sum of N35,000.00 in his residence at Egbewa GRA, behind Judges Quarters, Off NTA Road, Ado-Ekiti. In proof of its case, the prosecution called three witnesses. The appellant and the three other accused persons gave evidence in their respective defence. Appellant also called one other witness, Tunde Onikoyi (DW5) who was his employer in the building site where he was arrested.

The victim of the crime, honourable Justice Agbelusi Michael testified as PW1. In his testimony, he identified appellant and two other accused persons as the persons who robbed him on the night of the incident. He stated that he saw appellant and 3rd accused vividly when they switched his reading lamp upon entering his room. PW1 had earlier stated that appellant woke him from sleep "with the pistol of his gun". In his words "he tapped me and when I woke up, he gestured to me to keep quiet and pointed the gun at my ear". Please see last paragraph of page 25 of the record. He also stated that reporting to the police, he and some other victims of the robbery were taken by the police to the Ekiti State' University Teaching Hospital (EKSUTH) for treatment. While being taken in a vehicle to the police station after the treatment, the DPO informed the PW1 that some arrests were made.

In his testimony about how he identified appellant and other accused persons, PW1 stated that at the police station many suspects were lined up and a policeman asked him if he could identify those who came to rob him that morning. According to him, "I pointed out the 1st and 3rd accused and those who came to rob me that morning. The cloth they wore that morning was what they had on". See paragraph 4 of page 27 of the record. Continuing his testimony about the identification of the appellant and other accused persons, he stated: "On the 19/9/2012, so many suspects were arraigned. The police organized an identification parade. I and one of my children were asked to identify those who came. The name of that my daughter is Temitope Agbelusi. We identified the 1st - 3rd accused". See page 27 of the record.

Even though PW1, reported the matter to the police at Iyin Police Station, he neither made any statement nor did he describe the appellant to the police prior to the time appellant and others were pointed out to him by the police as suspects. PW1 did not give any description of the appellant to the police shortly after the commission of the offence, nor did he indicate or communicate to the police any features of the

appellant he noted which marked him out from other persons. In fact, PW1 only identified appellant as one of the persons that robbed him after the police had shown him the persons who they arrested in the course of the raid they carried out after PW1 reported the robbery incident to the police. Exhibit A, the statement PW1 made on 16/9/2012 was only made after appellant and other suspects had been shown to him as those who possibly robbed him the day before.

PW1 under cross-examination stated that he went to report to the police around 3am or 6am on the day of incident. PW2 testified that on the day of the incident, some policemen led by Inspector Olorunfemi went to the scene of the incident and arrested some groups of suspects numbering about nine. The appellant was not arrested at the scene of the alleged robbery, but was arrested by the police in the course of a raid in a building beside PW1 house (crime scene) where he was working as a bricklayer and wherein he slept. It was in the police custody that the appellant was fingered as one of the robbers by Pw1.

Appellant denied knowledge of the incident in his extra-judicial statement.

On the 24th day of October 2019 date of hearing, learned counsel for the appellant, Mazi Afam Osigwe Esq. adopted the brief of argument of the appellant filed on 4/10/19 and deemed filed on 24/10/19. In it were distilled three issues for determination, which are thus:-

2. **Were the learned justices of the court below right in pre-judging the main issue, in the substantive suit at an introductory stage of the judgment.**
3. **Was the court below right in its decision that there was no need for an identification parade as PW1 identified appellant alongside the other two accused persons as one of the persons who robbed them as well as unequivocally placed him at the crime scene.**
4. **Was the court below right in affirming the conviction of appellant even when there was no independent evidence linking him to the commission of the offence armed robbery.**

Learned Attorney General of Ekiti State, Olawale Fapohunda Esq. for the respondent, adopted the brief of argument filed on 21/10/2019 and deemed filed on 24/10/2019. He identified three issues for determination, which are stated hereunder, viz:-

1. **Whether the following statement in the lead judgment of the court below on page 227 in lines 14-16 of the record. "The evidence before the court, was overwhelming in pinning the appellant to the robbery in PW1's house" amounts to pre-judging the appeal before it. (Distilled from Ground 1).**

2. **Whether the learned justices of the court below were on solid footing in the law when they held that there was no need for identification parade in this case. (Distilled from Ground 2).**
3. **Whether the learned justices of Court of Appeal's affirmation of the conviction of the appellant based on the evidence on the record is not steadfast, unshakeable, impregnable and unimpeachable in law. (Distilled from Ground 3).**

For ease of reference, I shall make use of the issues as formulated by the appellant.

ISSUES 1, 2 & 3:

1. **Were the learned justices of the court below right in pre-judging the main issue, in the substantive suit at an interlocutory stage of the judgment.**
2. **Was the court below right in its decision that there was no need for an identification parade as PW1 identified appellant alongside the other two accused persons as one of the persons who robbed them as well as unequivocally placed him at the crime scene.**
3. **Was the court below right in affirming the conviction of the appellant even when there was no independent evidence linking him to the commission of the offence of armed robbery.**

Advancing the position of the appellant, learned counsel contended that the court below pre-judged the main issue presented for determination in the appeal when it held at an interlocutory stage of its decision in the lead judgment thus: **the evidence before the court was overwhelming in pinning the appellant to the scene of robbery in PW1's house".** That doing that was prejudicial and warrants a setting aside of the decision as it smacked of bias. He cited **Jadesimi Vs. Okotie - Eboh (1986) 1 NWLR (Pt.264) 22; Adio Vs. A. G. Oyo State & Ors. (2000) 2 SCNQR 752; Obadara & Ors Vs. President Ibadan West District Grade 'B' Customary Court (1964) 1 All NLR 336 at 344** etc.

It was further submitted for the appellant that the identification process in this instance is flawed as an identification parade was called for in the circumstances where there were contradictions in the evidence of PW1 as to the type of light the robbers used as well as whether the light was on or not in PW1's room.

He further submitted that these discrepancies in PW1's testimony created a credibility problem which the courts below should not have glossed over. He relied on

Alhaji Akiba Vs. Opaleye (1974) 11 SC 189 at 403; Ikemson Vs. The State (1989) 3 NWLR (Pt.110) 455.

Mazi Afam Osigwe further submitted that the courts below erred in relying on the unreliable and uncorroborated evidence of PW1 in convicting the appellant. That the respondent had not discharged the burden placed on it by Section 135 of the Evidence Act, 2011 in proof of the guilt of the appellant. He cited **Nweze Vs. The State (2017) LPELR -42344 (SC).**

That the contradictions in the evidence of the prosecution, the faulty identification and many loose ends produced doubts which had to be resolved in favour of the appellant. He cited **Nwosu Vs. The State (1986) 4 NWLR (Pt.35) 348; Njoku Vs. State**

(1993) NWLR (Pt.299) 272; Ateji Vs. The State (1976) 2 SC 79 at 93-94; Opayeni Vs. The State (1985) 2 NWLR (Pt.5) 101.

Learned attorney general for the respondent, Olawale Fapounda Esq. submitted that the appellant is merely raising dust on the judgment writing style of the lead judgment in the court below and that is not what should vitiate the judgment. He cited **Mogaji Vs. Odofin (1978) NSCC 275; Inakoju Vs. Adeleke (2007) 4 NWLR (Pt.1025) 423.**

On the identification issue, the respondent's counsel contended that it is only when the identification of the culprit is in doubt that an identification parade becomes necessary and that is not the case in this instance. He cited **Famuyiwa Vs. State (2017) LPELR - 43836 (SC) P.27; Ikemson Vs. The State (1989) 3 NWLR (Pt.1100) 455.**

For the respondent, the learned attorney general stated that there is indeed a discrepancy in respect of whether the appellant switched one of the lamps on or not and that is not material to affect the substance of the issue to be decided. He cited **Isibor Vs. State (2002) 3 NWLR (Pt. 754) 250; Ahmed Vs. State (2002) FWLR (Pt.90) 1358 at 1385; Ubani Vs. The State (2002) FWLR (Pt.95) 211 at 217.**

That the guilt of the appellant was proved beyond reasonable doubt and nothing has been brought forward for this court to interfere with the concurrent findings and conclusion of the two courts below. He cited **Haruna Vs. State (1990) 6 NWLR (Pt.125) 137; Aminu Tanka Vs. The State (2009) 1-2 SC (Pt.1) 198; Otti Vs.State (1993) 5 SCNJ 143.**

In a nutshell, the stand taken by the appellant is that the Court of Appeal pre-judged the case before delving into the substance of the appeal and the prosecution had failed to prove the case beyond reasonable doubt against the appellant. Also that appellant was not properly identified as one of the persons who robbed PW1.

Going by an opposing route, respondent stated that the evidence adduced by the prosecution correctly fixed the appellant to the commission of the crime and the prosecution discharged the burden of proof beyond reasonable doubt and there is no basis for this apex court interfering with the concurrent findings and conclusion of the two courts below.

The statement in the lead judgment of the court below which appellant's counsel took umbrage about, relating to bias is thus: **" .... the evidence before the**

court was overwhelming in pinning the appellant to the scene of robbery in PW1's house". It was at page 7, line 14-16 of the said judgment.

The version as proffered by the respondent's counsel is that the appellant lifted some part of a statement so as to convey what he portended and that the full text is thus: "I have carefully perused the record of appeal. It is my candid view that the evidence before the court was overwhelming in pinning the appellant to the scene of robbery in PW1's house".

What I see at play is appellant in full steam with the aim of pinning bias on the court below with the statement of the leading jurist as the arrowhead, alongside impugning the judgment writing style of a judge. It needs be reiterated that there is no hard and fast rule about the judgment writing style of a judge. What is expected is that a judgment contains certain specifics as summary of facts, evaluation of evidence, issues for deter-

mination and reason for the decision, the style in the writing of the judgment is really not important. See **Mogaji Vs. Odofin (1978) NSCC 275; Inakoju Vs. Adeleke (2007) 4 NWLR (Pt.1025) 423.**

Everything considered the requirements expected in a valid judgment are present in the case at hand and what the appellant is holding onto to depict bias is clearly a statement taken out of context and even not fully from the text of the very content of what the learned appellate justice said. Indeed, the statement at page 7 of the full judgment is not the evidence of pre-judgment nor was it harmful in the fair hearing rights of the appellant as all the requirements of a proper and valid judgment were in place. The method or style in judgment writing of the learned leading justice may not be the model to set a proforma but there is not fault about it, when the full text of what the judge said is taken into consideration.

I agree with learned attorney general for the respondent that it is much ado about nothing on this issue of bias or pre-judgment on the part of the court below. The issue one is resolved against the appellant.

On whether or not the identification of the appellant as one of the robbers was properly made by the PW1, the evidence would be helpful. At pages 25-26 of the record, PW1 had this to say:-

> **"I know the 1st -3rd accused persons. On the 15/9/2012 while the 4th accused was my driver. On 15th September 2012, a Saturday around 3 am" I was woken from my sleep by the 1st accused with the pistol of his gun, he tapped me and when I woke, he gestured to me to keep quiet and pointed the gun at my ear. Upon their entering, the 1st accused person put on my reading lamp which was very bright so I could see him vividly. None of the 1st -3rd accused wore any mask that morning. They were as they were standing. The 2nd accused person was standing at the door pointing his gun at me and I was wondering that this small boy could be an armed robber. A young boy, charcoal black. The 1st accused put his mouth near my ear and**

> **asked where is your money? Where are your handsets? They say you are a lawyer? I took him to where my valuables are at gun point. As he was collecting it and going about, the 2nd accused stood alert with his gun. He collected a sum of N35,000.00, my handsets and other items. When the 1st accused was done, both the 1st and 2nd accused persons led me out of the room. Upon my coming out of my room was the 3rd accused standing with his gun. None of the accused wore any mask. When I came out of my room, he pushed me up. They led me inside the toilet and locked the door, they went and gather all that were in the house and locked other in the toilet."**

It is well settled in law that whenever a court is faced with identification evidence, it must ensure and be satisfied that the evidence proves beyond reasonable doubt that the

accused before the court was the person who actually committed the offence with which he is charged. It is for this important reason that there ought not to be a doubtful identification of a culprit. Though it is known and trite in law that identification parade is not a must for identification in all cases where there has been a momentary encounter with a victim of a crime, especially where there are other pieces of evidence leading conclusively to the identity of the perpetrator of the offence. In the case at hand, there seems to be some missing links from which a rock solid identification can be said to have been made. See **Ikemson Vs. The State (1989) 3 NWLR (Pt.110) 455; R Vs. Turnbull (1976) (1976) All ER 549; Maikudi Aliyu Vs. The State (2007) All FWLR (Pt.388) 1123; Alabi Vs. State (1993) 7 NWLR (Pt.307) 511.**

The facts as put across by the respondent is that on the 15th July, 2012 at about 3am, the Hon. Justice Michael Agbelusi who later testified as PW1 was woken up by a number of taps on his body by the appellant with a pistol. The appellant quietly whispered into his ears some ferocious orders that he should keep quiet. That appellant was not alone in this nocturnal visit to the bedroom of PW1 as there were two other person in appellant's company and they were not masked. PW1 said there was light all around reflecting in the room where the appellant and his company paid an unholy visit to the home of PW1.

PW1 under the influence of the gun, PW1 surrendered his money, handsets and other items to the assailants. He and his children were locked up and it took the old man and his children about 45 minutes before he could get out of the locked up house. He made straight to the police station to lodge a complaint. He equally went to the hospital for medical attention after the reign of terror unleashed to him. The police effectively swung into action and arrested several people in an uncompleted building close to the scene of crime around 6:30am. He was called by the police to identify the persons who robbed him among several people lined up at the police station. Pronto, he identified the appellant and one other person. The clothes they wore were the very one they put on when he was robbed.

The appellant from his own angle in the narration of the PW1 pointed at some

salient points which are thus:-

1. **Even though PW1, reported the matter to the police at Lyin Police Station, he neither made any statement nor did he in any manner whatsoever describe the appellant to the police prior to the time appellant and others were pointed out to him by the police as suspects.**
2. **PW1 did not give any description of the appellant to the police shortly after the commission of the offence, nor did he indicate or communicate to the police any features of the appellant he noted which mark him out from other persons.**
3. **PW1 only identified appellant as one of the persons that robbed him after the police had shown him the persons who they arrested in the course of the raid they carried out after**

PW1 reported the robbery incident to the police.

4. **Exhibit A, the statement PW1 made on 16/9/2012 was only made after appellant and other suspects had been shown to him as those who possibly robbed him the day before .**
5. **In his examination in chief, PW1 stated that upon 1st and 3rd accused entering his room, 1st accused (appellant) switched on his "reading lamp which was very bright so I could see him vividly" - please see line 1-2 of page 26 of the record.**
6. **Yet under cross-examination by 1st and accused persons' (appellant's) counsel, he stated that "that night, the lamp was put on before I went to bed" - please see page 29 of the record.**
7. **Thus, PW1 gave contradictory testimony about whether the light was left on and whether it was switched on by appellant. He also earlier testified in answer to 3rd accused person's counsel that he sleeps with the light off - please see page 28 of the record.**
8. **The same PW1 who later claimed at page 26 of the record that appellant switched on the reading lamp when he walked into his room, had earlier testified that "I was woken from my sleep by the 1st accused with the pistol of his gun. He tapped me when I woke/ he gestured to me to keep quiet and pointed the gun at my ear".**
9. **In his extra-judicial statement (Exhibit A), PW1 stated, "They used my torchlight which (sic) very bright but they also put on my rechargeable lamp" .**

10. **PW1 further cast doubt or his testimony about light being on in his room on the night of the robber when he stated in answer to appellant's counsel's question that "There was light that day, so there was light all around reflecting in the room",**

Learned counsel for the appellant raised issues of contradictions from the testimony of the PW1, which discrepancies cannot be glossed over or trivialised. It is difficult to ignore these concerns of the appellant in the light of the appellant in the light of the evidence before the court and borne out of the record.

PW1 had testified that he and his daughter, Temitope Agbelusi identified the appellant and the two other accused persons as those who robbed them, she was not called to testify inspite of the vital weight her testimony would have brought to bear in the evidence, firstly as corroborative of PW1's testimony of identification and secondly, to make not obligatory an identification parade. This is so because some factors were present and which this court had stated, make imperative an identification parade. These are as follows:-

a. **PW1 did not know the accused persons before and his first acquaintance with them was allegedly during the commission of the offence;**
b. **PW1 was confronted by the offender for a very short time; and**
c. **Due to time and circumstances, PW1 might not have had the full opportunity of observing the features of the offender.**
d. **PW1 did not make any prior statement to the police describing the appellant prior to the time appellant and others were pointed out to him by the police as suspects.**
e. **PW1 only identified appellant as one of the persons that robbed him after the police had shown him the persons who they arrested in the course of the raid they carried out after PW1 reported the robbery incident to the police.**

See **R Vs. Turnbull (1976) All ER 549; Ikemson Vs. The State (supra); Maikudi Aliyu Vs. The State (2007) All FWLR (Pt.388) 1123,** to mention a few, that whenever any of these situations occur, it is vital that a proper identification parade takes into account the following:

d. **the description of the accused given to the police shortly after the commission of the offence;**

e. **the opportunity the victim had of observing the accused; and**
f. **the features of the accused noted by the victim and communicated to the police which marks the accused from other persons.**

The circumstances surrounding the identification of the appellant as one of the robbers are such as brought the guidelines enunciated by this court per Onu JSC in Alabi Vs. State (1993) 7 NWLR (Pt.307) 511 applicable. It is as follows:-

"This court has so amply demonstrated in the above cases how to conduct effective identification that it cannot be said of the instant case that what indeed was mounted at the identification parade, if at all as held and as evinced in the evidence of PW1, was a spontaneous one carried out at a most auspicious moment and at the earliest opportunity. See Lawrence Ogbodi Obidika Vs. The State (1977) 2 SC 21; Matthew Orimoloye Vs. The State (1984) 10 SC 138 at 142 and Okputu Obiode & Ors Vs. The State (1971) 1 All NLR 35 at 39; Cf. Zekeri Abudu Vs. The State (1985) 1 NWLR (Pt.1) 55; Anyanwu Vs. The State (1986) 5 NWLR (Pt.43) 612 and Mbenu Vs. The State (supra). It was Philimore, J. in John Smith Vs. Evans

(1908) 1 Cr. App. R 203 at page 204 who in an analogous case castigated the police and remarked: "… such methods as were resorted to in this case make the particular identification nearly valueless and police authorities ought to know that this is not the right way to identify."

Clearly a below standard identification process was conducted in this instance as elicited from the testimony of PW1 which brought out the fact that the appellant was not arrested at the scene of crime, rather he was apprehended just like eight others at an uncompleted building under construction after the PW1 had made a report at the police station. The nine persons were then lined up for the PW1 to identify whoever. This style is below what is expected where a man could through the process be sent to the gallows to await the hangman to execute him at anytime. The grave situation produces the necessity and nothing less than logical thinking based on cogent and admissible evidence in which facts leading to his conviction especially the identification are clearly found and the legal inference carefully drawn. It can hardly be permitted to stand if the evidence is founded on scraggy reasoning or a perfunctory performance which the current situation of a cloudy identification has turned out to be. See **Ogoala Vs. The State (1991) 2 NWLR (Pt.175) 509; Ndidi Vs. State (2007) 13 NWLR (Pt.1052) 633; Nwosu Vs. State (1986) 4 NWLR (Pt.35) 348 at 359.**

For a fact, the issue 2 on faulty identification is resolved in favour of the

appellant.

The follow question Issue 3 is whether the prosecution's case has been made out beyond reasonable doubt. In this regard, one calls to mind the statutory provision in that regard of the onus of proof and upon whom it resides.

The guiding section of the Evidence Act is reproduced hereunder and thus:-

Section 135 of Evidence Act, 2011 which provides thus:

"If the commission of a crime by a party to any proceeding is directly in issue in any proceeding civil or criminal, it must be proved beyond reasonable doubt" .... The section in (2) further provides as follows: "The burden of proving that any person has been guilty of a crime or wrongful act is, subject to Section 139 of this act, on the person who asserts it, whether the commission of such act is or is not directly in issue in the action".

By the above provision of the Evidence Act, it is the duty of the prosecution to prove the guilt of the appellant. The Supreme Court in **Nweze Vs. The State (2017) LPELR-42344 (SC)** restated the principle of the burden of proof/onus in criminal cases when it held thus**:-**

"Section 135 (2) of Evidence Act and Section 36 (5) of the Constitution of the Federal Republic of Nigeria 1999 has placed the burden of

proof in criminal cases squarely on the prosecution, who must prove its case beyond reasonable doubt and a general duty to rebut the presumption of innocence constitutionally guaranteed to the accused person. This burden does not shift".

What the respondent had put forward in evidence in discharging the burden of proof has been in the main the testimony of PW1 which is shaky and scanty on the identification apart from the discrepancies in the details he proffered which clearly needed corroboration or even the evidence of that witness, the daughter of PW1 whom he mentioned but was not called as her evidence would have tilted the case either way. All that in the heels of the evidence of PW2 whose testimony in effect confirmed the stance of the appellant whose DW5's testimony was that every person he identified as his worker in the construction site was released including the two accused person, and the appellant.

At the risk of stating the now obvious, the commission of a crime by a person must be proved beyond reasonable doubt and that burden lies on the prosecution and it never shifts.

In this instance, the conditions in the evidence of the PW1, the absence of the needed corroboration, the shaky identification have propelled the conclusion that the

prosecution has fallen short of the burden on it thereby producing reasonable doubt which has to be resolved in favour of the appellant. See **Ateji Vs. The State (1976) 2 SC 79 at 93-94; Opayemi Vs. The State (1985) 2 NWLR (Pt.5) 101; Njoku Vs. The State (1993) NWLR (Pt.299) 272.**

If there was an instance for the intervention or interference of an appellate court on concurrent findings of two courts below, the present case provides the classic in that a miscarriage of justice has taken place as well as a departure from well laid down principles of law guiding procedures in a criminal adjudicatory process.

This third issue is also resolved against the respondent and in favour of the appellant. In all the appeal is meritorious and allowed.

I set aside the judgment of the Court of Appeal which affirmed the decision, conviction and sentence of the appellant and in place thereof, I order the acquittal and discharge of the appellant.

Appeal allowed.

Mary Ukaego Peter-Ooili *Justice, Supreme Court*

MUSA DATTIJO MUHAMMAD, (JSC): My learned brother MARY UKAEGO PETER-ODILI JSC had obliged me a preview of his lead judgment just read. I entirely agree with the reasoning and conclusion therein that the appeal succeeds and it be allowed.

I must emphasize that in a case like this where the identification of the appellant is made without the necessary identification parade, the identification of the accused becomes doubtful and same cannot be the basis of his conviction by a reasonable tribunal. See **IKEMSON Vs. THE STATE (1989) LPELR - 1473 (SC)** and **NDUKWE Vs. STATE (2009) LPELR -1979 (SC).**

In **OSUAGWU Vs. STATE (2016) LPELR - 40836 (SC)** this court has restated the principle thus:-

> **"It is settled principle under our criminal justice system that where an identification is poor, as in the instant case, the trial court should return a verdict of not guilty unless there is another evidence which goes to show the correctness of such identification."**

In the case at hand notwithstanding the absence of the evidence other than the defective identification of the appellant by PW1, both courts below proceeded to convict the appellant. Concurrent as their findings are, being perverse, this court must interfere and ensure that justice is done. See **JAMES AFOLABI Vs. THE STATE (2016) LPELR - 40300 (SC)** and **AMADI Vs. AG IMO STATE (2017) LPELR - 42013 (SC).**

Learned appellant's counsel has further submitted that PW1 is violently contradictory in this evidence. I agree with learned counsel in this regard. The

contradiction in PWI's evidence renders same unreliable.

In the circumstance of this case, it is wrong of the two courts below to conclude that the prosecution had satisfied the requirement of Section 135(2) of the Evidence Act as well as Section 36(5) of the 1999 Constitution as amended of proving the guilt of the appellant beyond reasonable doubt.

It is for the foregoing and the fuller reasons outlined in the lead judgment that I also allow this appeal and abide by the consequential orders made in the lead judgment.

Musa Dattijo Muhammad
Justice, Supreme Court.

PAUL ADAMU GALINJE, (JSC): I have had the privilege of reading in draft, the judgment just delivered by my learned brother, Mary Ukaego Peter-Odili, JSC and I agree with the reasoning contained therein and the conclusion arrived thereat.

The evidence before the trial court shows that an identification parade was conducted in order to identify those who invaded the residence of **PWI** and robbed him of sundry items. The law is settled that identification parade is not a sine qua non to a conviction for a crime alleged. However it is essential in the following circumstances:-

1. **Where the victim did not know the accused before and his first acquaintance with him was during the commission of the offence,**
2. **Where the victim or witness was confronted by the offender for a very short time; and**
3. **Where the victim, due to time and circumstances, might not have had the opportunity of observing the features of the accused.**

However, for the victim to identify the offender, he must have made statement to the

police, stating by what means he will identify the accused. Failure to give particulars with which he will identify the accused before the conduct of the identification parade is fatal to the prosecution's case. See **Attah Vs. State (2010) 10 NWLR (Pt. 1201) 190.**The essence of identification parade is to show that the person charged with the offence is the same person who committed the offence. Where identification parade is poorly conducted, the trial court should return a verdict of not guilty.

A person charged with offence can only be convicted in absence of proper identification parade where there is evidence which goes to support the correctness of the identification. See **Archibong Vs. The State (2004) 1 NWLR (Pt. 855) 488.**

In the instant case, there is no evidence that the appellant was lined up with other physically similar persons before they were shown to the victim. Also, as my learned brother Peter-Odili, JSC has found out, **PWI** did not state in writing how the accused person would be identified, before the identification parade. Clearly the

identification parade was poor, as such the trial court had no reason to return a verdict of guilt, especially where there is no other evidence in support of the correctness of the identification.

With these few words and the more detailed reasoning in the lead judgment of my learned brother, which I adopt as mine, this appeal shall and it is hereby allowed. The concurrent judgment of the two lower courts is hereby set aside and quashed. Appellant is acquitted and discharged forthwith.

Paul Adamu Galumje
Justice, Supreme Court

UWANI MUSA ABBA AJI, (JSC): I had the privilege of reading in draft the judgment of my learned brother, M. U. Peter-Odili, JSC, wherein the appeal was allowed.

The appellant with 3 other accused persons was charged under section 1(2)(a) of the Robbery and Firearms (Special Provision) Act, LFN, 2004. That the appellant with the 3 others on 15/7/2012 armed with guns robbed one Honourable Justice Agbelusi Michael of 3 Nokia handsets, a signed cheque of N90,000.00 and sum of N35,000.00 in his residence at Egbewa GRA, behind Judges' Quarters, off NTA Road, Ado Ekiti. The appellant was not arrested at the scene of the alleged robbery but arrested in the course of a police raid in a building beside PW1's house where he was working as a bricklayer and wherein he slept. Thus, it was in police custody that the appellant was figured as one of the robbers by PW1. In his confessional statement, he also denied knowledge of the robbery incident.

The appellant distilled 3 issues for the determination of his appeal thus:

1. **Were the learned justices of the court below right in pre-judging the main issue, in the substantive suit at an interlocutory stage of the judgment.**
2. **Was the court below right in its decision that there was no need for an identification parade as PW1 identified appellant alongside the other two accused persons as one of the persons**

who robbed them as well as unequivocally placed him at the crime scene.

3. **Was the court below right in affirming the conviction of appellant even when there was no independent evidence linking him to the commission of the offence of armed robbery.**

The prosecution has a bounden duty in all criminal trials to prove its case beyond reasonable doubt especially in a charge of armed robbery such as the present case. In this instance therefore, the prosecution has to establish on this standard of proof beyond reasonable doubt the following requisite ingredients of the offence of armed

robbery, thus: a. That there was robbery or series of robberies. b. That the robbery was an armed robbery carried out with firearms or offensive weapons. c. That the person charged with the offence was one of the robbers or implicated therein. The method of carrying out the proof can be any or a combination of the methods, viz: i. Confessional statement of the accused. ii. Circumstantial evidence linking the accused to the crime iii. Evidence of an eye-witness. See Per PETER-ODILI, JSC in **ORISA Vs. STATE (2018) LPELR-43896(SC).**

Although circumstantial evidence can be used to convict an accused person, it must be very strong. The appellant's conviction was founded not on direct evidence but the circumstantial evidence of identification parade. It is salient to state that since the appellant was not previously known by the victim or PW1, the court must apply caution in convicting the appellant on faulty identification. The case of the respondent is fraught with inconsistencies to pin down the appellant as one of those who committed the armed robbery. The courts of this country have consistently held that whenever the case against an accused depends wholly or substantially on the correctness of the identification of the accused which the latter alleges to be mistaken, the judge should warn himself of the special regard for caution before convicting the accused in reliance on correctness of the identification. See Per ONU, JSC in **ALABI Vs. STATE (1993) LPELR- 397(SC).**

I therefore agree with my learned brother that the identification of the appellant as one of the armed robbers is faulty to convict the appellant of armed robbery. His conviction by the lower court is therefore set aside. He is hereby discharged and acquitted.

Uwan, Musa Abba Aji
Justice Supreme Court

OSAHON NATHANIEL OBAYUWANA *(Beneficiary under the Will of Late Pa. Samson Ewansins Obayuwana)*

MADAM OMOYEMWENSE SUBERU
FELIX IGBINOGHENE
(Executrix and Executor respectively of The Estate of Late Pa. Samson Obayuwana)

Vs.

CHIEF JOHN OSAMEDE ADUN

SC.831/2015

IN THE SUPREME COURT OF NIGERIA HOLDEN AT ABUJA

FRIDAY 24TH JANUARY, 2020

BEFORE THEIR LORDSHIPS

OLUKAYODE ARIWOOLA	**JUSTICE, SUPREME COURT**
JOHN INYANG OKORO	**JUSTICE, SUPREME COURT**
AMINA ADAMU AUGIE	**JUSTICE, SUPREME COURT**
PAUL ADAMU GALUMJE	**JUSTICE, SUPREME COURT**
UWANI MUSA ABBA AJI	**JUSTICE, SUPREME COURT**

PRACTICE AND PROCEDURE:- Appeal —Ground of appeal —Meaning —Whether it is error of law or fact which the appellant relies upon in asking an appellate court to set aside the judgment.

PRACTICE AND PROCEDURE:- Appeal —Ground of appeal —Absence of particulars therein —Where a ground does not contain particulars —Whether such absence will not vitiate a ground of appeal.

PRACTICE AND PROCEDURE:- Appeal —Ground of appeal —An appellate court has no jurisdiction to entertain an appeal filed without jurisdiction —The principle in ***Ukpong Vs. Comm., for Finance (2006) 19 NWLR (Pt. 1013) 187.***

PRACTICE AND PROCEDURE:- Appeal —Grounds of appeal —Classification thereof —Relevant considerations —The principle in ***Dairo Vs. Union Bank (2007) 16 NWLR***

(Pt. 1059) 99.

PRACTICE AND PROCEDURE:- Appeal —Grounds of appeal —Classification thereof —How matters of fact and law are ascertained —The principle in ***Metal Const. W.A. Ltd Vs. Migliore.***

PRACTICE AND PROCEDURE:- Appeal —Grounds of appeal —Classification thereof —Where a party complains that the lower court did not appreciate the evidence of

a party —Whether such ground is a ground of facts or mixed law and fact.

PRACTICE AND PROCEDURE:- Appeal —Grounds of appeal —Classification thereof —Where a party urges an appellate court to investigate fact that led to the award of damages —Whether such a ground constitutes ground of fact.

PRACTICE AND PROCEDURE:- Appeal —Grounds of appeal —Particulars therein —Whether should not be divorced from the main ground —The principle in ***Globe Fishing Ind. Ltd Vs. Coker (1990) 7 NWLR (Pt. 162) 265****.*

PRACTICE AND PROCEDURE:- Appeal —Grounds of appeal —Where a ground involves facts or mixed law and fact —Whether such a ground requires leave before filing.

PRACTICE AND PROCEDURE:- Appeal —Grounds of appeal —Where a ground of facts or mixed law and fact is filed without leave —Whether it robs the appellate court of its jurisdiction.

PRACTICE AND PROCEDURE:- Appeal —Grounds of appeal —Where a ground involves facts or mixed law and fact, leave is required —Rationale for seeking leave —The principle in ***Board of Custom & Exercise Vs. Barau (1982) NSCC (Vol. 13) 358.***

PRACTICE AND PROCEDURE:- Appeal —Grounds of appeal —Where a party does not give particulars in a ground of appeal —Whether it is not in every case that such a ground will be incompetent —The principle in ***Ukpong Vs. Comm. for Finance (2006) 19 NWLR (Pt. 1013)187.***

PRACTICE AND PROCEDURE:- Appeal —Grounds of appeal —Where a party complains of improper evaluation of evidence —Whether it is a ground of fact.

Issue for Determination

Whether the two grounds of appeal are ground of facts or mixed law and fact.

Fact of the Matter

The plaintiff/appellant sued the defendant/respondent at the Edo State High Court claiming some declaratory reliefs and entitlement to the estate of late Pa Samson Ewansing Obayanwana under Benin Native Law(s) custom.

The plaintiff equally claimed special and general damages against the defendant.

At the trial, the appellant called five witnesses while the respondent called two witnesses.

At the conclusion of trial, judgment was given in favour of the plaintiff. The

defendant appealed to the Court of Appeal which reversed the judgment of the trial court. The plaintiff/appellant has now appealed to the Supreme Court.

Held: *(Unanimously striking out the appeal)*

1. *The meaning of a ground of appeal*
The parties have said their own, but what does the law say? The respondent's objection queries the competency of the two grounds of appeal in the appellants' notice of appeal, and it is settled that a ground of appeal consists of error of law or fact, which an appellant sees as a defect in a judgment, and which he relies upon in asking an appellate court to set it aside - see Metal Const. W. A. Ltd. Vs. Migliore (1990) 1 NWLR (Pt. 126) 299. ***(P 161 para A - B)***

2. *Particulars of ground should not be divorce from the main ground*
The appellant must itemize the error or misdirection in the particulars to the ground(s) of appeal. The particulars of error or misdirection should not be independent complaints from the ground(s) of appeal but ancillary to it - see Globe Fishing Ind. Ltd. Vs. Coker (1990) 7 NWLR (Pt. 162) 265 and Nyako Vs. Adamawa State House of Assembly & Ors. (2016) LPELR-41822(SC), wherein this court per M. D. Muhammad, JSC, observed that -

> **The law does not allow a party to divorce the particulars of a ground from the main ground. They are the specifications of errors or misdirection, which show what the complaint against a decision is. To determine whether or not a ground of appeal is relevant to the issue formulated in an appeal, that ground must be read in conjunction with the particulars to make it a complete ground and must be based on the issue in controversy between the parties.**

Thus, in determining its category, the ground of appeal must be construed together with the <u>particulars of error</u>, because its classification as a ground of law, can only give competence to an appeal without leave, if the nature of the misdirection or the error clearly stated in the p<u>articular</u>s, bears out the category

assigned to it - Garuba Vs. Omokhodon (2011) 6-7 SC (Pt. V) 89.
(P 161 para B - E)

3. *Leave is necessary where ground of appeal involves question of facts or mixed law and fact*
So, where the ground of appeal involves questions of fact or of mixed law and fact, leave to appeal must be obtained from the court of appeal or this

court. Failure to obtain the requisite leave renders the appeal filed incompetent - see Garuba Vs. Omokhodon (supra), Irhabor Vs. Ogaiamien (1999) 8 NWLR (Pt. 616) 517, Uchendu Vs. Ogboni (1999) 5 NWLR (Pt. 603) 337 and Akpasubi Vs. Umweni (1982) 11 SC 113, where Eso, JSC, observed:

> **The appellate jurisdiction of this court on question of fact only exists where there has been leave of the Court of Appeal or of this court. No appeal on questions of fact lies to this court without such leave.** ***(P 161 para F - G)***

4. *Effect where ground of facts or mixed law and fact is filed without leave*
In other words, where - - question of facts has been brought before this court without leave, the court has no jurisdiction.

Simply put, this court has no jurisdiction to entertain an appeal on a ground of facts or mixed law and fact unless leave is sought and obtained. *(P 161 para G- H)*

5. *Where an appellate court lacks jurisdiction to entertain an appeal*
Ukpong Vs. Comm., for Finance and Econ. Dev. (supra), wherein Onnoghen, JSC (as he then was) explained -

> **Where an appeal is to be with leave but none was obtained, the condition precedent to validity of such an appeal has not been fulfilled and as a result the appeal is, in law, said to be incompetent and the appellate court is in consequence without jurisdiction to entertain same.**

In this case, the question that rears its head is whether the two grounds of appeal raised in the appellants' notice of appeal are grounds of law, as they said, or grounds of fact or mixed law and fact, as contended by the respondent? I must say that this is not an easy question to answer because there is a very thin line that runs between the said two categories, which makes it difficult to decipher a question of law from a question of fact. ***(P 162 para A - C)***

6. *Rationale for seeking leave where ground is of facts or mixed law and fact*
However, this court has laid down guidelines in numerous cases, which set out parameters, for finding answers to the said question - see Board of Custom & Excise Vs. Barau (1982) NSCC (Vol. 13) 358, wherein this court per Eso, JSC, aptly observed -

> **The Court of Appeal has to decide first, as a matter of law, that a trial court failed to make use of the advantage it has of seeing the witnesses - - before proceeding to substitute as a matter of fact,**

its-own finding made on the printed evidence - - - It is only where there is a wrong application of such facts that a Court of Appeal interferes. Where, however, the Court of Appeal finds as a matter of law that the facts have been correctly applied, if does not interfere. The court does not proceed any further to deal with facts - - This fine distinction is very important for it goes into the jurisdiction, which a Court of Appeal, exercises under the constitution While appeal to the Court of Appeal on the issue of law is as of right, an appeal on the facts is with leave of the court from where the appeal lies or the court to which the appeals lies. - - - Where a trial court fails to apply the facts, which it found, correctly to the circumstances of the case, and there is an appeal to a Court of Appeal, which alleges a misdirection in the exercise of the application by the trial court, the ground of appeal alleging the misdirection is a ground of law and not of fact. When the Court of Appeal finds such application to be wrong and decides to make its findings, such findings made by Court of Appeal are issues of fact and not law. Where the Court of Appeal interferes - - and there is a further appeal to a higher Court of Appeal on the application of the facts, the ground of appeal alleging such misdirection by a lower Court of Appeal is a ground of law and not of fact. It is only where there is an appeal against the finding made by the Court of Appeal in this exercise that issues of fact arise and leave will be required. ***(Pp 162-163 para D - A)***

7. Principles which determine the classification of grounds of appeal

See Dairo Vs. Union Bank (2007) 16 NWLR (Pt. 1059) 99, wherein this court listed the following principles to serve as a guide:

Where the court is being invited to investigate the existence or otherwise of certain facts upon which the award of damages to the respondent was based, such a ground of appeal is a ground of mixed law and fact - Maigoro Vs. Garba (1999) 10 NWLR (Pt. 624) 555.

i. **A ground of appeal, which challenges the findings of fact made by the trial court or involves issues of law and fact, is a ground of mixed law and fact - see Maigoro Vs. Garba (supra).**

ii. **Where the evaluation of facts established by the trial court before the law in respect thereof is applied, is under attack or question, the ground of appeal is one of mixed law and fact. See Maigoro Vs. Garba (supra).**

iii. **Where evaluation of evidence tendered at the trial is exclusively questioned, it is a ground of fact simpliciter - Ogbechie Vs. Onochie (1986) 2 NWLR (Pt. 23) 484.**

iv. **Where it is alleged that the trial court or an appellate court misunderstood the law or misapplied the law to the admitted or proved facts, such a ground of appeal is one of law simpiciter. See Nwadike s Ors. Vs. Ibekwe & Ors. (1987) 12 SC (Pt. 1) 164.**

v. **It is a ground of law if the adjudicating tribunal or court took into account some wrong criteria in reaching its conclusion or applied some wrong standard of proof or, if although in applying the correct criteria, it gave wrong weight to one or more of the relevant factors. See O' Kelly Vs. Trusthouse Forte P.I.C. (1983) 2 All ER 456 at 486; Nwadike & Ors. Vs. Ibekwe & Ors. (supra) pp. 491-492.**

vi. **Several issues that can be raised on legal interpretation of deeds, documents, term of art, words or phrases, and inferences drawn from therefrom are grounds of law - Ogbechie Vs. Onochie (supra).**

vii. **It is a ground of law where the ground deals merely with a matter of inference even if it is limited to admitted or proved and accepted facts. See Nwadike & Ors. Vs. Ibekwe & Ors. (supra).**

viii. **Where it is alleged that there was no evidence or no admissible evidence upon which a finding or decision was based, this is regarded as a ground of law See Ogbechie Vs. Onochie (supra) where ESO, JSC, citing an article by C. T Emery in Vol. 100 LQR held:**

If the tribunal purports to find that a particular event occurred although it is seized of no admissible evidence that the event did in fact occur, it is question of law. ***(Pp 163 - 164 para B - C)***

8. How matters of fact and law are ascertained

See also Metal Const. W.A. Ltd. Vs. Migliore (supra), wherein this court per Obaseki, JSC, expatiated on the principles, as follows:

Matters of fact have to be ascertained, failing admission, by competent and relevant evidence given by witnesses, experts

or provided by deeds, records, reports, etc. - - - Matters of law have to be ascertained, failing admission, by interpretation of statutes, cases and other authoritative sources of law aided by argument of counsel to parties in the litigation. An appeal on matters of fact allows investigation at the hearing of the appeal of the evidence and the proper inferences from it whereas an appeal on a point of law limits consideration of the appeal to such questions as to whether facts admitted or held proved, justify or permit by the rules of court a particular decision or disposal of the case - - In a secondary sense, any matter to be decided on evidence and inference therefrom is a matter of fact and other matters are matters of law. A decision of a trial Judge is normally a mixed finding. ***(P 164 para D - G)***

9. Where a party complains that the court did not appreciate the evidence of a party

Applying the principles to this case, I will not hesitate to say that Ground 1 of the grounds of appeal is a ground of facts or of mixed law and fact. The appellants' complaint in that ground of appeal (reproduced above) is that the Court of Appeal did not consider or appreciate the evidence of PW5, who was called as an expert, and his valuation report [Exhibit E], before it concluded that the PW5 did not give his qualification, and the basis for his valuation.

Obviously, this complaint requires this court to investigate or look into the evidence of PW5, and what he said in Exhibit E. It is a matter to be decided on evidence and inference therefrom, thus, the said Ground 2 is a ground of fact or mixed law and fact. ***(Pp 164-165 para H - A)***

10. Absence of particulars does not vitiate a ground of appeal

Both grounds of appeal in the appellants' notice of appeal, do not have any particulars of error, however the respondent only objected to the lack of any particulars of error in Ground 2. But the appellants are right that the position

of the law is that once the error complained of, is identified and properly oriented in the ground of appeal, the fact that it has no particulars is not enough for an appellate court to sidestep from doing justice - see Best (Nig.) Ltd. Vs. B.H. (Nig. Ltd. (2011) 5 NWLR (Pt. 1239) 95, Omisore Vs. AregbesoLa (2015) 15 NWLR (Pt. 1482) 205. ***(P 165 para B - C)***

11. It is not every failure to give such particulars that will render the ground so couched incompetent

Ukpong Vs. Comm. for Finance (supra), wherein this court held -

It is settled law that though an appellant is required to give particulars of error(s) of law in a ground of appeal complaining of error in law, it is not every failure to do so that will render the ground so couched incompetent particularly where sufficient particulars can be gleaned from the ground of appeal and the opponent and the court are left in no doubt as to the particulars on which the grounds are founded. ***(P 165 para C - D)***

12. Appellant complaint is directed against the evaluation of evidence by the Court of Appeal

The learned justice of the Court of Appeal erred in law when they held thus:

" - -It is apparent that what was not conclusively determined is the value of the respondent's property destroyed by the appellant, which has not been proved It is my humble but firm view that the claim under that head being in the nature of special damages for which it is trite law that same must be strictly proved,' when the uncontroverted evidence of PW5, the expert witness, was not considered by the court thereby occasioning a very serious miscarriage of justice.

That is how it is in the notice of appeal at page 199 of the record, but read properly, the appellants' complaint in Ground 2 is that the Court of Appeal did not consider the evidence of the PW5, before it concluded as it did on the issue of special damages.

In other words, it is clear from the grounds of appeal that their complaints are directed against the evaluation of evidence by the Court of Appeal of evidence tendered at the trial court, which culminated in the setting aside of the special damages, awarded by the trial court to the appellants, and that certainly, raises a question of fact to be determined by this court; not law.

To determine the issue, this court will have to re-examine facts that formed the basis of their complaints, and of the facts found at the trial, which

formed the basis of the said judgment. ***(Pp 166-167 para E-A)***

13. Where court is urged to investigate fact that led to the award of damages.

The two grounds of appeal are not grounds of law *simpliciter,* they are, in my view, grounds of mixed law and fact. Besides, as this court said in Maigoro Vs. Garba (1999) 10 NWLR (Pt. 624) 555, where the court is being invited to investigate the existence or otherwise of facts upon which an award of damages was based, such a ground of appeal is a ground of mixed law and fact.

As it is, the two grounds of appeal raise questions of fact, which have

been brought to this court without leave, and the end result is that the court lacks the jurisdiction to look into any of the questions raised. ***(P 167 para B - C)***

14. Effect of failure to obtain leave where necessary

It is clear from the myriad of authorities on the subject and in the light of the provision of section 233 (2) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended), that where the grounds of appeal are of fact or mixed law and fact, leave of this court or the court below must be sought before an appeal is lodged on those grounds. Failure to obtain such leave robs this court of jurisdiction to entertain those grounds. Those grounds are therefore incompetent and must be struck out. See Irabor & Anor Vs. Ogaiamien (1999) LPELR - 1535 (SC); Akinyemi Vs. Odu'a Investment Co. Ltd (2012) LPELR - 8270 (SC); Umanah Vs. Nigeria
Deposit Insurance Corporation (2016) LPELR 42556 (SC); Metal Construction (West Africa) Ltd Vs. Migliore & Ors.

In this appeal, it is glaring that the appellants two grounds raise questions of facts which are well expatiated in the lead judgment. This court lacks the jurisdiction to entertain incompetent grounds of appeal. They are accordingly struck out. I also make no order as to costs. ***(P 167 para E - G)***

Per Uwani (JSC)

"There is a preliminary objection raised by the respondent to the competence of the grounds of appeal presented and filed by the appellants which are of mixed facts and law, yet filed without the leave of this honourable court.

Therefore, where there is need for the leave, the situation poses a condition precedent to the igniting of the jurisdiction of the Supreme Court to hear the matter. Stated differently, the requirement of leave where it must be obtained in line with Section 233 (3) CFRN, the appellants must fulfill the condition precedent before the court can be vested with the requisite jurisdiction to entertain the appeal.

Leave is a condition precedent to appealing under Section 233(3) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended). Therefore, as far as leave to appeal to the court is concerned, the general power of the court

to entertain it is as per the constitutional provisions as contained in Section 233(3) of the Constitution. If or when a ground of appeal is based on facts alone or on mixed law and facts, it cannot be filed in the Supreme Court unless leave is sought and obtained. The above is very important in that the Supreme Court would have no jurisdiction to hear an appeal where the grounds of appeal are on facts or/and mixed law and facts and the appellants never sought and obtained leave to file the grounds. See per Peter-Odili, JSC in Nkagbate Vs. Opaye & Anor (2018) LPELR-43704 (SC). ***(P 167 para B - D)***

Representations:
G. E. Ezomo, (Esq.) for the appellant.
Olayiwola Afolabi, (Esq.) with P. E. Uwadiae, (Esq.), Wura Kuranga Adun, (Esq.), A. O. Yusuf, (Esq.) and Anthony Osula, (Esq.) for the respondent.

AMINA ADAMU AUGIE, JSC (Delivering the lead judgment): The appellants, who were plaintiffs, filed an action against the respondent at the Edo State High Court, wherein they claimed:

c. A DECLARATION that the 1st plaintiff is the beneficial owner under Bini Native Law and Custom of all that property situate and lying at No. 16, Old Eguanogbe Street, Benin City having inherited same from his late father, late Pa. Samson Ewansiha Obayuwana, who died testate vide his WILL dated 14/5/2002 and as such, 1st plaintiff is the one entitled to Statutory Right of Occupancy in respect of that property.

d. An order that the defendant shall pay the sum of N22, 000,000,00 (Twenty- Two Million Naira) as special and general damages for the illegal destruction and occupation of the 1st plaintiff's property as follows:

SPECIAL DAMAGES

j. The open market property in dispute is N12,000,000.00 (Twelve Million Naira) as per the valuation report

ii. Rent at the rate of N4,000.00 (Four Thousand Naira) per month from 10/4/2006, when the property of the 1st plaintiff was destroyed by the defendant until the determination of the case and until payment

GENERAL DAMAGES

j. N10,000,000.00 (Ten Million Naira) for shock, inconvenience, emotional stress, and sentimental attachment to ancestral home of the 1st plaintiff and loss of use of the said ancestral home

and shrine.

ii. An order of possession of all that piece or parcel of land as shown in the litigation survey plan filed herewith.

iii. An order of perpetual injunction restraining the defendant, whether by himself, his servants, agents, privies and or any person claiming through or under him or whosoever from entering or remaining upon the said piece or parcel of land in

purported exercise of any right in relation to the possession, use and occupation of the land or any part thereof in derogation of the 1st plaintiff's right or interest .

At the trial court, the appellants called five witnesses while two witnesses testified for the respondent. The learned trial judge, Okungbowa, J., delivered his judgment on 28/9/2009, wherein he found that the respondent had *"not proved a better title to the land in dispute"*. He concluded as follows in the judgment:

Since the value of the house is ascertainable and the loss of use is also ascertainable, it would not be appropriate to award general damages. On the whole, the plaintiffs are entitled to judgment and judgment is accordingly entered against the defendant, as follows:

1. **The 1st plaintiff is the beneficial owner of the property in dispute by virtue of the WILL of late Samson Ewansiha Obayuwana of which the 2nd and 3rd plaintiffs are the executrix and executor.**
2. **The defendant shall pay to the plaintiffs the sum of N12,000,000,00 (Twelve Million Naira) being the value of the property in dispute, which was illegally destroyed by the defendant.**
3. **The defendant shall pay to the plaintiffs the sum of N4,000,00 per month from Apri1 2006, until the judgment debt is liquidated.**
4. **The defendant shall give up possession of the land in dispute more particularly shown in the plaintiffs' litigation survey plan.**
5. **The defendant, whether by himself, his agents, privies, assigns, and any person claiming through him are hereby restrained perpetually from further trespassing on the land in dispute or any part thereof.**
6. **The defendant shall pay cost of N10, 000,00 to the plaintiffs.**

Dissatisfied, the respondent appealed to the Court of Appeal, and in its judgment delivered on **20/2015,** that court held that:

The records of the court below show that on the penultimate date when PW5 gave evidence, his qualification was not elicited by the plaintiff, and thereby not challenged by the respondent. The - - law is that in holding out a witness as an expert witness, he must first of all be led as to his qualification and experience in the field on which he is to give such expert opinion, and the technical or scientific tests undertaken in reaching the opinion offered - - - Upon giving his qualification and opinion, and the respondent - - failing to question the qualification

being claimed and the report rendered, the law then is to the effect that same cannot be raised on appeal - - - PW5, having failed to state his qualification and to further state the technical and or scientific tests undertaken by him in arriving at the report, Exhibit E, the trial judge acted in error when it accepted and relied on same to ground his finding on the issue. I, therefore, resolve this issue in favour of the appellant.

After resolving the issues, the Court of Appeal concluded that:

It is apparent that what was not conclusively determined is the value of the respondent's property destroyed by the appellant, which has not been proved. It is my - - view that the claim under this heading, being in the nature of special damages, for which it is trite that same must be strictly proved - - The failure to prove the head of claim, as required by law, leads to the inevitable conclusion that same was not proved and the claim is dismissed - - The other heads of claim have not been appealed against,· therefore, the judgment of the lower court on same is hereby affirmed.

This time, the appellants filed a notice of appeal containing two grounds of appeal in this court, which are being challenged by the respondent. The said grounds of appeal complain that -

Ground 1:

The learned justices of the Court of Appeal erred in law in holding that PW5, the expert witness, failed to give his qualification and the basis for his valuation when PW5, the expert witness, tendered Exhibit E which contains his qualifications, the value of the property and the basis for the valuation and which Exhibit was not considered or appreciated by the Court of Appeal in arriving at its decision thereby occasioning a very serious miscarriage of justice.

Ground 2:

The learned justice of the Court of Appeal erred in law when they held thus:

---It is apparent that what was not conclusively determined is the value of the respondents property destroyed by the appellant, which has not been proved. It is my humble but firm view that the claim under that head being in the nature of special damages for which it is trite law that same must be strictly proved".

When the uncontroverted evidence of **PW5,** the expert witness, was not considered by the court thereby occasioning a very serious miscarriage of justice.

They formulated one issue for determination in their brief, viz.

Having regard to the oral and documentary evidence of the appellants' witnesses, particularly that of the Estate Surveyor and Valuer (PW4) as stated in his report (Exhibit E) as to his qualification and technical procedure involved in arriving at his conclusion. Whether the Court of Appeal was right to have held that the special damages of N12,000,000.00 (Twelve Million Naira) awarded by the trial court was in error.

The respondent raised a preliminary objection in his own brief, challenging the competency of the said two grounds of appeal, on the ground they are either on facts and or mixed law and fact, which by decided authorities, require leave of the lower court.

The appellants filed a reply brief wherein they countered that the said two grounds of appeal are grounds of law. They argued, citing **Oraekwe Vs. Chukwuka (2012) 1 NWLR (Pt. 1280) 169, Ononyi Vs. AG, Anambra State (2009) 10 NWLR (Pt. 1148) 182, Skymit Motors Vs. UBA (2012) 10 NWLR (Pt. 1390) 491, Abalaka Vs. President FRN (2012) 5 NWLR (Pt. 1292) 102, Ngige Vs. Obi (No. 11) (2012) 7 NWLR (Pt. 1280) 40;** that the two grounds of appeal are grounds of law as they assert that a tribunal took into account some wrong criteria in reaching its conclusion, in that the Court of Appeal did not consider Exhibit E and the evidence of PW5 in reaching its conclusion; and the wrong criteria were that PW5 did not give his qualification, and his uncontroverted evidence did not meet the standard for awarding special damages, citing **Ajuwa Vs. S.P.D.C. Ltd. (2011) 18 NWLR (Pt. 1279) 797 at 822**

On the objection to **Ground 2,** they submitted that although an appellant is required to give particulars of error(s) of Law, in a ground of appeal complaining of error in law, it is not every failure to do so that will render the said ground incompetent, particularly where sufficient particulars can be gleaned from the ground of appeal, and the respondent and the court are left in no doubt as to the particulars on which the ground is based. On this point, they cited **Ukpong Vs. Commissioner for Finance (2006) 19 NWLR Pt. 1013) 187,** which relied on another decision of this court in **Hambe Vs. Hueze (2001) 4 NWLR (Pt. 703) 372.**

The parties have said their own, but what does the law say? The respondent's objection queries the competency of the two grounds of appeal in the appellants' notice of appeal, and it is settled that a ground of appeal consists of error of law or fact, which an appellant sees as a defect in a judgment, and which he relies upon in asking an appellate court to set it aside - see **Metal Const. W. A. Ltd. Vs. Migliore (1990) 1 NWLR (Pt. 126) 299.**

The appellant must itemize the error or misdirection in the particulars to the ground(s) of appeal. The particulars of error or misdirection should not be independent complaints from the ground(s) of appeal but ancillary to it - see **Globe Fishing Ind. Ltd. Vs. Coker (1990) 7 NWLR (Pt. 162) 265 and Nyako Vs. Adamawa State House of Assembly & Ors. (2016) LPELR-41822(SC),** wherein this court per M. D. Muhammad, JSC, observed that -

> **The law does not allow a party to divorce the particulars of a ground from the main ground. They are the specifications of errors or misdirection, which show what the complaint against a decision is. To determine whether or not a ground of appeal is relevant to the issue formulated in an appeal, that ground must be read in conjunction with the particulars to make it a complete ground and must be based on the issue in controversy between the parties.**

Thus, in determining its category, the ground of appeal must be construed together with the particulars of error, because its classification as a ground of law, can only give competence to an appeal without leave, if the nature of the misdirection or the error clearly stated in the particulars, bears out the category assigned to it - **Garuba Vs. Omokhodon (2011) 6-7 SC (Pt. V) 89.**

So, where the ground of appeal involves questions of fact or of mixed law and fact, leave to appeal must be obtained from the court of appeal or this court. Failure to obtain the requisite leave renders the appeal filed incompetent - see **Garuba Vs. Omokhodon (supra), Irhabor Vs. Ogaiamien (1999) 8 NWLR (Pt. 616) 517, Uchendu Vs. Ogboni (1999) 5 NWLR (Pt. 603) 337 and Akpasubi Vs. Umweni (1982) 11 SC 113,** where Eso, JSC, observed:

> **The appellate jurisdiction of this court on question of fact only exists where there has been leave of the Court of Appeal or of this court. No appeal on questions of fact lies to this court without such leave. In other words, where - - question of fact has been brought before this court without leave, the court has no jurisdiction.**

Simply put, this court has no jurisdiction to entertain an appeal on a ground of fact or mixed law and fact unless leave is sought and obtained - see **Ukpong Vs. Comm., for**

Finance and Econ. Dev. (supra), wherein Onnoghen, JSC (as he then was) explained

> **Where an appeal is to be with leave but none was obtained, the condition precedent to validity of such an appeal has not been fulfilled and as a result the appeal is, in law, said to be incompetent and the appellate court is in consequence without jurisdiction to entertain same.**

In this case, the question that rears its head is whether the two grounds of appeal raised in the appellants' notice of appeal are grounds of law, as they said, or grounds of fact or mixed law and fact, as contended by the respondent? I must say that this is not an easy question to answer because there is a very thin line that runs between the said two categories, which makes it difficult to decipher a question of law from a question of fact.

However, this court has laid down guidelines in numerous cases, which set out parameters, for finding answers to the said question - see **Board of Custom & Excise Vs. Barau** (1982) NSCC (Vol. 13) 358, wherein this court per Eso, JSC, aptly observed —

> **The Court of Appeal has to decide first, as a matter of law, that a trial court failed to make use of the advantage it has of seeing the witnesses - - before proceeding to substitute as a matter of fact, its-own finding made on the printed evidence - - - It is only where there is a wrong application of such facts that a Court of Appeal interferes. Where, however, the Court of Appeal finds as a matter of law that the facts have been correctly applied, if does not interfere. The court does not proceed any further to deal with facts - - This fine distinction is very important for it goes into the jurisdiction, which a Court of Appeal, exercises under the constitution While appeal to the Court of Appeal on the issue of law is as of right, an appeal on the facts is with leave of the court from where the appeal lies or the court to which the appeals lies. - - - Where a trial court fails to apply the facts, which it found, correctly to the circumstances of the case, and there is an appeal to a Court of Appeal, which alleges a misdirection in the exercise of the application by the trial court, the ground of appeal alleging the misdirection is a ground of law and not of fact. When the Court of Appeal finds such application to be wrong and decides to make its findings, such findings made by Court of Appeal are issues of fact and not law. Where the Court of Appeal interferes - - and there is a further appeal to a higher Court of Appeal on the application of the facts, the ground of appeal alleging such misdirection by a lower Court of Appeal is a ground of**

> **law and not of fact. It is only where there is an appeal against the finding made by the Court of Appeal in this exercise that issues of fact arise and leave will be required.**

See **Dairo Vs. Union Bank (2007) 16 NWLR (Pt. 1059) 99,** wherein this court listed the following principles to serve as a guide:

- **Where the court is being invited to investigate the existence or otherwise of certain facts upon which the award of damages to the respondent was based, such a ground of appeal is a ground of mixed law and fact - Maigoro Vs. Garba (1999)**

10 NWLR (Pt. 624) 555.

i. **A ground of appeal, which challenges the findings of fact made by the trial court or involves issues of law and fact, is a ground of mixed law and fact - see Maigoro Vs. Garba (supra).**

ii. **Where the evaluation of facts established by the trial court before the law in respect thereof is applied, is under attack or question, the ground of appeal is one of mixed law and fact. See Maigoro Vs. Garba (supra).**

iii. **Where evaluation of evidence tendered at the trial is exclusively questioned, it is a ground of fact simpliciter - Ogbechie Vs. Onochie (1986) 2 NWLR (Pt. 23) 484.**

iv. **Where it is alleged that the trial court or an appellate court misunderstood the law or misapplied the law to the admitted or proved facts, such a ground of appeal is one of law simpiciter. See Nwadike s Ors. Vs. Ibekwe & Ors. (1987) 12 SC (Pt. 1) 164.**

w. **It is a ground of law if the adjudicating tribunal or court took into account some wrong criteria in reaching its conclusion or applied some wrong standard of proof or, if although in applying the correct criteria, it gave wrong weight to one or more of the relevant factors. See O' Kelly Vs. Trusthouse Forte P.I.C. (1983) 2 All ER 456 at 486; Nwadike & Ors. Vs. Ibekwe & Ors. (supra) pp. 491-492.**

vi. **Several issues that can be raised on legal interpretation of deeds, documents, term of art, words or phrases, and inferences drawn from**

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therefrom are grounds of law - Ogbechie Vs. Onochie (supra).

vii. **It is a ground of law where the ground deals merely with a matter of inference even if it is limited to admitted or proved and accepted facts. See Nwadike & Ors. Vs. Ibekwe & Ors. (supra).**

viii. **Where it is alleged that there was no evidence or no admissible evidence upon which a finding or decision was based, this is regarded as a ground of law See Ogbechie Vs. Onochie (supra) where ESO, JSC, citing an article by C. T Emery in Vol. 100 LQR held:**

If the tribunal purports to find that a particular event occurred although it is seized of no admissible evi-

dence that the event did in fact occur, it is question of law.

See also **Metal Const. W.A. Ltd. Vs. Migliore (supra),** wherein this court per Obaseki, JSC, expatiated on the principles, as follows:

> **Matters of fact have to be ascertained, failing admission, by competent and relevant evidence given by witnesses, experts or provided by deeds, records, reports, etc. - - - Matters of law have to be ascertained, failing admission, by interpretation of statutes, cases and other authoritative sources of law aided by argument of counsel to parties in the litigation. An appeal on matters of fact allows investigation at the hearing of the appeal of the evidence and the proper inferences from it whereas an appeal on a point of law limits consideration of the appeal to such questions as to whether facts admitted or held proved, justify or permit by the rules of court a particular decision or disposal of the case - - In a secondary sense, any matter to be decided on evidence and inference therefrom is a matter of fact and other matters are matters of law. A decision of a trial Judge is normally a mixed finding.**

Applying the principles to this case, I will not hesitate to say that **Ground 1** of the grounds of appeal is a ground of fact or of mixed law and fact. The appellants' complaint in that ground of appeal (reproduced above) is that the Court of Appeal did not consider or appreciate the evidence of **PW5,** who was called as an expert, and his valuation report **[Exhibit E],** before it concluded that the **PW5** did not give his

qualification, and the basis for his valuation.

Obviously, this complaint requires this court to investigate or look into the evidence of **PW5,** and what he said in **Exhibit E.** It is a matter to be decided on evidence and inference therefrom, thus, the said **Ground 2** is a ground of fact or mixed law and fact.

Both grounds of appeal in the appellants' notice of appeal, do not have any particulars of error, however the respondent only objected to the lack of any particulars of error in G**round** 2. But the appellants are right that the position of the law is that once the error complained of, is identified and properly oriented in the ground of appeal, the fact that it has no particulars is not enough for an appellate court to sidestep from doing justice - see **Best (Nig.) Ltd. Vs. B.H. (Nig. Ltd. (2011) 5 NWLR (Pt. 1239) 95, Omisore Vs. AregbesoLa (2015) 15 NWLR (Pt. 1482) 205, and Ukpong Vs. Comm. for Finance (supra)**, wherein this court held -

> **It is settled law that though an appellant is required to give particulars of error(s) of law in a ground of appeal complaining of error in law, it is not every failure to do so that will render the ground so**

couched incompetent particularly where sufficient particulars can be gleaned from the ground of appeal and the opponent and the court are left in no doubt as to the particulars on which the grounds are founded.

In this case, the said Ground 2 of the grounds of appeal says -

The learned justice of the Court of Appeal erred in law when they held thus:

> **" - -It is apparent that what was not conclusively determined is the value of the respondent's property destroyed by the appellant, which has not been proved It is my humble but firm view that the claim under that head being in the nature of special damages for which it is trite law that same must be strictly proved,' when the uncontroverted evidence of PW5, the expert witness, was not considered by the court thereby occasioning a very serious miscarriage of justice.**

That is how it is in the notice of appeal at page 199 of the record, but read properly, the appellants' complaint in **Ground 2** is that the Court of Appeal did not consider the evidence of the **PW5,** before it concluded as it did on the issue of special damages.

In other words, it is clear from the grounds of appeal that their complaints are directed against the evaluation of evidence by the Court of Appeal of evidence tendered at the trial court, which culminated in the setting aside of the special damages,

awarded by the trial court to the appellants, and that certainly, raises a question of fact to be determined by this court; not law.

To determine the issue, this court will have to re-examine facts that formed the basis of their complaints, and of the facts found at the trial, which formed the basis of the said judgment. The two grounds of appeal are not grounds of law *simpliciter,* they are, in my view, grounds of mixed law and fact. Besides, as this court said in **Maigoro Vs. Garba (1999) 10 NWLR (Pt. 624) 555,** where the court is being invited to investigate the existence or otherwise of facts upon which an award of damages was based, such a ground of appeal is a ground of mixed law and fact.

As it is, the two grounds of appeal raise questions of fact, which have been brought to this court without leave, and the end result is that the court lacks the jurisdiction to look into any of the questions raised. The preliminary objection is sustained, and the appeal is struck out. Parties are to bear their own costs.

Amina Adamu Augie,
Justice, Supreme Court

JOHN INYANG OKORO, (JSC): I have before now read the lucid judgment delivered by my learned brother, Amina Adamu Augie, JSC. I have perused the reasons and conclusion adumbrated in the said judgment and I find them agreeable to my knowledge

of the law. I adopt them, with respect, as mine.
It is clear from the myriad of authorities on the subject and in the light of the provision of section 233 (2) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended), that where the grounds of appeal are of fact or mixed law and fact, leave of this court or the court below must be sought before an appeal is lodged on those grounds. Failure to obtain such leave robs this court of jurisdiction to entertain those grounds. Those grounds are therefore incompetent and must be struck out. See **Irabor & Anor Vs. Ogaiamien (1999) LPELR - 1535 (SC); Akinyemi Vs. Odu'a Investment Co. Ltd (2012) LPELR - 8270 (SC); Umanah Vs. Nigeria Deposit Insurance Corporation (2016) LPELR 42556 (SC); Metal Construction (West Africa) Ltd Vs. Migliore & Ors.**
In this appeal, it is glaring that the appellants two grounds raise questions of facts which are well expatiated in the lead judgment. This court lacks the jurisdiction to entertain incompetent grounds of appeal. They are accordingly struck out. I also make no order as to costs.

Appeal struck out.

John Inyang Okoro
Justice, Supreme Court

PAUL ADAMU GALINJE, (JSC): I have had the privilege of reading in draft, the judgment just delivered by my learned brother, AMINA ADAMU AUGIE, JSC and I agree with his reasoning leading to the conclusion that the preliminary objection is

sustained, and the appeal is struck out. I abide by the order made on costs.

Paul Adamu Galumje
Justice, Supreme Court

UWANI MUSA ABBA AJI, (JSC): His lordship Hon. Justice Amina Augie, JSC, obliged me with a copy of his lead judgment in this appeal and I find that the reason and conclusion reached therein accord with mine that the appeal be struck out.

There is a preliminary objection raised by the respondent to the competence of the grounds of appeal presented and filed by the appellants which are of mixed facts and law, yet filed without the leave of this honourable court.

Therefore, where there is need for the leave, the situation poses a condition precedent to the igniting of the jurisdiction of the Supreme Court to hear the matter. Stated differently, the requirement of leave where it must be obtained in line with Section 233 (3) CFRN, the appellants must fulfill the condition precedent before the court can be vested with the requisite jurisdiction to entertain the appeal.

Leave is a condition precedent to appealing under Section 233(3) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended). Therefore, as far as leave to appeal to the court is concerned, the general power of the court to entertain it is as per the constitutional provisions as contained in Section 233(3) of the Constitution. If or when a ground of appeal is based on facts alone or on mixed law and facts, it cannot be filed in the Supreme Court unless leave is sought and obtained. The above is very important in that the Supreme Court would have no jurisdiction to hear an appeal where the grounds

of appeal are on facts or/and mixed law and facts and the appellants never sought and obtained leave to file the grounds. See per Peter-Odili, JSC in **Nkagbate Vs. Opaye & Anor (2018) LPELR-43704 (SC).**

I am satisfied that this preliminary objection is meritorious and I uphold it. In line with the lead judgment, I too strike out the appeal as lacking in competence.

Uwani Musa Abba Aji
Justice, Supreme Court

PROVIDENCE OGECHUKWU MEKWUNYE

Vs.

W.A.E.C

SC 474/2016

IN THE SUPREME COURT OF NIGERIA HOLDEN AT ABUJA

FRIDAY, 17TH JANUARY, 2020

BEFORE THEIR LORDSHIPS

MARY UKAEGO PETER-ODILI — **JUSTICE, SUPREME COURT**
MUSA DATTIJO MUHAMMAD — **JUSTICE, SUPREME COURT**
JOHN INYANG OKORO — **JUSTICE, SUPREME COURT**
PAUL ADAMU GALUMJE — **JUSTICE, SUPREME COURT**
UWANI MUSA ABBA AJI — **JUSTICE, SUPREME COURT**

CONTRACT:- Bindness thereof —What constitutes —Whether there must be consensus ad idem.

CONTRACT:- Offer and acceptance —Where parties prescribed the manner of acceptance —Whether acceptance shall be in a manner prescribed by parties.

COURT:- Appellate court —Evaluation of evidence —Where a trial court properly evaluate evidence before it —Whether an appellate court will not interfere therein.

COURT:- Appellate court —Where a trial court has made credible findings of fact —whether an appellate court will not interfere therein in the absence of exceptional circumstances.

COURT:- Contractual dispute —Duty on court thereto —Whether it is a tribunal that can fairly come to conclusion that there was a contract between the parties.

COURT:- Contractual dispute —Duty thereto —Whether to scrutinize and examine all contractual documents admitted as exhibits to ascertain whether there exist a contract between the parties.

COURT:- Evaluation of evidence —Whether it is the primary duty of a trial court to evaluate

evidence before it —The principle in ***Umar Vs. Bayero University (1988) 4 NWLR (Pt.86) 85.***

COURT:- Extraneous issues —Whether court should not embark on inquisitional examination of document outside the court room.

EQUITY:- Estoppel by conduct —The principle in ***Akanni Vs. Makanju (1978)11 SC 13***

EQUITY:- Estoppel by conduct —The principle in ***Okonkwo Vs. Kpajie (1992) LPELR —2483 (SC)***

EQUITY:- Estoppel by conduct —Where a party has penalize another for failure to comply with procedure —Party duly paid the penalty fees —Whether the other party is estopped from failing to remedy the wrongful procedure.

EQUITY:- Estoppel by conduct —Where a party represent to another that an act is possible on payment of penalty fees —Whether party cannot resile from representation on collection of the penalty fees.

EVIDENCE:- Onus of proof —Where defendant contends facts and procedure contained in its guideline —The said guidelines were not tendered in evidence nor procedure proved —Whether defendant has failed to discharge onus of proof under S. 131 of Evidence Act, 2011.

JUDGMENT AND ORDERS:- Nature and purport - Whether to be confined to issues raised in pleadings and evidence tendered.

PRACTICE AND PROCEDURE:- Appeal —Brief writing —Formulation of issues for determination —Whether it is not proper to formulate as many issue as grounds of appeal —Relevant considerations thereof.

PRACTICE AND PROCEDURE:- Evidence —Evaluation thereof —Whether the primary duty of tribunal or court of trial.

WORDS AND PHRASES:- Offer —Meaning

Issue for Determination

Whether the respondent is not estopped in view of the established facts of this case, from refusing to issue the appellant a certificate in her full names ”Mekwunye Providence Ogechukwu”?

Fact of the Matter

The plaintiff/appellant sued the defendant/respondent at the Lagos State High Court claiming some declaratory reliefs connected with the November/December G.C.E. Examination. The plaintiff/appellant specifically wanted her result to be released and her certificate to reflect her true name instead of the name in the computer printout which the defendant issued to her.

The plaintiff/appellant also claimed damages for breach of contract.

At the end of trial the learned trial judge entered judgment for the plaintiff/appellant.

The defendant/respondent appealed to the Court of Appeal which allowed the appeal and set aside the judgment of the trial court. The plaintiff/appellant has now appealed to the Supreme Court.

Held: *(Unanimously allowing the appeal)*

1. *Lesser number of issues are usually formulated from grounds of appeal*

The issues formulated for determination of an appeal form part of the brief of argument, as such they are also bound to be brief. It is preferable that a number of grounds of appeal can, where appropriate be condensed into a single cognizable issue, where there are so many grounds of appeal, instead of formulating an issue from such ground of appeal. The appellant in this appeal has formulated eight issues for determination of this appeal from eight grounds of appeal. This procedure adopted by learned counsel has deviated from the principle governing brief writing and formulation of issues for determination of an appeal. Learned counsel has surreptitiously institutionalized the pre-brief writing era in his brief of argument. This is unacceptable, especially in this court, where issues in the litigation must have whittled down before the appeal is lodged here.

Be that as it may, after having read through the record and the parties briefs of argument, I am of the view that the 4th issue formulated by the appellant can conveniently determine this appeal. Even at the risk of repetition, I reproduced this issue hereunder as follows:-

> **"Whether the Respondent is not estopped in view of the established facts of this case, from refusing to issue the appellant a certificate in her full names "Mekwunye Providence Ogechukuru?."** ***(P 181 para E - G)***

2. *Appraisal of oral evidence is the primary duty of tribunal or court of trial*

The appraisal of oral evidence and ascription of probative value to such evidence is the primary duty of tribunal of trial and a Court of Appeal would only interfere with the performance of that exercise if the trial court either

from accepted or proved facts. ***(P 182 para E - F)***

3. Where a party contains a fact he has onus of proving that fact under S. 131 of Evidence Act, 2011

While the trial court clearly stated that the syllabus, and the rules and regulations of the respondent were not tendered in evidence and that the respondent did not demonstrate before it that the restrictions in the characters acceptable by its computer were made known to the appellant, where did the lower court find the evidence upon which it based its findings? Which pages of the book that had all the rules and regulations as to the filling of the forms and the examination proper. The book that contained the rules and regulations admittedly was the property of the respondent and it was its assertion that same was made available to the appellant. The duty to prove the existence of the book, squarely rested with the respondent, by virtue of Section 131 (2) of the Evidence Act 2011. ***(P 183 para B - C)***

4. Lower court was wrong

The main reason why the lower court allowed the appeal is that the appellant failed and/ or neglected to follow the rules that the computer could only accept twenty five letters and the appellant effected her registration with a twenty seven letters name. This to me is ridiculous. The end result of a failure to follow the rules of doing a particular thing would be a rejection of that thing that is sought to be done. The disobedience of the appellant in following the laid down rules, would have cost her the registration exercise and not tampering with the information supplied without hearing from her. The official receipt evidencing the registration fee paid by the appellant, Exhibit C1 bears "Oge-Chukwu". Even if certain part of the appellant's name was going to be tampered with, it is certainly not the name that was used in paying the registration fees.

(P 183 para C - D)

5. Respondent is estopped from refusing to issue appellant certificate in her names

Where then is the integrity where a genuine candidate who was allowed to sit for the examination conducted by the respondent after having complied with the laid down rules cannot use the certificate to realize her dreams. By accepting to carry out corrections in the appellant's name and having collected the sum of N5,000.00 as penalty fee, the respondent is estopped from refusing to issue the appellant a certificate in her full names. For every wrong there is a remedy. The computer and the respondent's website are creatures of human being. That which is created by human being cannot overwhelm him. Let the appellant's future remain aglow and secured. ***(P 184 para B - C)***

6. There was no exceptional circumstances presented by the respondent to warrant credible interference with the findings of trial court.

That the court below formulated its own case on matters not pleaded nor agitated by the parties without evidence and proceeded to give a decision on it which occasioned injustice to the appellant. That the court below did not show any exceptional circumstances presented by the respondent to warrant interference with the credible findings of the trial court. ***(P 188 para G - H)***

7. A judgment must be confined to issues raised in pleadings and evidence

It is trite in law that a judgment must be confined to the issues raised on the pleadings and evidence given by the parties in support of their case or cases. It is on those issues joined and argued and in respect of which evidence is led that the judgment must be based. Where that is not done by the court, it will be taken that the court had made a case for the parties by formulating its own case not backed by evidence and proceeding to give judgment on a hypothetical case, a situation decried by the Supreme Court in numerous occasions. See Baridam Vs. State (1994) LPELR -753; Oniah Vs. Onyia (1989) 1 NWLR (Pt.99) 514 at 531. ***(P 191 para D - E)***

8. What constitutes a binding contract

This instant case has brought up the question whether or not what transpired between the parties is a contract and so what brings about the formation of a contract is to be considered to see if the qualities necessary in a contract are at play here. To constitute a binding contract between parties there must be a meeting of the mind which is referred to as "consensus ad idem" which mutual consent relates to an offer and acceptance. ***(P 191 para E - G)***

9. Meaning of offer

The definition of an offer in my humble view is, the expression by a party of readiness to contract on the terms specified by him which if accepted by the offeree gives rise to a binding contract. The maturation to a contract happens where the offeree signifies a clear and unequivocal intention to accept the offer. ***(P 191 para F- G)***

10. Acceptance must be in accordance with the agreed manner

In fuller expatiation, in order to establish that the parties have formed a contract, there must be evidence of consensus ad idem between them. If there is a stipulated mode for acceptance of the offer, the offeree has a duty to comply with same and no less. See Bilante Int'l Ltd. Vs. NDIC (1997) 8

NWLR (Pt.515) 37; Afolabi Vs. Polymera Industries (1967) 1 All NLR 14.

In this case at hand, the appellant has established as seen in the record that there was an offer which was duly accepted and a consideration given, all of

which ingredients culminated into a subsisting and valid contract between the parties and there is nothing in support of the assertion that terms of the contract included that the names of the appellant would be limited to 25 characters.
(Pp 191-192 para G - A)

11. A court should not embark on inquisitorial examination of document outside the court room

It is because of what has been shown from the record that the court below went against long settled principle of adjudication which does not permit a judge to embark on an inquisitorial examination of documents outside the court room. The judge is also not allowed to act on what he has found out in such a document in relation to an issue not supported by the evidence proffered nor was brought to be agitated in the regular adversarial procedure. I place reliance on Senator Iyiola Omisore & Anor. Vs. Ogbeni Rauf Adesoji Aregbesola & Ors. (2015) KPELR -24803 SC per Nweze JSC; Bamgbose Vs. Oshoko (1988) 2 NWLR (Pt.78) 509; Gbafe Vs. Gbafe (1996) 6 NWLR (Pt.455) 417; State Vs. Aibangbee (1988) 3 NWLR (Pt.84) 548; Adetoun Oladeji (Nig.) Ltd. Vs. Nigerian Breweries (2007) 5 NWLR (Pt.1027) 415. ***(P 192 para B - C)***

12. The respondent cannot resile from their representation

It is clear from the evidence before the court that the respondent in unequivocal terms, evidenced by Exhibit C7 informed the appellant that an amendment to the appellant's name is possible and stated a penalty fe in the sum of Five Thousand Naira N5,000.00 which appellant relied upon and complied with. Therefore, the respondent cannot now resile from their representation made to the appellant that an amendment is possible if the penalty is paid which the appellant obliged with. Therefore the respondent is estopped from changing the goal post as a party cannot aprobate and reprobate at the same time.
(Pp 193-194 para G - A)

13. Estoppel by conduct

This court in Akanni Vs. Makanju (1978) 11 SC 13 at 26 per Obaseki JSC stated the law thus:-

"The general rule as to standing-by was laid down in Caincross

Vs. Lorimer (1860) 3 L T 130. It was adopted with approval by the West African Court of Appeal in Morayo Vs. Okiade and Ors, 8 WACA 46 at page 47 and read as follows: "It is a rule of universal law that if a man either by word or conduct has intimated that he consents to an act which has been done and that he will offer no opposition to it although it could not have been lawfully done without his consent and he thereby induces others to do that from which they otherwise

might have obtained, he cannot question the legality of the act he had so sanctioned to the prejudice of those who have given faith to his word or the fair inference to be drawn from his conduct".

See also (i) Section 169 Evidence Act, 2011
(ii) Buhari Vs. INEC (2008) 12 SC (Pt.1) 1 at 60-61; and
(iii) Nsirim Vs. Nsirim (2002) 2 SC (Pt.1) 47
(P 194 para B - D)

14. Principles of estoppel by conduct

See also the case of Okonkwo Vs. Kpajie (1992) LPELR - 2483 (SC) where this Court held thus:-

"This is estoppel by conduct - by matter in pais. Where a man by word or conduct willfully made a representation of a state of facts to another and thereby induced that other to believe that the state of things were as represented by that person and that other took him by his words and acted upon that representation, then that person who made the representation either by himself or his representative in interest cannot now turn around to say or behave as if the state of things were not as he represented them. He is estopped from asserting the contrary. See Section 150 of the Evidence Act; Also Joe Iga & Ors. Vs. Ezekiel Amakiri & Ors. (1976) 11 SC 1, 12-13. All that is required in such a case is that the facts to be relied upon as estoppel be duly pleaded or brought to the notice of the adjudicating tribunal in some appropriate way, such as has been done in paragraph 16 of the statement of defence in this case: see Sanders Vs. Sanders (1952) 1 All E.R. 767". *(Underlining mine for emphasis). (P 194 para E - H)*

15. It is the primary duty of a trial court to evaluate evidence before it

It is to be reiterated that it is the primary duty of a trial court to evaluate evidence before it and make definite findings on such evidence and so from the trial court's advantageous position and exclusive at that to consider the de-

meanour of each witness before the court. ***(P 195 para E - F)***

16. It is the primary duty of a trial court to evaluate evidence

This situation was well articulated by this court per Belgore JSC (as he then was) in Umar Vs. Bayero University (1988) 4 NWLR (Pt.86) 85 thus:-

> **"It is the primary duty of the trial court to evaluate evidence before it and make definite findings on such evidence. It has every advantage of**

> **doing this. The witnesses are before it and it is well placed to judge the demeanour of each witness. For examination-in- chief, cross examination and re-examination, the trial court has an advantage over all appellate courts of deciding who to believe or disbelieve. The record of proceeding, however detailed or comprehensive is not cinematograph or even live voice accompanying pictures but mere attempt to record what was said or demonstrated and not the demonstration of the evidence itself. It is for this reason that unless it is expedient in exceptional circumstances, the appellate court should not disturb the findings of fact of trial court. You can believe that person you can see and hear; similarly the person you disbelieve. A Court of Appeal merely sees the records and not the person whose voice and demonstration are written down. The exceptional circumstances could be incompetent evidence, evidence legally inadmissible like hear-say and some secondary evidence. For trials are only trials in law if based on lawful evidence; a judgment based on inadmissible evidence is no judgment and will be declared null and void". (Underlining mine for emphasis).** ***(Pp 195 - 196 para F - B)***

17. Lower court was speculative and arrive at decisions outside evidence

It therefore beats logic, from where the court below found the basis for its own conclusion with postulations or speculations operating only in the mind of the Court of Appeal which led it into making a different case from that upon which the parties had joined issues. See Adetoun Oladeji (Nig.) Ltd. Vs. Nigerian Breweries Plc (2007) 5 NWLR (Pt.l027) 415; Badejo Vs. Fed. Minister of Education (1996) 8 NWLR (Pt.464) 15; Chief Ebba Vs. Chief Olgbodo & Anor. (1984) 1 SCNLR 372; S. O. Ilodibia Vs. Nigerian Cement Company Ltd. (1997) 7 NWLR (Pt.512) 174 at 190-191.

Without a further waste of time, it is clear from the foregoing and the fuller reasoning in the lead judgment that this appeal has loads of merit and I allow it. ***(P 196 para D - E)***

18. An appellate court will not interfere where evidence is properly evaluated

It is still the principle that where in its primary duty of evaluating evidence the trial court has done the needful, by ascribing the correct probative value to the evidence of parties and drawing impeccable inference from the evidence, an appellate court is hamstrung. It cannot lawfully interfere. See EZEANI Vs. FRN (2019) LPELR - 46800 SC and EZECHUKWU & ANOR Vs. O. C. ONWUKA (2016) LPELR - 26055 (SC). ***(Pp 196-197 para H - A)***

19. Duty of court where there is contractual dispute

The law is that as much as the court would not re-write the agreement of parties,

where a contract consist of series of documents, the court has a duty to scrutinize and examine closely all contractual documents admitted as exhibits to determine whether there exist a contract between the parties and the issue(s) in controversy between the parties. The documents must be read together. See BFI Groups Corporation Vs. Bureau of Public Enterprises (2012) 18 NWLR (Pt. 1332) Pt. 209; Central Bank of Nigeria Vs. Mrs. Agnes M. Igwillo (2007) 14 NWLR (Pt. 1054) 593 at 433. In the case of BFI Groups Corporation Vs. Bureau of Public Enterprises (supra) this court per Fabiyi, JSC at page 235 stated as follows "outside oral evidence, the lower court had an abiding duty to scrutinize all the series of documents and bonds to determine whether there exists a contract between the parties. ***(P 197 para F - H)***

20. When a tribunal can fairly come to conclusion that there was a contract between the parties.

See Shell BP Petroleum Co. Ltd. Vs. Jammal Engineering (Nig) Ltd. (1974) 4 SC 33 at 72 cited by senior counsel to the appellant wherein this court per Coker, JSC pronounced as follows:-

> **"The final exercise of judgment must of necessity involve a consideration of all the correspondence that is properly put in evidence by both sides - all the correspondence tendered in order to establish the case and all that produced in order to disprove the existence of a contract. It is only after such detailed consideration that a tribunal can fairly come to a conclusion as to whether or not the parties actually arrived at an agreement."**

In the instant case, it is not in doubt that parties had reached an agreement to have the appellant write the respondent's examination using her surname "Ogechukwu" when her payment of registration fee

was accepted and receipt issued to that effect. It is also in evidence that by a letter dated 10th November, 2008 the respondent advised the appellant to make a written request for her name to be amended together with a penalty fee of N5000.00 which she paid. As rightly stated by my learned brother in the lead judgment, having collected the sum of N5,000.00 as penalty fee for corrections to be effected on the appellant's name, the respondent is estopped from refusing to correct whatever error or mistake that was found on the name and have her certificate issued in her full surname as "Ogechukwu" instead of "Ogechuk." ***(Pp 167 - 168 para H - C)***

Per Uwani (JSC)

"By the ingredients of a valid contract therefore, a contract had come into play. Nevertheless, it was after a valid contract was formed that the respondent came

up with the story that their registration software cannot contain more than 25-character name.

The offer made by the respondent caused the appellant to accept by buying, filling and submitting the Form, while the consideration was for N4,250.00. There is therefore the presumption and regularity of a valid contract between the parties the breach of which is by enforcement as sought by the appellant. It is settled law that a contract is formed once there is an offer by the offeror to the offeree which is accepted by the offeree backed by consideration. At that point in time, the parties to the contract are said to be ad idem or in agreement, and, that agreement or contract is binding on both parties and as such it is enforceable by action. See Per ONNOGHEN, JSC, in YARO Vs. AREWA CONSTRUCTION LTD & ORS (2007) LPELR-3516(SC).

In fact, as at the time the contract was entered into and matured or crystalized, there was no clause or proviso of the requirement of not more than 25-letter name. The fact is that respondent vide Exhibit C7 accepted and admitted that an amendment in the spelling was possible. Thus, they cannot now turn around to withhold the certificate of the appellant as same will amount to breach, remediable in enforcement. For the purpose of ascertaining the intention of the parties, regard must be had to the terms of the contract, the conduct of the parties, and the circumstances of the case. See NANKA-BRUCE Vs. COMMONWEALTH TRUST LTD. (1926) A.C. 77. The respondent must therefore be estopped by what he caused the appellant to believe and act upon. ***(Pp 198-199 para H - D)***

Representations:

Dr. C. D Mekwunye (Esq.) with Ikechukwu Onyemba and Adaobi Chuikwaha for the appellant.
MR. I. G Haruna with Tola Olorunfunmi; Tunde Osimubi; A. Y Zubairu and H. I Apah for the respondent.

PAUL ADAMU GALINJE, JSC (Delivering the lead judgment): On or about April 2008, the respondent herein advertised for entries into the November/December West African Senior Secondary School Examination (WASSCE Private) and advised prospective candidates to pay N4,250 for on-line registration. On 3rd April 2008, the appellant, who sued by her next friend, **Charles Dumbiri Mekwunye,** because she was a minor, paid the N4,250 and was issued a receipt **(Exhibit Cl)** in the name of "Ogechukwu" on the advice of the respondent's cashier. Consequently the appellant was able to access the respondent's website and registered on-line for the November/December, 2008 West African Senior Secondary School Certificate Examination (WASSCE Private).

The registration was unqualified and the appellant registered with the name **"Mekwunye Providence Ogechukwu".** The computer acknowledged acceptance

of the registration, but omitted the last two letters of the appellant's name, thus making it reads "Ogechuk" **(Exhibit C2).** Appellant was not happy with the outcome, and therefore instructed the firm of Paul I. Okoh & Co, Legal Practitioner, to take up the matter. Paul I. Okoh & Co. wrote to the respondent and complained about the wrong spelling of the appellant's name. Instead of replying the letter, the respondent contacted the appellant and her father and informed them that its computer was configured to accept only 25 letters, whereas the appellant's name was made up of 27 letters. The appellant's solicitors again on the 17th October 2008, wrote another letter to the respondent and demanded rectification of the name of the appellant. This time, the respondent by a letter dated 10th November 2008 advised the appellant to request in writing for amendment of her name in the November /December, 2008 West African Senior Secondary School Certificate Examination (WASSCE Private). In addition, she was required to pay a penalty fee of N5,000.00 and attached her original copy of the receipt to the application.

The appellant complied and sent a bank draft for N5,000.00 to the respondent. Also sent to the respondent is the appellant's admission notice/photocard. Inspite of the compliance with the advice of the respondent, the name of the appellant was not rectified.

By a writ of summons and a statement of claim, both filed on the 11th February 2009, the appellant herein, who was the claimant at the Lagos State High Court claimed against the respondent as follows:-

3. **A declaration that the contract between the claimant and defendant is binding on the parties and that the claimant is entitled to have her November/December 2008 (WASSCE Private) result released and certificate made in her full names - "Mekwunye Providence Oge-chukwu ".**
4. **A declaration that the rejection of the last two letters in "Ogechukwu" vide the defendant's acknowledgement of registration thereby renaming the claimant as "Mekwunye Providence Ogechuk" was wrongful, strips the claimant of her identity, the usefulness and essence of the said examination, thereby rendering the result and certificate in evidence thereof useless and the entire exercise worthless.**
5. **An order compelling the defendant to release the claimant's result and issue her certificate in the name "Mekwunye Providence Oge-chukwu" being the names with which she sat the said November/December 2008 WASSCE (Private).**
6. **Damages for breach of contract in the sum of N10,000,000.00.**

In opposition, the respondent who was the defendant at the trial court filed a statement of defence on the 1st of February 2010, in which it denied being

responsible for the wrong spelling of the appellant's name.

Issues having been joined, the suit was set down for trial. At the end of the trial and in a reserved and considered judgment delivered on the 19th November 2013, Femi - Adeniyi. J. held that the claimant (appellant herein) established upon the preponderance of evidence that she is entitled to the reliefs sought. The learned trial judge entered judgment in terms of reliefs 1, 2 and 3, as claimed. In terms of relief 4, the sum of N517,300.00 was awarded to the claimant/ appellant as damages for breach of contract.

The respondent was not satisfied with the decision. Being aggrieved, it appealed to the Court of Appeal, Lagos Division on six grounds of appeal and submitted five issues for determination of its appeal. The first issue which challenged the jurisdiction of the trial court was resolved in favour of the appellant herein, who was the respondent at the lower court, as it was held that the trial court has jurisdiction to hear and determine the appellant's claims.

However, the remaining four issues which questioned the verdict of the trial court were resolved in favour of the respondent, whose appeal was allowed in part. All the reliefs granted by the trial court were set aside. The appellant is aggrieved with the judgment of the lower court and has therefore brought this appeal. Here notice of appeal, dated and filed on the 4th of May 2016 contains

eight grounds of appeal.

Parties filed and exchanged briefs of argument. The appellant's brief of argument, settled by Dr. Charles D. Mekwunye Esq. of counsel, the next friend by whom the appellant, being a minor instituted this action, was filed on the 15th July, 2016. Learned counsel formulated eight issues for determination of this appeal as follows:-

1. **Whether in view of the state of the pleadings and the evidence adduced before the trial court as borne out from the records before the honourable justices of the Court of Appeal, the appellant succeeded in establishing that the terms of the offer are as contain in the newspaper publication which is without any term as to abbreviation of names by a computer software which she unqualifiedly accepted and furnished consideration by paying the sum of N4,250. 00 (four thousand, two hundred and fifty naira only) thereby crystalizing the contract between the parties herein.**
2. **Whether the honourable justices of the Court of Appeal were right when they failed to consider the appellant's issue 3 bothering on whether the respondent can validly make regulations capable of limiting the appellant's names to 25 alphabets/characters under its enabling statutes and whether by so doing, the honourable justices of the Court of Appeal did not breach the appellant's rights to fair trial.**
3. **Whether it was open to the court below to suo moto raise and decide the appeal on the issue of negligence without hearing the parties to the appeal thereby breaching the appellant's fair hearing right.**
4. **Whether the respondent is not estopped in view of the established facts of this case, from refusing to issue the appellant a certificate in her full names "Mekwunye Providence Ogechukwu"?**
5. **Whether the honourable justices of the court below were right when they re-evaluated the evidence as borne out from the records without the respondent putting before the court below materials showing anything exceptional that the judgment of the learned trial judge was perverse thereby substituting their views for that of the learned trial judge who saw, hear and observed the demeanors of the witnesses before the court.**
6. **Whether the court below was right in interfering with the**

award of general damages in contract made by the learned trial judge when their lordship suo motu made out a case in negligence not supported by the pleadings and the evidence as borne out from the records before them.

7. **Whether in view of the state of the pleadings and the evidence adduced before the trial court as borne out from the records before the court below, was the court below right when it held that the appellant acted in defiance of set rules and regulations when no evidence of the rules and regulations was placed before placed before the learned trial judge as shown on the records before their lordships of the court below.**
8. **Whether in view of the totality of the pleadings and evidence adduced before the learned trial judge and as born out from the records before the court below) was the court below right when it availed the respondent of the defence of volenti non fit injuria when the case before it was in contract.**

The respondent's brief of argument settled by I. G Haruna is dated and filed on the 21st October, 2019. Learned counsel formulated four issues for determination of this appeal and they are reproduced hereunder as follows:-

1. **Whether the court below rightly absolved the respondent of any liability for breach of contract and set aside the general damages awarded by the trial court for breach of contract against the respondent.**

2. **Whether in the circumstances of this case, the court below acted in breach of the appellant's right to fair hearing.**
3. **Whether the court below was right when it re-evaluated the evidence on record and found in favour of the respondent that certain pieces of evidence were not properly evaluated by the trial court.**
4. **Whether in the circumstance of this case, the respondent is estopped from refusing to issue the appellant certificate in her full name.**

Learned counsel for the appellant filed a 20 pages reply brief on the 9th September, 2019. This reply brief was deemed properly filed and served on the 21st October, 2019.

Learned counsel for the appellant does not seem to appreciate the concept of brief writing and formulation of issues for determination of appeals that were

introduced in the Court of Appeal and the Supreme Court in September, 1977. The idea was to prune down unnecessary and voluminous submissions from parties in litigation. A brief of argument must answer to its name, and not a forum for quoting grounds of appeal from which issues are framed and argument which are not directed at the ratio of the decision against which the appeal lies. See **R.A.S.C Ltd Vs. Akib (2006) 13 NWLR (Pt. 997) 333 at 347 paras A-B.** The issues formulated for determination of an appeal form part of the brief of argument, as such they are also bound to be brief. It is preferable that a number of grounds of appeal can, where appropriate be condensed into a single cognizable issue, where there are so many grounds of appeal, instead of formulating an issue from such ground of appeal. The appellant in this appeal has formulated eight issues for determination of this appeal from eight grounds of appeal. This procedure adopted by learned counsel has deviated from the principle governing brief writing and formulation of issues for determination of an appeal. Learned counsel has surreptitiously institutionalized the pre-brief writing era in his brief of argument. This is unacceptable, especially in this court, where issues in the litigation must have whittled down before the appeal is lodged here.

Be that as it may, after having read through the record and the parties briefs of argument, I am of the view that the 4th issue formulated by the appellant can conveniently determine this appeal. Even at the risk of repetition, I reproduced this issue hereunder as follows:-

"Whether the respondent is not estopped in view of the established facts of this case, from refusing to issue the appellant a certificate in her full names "Mekwunye Providence Ogechukuru?",

I have set out the facts of this case elsewhere in this judgment. From the facts

which I have set out before now, the respondent's claim is that its online registration of candidates had a set of rules and regulations guiding their examinations which were always brought to the attention of the candidates before registration and that its syllabus also contained the rules and regulations to the effect that the defendant's registration software clearly and continually informed the candidates that it could not accept names that had more than twenty five characters at the point of registration.

The appellant's case is that the registration process was unqualified and that she registered for the examination with her full names **"Mekwunye Providence Oge-Chukwu".** It is also her case that when the respondent's website acknowledged acceptance of the registration, it omitted the last two letters of her surname. According to the appellant, it was after the drop of two letters from her last name that she complained to the respondent and she was told that the defendant's website was configured to accept

only twenty five letters.

In resolving the two contentious stories, the trial judge held:-

> **"The defendant failed to demonstrate how its website advises applicants that names entered cannot be more than 25 characters and that the candidate can have his or her name meaningfully abbreviated before the registration process is completed. The defendant also did not produce before this court a copy of its syllabus which contains the same stipulation and did not debunk the claimant's evidence that the syllabus was received after registration. I find and hold that the defendant has failed to prove that the claimant had knowledge of the risk she ran by inputting her full name into the data page on the defendant's website and therefore the defence of volenti cannot avail it."**

The appraisal of oral evidence and ascription of probative value to such evidence is the primary duty of tribunal of trial and a Court of Appeal would only interfere with the performance of that exercise if the trial court either made a finding that is not supported by evidence or drawn wrong conclusion from accepted or proved facts.

In its judgment, the lower court at page 273 of the printed record of this appeal, held:-

> **"The respondent claimed that at the point of entering into the contract, that the appellant did not inform her of the limitation. The appellant on the other hand stated that WAEC has a handbook which all prospective students were supposed to read and abide by its rules on every aspect.**
>
> **This book had all the rules and regulation as to the filling of forms and the examination proper. Also the registration**

> **software/website clearly and continually informed the candidate of the restriction as to the number of characters, why then did respondent not abide by the rules and regulations. "**

While the trial court clearly stated that the syllabus, and the rules and regulations of the respondent were not tendered in evidence and that the respondent did not demonstrate before it that the restrictions in the characters acceptable by its computer were made known to the appellant, where did the lower court find the evidence upon which it based its findings? Which pages of the book that had all the rules and regulations as to the filling of the forms and the examination proper. The book that contained the rules and regulations admittedly was the property of the respondent and it was its assertion that

same was made available to the appellant. The duty to prove the existence of the book, squarely rested with the respondent, by virtue of Section 131 (2) of the Evidence Act 2011.

The main reason why the lower court allowed the appeal is that the appellant failed and/ or neglected to follow the rules that the computer could only accept twenty five letters and the appellant effected her registration with a twenty seven letters name. This to me is ridiculous. The end result of a failure to follow the rules of doing a particular thing would be a rejection of that thing that is sought to be done. The disobedience of the appellant in following the laid down rules, would have cost her the registration exercise and not tampering with the information supplied without hearing from her. The official receipt evidencing the registration fee paid by the appellant, **Exhibit C1** bears "Oge-Chukwu". Even if certain part of the appellant's name was going to be tampered with, it is certainly not the name that was used in paying the registration fees.

At pages 281 - 282 of the printed record of this appeal, the lower court held:-

> **"The trial judge ought to have made a finding that the error is that of the respondent and not a failing or negligence of the appellant. Asking the appellant to issue a certificate manually generated to accommodate the respondent's full names is unacceptable. The integrity of the appellant is more important to it. For long the appellant has been battling to make sure that the integrity of the examinations and certificates are protected. The respondent has asked for the impossible which the appellant cannot accede to do. The appellant is protecting itself from such violations of its set rules".**

Now the question I may ask is whether the attitude of the respondent herein has assisted in preserving its integrity?

The future aspiration of the appellant lies in the result generated by the respondent. The appellant has configured its computer in such a way as to admit figures not In conformity with its rules and regulations. Not only that, the respondent by

Exhibit C7, a letter dated 10th November 2008, clearly admitted that it had the capacity to rectify the name, on payment of N5,000.00 penalty fee by the appellant. The appellant paid the penalty through Oceanic Bank Cheque draft dated 12th January 2009, which respondent acknowledged receipt, but failed to deliver.

Where then is the integrity where a genuine candidate who was allowed to sit for the examination conducted by the respondent after having complied with the laid down rules cannot use the certificate to realize her dreams. By accepting to carry out corrections in the appellant's name and having collected the sum of N5,000.00 as penalty fee, the respondent is estopped from refusing to issue the appellant a certificate in her full names. For every wrong there is a remedy. The computer and the respondent's website are creatures of human being. That which is created by human being cannot overwhelm

him. Let the appellant's future remain aglow and secured.

The 4th issue is accordingly resolved in favour of the appellant. The appeal herein is allowed. The judgment of the lower court is hereby set aside. In its place, I hereby restore the judgment of the trial High Court.

There shall be cost of prosecuting this appeal which I assess at N500,000.00 in favour of the appellant and against the respondent.

Paul Adamu Galinje
Justice, Supreme Court

MARY UKAEGO PETER-ODILI, (JSC): I agree with the judgment just delivered by my learned brother, Paul Adamu Galumje JSC and to underscore the support I have in the reasonings from which the decision emanated, I shall make some remarks.

This is an appeal against the judgment of the Court of Appeal Lagos Division or lower court or court below, delivered on the 22nd day of March, 2016, Coram: Uzo 1. Ndukwe-Anyanwu, Tijjani Abubakar and Jamilu Yammarn a Tukur JJCA which allowed the respondent's appeal and set aside the judgment of the trial High Court.

FACTS:
The appellant was the original claimant before the High Court of Lagos State while the respondent was the defendant in the action by the claimant for:-

"(a) A declaration that the contract between the claimant and defendant is binding on the parties and that the claimant is entitled to have her November/December 2008 WASSCE (Private) result released and certificate made in her cull names - "Mekwunye Providence Ogechukwu".

(b) A declaration that the rejection of the last two letters in "Ogechukwu" vide the defendant's acknowledgement of registration thereby renaming the claimant as "Mekwunye Providence Ogechuk" was wrongful, strips the claimant of her identity, the usefulness and essence of

the said examination, thereby rendering the result and certificate in evidence thereof useless and the entire exercise worthless.

(c) An order compelling the defendant to release the claimant's result and issue her certificate in the name "Mekwunye Providence Oge-chukwu" being the name with which she sat for the said November/December 2008 WASSCE (private).

(d) Damages for breach of contract in thie sum of N10,000,000.00"

The Hon. Justice O. O. Femi-Adeniyi who took oral and documentary evidence and addresses of counsel in the matter and gave judgment in favour of the claimant in the following terms:

> **"Upon the facts laid before this court, I am satisfied that the claimant has established upon the preponderance of evidence that she is entitled to the reliefs sought. The claim succeeds and judgment be and is hereby entered for the claimant as follows:-**
>
> **(1) The contract between the parties is binding on the parties and the claimant is entitled to have the November/December 2008 West African Senior Secondary Certificate Examination (WASSCE) (private) result released and certificate on the result made in her full names -"Mekwunye Providence Oge-chukwu".**
>
> **(2) The rejection of the last two letters in "Ogechukwu" vide the defendant's acknowledgement of registration thereby renaming the claimant as "Mekwunye Providence Ogechuk" was wrongful, strips the claimant of her identity, the usefulness and essence of the said examination, thereby rendering the result and certificate in evidence thereof useless and the entire exercise worthless.**
>
> **(3) The defendant be and is hereby ordered to release the claimant's results and issue her certificate on the result in the name "Mekwunye Providence Oge-chukwu" being the names with which she sat for the said November/December 2008 West African Senior Secondary Certificate Examination (WASSCE) (Private).**
>
> **(4) Damages for breach of contract in the sum of N517,300.00.**

The fuller background facts are well set out in the lead judgment and I shall not repeat them except circumstances warrant a reference to any part thereof.

On the 21st day of October, 2019 date of hearing, Dr. Charles D. Mekwunye, learned counsel for the appellant adopted the brief of argument filed on 24/10/2016 and a reply brief filed on 9/9/19. He formulated eight (8) issues for determination, viz:-

> **1. Whether in view of the state of the pleadings and the evidence adduced before the trial court as borne out from the records before the honourable justices of the Court of Appeal, the appellant succeeded in establishing that the terms of the offer are as contained in the newspaper publication which is without any term as to abbreviation of names by a**

computer software which she unqualifiedly accepted and furnished consideration by paying the sum of N4,250.00 (four thousand, two hundred and fifty naira only) thereby crystallizing the contract between the parties herein. (Distilled from Ground 1).

2. **Whether the honourable justices of the Court of Appeal were right when they failed to consider the appellant's issue 3 bothering on whether the respondent can validly make regulations capable of limiting the appellant's names to 25 alphabets/characters under its enabling statutes and whether by so doing, the honourable justices of the Court of Appeal did not breach the appellant's rights to fair trial. (Distilled from Ground 2).**
3. **Whether it was open to the court below to suo motu raise and decide the appeal on the issue of negligence without hearing the parties to the appeal thereby breaching the appellant's fair hearing right. (Distilled from Ground 3).**
4. **Whether the respondent is not estopped in view of the established facts of this case, from refusing to issue the appellant a certificate in her full names "Mekwunye Providence Ogechukwu? (Distilled from Ground 8).**
5. **Whether the honourable justices of the court below were right when they re-evaluated the evidence as borne out from the records without the respondent putting before the court below materials showing anything exceptional that the judgment of the learned trial judge was perverse thereby substituting their views for that of the learned trial judge who saw, heard and observed the demeanours of the witnesses before the court. (Distilled from Ground 4).**
6. **Whether the court below was right in interfering with the award of general damages in contract made by the learned trial judge when their lordships suo motu made out a case in negligence not supported by the pleadings and the evidence as borne out from the records before them. (Distilled from Ground 5).**
7. **Whether in view of the state of the pleadings and the evidence adduced before the trial court as borne out from the records before the court below, was the court below right when it held that the appellant acted in defiance of set rules and regulations when no evidence of the rules and regulations was**

placed before their lordships of the court below. (Distilled from Ground 6).

8. **Whether in view of the totality of the pleadings and evidence adduced before the learned trial judge and as borne out from the records before the court below, was the court below right when it availed the respondent of the defence of volenti non fit injuria when the case before it was in contract. (Distilled from Ground 7).**

Learned counsel for the respondent, I. G. Haruna Esq. adopted the brief of argument filed on 5/2/19 and deemed filed on 21/10/19. He formulated four issues for determination which are thus:-

1. **Whether the court below rightly absolved the respondent of any liability for breach of contract and set aside the general damages awarded by the trial court for breach of contract against the respondent. (Grounds 1, 5, 6 and 7).**
2. **Whether in the circumstances of this case, the court below acted in breach of the appellant's right to fair hearing. (Grounds 2 and 3).**
3. **Whether the Court below was right when it re-evaluated the evidence on record and found in favour of the respondent that certain pieces of evidence were not properly evaluated by the trial court. (Ground 4.)**
4. **Whether in the circumstances of this case, the respondent is estopped from refusing to issue the appellant certificate in her full names. (Ground 8).**

For simplicity and ease of reference, I shall make use of the issues as distilled by the respondent.

1. **Whether the court below rightly absolved the respondent of**

any liability for breach of contract and set aside the general damages awarded by the trial court for breach of contract against the respondent. (Grounds 1, 5, 6 and 7).

2. **Whether in the circumstances of this case, the court below acted in breach of the appellant's right to fair hearing. (Grounds 2 and 3).**
3. **Whether the court below was right when it re-evaluated the evidence on record and found in favour of the respondent that**

certain pieces of evidence were not properly evaluated by the trial court. (Ground 4).

4. **Whether in the circumstance of this case, the respondent is estopped from refusing to issue the appellant certificate in her full names. (Ground 8).**

For the appellant, it was contended by learned counsel that the issue joined by the parties from the state of their pleadings and that is that whilst the appellant pleaded that as at the time of the contract when acceptance met offer, the terms of the contract were complete and candidates were not informed that the characters of their names cannot exceed 25 and that they may have to abbreviate their names, as the respondent contends that the information which was given during registration for the examination with the computer was part of the contract.

That the learned trial judge made the correct finding that the respondent proffered no evidence in respect of limitation of characters of the names of an applicant to 25 during the trial of this matter.

That the appellant has clearly established as borne out on the record that there was an offer which was duly accepted and a consideration given in that respect culminating into a subsisting and valid contract between the parties herein and that the terms of that contract did not include that the names of the appellant will be limited to 25 characters and the court is urged to so hold.

Dr. Mekwunye of counsel for the appellant stated that the court below failed to consider appellant's issue 3 which centered on Section 23 of the WAEC Act, Section 18 of the Interpretation Act, The African Charter on Human and Peoples Rights (Ratification and Enforcement) and Section 9 of the Births, Deaths etc (Compulsory Registration) Act.

That the failure led to a denial of fair hearing right of the appellant sufficient to nullify judgment of the Court of Appeal.

That the court below formulated its own case on matters not pleaded nor agitated by the parties without evidence and proceeded to give a decision on it which occasioned injustice to the appellant. That the court below did not show any exceptional circumstances presented by the respondent to warrant interference with the credible findings of the trial court.

Learned counsel for the appellant urged the court to restore the findings and

decision of the trial court which were in line with the pleadings and evidence unlike what the court below did which was outside the record. Numerous judicial authorities were cited.

For the respondent learned counsel, I. G. Haruna Esq. contended that the respondent's publication in the national dailies sometime in April 2008, the receipt of payment issued by the respondent to the appellant, the scratch card given to the appellant

upon the payment and the admission notice/photo card printed by the appellant are several documents that must be read together in determining the issues before the court on the basis of documents relating to the contract and the conduct of the parties in this case showed the none culpability to the breach of contract on the part of the respondent. That it was the appellant who was at fault and should bear the consequences. That appellant cannot take benefit from his own wrong.

Mr. Haruna of counsel stated that the Court of Appeal effectively resolved the appeal in a fair manner including the complaint raised in appellant's brief in the court below.

That the trial court did not properly evaluate the evidence of the respondent and the court below right to re-evaluate the evidence led by the respondent and came to the decision which it made.

Learned counsel relied on many judicial authorities to buttress the points raised and canvassed.

In a nutshell, appellant's stance is that the learned trial judge from the evidence before him as borne out from the records that the case before the court is simply on contract and the trial court found in favour of the appellant and it was the court below that went the wrong way.

That position the respondent disagreed with but is of the view that the Court of Appeal was right in upturning what the trial court did.

A foray back in time to the pleadings would show that the relevant paragraphs of the statement of claim which are paragraphs 9, 10 and 11 thus:-

> **"9. The claimant avers that the registration for the examination was done after the payment and acceptance by the defendant of the N4,250 fee which transaction was without any qualification whatsoever.**
>
> **10. The claimant further avers that the registration was unqualified by the defendant and the claimant registered for 'the examination with the names 'Mekwunye Providence Oge-chukwu'.**
>
> **11. The defendant's computer in acknowledging acceptance of the registration showed the claimant's name as 'Mekwunye Providence Ogechuk' without the last two (2) letters in 'Ogechukwu'. The claimant will rely on the Defendant's admission notice/photo card in proof of this**

> **fact". (Underlining mine for emphasis)**

By paragraph 7 of its statement of defence reproduced at page 81 of the records, the respondent as defendant before the trial court denied the averments contained above thus:

"7. With reference to paragraph 4-11 of the statement of claim, the defendant states the correct position is as follows that:-

i. The claimant paid for the E. (online) registration for SSCE Nov/Dee 2008 filled the forms and also paid the Examinations fees to the defendant. (Underlining mine).

ii. The defendant is not responsible for registering the candidates for examination as the exercise is done on-line.

iii. The defendant's activity as set out is organized and has a set of rules and regulations guiding he examination etc, which is always brought first and foremost to the attention of the candidate for the affirmation.

iv, The claimant herein was on the internet and was fully aware of the rules and regulations guiding the entire examination. There is also the syllabus guiding examinations in book form which contain rules and regulations guiding the examination and all candidates are aware of these.

Again at paragraph 7(v) and 7(vi), the defendant/respondent averred thus:

v. At the point of registration, the registration software clearly and continually informs the candidate that the names cannot be more than (25) twenty five characters and that in cases, she can have her name meaningfully abbreviated.

vi. In defence or indeed compliance to that instruction and in her wisdom she abbreviated her name as 'Oge-Chuk'. She alone took and implemented that decision.

The learned trial judge as found at page 195 of the record held as follows:-

"The defendant failed to demonstrate how its website advises applicants that names entered cannot be more than 25

characters and that the candidate can have his or her name meaningfully abbreviated before the registration process is completed. The defendant also did not produce before this court a copy of its syllabus which contains the same stipulation and did not debunk the claimant's evidence that the syllabus was received after registration".

The court below on its part went the opposite way to hold thus:-

> **"If there is a restriction in the form, every candidate is duty bound to obey and abide by such rules. You disobey at your own peril. The respondent at the point of registration on line for examination acted in defiance or indeed non compliance with the rules and instructions when the examination soft-ware clearly and continually informed the candidate that the names to be filled in cannot be more than 25 letters or characters" .**

The slant of the decision above of the Court of Appeal smacks of speculation as the use of the word "if" connotes, not in keeping with consideration of evidence and the resultant decision. This is because it is trite in law that a judgment must be confined to the issues raised on the pleadings and evidence given by the parties in support of their case or cases. It is on those issues joined and argued and in respect of which evidence is led that the judgment must be based. Where that is not done by the court, it will be taken that the court had made a case for the parties by formulating its own case not backed by evidence and proceeding to give judgment on a hypothetical case, a situation decried by the Supreme Court in numerous occasions. See **Baridam Vs. State (1994) LPELR -753; Oniah Vs. Onyia (1989) 1 NWLR (Pt.99) 514 at 531.**

This instant case has brought up the question whether or not what transpired between the parties is a contract and so what brings about the formation of a contract is to be considered to see if the qualities necessary in a contract are at play here. To constitute a binding contract between parties there must be a meeting of the mind which is referred to as "consensus ad idem" which mutual consent relates to an offer and acceptance. The definition of an offer in my humble view is, the expression by a party of readiness to contract on the terms specified by him which if accepted by the offeree gives rise to a binding contract. The maturation to a contract happens where the offeree signifies a clear and unequivocal intention to accept the offer.

In fuller expatiation, in order to establish that the parties have formed a contract, there must be evidence of consensus ad idem between them. If there is a stipulated mode for acceptance of the offer, the offeree has a duty to comply with same and no less. See **Bilante Int'l Ltd. Vs. NDIC (1997) 8 NWLR (Pt.515) 37; Afolabi Vs. Polymera Industries (1967) 1 All NLR 14.**

In this case at hand, the appellant has established as seen in the record that there

was an offer which was duly accepted and a consideration given, all of which ingredients culminated into a subsisting and valid contract between the parties and there isnothing in support of the assertion that terms of the contract included that the names of the appellant would be limited to 25 characters.

It is because of what has been shown from the record that the court below went against long settled principle of adjudication which does not permit a judge to embark on an inquisitorial examination of documents outside the court room. The judge is also not allowed to act on what he has found out in such a document in relation to an issue not supported by the evidence proffered nor was brought to be agitated in the regular adversarial procedure. I place reliance on **Senator Iyiola Omisore & Anor. Vs. Ogbeni Rauf Adesoji Aregbesola & Ors. (2015) KPELR -24803 SC per Nweze JSC; Bamgbose Vs. Oshoko (1988) 2 NWLR (Pt.78) 509; Gbafe Vs. Gbafe (1996) 6 NWLR (Pt.455) 417; State Vs. Aibangbee (1988) 3 NWLR (Pt.84) 548; Adetoun Oladeji (Nig.) Ltd. Vs. Nigerian Breweries (2007) 5 NWLR (Pt.1027) 415.**

To further buttress the point above made, I shall refer to Exhibits C5 and C6 respectively written to the respondent and the reply to those letters by respondent admitted as Exhibit C7 of 10th July 2008 which is quoted hereunder, viz:-

> **"L/TAD/PCED/CR.51/Vol.l**
> **Mekwunye Providence Ogechukwu (Miss) 1, Niger Street,**
> **Parkview Estate,**
> **Ikoyi.**
>
> **Dear Sir/Madam,**
>
> **RE: EKUNYE PROVIDENCE OGECHUKWU (MISS) NEGLIGENT MISSPELLING OF NAME**
> **Please refer to your letter on the above subject matter dated October 13, 2008 signed by Paul I. Okoh & Co. who allegedly are your Solicitors.**
>
> **It is important to note that your registration was done on-line by you so the West African Examinations Council should not be held responsible for any error in your registration.**
>
> **You are therefore advised to request in writing for amendment of your name in the November/December, 2008 WASSCE (P). Your request should be addressed to the DR (PCED), WAEC Yaba. You will also be required to play a penalty fee of N5,000.00 and attached the original copy of the receipt to your application.**

Also attach a photocopy of your admission notice/photo card to the applica-

tion.

Thank you.

Yours faithfully,
(Signed).
MRS. F. N. IWEHA - ONUKU
FOR: DEPUTY REGISTRAR (PECD)
FOR: HEAD OF NATIONAL OFFICE".

Sequel to the above (Exhibit C7), the appellant issued a certified managers' cheque dated the 12th day of January, 2009 (Exhibit C11) in favour of the respondent being penalty requested to be paid by the respondent by virtue of Exhibit C7 by the appellant or the amendment of her name that was abbreviated by the respondent without her consent. Exhibit C11 is hereunder reproduced for ease of reference:-

"OCEANIC BANK 01248764
INTERNATIONAL PLC VICTORIA ISLAND BRANCH VI **124**
LAGOS STATE

Pay **Date: 12/10/2009**

WEST AFRICAN EXAMINATION COUNSEL*****************
Or Order
_____ 5,000.00
The Sum of Five Thousand Naira Only*****************

PAYABLE AT: VI BANCH FOR: Oceanic Bank Plc
'(001) Authorised Signature
_____DO NOT WRITE, SIGN OR STAMP BELOW THIS LINE

"01248764" 056150014''': 0481000122". 04"

It is clear from the evidence before the court that the respondent in unequivocal terms, evidenced by Exhibit C7 informed the appellant that an amendment to the appellant's name is possible and stated a penalty fee in the sum of Five Thousand Naira N5,000.00 which appellant relied upon and complied with. Therefore, the respondent cannot now resile from their representation made to the appellant that an amendment is possible if

the penalty is paid which the appellant obliged with. Therefore the respondent is estopped from changing the goal post as a party cannot aprobate and reprobate at the same time.

I shall call in aid some decided authorities and I shall cite them accordingly.,

This court in Akanni Vs. Makanju (1978) 11 SC 13 at 26 per Obaseki JSC stated the law thus:-

> **"The general rule as to standing-by was laid down in Caincross Vs. Lorimer (1860) 3 LT 130. It was adopted with approval by the West African Court of Appeal in Morayo Vs. Okiade and Ors, 8 WACA 46 at page 47 and read as follows: "It is a rule of universal law that if a man either by word or conduct has intimated that he consents to an act which has been done and that he will offer no opposition to it although it could not have been lawfully done without his consent and he thereby induces others to do that from which they otherwise might have obtained, he cannot question the legality of the act he had so sanctioned to the prejudice of those who have given faith to his word or the fair inference to be drawn from his conduct".**
>
> **See also (i) Section 169 Evidence Act, 2011**
> **(ii) Buhari Vs. INEC (2008) 12 SC (Pt.1) 1 at 60-61; and**
> **(iii) Nsirim Vs. Nsirim (2002) 2 SC (Pt.1) 47**

See also the case of Okonkwo Vs. Kpajie (1992) LPELR - 2483 (SC) where this Court held thus:-

> **"This is estoppel by conduct - by matter in pais. Where a man by word or conduct willfully made a representation of a state of facts to another and thereby induced that other to believe that the state of things were as represented by that person and that other took him by his words and acted upon that representation, then that person who made the representation either by himself or his representative in interest cannot now turn around to say or behave as if the state of things were not as he represented them. He is estopped from asserting the contrary. See Section 150 of the Evidence Act; Also Joe Iga & Ors. Vs. Ezekiel Amakiri & Ors. (1976) 11 SC 1, 12-13. All that is required in such a case is that the facts to be relied upon as estoppel be duly pleaded or brought to the notice of the adjudicating tribunal in some appropriate way, such as has been done in paragraph 16 of the statement of defence in this case: see Sanders Vs. Sanders (1952) 1 All E.R. 767".**

(Underlining mine for emphasis).

I shall refer once again to what the learned trial judge did which I quote thus:-

"The defendant failed to demonstrate how its website advises applicants that names entered cannot be more than 25 characters and that the candidate can have his or her name meaningfully abbreviated before the registration process is completed. The defendant also did not produce before this court a copy of its syllabus which contains the same stipulation and did not debunk the claimant's evidence that the syllabus was received after registration.

I find and hold therefore that the defendant has failed to prove that the claimant had knowledge of the risk she ran by inputting her full name into the data page on the defendant's website and therefore the defence of volenti cannot avail it". (Underlining mine for emphasis).

The Court of Appeal then went into an arena not justified by the records as follows:-

"This book had all the rules and regulations as to the filing of forms and the examination proper. Also the registration software/website clearly and continually informed the candidate of the restriction as to the number of characters, why then did the respondent not abide by the rules and regulations."

It is to be reiterated that it is the primary duty of a trial court to evaluate evidence before it and make definite findings on such evidence and so from the trial court's advantageous position and exclusive at that to consider the demeanour of each witness before the court. This situation was well articulated by this court per Belgore JSC (as he then was) in Umar Vs. Bayero University (1988) 4 NWLR (Pt.86) 85 thus:-

"It is the primary duty of the trial court to evaluate evidence before it and make definite findings on such evidence. It has every advantage of doing this. The witnesses are before it and it is well placed to judge the demeanour of each witness. For examination-in- chief, cross examination and re-examination, the trial court has an advantage over all appellate courts of deciding who to believe or disbelieve. The record of proceeding, however detailed or comprehensive is not cinematograph or even live voice accompanying pictures but mere attempt to record what was said

or demonstrated and not the demonstration of the evidence itself. It is for this reason that unless it is expedient in exceptional circumstances, the appellate court should not disturb the findings of

fact of trial court. You can believe that person you can see and hear; similarly the person you disbelieve. A Court of Appeal merely sees the records and not the person whose voice and demonstration are written down. The exceptional circumstances could be incompetent evidence, evidence legally inadmissible like hear-say and some secondary evidence. For trials are only trials in law if based on lawful evidence; a judgment based on inadmissible evidence is no judgment and will be declared null and void". (Underlining mine for emphasis).

I have to go along with the submissions of learned counsel for the appellant that when the learned trial judge held that the respondent failed to produce the copy of its syllabus alleged to contain the stipulations or demonstrate how its website advises applicants that names entered cannot be more than 25 characters and that the candidate can have his or her name meaningfully abbreviated before the registration process is completed and no computer or computer software was brought to the trial court.

It therefore beats logic, from where the court below found the basis for its own conclusion with postulations or speculations operating only in the mind of the Court of Appeal which led it into making a different case from that upon which the parties had joined issues. See Adetoun Oladeji (Nig.) Ltd. Vs. Nigerian Breweries Plc (2007) 5 NWLR (Pt.l027) 415; Badejo Vs. Minister of Education (1996) 8 NWLR (Pt.464) 15; Chief Ebba Vs. Chief Olgbodo & Anor. (1984) 1 SCNLR 372; S. O. Ilodibia Vs. Nigerian Cement Company Ltd. (1997) 7 NWLR (Pt.512) 174 at 190-191.

Without a further waste of time, it is clear from the foregoing and the fuller reasoning in the lead judgment that this appeal has loads of merit and I allow it. I also set aside the judgment of the Court of Appeal and order the reinstatement of the decision and orders of the trial High Court.

I abide by the consequential orders made.

Mary Ukaego Peter-Odili ***Justice, Supreme Court***

MUSA DATTIJO MUHAMMAD, (JSC): Having had a preview of the lead judgment of my learned brother PAUL ADAMU GALUMJE JSC, just read, I entirely agree with the reasoning and conclusion therein that this appeal has merit and that it succeeds.

I rely on the facts of the case that brought about this appeal, as stated in the lead judgment, in emphasizing that the lower court has erred in interfering with the judgment of the trial court that is clearly supported by evidence, It is still the principle that where in its primary duty of evaluating evidence the trial court has done the

needful, by ascribing the correct probative value to the evidence of parties and drawing impeccable inference from the evidence, an appellate court is hamstrung. It

cannot lawfully interfere. See **EZEANI Vs. FRN (2019) LPELR - 46800 SC and EZECHUKWU & ANOR Vs. O. C. ONWUKA (2016) LPELR - 26055 (SC).**

In the case at hand the lower court's interference with the trial court's unassailable findings is uncalled for. It is for this and the fuller reasons adumbrated in the lead judgment that I, too, allow this appeal and abide by the consequential orders reflected in the lead judgment.

Musa Dattijo Muhammad,
Justice, Supreme Court

JOHN INYANG OKORO, (JSC): I totally agree with the lead judgment rendered by my learned brother, **Paul Adamu Galumje,** JSC together with the cost as assessed by my Lord in favour of the appellant. I have perused the reasons and conclusion expatiated in the said lead judgment and I have found them agreeable to my understanding of the law on the subject. This appeal is meritorious and deserves to be allowed.

The facts giving rise to this appeal and submission made by learned counsel on both sides have been meticulously summarized in the lead judgment and need no repetition here save as it is necessary to refer to any portion thereof for purpose of dealing with any portion in decision in this appeal.

It is the case of the appellant that she paid an initial sum of N4,250.00 to the respondent as online registration fee for the November/December 2008 West African Senior School Certificate Examination, for which she was issued a receipt (Exhibit 1). She further paid the sum of N5000.00 vide a bank draft as penalty to have her surname which was wrongly spelt corrected by the respondent. I hold the view that the test for a valid contract was reached between the parties when the appellant's registration fee of N4,250 was accepted by the respondent and receipt issued to that effect in the appellant's complete surname as "Ogechukwu." See **Akinyemi Vs. Odu'a Investment Co. Ltd (2012) 17 NWLR (pt. 1329) 209 at 236.**

The law is that as much as the court would not re-write the agreement of parties, where a contract consist of series of documents, the court has a duty to scrutinize and examine closely all contractual documents admitted as exhibits to determine whether there exist a contract between the parties and the issue(s) in controversy between the parties. The documents must be read together. See **BFI Groups Corporation Vs. Bureau of Public Enterprises (2012) 18 NWLR (Pt. 1332) Pt. 209; Central Bank of Nigeria Vs. Mrs. Agnes M. Igwillo (2007) 14 NWLR (Pt. 1054) 593 at 433. In the case of BFI Groups Corporation Vs. Bureau of Public Enterprises (supra)** this court per Fabiyi, JSC at page 235 stated as follows "outside oral evidence, the lower court had an abiding duty to scrutinize all the series of documents and bonds to determine whether there exists a contract between the parties. See **Shell BP Petroleum Co. Ltd. Vs. Jammal Engineering (Nig) Ltd. (1974) 4 SC 33 at 72** cited by senior

counsel to the appellant wherein this court per Coker, JSC pronounced as

follows:-

> **"The final exercise of judgment must of necessity involve a consideration of all the correspondence that is properly put in evidence by both sides - all the correspondence tendered in order to establish the case and all that produced in order to disprove the existence of a contract. It is only after such detailed consideration that a tribunal can fairly come to a conclusion as to whether or not the parties actually arrived at an agreement."**

In the instant case, it is not in doubt that parties had reached an agreement to have the appellant write the respondent's examination using her surname "Ogechukwu" when her payment of registration fee was accepted and receipt issued to that effect. It is also in evidence that by a letter dated 10th November, 2008 the respondent advised the appellant to make a written request for her name to be amended together with a penalty fee of N5000.00 which she paid. As rightly stated by my learned brother in the lead judgment, having collected the sum of N5,000.00 as penalty fee for corrections to be effected on the appellant's name, the respondent is estopped from refusing to correct whatever error or mistake that was found on the name and have her certificate issued in her full surname as "Ogechukwu" instead of "Ogechuk."

For all I have said above, I find merit in this appeal. Same is accordingly allowed by me. The judgment of the court below is hereby set aside and the judgment of the trial court is hereby restored. I abide by the cost as assessed by my learned brother in the lead judgment.

Appeal Allowed.

John Inyang Okoro
Justice, Supreme Court

UWANI MUSA ABBA AJI, (JSC): I was opportuned to have read the lead judgment just delivered by my brother, Paul Adamu Galumje, JSC. I am in agreement with the reasoning and conclusion reached by him in allowing the appeal.

The fuller facts are as narrated in the lead judgment. Summarily, the appellant seeks for the release of her WAEC certificate in her full name of "Mekwunye Providence Ogechukwu" which the respondent wrongly omitted the last 2 letters in "Ogechukwu" in the online registration portal/ software of the respondent because it cannot absorb more than 25-character name. The appellant therefore seeks for the enforcement of the contract between her and the respondent. By the facts on record, the appellant as advertised by the respondent bought the Form, filled and submitted, wrote the exam but her result could not be released because her name contains more than 25-letter name which the respondent's registration software could not capture all.

By the ingredients of a valid contract therefore, a contract had come into play. Nevertheless, it was after a valid contract was formed that the respondent came up with

the story that their registration software cannot contain more than 25-character name.

The offer made by the respondent caused the appellant to accept by buying, filling and submitting the Form, while the consideration was for N4,250.00. There is therefore the presumption and regularity of a valid contract between the parties the breach of which is by enforcement as sought by the appellant. It is settled law that a contract is formed once there is an offer by the offeror to the offeree which is accepted by the offeree backed by consideration. At that point in time, the parties to the contract are said to be ad idem or in agreement, and, that agreement or contract is binding on both parties and as such it is enforceable by action. See Per ONNOGHEN, JSC, in **YARO Vs. AREWA CONSTRUCTION LTD & ORS (2007) LPELR- 3516(SC).**

In fact, as at the time the contract was entered into and matured or crystalized, there was no clause or proviso of the requirement of not more than 25-letter name. The fact is that respondent vide Exhibit C7 accepted and admitted that an amendment in the spelling was possible. Thus, they cannot now turn around to withhold the certificate of the appellant as same will amount to breach, remediable in enforcement. For the purpose of ascertaining the intention of the parties, regard must be had to the terms of the contract, the conduct of the parties, and the circumstances of the case. See **NANKA-BRUCE Vs. COMMONWEALTH TRUST LTD. (1926) A.C. 77.** The respondent must therefore be estopped by what he caused the appellant to believe and act upon.

Going also by the stance of my brother in the lead judgment, this appeal has merit and is hereby allowed. The judgment of the lower court is set aside. The consequential orders by him apply.

Uwani Musa Abba Aji
Justice, Supreme Court

ABCDEFGH

Judgements of the Supreme Court of Nigeria Law Report
17th January, 2020
17th January, 2020

SGT.STEPHEN IDAHOSA
Vs.
CHRISTOPHER IDAHOSA

SC.52/2011

IN THE SUPREME COURT OF NIGERIA
HOLDEN AT ABUJA

FRIDAY, 17TH JANUARY, 2020

BEFORE THEIR LORDSHIPS

MARY UKAEGO PETER-ODILI JUSTICE, SUPREME COURT

MUSA DATIIJO MUHAMMAD **JUSTICE, SUPREME COURT**
JOHN INYANG OKORO **JUSTICE, SUPREME COURT**
PAUL ADAMU GALUMJE **JUSTICE, SUPREME COURT**
UWANI MUSA ABBA AJI **JUSTICE, SUPREME COURT**

EVIDENCE:- Dying declaration —Where a person makes a statement that is not connected to the cause of his death but merely the paternity of his children —Whether such statement cannot be construed as dying declaration.

EVIDENCE:- Hearsay —Where the paternity of a party is allegedly asserted based on a dying declaration —Whether it is hearsay evidence which cannot establish the truth of what it asserts.

EVIDENCE:- Legitimacy proceedings —Where a party challenges the paternity of a child during the continuance of a valid marriage —Whether scanty presentation will not meet the standard of proof which is beyond reasonable doubt.

EVIDENCE:- Legitimacy proceedings —Where a person is born during the continuance of a legal marriage —Whether proof beyond reasonable doubt is required to establish that that person is illegitimate child —The principle in ***Preston-Jones Vs. Preston- Jones (1951) 1 All ER 124 at 127.***

EVIDENCE:- Onus of proof —Where a party asserts a fact —Whether the onus of proving that fact lies on party —S. 131 of the Evidence Act, 2011 considered.

EVIDENCE:- Presumption of legitimacy —A child born during the continuance of legal marriage is presumed to be the legitimate child of the man —Onus on party alleging otherwise —Whether proof is beyond reasonable doubt.

EVIDENCE:- Presumption of legitimacy —Where a person is born during the continuance of a legal marriage —Whether he shall be presumed to be a child of that man.

WORDS AND PHRASES:- Dying declaration —Meaning

Issues for Determination

1. **Whether the learned justice of the Court of Appeal were right in setting aside the judgment of the trial court and entered in**

its place judgment in favour of the respondent with the costs of N30,000,00 against the appellant having regard to the evidence adduced by the appellant at the trial and the relief claimed by the respondent at the lower court. (Grounds 1, 2 and 10).

2. **Whether the learned justices of the Court of Appeal were right in their holding that the appellant did not discharge the burden of proving that their mother (Onaiwu) made a death bed confession as to the paternity of the respondent and that the trial judge's evaluation of the evidence led at the trial amounted to fishing for evidence where none exists. (Grounds 3, 4, 7 and 9).**
3. **Whether the learned justices of the Court of Appeal were right in holding that the trial court should have refrained from using any aspect of the evidence of the Eronmwon family in arriving at its conclusion having earlier found as a fact that the members of Eronmwon family had no right to determine who the heir of late Pa, Idahosa is. (Ground 5).**
4. **Whether the learned justices of the Court of Appeal were right in holding that the presumption of legitimacy enures to the benefit of the respondent. (Grounds 6 and 8).**

Fact of the Matter

The plaintiff/respondent sued the defendant/appellant at Edo State High Court sitting at Benin Judicial Division claiming some declaratory and injunctive reliefs relating to his patternity to late Pa. Egharevba Idahosa.

The defendant/appellant also filed a counter-claim in relation to the same fact in issue. The cause of action arose from alleged confessional statement/dying declaration made by one late madam Onaiwu Idahosa.

In the said dying declaration, the said late madam Onaiwu Idahosa stated that plaintiff/respondent was not the biological son of Late pa. Eghareuba Idahosa.

It was alleged that she gave birth to the plaintiff/respondent while receiving medical treatment at Benin for Late Pa. Osayande.

At the conclusion of trial, the respondent's claim as to his perternity by Pa.

Egharevba Idahosa was dismissed and part of the appellant's counter-claim were granted. The respondent appealed to the Court of Appeal which allowed the appeal and set aside the decision of the trial court.

Consequently, the defendant/appellant has now appealed to the Supreme Court.

Held: *(Unanimously dismissing the appeal)*

1. Hearsay evidence is inadmissible to prove the truth of a statement.

I find it difficult to go along with what the learned trial judge found as proof of the paternity of the plaintiff and his elder sister as it cannot be so casually established from a so-called confession or dying declaration of the mother in the absence of plaintiff and his sister without a buttressing support. It therefore falls into the category of a hearsay evidence as it is sought to use the said statement to establish the truth of what is contained in the statement and so made it inadmissible to be used to prove what the defendants asserted. See Are Vs. Adisa (1967) NMLR P.304 at 306; Subramanian Vs. Public Prosecutor (1965) 1WLR 963 at 969 wherein the judicial committee of the privy council made the distinction between what is taken as hearsay and thereby inadmissible and what is not hearsay and admissible when the statement is proposed to establish by evidence not the truth of the statement but the fact that it was made.
(P 212 para A - B)

2. *A child born during the continuance of a legal marriage is presumed to be the legitimate child of the man*
The situation on ground has brought up the issue of the required standard of proof in the determination of the paternity of the plaintiff and his elder sister so as to remove them from the Idahosa family into that of Pa. Osayande who is the alleged biological father. In such an instance as we are faced, it is standard of proof beyond reasonable doubt. This is so because to dislodge the presumption of law in Section 148 of the Evidence Act now Section 165 of the Evidence Act, 2011, that a child born during the continuance of a legal marriage is presumed to be the legitimate child of the man. ***(P 212 para D - E)***

3. *Proof beyond reasonable doubt is required to illegitimate a child born during continuance of legal marriage.*
The position is very well expatiated in the English case of Preston-Jones Vs. Preston-Jones (1951) 1 All ER 124 at 127 where the House of Lords in England faced with a similar situation stated, per Lord Simonds thus:-

> **"It is plain that this appeal raises a question of peculiar difficulty, which I may state in this way:**
> **"If a husband proves that his wife has given birth to a**

> **normal child three hundred and sixty days after he could have had intercourse by her is given, what if any, further evidence is required that the child is not his child?"**

Let me first get one difficult question out of the way. A question was raised as to the standard of proof. The result of a finding of

adultery in such a case as this, in effect to bastardise the child. That is a matter which from time out of strict proof has been required.....
In this context at least no higher proof of a fact demanded than it is established beyond all reasonable doubt. See HEAD Vs. HEAD (2).” ***(Pp 212-213 para F - A)***

4. *He who asserts must prove.*
For a fact, clearly the burden of establishing whether the appellant was in Benin on the day the alleged confession was made is on the appellant who made the assertion in keeping with Section 135 of the Evidence Act (now Section 131 of the Evidence Act, 2011) which stipulates that he who asserts must prove. Therefore, the learned trial judge did not have much to go on as evidence since appellant failed to establish his presence in Benin on the said date when the alleged statement was made and nobody else in Benin called in support of the appellant being at Madam Onaiwu Idahosa’s house the day before she died when the said confession was allegedly made. The situation is all the more dire with the strongly contentious and robust rebuttal by the respondent and so it is easy to agree with learned counsel for the respondent that the trial court wrongly shifted the burden to the respondent and reduced the standard of proof to that on the balance of probabilities. See Megwalu Vs. Megwalu (2005) 2 SMC 185.
The court below as seen page 295 on the alleged confession held thus:

”Having found that members of Eronmwon family had no right to determine who the heir of late Pa. Idahosa is, the lower court should have refrained from using any aspect of their evidence in arriving at the conclusion that the 1st respondent is the said heir”.
(P 213 para D - G)

5. *Court of Appeal rightly applied the presumption of legitimacy.*
Indeed the Court of Appeal was on solid foundation when it applied Section 148 of the Evidence Act now Section 165 in holding that the respondent is the eldest son of late Pa. Idahosa was not rebutted by the defendants as the presumption under Section 148 Evidence Act is not one to be taken lightly and is at the same platform as the required standard of proof in criminal cases. I place reliance on

Preston-Jones Vs. Preston-Jones (1951) AC 391 and Movris Vs. Davies (1837) 5 C1 7 Fin 163, ER 365. ***(Pp 213-214 para H -A)***

6. *Evidence adduced did not mean standard of proof*
I agree also that the pieces of evidence put across by the appellant fell short

of what is expected in a pedigree matter especially when Pa. Osayande was invited to testify as to paternity of plaintiff and his sister, Mrs. Ekwebelem, he did not talk of any intimacy with Madam Onaiwu, their mother and was vague in his testimony without details as to dates or the sexes of the children or whether he had given any names to them. As a matter of fact such scanty presentations cannot be utilised to ground a proof when the standard is that beyond reasonable doubt. The situation is so serious that there was no evidence of a divorce between Pa. Idahosa and Madam Onaiwu at any time and so the presumption of Section 148 of the Evidence Act now Section 165 was in full bloom to endow the children born within that marriage the status of children of the husband of Madam Onaiwu who is Pa. Idahosa and the plaintiff being the first son remained the eldest son along with his elder sister Mrs. Comfort Ekwebelem. ***(P 214 para B - C)***

7. Any person born during the continuance of a legal marriage shall be presumed to be a child of that man

In answering the above questions, the law is trite that any person born during the continuance of a valid marriage shall be presumed to be a child of that man. The burden of proving otherwise rests with the party alleging the contrary. See Ukeje Vs. Ukeje (2014) 11 NWLR (Pt. 1418) 384. It is instructive to note that under our law, evidence to dislodge paternity as in the instant case requires prove beyond reasonable doubt. ***(P 214 para B - C)***

8. Evidence is hearsay

Now, the question on my mind is this: on the day the appellant heard such heavy confession from late Madam Onaiwu, why didn't he raise alarm to invite witnesses? It is now his word against that of the respondent and the court cannot successfully pick and choose which testimony to believe. Such evidence is now at best an hear-say evidence and no court can safely rely on it. See Doma Vs. INEC (2012) 13 NWLR (Pt .1317) page 297; Are Vs. Adisa (1967) Vol. 5 SC Pg.166; Subramania Vs. Public Prosecutor (1965) 1 NLR 963 at 969. ***(P 215 para E - F)***

9. No evidence to dislodge the respondent's paternity

I have stated elsewhere in this judgment that under section 165 of the Evidence Act, any person born during the continuance of a valid marriage between his mother and any man, or within 280 days after dissolution of the marriage, the mother remaining unmarried, shall be presumed to be a child of the man. In the

instant case the parent to the respondent were married until death in 1977 and 1997 respectively. There is no evidence of dissolution of their marriage before death. I cannot therefore find any evidence to dislodge the

respondent's paternity under our law. ***(P 215 para G - H)***

10. Definition of a dying declaration

The argument that the confession by Madam Onaiwu is a dying declaration which ought to be admitted and acted upon is unacceptable. A dying declaration is defined by Black's Law Dictionary 6th Edition as statement made by a person who believed he is about to die in reference to the manner in which he received the injuries of which he is dying, or other cause of his death, and in reference to the person who inflicted such injuries or the connection with such injuries of a person who is charged or suspected of having committed them. Generally, the admissibility of such declarations is limited to use in prosecutions for homicide. ***(P 216 para D - E)***

11. Rules applicable to dying declaration are inapplicable in this case

However in prosecution for homicide or in civil action, a statement made by declarant while believing that his death was imminent, concerning the cause or circumstances of what he believed to be his impending death is not excluded by the hearsay rule. In the instant case, the statement was not made in reference to the cause of the declarant's death and so the rule applicable to dying declaration is inapplicable in the circumstance of this case. ***(P 216 para F - G)***

Representations:

G. E. Ezomo for appellant.

Ogaga Ovrawah for respondent and with him is Onyekachi Umah.

MARY UKAEGO PETER-ODILI JSC (Delivering the lead judgment): This is an appeal against the judgment of the Court of Appeal or court below or lower court, Benin Division, Coram: Amina Adamu Augie JCA (as he then was); George Oladeinde Shoremi and Ali Abubakar Babandi Gumel JJCA which in delivering the judgment on the 9th day of July, 2010 set aside the decision of the trial court and entered a judgment in favour of the respondent.

Dissatisfied, the appellant appealed to the apex court.

FACTS BRIEFLY STATED:

Madam Onaiwu Idahosa, Mr. Stephen Eronmwon and Mr. Okhuasuyi Eronmwon are all children of Pa. Eronmwon. Messrs Stephen Eronmwon and Okhuasuyi Eronmwon were the 2nd and 3rd defendants respectively at the trial of this action at the High Court. Pa. Egharevba Idahosa and Madam Onaiwu Idahosa were husband and wife. They settled in Lagos. It happened that Madam Onaiwu Idahosa was ill in

Lagos and the Husband sent her to Benin for treatment. Madam Onaiwu's father, Pa. Eronmwon employed the services of a native doctor called Omonor who treated Madam Onaiwu Idahosa. Madam Onaiwu Idahosa at this time was staying with her father.

After the treatment of Madam Onaiwu Idahosa, the father demanded for the cost of her treatment from her husband, Pa. Egharevba Idahosa who refused to pay whereupon Pa. Eronmwon instituted a legal action for the recovery of cost of treatment at the native court and obtained judgment. The native Court of Benin City

judgment of 1935 was admitted as Exhibit B at the trial of this action.

The version put forward by the appellant is that during the period of separation o

Pa. Egharevba Idahosa came from Lagos to Benin City to re-arrange a re-union with his wife, Madam Onaiwu Idahosa, who then went to live at Lagos with him the appellant and her elder sister PW2, Mrs. Comfort Ekwebelem. After the re-union, Madam Onaiwu Idahosa gave birth to her other children including the appellant who was the 1st defendant at the trial for Pa. Egharevba Idahosa.

When Pa. Egharevba Idahosa died, Madam Onaiwu Idahosa presented the appellant and PW2 Mrs. Comfort Ekwebelem as children of Pa. Egharevba Idahosa. There was evidence before the trial judge that Madam Onaiwu Idahosa refused her relations from the Eronmwon family to participating in the burial of Pa. Egharevba Idahosa since she thought they knew her mischief in order for same not to be made public.

After the conclusion of the burial, the respondent inherited Pa. Egharevba Idahosa's Igiogbe at No.15, Ogbelaka Street, even though the appellant laid claim as his eldest surviving son.

Madam Onaiwu Idahosa had a protracted illness. A day before she died, she allegedly confessed to the appellant and the respondent to the effect that she had the respondent and his elder sister Mrs. Comfort Ekwebelem for Pa. Osayande while she was separated from the husband and while living with her own father in her father's house at Benin City.

As a result of the startling and dislodging declaration allegedly made by Madam Onaiwu Idahosa, the Eronmwon family to which she belonged, refused to kill the traditional goat to signal the commencement of her burial until the issue of paternity of the respondent was resolved. The matter was reported to the Oba's Palace for resolution but before the Oba could come out with a final verdict in respect of it, the respondent instituted the action giving rise to this appeal against the appellant, who then counter claimed against the respondent.

At the conclusion of trial, the respondent's claim as to his paternity by Pa. Egharevba Idahosa was dismissed and part of the appellant's counter claims were granted. The respondent then appealed to the Court of Appeal and briefs of argument

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were filed and exchanged. At the close of the hearing, the learned justices set aside the judgment of the trial court and entered in its place judgment for the respondent as per his claim at the trial court. Hence this appeal to this honourable court.

On the 22nd day of October, 2019 date of hearing, learned counsel for the appellant, G. E. Ezomo adopted the brief filed on 16/5/2011 in which he formulated four issues for determination.

2. **Whether the learned justice of the Court of Appeal were right in setting aside the judgment of the trial court and entered in its place judgment in favour of the respondent with the costs of N30,000,00 against the appellant having regard to the evidence adduced by the appellant at the trial and the relief claimed by the respondent at the lower court. (Grounds 1, 2 and 10).**
3. **Whether the learned justices of the Court of Appeal were right in their holding that the appellant did not discharge the burden of proving that their mother (Onaiwu) made a death bed confession as to the paternity of the respondent and that the trial judge's evaluation of the evidence led at the trial amounted to fishing for evidence where none exists. (Grounds 3, 4, 7 and 9).**
4. **Whether the learned justices of the Court of Appeal were right in holding that the trial court should have refrained from using any aspect of the evidence of the Eronmwon family in arriving at its conclusion having earlier found as a fact that the members of Eronmwon family had no right to determine who the heir of late Pa, Idahosa is. (Ground 5).**
5. **Whether the learned justices of the Court of Appeal were right in holding that the presumption of legitimacy enures to the benefit of the respondent. (Grounds 6 and 8).**

Learned counsel for the respondent, Ogaga Ovrawah Esq. adopted the brief of argument filed on 28/12/16 and adopted the issues as crafted by the appellant.

The four issues as drafted by learned counsel for the appellant cover the field and I shall use them.

ISSUES 1 - 4 AND RESOLUTIONS:

Canvassing the position of the appellant, learned counsel submitted that the evidence led at the trial were thoroughly evaluated by the trial court after which he came to the valid conclusion as it did and the court below had taken a wrong route thereby reaching

an erroneous conclusion hence the need for the interference by this court to right the wrong. He cited **Ndoma-Egba Vs. A.C.B. Plc (2005) 14 NWLR (Pt.944) 79 at 107; Auchi Polytechnic Vs. Okhuoghae (2005) 10 NWLR (Pt.933) 279 at 296 - 297; Ishola Vs. U. B. N Ltd (2005) 6 NWLR (Pt.922) 422 at 442-443; Auta Vs. Olaniyi (2005) 4 NWLR (Pt.863) 394 at 418.**

He stated on that the subject matter of this action is the paternity of the respondent who was the plaintiff at the trial court and not one based on the property of Pa. Osayande. That there was direct evidence on that paternity of the respondent and the witness not cross-examined at all in this respect which is an implied admission of the evidence given and fatal to the respondent's case. That it is settled law that the lower court can believe an aspect of the evidence of Pa. Osayande as a witness and do away with the others as earlier submitted. He cited **Amadi Vs. Nwosu (1992) 5 NWLR (Pt.241) 273, Ojo Vs. Anibire (1999) 11 NWLR (Pt.628) 630.**

Mr. Ezomo of counsel for the appellant contended that the relief claimed by the respondent as contained in his notice of appeal was "to set aside the judgment" and he did not appeal against those of his reliefs that were not granted by the trial court, as his appeal was mainly against the counter claim of the appellant granted by the trial court.

That it is trite law that under our civil jurisdiction, a court does not grant to a party more than what he has claimed. That the same position is all the none so in the appellate courts where a relief is only granted in response to the issues raised from a ground or grounds of appeal and in this case the grounds of appeal did not contain any claim to grant the respondent's claim as dismissed by the trial court. He cited **Briggs Vs. C. L. O. R. S. N. (2005) 12 NWLR (Pt.938) 59 at 91; Adelaja Vs. Fanoki (1990) 2 NWLR (Pt.131) 137.**

For the appellant it was further submitted that there were pieces of evidence at the trial stage which the trial court relied and the totality of evidence before it that the burden of proof on the appellant had been discharged as the learned trial judge had the advantage of observing the demeanour of witnesses in the box and had the discretion to decide who to believe and the reasons for the belief which the trial judge did in this case in relation to the confession as to the paternity of the respondent. He relied on **Buhari Vs. Obasanjo (2005) 13 NWLR (Pt.941) 1 at 122; Sanni Vs. Ademiluyi (2003) 3 NWLR (Pt.807) 381;** Section 33 (e) of the Evidence Act.

That findings of fact are peculiarly within the province of and reserved for the trial court and the evaluation and ascription of probative value of the evidence are the primary functions of the trial court which sees, hears and assesses the witnesses. It was cited **Kowa Vs. Musa (2006) 5 NWLR (Pt.972) 1 at 37 & 38.**

Learned counsel for the appellant contended that under Benin Customary Laws and Usage and in fact general legal principles, there is a world of difference between having a right to determine who the heir of Pa. Egharevba Idahosa is and the right to testify as a witness of facts within that knowledge of such witness of who should be the heir. He cited **Section 155 (10) of the Evidence** Act; **Kowa Vs. Musa (supra) 35; Ngige Vs. Obi (2006) 14 NWLR (Pt.999) 1.**

It was submitted for the appellant that the presumption of legitimacy covers children born during the continuance of a valid marriage as provided by Section 148 of the Evidence Act and nothing was proffered in rebuttal of that presumption of legitimacy.

Ogaga Ovrawah Esq. of learned counsel for respondent submitted that the defendants did not prove that the late mother of the plaintiff and the 1st defendant made such a statement or what the learned trial judge called confession or dying declaration the day before she died. That the alleged confession is at best hearsay. He cited **Are Vs. Adisa (1967) Vol. 5 SC Pg. 166.**

That the learned trial judge was in error relying on the evidence of Eronmwon family in determining the paternity of the plaintiff after he had declared that Eronmwon family has no right under Bini Customary law to determine who Pa. Idahosa's eldest son is and the Court of Appeal was correct in its decision.

That the burden of proof that Pa. Osayande fathered the plaintiff and his elder sister Mrs. Comfort Ekwebelem is on the defendants and such proof is beyond reasonable doubt and that onus has not been discharged. He referred to **Preston - Jones Vs. Preston - Jones (1951) 1 All ER 124 at 127.**

Learned counsel for the respondent stated that the words allegedly uttered by Madam Onaiwu Idahosa do not amount to a dying declaration under Section 33 (1) (c) of the Evidence Act. That the Court of Appeal was right when it held that the trial court shifted the burden of proof to the respondent. He cited Preston - Jones Vs. Preston - Jones (supra); **Megwalu Vs. Megwalu (2005) 2 SMC 185.**

That the evidence tendered by the appellant is not strong, distinct, satisfactory and conclusive to dislodge the presumption of law in Section 148 of the Evidence Act (now Section 165) of the Evidence Act, 2011) and so the court should uphold the decision of the Court below and dismiss the appeal.

The angle taken by the appellant are captured in these bullet point style as follows:-

i. **Having regard to the evidence adduced by the appellant at the trial, the learned trial judge's decision is supportable and should be allowed to stand while the decision of the Justices of the Court of Appeal ought to and should be set aside as it is against the weight of evidence.**
ii. **The burden of proving that their mother (Onaiwu) made a death bed confession (or pedigree declaration) as to the paternity of the respondent and discharged by the appellant and the trial court was right to have held so after a proper evaluation of the evidence. The learned justices of the Court of Appeal's position to the contrary is unsupportable.**
iii. **The trial judge's reliance on the evidence of the Eronmwon family in arriving at its conclusion was proper as**

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they can validly give evidence of facts within their knowledge even if they do not have the right to decide who the heir of Pa. Idahosa is and the position taken by the learned justices of the Court of Appeal to the contrary was in error.

iv. The presumption of legitimacy which would have enured to the benefit of the respondent was rebutted by clear, direct and positive evidence adduced by the appellant at the trial which the justices of the Court of Appeal did not consider.

The opposing stance of the respondent in similar style of salient points being thus:-

(1) The Court of Appeal was right in setting aside the judgment of the trial court because the learned trial judge relied on inadmissible and tenuous evidence in arriving at the conclusion that the appellant's the eldest son of late Pa. Egharevba and cost awarded was not excessive. The Court of Appeal order was based on the relief sought.

(2) The Court of Appeal was right when they held that the evidence on which the learned trial judge came to the conclusion that the appellant was the eldest son of Pa. Idahosa was flimsy and below standard of proof required in a pedigree case.

(3) The Court of Appeal was right when they held that the learned trial judge having declared that Eronmwon family cannot determine who late Pa. Osayande Idahosa's eldest son is, was wrong to rely strongly on the evidence of the 2nd defendant on the issue.

(4) The Court of Appeal was right when they held that the learned trial judge was in error when he held that the appellant dislodged the presumption of legitimacy of the respondent under Section 148 of the Evidence Act (now Section 165 of the Evidence Act, 2011).

(5) The respondent's action had merit.

The learned trial judge had held as follows:-

" ..... it is not unnatural or contrary to human behaviour, for the plaintiff who had all his lifetime been held out as having the same father with the 1st defendant and who has believed and acted in that capacity all along without contrary suggestion until the dying declaration was clamped on him in the presence of only the 1st defendant who is his junior brother of the same mother, to

> **deny that his mother ever made the denying declaration. More so, when his mother died shortly after making that staggering and dislodging declaration, which if found to be true, would unseat him as the head of the family of late Pa, John Egharevba Idahosa, and still more so, when his mother died before any other member of Idahosa family or any member of Eronmwon family could ask his mother any question on the declaration or investigate the dying declaration". Page 208 of the record refers.**

The learned trial judge had held further thus:-

> **"I have no doubt in my mind that Madam Onaiwu Idahosa made a dying declaration to the plaintiff and the 1st defendant to the effect that she had the plaintiff and his elder sister for Pa. Osayande while she was living with her father in Benin City and at a time when she temporarily separated from her husband". (page 207 of the record).**

A foray into the beginning would show that the respondent who was plaintiff at the trial court took out summons against the defendant (appellant herein) seeking among other things:-

> **(a) A declaration that he is his late father's eldest son.**
> **(b) A declaration that according Bini Customary law, on the demise of his father he became head of his family.**
> **(c) That the defendants have no right to determine who was eldest son of his father.**

The learned trial judge in coming to the conclusion that the plaintiff was not the son of late Pa. Egharevba Idahosa relied on the following pieces of evidence:

> **(i) the evidence of the 1st defendant that his mother on her dying bed had said that she did not bear the plaintiff and the elder sister for late Pa, Idahosa who had died in 1977.**
> **(ii) evidence of 1st defendant on Madam Onaiwu Idahosa's alleged dying declaration to that effect.**
> **(iii) evidence of the 2nd defendant, a retired permanent secretary who the judge said "unequivocally" testified from "his personal knowledge" about the paternity of the plaintiff. and not on evidence of what was told to him.**
> **(iv) the evidence of DW2 who said that he was father of the plaintiff and his elder sister without more.**

I find it difficult to go along with what the learned trial judge found as proof of the paternity of the plaintiff and his elder sister as it cannot be so casually established from a so-called confession or dying declaration of the mother in the absence of plaintiff and his sister without a buttressing support. It therefore falls into the category of a hearsay evidence as it is sought to use the said statement to establish the truth of what is contained in the statement and so made it inadmissible to be used to prove what the defendants asserted. See **Are Vs. Adisa (1967) NMLR P.304 at 306; Subramanian Vs. Public Prosecutor (1965) 1WLR 963 at 969** wherein the judicial committee of the privy council made the distinction between what is taken as hearsay and thereby inadmissible and what is not hearsay and admissible when the statement is proposed to establish by evidence not the truth of the statement but the fact that it was made.

An interesting fact of the case came by way of the evidence of 2nd defendant, a retired permanent secretary who gave evidence from his personal knowledge. The curious angle stems from the fact that the 2nd defendant was 64 years old, having been born in 1934 giving evidence from his personal knowledge of events that occurred in 1928 and 1930. It therefore beats the imagination how his testimony could be correctly utilised as evidence of Eronmwon family in determining the paternity of the plaintiff of the Idahosa family in the determination of who Pa. Idahosa's eldest son is.

The situation on ground has brought up the issue of the required standard of proof in the determination of the paternity of the plaintiff and his elder sister so as to remove them from the Idahosa family into that of Pa. Osayande who is the alleged biological father. In such an instance as we are faced, it is standard of proof beyond reasonable doubt. This is so because to dislodge the presumption of law in Section 148 of the Evidence Act now Section 165 of the Evidence Act, 2011, that a child born during the continuance of a legal marriage is presumed to be the legitimate child of the man.

The position is very well expatiated in the English case of **Preston-Jones Vs. Preston-Jones (1951) 1 All ER 124 at 127** where the House of Lords in England faced with a similar situation stated, per Lord Simonds thus:-

> **"It is plain that this appeal raises a question of peculiar difficulty, which I may state in this way:**
>
> > **"If a husband proves that his wife has given birth to a normal child three hundred and sixty days after he could have had intercourse by her is given, what if any, further evidence is required that the child is not his child?"**
>
> **Let me first get one difficult question out of the way. A question was raised as to the standard of proof. The result of a finding of adultery in such a case as this, in effect to bastardise the child. That is a matter which from time out of strict proof has been required.....**

> **In this context at least no higher proof of a fact demanded than it is established beyond all reasonable doubt. See HEAD Vs. HEAD (2).”**

It needs be brought to the fore that the respondent did not take the assertion of the defence that he was not the eldest son of Pa. Idahosa, but of Osayande family, lying down rather he had put up a fierce fight by contending evidence when he testified as follows:-

> **“It is not true that my mother asked me to invite 1st defendant to Benin on 26/7/97. It is not true that on the 1/8/97 before my mother died she confessed to me and the 1st defendant that myself and my senior sister are not the children of John Egharevba Idahosa”,**

Under cross-examination plaintiff said:

> **”It is not correct that two days before my mother died; she sent for the 1st defendant. The 1st defendant saw my mother last in 1995.**

For a fact, clearly the burden of establishing whether the appellant was in Benin on the day the alleged confession was made is on the appellant who made the assertion in keeping with Section 135 of the Evidence Act (now Section 131 of the Evidence Act, 2011) which stipulates that he who asserts must prove. Therefore, the learned trial judge did not have much to go on as evidence since appellant failed to establish his presence in Benin on the said date when the alleged statement was made and nobody else in Benin called in support of the appellant being at Madam Onaiwu Idahosa’s house the day before she died when the said confession was allegedly made. The situation is all the more dire with the strongly contentious and robust rebuttal by the respondent and so it is easy to agree with learned counsel for the respondent that the trial court wrongly shifted the burden to the respondent and reduced the standard of proof to that on the balance of probabilities. See **Megwalu Vs. Megwalu (2005) 2 SMC 185.**

The court below as seen page 295 on the alleged confession held thus:

> **”Having found that members of Eronmwon family had no right to determine who the heir of late Pa. Idahosa is, the lower court should have refrained from using any aspect of their evidence in arriving at the conclusion that the 1st respondent is the said heir”.**

Indeed the Court of Appeal was on solid foundation when it applied Section 148 of the Evidence Act now Section 165 in holding that the respondent is the eldest son of late Pa. Idahosa was not rebutted by the defendants as the presumption under Section 148

Evidence Act is not one to be taken lightly and is at the same platform as the required standard of proof in criminal cases. I place reliance on **Preston-Jones Vs. Preston-Jones (1951) AC 391 and Movris Vs. Davies (1837) 5 C1 7 Fin 163, ER 365.**

I agree also that the pieces of evidence put across by the appellant fell short of what is expected in a pedigree matter especially when Pa. Osayande was invited to testify as to paternity of plaintiff and his sister, Mrs. Ekwebelem, he did not talk of any intimacy with Madam Onaiwu, their mother and was vague in his testimony without details as to dates or the sexes of the children or whether he had given any names to them. As a matter of fact such scanty presentations cannot be utilised to ground a proof when the standard is that beyond reasonable doubt. The situation is so serious that there was no evidence of a divorce between Pa. Idahosa and Madam Onaiwu at any time and so the presumption of Section 148 of the Evidence Act now Section 165 was in full bloom to endow the children born within that marriage the status of children of the husband of Madam Onaiwu who is Pa. Idahosa and the plaintiff being the first son remained the eldest son along with his elder sister Mrs. Comfort Ekwebelem.

For full measure, the Court of Appeal was right in its re-evaluation and review of what the trial court did and finding that the court of trial fell into grave error whereby it reached a wrong conclusion, the court below was right to effect the correction.

In conclusion, the appeal lacks merit and I do not hesitate in dismissing it based on the foregoing. Appeal is hereby dismissed as I affirm the judgment and orders of the Court of Appeal which set aside the decision of the trial court.

Costs of N100,000.00 awarded to the respondent.

Mary Ukaego Peter-Odili
Justice, Supreme Court

MUSA DATTIJO MUHAMMAD, (JSC): Having read in advance the lead judgment of my learned brother MARY UKAEGO PETER-ODILI JSC just delivered, with whose reasoning and conclusion I entirely agree and being unable to reasonably add to the exhaustive treatment of issues therein made, I adopt same as mine in dismissing the unmeritorious appeal. I abide by the consequential order on costs made in the lead judgment.

Musa Dattijo Muhammad
Justice, Supreme Court

JOHN INYANG OKORO, (JSC): I am in agreement with the lead judgment delivered by my learned brother, **Mary Ukaego Peter-Odili,** JSC, which I was privileged to read before now.

This appeal arose from the judgment of the Court of Appeal, Benin Division wherein the learned justices at the court below found in favour of this respondent and set aside the decision of the trial court which pronounced the appellant as the eldest son of

their father, Pa Eghareuba Idahosa.

To my mind, the main issue in this appeal is to determine the paternity of the

respondent. I am therefore of the considered view that issue 4 nominated by the appellant would sufficiently resolve this appeal, to wit:-

> **"Whether the learned justices of the Court of Appeal were right in holding that the presumption of legitimacy inures to the benefit of the respondent. "**

In answering the above questions, the law is trite that any person born during the continuance of a valid marriage shall be presumed to be a child of that man. The burden of proving otherwise rests with the party alleging the contrary. See **Ukeje Vs. Ukeje (2014) 11 NWLR (Pt. 1418) 384.** It is instructive to note that under our law, evidence to dislodge paternity as in the instant case requires prove beyond reasonable doubt.

The brief fact of the case is that after the death and burial of Pa Eghareuba Idahosa, the respondent took possession of the late father's Igiogbe at No. 15 Ogbelaka Street, Benin City. The appellant who is the respondent's younger brother contended that the respondent is the biological son of one Pa Osayande who testified as DW2. The appellant contends that shortly before the death of their mother, Madam Onaiwu, she confessed to himself and the respondent that at the time wherein she was separated from late Pa Eghareuba Idahosa, she took in for Pa Osayande and gave birth to the respondent and PW2, Mrs Comfort Ekwebelem. The matter was reported to the Oba's Palace for resolution but before the Oba could come out with a final verdict; the respondent commenced this action claiming *inter alia:* **"** a declaration that he is his late father's eldest son." Under cross examination at the trial court, the
respondent (as plaintiff) debunked the appellant's story that late Madam Onaiwu confessed to both of them before she died. It is his testimony that the appellant was not even in Benin on the date the alleged confession was made.

Now, the question on my mind is this: on the day the appellant heard such heavy confession from late Madam Onaiwu, why didn't he raise alarm to invite witnesses? It is now his word against that of the respondent and the court cannot successfully pick and choose which testimony to believe. Such evidence is now at best an hear-say evidence and no court can safely rely on it. See **Doma Vs. INEC (2012) 13 NWLR (Pt .1317) page 297; Are Vs. Adisa (1967) NWLR page 304 at 306; Subramania Vs. Public Prosecutor (1965) 1 NLR 963 at 969.**

I have stated elsewhere in this judgment that under section 165 of the Evidence Act, any person born during the continuance of a valid marriage between his mother and any man, or within 280 days after dissolution of the marriage, the mother remaining unmarried, shall be presumed to be a child of the man. In the instant case the parent to the respondent were married until death in 1977 and 1997 respectively. There is no evidence

of dissolution of their marriage before death. I cannot therefore find any evidence to dislodge the respondent's paternity under our law.

May I also state that our world today has shifted significantly to science and scientific analogies. I wonder why parties in this appeal never considered subjecting

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themselves to a medical test, to wit: a DNA test, to ascertain the paternity of parties rather than resort to litigation which has lasted this length of time.

For all I have said above, I hold that the court below was right to hold that the presumption of legitimacy inures to the benefit of the respondent. This appeal has no merit and it is accordingly dismissed by me. The judgment of the Court of Appeal is hereby affirmed by me. I abide by the cost as assessed by my brother in the lead judgment.

Appeal dismissed.

John Inyang Okoro *Justice, Supreme Court*

PAUL ADAMU GALINJE, (JSC): I have had the privilege of reading in draft, the judgment just delivered by my learned brother, Mary Ukaego Peter-Odili, JSC and I agree with the reasoning contained therein and the conclusion arrived thereat. The claim by the appellant that Madam Onaiwu Idahosa confessed before her death that the respondent was born to Pa Osayande was not established. According to the appellant, the confession was made in his presence and the respondent. The record of the customary court only showed that Pa Oronmwon who treated Madam Onaiwu Idahosa, sought for the refund of the expenses he incurred on her from Pa Ogarevbe Idahosa, her husband.

The argument that the confession by Madam Onaiwu is a dying declaration which ought to be admitted and acted upon is unacceptable. A dying declaration is defined by Black's Law Dictionary 6th Edition as statement made by a person who believed he is about to die in reference to the manner in which he received the injuries of which he is dying, or other cause of his death, and in reference to the person who inflicted such injuries or the connection with such injuries of a person who is charged or suspected of having committed them. Generally, the admissibility of such declarations is limited to use in prosecutions for homicide.

However in prosecution for homicide or in civil action, a statement made by declarant while believing that his death was imminent, concerning the cause or circumstances of what he believed to be his impending death is not excluded by the hearsay rule. In the instant case, the statement was not made in reference to the cause of the declarant's death and so the rule applicable to dying declaration is inapplicable in the circumstance of this case.

The lower court allowed the appeal, on the ground that the issue of confession by Madam Onaiwu was a mere presumption and was not supported by independent witness. I agree with the lower court.

For these few words and the more elaborate reasoning in the lead judgment of my learned brother, Peter-Odili, JSC which I adopt as mine, this appeal shall be and it is hereby dismissed. I endorse all the consequential orders contained in the lead judgment, including order as to costs.

Paul Adamu Galumje
Justice, Supreme Court

UWANI MUSA ABBA AJI, (JSC): I read before now in draft the lead judgment of my learned brother, **Mary Peter-Odili, JSC,** just delivered. I am in agreement with the reasoning therein and conclusion arrived thereat, that the appeal is lacking in merit and should be dismissed. I too will dismiss the appeal and is hereby dismissed without hesitation. I also abide with the order as to costs.

Uwani Musa Abba Aji
Justice, Supreme Court

THE STATE
Vs.
TOYIN ORAY (ACMS JOROMI) (M)

SC.1000/2015

IN THE SUPREME COURT OF NIGERIA HOLDEN AT ABUJA

FRIDAY, 17TH JANUARY, 2020

BEFORE THEIR LORDSHIP

MARY UKAEGO PETER-ODILI — JUSTICE, SUPREME COURT
MUSA DATTIJO MUHAMMAD — JUSTICE, SUPREME COURT
JOHN INYANG OKORO — JUSTICE, SUPREME COURT
PAUL ADAMU GALUMJE — JUSTICE, SUPREME COURT
UWANI MUSA ABBA AJI — JUSTICE, SUPREME COURT

CRIMINAL LAW AND PROCEDURE:- Armed robbery —Conviction thereof —Whether prosecution must not tender the weapon used in armed robbery for the accused to be properly convicted thereto.

CRIMINAL LAW AND PROCEDURE:- Armed robbery —Conviction thereto —When an accused may be convicted for armed robbery —Whether he must not necessary bear arms.

CRIMINAL LAW AND PROCEDURE:- Armed robbery —Proof thereof —Where weapon used in commission of offense was not tendered —Whether non tendering of gun is not fatal.

CRIMINAL LAW AND PROCEDURE:- Effect where accused was found in locus criminis —Whether the non tendering of gun is not fatal to the case of prosecution.

CRIMINAL LAW:- Armed robbery —Nature thereof —Whether is an aggravated form of robbery which may be committed without the use of arms.

CRIMINAL LAW:- Armed robbery —Essential elements

CRIMINAL LAW:- Armed robbery —Where accused violently assaults another while carrying a gun —Whether he may be convicted of armed robbery.

JUDGMENT AND ORDERS:- Decision not supported with evidence —Whether perverse.

PRACTICE AND PROCEDURE:- Decision of court —Perversity thereof —Whether improper evaluation of evidence and wrong inferences can also amount to perversity.

PRACTICE AND PROCEDURE:- Evidence —Evaluation thereof —Whether the exclusive preserve of the trial court.

STATUTE:- Construction thereof —The word "or" —How construed —The principle in ***Abubakar & Ors. Vs. Yar'Adua & Ors (2008) LPELR —51 SC***

STATUTE:- Construction thereof —The word "or" —The principle in ***Abia State University Vs. Anyaibe (1996) 3 NWLR (Pt. 439) 646.***

STATUTE:- Construction thereof —The word "or" —Whether always bears the disjunctive meaning in an enactment.

STATUTE:- Robbery and Firearms Special Provisions Act —S.S 1(1) & (2) and 15 thereof —Nature and purport.

WORDS AND PHRASES:- Armed robbery —Meaning

WORDS AND PHRASES:- Armed robbery —Meaning —The principle in ***Aruna & Anor Vs. State (1990) LPELR-568 (SC).***

WORDS AND PHRASES:- Firearms —Meaning —S. 15(1) of Firearms and Special Provision considered.

WORDS AND PHRASES:- Firearms and offensive weapon —Meaning.

Issue for Determination

"Whether upon a careful evaluation of the evidence led in this case, the court below was right when it held that the respondent was not guilty of armed robbery but robbery simpliter and therefore substituted his death sentence with imprisonment."

Facts of the Matter

The accused/respondent and 3 others were charged at the High Court of Kaduna State for armed robbery.

In proof of their case, the prosecution called four witnesses, and tendered Exhibits

including the confessional statement of the accused.

In his defence, the respondent testified on his behalf and called no other witness.

At the end of trial, the trial court found the respondent and one other guilty of armed robbery and sentenced them to death.

On appeal to the Court of Appeal, it reduced the sentence for armed robbery to that for robbery simpliciter.

This has prompted the prosecution to appeal to the Supreme Court.

Held: *(Unanimously allowing the appeal)*

1. The nature and purport of S.S 1(1) & (2) and 15

Now, it is indeed beyond contention that it is appellant's burden to prove the charge against the respondent beyond reasonable doubt. The lone charge he is tried and convicted for at the trial court is pursuant to the Robbery and Firearms (Special Provisions) Act 1990 Sections 1 (1) & (2) and 15 of which provide thus:-

"1(1) Any person who commits the offence of robbery shall upon trial and conviction under the Act, be sentenced to imprisonment for not less than 21 years.

(2) If

(a) any offender mentioned in subsection (1) of this Section is armed with firearms or any offensive weapon or in company with any person so armed; or

(b) at or immediately before or immediately after the time of the robbery the said offender wounds or uses any personal violence to any person, the offender shall be liable upon conviction under this Act to be sentenced to death." (Underlining supplied for emphasis). ***(P 231.para D - F)***

2. Definition of firearms

Section 15 (1) of the 1990 Act inter-alia defines firearms and offensive weapon thus:-

"…..; firearms include any canon, gun, rifle, carbine, machine gun, cap-gun, flint-lock gun, revolver, pistol, explosive or ammunition or other firearms, whether whole or in detached pieces."

" .... Offensive weapon means any article (apart from a firearm) made or adapted for use for causing injury to the person or intended

by the person having it for such use by him and it includes and air gun air pistol, bow and arrow spear, cutlass, matchet, dagger, cudget or any piece of wood, metal glass or stone capable of being used as an offensive weapon." ***(Pp 231 - 232 para G - A)***

3. Arm robbery is an aggravated form of robbery

This court in its application of the foregoing Sections have defined armed robbery to simply mean the unlawful taking of property from another person with the use or threat of violence. The court has held armed robbery to mean an aggravated form of robbery and that same may be committed without the use of arms. See AUDU ARUNA & ANOR Vs. THE STATE (1990) LPELR - 568 (SC) and ISRAEL PIUS Vs. THE STATE (2015) LPELR - 24446 (SC), FRN Vs. MOHAMMED USMAN & ANOR (2012) LPELR - 7818 (SC) and DANIEL KEKONG Vs. THE STATE (2017) LPELR - 42343 (SC).

In the instant case, for the respondent to be lawfully convicted for

armed robbery under Section 1(2) (a) or (b) of the Robbery and Firearms (Special Provisions) Act, therefore, the prosecution must not only prove robbery by the accused alone or in company of others beyond reasonable doubt but also that the accused or any other in whose company he was at the time of the robbery was armed with "firearms" or "offensive weapon". Still, he may be convicted if the evidence reveals that the offender himself or while in company of others injured or used any personal violence on their victim(s) immediately before or after the time of the robbery. See EDET ASUGUO BASSEY Vs. THE STATE (2012) LPELR - 7813 (SC). ***(P 232 para B - D)***

4. Effect where accused were found in locus criminis of armed robbery

It is in fact not necessary to prove that an accused is armed it will suffice if it is shown that he is a member of an armed gang. See ERPULOR Vs. THE STATE (1990) 12 SCNJ 71 at 76. The evidence has shown that the 1st and 4th accused were at the locus CRIMINIS. The none tendering of the gun to my mind is not fatal to the case of the prosecution when there is key eye witness who testify that they saw a gun. It is immaterial to tender the gun and none tendering of it will not be fatal so long as there is evidence before the court that the 1st and 4th accused in company of others at large, have all acted and formed common intention to rob. It is not required by the law for the prosecution to tender the gun. See ALOR SUPRA 742 - 743. See also EKPULOR SUPRA 76." (Underlining mine for emphasis).

The court then concluded at pages 53 - 54 as follows:-

"In this case at hand I am satisfied that the evidence led by the prosecution has established that:-

1. **There was robbery**
2. **The robbery was armed robbery**
3. **The 1st and 4th accused participated in the said armed robbery in company of 2 other persons now at large.**

I uphold the submissions of the learned state counsel in its entirety; I hold that the prosecution has proved its case against the 1st and 4th accused persons beyond reasonable doubt. I hereby convict the 1st and 4th accused persons under Section 164 CPC for an offence of Armed Robbery punishable under

Section 1 (1) FIRE ARMS SPECIAL PROVISION ACT CAP 398 LAWS OF THE FEDERATION 1990." ***(P 234 para A -E)***

5. Trial court has exclusive preserve in the evaluation of evidence

It is settled that the role of the trial court in the evaluation of evidence is distinct from that of the appellate court. The evaluation of evidence remains the trial court's exclusive preserve because of the singular opportunity it has of hearing and watching the demenour of the witnesses as they testified which fact makes the court best suited to assess the credibility of the witnesses. Where the credibility of the witnesses becomes an issue, such as in the instant case, the appellate court is certainly handicapped. Where, however, the evaluation of evidence does not entail the assessment of the witnesses' credibility, the appellate court is in as good a position as the trial court to evaluate the evidence on record and make its own findings. The lower court and indeed this court, where the trial court's findings are perverse, have the duty to re-appraise the evidence on record in order to obviate the miscarriage of justice the trial court's wrong evaluation of the evidence occassioned. See C.P.C. Vs. INEC & ORS (2011) LPELR - 8257 (SC) and EFFIONG ODIONG MKPINANG & ORS Vs. CHIEF EFFION NDEM & ORS (2012) LPELR - 15536 (SC).

And simply put, a perverse decision of a court which the appellate court is duty bound to set-aside is one that is not based on evidence, or has evolved following the wrongful application of the law to the facts in evidence. See BARIDAM Vs. STATE (1994) LPELR - 753(SC) and ABDULMUMINI Vs. FRN (2017) LPELR - 43726 (SC).

I find tremendous force in the submission of learned appellant's counsel that has the lower court critically appraised the evidence on record, in relation to the clear and unambiguous words of Section 1 (2) (a) and (b) of the Robbery and Firearms (Special Provisions) Act 1990, pursuant to which the respondent

is convicted, it would have concluded differently. The evidence of both PWI and PWII, as the trial court rightly found, reveals that the respondent was armed with a gun at the time of the robbery. It is also in evidence that the respondent had used personal violence not only against PWI, who was then three months pregnant, but PW2, her husband, as well. Learned counsel is certainly right that the clear and unambiguous words of Section 1 situates the conduct of the respondent either by virtue of Section 1 (2) (a) because of the gun in his possession or under 1 (2) (b) for the personal violence he applied to both PWI and PWII just before the robbery. Since the evidence of these two eye witnesses is not inadmissible, patently incredible and has neither been challenged nor controverted, courts, including the apex court, must accept and act on it. It is basic that the unchallenged evidence stands.

The authorities are legion: BERNARD OKOEBOR Vs. POLICE COUNCIL &ORS (2003) LPELR - 2458 (SC), AIGBADION Vs. STATE (2000) LPELR - 264 (SC), NWEDE Vs. THE STATE (1985) 3 NWLR (Pt. 13) 444, OKA Vs. STATE (1975) 9 - 11 SC 17, AJIBADE Vs. STATE (2012) LPELR - 15531 (SC), NIGERIAN ARMY Vs. YAKUBU (2013) LPELR - 20085 (SC). ***(P 235-236 para F - D)***

6. *Prosecution must not tender the weapon used in armed robbery for the accused to be properly convicted.*

The lower court appears swayed by the evidence of PW3 to the effect that neither "firearms" nor "offensive weapon" is retrieved from the scene of crime and that only a toy gun was recovered from the respondent. It is certainly not the law that the prosecution must tender the weapon used in committing the offence of armed robbery for the accused to be rightly convicted for the offence. Once there is cogent and reliable evidence the court finds authentic and believes in, failure to tender the weapon used in the robbery is not held as being prejudicial to the case of the prosecution. In the case at hand, the non tendering of the gun PWI and PWII testified to have seen the respondent with or heard others in his company fired at the time of the robbery, in evidence not being an imperative, the lower court is wrong to have held it is. See STATE Vs. AJAYI (2016) LPELR - 40663 (SC), JAMES SIMON Vs. THE STATE (2017) LPELR - 41988 (SC), AGUGUA Vs. STATE (2017) LPELR - 42021 SC.
(P 236 para E -F)

Per Muhammad (JSC)

"The trial court, learned appellant's counsel is right, is correct, in view of the unchallenged evidence of robbery with violence and while the respondent and others in his company were armed with guns, evidence the trial court believed and lawfully acted upon, to have found the respondent guilty even though the gun(s) is not produced in evidence." See OLAYINKA Vs. STATE (2007) 2 NCC 505, TERLUMEN GIKI Vs. THE STATE (2018) LPELR - 43604 (SC).

Lastly, learned respondent's counsel has made so much fuss about the toy gun allegedly recovered from the respondent. Slight circumspection would have made learned counsel's outcry unnecessary. The record of appeal clearly shows that the toy gun was admitted in evidence because of its purported relevance only. The trial court in making a distinction between the admissibility of the toy gun in evidence and the probative value to ascribe to it refused to ignore the fact that it was not PW3, through whom it was tendered, that recovered the toy gun from the respondent. The police officer who retrieved the toy gun from the respondent did not testify to enlighten the

court on the circumstances surrounding its recovery. He was not available for cross-examination and no reasons were given by the prosecution. Understandably, the trial court realized the limitation of the use the particular evidence could be put to and unlike the lower court, restrained itself from crossing the boundaries. Whereas the trial court chose to believe PWI and PWII's evidence pertaining the gun they saw the respondent hold and those others fired outside by his co-travelers, the lower court, though handicapped needlessly preferred to believe the hearsay account of PW3 that the toy gun was what the respondent used during the robbery and same was retrieved from him. It is certainly wrong for the lower court to place such value on the toy gun. See ADEUSI ADESINA Vs. THE PEOPLE OF LAGOS STATE (2019) LPELR - 46403 (SC) and ODOGWU Vs. STATE (2013) 14 NWLR (Pt 1373) 74 at 103.
(Pp 236-237 para G - C)

7. Definition of firearms and offensive weapon
Section 15 (1) of the Robbery and Firearms (Special Provisions) Act 1999 defines the terms "Firearms: and "Offensive Weapon'' as follows:-

> **Firearms include "any canon, gun, rifle, carbine, machine-gun, cap-gun, flint-lock gun, revolver, pistol, explosive or ammunition or other firearm, whether whole or in detached pieces."**
>
> **Offensive weapon means any article (apart from a firearms) made or adopted for use for causing injury to the person or intended by the person having it for such use by him and it includes an air gun, air pistol, bow and arrow, spear, cutlass, matchet, dagger, cudgel, or any piece of wood, metal glass or stone capable of being used as an offensive weapon." *(P 240 para E - F)***

8. When an accused may be sentenced to death for armed robbery
It is difficult not to see that the clear, plain and unambiguous wording of Section 1 (2) (a) and (b) of the Robbery and Firearms (Special Provisions) Act that the use of the word "or" in-between paragraphs (a) and (b) of sub-section 2, the intention of the legislature was that where an offender under (a) is armed with a

firearm or any offensive weapon or is in company with any person so armed, he shall be liable upon conviction under the Act to be so sentenced to death. ***(P 240 para G -H)***

9. The nature and purport of S. 1 of Robbery and Firearms Special Provisions Act, 1990
Section 1:

(1) Any person who commits the offence of robbery shall upon trial and conviction under this Act, be sentenced to imprisonment for not less than 2l years.

(2) If:-

(a) Any offender mentioned in subsection (1) of this section is armed with any firearms or any offensive weapons or is in company with any person so armed; or

(b) At or immediately after the time of the robbery the said offender wounds or uses any personal violence to any person;

The offender shall be liable upon conviction under this Act to be sentenced to death.

(3) The sentence of death imposed under this section may be executed by hanging the offender by the neck till be dead or by causing such offender to suffer death by firing square as the Governor may direct." ***(P 241 para B - D)***

10. The word "or" always bears the disjunctive meaning in an enactment.

The word "or" in legislation or statutes such as the one above quoted has been explained in many judicial authorities that the word "or" always bears the disjunctive meaning in the enactment. I shall refer to Anie & ors, Vs. Uzorka & Ors, (1993) LPELR-490 (SC) per Onu JSC at pages 23-24 as follows:-

> **"The italics above are mine to emphasize the use of the word "OR" which has sometimes been used as "and". See Brown &. Co. Vs. Harrison (1927) 43 TLP 394. For instance Mackinnon J, read "or" as "and" in the Carriage of Goods by Sea Act, 1924 and his decision was confirmed by the Court of Appeal (England). One does not do it unless one is obliged to, because "or" does not generally mean "and" and "and" does not generally mean "or". See Green. Vs. Premier Glynrhonwy State Co. Ltd. (1928) 1 K.B 561 at P.568 CA (per Scrutton L.J).**

> **In the context that "or" is used in the Act in the italicized clause above, its true meaning in the clause "The Permanent Secretary of Ministry "OR" the head of any government department etc." it is bound to be disjunctive rather than**

conjunctive as respondents counsel in his brief would want us to hold. Black's Law Dictionary, 5th Edition at P .987 defines "OR" as "A disjunctive particle (sic) used to express an alternative or to give a choice of one among two or more things."
(Pp 241-242 para E - A)

11. The definition of the word "or"
Again, in the subsequent case of Abubakar & Ors. Vs. Yar'Adua S:.. Ors. (2008) LPELR-51 (SC) this court held per Katsina-Alu JSC (as he then was) at pages 23-24 thus:-

> **"The word "or" is defined in Black's Law Dictionary Sixth Edition in the following terms:**
>
> > **"A disjunctive participle used to express an alternative or to give a choice of one among two or more things."**
> > *(P 242 para B - C)*

12. The word "or" always bears the disjunctive meaning
In an earlier decision of the Court of Appeal in the case of Abia State University Vs. Anyaibe (1996) 3 NWLR (Pt.439) 646 at 661 per Katsina-Alu JCA (as he then was) the implication of the word "or" was stated as follows:-

> **"….. It is to be noted that Twelve months period is separated from the next period following by the word "or", This word always bears the disjunctive meaning in an enactment that is to say it separates the provision preceding it from the provision coming after it. Its role is to show that the provisions in which it is appearing are distinct and separate one from the other. In Black's Law Dictionary, Sixth Edition, the word "or" is defined, inter-alia: A disjunctive participle used to express an alternative or to give a choice of one among two or more things." *(P 242 para C -D)***

13. Respondent violently assaulted PW1 and PW2 and was carrying a gun
Indeed, from the evidence adduced, there is no justifying the stand of the court below as the respondent had been shown to have violently assaulted PW1 and PW2 and he was carrying a gun alongside his cohorts, a situation that well position the gun whether described as locally made or a toy gun within the sphere of the firearms envisaged by the Act particularly Sections 1 and 11. See

Dairo Vs. UBA Plc (2007) 16 NWLR (Pt.1059) 99 at 161; UBA Ltd. & Anor.

Vs. Achoru (1999) LPELR -3403 (SC) 16; A.I.C. Limited Vs. NNPC (2005) LPELR-6 (SC) pp.40-41. ***(P 243 para A - B)***

14. Definition of armed robbery

This apex court had defined armed robbery as being robbery plus violence used or threatened and that was what happened in the case in hand. The alluded conflict in evidence of the prosecution witnesses were on very minor areas not touching the substantial part of the prosecution's case and so in the sister case heard and determined by this court in SC.999/2015 delivered on 1st June 2018. Sanusi JSC did not waste time in dismissing such allusions. This court equally rejected the conclusion by the Court of Appeal and held there was no basis for changing the findings and conclusion of the trial court and so allowed the appeal, restoring the decision, conviction for armed robbery and sentence to death by hanging.

Indeed, that position by my learned brother, Sanusi JSC in SC.999/2015 which came from the same transaction as the current one has properly settled the one under discourse as what transpired in the same incident was armed robbery which was executed with violence armed with firearms. See Pius Vs. The State (2015) LPELR-24446 (SC) page 8; FRN Vs. Usman &. Anor. (2012) LPELR-7818 (SC) 14 at 15; Aruwa & Anor. Vs. The State (1990) 6 NWLR (Pt.155) 125 at 135; Eke Vs. The State (2011) 3 NWLR (Pt.1235) 589 at 605 —606. ***(P 243 para B-D)***

15. Any decision given without evidence in support is perverse

To my mind, the main issue in this appeal, simply put is, whether the court below in its evaluation of the evidence it was perverse in its judgment. In answering the above question, the law is that any decision given without evidence in support must be perverse. See. Incar (Nig) Plc & Anor. Vs. Bolex Enterprises (Nig) (2001) LPELR - 1514(SC); Atolagbe Vs. Shorun (1885) LPELR-592(SC); Rabiu Vs. Kano State (1980) LPELR - 2936 (SC). ***(P 243 para G - H)***

16. Failure to draw appropriate inference can amount to perversity

In the case of Okhuarobo & Ors Vs. Aigbe (2002) LPELR-2449, (SC); this court per Ayoola, JSC, observed as follows: "it is not only when there is no evidence to support a decision that the decision can be held perverse. <u>The observance of proper evaluation of evidence and failure to draw appropriate inference from them can also amount to perversity</u> Where the inferences is so clear that no reasonable tribunal would fail to draw them, or where the inference drawn by the trial judge does not follow from the findings of fact he made." (emphasis supplied). ***(Pp 243-244 para H - A)***

17. Failure to tender weapon used is not fatal.

In this case, the evidence of PW1 and PW2 who were the only eye witnesses and indeed victims of the crime is that they saw a gun. It was not in their place to decipher whether what the respondent carried was a real gun or toy. Indeed under our law, even if the weapon used in commission of the offence was not tendered in evidence, such failure is not fatal to the case. This is because if the evidence on ground indisputably supports the fact that armed robbery occurred, failure to tender the weapon in court would not change the narrative. See Olayinka Vs. State (2002) 9. NWLR (Pt. 1040) 561 at 565. ***(P 244 para B - C)***

18. Essential elements of armed robbery

The essential ingredients of armed robbery are:- (a) That there was committed a robbery or series of robberies. (b) That the robbery was committed while any or all the robbers was/were in possession of arms or offensive weapon (c) That the accused person was one of those who took part in the armed robbery. See Per SANUSI, JSC in ORISA Vs. STATE (2018) LPELR-43896(SC).

By the confessional statement of the respondent and the evidence of the prosecution witnesses, PW1, PW2, PW3 and PW 4 (the police office that carried out the investigation), it is indisputably clear and unarguable that the respondent was in the company of an armed gang that robbed their victims. Whether a toy gun was used or not, recovered or not, is not material to dislodge armed robbery. There is evidence that the victims were parted with their properties, whether real or unreal weapon was used, which made them to submit to their robbers. ***(P 245 para B - C)***

19. Definition of armed robbery

Per PHILIP NNAEMEKA-AGU, JSC in ARUNA & ANOR Vs.. STATE (1990) LPELR-568 (SC) defined armed robbery to simply mean stealing plus violence used or threatened. Per KUMAI BAYANG AKA'AHS, JSC in PIUS Vs. STATE (2015) LPELR-24446(SC), relying on Kerenku Vs. Tiv N.A. (1965) All NLR 570 at 571, held that armed robbery is an aggravated form of robbery and the offence of robbery can be committed without the use of arms. The offence of robbery is theft or extortion by force or fear of force.

The lower court was therefore wrong to hold that because a toy gun was used by the respondent or recovered from the scene, armed robbery was not proved. This is completely in aberration with the evidence at the trial and is a perversion of the facts of the case. ***(P 245 para D - E)***

Representations:
Abdullahi Yahya, for the appellant.
Olukayode Adeluola, for the respondent.

MUSA DATTIJO MUHAMMAD JSC: (Delivering the lead judgment): This is an appeal against the judgment of the Court of Appeal sitting at Kaduna delivered on the 15th September 2015. The court, hereinafter referred as the lower court, in the said decision, allowed in part the appeal of the respondent herein by setting aside his conviction and sentence for the offence of armed robbery by the Kaduna State High Court, the trial court, and substituting same with conviction and sentence for robbery simpliciter. The respondent and three others were arraigned before the trial court on a one count charge of armed robbery.

The appellant herein relied on four witnesses, PWI and PWII, the victims of the armed robbery and PW3 and PW4 the investigating police officers into the case against the respondent and the three others. Exhibits 1 and 2, supposedly respondent's confessional statements, were tendered and admitted through PW3.

The respondent testified on his own defence. None other gave evidence for him.

The trial court in its considered judgment, dated 4th day of August 2005, found the respondent and one Michael Omofadezi, the 4th accused, guilty of armed robbery and sentenced them to death.

Aggrieved, the respondent appealed to the lower court. The court in allowing the appeal in part, set aside his conviction and sentence for armed robbery and substituted same for robbery and sentence of twenty one years imprisonment with effect from the 4th day of August 2005, the date of his conviction by the trial court.

Dissatisfied with the judgment of the lower court, the state has appealed against it by its notice of appeal filed on 16th day of October 2015 containing three grounds.

In the appellant's brief, settled by Abdullahi Yahya Esq, adopted and relied upon as its argument for the appeal, a lone issue has been distilled as arising for the determination of the appeal thus:-

"Whether upon a careful evaluation of the evidence led in this case, the court below was right when it held that the respondent was not guilty of armed robbery but robbery simpliter and therefore substituted his death sentence with imprisonment."

The similar issue formulated by the respondent at paragraph 2 of his brief settled, adopted and relied upon by Olukayode Adeluola of counsel at the hearing of the appeal reads:-

"Whether by the evidence adduced at the trial court, the lower court was right in coming to the conclusion that only the lesser offence of robbery was committed and not armed robbery."

On its lone issue, learned appellant's counsel refers to Section 1(2)(a) and (b) of the Robbery and Firearms (Special Provision) Act pursuant to which appellant's conviction was arrived at by each of the two lower courts and contends that whereas the trial court's decision comes within the purview of the section, the lower court's decision does not. The lower court's finding that the appellant was not armed with firearms or offensive weapon as provided for in Section 1(2)(a) of the Act to make his conduct punishable with death, learned counsel contends, is not supported by the evidence of both PWI and PWII, the victims of the armed robbery, who attested to the personal violence against them by the respondent. This fact, it is submitted, remains neither challenged nor controverted either through cross-examination or other independent evidence to the contrary. The lower court's finding, given the evidence on record, that only robbery simpliciter was proved against the respondent is, therefore, erroneous. Referring to the definition of firearms in Section II of the Robbery and Firearms (Special Provisions) Act as well as **EKE Vs. THE STATE (2011) 3 NWLR (Pt. 1235) 589 at 605 - 606, ARUWA & ANOR Vs. THE STATE (1990) 6 NWLR (Pt. 155) 125 at 135, FRN Vs. USMAN & ANOR (2012) LPELR - 7818 (SC)** and **PIUS Vs. THE STATE (2015) LPELR - 2446 (SC),** learned counsel insists that the respondent, as rightly found by the trial court, is liable for armed robbery. Since the trial court's findings are based on the evidence on record and correct, on the authority of inter-alia **DAIRO Vs. UBN PLC (2007) 16 NWLR (Pt. 1059) 99 at 161, UBA LTD & ANOR Vs. ACHORU (1990) LPELR - 3403 (SC)** and **A.I.C. LTD Vs. NNPC (2005) LPELR 6 (SC),** learned appellant's counsel urges that the lower court's wrong findings to the contrary are liable to be set aside. He urges the resolution of the lone issue in appellant's favour and allowing the appeal.

In reply, learned respondent's counsel submits that the trial court has the duty of ensuring that the prosecution, the appellant herein, has proved all the ingredients of the offence respondent is charged and convicted for beyond reasonable doubt. To attain the task the appellant may rely on the evidence of eye witnesses, circumstantial evidence which points irrevocably to the guilt of the respondent or the latter's confessional statement or a combination of any of the three. Learned counsel refers to **ODOGWU Vs. STATE (2013) 14 NWLR (Pt. 1373) 129** and **MBANG Vs. STATE (2013) 7 NWLR (Pt. 1352) 48.**

The evidence of the two eye witnesses, PW1 and PW2, it is further argued, swayed the trial court to its wrong decision on the guilt of the respondent. Firstly, it is contended, there is contradiction in the evidence of the two witnesses as to whether or not the respondent indeed had a gun at all during the robbery. To this contradiction is the further uncertainty added by the testimony of PW3. PW3, it is submitted, had testified that he did not recover any shell of bullets that PW1 and PWII testified they heard being fired from the scene of the robbery. Instead,

learned respondent's counsel further submits, PW3's evidence is that what was recovered from the respondent was a toy gun and nothing else. The lower court's findings at page 133 of the record of appeal, contrary to that of the trial court, that the contradiction in the evidence of the

prosecution's case disentitles any court from relying on it to convict the respondent, it is further submitted, cannot be faulted. In view of the material contradiction in the testimonies of PWI and PW2, the law requires that the evidence of the two be discountenanced. The toy gun being what PWI saw with the respondent and was retrieved from the him, it is further argued, being neither the "firearm" nor the "offensive weapon" contemplated under Section 15 (1) of the Robbery and Firearms (Special Provision) Act 1990, the lower court is right in its finding that a conviction under Section 1 (1) (a) or (b) of the Act is untenable. Relying on **JIMMY Vs. STATE (2013) 18 NWLR (Pt. 1386) 229, JEMINABO PRINCEWILL Vs. THE STATE (1994) 6 NWLR (Pt. 353) 703** and **ONUBOGU Vs. STATE (1974) 9 SC 1 at 23 - 24,** learned respondent's counsel submits that the contradiction in the evidence adduced by the appellant against the respondent being material, same must be resolved in his favour. Further relying on **ADARA & ANOR Vs. STATE (2006) All FWLR (Pt. 311) 1788,** learned counsel contends that the lower court's jurisdiction to substitute respondent's conviction for a lesser offence is not in doubt and same has been justly exercised. As a whole, he concludes, the lone issue be resolved against the appellant and its appeal dismissed.

Now, it is indeed beyond contention that it is appellant's burden to prove the charge against the respondent beyond reasonable doubt. The lone charge he is tried and convicted for at the trial court is pursuant to the Robbery and Firearms (Special Provisions) Act 1990 Sections 1 (1) & (2) and 15 of which provide thus:-

"1(1) Any person who commits the offence of robbery shall upon trial and conviction under the Act, be sentenced to imprisonment for not less than 21 years.

(2) If

(a) any offender mentioned in subsection (1) of this Section is armed with firearms or any offensive weapon or in company with any person so armed; or

(b) at or immediately before or immediately after the time of the robbery the said offender wounds or uses any personal violence to any person, the offender shall be liable upon conviction under this Act to be sentenced to death." (Underlining supplied for emphasis).

Section 15 (1) of the 1990 Act inter-alia defines firearms and offensive weapon thus:-

> **"…..; firearms include any canon, gun, rifle, carbine, machine gun, cap-gun, flint-lock gun, revolver, pistol, explosive or ammunition or other firearms, whether whole or in detached pieces."**
>
> ***"*** **.... Offensive weapon means any article (apart from a firearm) made or**

> **adapted for use for causing injury to the person or intended by the person having it for such use by him and it includes and air gun air pistol, bow and arrow spear, cutlass, matchet, dagger, cudget or any piece of wood, metal glass or stone capable of being used as an offensive weapon."**

This court in its application of the foregoing Sections have defined armed robbery to simply mean the unlawful taking of property from another person with the use or threat of violence. The court has held armed robbery to mean an aggravated form of robbery and that same may be committed without the use of arms. See **AUDU ARUNA & ANOR Vs. THE STATE (1990) LPELR - 568 (SC)** and **ISRAEL PIUS Vs. THE STATE (2015) LPELR - 24446 (SC), FRN Vs. MOHAMMED USMAN & ANOR (2012) LPELR - 7818 (SC)** and **DANIEL KEKONG Vs. THE STATE (2017) LPELR - 42343 (SC).**

In the instant case, for the respondent to be lawfully convicted for armed robbery under Section 1(2) (a) or (b) of the Robbery and Firearms (Special Provisions) Act, therefore, the prosecution must not only prove robbery by the accused alone or in company of others beyond reasonable doubt but also that the accused or any other in whose company he was at the time of the robbery was armed with "firearms" or "offensive weapon". Still, he may be convicted if the evidence reveals that the offender himself or while in company of others injured or used any personal violence on their victim(s) immediately before or after the time of the robbery. See **EDET ASUGUO BASSEY Vs. THE STATE (2012) LPELR - 7813 (SC).**

At trial, PWI and PWII the only eye witnesses had testified along with PW3 and PW4 the police officers who investigated the case against the respondent and three others. Testifying, PWI at page 6 of the record divulged partly as follows:-

> **"On 7/10/2001 at about 2.00am the 1st to 4th accused came. <u>The 1st Accused opened and break (sic) my door and he was holding a gun and a touch light</u>. He asked my husband to give to him the money he wanted to buy a car with. The 1st accused and the rest were all wearing police**

uniform. <u>They started beating us and I was carrying 3 months pregnancy. The 1st accused said if my husband refused to give him money he</u> will shoot us……. he was kicking me, my husband gave him N32,000.00k and the 1st accused gave it to the 3rd accused."

Under cross examination PWI stated:-

"…. I know the 1st accused person for long before that day but we were not very close."

ABCDEFGH

PWII's similar evidence at page 8 of the record inter-alia reads:-

"……I know the 1st and 4th accused persons.

<u>On 7/10/2001 we were sleeping together with my wife around 2.00am the accused came and broke our door and they entered our room. The 1st accused entered and was holding gun and tourch light, another person, 2nd accused entered inside my room. 2 people, 3rd and 4th accused were outside and were shouting saying any person who came out they will shoot. 1st accused was beating me with the tourch light. They started beating my wife who was three months pregnant. They wore police uniform. They asked me of the money I said I will buy car with; if I refused they will shoot me. I gave the sum of N32,000.00k to the 1st accused by myself; He gave it to the 2nd accused."</u>
(Underlining supplied for emphasis).

Under cross examination PWII maintained thus:-

"……I saw the 1st accused and 2nd accused inside the room. 3rd and 4th accused were inside the compound with gun. <u>I heard gun shots of which my co-tenants could not come out …….</u>"(Underlining supplied for emphasis).

I am unable to see any material contradiction in the foregoing testimonies of the two witnesses such that will make a reasonable tribunal to discountenance their evidence!!!

Under cross examination, PW3 at page 19 of the record continued as follows:-

"I visited the scene of crime and went round the surroundings. I did not find any empty shell of bullets or marked by any bullet. Only the toy gun was recovered, no other gun has been recovered."

The trial court in relation to the evidence led before it held at pages 52 - 53 of the record of appeal firstly as follows:-

> **"Both PWs 1 and 2 have testified that they saw <u>one of the accused person holding a gun. If PW has seen the gun and did not hear gunshot and PW2 saw the gun and heard gunshot this is no material and fundamental contradiction</u>. Both have seen a gun. Evidence of shooting at the scene of the robbery is no requirement to establish armed robbery. See Alor supra 726 at 737 D - F. See also Eze Vs. State (1985) 3 NWLR 13429.**

> **<u>It is in fact not necessary to prove that an accused is armed it will suffice if it is shown that he is a member of an armed gang. See ERPULOR Vs. THE STATE (1990) 12 SCNJ 71 at 76. The evidence has shown that the 1st and 4th accused were at the locus CRIMINIS. The none tendering of the gun to my mind is not fatal to the case of the prosecution when there is key eye witness who testify that they saw a gun. It is immaterial to tender the gun and none tendering of it will not be fatal so long as there is evidence before the court that the 1st and 4th accused in company of others at large, have all acted and formed common intention to rob. It is not required by the law for the prosecution to tender the gun. See ALOR SUPRA 742 - 743. See also EKPULOR SUPRA 76." (Underlining mine for emphasis).</u>**

The court then concluded at pages 53 - 54 as follows:-

> **"In this case at hand I am satisfied that the evidence led by the prosecution has established that:-**
>
> **4. There was robbery**
> **5. The robbery was armed robbery**
> **6. The 1st and 4th accused participated in the said armed robbery in company of 2 other persons now at large.**
>
> **I uphold the submissions of the learned state counsel in its entirety; I hold that the prosecution has proved its case against the 1st and 4th accused persons beyond reasonable doubt. I hereby convict the 1st and 4th accused persons under Section 164 CPC for an offence of Armed Robbery punishable under Section 1 (1) FIRE ARMS SPECIAL PROVISION ACT CAP 398 LAWS OF THE FEDERATION 1990."**

The lower court in finding merit in the appeal filed by the respondent enthused at page 133 of the record of appeal as follows:

> **"In view of the conflict in the evidence of PW1 and PW2 as to who held a gun and who was shooting, taken together with the evidence of PW3 that no empty bullet shell were recovered at the scene nor bullet marks seen, I must resolve the contradiction of whether guns were used on that day in favour of the appellant.**
>
> **In addition to this is the fact that, by the appellant's admission, and confirmed by the prosecution, what was used by the appellant on**

> **the day in question was a toy gun.**
> **A toy gun does not fall under the definition of "firearms" under Section 15 of the Robbery Firearms (Special Provisions) Act Supra which is defined to include: ……**
>
> **The imposition of the sentence of death under Section 1(2) of the Act, is a grievous sentence, I hold, only to be given where the proof is beyond reasonable doubt that the offender was armed with a firearm or offensive weapon or was in the company of one so armed. This vital ingredient, I hold, has not been proved by the prosecution. The trial judge, I accordingly hold, was in error to have resolved this contradiction in favour of the prosecution and imposed the sentence of death on the appellant." *(underlining supplied for emphasis).***

The court concluded at page 135 of the record thus:-

> **"This appeal succeeds in part. The conviction and sentence of the lower court is hereby set aside. In its place is substituted a conviction for robbery with a sentence of twenty-one years imprisonment. This term is to take effect from the 4th of August 2005, the date of his conviction by the lower court."**

The issue the appeal raises pertains the duty the court has in the evaluation of evidence for the purpose of deciding in whose favour the scale preponderates. Whereas in the case at hand, as the learned appellant's counsel rightly submits the trial court has correctly ascribed greater weight to the appellant's case, the lower court, on the other hand, is wrong in its finding to the contrary in favour of the respondent.

It is settled that the role of the trial court in the evaluation of evidence is distinct

from that of the appellate court. The evaluation of evidence remains the trial court's exclusive preserve because of the singular opportunity it has of hearing and watching the demenour of the witnesses as they testified which fact makes the court best suited to assess the credibility of the witnesses. Where the credibility of the witnesses becomes an issue, such as in the instant case, the appellate court is certainly handicapped. Where, however, the evaluation of evidence does not entail the assessment of the witnesses' credibility, the appellate court is in as good a position as the trial court to evaluate the evidence on record and make its own findings. The lower court and indeed this court, where the trial court's findings are perverse, have the duty to re-appraise the evidence on record in order to obviate the miscarriage of justice the trial court's wrong evaluation of the evidence occasioned. See **C.P.C. Vs. INEC & ORS (2011) LPELR - 8257 (SC)** and **EFFIONG ODIONG MKPINANG & ORS Vs. CHIEF EFFION NDEM & ORS (2012) LPELR - 15536 (SC).**

And simply put, a perverse decision of a court which the appellate court is duty bound to set-aside is one that is not based on evidence, or has evolved following the wrongful application of the law to the facts in evidence. See **BARIDAM Vs. STATE (1994) LPELR - 753(SC)** and **ABDULMUMINI Vs. FRN (2017) LPELR - 43726 (SC).**

I find tremendous force in the submission of learned appellant's counsel that has the lower court critically appraised the evidence on record, in relation to the clear and unambiguous words of Section 1 (2) (a) and (b) of the Robbery and Firearms (Special Provisions) Act 1990, pursuant to which the respondent is convicted, it would have concluded differently. The evidence of both PWI and PWII, as the trial court rightly found, reveals that the respondent was armed with a gun at the time of the robbery. It is also in evidence that the respondent had used personal violence not only against PWI, who was then three months pregnant, but PW2, her husband, as well. Learned counsel is certainly right that the clear and unambiguous words of Section 1 situates the conduct of the respondent either by virtue of Section 1 (2) (a) because of the gun in his possession or under 1 (2) (b) for the personal violence he applied to both PWI and PWII just before the robbery. Since the evidence of these two eye witnesses is not inadmissible, patently incredible and has neither been challenged nor controverted, courts, including the apex court, must accept and act on it. It is basic that the unchallenged evidence stands. The authorities are legion: **BERNARD OKOEBOR Vs. POLICE COUNCIL &ORS (2003) LPELR - 2458 (SC), AIGBADION Vs. STATE (2000) LPELR - 264 (SC), NWEDE Vs. THE STATE (1985) 3 NWLR (Pt. 13) 444, OKA Vs. STATE (1975) 9 - 11 SC 17, AJIBADE Vs. STATE (2012) LPELR - 15531 (SC), NIGERIAN ARMY Vs. YAKUBU (2013) LPELR - 20085 (SC).**

The lower court appears swayed by the evidence of PW3 to the effect that neither "firearms" nor "offensive weapon" is retrieved from the scene of crime and that only a toy gun was recovered from the respondent. It is certainly not the law that the prosecu-

tion must tender the weapon used in committing the offence of armed robbery for the accused to be rightly convicted for the offence. Once there is cogent and reliable evidence the court finds authentic and believes in, failure to tender the weapon used in the robbery is not held as being prejudicial to the case of the prosecution. In the case at hand, the non tendering of the gun PWI and PWII testified to have seen the respondent with or heard others in his company fired at the time of the robbery, in evidence not being an imperative, the lower court is wrong to have held it is. See **STATE Vs. AJAYI (2016) LPELR - 40663 (SC), JAMES SIMON Vs. THE STATE (2017) LPELR - 41988 (SC), AGUGUA Vs. STATE (2017) LPELR - 42021 SC.**

The trial court, learned appellant's counsel is right, is correct, in view of the unchallenged evidence of robbery with violence and while the respondent and others in his company were armed with guns, evidence the trial court believed and lawfully acted upon, to have found the respondent guilty even though the gun(s) is not produced in evidence. See **OLAYINKA Vs. STATE (2007) 2 NCC 505, TERLUMEN GIKI**

Vs. THE STATE (2018) LPELR - 43604 (SC).

Lastly, learned respondent's counsel has made so much fuss about the toy gun allegedly recovered from the respondent. Slight circumspection would have made learned counsel's outcry unnecessary. The record of appeal clearly shows that the toy gun was admitted in evidence because of its purported relevance only. The trial court in making a distinction between the admissibility of the toy gun in evidence and the probative value to ascribe to it refused to ignore the fact that it was not PW3, through whom it was tendered, that recovered the toy gun from the respondent. The police officer who retrieved the toy gun from the respondent did not testify to enlighten the court on the circumstances surrounding its recovery. He was not available for cross-examination and no reasons were given by the prosecution. Understandably, the trial court realized the limitation of the use the particular evidence could be put to and unlike the lower court, restrained itself from crossing the boundaries. Whereas the trial court chose to believe PWI and PWII's evidence pertaining the gun they saw the respondent hold and those others fired outside by his co-travelers, the lower court, though handicapped needlessly preferred to believe the hearsay account of PW3 that the toy gun was what the respondent used during the robbery and same was retrieved from him. It is certainly wrong for the lower court to place such value on the toy gun. See **ADEUSI ADESINA Vs. THE PEOPLE OF LAGOS STATE (2019) LPELR - 46403 (SC) and ODOGWU Vs. STATE (2013) 14 NWLR (Pt 1373) 74 at 103.**

I entirely agree with learned appellant's counsel that with these cited infractions in the lower court's judgment same must be adjudged perverse. I so hold and find merit in the appeal. Resultantly, the lower court's perverse judgment is set-aside and in its place the trial court's judgment convicting and sentencing the respondent for armed robbery hereby restored.

Finally, on account of the trial court's observation as to the peculiar circumstanc-

es of the respondent, the Governor of Kaduna State is hereby urged to exercise his powers of prerogative of mercy under Section 212 of the 1999 Constitution, in favour of the respondent.

Musa Dattijo Muhammad,
Justice, Supreme Court

MARY UKAEGO PETER-ODILI (JSC): I agree with the judgment just delivered by learned brother, Musa Dattijo Muhammad JSC and to register the support I have in the reasonings from which the decision emanated, I shall make some remarks.

This is an appeal against the decision of the Court of Appeal, Kaduna Judicial Division, delivered on the 18th day of September, 2015, Coram: Isaiah Olufemi Akeju, Habeeb A. O. Abiru and Oludotun A. Adefope-Okojie, JJCA, wherein the court in the lead judgment delivered by Adefope-Okojie, JCA allowed the appeal in part by setting aside the conviction and sentence of the respondent by the trial court for the offence of armed robbery and sentence of death and substituting the same with a Conviction for robbery and sentence of twenty-one (21) years imprisonment with effect from the 4th

day of August, 2005, being the date of conviction by the trial court.

The appellant herein as prosecutor, being dissatisfied with the judgment of the Honourable Court of Appeal, hereinafter referred to as the court below or lower court lodged the instant appeal via its notice of appeal dated and filed on the 16th day of October, 2015. The judgment of the court below can be found at pages 118-143, while the notice of appeal can be found at pages 114-147 all of the records of appeal.

The facts are fully set out in the lead judgment and I shall not repeat them unless there comes a necessity to make use of any parts thereof.

The hearing of the appeal was on the 24/10/2019 at which date, learned counsel for the appellant, Abdullahi Yahaya Esq. adopted the brief of argument filed on 14/3/2018 and deemed filed on 20/2/19. In the brief was identified a sale issue for determination, viz:-

> **Whether upon a careful evaluation of the evidence led in this case, the court below was right when it held that the respondent was not guilty of armed robbery but of robbery simpliciter and therefore substituted his death sentence with imprisonment. (Grounds 1, 2 and 3).**

Learned counsel for the respondent, Olukayode Adeluola adopted the brief of argument filed on 17/4/2018 and deemed filed on 20/2/19 and crafted a sole issue for determination which is as follows:-

> **Whether by the evidence adduced the trial court, the lower court was right in coming to the conclusion that only the lesser offence of robbery**

was committed and not armed robbery.

I shall use the issue as framed by the appellant for ease of reference.

SOLE ISSUE:

Whether upon a careful evaluation of the evidence led in this case, the court below was right when it held that the respondent was not guilty of armed robbery but of robbery slmpliciter and therefore substituted his death sentence with imprisonment .

Learned counsel for the appellant submitted that both the trial court and the court below found that the respondent committed robbery but the point of divergence is, while the court of trial held on the evidence before it that the respondent was guilty of armed robbery and therefore sentence him to death by hanging, the court below found and held the evidence did not show that the respondent committed armed robbery and since he was not armed with a firearm or offensive weapon, but rather was armed with a

locally made pistol ”toy-gun” was neither a firearm or an offensive weapon.

For the appellant, it was contended that the court below was in error as the evidence showed that the weapon was a locally made pistol and the fact that respondent and PW3 termed it a ”toy gun” did not change the offensive nature of the weapon, which brought with the Robbery and Firearms (Special Provisions) Act. He cited **Dario Vs. UBN Plc 2007 16 NWLR (Pt.1059) 99 at 161; UBA Ltd & Anor Vs. Achoru (1990) PLELR-3403 (SC) at page 16; A. I. C. Limited Vs. NNPC (2005) LPELR-6 (SC) pages 40-41.**

Learned counsel for the appellant referred to the sister case of this appeal which is SC.999/2015 which judgment was delivered on 1st June 2018 and the appeal allowed with a restoration of the conviction and sentence by hanging to death of the trial court.

For the respondent, learned counsel stated that there has been evidence of the prosecution on record before the trial court which in the opinion of the Lower court was contradictory, such contradiction in the evidence of the prosecution ought to be resolved in favour of the accused person as the contradiction is germane to the major ingredient of the offence, possession of arms or absence of arms in a charge for armed robbery. That the essential ingredient for the offence of armed robbery that distinguishes it from robbery simpliciter which is the use of firearms in the robbery and no conclusive evidence showed that there was a fun as denied by the statute in the course of the robbery and in this instance, it was a toy gun.

That the lower court was correct in its conclusion unlike that of the trial court. He cited Mbang Vs. State (2013) 7 NWLR (Pt.1352) 48; Jimmy Vs. State (2013) 18 NWLR (Pt.1386) 229; Jeminabo Princewill Vs. The State (1994) 6 NWLR

(Pt.353) 703 etc.

The position taken by the court below in conclusion fort which the appellant has come before this court is as seen in the lead judgment of Adefope-Okojie JCA at page 134 of the record of appeal thus:-

> **"The imposition of the sentence of death under Section 1 (2) of the Act, is a grievous sentence, I hold, only to be given where the proof is beyond reasonable doubt that the offender was armed with a firearm or offensive weapon or was in the company of one so armed. This vital ingredient, I hold, has not been proved by the prosecution. The trial judge, I accordingly hold, was in error have resolved this contradiction in favour of the prosecution and imposed the sentence of death on the appellant. This court, as the trial court, is however seised of jurisdiction to award a lesser offence where that lesser offence is proved.**

That stance of the Court of Appeal went against the angle taken at the Court of trial who saw the situation differently in the interpretation of Section (1) of the Robbery and

Firearms (Special Provisions) Act which defines Robbery thus: Stealing anything and, at or immediately before or' after the time of stealing it, using or threatening to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained.

That court of trial therefore held thus:-

> **"In this case at hand, I am satisfied that the evidence led by the prosecution has established that:**
> 1. **There was robbery;**
> 2. **The robbery was armed robbery;**
> 3. **The 1st and 4th accused participated in the said armed robbery in company of 2 other persons now at large.**
>
> **I uphold the submission of the learned State counsel in its entirety; I hold that the prosecution has proved Its case against the 1st and 4th accused persons beyond reasonable doubt. I hereby convict the 1st and 4th accused persons under Section 164 CPC for offence of Armed Robbery punishable under Section 1 (1) FIRE ARMS SPECIAL PROVISIONS ACT."**

Section 15 (1) of the Robbery and Firearms (Special Provisions) Act 1999 defines the terms "Firearms: and "Offensive Weapon'' as follows:-

Firearms include "any canon, gun, rifle, carbine, machine-gun, cap-gun, flint-lock gun, revolver, pistol, explosive or ammunition or other firearm, whether whole or in detached pieces."

Offensive weapon means any article (apart from a firearms) made or adopted for use for causing injury to the person or intended by the person having it for such use by him and it includes an air gun, air pistol, bow and arrow, spear, cutlass, matchet, dagger, cudgel, or any piece of wood, metal glass or stone capable of being used as an offensive weapon."

It is difficult not to see that the clear, plain and unambiguous wording of Section 1 (2) (a) and (b) of the Robbery and Firearms (Special Provisions) Act that the use of the word "or" in-between paragraphs (a) and (b) of subsection 2, the intention of the legislature was that where an offender under (a) is armed with a firearm or any offensive weapon or is in company with any person so armed, he shall be liable upon conviction under the Act to be so sentenced to death.

Therefore to elucidate on what I am trying to say above, I shall quote the said

section of the Robbery and Firearms (Special Provisions) Act in Section 1 thus:-

Section 1:

(1) Any person who commits the offence of robbery shall upon trial and conviction under this Act, be sentenced to imprisonment for not less than 2l years.

(2) If:-

(a) Any offender mentioned in subsection (1) of this section is armed with any firearms or any offensive weapons or is in company with any person so armed; or

(b) At or immediately after the time of the robbery the said offender wounds or uses any personal violence to any person;

The offender shall be liable upon conviction under this Act to be sentenced to death.

(3) The sentence of death imposed under this section may be executed by hanging the offender by the neck till be dead or by causing such offender to suffer death by firing square as the Governor may direct."

The word ”or” in legislation or statutes such as the one above quoted has been explained in many judicial authorities that the word ”or” always bears the disjunctive meaning in the enactment. I shall refer to **Anie & ors, Vs. Uzorka & Ors, (1993) LPELR-490 (SC) per Onu JSC at pages 23-24** as follows:-

> **”The italics above are mine to emphasize the use of the word ”OR” which has sometimes been used as ”and”. See Brown &. Co. Vs. Harrison (1927) 43 TLP 394. For instance Mackinnon J, read ”or” as ”and” in the Carriage of Goods by Sea Act, 1924 and his decision was confirmed by the Court of Appeal (England). One does not do it unless one is obliged to, because ”or” does not generally mean ”and” and ”and” does not generally mean ”or”. See Green. Vs. Premier Glynrhonwy State Co. Ltd. (1928) 1 K.B 561 at P.568 CA (per Scrutton L.J). In the context that “or” is used in the Act in the italicized clause above, its true meaning in the clause ”The Permanent Secretary of Ministry “OR” the head of any government department etc.” it is bound to be disjunctive rather than conjunctive as respondents counsel in his brief would want us to hold. Black’s Law Dictionary, 5th Edition at P .987 defines “OR”**

> **as “A disjunctive particle (sic) used to express an alternative or to give a choice of one among two or more things.”**

Again, in the subsequent case of **Abubakar & Ors. Vs. Yar’Adua & Ors. (2008) LPELR-51 (SC)** this court held per Katsina-Alu JSC (as he then was) at pages 23-24 thus:-

> **”The word ”or” is defined in Black’s Law Dictionary Sixth Edition in the following terms:**
>
> > **”A disjunctive participle used to express an alternative or to give a choice of one among two or more things.”**

In an earlier decision of the Court of Appeal in the case of **Abia State University Vs. Anyaibe (1996) 3 NWLR (Pt.439) 646 at 661** per Katsina-Alu JCA (as he then was) the implication of the word ”or” was stated as follows:-

> **“….. It is to be noted that Twelve months period is separated from the next period following by the word ”or”, This word always bears the disjunctive meaning in an enactment that is to say it separates the provision preceding it from the provision coming after it. Its role is to show that the provisions in which it is appearing are distinct and sep-**

arate one from the other. In Black's Law Dictionary, Sixth Edition, the word "or" is defined, inter-alia: A disjunctive participle used to express an alternative or to give a choice of one among two or more things."

A foray into what transpired at the trial court shows that the prosecution called four witnesses who testified as PW1, PW2, PW3 and PW4 with the victims and eye witnesses testifying as PW1 and PW2 with the Investigating Police Officer, Corporal Kolawale Gbenga testifying as PW3 and Kabiru Tanimu, a member of the Vigilante Group that arrested the respondent and handed him over to the police testifying as PW4.

The evidence of PW1 and PW2 gave evidence of the personal violence meted out by the respondent on them the victims while carrying a gun and torchlight.

In the respondent's confessional statement, he admitted the use of a "toy-gun" which he hid at the Lebanon Hotel, to which he took the policemen and the gun was recovered by the police team led including PW3 who described the gun as a locally made pistol and also described it as a toy gun.

While the learned trial judge found the pistol to meet the definition of firearm under Section 11 of the Robbery and Firearms (Special Provisions) Act, the court below with the mention of toy-gun had a contrary view hence it reduced the offence as mere robbery instead armed robbery as charged and found at the court of trial.

Indeed, from the evidence adduced, there is no justifying the stand of the court below as the respondent had been shown to have violently assaulted PW1 and PW2 and he was carrying a gun alongside his cohorts, a situation that well position the gun whether described as locally made or a toy gun within the sphere of the firearms envisaged by the Act particularly Sections 1 and 11. See **Dairo Vs. UBA Plc (2007) 16 NWLR (Pt.1059) 99 at 161; UBA Ltd. & Anor. Vs. Achoru (1999) LPELR -3403 (SC) 16; A.I.C. Limited Vs. NNPC (2005) LPELR-6 (SC) pp.40-41.**

This apex court had defined armed robbery as being robbery plus violence used or threatened and that was what happened in the case in hand. The alluded conflict in evidence of the prosecution witnesses were on very minor areas not touching the substantial part of the prosecution's case and so in the sister case heard and determined by this court in SC.999/2015 delivered on 1st June 2018. Sanusi JSC did not waste time in dismissing such allusions. This court equally rejected the conclusion by the Court of Appeal and held there was no basis for changing the findings and conclusion of the trial court and so allowed the appeal, restoring the decision, conviction for armed robbery and sentence to death by hanging.

Indeed, that position by my learned brother, Sanusi JSC in SC.999/2015 which came from the same transaction as the current one has properly settled the one under discourse as what transpired in the same incident was armed robbery which was executed with violence armed with firearms. See **Pius Vs. The State (2015) LPELR-24446 (SC)**

page 8; FRN Vs. Usman &. Anor. (2012) LPELR-7818 (SC) 14 at 15; Aruwa & Anor. Vs. The State (1990) 6 NWLR (Pt.155) 125 at 135; Eke Vs. The State (2011) 3 NWLR (Pt.1235) 589 at 605 —606.

In conclusion, it is clear that from the foregoing and the well articulated lead judgment that this appeal is meritorious and I allow it. I set aside the judgment and orders of the Court of Appeal as I re-instate the decision, conviction and sentence given by the trial High Court.

Appeal allowed.

Mary Ukaego Peter-Odili
Justice, Supreme Court

JOHN INYANG OKORO, (JSC): I had the opportunity of reading before now the leading judgment just delivered by my learned brother, Musa Dattijo Muhammad, JSC. I entirely agree with his reasoning and conclusion that this appeal is meritorious. I do also abide by the adjuration to the Governor of Kaduna State to exercise his prerogative of mercy in favour of the respondent.

To my mind, the main issue in this appeal, simply put is, whether the court below in its evaluation of the evidence it was perverse in its judgment. In answering the above question, the law is that any decision given without evidence in support must be perverse. See. **Incar (Nig) Plc & Anor. Vs. Bolex Enterprises (Nig) (2001) LPELR - 1514(SC); Atolagbe Vs. Shorun (1885) LPELR-592(SC); Rabiu Vs. Kano State (1980) LPELR - 2936 (SC).** In the case of **Okhuarobo & Ors Vs. Aigbe (2002)**

LPELR-2449, (SC); this court per Ayoola, JSC, observed as follows: ”it is not only when there is no evidence to support a decision that the decision can be held perverse. The observance of proper evaluation of evidence and failure to draw appropriate inference from them can also amount to perversity Where the inferences is so clear that no reasonable tribunal would fail to draw them, or where the inference drawn by the trial judge does not follow from the findings of fact he made.” (emphasis supplied).

In this case, the evidence of PW1 and PW2 who were the only eye witnesses and indeed victims of the crime is that they saw a gun. It was not in their place to decipher whether what the respondent carried was a real gun or toy. Indeed under our law, even if the weapon used in commission of the offence was not tendered in evidence, such failure is not fatal to the case. This is because if the evidence on ground indisputably supports the fact that armed robbery occurred, failure to tender the weapon in court would not change the narrative. See **Olayinka Vs. State (2002) 9. NWLR (Pt. 1040) 561 at 565.**

Following from the above, I am therefore of the view that the evaluation of the evidence by the court below, by placing more weight to the evidence of a toy gun, which is not what weighed on the robbery, was perverse. Having found that the judgment of the court below was perverse, same is hereby set aside and the judgment of the trial court is

hereby restored.

Appeal Allowed.

John Inyang Okoro
Justice, Supreme Court

PAUL ADAMU GALINJE, (JSC): I have had the privilege of reading in draft, the judgment just delivered by my learned brother, MUSA DATTIJO MUHAMMAD, JSC and I agree that the appeal is meritorious and should be allowed. Based on the reasoning in the lead judgment, I allow the appeal and endorse all the consequential orders made in the judgment of my learned brother.

Appeal allowed.

Paul Adamu Galinje
Justice, Supreme Court

UWANI MUSA ABBA AJI, (JSC): My learned brother M. D. Muhammad, JSC, obliged me in draft a copy of the lead judgment just delivered and I agree that this appeal be allowed. My learned brother has exhaustively dealt with the salient issues submitted by the parties for the determination of this appeal. Both the reasoning and the conclusion accord with mine and I hereby allow the appeal.

The respondent with other 3 persons was charged with armed robbery. They were all convicted after the trial. On appeal by the Respondent, his sentence was reduced to robbery, hence this appeal by the prosecution.

ABCDEFGH

ISSUE:

> **Whether upon a careful evaluation of the evidence led in this case, the court below was right when it held that the respondent was not guilty of armed robbery but robbery simpliciter and therefore substituted his death sentence with imprisonment.**

The essential ingredients of armed robbery are:- (a) That there was committed a robbery or series of robberies. (b) That the robbery was committed while any or all the robbers was/were in possession of arms or offensive weapon (c) That the accused person was one of those who took part in the armed robbery. See Per SANUSI, JSC in **ORISA Vs. STATE (2018) LPELR-43896(SC).**

By the confessional statement of the respondent and the evidence of the prosecution witnesses, PW1, PW2, PW3 and PW 4 (the police office that carried out the investigation), it is indisputably clear and unarguable that the respondent was in the company of an armed gang that robbed their victims. Whether a toy gun was used or not, recovered or

not, is not material to dislodge armed robbery. There is evidence that the victims were parted with their properties, whether real or unreal weapon was used, which made them to submit to their robbers.

Per PHILIP NNAEMEKA-AGU, JSC in **ARUNA & ANOR Vs.. STATE (1990) LPELR-568 (SC)** defined armed robbery to simply mean stealing plus violence used or threatened. Per KUMAI BAYANG AKA'AHS, JSC in **PIUS Vs. STATE (2015) LPELR-24446(SC),** relying on **Kerenku Vs. Tiv N.A. (1965) All NLR 570 at 571,** held that armed robbery is an aggravated form of robbery and the offence of robbery can be committed without the use of arms. The offence of robbery is theft or extortion by force or fear of force.

The lower court was therefore wrong to hold that because a toy gun was used by the respondent or recovered from the scene, armed robbery was not proved. This is completely in aberration with the evidence at the trial and is a perversion of the facts of the case.

The appeal therefore succeeds. I also advise that the respondent seeks the mercy of the State Governor.

Uwani Musa Abba Aji
Justice, Supreme Court

ABCDEFGH

THEOPHILUS KURE
Vs.
COMMISSIONER OF POLICE

SC.317/2018

IN THE SUPREME COURT OF NIGERIA

HOLDEN AT ABUJA

FRIDAY, 24TH JANUARY, 2020

BEFORE THEIR LORDSHIPS

OLUKAYODE ARIWOOLA — **JUSTICE, SUPREME COURT**
KUDIRAT M. O, KEKERE-EKUN — **JUSTICE, SUPREME COURT**
AMINA ADAMU AUGIE — **JUSTICE, SUPREME COURT**
PAUL ADAMU GALUMJE — **JUSTICE, SUPREME COURT**
UW ANI MUSA ABBA AJI — **JUSTICE, SUPREME COURT**

CRIMINAL LAW AND PROCEDURE:- Arraignment and trial —Whether different from conviction.

CRIMINAL LAW AND PROCEDURE:- Cheating —Elements thereof —What prosecution must prove.

CRIMINAL LAW AND PROCEDURE:- Criminal breach of trust —Ingredients thereof —What prosecution must prove.

CRIMINAL LAW AND PROCEDURE:- Trial and conviction —Meaning

CRIMINAL LAW:- Breach of contract —Where the relationship between the parties is based on contract —Whether breach thereof does not lead to penal punishment —The principle in ***Onagoruwa Vs. State (1993) LPELR —43436***

CRIMINAL LAW:- Cheating —Meaning —S. 320 of Penal Code considered.

CRIMINAL LAW:- Cheating and criminal breach of trust —Whether distinct from each other —S. 213 of CPC considered.

CRIMINAL LAW:- Criminal breach of trust —Ingredients thereof —Where property is

obtained fraudulently and by deceit —Whether cannot amount to criminal breach of trust.

CRIMINAL LAW:- Criminal breach of trust —Meaning —S. 311 of the Penal Code considered.

CRIMINAL LAW:- Criminal breach of trust —Nature thereof —Whether there must be evidence of trust in a criminal breach of trust.

CRIMINAL LAW:- Criminal breach of trust —Where agreement is based on contract —Whether breach thereof does not amount to criminal breach of trust.

EQUITY:- Equitable trust —Elements of trust —Relevant principles.

EQUITY:- Equitable trust —Nature and purport —Whether it is a fiduciary relationship regarding to property.

PRACTICE AND PROCEDURE:- Appeal —Concurrent findings —Where shown to be perverse or has led to miscarriage of justice —Whether Supreme Court will interfere therein.

STATUTE:- Police Act Cap. P.19 Laws of the Federation of Nigeria —S. 4 thereof —Whether provides for the duties of Nigerian Police.

STATUTE:- Police Act Cap. P.19 of Laws of the Federation of Nigeria —S. 4 thereof —Whether does not permit the police to dabble into contractual disputes between parties.

Issues for Determination

1. **Whether the lower court was right to have upheld the conviction of the appellant by the lower courts for both criminal breach of trust and cheating based on the same factual situation in respect of one transaction in the same proceedings.**
2. **Whether the lower court was right to have relied on the judgment of the trial court to uphold the conviction and sentence of the appellant for criminal breach of trust and cheating having regard to the evidence.**

Facts of the Matter

The appellant was arraigned before a Kaduna State Chief Magistrate's Court for the offence of criminal breach of trust and cheating contrary to Sections 312 and 322 of the Panel Code.

The appellant withdrew some part of the money paid into his account for the contract of supply of wild animals which he failed to do. The appellant however pleaded not guilty to these charges.

In proof of its case, the prosecution called 3 witnesses while the accused testified on his behalf.

At the end of trial, the learned trial magistrate convicted the accused and sentenced him accordingly.

The appellant's appeals to the High Court and Court of Appeal were not successful. He has further appealed to the Supreme Court.

Held: *(Unanimously allowing the appeal)*

1. An arraignment and trial are different from conviction.

An arraignment and trial are different from conviction. Since the appellant's issue one at the lower court and this court have not raised any question con-

cerning arraignment and trial, all the submissions made by learned counsel for the respondent regarding Section 213 of the CPC go to no issue.

The authority of Garba Mailayi & Anor. Vs. State (supra) which was cited and relied upon by the learned counsel for the respondent is not applicable in the instant appeal, as it has to do with the trial of joint offences and not conviction and sentence. Trial and conviction are distinct and separate words that carry different meaning. ***(P 259 para B -C)***

2. *The meaning and nature of trial and conviction.*
Trial is a formal judicial reception and examination of evidence in the process of determination of legal claims or in criminal matters, whether the prosecution has proved its case in an adversary proceeding while conviction is a final decision in which a person is found guilty of a criminal offence upon a criminal trial by the court. It is the end product of the evidence received in the course of trial. ***(P 259 para C - D***

3. *Cheating and criminal breach of trust are not the same*
The ingredients leading to the offences of cheating and criminal breach of trust are not the same. ***(P 259 para D -E)***

4. The definition of cheating
The definition of the offence of cheating, relevant to this case is as contained in Section 320(a) of the Penal Code. This section provides as follows:-

> **"320 . Whoever by deceiving any person**
> **(a) Fraudulently or dishonestly induces the person so deceived to deliver any property to any person or to consent that any person shall retain any property.** ***(P 259 para D - E)***

5. *What prosecution must prove in a case of cheating.*
The punishment section under which the appellant was charged is Section 322 of the Penal Code. In order to prove the offence of cheating the prosecution must prove that the Rivers State Ministry of Culture and Tourism was deceived and thereby fraudulently induced by the appellant to deliver the sum of N3.5million to it. ***(P 259 para E - F)***

6. *The meaning of criminal breach of trust*
On the other hand the offence of criminal breach of trust is defined under Section 311 of the Penal Code as follows:-

"Whoever being in any manner entrusted with property or with any dominion over property, dishonestly misappropriates or converts to his own use that property or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract express or implied, which he has made touching the discharge of such trust, or willfully suffers any other person so to do, commits criminal breach of trust. " ***(P 259 para F - G)***

7. Ingredients of criminal breach of trust

The offence of criminal breach of trust is punishable under Section 312 of the Penal Code. For the prosecution to succeed in establishing the offence of criminal breach of trust, it must prove the following ingredients: -

1. **That the accused person was entrusted with property or dominion over it.**
2. **That he misappropriated it, converted it to his own use or disposed of the said property.**
3. **That the accused did so in violation of any direction of law, prescribing the mode in which such trust was to**

be discharged or any legal contract expressed or implied which he had made concerning the trust or that he intentionally allowed some other persons to misappropriate, convert or dispose of the property in violation of the mode of execution of the trust. See Uzoagba Vs. C.O.P (2014) 5 NWLR (Pt. 1401) 441; Federal Republic of Nigeria Vs. Martins (2012) 14 NWLR (Pt. 1320) 287. ***(P p259 - 260 para H - C)***

8. What amount to a trust

While the offence of cheating under Section 322 of the Penal Code involves deceit and or fraudulent and dishonest inducement of the person so deceived to part or deliver the property in issue to any person, the offence of criminal breach of trust does not involve deceit and/ or fraudulent and dishonest inducement of the settlor to deliver the property for which the trust is created, to the trustee. For a trust to be valid, it must involve specific property, reflect the settlor's intent and be created for a lawful purpose. Where a property is

obtained deceitfully or through fraudulent and dishonest inducement, such transaction cannot amount to a trust. Where there is no trust, breach of such trust cannot be founded by any tribunal or court. By the different ingredients that lead to the commission of the two offences with which the appellant was charged and convicted, there is no way that the appellant could be properly convicted for the two offences, involving the same sets of facts of delivering money to the appellant by the Rivers State Ministry of Culture and Tourism for the contract of supply of calf giraffe. The first issue is therefore resolved in favour of the appellant. ***(P 260 para D - E)***

9. Lower court relied on the judgment of the High Court and not that of the Chief Magistrate Court

I wish to state straight away that the lower court relied on the judgment of the High Court and not the judgment of the trial Chief Magistrate, since the appeal to it was from the decision of the High Court. Be that as it may, the complaint here is whether the prosecution did establish its case beyond reasonable doubt as to warrant a conviction for cheating and criminal breach of trust contrary to Sections 322 and 312 of the Penal Code. I have reproduced the provision of these sections of the Penal Code elsewhere in this judgment. Mrs. Sokari Davies, the prosecution's first witness testified as follows:-

> **"1 met the accused person in 2005. He was introduced to me as a consultant in wild animals by a friend, Roland Ahmed who claimed that the accused is his friend that could supply wild animals to us. So when the need arose, I told my commissioner**

> **then about him and the commissioner and I invited him during a conference we came to attend in Abuja at Ladi Kwali Hall of Sheraton Hotel. He came to us and we discussed with him about wild animals we wanted him to supply to us."**
> *(Pp 260-261 para G - B)*

10. There must be evidence of trust in a criminal breach of trust

All the prosecution witnesses testified that the transactions between the Ministry of Culture & Tourism, Rivers State and the appellant were based on contract between the parties and that the contract had wholly failed because of the appellant's non-performance. The second comment under Section 312 of the Notes on the Penal Code law by S. S Richardson, states as follows:-

> **"(2) Breach of trust is not the same thing as breach of con-**

tract. In all the cases given in the illustration to Section 311, in which a person is said to have committed criminal breach of trust, the property misappropriated is the property of another person or property of which the offender was not the beneficial owner."

For a criminal breach of trust to occur, there must be evidence of trust. *(P 262 para F - H)*

11. When does trust arise.

A trust arises as a result of a manifestation to create it. It is a fiduciary relationship regarding property and charging the person with title to the property with equitable duties to deal with it for another's benefit. It is a property interest held by one person, called the trustee at the request of another person called the settlor for the benefit of a third party called the beneficiary. For the trust to be valid, it must involve specific property, reflect the settlor's intent and be created for a lawful purpose. A trust exists when property is to be administered by one person on behalf of another for some purpose other than the trustee's benefit. Where the property is administered for the benefit of the person holding it, it ceases to bear the meaning of trust. ***(P 262-263 para H - A)***

12. Elements of trust.

There is no evidence that shows the beneficiary of the money that was given to the appellant to buy the giraffe was a person other than the appellant. A trust involves three elements:-

1. **A trustee, who holds the trust property and is subject to deal with it for the benefit of one or more others.**
2. **One or more beneficiaries to whom and for whose benefit**

the trustee owes duties with respect to the trust property.

3. **Trust property, which is held by the trustee for the beneficiaries.**

In the instant case there are no beneficiaries other than the appellant, as the money was deposited in the appellant's account to be administered by him. *(P 263 para D - E)*

13. There was no evidence of criminal breach of trust

Having considered the evidence at the trial court, I am of the firm view that the transactions involved in this case were based on contractual agreement,

as there is no evidence of criminal breach of trust. ***(P 263 para G - H)***

14. Criminal law does not punish breach of contract

In Onagoruwa Vs. State (1993) LPELR - 43436 (CA) at pages 67 - 68 paras, F - B, Niki Tobi, JCA (as he then was) said:-

> **"There is no law known to me where a breach of agreement between two parties, which has no element of criminality, can result in a criminal charge and subsequent conviction. At best, it can be a breach of a contractual relationship which the criminal law lacks legal capacity or competence to enforce and punish. "**
> *(Pp 263-264 para H - A)*

15. The duties of the police.

The role of the Police is clearly spelt out in Section 4 of the Police Act Cap. P 19 Laws of the Federation of Nigeria 2004, to wit:

> **"4. The Police shall be employed for the prevention and detection of crime, the apprehension of offenders, the preservation of law and order, the protection of life and property and the due enforcement of all laws and regulations with which they are directly charged ... "**

As stated earlier, the compliant was purely civil with no element of criminality. The police ought to have referred the appellant to the court to pursue a civil claim. ***(P 265 para C - D)***

16. When to disturb concurrent findings

The appellant is challenging the concurrent findings of the two lower courts, regarding his conviction and sentence for the offences of criminal breach of trust and cheating. Yes, the position of the law is that where there is evidence to

support such concurrent findings, they will not be disturbed unless they are shown to be perverse, or miscarriage of justice or violation of principles of law or procedure is shown on the record - Ogoala Vs. State (1991) 2 NWLR (Pt. 175) 509. ***(P 265 para F - G)***

17. There are good reasons to interfere with the concurrent findings of the two lower courts

It is also settled that the onus lies on the appellant to give good reasons why this court should interfere with the concurrent findings of the two lower courts; and, as my learned brother, Galumje, JSC, said in the lead judgment,

it is clear from the facts and circumstances of this case that the situation in which the appellant found himself, demands that this court must intervene by doing something about it.

In other words, it is clear from the peculiar facts of this case that there are good reasons for this court to disturb or interfere with the concurrent findings of the two lower courts. There was nothing to indicate deceit on the part of the appellant to ground a conviction for the offence of cheating; and there was no evidence to establish that the appellant committed the offence of criminal breach of trust. ***(Pp 265 - 266 para H - A)***

Per Uwani (JSC)

"The primary duty of the police by Section 4 of the Police Act is the prevention of crime, investigation and detection of crime and the prosecution of offenders. See IBIYEYE Vs. GOLD (2012) ALL FWLR (Pt. 659) 1074. The Police is not a debt recover agency and has no business to dabble into contractual disputes between parties arising from purely civil transactions. See MCLAREN Vs. JENNINGS (2003) FWLR (Pt. 154) 528. When, as in the circumstances of this action, a purely civil matter is reported to the Police, such a person cannot go scot-free as the report ought not to have been made at all since it is not within the purview of Police duties. It is a report made malafide and he will be equally liable for the action taken by the Police irrespective of whether he actively instigated them or not, since he had no business involving the police in a purely civil matter in the first place. Such conduct which portrays disregard of the law and is aimed at using the coercive powers of the State to punish a contracting party in a purely civil matter ought to be mulcted in exemplary damages". See OKAFOR & ANOR Vs. AIG POLICE ZONE II ONlKAN & ORS (2019) LPELR-46505.
(Pp 266-267 para G - B)

Representations:

L. A. O. Nylader (SAN) with J. F Adamu and Seember Wayo (Esq.) for the appellant.

MR. E. E. Ekhasemomhe with P. O. Iyaji for the respondent.

PAUL ADAMU GALINJE, JSC. (Delivering the lead judgment): The appellant herein, was introduced to Mrs. Sokari Davies, who was Director of Tourism, Ministry of Culture and Tourism, Rivers State of Nigeria as a consultant in wild animals by one Roland Ahmed in 2005. Ahmed who described the appellant as his friend told Mrs. Sokari Davies that the appellant was capable of supplying wild animals to the ministry. So when the need for purchase of wild animal arose, Mrs. Davies told the commissioner in charge of her Ministry about the appellant. Together they invited the appellant where they discussed

extensively about the supply of wild animals. In 2013, Mrs. Davies contacted the appellant and sought to know what types of animals he had. The appellant told her that he had Giraffes, Zebbras and other animals, for sale. The appellant after a formal discussion with the commissioner in charge of the ministry, agreed to supply a calf giraffe at the cost of three million, five hundred thousand naira (N3.5Million). He supplied his Bank Account No..2008212399 domiciled at the United Bank for Africa and promised to deliver the animal within two weeks. The honourable commissioner directed Mrs. Davies and the Director of Finance to effect payment and ensure prompt delivery of the animal. Payment was effected on the 1st of February, 2013 and the appellant sent a receipt for the payment to Mrs. Sokari Davies by e-mail. The animal was not delivered. Several months later, Mrs. Davies discovered that the appellant had withdrawn substantial part of the money when the animal was yet to be supplied. She contacted a lawyer who applied for and obtained an order of lien on the account into which the money was paid. She wrote a letter of complaint to the Commissioner of Police, Kaduna State on the 26th of November, 2013 and the appellant was subsequently arrested and was arraigned before a Chief Magistrate's Court Kaduna for the offence of criminal breach of trust and cheating contrary to Sections 312 and 322 of the Penal Code. By the time lien was placed on the account into which the money was paid, the appellant had withdrawn N2,550,000.00 leaving a balance of N995,000.00.

The appellant herein, was arraigned before a Chief Magistrate Court, Kaduna on a First Information Report (FIR) on allegation of criminal breach of trust and cheating contrary to Sections 312 and 322 of the Penal Code. After the First Information Report was read and explained to the appellant, he pleaded not guilty. In order to prove its case, the prosecution called three witnesses and tendered in evidence two written statements of the appellant and a printout statement of UBA Account of the appellant. These documents were admitted in evidence and marked **Exhibits AI, A2,** and **B** respectively.

At the close of prosecution's case, the learned Chief Magistrate ruled that the prosecution had established a prima facie case of cheating and criminal breach of trust against the appellant. The appellant pleaded not guilty to the two counts charge that was framed by the Chief Magistrate and elected to give evidence in his defence. After his evidence in chief, the appellant made several attempts to call another witness without success, and so he finally closed his case on the 5th of October, 2015.

In a reserved judgment, delivered on the 23rd of October, 2015, the trial Chief Magistrate found the appellant guilty as charged and sentenced him to a fine of N5,000.00 or 1 year imprisonment for the offence of cheating and a fine of N8,000.00 or 2 years imprisonment for criminal breach of trust. In addition, the appellant was ordered

to pay the sum of N2,505,00.00 as compensation to the nominal complainant, being the balance of the N3.5Million paid to the appellant by the nominal complainant for male calf giraffe which he failed to deliver to her, since the nominal; complainant had already retrieved the sum of N995,000.00 from the bank account of the convict at UBA Plc.

The appellant was not happy with the decision of the Chief Magistrate. Being aggrieved, he appealed to the High Court and submitted two grounds of appeal. The appeal was heard and in a unanimous decision, the High Court (Coram M. L Bello and B. F Zubairu JJ) dismissed the appeal and affirmed the decision of the Chief Magistrate.

Once again, the appellant was thoroughly dissatisfied with the decision of the High Court, and therefore appealed to the Court of Appeal, Kaduna Division on three grounds of appeal and submitted two issues for determination of the appeal. The appeal was heard and in a reserved and considered judgment delivered on the 30th day of October, 2017, the appellant's appeal was dismissed for lack of merit. The appellant has finally brought this appeal against the decision of the lower court. His notice of appeal, filed on the 28th November 2017, contains three grounds of appeal.

Parties filed and exchanged briefs of argument. Mr. Nylander, learned counsel for the appellant formulated two issues for determination of this appeal as follows:-

1. **Whether the lower court was right to have upheld the conviction of the appellant by the lower courts for both criminal breach of trust and cheating based on the same factual situation in respect of one transaction in the same proceedings.**
2. **Whether the lower court was right to have relied on the judgment of the trial court to uphold the conviction and sentence of the appellant for criminal breach of trust and cheating having regard to the evidence.**

Mr. Emmanuel Ekhasemomhe, learned counsel for the respondent also formulated two issues for determination of this appeal. They read thus:-

1. **Whether the lower court was right to have upheld that the appellant could be convicted for both criminal breach of trust and cheating based on the same factual situation in respect of one transaction in the same proceedings.**
2. **Whether the lower court was right to have relied on the judgment of the trial court to uphold the conviction and sentence of the appellant for criminal breach of trust and**

cheating, having regards to the evidence adduced.

For a proper consideration of the issues submitted for determination of this appeal, it is pertinent to set out in brief the facts of this case as highlighted in the judgment of the lower court. The appellant a '*veterinarian'* entered into a contract with the ministry of culture and tourism, Rivers State, through one Mrs. Sokari Davies, the Director of Tourism, to supply a calf giraffe in the sum of N3.5Million. The said sum was paid on 1/2/2013 into the account of the appellant domiciled at the United Bank for Africa (UBA). Appellant promised to deliver the calf giraffe in two weeks.

Several months passed, no delivery was made despite repeated demands made to the appellant to deliver. Mrs. Sokari Davies, who stood in for the ministry of culture and tourism, Rivers State, decided to check whether the money she deposited in the appellant's account was still intact. To her surprise, the appellant had been making piecemeal withdrawals leaving a balance of one million naira (N1,000,000.00) in the account. She now went to court, sought for and obtained an order ex-parte, which placed lien on the appellant's account, and by the time the order was served on the bank there was further withdrawal from the said account, which brought the balance to the credit of the appellant down to nine hundred and ninety-five thousand naira (N995,000.00). This balance was subsequently transferred to the account of Mrs. Sokari Davies. Mrs. Sokari Davies who testified at the trial court as **PW1,** reported the transaction to the police in Kaduna, where the appellant lived. As a result of the report, the appellant was arrested and arraigned before the Chief Magistrate's court for the offences of cheating and criminal breach of trust contrary to Sections 312 and 322 of the Penal Code.

The appellant, being the aggrieved party and the complainant in this appeal, I will adopt the two issues formulated on his behalf in the determination of this appeal.

On the first issue, learned counsel for the appellant submitted that while the appellant may be convicted for one of the two offences with which he was charged, depending on which one of them is properly established, he cannot properly be convicted for both offences in the circumstances of the facts and evidence of the instant case, especially, as the entire evidence is hinged on one and the same factual situation. Learned counsel further submitted that the two offences relate to different scenarios with different ingredients and cannot co-exist in the same factual situation borne out of a single transaction. In aid, learned counsel cited **R Vs. Sindair (1968) 3 ALL E.R 241 and Uzoagba Vs. Cop (2014) 5 NWLR (Pt. 140) 441.**

On the second issue for determination of this appeal, learned counsel submitted that the prosecution did not prove its case beyond reasonable doubt and the lower court was wrong when it upheld the decision of the High Court that upheld the decision of the Chief Magistrate Court. Learned counsel urged this court to resolve the two issues in favour of the appellant and acquit him. Learned counsel for the respondent on issue one, submitted that the lower court was right to have held that the

appellant could be convicted for both criminal breach of trust and cheating based on the same factual situation in respect of one transaction in the same proceedings. In aid, learned counsel cited Section 213 of the Criminal Code and the authorities in **Garba Mailayi & Anor Vs. State (1968) ANLR 117,** and **Major Dennis Toinpre Des Dokubos Vs. The Nigerian Army (2015) LPELR 25969 (CA).** In a further argument, learned counsel submitted that the appellant at the trial Chief Magistrate's Court, did not canvass for separate trial for both offences despite the fact that he could have persuaded the trial Chief Magistrate's Court for a separate trial pursuant to the provisions of Section 213 of the Criminal Procedure Code. Still in argument, learned counsel submitted that the appellant has failed to show that he was prejudiced by his trial and conviction for the said offences in single proceeding based on the same set of facts. Finally this court is urged to resolve this issue in favour of the respondent.

On the 2nd issue for determination of this appeal, learned counsel for the respondent submitted that the lower court was right to have relied on the judgment of the High Court to uphold the conviction and sentence passed on the appellant for criminal breach of trust and cheating, having regard to the totality of the evidence adduced before the trial court. According to the learned counsel, the appellant at the lower court did not canvass that the offences with which he was charged, were not established against him beyond reasonable doubt as such he cannot raise that issue before this court. Finally learned counsel submitted that this is not one of those cases where the appellate court can disturb the concurrent findings and conclusions of three lower courts as there is no violation of some principle of law and procedure which can be said to have resulted in miscarriage of justice. In aid, learned counsel cited **Zakari Vs. Nigerian Army (2015) 62 NSCQR (Pt. 1) 214 at 254; Alhaji Ganiyu Martins Vs. C.O.P (2012) 12 MJSC (Pt. 11) 73 at 93 - 94.**

The first question to be dealt with in this appeal is whether the lower court was right to have upheld the conviction of the appellant for both criminal breach of trust and cheating contrary to Sections 312 and 322 of the Penal Code. The lower court, after making reference to Section 213 of the Criminal Procedure Code and paving reviewed some authorities which were cited by learned counsel for respective parties came to the following conclusion:-

> **"Cheating and criminal breach of trust under Sections 312 and 320 are distinct offences with different ingredients, albeit similar. It is their similarity that permits their joinder in the same trial. The duty on the trial court is to satisfy itself that the different ingredients constituting the offence have been proved.**
>
> **As pointed out by the respondent's counsel, had the appellant felt prejudiced by the joinder of charges, the same should have been**

stated at the inception of trial, with a request for separate trials.

> **This not having been done, renders this complaint too late in the day."**

With this comment, the lower court resolved the first issue before it against the appellant.

Before I peep into the provision of Section 213 of the CPC, I wish to reproduced the appellant's first issue for determination before the lower court, as follows:-

> **"Whether the lower court was right to hold that the appellant could be convicted for both criminal breach of trust and cheating based on the same factual situation in respect of one transaction in the same proceedings. "**

Section 213 of the CPC provides as follows:-

> **"Where a person is accused of several offences of the same or similar character he may be charged with and tried at one trial for any number of them, but if the court, before the trial or at any stage of the trial before judgment is pronounced, considers that he may be prejudiced or embarrassed in his defence by such procedure or that for any other reason it is desirable to do so, the court may order a separate trial of anyone or more of such charges."**

Reading through the contents of the first issue that was submitted by the appellant at both the lower court and this court, it is very clear that he was questioning his conviction and sentence for the two offences on a single transaction that was based on the same factual situation. Learned counsel for the appellant, both at the lower court and this court never raised the issue of joinder of the offences of criminal breach of trust and cheating at the trial stage that is from arraignment to the judgment. His argument is not against the trial of the appellant for the two offences at the same time. It is his argument that the appellant could not properly be convicted for both offences based on the same set of facts. This line of argument is clearly admitted by learned counsel for the respondent at paragraph 4.6 of the respondent's brief of argument when he states as follows:-

> **"The most important consideration with respect to this issue is whether both offences were proved beyond reasonable doubt. Once this is ascertained and the answer is positive, a conviction for both offences based on the same set of facts in the same proceedings should stand ... "**

By this statement, it is clear that even if an accused is tried for several similar offences, the prosecution must prove beyond reasonable doubt, each of the offences before a conviction on any of them can stand. The mere fact that accused is found guilty for one of the offences, is not a conclusive evidence that he is guilty for all the offences.

An arraignment and trial are different from conviction. Since the appellant's issue one at the lower court and this court have not raised any question concerning arraignment and trial, all the submissions made by learned counsel for the respondent regarding Section 213 of the CPC go to no issue.

The authority of **Garba Mailayi & Anor. Vs. State (supra)** which was cited and relied upon by the learned counsel for the respondent is not applicable in the instant appeal, as it has to do with the trial of joint offences and not conviction and sentence. Trial and conviction are distinct and separate words that carry different meaning. Trial is a formal judicial reception and examination of evidence in the process of determination of legal claims or in criminal matters, whether the prosecution has proved its case in an adversary proceeding while conviction is a final decision in which a person is found guilty of a criminal offence upon a criminal trial by the court. It is the end product of the evidence received in the course of trial.

The ingredients leading to the offences of cheating and criminal breach of trust are not the same. The definition of the offence of cheating, relevant to this case is as contained in Section 320(a) of the Penal Code. This section provides as follows:-

> **"320 -Whoever by deceiving any person**
> **(a) Fraudulently or dishonestly induces the person so deceived to deliver any property to any person or to consent that any person shall retain any property.**

The punishment section under which the appellant was charged is Section 322 of the Penal Code. In order to prove the offence of cheating the prosecution must prove that the Rivers State Ministry of Culture and Tourism was deceived and thereby fraudulently induced by the appellant to deliver the sum of N3.5million to it.

On the other hand the offence of criminal breach of trust is defined under Section 311 of the Penal Code as follows:-

> **"Whoever being in any manner entrusted with property or with any dominion over property, dishonestly misappropriates or converts to his own use that property or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract express or implied, which he has made touching the discharge of such trust, or willfully suffers any other person so to do, commits criminal breach of trust. "**

Code. For the prosecution to succeed in establishing the offence of criminal breach of trust, it must prove the following ingredients: -

1. **That the accused person was entrusted with property or dominion over it.**
4. **That he misappropriated it, converted it to his own use or disposed of the said property.**
5. **That the accused did so in violation of any direction of law, prescribing the mode in which such trust was to be discharged or any legal contract expressed or implied which he had made concerning the trust or that he intentionally allowed some other persons to misappropriate, convert or dispose of the property in violation of the mode of execution of the trust. See Uzoagba Vs. C.O.P (2014) 5 NWLR (Pt. 1401) 441; Federal Republic of Nigeria Vs. Martins (2012) 14 NWLR (Pt. 1320) 287.**

While the offence of cheating under Section 322 of the Penal Code involves deceit and or fraudulent and dishonest inducement of the person so deceived to part or deliver the property in issue to any person, the offence of criminal breach of trust does not involve deceit and/ or fraudulent and dishonest inducement of the settlor to deliver the property for which the trust is created, to the trustee. For a trust to be valid, it must involve specific property, reflect the settlor's intent and be created for a lawful purpose. Where a property is obtained deceitfully or through fraudulent and dishonest inducement, such transaction cannot amount to a trust. Where there is no trust, breach of such trust cannot be founded by any tribunal or court. By the different ingredients that lead to the commission of the two offences with which the appellant was charged and convicted, there is no way that the appellant could be properly convicted for the two offences, involving the same sets of facts of delivering money to the appellant by the Rivers State Ministry of Culture and Tourism for the contract of supply of calf giraffe. The first issue is therefore resolved in favour of the appellant.

The second issue for determination of this appeal, even at the risk of repetition is whether the lower court was right to have relied on the judgment of the trial court to uphold the conviction and sentence of the appellant for criminal breach of trust and cheating having regard to the evidence. I wish to state straight away that the lower court relied on the judgment of the High Court and not the judgment of the trial Chief Magistrate, since the appeal to it was from the decision of the High Court. Be that as it may, the complaint here is whether the prosecution did establish its case beyond

reasonable doubt as to warrant a conviction for cheating and criminal breach of trust contrary to Sections 322 and 312 of the Penal Code. I have reproduced the provision of these sections of the Penal Code elsewhere in this judgment. Mrs. Sokari Davies, the prosecution's first witness testified as follows:-

> **"1 met the accused person in 2005. He was introduced to me as a consultant in wild animals by a friend, Roland Ahmed who claimed that the accused is his friend that could supply wild animals to us. So when the need arose, I told my commissioner then about him and the commissioner and I invited him during a conference we came to attend in Abuja at Ladi Kwali Hall of Sheraton Hotel. He came to us and we discussed with him about wild animals we wanted him to supply to us."**

In his evidence in chief, the appellant told the court that he is a veterinarian and that he holds HND from the College of Agriculture and Animal Science Kaduna. In all this, no one gave evidence that the Ministry of culture and tourism, Rivers State was deceived and fraudulently induced to deliver the three million five hundred thousand naira to the appellant. Mr. Roland Ahmed who was alleged to have introduced the appellant as dealer in wild animals was not called as a witness to deny that the appellant was not a veterinarian and never embarked on supply of wild animals as a business. Since there is no evidence of deceit on the part of the appellant, the trial court was wrong in finding him guilty of the offence of cheating.

Although it is not in the character of the Supreme Court to interfere with concurrent decisions of two or three lower courts, however where such decision is unreasonable and cannot be supported by evidence and the law, this court has a duty to interfere in order to meet the ends of justice. I am of the firm view that the lower court acted in error, when it affirmed the decision of the Kaduna State High Court which in turn affirmed the decision of the Chief Magistrate's Court which found the appellant guilty of the offence of cheating.

The next question is whether the prosecution established the offence of criminal breach of trust against the appellant.

I have set out the ingredients of the offence of criminal breach of trust contrary to Section 312 of the Penal Code elsewhere in this judgment. The question is, was the appellant entrusted with N3.5 million, by the Ministry of Culture and Tourism, Rivers State? Under cross examination, PW1, the star witness for the prosecution admitted at page 8 of the record of this appeal, as follows:-

> **"The contract to supply giraffe was given to the accused through me, by our ministry. The accused initially told me that he would get the giraffes from Chad, and later he said Niger. By that time, I wasn't**

aware of any security situation in the North." (Underlining is mine).

In his evidence, PW2, a police corporal, who recorded the statement of the appellant, at page 9 of the record said:-

> **"On 26/11/2013, I was in the office when a case of criminal breach of trust and cheating was addressed to the C.O.P, by the Rivers State Government signed by Mrs. Sokari W. Davies against the accused person. That sometime in February, 2013, the complainant contracted his service to supply her with a giraffe calf worth N3.5million. That the giraffe was not supplied".**

PW3, Inspector Yakubu Dabo, who was the team leader that carried out investigation into this mater, confirmed at pages 13 - 14 of the record of this appeal that the transaction between the Rivers State Ministry of Culture & Tourism and the appellant was based on contractual agreement, when he stated as follows:-

> **"I know the accused person. On 26/11/2013, I was in Department of Criminal Investigation (D.C.I) when a letter of complaint was received written by Mrs. Sokari Davies, to the Commissioner of Police, Kaduna State, on behalf of Ministry of Culture & Tourism, Rivers State entered into contract with the accused person. And they paid him the sum of N3.5million for the supply of a male giraffe calf. Mrs. Sokari made the payment to the accused on behalf of the Ministry of Culture & Tourism, Rivers State.**
> **The money was deposited in a bank account no. 2008212399, UBA Plc Limited (sic). The accused person is the holder of the said *account.* The deposit was made on 1/2/2013. The accused promised to deliver the male giraffe calf in two weeks' time. After the payment he could not deliver the said giraffe as promised, which led to their reporting this case. " (*underlining* is *mine)***

All the prosecution witnesses testified that the transactions between the Ministry of Culture & Tourism, Rivers State and the appellant were based on contract between the parties and that the contract had wholly failed because of the appellant's non-performance. The second comment under Section 312 of the Notes on the Penal Code law by S. S Richardson, states as follows:-

> **"(2) Breach of trust is not the same thing as breach of contract. In all the cases given in the illustration to Section 311, in which a person is**

said to have committed criminal breach of trust, the property misappropriated is the property of another person or property of which the offender was not the beneficial owner."

For a criminal breach of trust to occur, there must be evidence of trust. A trust arises as a result of a manifestation to create it. It is a fiduciary relationship regarding property and charging the person with title to the property with equitable duties to deal with it for

another's benefit. It is a property interest held by one person, called the trustee at the request of another person called the settlor for the benefit of a third party called the beneficiary. For the trust to be valid, it must involve specific property, reflect the settlor's intent and be created for a lawful purpose. A trust exists when property is to be administered by one person on behalf of another for some purpose other than the trustee's benefit. Where the property is administered for the benefit of the person holding it, it ceases to bear the meaning of trust.

In the instant case, the N3.5million naira paid to the appellant include cost for logistics and procurement of the giraffe and the appellant's profit since the giraffe was not a commodity that was on display and could be bought for the N3.5million.

The appellant testified that the animal was not available in Nigeria and that its procurement was possible only in Niger' Republic or Chad. Was he expected to trek to these countries to procure the calf giraffe with the money advanced to him. Clearly the intention of the Ministry of Culture & Tourism, Rivers State was for the appellant to manage the money in such a way as to procure the calf giraffe. It was not its business to dictate how the giraffe was to be procured. There is no evidence that shows the beneficiary of the money that was given to the appellant to buy the giraffe was a person other than the appellant. A trust involves three elements:-

4. **A trustee, who holds the trust property and is subject to deal with it for the benefit of one or more others.**
5. **One or more beneficiaries to whom and for whose benefit the trustee owes duties with respect to the trust property.**
6. **Trust property, which is held by the trustee for the beneficiaries.**

In the instant case there are no beneficiaries other than the appellant, as the money was deposited in the appellant's account to be administered by him.

One worrisome procedure adopted at the Chief Magistrate's Court was the charge against the appellant for criminal breach of trust and cheating the Ministry of Culture & Tourism in the sum of N3.5million, inspite of the fact that the nominal complainant clearly stated in evidence that they had recovered the sum of N995,000.00 from the N3.5million naira which was paid into the appellant's account. The only

outstanding balance against the appellant was in the region of N2,505,000.00. The appellant was therefore convicted on a defective charge, which stipulated that he committed criminal breach of trust and cheating his victim in the sum of N3.5million. Although the error is not so material as to vitiate the proceedings in this case, it shows how desperate the trial court had become in finding reasons to convict the appellant.

Having considered the evidence at the trial court, I am of the firm view that the transactions involved in this case were based on contractual agreement, as there is no evidence of criminal breach of trust. In **Onagoruwa Vs. State (1993) LPELR - 43436**

(CA) at pages 67 - 68 paras, F - B, Niki Tobi, JCA (as he then was) said:-

> **"There is no law known to me where a breach of agreement between two parties, which has no element of criminality, can result in a criminal charge and subsequent conviction. At best, it can be a breach of a contractual relationship which the criminal law lacks legal capacity or competence to enforce and punish. "**

Although this is a decision of the Court of Appeal, I am very much persuaded to follow it in this case. The N3.5million naira was clearly a consideration for the contract between the parties which had wholly collapsed. The remedy in my view lies in civil litigation. The second issue for determination of this appeal is again resolved in favour of the appellant.

Having resolved the two issues in favour of the appellant, this appeal shall be and it is hereby allowed. The conviction and sentence passed on the appellant as affirmed by the lower court is set aside. The appellant is acquitted and discharged forthwith.

Paul Adamu Galinje *Justice, Supreme Court*

KUDIRAT MOTONMORI OLATOKUNBO KEKERE-EKUN, JSC): I have had a preview of the judgment of my learned brother, Paul Adamu Galumje, JSC, just delivered. His Lordship's reasoning and conclusion represent my views in this appeal.

The appellant herein entered into a contract with the Ministry of Culture and Tourism, Rivers State, through one Mrs. Sokari Davies, the Director of Tourism, to supply a male calf giraffe in the sum of N3.5million. The total sum was paid into his bank account with United Bank for Africa on 1/2/13. Despite repeated demands, the calf giraffe was not supplied and the money was not refunded. Upon enquiry, Mrs. Sokari Davies discovered that the appellant had been making sundry withdrawals from the deposited sum. At the time of her enquiry the sum had been depleted by N2.5 million, leaving the sum of N1,000,000.00. She obtained an *ex-parte* order placing a lien on the account. By the time the order was served on the bank, further withdrawals had been

made leaving a balance of N995,000.00.

Mrs. Sokari Davies made a complaint to the Police in Kaduna, where the appellant resided. He was arrested and charged before the Chief Magistrate's Court with the offences of cheating and criminal breach of trust contrary to Sections 312 and 322 of the Penal Code. He was found guilty as charged and sentenced to a fine of N5,000 or 1 year imprisonment for the offence of cheating and a fine of N8,000.00 or 2 years imprisonment for criminal breach of trust. He was also ordered to pay N2,505,000.00 to the nominal complainant representing the balance of N3.5m for the male calf giraffe which he failed to deliver.

The appellant challenged his convictions and sentences right through the

hierarchy of the courts from the High court to the Court of Appeal. He was unsuccessful, hence the further appeal to this court.

The crux of this appeal is whether the facts narrated above gave rise to a civil claim or whether the commission of criminal offences was disclosed. My learned brother has given a thorough consideration of this issue in the lead judgment. I am in complete agreement with him that what the facts disclose is a civil complaint of breach of contract. The sum of N3.5m was paid to the appellant in furtherance of the contract between the parties. The failure to deliver the calf giraffe meant that the consideration for the contract wholly failed. The remedy of the nominal complainant was in a civil suit for damages for breach of contract or for an order for specific performance. It was the duty of the Police to advise her accordingly and to decline to proceed with the complaint.

The role of the Police is clearly spelt out in Section 4 of the Police Act Cap. P 19 Laws of the Federation of Nigeria 2004, to wit:

> **"4. The Police shall be employed for the prevention and detection of crime, the apprehension of offenders, the preservation of law and order, the protection of life and property and the due enforcement of all laws and regulations with which they are directly charged ..."**

As stated earlier, the compliant was purely civil with no element of criminality. The police ought to have referred the appellant to the court to pursue a civil claim.

In the circumstances, and for the more detailed reasoning contained in the lead judgment, I find merit in this appeal. It is hereby allowed. The conviction and sentence passed on the appellant, as affirmed by the lower court is hereby set aside. The appellant is accordingly acquitted and discharged.

Kudirat Motonmori Olatokunbo Kekere-Ekun
Justice, Supreme Court

AMINA ADAMU AUGIE, (JSC): I read in draft the lead Judgment delivered by my

learned brother, Galumje, JSC, and I agree with his reasoning and conclusions therein.

The appellant is challenging the concurrent findings of the two lower courts, regarding his conviction and sentence for the offences of criminal breach of trust and cheating. Yes, the position of the law is that where there is evidence to support such concurrent findings, they will not be disturbed unless they are shown to be perverse, or miscarriage of justice or violation of principles of law or procedure is shown on the record - **Ogoala Vs. State (1991) 2 NWLR (Pt. 175) 509.**

It is also settled that the onus lies on the appellant to give good reasons why this court should interfere with the concurrent findings of the two lower courts; and, as my learned brother, Galumje, JSC, said in the lead judgment, it is clear from the facts and circumstances of this case that the situation in which the appellant found himself,

demands that this court must intervene by doing something about it.

In other words, it is clear from the peculiar facts of this case that there are good reasons for this court to disturb or interfere with the concurrent findings of the two lower courts. There was nothing to indicate deceit on the part of the appellant to ground a conviction for the offence of cheating; and there was no evidence to establish that the appellant committed the offence of criminal breach of trust.

It is for this and other eloquent reasons in the lead judgment that I also allow this appeal and set aside his conviction and sentence imposed on the appellant that was affirmed by the Court of Appeal.

The appellant is, accordingly, acquitted and discharged.

Amina Adamu Augie
Justice, Supreme Court

UWANI MUSA ABBA AJI, (JSC): I have had the benefit of reading in draft the leading judgment by my learned brother, Galumje , JSC. I agree with his lordship that the appeal be allowed, discharging and acquitting the appellant.

The appellant, a veterinarian living in Kaduna, entered into a contract with the Ministry of Culture and Tourism, Rivers State, through Mrs. Sokari Davies, the Director of Tourisrn, to supply a calf giraffe for a sum of N3.5 million. The said money was paid on 1/2/2013 into the UBA account of the appellant. The calf giraffe was to be supplied in 2 weeks but several months passed without the delivery amidst repeated demands. The money deposited was withdrawn in piece meals leaving only NI million in the account. By the court's order, a lien was placed on the appellant's account which had 995,000.00 standing and the money eventually transferred to Mrs. Davies. However, Mrs. Davies complained to the commissioner of police vide a letter dated 26/11/2013, who arrested and arraigned the appellant before a Chief Magistrate's court, Kaduna.

As I went through the facts of this case, I was wondering how a purely civil matter could easily metamorphose and transubstantiate into a purely criminal case. The end result now is that the appellant has suffered irreparable damage, disgrace, shame, odi-

ousness and untold hardship in the hand of the Police that is constitutionally and legally saddled with prosecution of criminal offences. The police have muzzled the rights and freedom of Nigerians even where cases are clearly outside their jurisdiction, power for corridor. If this is not curbed, everybody including the judicial officers will suffer always from floodgates of civil matters being hijacked by the police and transmuted into crimes. If this is not tackled, everybody would have suffered in the merciless hand of the police who has become a law unto itself in this country.

The primary duty of the police by Section 4 of the Police Act is the prevention of crime, investigation and detection of crime and the prosecution of offenders. See **IBIYEYE Vs. GOLD (2012) ALL FWLR (Pt. 659) 1074.** The Police is not a debt recover agency and has no business to dabble into contractual disputes between parties arising from purely civil transactions. See **MCLAREN Vs. JENNINGS (2003)**

FWLR (Pt. 154) 528. When, as in the circumstances of this action, a purely civil matter is reported to the Police, such a person cannot go scot-free as the report ought not to have been made at all since it is not within the purview of Police duties. It is a report made malafide and he will be equally liable for the action taken by the Police irrespective of whether he actively instigated them or not, since he had no business involving the police in a purely civil matter in the first place. Such conduct which portrays disregard of the law and is aimed at using the coercive powers of the State to punish a contracting party in a purely civil matter ought to be mulcted in exemplary damages. See **OKAFOR & ANOR Vs. AIG POLICE ZONE II ONlKAN & ORS (2019) LPELR-46505.**

Mrs. Sokari Davies being an enlightened person knows that reporting such a matter to the police, instead of going to court to seek for enforcement of the said contract or damages for breach of same, is wickedness and malafide.

The charges for cheating and criminal breach of trust cannot have a place against the appellant, let alone proving it to a conviction. the appellant is hereby discharged and acquitted. He in fact deserves an unreserved apology from Mrs. Sokari Davies who set unjustly and malafide the criminal stone rolling against the appellant.

Uwani Musa Abba Aji
Justice, Supreme Court

TRANSNAV PURPOSE NAVIGATION LIMITED
Vs.
VELCAN ENERGY HOLDINGS, DUBAI LTD
VEL CAN SA
M/V SAM PURPOSE

SC. 1338/2018

IN THE SUPREME COURT OF NIGERIA HOLDEN AT ABUJA

FRIDAY, 17TH JANUARY, 2020
BEFORE THEIR LORDSHIPS

MARY UKAEGO PETER-ODILI **JUSTICE, SUPREME COURT**
MUSA DATTIJO MUHAMMAD **JUSTICE, SUPREME COURT**
JOHN INYANG OKORO **JUSTICE, SUPREME COURT**
PAUL ADAMU GALUMJE **JUSTICE, SUPREME COURT**
UWANI MUSA ABBA AJI **JUSTICE, SUPREME COURT**

ACTION:- Action in Rem —Meaning —The principle in Pacers Multi-Dynamics Ltd Vs. The M.V. Dancing Sisters & Anor. (2012) LPELR-7848(SC).

ACTION:- Admiralty jurisdiction —Nature and purport

CONSTITUTIONAL LAW:- CFRN 1999 —Section 36(1) thereof —Nature and purport thereof .

CONSTITUTIONAL LAW:- Fair hearing —Breach thereof —Whether renders proceedings in which the breach occurs a nullity.

CONSTITUTIONAL LAW:- Fair hearing —Inordinate delay in attending to matters brought before the court —Whether amounts to breach of fair hearing.

CONSTITUTIONAL LAW:- Fair hearing —Whether court has no jurisdiction to determine rights of parties without hearing the parties —Section 36(1) CFRN 1999 considered.

CONSTITUTIONAL LAW:- Right to fair hearing —Whether fundamental to every judicial proceedings —Implication thereof.

*COURT:- Applications —Duty of court thereon —Whether to determine and decide on every application brought before it —The principle in **FAAN Vs. WES (Nig.) Ltd (2011) 8***

NWLR (Pt. 1249)219.

COURT:- Applications —Duty thereon —Where court fails to determine a pending application —Whether it amounts to a breach of fair hearing.

COURT:- Applications —Duty thereon —Whether a court of law has a duty to dispose of all pending applications.

COURT:- Applications —Where an application is filed before a court —Whether such application no matter how trivial has to be heard.

COURT:- Jurisdiction thereof —Whether courts has no jurisdiction or discretion to refuse to take a pending case before it —The principle in ***FAAN Vs. Wes Nigeria Ltd. (2011) NWLR (Pt. 1249) 219 at 237***

JUDGMENT AND ORDERS:- Completed act —Where an act is completed —Whether court does not grant order thereto.

JUDGMENT AND ORDERS:- Nullity thereof —Where an order is made against a party who did not participate in the proceedings —Whether such an order amounts to a nullity.

PARTIES:- Order of court —Where a party did not participate in proceedings —Whether such party cannot be bound by an order made therein.

Issues for Determination

1. **Whether the lower court was right to have held that the decision of the trial court to defer the determination of the 1st and 2nd respondents' application in deference to its earlier order staying further proceedings pending the conclusion of arbitration was unwarranted, unreasonable and constituted a breach of their right to fair hearing.**
2. **Whether the order of the lower court directing that the case be remitted back to another judge of the trial court for an expedited hearing of the 1st and 2nd respondents' application ought to be allowed to stand having regard to the peculiar circumstances of the case.**

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Facts of the Matter

The plaintiff/appellant sued the 3rd defendant claiming monetary reliefs in respect of a chartered credit agreement (CCA).

By way of interlocutory application, the appellant sought the arrest of the 3rd respondent, which the trial court granted.

The 1st and 2nd respondents filed an application before the trial court which the trial court did not consider but rather stayed further proceedings. They thus appealed to the Court of Appeal. The Court of Appeal found that the trial court breached the respondents rights to fair hearing by refusing to consider the application.

The court allowed the appeal and remitted the case to another judge for determination.

The appellant has now appealed to the Supreme Court.

Held: *(Unanimously dismissing the appeal)*

1. *The nature and purport of admiralty jurisdiction*
One of the most attractive and most significant features of the admiralty jurisdiction of the lower court is the possibility of instituting an "action in rem", that is directly against a vessel, usually by getting an order arresting the vessel after a writ of summons has been issued, wherein the vessel is made the defendant to a suit. The aim of this is usually to ensure that the plaintiff is assured of reaping the fruits of judgment in the event of a successful outcome, due to the peculiar nature of the shipping industry.
(P 374 para G - A)

2. *Meaning of action in rem*
This court in PACERS MULTI-DYNAMICS LTD Vs. THE M.Vs. DANCING SISTER & ANOR (2012) LPELR-7848(SC), Per RHODES-VIVOUR, JSC, defined an action in *rem* thus: "An admiralty action in *rem* is a proceeding against a ship, the res, where the ship is arrested. By the arrest the owner of the ship is compelled to enter appearance and defend the ship. The owner is enjoined to answer to the judgment of the court to the extent of his interest in the property. It is equally in evidence that the owners of the 3rd respondent vessel became bankrupt, hence the need for intervention by the 1st and 2nd respondents as Senior Secured Lenders and First Preferred Mortgagees. Thus, even if the trial court could not determine their rights and interest therein. ***(P 374 - 375 para H - B)***

3. *Every application before the court has to be heard*

It is trite law that every pending application however frivolous ought to be heard.

The 1st and 2nd respondents' application with the accompanying affidavit contained at pages 660-666, Vol. II, dated 19/9/2017 sought the discharge or setting aside the order arresting the 3rd respondent. The said application and by the deposed affidavit and the documents attached was mean to invoke the jurisdiction of the trial court to determine their rights as Senior Secured Lenders and First Preferred Mortgagees in relation to the 3rd respondent vessel. The said application was completely ignored, neglected and not considered by the trial court. By the records, the application was neither struck out nor dismissed or granted as prayed. Thus, there was no determination of the pending application. This refusal, error, omission or neglect similarly did not escape the curious eyes and rapt attention of the lower court when at page 1394, Vol. IV, it held:

> **… the failure or neglect or deliberate refusal of the court below to determine the appellant's application filed on 19/9/2017 and which it had already heard on 18/10/2017 amounted to an out-right denial of the rights of the appellants to fair hearing ... and such a ruling, being a nullity, cannot stand.** ***(P 375 para C - F)***

4. The court of law has a duty to dispense with all pending applications

It is not in dispute and indeed the law is very well settled that a court of law has a duty to dispense with all pending applications and/ or processes before it, before reaching a final decision in a cause or matter.

Certainly the failure of a court to do so, without a valid reason would amount to a violation of the right of the party not heard to fair hearing and such violation would render the proceedings liable to be struck out. See Per KEKERE-EKUN, JSC in PDP & ORS Vs. EZEONWUKA & ANOR (2017) LPELR- 42563(SC). ***(P 375 - 376 para H - A)***

5. Court does not grant an order against completed act

It is trite law that a court does not grant an order against completed act. See AYORINDE Vs. AG OF OYO STATE (1996) 3 NWLR (Pt.434) 20, THE REGENCY COUNCIL OF OLOTA Vs. SODEINDE (1998) 6 NWLR (Pt.552) 72; LAFFERI Vs. NAL MERCHANT BANK (PLC (2001) 3 WRN 106.

(P 376 para C - D)

6. A party cannot be bound by an order in which he did not participate in the proceedings

Furthermore, as at when the order for stay was made on 31/3/201 7, the 1st and 2nd respondents were not joined yet since they were only joined on 26/9/2017. Thus, the 1st and 2nd respondents cannot be bound by an order when they were not parties to the proceedings. The application for stay and the eventual order

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based on the arbitration agreement between the appellant and the owners of the 3rd respondent did not have the respondents as parties. Thus, the respondents, not being parties to the arbitration agreement cannot be bound. *(P 376 para D - E)*

7. Effect of an order made against a party which did not participate in the proceedings

The effect of order(s) made against persons not joined as a party is that such order is a nullity and of no effect. Where persons who ought to be joined to the suit had orders made against them by the trial judge, such proceedings ought to be a nullity, being a denial of the 1st and 2nd respondents' right to fair hearing. See OVUNWO & ANOR Vs. WOKO & ORS (2011) 7 SCM 207 at 231-232, NURTW & ANOR Vs. RTEAN & ANOR (2012) 3 SCM 171 AT 178-179, PER BAGE, JSC in OYEYEMI & ORS Vs. OWOEYE & ANOR (2017) LPELR- 41903 (SC). ***(P 376 para F - G)***

8. The nature and purport of Section 36(1) of CFRN

On the critical question of whether the trial court breached the respondents' right to fair hearing when that court failed to determine the application dated 19th September, 2017, an answer thereto takes one to Section 36 (1) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended which provides thus:

> **"In the determination of the civil rights and obligations, including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such manner as to secure its independence and impartiality".**

The interpretation of Section 36 (1) CFRN has been variously done by the Courts particularly the apex court so as to make the meaning and import now common place as to include access to court and fair hearing. See Abubakar Audu Vs. FRN (2013) 53 NSCQLR 456 at 469; Alioke Vs. Oye & Ors. (2018) LPELR-45153 (SC) 1 at 26 - 27; Ekiyor & Anor. Vs. Bomor (1997) 9 NWLR (Pt.519) 1 at 11 & 14; Ariori Vs. Elemo (2012) 4 LC 460 at 492;

Menakaya Vs. Menakaya (2001) 16 NWLR (Pt.738) 203 at 263; Amadi Vs. NNPC (2000) 10 NWLR (Pt.764) 76 at 109 - 110; Bakare Vs. A. G. Federation (1990) 5 NWLR (Pt.152) 516 at 535. ***(P 381 - 382 para H - B)***

9. Effect of inordinate delay in attending to matters brought before the court

It is in the light of the fundamental position of the principle of fair hearing that the courts have emphasised that justice delayed is justice denied and inordinate

delay in the determination of matters brought before the court will result in a violation of the right to fair hearing. Bearing the above in mind the courts must attend to and determine every application brought before it as not doing so would lead to a denial of fair hearing hence the result of the trial court failure to hear and determine the application of 19th September, 2017 which has led all the way to the appeal in hand. See Pepple Vs. Green (1990) 4 NVVLR (Pt.142) 108 at 121; Amadi Vs. NNPC (2000) 10 NWLR (Pt.674) 76 at 100; Ojukwu Vs. Nnoruka (2000) 1 NWLR (Pt.641) 348 at 359; Mobil Oil Unlimited Vs. Monokpo (2003) 18 NWLR (Pt.852) 346 at 413 - 414. ***(P 382 para E - G)***

10. A court has no jurisdiction to refuse to take a pending process before it

What I have been grappling with to put across was well stated by this court in FAAN Vs. Wes Nigeria Ltd. (2011) NWLR (Pt.1249) 219 at 237 as follows:-

> **"It is the law that a court of law has neither jurisdiction or discretionary power to refuse to take a pending process before it, whatever may be its pre-trial opinion on it. The process may be a downright abuse of the judicature as an institution. It may be stupid, reckless, irregular, aberrant or unmeritorious, but still, the court must hear it and rule on it. See the case of Elike Vs. Nwankwoala (1984) 12 SC 301 ...**
>
> **Indeed, it is the duty of a court to entertain and decide on the merit or otherwise of any application brought before it by any party notwithstanding the perceived strength or the weakness of such an application. It is a party's basic and constitutional right which he cannot be denied of."** ***(P 382 - 383 para H - C)***

11. Respondents were not bound by proceeding in which they were not parties

It is to be stated that the trial court's order of stay of proceedings of 31st March 2017 does not encumber or hinder the Court of Appeal from making

the order remitting the application dated 19th September, 2017 back to the trial court for hearing and determination. Noteworthy is the fact that the respondents were not parties to the order of stay of proceedings as they were only joined on 26th September 2017 and so were not bound to proceedings to which they were not parties at the time the order was made. See Okwu Vs. Umeh (2016) 4 NWLR (Pt.1501) 120 at 143 - 144; A. G. Federation Vs. ANPP & Ors. (2004) All FWLR (Pt.190) 1458 at 1476 - 1477; Green Vs. Green (1987) 3 NWLR (Pt.61) 480.

It is that existing situation of the respondents not being parties at the time of the stay of proceedings order that made it imperative among other reasons for the application of the respondents to be heard by that court as the ventilation of the grievance that brought about the application could open the

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eyes of the court to the full picture of what is before it since the respondents were not parties to the arbitration agreement. See A. I. D. C. Vs. Nigeria L. N. G. (2000) 4 NWLR (Pt.653) 494 at 506 - 507. ***(P 383 - 384 para F - A)***

12. Court has no jurisdiction to determine rights of parties without hearing the parties.

By Section 36 of the 1999 Constitution as amended, no court has the jurisdiction of determining the rights and/or obligation of a party without having heard the party whose right and/or obligation it so determined. Any decision of a court arrived at without hearing the party, being a breach of the clear and unambiguous section of the Constitution, is null and void. The lower court is right to have so held. An appeal against the decision is futile. ***(P 387 para E - F)***

13. Breach of fair hearing renders proceedings a nullity

The effect of breach of the right of fair hearing is trite in law. Such a breach renders the whole proceedings in the course of which the breach occurred and the decision arrived at by the court a nullity.

In the case at hand the lower court's decision declaring the trial court's decision arrived at in breach of the respondents' right of fair hearing is impeccable see: PRINCE ABUBAKAR AUDU Vs. FEDERAL REPUBLIC OF NIGERIA (2013) LPELR -19897 (SC) and EYE Vs. FRN (2018) LPELR - 43599 (SC). ***(P 387 para F - G)***

14. Right to fair hearing is fundamental to every judicial proceedings

First of all, the right to fair hearing is fundamental to every judicial proceeding in our legal system. It is the bedrock of our justice system such that

its breach in our judicial system automatically vitiates the entire proceedings. See Chukwuma Vs. FRN (2011)13 NWLR (Pt. 1264) 391; Awoniyi Vs. Registered Trustees AMORC (2000) 10 NWLR (Pt. 676) 522. ***(P 389 para F - G)***

15. The nature and purport of S.36(1) of CFRN 1999 as amended

The right to fair hearing is constitutionally guaranteed under Section 36(1) of the 1999 Constitution of the Federal Republic of Nigeria (as amended] as follows:-

> **"In the determination of his civil rights and obligation including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such manner as to secure its independence and impartiality."** ***(P 389 - 390 para G - A)***

16. Court is under obligation to hear all matters properly brought before it

It follows therefore that the court is under obligation to hear and determine all matters properly brought before it fairly. The court of law is duty bound to consider and pronounce on all issues properly committed before it for determination by contending parties. ***(P 390 para B - C)***

17. It is the duty of a court to determine on any application brought before it

In the case of FAAN Vs. WES (Nig) Ltd (2011) 8 NWLR (Pt. 1249) 219 at 237, this court per Muhammad, JSC held as follows:-

> **"Indeed, it is the duty of a court to entertain and decide on the merit or otherwise of any application brought before it by any party notwithstanding the perceived strength or the weakness of such an application. It is a party's basic and constitutional right which he cannot be denied of. See also Mobil Producing Nigeria Unlimited & Anor Vs. Simeon Monokpo & Anor (2003) 18 NWLR (Pt. 852) 346.** ***(P 390 para C - D)***

Representations:

Babajide Koku, (SAN) with Victor Ogude, Oluwafemi Adenitire & Faith Falade for the appellant.

DR. Oladapo Olanipekun, (SAN) with Kofi Antwi Apori, Veronica Obi & Ebunoluwa Jegede, for the 1st & 2nd respondents.

Deborah Emawodia for the 3rd respondent

UWANI MUSA ABBA AJI, JSC (Delivered the lead judgement): This appeal is against the judgment of the lower court allowing the appeal of the 1st and 2nd respondents, who were interveners in the suit before the trial court and directed that the matter be remitted back to the trial court for accelerated hearing of the 1st and 2nd respondents pending the application which was not determined as a result of his earlier order staying proceedings in the suit pending the conclusion of London arbitration.

The appellant sued the 3rd respondent for monetary reliefs in respect of a Chartered Credit Agreement (CCA) dated 30/6/2016 and in order to secure its claim, obtained an interlocutory order of arrest on 19/1/2017 vide an *exparte* application dated 12/1/2017. The trial court however refused the 1st and 2nd respondents' application of 19/9/2017 but stayed further proceedings in the suit. The trial court did not consider the rights and interests of the respondents in their application of 19/9/2017, which caused them to appeal to the lower court. The lower court found that the trial court breached the respondents' rights to fair hearing and remitted the matter back to another judge for expedited hearing. The appellant not comfortable with this has appealed to the Supreme Court. The issues for determination are:

ISSUES:

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2. **Whether the lower court was right to have held that the decision of the trial court to defer the determination of the 1st and 2nd respondents' application in deference to its earlier order staying further proceedings pending the conclusion of arbitration was unwarranted, unreasonable and constituted a breach of their right to fair hearing.**
4. **Whether the order of the lower court directing that the case be remitted back to another judge of the trial court for an expedited hearing of the 1st and 2nd respondents' application ought to be allowed to stand having regard to the peculiar circumstances of the case.**

The two issues shall be considered together. The submission of the appellant is that the lower court was wrong to have decided that the right to fair hearing of the 1st and 2nd respondents was breached when their application dated 19/9/2017 was not determined, since they were not parties to the case instituted by the appellant against the 3rd respondent on 12/1/201 7. That since the inception of the suit and while 3rd respondent remained under arrest and further proceedings in the matter was stayed pending the London arbitration, the 1st and 2nd respondents intervened to be joined and sought for the discharge of the order of arrest of

the 3rd respondent without first seeking leave to vacate the earlier order staying further proceedings in the matter pending the London arbitration. That what the trial court did was not to neglect to hear or determine the application of the 1st and 2nd respondents but to depend on his finding on the appellant's preliminary objection. He submitted that the 1st and 2nd respondents were guilty of tardiness to promptly intervene to assert their interest the moment the 3rd respondent vessel was arrested and detained. Thus, that the trial court was bound to first resolve the preliminary objection before considering the application of the 1st and 2nd respondents. He cited variously in support **GENERAL MOHAMMED A. GARBA (RTD) Vs. MUSTAPHA SANI MOHAMMED & ORS (2016) LPELR-40612(SC), EXXON MOBIL CORPORATION 5959 LAS CONILAS BOULEVARD IRVING TEXAS (USA) Vs. ARCHIANGA (JP) & ORS (2018) LPELR-44979(SC).**

The 1st , 2nd and 3rd respondents submitted that the trial court would have heard and determined any how the application of the 1st and 2nd respondents rather than staying the proceedings pending the London arbitration that was no longer going on due to the insolvency of the 3rd respondent, which amounted to the matter being stayed in perpetuity. Thus, that the right to fair hearing lies in the procedure followed and not in the correctness of the case. They rely on **UNITED BANK FOR AFRICA LTD Vs. MR NGOZI ACHORU (1990) 6 NWLR (Pt.156), MILITARY GOVERNOR, IMO STATE Vs. NWAUWA (1997) 2 NWLR (Pt.496) 708.** In support of the case in **FAAN Vs. WES IGERIA LTD (2011) NWLR (Pt. 1249) 219**

at 237, it was submitted that a court has neither jurisdiction nor discretionary power to refuse to take a pending application or process before it. Therefore, that the decision of the trial court on 17/11/2017 is a nullity.

The appellant has submitted on the 2nd issue that there was no application from the 1st and 2nd respondents to set aside the order of 31/3/2017. Thus, where a court makes an order, it remains binding and subsisting unless same is set aside by the same or appellate court. He cited in support **BOLUWAJI FALANA & ORS Vs. SAMULE OMODOLE OLORO & 2 ORS (2013) 10 WRN at 107.**

The respondents' response is that the court cannot make an order to reverse an already completed act since the directive of the lower court remitting the case back to the trial court for expeditious hearing has already been complied with. Legal support was based on **YAKUBU Vs. ASHIPA (1999) 12 NWLR (Pt.629) 153.**

Noteworthy in this appeal is that the action herein is in rem. By the facts, the 1st and 2nd respondents were Senior Secured Lenders and First
Preferred Mortgagees in respect of the 3rd respondent vessel with an accrued exposure of $5,255,285.00. In recognition of this, the appellant executed a Charterers' Subordination Undertaking (CSU) dated 30/6/2016 In favour of the respondents. However, in the arrest

of the 3rd respondent, the appellant failed to disclose the existence of the CSU in obtaining the said arrest order. Thus, the 1st and 2nd respondents were constrained to intervene to assert their rights/interests as Senior Secured Lenders. The leave to intervene was granted on 26/9/2017 and the suit came up on 18/10/2017 for hearing all pending applications. On the date of ruling on all the pending applications, the trial court failed, refused or neglected to make any pronouncements on the 1st and 2nd respondents' rights and interests, hence the appeal. One of the most attractive and most significant features of the admiralty jurisdiction of the lower court is the possibility of instituting an "action in rem", that is directly against a vessel, usually by getting an order arresting the vessel after a writ of summons has been issued, wherein the vessel is made the defendant to a suit. The aim of this is usually to ensure that the plaintiff is assured of reaping the fruits of judgment in the event of a successful outcome, due to the peculiar nature of the shipping industry. This court in **PACERS MULTI-DYNAMICS LTD Vs. THE M.Vs. DANCING SISTER & ANOR (2012) LPELR-7848(SC),** Per RHODES-VIVOUR, JSC, defined an action in *rem* thus: "An admiralty action in *rem* is a proceeding against a ship, the res, where the ship is arrested. By the arrest the owner of the ship is compelled to enter appearance and defend the ship. The owner is enjoined to answer to the judgment of the court to the extent of his interest in the property. It is equally in evidence that the owners of the 3rd respondent vessel became bankrupt, hence the need for intervention by the 1st and 2nd respondents as Senior Secured Lenders and First Preferred Mortgagees. Thus, even if the trial court could not determine their rights and interest therein, it is trite law that every pending application however frivolous ought to be heard.

The 1st and 2nd respondents' application with the accompanying affidavit contained at pages 660-666, Vol. II, dated 19/9/2017 sought the discharge or setting

aside the order arresting the 3rd respondent. The said application and by the deposed affidavit and the documents attached was mean to invoke the jurisdiction of the trial court to determine their rights as Senior Secured Lenders and First Preferred Mortgagees in relation to the 3rd respondent vessel. The said application was completely ignored, neglected and not considered by the trial court. By the records, the application was neither struck out nor dismissed or granted as prayed. Thus, there was no determination of the pending application. This refusal, error, omission or neglect similarly did not escape the curious eyes and rapt attention of the lower court when at page 1394, Vol. IV, it held:

> **… the failure or neglect or deliberate refusal of the court below to determine the appellant's application filed on 19/9/2017 and which it had already heard on 18/10/2017 amounted to an outright denial of the rights of the appellants to fair hearing ... and such a ruling, being a nullity, cannot stand.**

The trial court having heard the 1st and 2nd respondents' application on 18/10/2017 was wrong not to have determined same. It is not in dispute and indeed the law is very well settled that a court of law has a duty to dispense with all pending applications and/ or processes before it, before reaching a final decision in a cause or matter.

Certainly the failure of a court to do so, without a valid reason would amount to a violation of the right of the party not heard to fair hearing and such violation would render the proceedings liable to be struck out. See Per KEKERE-EKUN, JSC in **PDP & ORS Vs. EZEONWUKA & ANOR (2017) LPELR- 42563(SC).**

On whether the order of the lower court directing that the case be remitted back to another judge of the trial court for an expedited hearing of the 1st and 2nd respondents' application ought to be allowed to stand having regard to the peculiar circumstances of the case, my attention has been drawn to the fact that the lower court order of 16/11/2018 remitting the case for expeditious hearing has been complied with as evidenced in the record before me at pages 1418-1475, Vol. IV. To allow this appeal will further frustrate and delay the course of justice. It is trite law that a court does not grant an order against completed act. See **AYORINDE Vs. AG OF OYO STATE (1996) 3 NWLR (Pt.434) 20, THE REGENCY COUNCIL OF OLOTA Vs. SODEINDE (1998) 6 NWLR (Pt.552) 72; LAFFERI Vs. NAL MERCHANT BANK (PLC (2001) 3 WRN 106.**

Furthermore, as at when the order for stay was made on 31/3/201 7, the 1st and 2nd respondents were not joined yet since they were only joined on 26/9/2017. Thus, the 1st and 2nd respondents cannot be bound by an order when they were not parties to the proceedings. The application for stay and the eventual order based on the arbitration agreement between the appellant and the owners of the 3rd respondent did not have the respondents as parties. Thus, the respondents, not being parties to the arbitration agreement cannot be bound. The effect of order(s) made against persons not joined as a

party is that such order is a nullity and of no effect. Where persons who ought to be joined to the suit had orders made against them by the trial judge, such proceedings ought to be a nullity, being a denial of the 1st and 2nd respondents' right to fair hearing. See **OVUNWO & ANOR Vs. WOKO & ORS (2011) 7 SCM 207 at 231-232, NURTW & ANOR Vs. RTEAN & ANOR (2012) 3 SCM 171 AT 178-179,** PER BAGE, JSC in **OYEYEMI & ORS Vs. OWOEYE & ANOR (2017) LPELR- 41903 (SC).**

There is no merit in the whole appeal prosecuted by the appellants to this court and same is hereby dismissed. Parties are to bear their own costs.

Uwani Musa Abba Aji
Justice, Supreme Court

MARY UKAEGO PETER-ODILI, (JSC): I agree with the judgment just delivered by my learned brother, Uwani Musa Abba Aji JSC and to register the support I have in the reasonings from which the decision came about, I shall make some comments.

By consent of counsel for the respective parties in court, the appeal SC.93/2019 was converted to the cross-appeal to SC.1338/2018 which is taken as the main appeal.

This is an appeal against the judgment of the Court of Appeal, Lagos Division delivered on the 16th day of November 2018, Coram: Tom Shuaibu Yakubu, Biobele Abraham Georgewill and Abimbola Osarugue Obaseki-Adejumo JJCA, which allowed the appeal of the 1st and 2nd respondents who were interveners in the suit before the trial court and directed that the matter be remitted to the trial court for an accelerated hearing of the 1st and 2nd respondents' pending application which was not determined by the trial Judge as a result of his earlier order staying the proceedings of the suit pending the conclusion of the London arbitration.

The background facts leading to this appeal are well set out in the lead judgment and so I shall not repeat them unless circumstances warrant the reference to any part thereof.

On the 21st day of October, 2019 date of hearing, learned counsel for the appellant, Victor Ogude Esq. adopted the brief of argument, settled by Babajide Koku SAN and filed on 24/1/19 in which brief were crafted two issues for determination which are as follows:-

1. **Whether the lower court was right to have held that the decision of the trial court to defer the determination of the 1st and 2nd respondents' application in deference to its earlier order staying further proceedings pending the conclusion of arbitration was unwarranted, unreasonable and constituted a breach of their right to fair hearing. This issue flows from Grounds 1, 2 and 3 of the notice of appeal.**
2. **Whether the order of the lower court directing that the case be remitted back to another judge of the trial court for an**

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expedited hearing of the 1st and 2nd respondents' application ought to be allowed to stand having regard to the peculiar circumstances of the case. This issue flows from Ground 4 of the notice of appeal.

Learned counsel for appellant also adopted the reply brief filed on 28/3/2019.

Learned Senior Counsel, Dr. Oladapo Olanipekun for the 1st and 2nd respondents adopted the brief of argument filed on

26/2/2019 and on his own part drafted two issues for determination which are thus:-

1. **Whether the lower court was not right in holding that the failure of the learned trial judge to determine the 1st and 2nd re-**

spondents' application dated 19th September, 2017 constitutes a breach of the right to fair hearing. (Grounds 1, 2 and 3).

2. **Whether the trial court's order of stay of proceedings made on 31st March, 2017 constitutes a legal/jurisdictional hindrance/ impediment preventing the lower court from making its order remitting the 1st and 2nd respondents' application dated 19th September, 2017 back to the trial court for expedited hearing and determination. (Ground 4).**

Learned counsel for the 3rd respondent, Deborah Emawodia Esq. filed no brief.

For ease of reference, I shall utilise the issues as formulated by the appellant.

ISSUES 1 AND 2:

1. **Whether the lower court was right to have held that the decision of the trial court to defer the determination of the 1st and 2nd respondents' application in deference to its earlier order staying further proceedings pending the conclusion of arbitration was unwarranted, unreasonable and constituted a breach of their right to fair hearing.**
2. **Whether the order of the lower court directing that the case be remitted to another judge of the trial court for an expedited hearing of the 1st and 2nd respondents' application ought to be allowed to stand having regard to the peculiar circumstances of the case.**

Advancing the position of the appellant, learned senior counsel stated that to determine whether or not a party was denied fair hearing, it is important to review the history and

circumstances of the case. He cited Section 36 (1) of the 1999 Constitution of the Federal Republic of Nigeria (CFRN for short); **Danladi Vs. Dangiri & Ors (2014) LPELR - 24020 (SC); Pan & Anor. Vs. Mohammed & Anor. (2008) 16 NWLR (Pt.1112); Olatunbosun Vs. Anenih (2009) 15 NWLR (Pt.1165) 560 at 573.**

That the decision of the trial court in exercising his discretion not to reopen the proceedings pending the conclusion of the London arbitration proceedings was justified and reasonable and an exercise of discretion properly done having regard to the peculiar circumstances of the case. That the Court of Appeal was wrong to hold that the trial court breached the 1st and 2nd respondents' right to fair hearing.

For the appellant, it was further submitted that there is no document to show that the order of the Lower court made on the 31st March, 2017 was set aside by the trial court or appealed against and so, that order remains binding and subsisting. He cited **Boluwaji**

Falana & Ors. Vs. Samuel Omodole Oloro & 2 Ors. (2013) 10 WRN 85 at 107, Edilcon (Nig.) Ltd Vs. UBA Plc (2017) LPELR-42342; Agbaje Vs. INEC (2016) 4 NWLR (Pt.1501) 151; Akere Vs. Governor of Oyo State (2012) 12 NWLR (pt.1501) 151.

That in the light of the failure of the 1st and 2nd respondents to either seek leave to appeal as an interested party against the prior order of the trial court made on the 31st March 2017 staying further proceedings before the trial court pending the conclusion of arbitration in London or apply to set aside or vacate the order of the trial court staying proceedings in the matter made on the 31st March 2017 the said order was still extant. That it was therefore improper for the lower court to order remittance of the 1st and 2nd respondents' application filed on 19/9/17 to the Chief Judge of the Federal High Court for reassignment to another judge for expeditious hearing and determination in the face of the subsisting order of stay of proceedings on 31st March 2017.

Respondent, learned senior advocate, Dr. Olanipekun stated that the inordinate delay in the determination of matters brought before the court will invariably result in a violation of the right of fair hearing hence the decision of the Court of Appeal sending the matter back for hearing on the merit expeditiously was proper and correct. He cited **Pepple Vs. Green (1990) 4 NWLR (Pt.142) 108 at 1212; Amadi Vs. NNPC (2000) 10 NWLR (Pt.674) 76 at 100; Ojukwu Vs. Nnoruka (2000) NWLR (Pt.641) 348 at 359; Mobil Oil Vs. Monokpo (2009) 18 NWLR (Pt.852) 346 at 413-414** etc.

He called the attention of the court to the fact that the trial court had not determined the application dated 19th September, 2017 to which application the appellant had filed a preliminary objection which objection the trial court refused.

That the narrow issue in this appeal is whether or not the application should have been determined one way of the other as held by the Lower court. He cited **Buhari Vs. Yusuf (2003) 14 NSCQLR 1114 at 1165.**

Learned counsel for the respondents' 1st and 2nd contended that the trial court's order of stay of proceedings of 31st March, 2017 does not in any way encumber or hinder the Lower court from making the order remitting the application dated 19th September, 2017 back to the trial court.

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That the order of stay of proceedings made on 31st March 2017 at which the respondents were not parties at the trial court as they were only joined on the 26th September, 2017 and that it is trite law that court orders are only binding on parties to the particular proceedings. He relied on **Okwu Vs. Umeh (2016) NWLR (Pt.1501) 120; A. G. Federation Vs. ANPP & Ors, (2004) All FWLR (Pt.190) 1458; Green Vs. Green (1987) 3 NWLR (Pt.61) 480; SPOC Vs. X. M. Fed. Ltd. (2006) 16 NWLR (Pt.1004) 189.**

That both the application for stay of proceedings and the eventual order were predicated on the arbitration agreement in respect of the Charterer's Credit Agreement (CCA) between the appellant and the owners of the 3rd respondent and the doctrine of

privity of contract dictates that agreements are binding only on the parties thereto. He cited **A. G. Federation Vs. AIC Ltd. (20000) 2 NSCQLR 1111 at 1123; Technip Vs. AIC Ltd. (2016) 2 NWLR (Pt.1497) 421; Ironbar Vs. Federal Mortgage Finance (2014) 4 BFLR 79 at 96 & 97.**

Briefly stated, the angle from which the appellant's position emerged is that the decision of the trial judge in exercising his discretion not to reopen proceedings pending the conclusion of the London arbitration proceedings was justified and reasonable.

That to the extent that the lower court's order of 31st March, 2017 had not been set aside by the trial court and the Court of Appeal, the order remains valid and subsisting and since the 1st and 2nd respondent to either seek leave to appeal as an interested party against the prior order of the trial court made on 31st March 2017 staying further proceedings before the trial court pending the conclusion of arbitration in London or apply to set aside or vacate the order of 31st March 2017, the said order remained extant. That the situation made improper the order of the Court of Appeal remitting the 1st and 2nd respondents' application filed on the 19/9/2017 for expeditious trial.

The respondents opposite channel is that the trial court failed to determine that the appellant ought not to have instituted the suit or obtained the arrest order in the first place given the clear terms of the Charters' Subordination Undertaken (CSU) which appellant executed, dated 30th June, 2016 in favour of the respondents which deferred all of its rights in respect of the Charterers' Credit Agreement (CCA) in respect of the rights of the respondents. The culmination of what the justice of the matter would be is that if the respondents' application succeeded, the only option open to the court is to strike out the suit in its entirety and or lift the arrest order. That in line with the judicial policy statement that there must be an end to litigation. See **Dingyadi Vs. INEC (No.2) (2010) 18 NWLR (Pt.1224) 154; Akanbi Vs. Alao (1989) 3 NWLR (Pt.108) 118 at 140; Oshoboja Vs. Amuda (2009) 18 NWLR (Pt.1172) 188 at 211; John Omokhafe Vs. Esekhome (1993) 8 NWLR (Pt.309) 58 at 67.**

On the critical question of whether the trial court breached the respondents' right to fair hearing when that court failed to determine the application dated 19th September, 2017, an answer thereto takes one to Section 36 (1) of the Constitution of

the Federal Republic of Nigeria, 1999 (as amended which provides thus:

> **"In the determination of the civil rights and obligations, including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such manner as to secure its independence and impartiality".**

The interpretation of Section 36 (1) CFRN has been variously done by the Courts particularly the apex court so as to make the meaning and import now common

place as to include access to court and fair hearing. See Abubakar Audu Vs. FRN (2013) 53 NSCQLR 456 at 469; Alioke Vs. Oye & Ors. (2018) LPELR-45153 (SC) 1 at 26 - 27; Ekiyor & Anor. Vs. Bomor (1997) 9 NWLR (Pt.519) 1 at 11 & 14; Ariori Vs. Elemo (2012) 4 LC 460 at 492; Menakaya Vs. Menakaya (2001) 16 NWLR (Pt.738) 203 at 263; Amadi Vs. NNPC (2000) 10 NWLR (Pt.764) 76 at 109 - 110; Bakare Vs. A. G. Federation (1990) 5 NWLR (Pt.152) 516 at 535.

It is in the light of the fundamental position of the principle of fair hearing that the courts have emphasised that justice delayed is justice denied and inordinate delay in the determination of matters brought before the court will result in a violation of the right to fair hearing. Bearing the above in mind the courts must attend to and determine every application brought before it as not doing so would lead to a denial of fair hearing hence the result of the trial court failure to hear and determine the application of 19th September, 2017 which has led all the way to the appeal in hand. See **Pepple Vs. Green (1990) 4 NVVLR (Pt.142) 108 at 121; Amadi Vs. NNPC (2000) 10 NWLR (Pt.674) 76 at 100; Ojukwu Vs. Nnoruka (2000) 1 NWLR (Pt.641) 348 at 359; Mobil Oil Unlimited Vs. Monokpo (2003) 18 NWLR (Pt.852) 346 at 413 - 414.**

What I have been grappling with to put across was well stated by this court in **FAAN Vs. Wes Nigeria Ltd. (2011) NWLR (Pt.1249) 219 at 237** as follows:-

> **"It is the law that a court of law has neither jurisdiction or discretionary power to refuse to take a pending process before it, whatever may be its pre-trial opinion on it. The process may be a downright abuse of the judicature as an institution. It may be stupid, reckless, irregular, aberrant or unmeritorious, but still, the court must hear it and rule on it. See the case of Elike Vs. Nwankwoala (1984) 12 SC 301 ...**
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> **Indeed, it is the duty of a court to entertain and decide on the merit or otherwise of any application brought before it by any party notwithstanding the perceived strength or the weakness of such an application. It is a party's basic and constitutional right which he**

> **cannot be denied of. "**

See also: Dingyadi Vs. INEC (No.1) (2010) 18 NWLR (Pt.1224) 1, 53; Magna Maritime Services Ltd. & Anor. Vs. S. A. Oteju & Anor, (2005) All FWLR (Pt.270) 1995, 2012; Economic and Financial Crimes Commission Vs. Dr. Erastus Akingbola (2015) All FWLR (Pt. 777) 656, 691; The Chief of Naval Staff & Anor. Vs. Benjamin Livinus Tsenongo (2018) LPELR-45883 (CA) 1, 21-22; Samuel Egege & Anor. Vs. The Registered Trustees of Gospel Deliverance Mission (2017) LPELR-43063 (CA) 1, 44-45; University of Calabar Teaching Hospital Vs. Lizikon Nigeria Limited & Anor. (2017) LPELR-42330 (CA) 1, 13-14.

It is to be stated that the trial court's order of stay of proceedings of 31st March 2017 does not encumber or hinder the Court of Appeal from making the order remitting the application dated 19th September, 2017 back to the trial court for hearing and determination. Noteworthy is the fact that the respondents were not parties to the order of stay of proceedings as they were only joined on 26th September 2017 and so were not bound to proceedings to which they were not parties at the time the order was made. See **Okwu Vs. Umeh (2016) 4 NWLR (Pt.1501) 120 at 143 - 144; A. G. Federation Vs. ANPP & Ors. (2004) All FWLR (Pt.190) 1458 at 1476 - 1477; Green Vs. Green (1987) 3 NWLR (Pt.61) 480.**

It is that existing situation of the respondents not being parties at the time of the stay of proceedings order that made it imperative among other reasons for the application of the respondents to be heard by that court as the ventilation of the grievance that brought about the application could open the eyes of the court to the full picture of what is before it since the respondents were not parties to the arbitration agreement. See **A. I. D. C. Vs. Nigeria L. N. G. (2000) 4 NWLR (Pt.653) 494 at 506 - 507.**

Indeed, I see nothing on which to base a fault on what the court below did in its consideration and determination of the appeal before it as its conclusion was clearly grounded on the facts, circumstances, guiding laws and decided cases so as to reach the finality of its determination to be that the justice of the matter deserved that the grievance of the respondents must be aired and considered by the court of trial which was not obstructed in any way from carrying out its bounden duty of a hearing of the application of 19th September, 2017.

From the foregoing and the better articulated lead judgment, this appeal has no peg to hang on as I too dismiss it.

CROSS-APPEAL

From the eight (8) grounds of appeal the appellant distilled three issues for determination, viz:

i. **Having regard to the nature of the complaints/ submissions raised by the appellants vide issues 2, 3 and 4 of their brief of argument at the lower court, vis-a-vis their constitutionally guaranteed rights to own property, whether the lower court was not in error in failing to consider and determine the said issues. (Grounds 1, 2, 3 and 8).**

ii. **Considering the lower court's finding that the trial court ought to have determined the appellant's application dated 19th September, 2017, whether the lower court did not err in law and occasion a miscarriage of justice in failing to determine the said application as urged by the appellants. (Grounds 4 and 5).**

iii. **Whether the lower court was not in error in failing to give effect to the express terms of the Charterers' Subordination Undertaking (CSU) dated 30th June, 2016, by striking out the 1st respondent's suit at the trial court and or discharging the arrest order dated 19th January, 2019. (Grounds 6 and 7).**

The 1st respondent had a sole issue distilled which is as follows:

Whether the decision of the lower court declining to make pronouncements on the other issues canvassed by the appellants was wrong and occasioned any miscarriage of justice to the appellants. (This issue flows from grounds 1 - 8 of the appellants notice of appeal).

I shall make use of the single issue crafted by the cross-respondent.

Whether the decision of the lower court declining to make pronouncements on the other issues canvassed by the appellants was wrong and occasioned any miscarriage of justice to the appellants. (This issue flows from grounds 1-8 of the appellants notice of appeal).

Learned counsel for the cross-appellants contended that the breach of fair hearing did not arise from a vitiating factor in the course of proceedings or hearing but the failure to make a determination after the hearing. That the court below after finding that there was a breach of the cross appellants' rights to fair hearing applied the principle of law that a breach of the right to fair hearing vitiates the entire proceedings where it occurred and this nullified the proceedings by remitting same back to the trial court or rehearing.

That the court below failed to remedy the resultant effect of the breach of the cross-appellants' rights. He cited **BFI Group Corporation Vs. Bureau of Public Enterprises (2012) 18 NWLR (Pt.1332) 209 at 243 etc.**

That remitting the case for trial de novo has left the breach of the appellants'

rights without a remedy and aggravated the breach. He cited **Lawan Abdullahi Buba Wassah & Ors. Vs. Tukshahe Kara & Ors, (2014) LPELR-24212 (SC).**

For the cross-appellant, it was canvassed that the court below ought to have applied its powers under Section 15 of the Court of Appeal Act to give substantial justice and so to meet the ends of justice, the apex court should invoke its powers under Section 22 of the Supreme Court Act to give the required remedy in the clearly identified breach of the appellants' right. He cited **Lau Vs. PDP (2018) 4 NWLR (Pt.1608) 60 at 119; Uwazuruike Vs. A. A. Federation (2013) 10 NWLR (Pt.1361) 105 at 126 - 127; Adeoye Vs. State (1999) 6 NWLR (Pt.605) 74; Obi Vs. INEC (2007) 7 SC 268 at 310**

- 311.

Learned counsel for the cross-respondent submitted that the fact that the lower court had declared the entire ruling of the trial court a nullity, no useful purpose will be served by acceding to the appellants insistency that the unresolved issues ought to have been resolved in their favour. That where proceedings of a trial court is held to be a nullity then any cross-appeal arising therefrom cannot stand. He cited **Alimi Vs. Kosebinu (2016) 17 NWLR (Pt.1542) 337 at 358.**

Learned counsel for the cross-respondent submitted that the cross-appellants in their capacity as interveners are restricted to the protection of their interest in the res in this case, the arrested vessel (2nd respondent) and the court would not permit the interveners to go outside that interest. He cited **The Byzantine (1922) 16 ASS 19.**

That an intervener does not prosecute his own claim in an action in which he intervenes but protects his interest in the property by defending the action in rem. The intervener is permitted to set up such defences as the owner of the ship could have set up had it defended the action.

As a matter of fact, the Court of Appeal having declared the entire ruling of the trial court a nullity, there is really nothing on which this cross-appeal and its prayers can stand. See **Alimi Vs. Kosebinu (2016) 17 NWLR (Pt.1542) 337 at 358.**

There is no gainsaying that there is no point in further consideration of this cross-appeal which had died by reason of the decision in the main appeal. Therefore the cross-appeal is dismissed.

As I earlier said in the main appeal of SC.1338/18 that the appeal lacks merit and is dismissed, same as the cross-appeal under the number SC.93/2019. I abide by the consequential order made.

Mary Ukaego Peter-Odili
Justice, Supreme Court

MUSA DATTIJO MUHAMMAD, (JSC): My lord UWANI MUSA ABBA AJI JSC had obliged me a preview of his lead judgment just delivered. I entirely agree with the reasoning and conclusion therein stated that the appeal lacks merit and that it be dismissed.

The 1st and 2nd respondents had sought the leave of the trial court to intervene in the proceedings between the appellant and the 3rd respondent. Rather than consider the

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application of the 1st and 2nd respondents; the court proceeded to grant appellant's application for stay of further proceedings without hearing and determining respondents' entrities in their application of 19th September 2017. 1st and 2nd respondents' appeal to the Court of Appeal against the trial court's decision was allowed. The respondent at the lower court has now appealed to this court submitting that the court has erred in its decision allowing the appeal thereat and ordering thereon for the 1st and 2nd respondent's application to be expeditiously heard by another judge of the trial court.

By Section 36 of the 1999 Constitution as amended, no court has the jurisdiction of determining the rights and/or obligation of a party without having heard the party whose right and/or obligation it so determined. Any decision of a court arrived at without hearing the party, being a breach of the clear and unambiguous section of the Constitution, is null and void. The lower court is right to have so held. An appeal against the decision is futile. The effect of breach of the right of fair hearing is trite in law. Such a breach renders the whole proceedings in the course of which the breach occurred and the decision arrived at by the court a nullity.

In the case at hand the lower court's decision declaring the trial court's decision arrived at in breach of the respondents' right of fair hearing is impeccable see: **PRINCE ABUBAKAR AUDU Vs. FEDERAL REPUBLIC OF NIGERIA (2013) LPELR -19897 (SC)** and **EYE Vs. FRN (2018) LPELR - 43599 (SC).**

It is for the foregoing and more so the fuller reasons adumbrated in the lead judgment that I also dismiss this appeal and abide by the consequential orders therein made.

Musa Dattijo Muhammad,
Justice, Supreme Court.

JOHN INYANG OKORO, (JSC): I have had the privilege of reading the draft of the lead judgment of my learned brother, **Uwani Musa Abba Aji,** JSC just delivered. I agree with him that this appeal is devoid of merit and should be dismissed. I will proffer only a few comments of my own in support of the lead judgment.

A brief facts leading to this appeal has it that the appellant (as plaintiff) instituted an *in rem* action against the 3rd respondent (as defendant) claiming monetary reliefs. It also obtained an order Ex-parte for the arrest of the 3rd respondent pending when satisfactory security is provided to secure the appellant's claim. Following the arrest of 3rd respondent, it entered appearance on 10th February, 2017 and filed an application seeking an order for release of 3rd respondent or in the alternative an order staying further proceedings in the matter pending the arbitration in London. The appellant filed a similar application which the learned trial judge consolidated and heard. The court stayed further proceedings in the suit pending the conclusion of arbitration in London.

The 1st and 2nd respondents later approached that court vide a motion Ex-parte dated 19th September, 2017 seeking an order to intervene in the suit for the purpose of

contesting the 3rd respondent's arrest. The said application was granted. The 1st and 2nd respondents also filed a motion on notice seeking *inter alia* to protest their vested and proprietary rights and interests as mandated by Section 43 and 44 of the 1999 Constitution. The said application of 19/9/2017 revealed that the 1st and 2nd respondents had executed a Senior Secured Term Loan Agreement dated 30th June, 2016 and also a First Preferred Mortgage Deed dated 1st July, 2016 and 24th April, 2017 with the 3rd

respondent. In recognition of the 1st and 2nd respondent's senior secured priority rights, the appellant executed a charterer's subordinate undertaking with the 3rd respondent. In the said CSU, the appellant deferred all of its rights in respect of its charterer's credit agreement to the right of the 1st and 2nd respondents as senior secured lenders. The motion on notice also revealed that the appellant undertook not to enforce any rights in respect of the CCA until all obligations due to the appellant have been met and discharged. However, the appellant commenced the action at the trial court and obtained an order to arrest the 3rd respondent without disclosing to that court the existence of the charterer's subordinate undertaking. The 1st and 2nd respondents application of 19/9/2017 therefore sought an order discharging the order of arrest of the 3rd respondent as well as striking out or dismissing the suit for want of jurisdiction.

On 18/10/17, the trial court heard the said motion on notice together with appellant's preliminary objection to the motion. On 17/11/17 the court refused the appellant's preliminary objection and rather than consider and determine the 1st and 2nd respondents' application, it proceeded to order a further stay of the proceedings until arbitration is concluded.

Both the appellant and the respondents have nominated two issues each for the determination of this appeal. Both issues on either part are similar. I shall therefore proceed anon with issue 1 distilled by the 1st and 2nd respondents which I consider is apt to resolve this appeal, to wit:

> **"Whether the lower court was not right in holding that the failure of the learned trial judge to determine the 1st and 2nd respondents' application dated 19th September, 2017 constitutes a breach of their right to fair hearing."**

First of all, the right to fair hearing is fundamental to every judicial proceeding in our legal system. It is the bedrock of our justice system such that its breach in our judicial system automatically vitiates the entire proceedings. See **Chukwuma Vs. FRN (2011)13 NWLR (Pt. 1264) 391; Awoniyi Vs. Registered Trustees AMORC (2000) 10 NWLR (Pt. 676) 522.** The right to fair hearing is constitutionally guaranteed under Section 36(1) of the 1999 Constitution of the Federal Republic of Nigeria (as amended] as follows:-

> **"In the determination of his civil rights and obligation including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such manner as to secure its independence and impartiality."**

It follows therefore that the court is under obligation to hear and determine all matters properly brought before it fairly. The court of law is duty bound to consider and pronounce on all issues properly committed before it for determination by contending parties. In the case of **FAAN Vs. WES (Nig) Ltd (2011) 8 NWLR (Pt. 1249) 219 at 237**, this court per Muhammad, JSC held as follows:-

"Indeed, it is the duty of a court to entertain and decide on the merit or otherwise of any application brought before it by any party notwithstanding the perceived strength or the weakness of such an application. It is a party's basic and constitutional right which he cannot be denied of. See also **Mobil Producing Nigeria Unlimited & Anor Vs. Simeon Monokpo & Anor (2003) 18 NWLR (Pt. 852) 346.**

I therefore hold the view that failure of the trial court to pronounce on the 1st and 2nd respondents' motion on notice of 19/9/17 was a clear breach on their right to fair hearing. The Court of Appeal was right to set aside the trial court's ruling of 17/11/17 and remit the case back to the trial court for determination.

This appeal has no merit and is accordingly dismissed. The decision of the court below is hereby affirmed.

Appeal dismissed.

John Inyang Okoro
Justice, Supreme Court

PAUL ADAMU GALINJE, (JSC): I have had the privilege of reading in draft the judgment just delivered by my learned brother, UWANI MUSA ABBA AJI, JSC and I agree that there is no merit in this appeal. Same is accordingly dismissed by me as well. Parties shall bear their respective costs.

Paul Adamu Galumje
Justice, Supreme Court

ABCDEFGH

Transnav Purpose Navigation Ltd. Vs. Velcan Energy Holdings, Dubai Ltd.(Peter-Odili, JSC) [2020] JSCNLR, Vol. 1

WARRI REFINING & PETROCHEMICAL CO LTD
Vs.
GECMEP NIGERIA LIMITED

SC. 769/2017

IN THE SUPREME COURT OF NIGERIA HOLDEN AT ABUJA

FRIDAY, 24TH JANUARY 2020

BEFORE THEIR LORDSHIPS

OLUKAYODE ARIWOOLA **JUSTICE, SUPREME COURT**
KUDIRAT M. O. KEKERE-EKUN **JUSTICE, SUPREME COURT**
JOHN INYANG OKORO **JUSTICE, SUPREME COURT**
AMINA ADAMU AUGIE **JUSTICE, SUPREME COURT**
PAUL ADAMU GALUMJE **JUSTICE, SUPREME COURT**

ACTION:- Pre-action notice —S. 12 of NNPC Act —Whether does not apply to cases of contract.

ACTION:- Pre-action notice —S. 12(2) of NNPC Act —Where parties entered into a simple contract —Whether it is not within their contemplation that S. 12 of NNPC Act shall apply which deals with pre-action notice.

*ACTION:- Pre-action notice —Section 2 of Public Officers Protection Ordinance —Where a statute has specifically enumerated areas of its operation —Whether it is not proper to extend the operation of the statute beyond those areas —The principle in **Salako Vs. L.E.D.B and Anor. 20 N.L.R 169***

*ACTION:- Pre-action notice —Whether does not apply to cases of contract —The principle in **Wema Sec. Fin. Plc Vs. N.A.I.C (2015) 16 NWLR (Pt. 1484) 93***

*ACTION:- Pre-action notice —Whether does not apply to cases of contract —The principle in **Midland Railway Company Vs. The Local Board for the District of Withington (1882-3)***

*CASE LAW:- Pre-action notice —Service thereof —The principle in **Amadi Vs. NNPC (2000) FWLR (Pt. 9) 1527.***

CASE LAW:- Pre-action notice —Whether does not apply in cases of contract —The

*principle in **N.P.A. Plc Vs. Lotus Plastics Ltd (2005) 19 NWLR (Pt. 959)158.***

JUDGMENT AND ORDERS:- Final decision —Where the Court of Appeal confirms the ruling of a trial court that it has jurisdiction —Whether that decision of the Court of Appeal is a final decision.

JUDGMENT AND ORDERS:- Final Order —What constitutes —Whether it envisages a permanent order made by the court in which the parties cannot go back to the same court.

JUDGMENT AND ORDERS:- Interlocutory and final decisions —Distinction therein

—The principle in ***Alor Vs. Ngene (2007) 17 NWLR (Pt. 1062) 163 at 175-176.***

JUDGMENT AND ORDERS:- Interlocutory decision —Nature thereof —Whether does not adjudicate the ultimate rights of the parties in the actions —The principle in ***Igunbor Vs. Afolabi (2001) FWLR (Pt. 59) 1284 165 D-E***

PRACTICE AND PROCEDURE:- Appeal —Classification of grounds of appeal —How determined —Whether to consider not only bare wordings of the ground but also relevant particulars supplied.

PRACTICE AND PROCEDURE:- Appeal —Grounds of appeal —Classification thereof —Whether a complain that the court misunderstood the appellant's case is a ground of facts or mixed law and fact.

STATUTE:- Interpretation thereof —Whether a statute must be interpreted as a whole and not disjointedly.

STATUTE:- NNPC Act —Section 12(2) thereof —Nature and purport.

WORDS AND PHRASES —'No suit shall be commenced' —Meaning —Section 12 of NNPC Act considered.

Issue for Determination

The only issue in contention in this appeal therefore, is whether, pursuant to Section 12(2) of the NNPC Act, 2004, the appellant was entitled to be served with a pre-action notice before the commencement of the suit against it at the trial court.

Facts of the Matter

The plaintiff/respondent sued the defendant/appellant at the High Court of Edo State Benin divisional Division claiming an order of the honourable court declaring the defendant's letter dated 30th April, 2014 rejecting the heptant chemical supplied to it by the plaintiff as null and void and of no effect.

He also claimed debts owed to him by the defendant in respect of the chemical supplied, special and general damages. The defendant filed a statement of defence wherein he raised an objection to the non service of a pre-action notice, lack of jurisdiction of the trial court based on the fact that it was a Federal agency and the trial court lacks the requisite jurisdiction.

In its ruling, the trial court dismissed the objection. This prompted the defendant/appellant to unsuccessfully appealed to the Court of Appeal, hence this further appeal to the Supreme Court.

Held: *(Unanimously dismissing the appeal)*

1. Distinction between interlocutory and final decision

It is my considered view that the first ground of objection can be resolved without much ado. The appeal before the court below arose from an interlocutory decision of the trial court. However, the judgment rendered in respect of the interlocutory decision is a final decision. On the distinction between a final and an interlocutory decision, this court in Alor. Vs. Ngene (2007) 17 NWLR (Pt. 1062) 163 @ 175 - 176 F - A, held, *inter alia*

> **" ... if the order, decision or judgment of a court finally and completely determines the right of the parties in the case, it is final. But if it does not it is interlocutory only. And in order to determine whether the decision is final or interlocutory, the decision must relate to the subject matter in dispute between the parties and not the function of the court in making the order."**
> *(P 409 - 410 para G - A)*

2. An interlocutory decision does not adjudicate the ultimate rights of the parties in the actions

In Igunbor Vs. Afolabi (2001) FWLR (Pt. 59)1284 165 D —E this court held, *inter alia:*

> **"A final order or judgment is one which brings to an end, the rights of the parties in the action. <u>It disposes of the subject matter of the controversy.</u> Or determines the litigation as to all parties on the merits.**

> **On the other hand, an interlocutory order or judgment is one given in the process of the action or cause, which is only intermediate and does not finally determine the rights of the parties in the action. It is an order which determines some preliminary or subordinate issue or settles some step or question but does not adjudicate the ultimate rights of the parties in the action.**

However, where the order made finally determines the rights of the parties, as to the particular issue disputed, it is a final order, even if arising from an interlocutory application. ” ***(P 410 para B - F)***

3. What constitutes a final order

In Alor Vs. Ngene (supra) @ 177 D —E it was also held:

“A final order envisages that it is a permanent order made by the court and the parties in respect of whom or against whom the order is made cannot go back to the same court to challenge or change that order, The court is, by virtue of that order, functus officio, and the only option to the parties is by way of appeal against that order, ”

Per Niki Tobi, JSC @ 179 - 180 H - A (Supra):

”A decision is said to be final when the court that gave the decision has nothing else or nothing more to do with the case; to the extent that the court becomes functus officio, a latinism which literally means ”having performed his or her office.”
(P 410 - 411 para G - B)

4. The decision of the lower court is the final decision

Applying these principles to the instant case, there is no doubt that the decision of the lower court upholding the ruling of the trial court is a final decision. The subject matter of the controversy was whether the trial court had the requisite jurisdiction to determine the matter before it and whether the decision affirming its jurisdiction was correct. The lower court made a final pronouncement on the issue and dismissed the appeal. The court has nothing more to do with the case and is therefore *functus officio.* By Section 27 (2) of the Supreme Court Act, the appellant had 3 months within which to appeal against the decision. The judgment was delivered on 5/7/17 while the notice of appeal was filed on 24/7/17,

well within the time stipulated by the law. To that extent, the appeal before this court is competent. The preliminary objection on this ground is overruled.

The second ground of objection concerns the competence of Grounds 1, 2 and 3 of the notice of appeal as to whether they are grounds of pure law, in which case the appellant is entitled to appeal as of right or whether they

are grounds of facts or mixed law and facts in which case leave to appeal ought to have been sought and obtained. ***(P 411 para C - F)***

5. *How to determine the nature of a ground of appeal*

It has been consistently observed by this court that it is not an easy or straightforward task to distinguish between a ground of appeal, which is of law alone and one which is of mixed law and fact. The court is enjoined to consider not only the bare wording of the ground but also relevant particulars supplied to determine the real complaint. See Ifediorah & Ors. Vs. Ume & Ors. (1988) 2 NWLR (Pt. 74) 5; Briggs Vs. The Chief Lands Officer of Rivers State of Nig. & Ors (2005) 12 NWLR (Pt. 938) 59; N.N.S. Co. Ltd Vs. Establishment Sima of Vaduz (1990) 7 NWLR (Pt.164) 526. ***(P 411 - 412 para G - A)***

6. *A ground should be examined thoroughly together with its particulars to determine its classification*

In Ogbechie & Ors. Vs Onochie & Ors.(1986) SC 54, His Lordship Eso, JSC stated:

> **"There is no doubt that it is always difficult to distinguish a ground of law from a ground of fact but what is required is to examine thoroughly the grounds of appeal in the case concerned to see whether the grounds reveal a misunderstanding by the lower tribunal of the law, or a misapplication of the law to the facts already proved, or admitted, in which case it would be a question of law. Where, however, the grounds are such that would reveal or are grounds that would question the evaluation of facts by the lower tribunal before the application of the law, that would amount to question of mixed law and fact. The issue of pure fact is easier to determine."**

See also: Ifediorah Vs. Umeh (supra); Nwaolisah Vs. Nwabufoh (2011) 14 NWLR (Pt. 1268) 600; ACB Plc Vs Obmiami Brick and Stone Nig. Ltd. (1993) LPELR - 206 (SC) @ 27 E —F; Chrome Air Services Ltd. & Ors. Vs. Fidelity Bank (2017) 12 SC (Pt. 111) 57. ***(P 412 para A - D)***

7. *A complaint that a court misunderstood the appellant's case is a ground of fact or*

mixed law and facts.

A complaint that the court misunderstood the appellant's case is a ground of

fact or mixed law and fact.

Ground 2 challenges the finding of the lower court that based on the pleaded facts, the requirements of a valid contract were met. i.e. offer, acceptance, consideration. In Ground 3, it is also contended that the lower court misconstrued the appellant's case by focusing on the nature of the alleged contract between the parties rather than the actual reliefs claimed. Having regard to the relevant principles enunciated above, I am in no doubt that Grounds 1, 2 and 3 of the notice of appeal are grounds of mixed law and fact, for which the appellant required the leave of this court or the court below before filing same, pursuant to Section 233(3) of the 1999 Constitution, as amended. I therefore agree with learned counsel for the respondent that Grounds 1, 2 and 3 are incompetent for failure to obtain the requisite leave of court. Issue A in the appellant's brief is predicated on Ground 3, while issue C is predicated on Grounds 1 and 2. Having been predicated upon incompetent grounds of appeal, the said issues A and C are also incompetent. The preliminary objection therefore succeeds in part. Grounds 1, 2 and 3 of the notice of appeal and issues A and C predicated thereon, are incompetent and accordingly struck out. ***(P 412 - 413 para G - B)***

8. *The nature and purport of S. 12(2) of NNPC Act, 2004*

Section 12(2) of the NNPC Act, 2004 provides:

> **"No suit shall be commenced against the authority before the expiration of a period one month after written notice of intention to commence the suit shall have been served on the corporation by the intending plaintiff or his agent; and the notice shall clearly and explicitly state the cause of action, the particulars of the claim, the name and place of abode of the intending plaintiff and the relief which he claims."** ***(P 416 para F - H)***

9. *A statutory must be construed as a whole*

My Lords, it is well settled that in the interpretation of a statutory provision, it should not be considered in isolation or disjointedly, in order to ascertain the intention of the legislature. It must be construed as a whole. See: S.P.D.C. Vs. Isaiah (1997) 6 NWLR (Pt. 508) 236; Obi Vs. INEC (2007) 11 NWLR (Pt. 1046) 560; Chime & Anor. Vs. Ude & Ors. (1996) LPELR - 848 (SC) @ 51 B - C.

(P 417 para A - B)

10. *Section 12 of NNPC Act does not apply to cases of contract*

From the provisions set out above, it is quite clear that the whole of Section 12

covers suits in respect of matters spelt out in sub-paragraph (1). Sub-paragraph (2) is a continuation of the subject matter in sub paragraph (1).

In N.P.A. Construzioni Generali Farsura Cogefar SPA (1974) 12 SC 69, this court had cause to construe the provisions of Section 97 of the Ports Act, which provide thus:

> **"No suit shall be commenced against the authority until one month at least after notice of intention to commence the same shall have been served upon the authority by the intending plaintiff or his agent."**

The provisions are no doubt *in pari materia* with the provisions of Section 12(2) of the NNPC Act. Now, in construing Section 97(2) of Ports Act, this court also set out the provisions of Sub-section (1) of the section, which again, is *in pari materia* with Section 12(1) of the NNPC Act. The court held, *inter alia,* at page 83, line 29 to page 84 line 16 as follows:

> **"We shall now deal with the other point which to our mind, does not seem to be well-settled, namely whether the kind of statutory privilege which we have been considering is applicable to an action founded upon a contract. In other words, whether 5.97 of the Ports Act applies to cases of contract. We think that the answer to this question must be in the negative. We agree that the section applies to everything done or omitted or neglected to be done under the powers granted by the Act. But we are not prepared to give to the section the stress which it does not possess. We take the view that the section does not apply to cases of contract.**
> *(P 417 - 418 para G - E)*

11. Limitation to the application of the Act

The learned Chief Justice, in deciding this point made reference to the case of Salako Vs. L.E.D.B. and Anor. 20 N.L.R. 169 where de Commarmond S.P.J. as he then was, construed the provision of Section 2 of the Public Officers Protection Ordinance which is almost identical with S.97 of the Ports Act and thereafter stated the law as follows: -

> **"I am of opinion that Section 2 of the Public Officers Protection Ordinance does not apply in cases of recovery of land, breaches of contract claims for work and labour done, etc. "**

We too are of the opinion that de Commarmond S.P.J. has

> **quite rightly stated the law in the passage of his judgment cited above. It seems to us that an enactment of this kind i.e. S.97 of the Ports Act is not intended by the legislature to apply to specific contracts. "**

The court held that the section applies to everything done or omitted to be done under the Act. In other words, it applies to those matters specifically referred to in sub-section (1) of the Act. It is for this reason that the court held that it would be stretching the meaning of the provision too far if it is extended to specific contracts. ***(P 418 - 419 para E - A)***

12. Pre-action notice does not apply to cases involving contract

The court at page 85 (supra) cited with approval, the decision of the Court of Appeal in Midland Railway Company Vs. The Local Board for the District of Withington (1882-3) 11 QBD 788,per Brett, M.R. at Page 794, wherein the applicability of the provisions of Section 204 of the Public Health Act, 1875, which are similar to Section 97 (2) of the Ports Act and Section 12(2) of the NNPC Act, was considered. His Lordship held thus:

> **"It has been contended that this is an action in contract and that whenever an action is brought upon a contract, the section does not apply. I think that where an action has been brought for something done or omitted to be done under an express contract; the section does not apply; according to the cases cited an enactment of this kind does not apply to specific contracts. Again when goods have been sold, and the price is to be paid upon a quantum meruit, the section will not apply to an action for the price, because the refusal or omission to pay would be a failure to comply with the terms of the contract and not with the provisions of the statute"** ***(P 419 para C - F)***

13. The meaning of "no suit shall be commenced"

I am of the considered view that if the entire provisions of Section 12 of the NNPC Act are considered, it becomes clear that the suits to which sub-sections (1) and (2) relate are those suits in respect of the subject matter clearly spelt out in sub-section (1). That is, the purport of the decision in the Construzioni Generali case. The phrase "No suit shall be commenced ... " refers to any suit in respect of the matters set out in sub-section (1).

This decision has been followed by this court in several cases, such as: N.P.A. Plc. Vs. Lotus Plastics Ltd. (2005) 19 NWLR (Pt. 969) 158; Wema Sec. & Fin. Plc. Vs N.A.I.C. (2015) 16 NWLR (Pt. 1484) 93. ***(P 419 - 420 para G***

14. The principle in N.P.A Vs. Lotus Plastics Ltd (2005) 19 NWLR (Pt. 969) 158

In the case of N. P .A. Vs Lotus Plastics Ltd (supra), the court noted that the principle in the Construzioni Generali case was that limitation laws such as Section 97 of the Ports Act, do not apply to cases of contract. It however held that based on the peculiar facts of the case (i.e. Lotus Plastics), the claim was founded on the statutory duties of the appellant and not breach of contract. It therefore held that to be maintainable, the 1st respondent's action ought to have been brought within the period prescribed by Section 72(1) of the Ports Decree No. 74 of 1993. ***(P 420 para A - B)***

15. Status dealing with limitation of actions do not apply to contract

In Wema Sec. Fin. Plc Vs. N.A.I.C. (supra).

> **"It is now settled law that Section 2 of the Public Officers (Protection) Act and all such enactments similarly worded like it, for example, Section 26(1) (a) and (b) of the Nigerian Agricultural Insurance Act (supra) do not apply to cases of contract ...**
>
> **To hold otherwise would be to negate the general principles upon which the law of contract is based. "**

A host of authorities were quoted in the judgment, including the Construzioni Generali case (supra); Salako Vs. L.E.D.B. & Anr. (1953) 20 NLR 169; Osun State Govt. Vs. Dalami (Nig) Ltd. (2007) 9 NWLR (Pt. 1038) 66 @ 83 - 84 F —E; Ugwuanyi Vs. NICON Insurance Plc.(2013) 11 NWLR (Pt. 1366) 546 @ 612E - 615F. ***(P 420 para C - E)***

16. The principle in ***Amadi Vs. NNPC***

The case of Amadi Vs. NNPC (2000) FWLR (Pt. 9) 1527, relied upon heavily by learned counsel for the appellant, was considered by this court in Ugwuanyi Vs. Nicon Insurance Plc (supra). His Lordship, Rhodes-Vivour, JSC had this to say:

> **"The issue before the court (in Amadi's case) was whether the pre-action notice served on the respondent contained the information as provided by Section 11(2) of the NNPC Act and not whether the NNPC Act extended to suit of breach of contract of employment. This court set aside the decision of the Court of**

Appeal and ordered the case heard by another judge of the Lagos High Court after finding that all the requirements of Section 11(2) of the NNPC Act had been met by the plaintiff. If ever there was a case

most irrelevant to the issue under consideration, Amadi Vs. NNPC supra is that case. The issue in this case, once again, is whether a plaintiff who sues on a specific contract (a contract of employment) needs to serve pre-action notice on the defendant while in Amadi's case, a pre-action notice was served, but did the pre-action notice contain the required information as provided by Section 11(2) of the NNPC Act. That was the issue."

In overturning the concurrent findings of the two lower courts, His Lordship held at page 617 B - C of the report:

"Concurrent findings of the courts below are that where a plaintiff's claim is for a specific contract or whatever claim, he must serve on the defendant a pre-action notice, as provided by Section 26 of the NICON Insurance Act before the court can have jurisdiction to hear his suit. This finding, confirmed by the Court of Appeal is perverse in the light of the reasoning in N.P.A. Vs. Construzioni Generali supra which states clearly that Section 97 of the Ports Act and similar enactments are not intended by the legislature to apply to specific contracts." *(P420 - 421 para F - G)*

17. The provisions of S. 12(2) of NNPC Act are not applicable

I shall toe the same line in this appeal. The appellant has failed to satisfy me that the decision is wrong in law. In the final analysis, I hold that the transaction between the parties, being one of simple contract and having not expressly incorporated them as terms of their contract, the provisions of Section 12(2) of the NNPC Act are not applicable. The respondent's suit was properly instituted before the trial court. I therefore resolve this sole surviving issue against the appellant. The appeal fails and is hereby dismissed. The judgment of the lower court is affirmed. *(P421 - 422 para G - A)*

Representations:
O.A. Okpakpor (Esq.) for the appellant with Dr. Ayodele Gada & Anita Oteh (Esq.)
O. D. Emole (Esq.) for the respondent.

KUDIRAT MOTONMORI OLATOKUNBO KEKERE-EKUN, JSC

(Delivering the lead judgment): This appeal is against the judgment of the Court of Appeal, Benin Division, delivered on 5th July 2017, dismissing the appellant's appeal against the ruling of the trial court delivered on 11/8/2015 in respect of preliminary points of law raised in paragraphs 1, 2, 3, 6 and 26 of its statement of defence, challenging the competence of the suit and the court's jurisdiction to entertain it.

By its writ of summons and statement of claim filed on 20/3/2015, the

respondent, as plaintiff, sought the following reliefs against the appellant:

1) An order of the honourable court declaring the defendants letter dated 30th April 2014 rejecting the Heptane Chemical supplied to it by the plaintiff as null and void and of no effect.

4) The sum of N20,278, 065. 00 being the debt owed to the plaintiff by the defendant for the supply of Heptane Chemicals.

5) 21% interest accruing on the debt from 13th December 2013 when the debt was due for payment to the date of payment of the debt.

4) The sum of N450,000.00 being special damages arising from transportation and hotel bills expended by the plaintiffs in nine (9) trips to the defendants office over the delayed payment.

6) The sum of N50 million as general damages for breach of contract.The appellant filed a statement of defence and also filed a motion dated and filed on 6/5/2015 seeking an order setting down for hearing the points of law raised in paragraphs 1, 2, 3, 6 and 26 of the said Statement of defence as follows:

"1. The defendant shall contend by way of objection at the trial that this suit is grossly incompetent as the same was instituted in the absence of a written notice of intention to commence legal proceedings against the defendant (pre-action notice) first served on it in accordance with Section 12(2) of the Nigerian National Petroleum Corporation Act, Cap. N123, Laws of the Federation of Nigeria, 2004 and that this honourable court lacks the requisite jurisdiction to entertain the same and will therefore urge this court to strike it out.

2. The defendant shall also contend by way of objection at the trial that this suit is grossly incompetent as it is instituted against an unknown party and that this court lacks the requisite jurisdiction to entertain the same

and will therefore urge this honourable court to strike it out.

3. The defendant shall also contend by way of objection at the trial that the defendant is a Federal Government Agency and that this honourable court lacks the jurisdiction to hear and determine the suit and the same should be struck out .

In the alternative

6. The defendant admits paragraph 2 of the statement of claim only to the extent that the Warri Refining and Petrochemical

Company Ltd as a company registered under the laws of Nigeria is a subsidiary of the Nigerian National Petroleum Corporation. The defendant is not known as Warri Refining & Petrochemical Co. Ltd as contained in the processes filed by the plaintiff before court. The defendant shall found upon her certificate of incorporation.

26. The defendant shall further contend at the trial that the plaintiff did not serve her with any prior written notice of intention to commence legal proceedings against her (pre-action notice) in accordance with Section 12(2) of the Nigerian National Petroleum Corporation Act Cap. N123, Laws of the Federation of Nigeria, 2004.

The parties filed and exchanged written addresses in respect of the points of law, which were accordingly set down for hearing. The learned trial judge, in a considered ruling delivered on 11/8/2015, held *inter alia,* as follows:

"From the claimant's claim, as contained in paragraph 23(i) - (v) of the statement of claim as reproduced earlier in the ruling, and in view of the decision in all the cases considered herein/ the plaintiff's claim is in respect of breach of a simple contract of supply of chemicals from the defendants. .. Therefore it is one which, in my estimation can be determined by a court other than the Federal High Court. " (See page 121 of the record).

On whether the requirement of a pre-action notice is applicable to this case, His Lordship held:

"The question that comes to mind at this time is whether there is provision of pre-action notice in the contract between the plaintiff/respondent and the defendant/applicant. If the answer is no, then the parties are bound by the terms of their contract. Consequently, since there is no provision for pre-action notice in the contract between the plaintiff/respondent and the defendant/applicant, the court will assume jurisdiction over the matter. " (See page 122 of the record).

The appellant was dissatisfied with the decision and appealed to the lower court. The appeal was dismissed on 5/7/17. The appellant is still dissatisfied and has further appealed to the Supreme Court vide its notice of appeal filed on 24/7/17 containing 5 grounds of appeal.

The parities duly filed and exchanged their respective briefs of argument in

compliance with the rules of this court. At the hearing of the appeal on 29/10/2019, O.A. Okpakpor Esq., of counsel, adopted and relied on the appellant's brief filed on 20/10/17 and its reply brief filed on 4/10/2018 in urging the court to dismiss the respondent's preliminary objection and allow the appeal.

O. D. Emole Esq. adopted and relied on the respondent's brief filed on 8/12/17. He urged the court to uphold the preliminary objection incorporated therein, and argued at pages 7 - 12 thereof and to dismiss the appeal for being incompetent. Alternatively, he urged the court to dismiss the appeal in its entirety.

Having raised a preliminary objection to the hearing of the appeal, it must be considered first before delving into the merit of the appeal, if necessary. The grounds for the objection are as follows:

1. **The appeal being interlocutory, was filed outside the period prescribed by Section 27(2) of the Supreme Court Act Cap. 515 LFN 2004 and no application made for extension of time to seek leave to appeal.**
2. **Grounds 1, 2 and 3 of the notice of appeal involve questions of mixed law and fact for which leave ought to have been sought and obtained**
3. **Issues A and C formulated in the appellants brief are distilled from incompetent grounds and therefore incompetent**

On the first ground of objection, learned counsel contended that the decision of the court below did not determine the final rights of the parties and was therefore an interlocutory decision. That by Section 27(2) of the Supreme Court

Act, an appeal from an interlocutory decision ought to be filed within 14 days, whereas, the appellant filed its appeal before this court more than 14 days after the ruling was delivered. He submitted that by the tenor of Section 27 (2) (a), even where the appeal is on grounds of law alone, so long as it is an appeal, in a civil case, against an interlocutory decision, it must be filed within 14 days. He referred to **Allamah Vs. Kpolokwu (2016) 6 NWLR (Pt. 1507) 1 @ 36 - 37 D —C; Isah Vs. INEC (2016) 18 NWLR (Pt. 1544) 175 @ 232 A.** He submitted there is no evidence on record to show that the appellant sought and obtained an enlargement of time within which to appeal and therefore the appeal is incompetent.

On the second ground of objection, learned counsel submitted that a careful perusal of grounds 1, 2, and 3 along with their particulars, reveals that they are grounds of fact or at least mixed law and fact, for which leave is required in compliance with Section 233(3) of the Constitution of the Federal Republic of Nigeria, (CFRN) 1999, as amended. He referred to: **Nzei Vs. U.N.N. (2017) 6 NWLR (Pt. 1561) 300 @ 338 - 339 F —B; Allamah Vs. Kpolokwu (supra); Umanah (JNR) Vs. N.D.C. (2016) 14 NWLR (Pt. 1533) 458 *@ 485;* Ekanem Vs. Umanah (2006) 11 NWLR (Pt. 992) 510.**

On the third issue, learned counsel argued that if grounds 1, 2 and 3 are found to be incompetent, the appellant's issues A and C predicated thereon, are equally incompetent and should be struck out.

In his reply on points of law, learned counsel for the respondent submitted on the first ground of objection, that the decision of the lower court appealed against is a final judgment albeit arising from an interlocutory decision of the trial court. He submitted that having pronounced that the appeal is dismissed, it put an end to rights of the parties as far as the issues canvassed before that court were concerned. He referred to **Skymit Motors Ltd. Vs. U.B.A. Plc (2014) All FWLR (Pt. 721) 1547@ 1561 - 1562; Nigeria Agjp Oil Co. Ltd. Vs. Nweka (2016) All FWLR (Pt. 845)1@ 26 - 27.**

On the competence of grounds 1, 2 and 3, learned counsel contended that the three grounds of appeal are pure issues of law, on which the appellant is entitled to appeal as of right. He argued that grounds 1 and 2 are complaining about the court's misunderstanding of the law of contract and its applicability to the facts of the case. He contended that there was no evidence before the court upon which it could reach a finding that the relationship between the parties was one of simple contract. He referred to **State Vs. Omoyele (2017) ALL FWLR (Pt. 887) 37 @ 64 - 66.** With regard to Ground 3, he submitted that the complaint is that the lower court failed to pronounce on the issue raised before it, to wit: the content of the reliefs sought by the respondent, as opposed to the nature of the relationship between the parties.

It is my considered view that the first ground of objection can be resolved without much ado. The appeal before the court below arose from an interlocutory decision of the

trial court. However, the judgment rendered in respect of the interlocutory decision is a final decision. On the distinction between a final and an interlocutory decision, this court in **Alor. Vs. Ngene (2007) 17 NWLR (Pt. 1062) 163 @ 175 - 176 F - A,** held, *inter alia*

> **" ... if the order, decision or judgment of a court finally and completely determines the right of the parties in the case, it is final. But if it does not it is interlocutory only. And in order to determine whether the decision is final or interlocutory, the decision must relate to the subject matter in dispute between the parties and not the function of the court in making the order."**

In Igunbor Vs. Afolabi (2001) FWLR (Pt. 59)1284 165 D —E this court held, *inter alia:*

> **"A final order or judgment is one which brings to an end, the rights of the parties in the action. <u>It disposes of the subject matter of the controversy.</u> Or determines the litigation as to all parties on the merits.**

> **On the other hand, an interlocutory order or judgment is one given in the process of the action or cause, which is only intermediate and does not finally determine the rights of the parties in the action. It is an order which determines some preliminary or subordinate issue or settles some step or question but does not adjudicate the ultimate rights of the parties in the action.**
>
> **However, where the order made finally determines the rights of the parties, as to the particular issue disputed, it is a final order, even if arising from an interlocutory application. "**

In Alor Vs. Ngene (supra) @ 177 D —E it was also held:

> **"A final order envisages that it is a permanent order made by the court and the parties in respect of whom or against whom the order is made <u>cannot go back to the same court</u> to challenge or change that order, The court is, by virtue of that order, <u>functus officio,</u> and the only option to the parties is by way of appeal against that order, "**

Per Niki Tobi, JSC @ 179 - 180 H - A (Supra):

> **"A decision is said to be final when the court that gave the decision has nothing else or nothing more to do with the case; to the extent that the court becomes <u>functus officio,</u> a latinism which literally means "having performed his or her office."**

Applying these principles to the instant case, there is no doubt that the decision of the lower court upholding the ruling of the trial court is a final decision. The subject matter of the controversy was whether the trial court had the requisite jurisdiction to determine the matter before it and whether the decision affirming its jurisdiction was correct. The lower court made a final pronouncement on the issue and dismissed the appeal. The court has nothing more to do with the case and is therefore *functus officio.* By Section 27 (2) of the Supreme Court Act, the appellant had 3 months within which to appeal against the decision. The judgment was delivered on 5/7/17 while the notice of appeal was filed on 24/7/17, well within the time stipulated by the law. To that extent, the appeal before this court is competent. The preliminary objection on this ground is overruled.

The second ground of objection concerns the competence of Grounds 1, 2 and 3 of the notice of appeal as to whether they are grounds of pure law, in which case the appellant is entitled to appeal as of right or whether they are grounds of facts or mixed

law and facts in which case leave to appeal ought to have been sought and obtained.

It has been consistently observed by this court that it is not an easy or straightforward task to distinguish between a ground of appeal, which is of law alone and one which is of mixed law and fact. The court is enjoined to consider not only the bare wording of the ground but also relevant particulars supplied to determine the real complaint. See **Ifediorah & Ors. Vs. Ume & Ors. (1988) 2 NWLR (Pt. 74) 5; Briggs Vs. The Chief Lands Officer of Rivers State of Nig. & Ors (2005) 12 NWLR (Pt. 938) 59; N.N.S. Co. Ltd Vs. Establishment Sima of Vaduz (1990) 7 NWLR (Pt.164) 526.**

In Ogbechie & Ors. Vs. Onochie & Ors.(1986) SC 54, His Lordship Eso, JSC stated:

> **"There is no doubt that it is always difficult to distinguish a ground of law from a ground of fact but what is required is to examine thoroughly the grounds of appeal in the case concerned to see whether the grounds reveal a misunderstanding by the lower tribunal of the law, or a misapplication of the law to the facts already proved, or admitted, in which case it would be a question of law. Where, however, the grounds are such that would reveal or are grounds that would question the evaluation of facts by the lower tribunal before the application of the law, that would amount to**

question of mixed law and fact. The issue of pure fact is easier to determine."

See also: Ifediorah Vs. Ume (supra); Nwaolisah Vs. Nwabufoh (2011) 14 NWLR (Pt. 1268) 600; ACB Plc Vs Obmiami Brick and Stone Nig. Ltd. (1993) LPELR - 206 (SC) @ 27 E —F; Chrome Air Services Ltd. & Ors. Vs. Fidelity Bank (2017) 12 SC (Pt. 111) 57.

I shall now examine the challenged grounds of appeal. Ground 1 challenges the finding of the lower court that the subject matter of the appellant's claim is debt recovery rooted in simple contract. In the particulars, reference is made to the facts pleaded in the statement of claim and it is contended that a perusal of these facts reveal that there was no obligation on the respondent to pay for products that did not meet its specifications and therefore there was no debt owed to the respondent. In effect, the appellant contends that the lower court misunderstood the facts of the case. As held by this court in **Nzei Vs. U.N.N. (2017) 6 NWLR (Pt. 1561) 300 @ 338 - 339 F —B**, a complaint that the court misunderstood the appellant's case is a ground of fact or mixed law and fact.

Ground 2 challenges the finding of the lower court that based on the pleaded facts, the requirements of a valid contract were met. i.e. offer, acceptance, consideration. In Ground 3, it is also contended that the lower court misconstrued the appellant's case by focusing on the nature of the alleged contract between the parties

rather than the actual reliefs claimed. Having regard to the relevant principles enunciated above, I am in no doubt that Grounds 1, 2 and 3 of the notice of appeal are grounds of mixed law and fact, for which the appellant required the leave of this court or the court below before filing same, pursuant to Section 233(3) of the 1999 Constitution, as amended. I therefore agree with learned counsel for the respondent that Grounds 1, 2 and 3 are incompetent for failure to obtain the requisite leave of court. Issue A in the appellant's brief is predicated on Ground 3, while issue C is predicated on Grounds 1 and 2. Having been predicated upon incompetent grounds of appeal, the said issues A and C are also incompetent. The preliminary objection therefore succeeds in part. Grounds 1, 2 and 3 of the notice of appeal and issues A and C predicated thereon, are incompetent and accordingly struck out.

The sole issue remaining for the determination of the appeal is issue B, to wit:

"Whether the requirement of pre-action notice as contained in Section 12 (2) of the NNPC Act, 2004 must be incorporated in the contractual relationship between the parties herein before it can be binding and/or that the said Section 12 (2) of the NNPC Act, 2004 is inapplicable to cases of contract."

Learned counsel for the appellant, in support of this issue, submitted that the service of a

pre-action notice on a party before the institution of any action against it, is a mandatory statutory requirement. He contended that it is not a subject of contractual negotiation and is not expected to be incorporated as a term of the contract before it can become applicable. He referred to: **Amadi Vs. N.N.P.C. (2000) FWLR (Pt. 9) 1527 @ 1556 and Nigercare Devt. Co. Ltd. Vs. Adamawa State Water Board (2008) ALL FWLR (Pt. 422) 1052.** He submitted that once the statute makes provision for pre- action notice, the contracting parties have no choice but to fully comply and that the consequence of non-compliance is that the subsequent proceedings are liable to be nullified.

Relying on the cases of **Ibrahim Vs. Lawal (2015) ALL FWLR (Pt. 799) 990 @ 1014 and Eboigbe Vs. N.N.P.C. (1994) 5 NWLR (Pt. 347) 659,** he submitted that the mandatory provisions, such as Section 12 (2) of the NNPC Act, 2004 cannot be the subject of a waiver, as the parties are not expected to contract out of it. He referred to the case of **NNPC Vs. Contruzioni Generali Farsura Cogefar SPA (1974) 12 SC 81 @ 200** relied upon by the lower court and contended that the court misconceived this court's decision in that case. He submitted that the issue in contention in the case was not whether a pre-action notice was incorporated in the contract but whether Section 97(2) of the Ports Act, which provides for pre-action notice, was applicable to cases of contract.

He submitted that where, as in Section 12(2) of the NNPC Act, 2004, a statute uses the phrase "no suit shall be commenced ... ", it prohibits the commencement of ALL suits irrespective of the type or cause of action contemplated. He noted that in

Nigercare Devt. Co. Ltd. Vs Adamawa State Water Board (supra), this court observed that the provisions of Section 51(1) and (2) of the Adamawa State Water Board Edict No. 4 of 1996, which is *in pari material,* is wider and all embracing and different in application from Section 97 of the Port Authority Act, which was construed in the Contruzioni Generali case. He referred to: **Fawehinmi Construction Co. Ltd. Vs. Obafemi Awolowo University *(1998)* 6 NWLR (Pt. 553) 171; Amadi Vs. N.N.P.C. (supra); Ntiero Vs N.P.A. (2008) ALL FWLR (Pt. 430) 688; Ugwuanyi Vs. NICON Insurance Plc. (2013) ALL FWLR (Pt. 686) 482.**

Relying on the interpretation section of the NNPC Act, i.e. Section 22 thereof, learned counsel submitted that the provisions of Section 12(2) of the NNPC Act are applicable to the appellant, being a subsidiary of the Nigerian National Petroleum Corporation (NNPC).

He also urged the court to discountenance its decision in the Construzioni Generali case as wrongly decided, having regard to its later decisions in **Ntiero Vs. NPA (supra), Amadi Vs. NNPC (supra); Nigercare Devt. Co. Ltd. Vs. Adamawa State Water Board (supra) and Ugwuanyi Vs. NICON Insurance Plc (supra),** which were cases bordering on contract where similar provisions were held to be applicable.

In response to the above submissions, learned counsel for the respondent reiterated the applicability of the Construzioni Generali *case* to the instant case, as relied upon

by the lower court. He submitted that Amadi Vs. NNPC (Supra) relied upon by the appellant, did not constitute a departure from the Construzioni Generali case. He submitted that Amadi's case was not a case of simple contract and further, that the court held that Section 11(2) of the NNPC Act, 1977 was a condition precedent to instituting an action against NNPC because the parties had expressly so agreed. To further buttress his position, he referred to the case of **N.P.A. Plc. Vs. Lotus Plastics Ltd. (2005) 19 NWLR (Pt. 959) 158,** where the Construzioni Generali case was cited with approval. He referred to several relevant portions of the judgment. He submitted that this court reached the decisions in these cases notwithstanding the fact that the provisions for pre-action notice commenced with the phrase, "No suit shall be commenced ..." , as in Section 12 (2) of the NNPC Act, 2004. He also referred to **Onuorah Vs. K.R.P.C. (2005) 2 SC (Pt. II) 1 @ 10; Wema Sec. & Fin. Plc. Vs. N.A.I.C. (2015) 16 NWLR (Pt. 1484) 93,** to the effect that all enactments similarly worded like Section 12(2) of the NNPC Act, do not apply to cases of contract.

He urged the court to discountenance the cases of **Nigercare Devt. Co. Ltd. Vs Adamawa State Water Board (Supra)** and **Ntiero Vs. NPA (supra)** on the ground that they are not helpful in deciding specific issues of the applicability of pre-action notices to cases of contract. He submitted that the two lower courts were bound by the previous decisions of this court on the issue under the doctrine of *stare decisis.*

He submitted that the contract between the parties was in writing wherein they expressly agreed on the terms and that there was no incorporation therein, either expressly or otherwise, of Section 12 (2) of the NNPC Act, 2004. He submitted that

parties are bound by their contracts and the courts would only give effect to such terms as are expressly agreed between the parties.

Referring to paragraphs 19 and 20 of the amended statement of claim at page 74 of the records and the authority of **Ugwanyi Vs. NICON Insurance Plc** on the purport of a pre-action notice, which is to afford the defendant time to determine whether or not to make reparation to the plaintiff, he submitted that the appellant had ample time to make reparation to the respondent but failed to do so. He urged the court to lean on the side of substantive justice in this matter and to shun technicalities.

In reply on points of law, learned counsel for the appellant argued that learned counsel for the respondent's contention that the provisions of Section 12(1) and 12(2) of the NNPC Act, 2004 are all pre-action notices and are statutory procedural provisions because they commence with the phrase "No suit shall be commenced…*"*., is misleading, and urged the court to discountenance it, having regard to the clear interpretation of those provisions in **Amadi Vs. NNPC (supra).** He submitted that although the opening phrase in Section 2 of the Public Officers Protection Act and Section 12(1) of the NNPC Act, 2004 is "No action shall be commenced …", the provisions by their content, are not statutory procedural requirements, while Section 12(2) of the NNPC Act, 2004 is a statutory procedural requirement.

He maintained that insistence on strict adherence to mandatory statutory provisions cannot be construed as placing reliance on technicalities. He also noted that there is no provision for constructive notice in the provision.

I shall commence the resolution of this issue by noting that having struck out Grounds 1, 2 and 3 of the notice of appeal for being incompetent for failure to obtain leave to appeal, the said grounds being of mixed law and facts, and having struck out issues A and C formulated by the appellant, the finding of the lower court that the transaction between the parties was a simple contract and that the Federal High Court lacked jurisdiction to entertain it, is no longer in issue in this appeal. The decision is binding on the parties. The only issue in contention in this appeal therefore, is whether, pursuant to Section 12(2) of the NNPC Act, 2004, the appellant was entitled to be served with a pre-action notice before the commencement of the suit against it at the trial court.

Section 12(2) of the NNPC Act, 2004 provides:

> **"No suit shall be commenced against the authority before the expiration of a period one month after written notice of intention to commence the suit shall have been served on the corporation by the intending plaintiff or his agent; and the notice shall clearly and explicitly state the cause of action, the particulars of the claim, the name and place of abode of the intending plaintiff and the relief which he claims."**

My Lords, it is well settled that in the interpretation of a statutory provision, it should

not be considered in isolation or disjointedly, in order to ascertain the intention of the legislature. It must be construed as a whole. See: **S.P.D.C. Vs. Isaiah (1997) 6 NWLR (Pt. 508) 236; Obi Vs. INEC (2007) 11 NWLR (Pt. 1046) 560; Chime & Anor. Vs. Ude & Ors. (1996) LPELR - 848 (SC) @ 51 B - C.**

Section 12 of the NNPC Act, 2004 bears the heading *''Limitation of suits against the Corporation, etc. "* The type of suits covered by the section are spelt out in sub-section (1) of the section, which provides:

> **"(1) Notwithstanding anything in any other enactment, no suit against the corporation, a member of the board or any employers of the corporation <u>for act done in pursuance or execution of any enactment or law, or of any public duties or authority, or in alleged neglect or default in the execution of such enactment or law, duties or authority,</u> shall lie or be instituted in any court unless it is commenced within twelve months next after the set; neglect or default complained of, or in the case of a continuance of damage or injury, within twelve months next after the ceasing thereof."**

Sub-paragraph 2, which follows, then provides that no suit shall be commenced against the corporation before the expiration of a period of one month after written notice to commence legal action shall have been given by the intending plaintiff.

From the provisions set out above, it is quite clear that the whole of Section 12 covers suits in respect of matters spelt out in sub-paragraph (1). Sub-paragraph (2) is a continuation of the subject matter in sub paragraph (1).

In **N.P.A. Construzioni Generali Farsura Cogefar SPA (1974) 12 SC 69,** this court had cause to construe the provisions of Section 97 of the Ports Act, which provide thus:

> **"No suit shall be commenced against the authority until one month at least after notice of intention to commence the same shall have been served upon the authority by the intending plaintiff or his agent."**

The provisions are no doubt *in pari materia* with the provisions of Section 12(2) of the NNPC Act. Now, in construing Section 97(2) of Ports Act, this court also set out the provisions of Sub-section (1) of the section, which again, is *in pari materia* with Section 12(1) of the NNPC Act. The court held, *inter alia,* at page 83, line 29 to page 84 line 16 as follows:

> **"We shall now deal with the other point which to our mind, does not seem to be well-settled, namely whether the kind of statutory**

> **privilege which we have been considering is applicable to an action founded upon a contract. In other words, whether 5.97 of the Ports Act applies to cases of contract. We think that the answer to this question must be in the negative. We agree that the section applies to everything done or omitted or neglected to be done under the powers granted by the Act. But we are not prepared to give to the section the stress which it does not possess. We take the view that the section does not apply to cases of contract. The learned Chief Justice, in deciding this point made reference to the case of Salako Vs. L.E.D.B. and Anor. 20 N.L.R. 169 where de Commarmond S.P.J. as he then was, construed the provision of Section 2 of the Public Officers Protection Ordinance which is almost identical with S.97 of the Ports Act and thereafter stated the law as follows: -**
>
> > **"I am of opinion that Section 2 of the Public Officers Protection Ordinance does not apply in cases of recovery of land, breaches of contract claims for work and labour done, etc. "**

We too are of the opinion that de Commarmond S.P.J. has quite rightly stated the law in the passage of his judgment cited above. It seems to us that an enactment of this kind i.e. S.97 of the Ports Act is not intended by the legislature to apply to specific contracts. "

The court held that the section applies to everything done or omitted to be done under the Act. In other words, it applies to those matters specifically referred to in sub-section (1) of the Act. It is for this reason that the court held that it would be stretching the meaning of the provision too far if it is extended to specific contracts. The court at page 85 (supra) cited with approval, the decision of the Court of Appeal in **Midland Railway Company Vs. The Local Board for the District of Withington (1882-3) 11 QBD 788,per Brett, M.R. at Page 794,** wherein the applicability of the provisions of Section 204 of the Public Health Act, 1875, which are similar to Section 97 (2) of the Ports Act and Section 12(2) of the NNPC Act, was considered. His Lordship held thus:

"It has been contended that this is an action in contract and that whenever an action is brought upon a contract, the section does not apply. I think that where an action has been brought for something done or omitted to be done under an express contract; the section does not apply; according to the cases cited an enactment of this kind does not apply to specific contracts. Again when goods have been sold, and the price is to be paid upon a quantum meruit, the

section will not apply to an action for the price, because the refusal or omission to pay would be a failure to comply with the terms of the contract and not with the provisions of the statute"

I am of the considered view that if the entire provisions of Section 12 of the NNPC Act are considered, it becomes clear that the suits to which sub-sections (1) and (2) relate are those suits in respect of the subject matter clearly spelt out in sub-section (1). That is, the purport of the decision in the Construzioni Generali case. The phrase "No suit shall be commenced ... " refers to any suit in respect of the matters set out in sub-section (1).

This decision has been followed by this court in several cases, such as: N.P.A. Plc. Vs. Lotus Plastics Ltd. (2005) 19 NWLR (Pt. 959) 158; Wema Sec. & Fin. Plc. Vs N.A.I.C. (2015) 16 NWLR (Pt. 1484) 93.

In the case of N. P .A. Vs Lotus Plastics Ltd (supra), the court noted that the principle in the Construzioni Generali case was that limitation laws such as Section 97 of the Ports Act, do not apply to cases of contract. It however held that based on the peculiar facts of the case (i.e. Lotus Plastics), the claim was founded on the statutory duties of the appellant and not breach of contract. It therefore held that to be maintainable, the 1st

respondent's action ought to have been brought within the period prescribed by Section 72(1) of the Ports Decree No. 74 of 1993. In **Wema Sec. Fin. Plc Vs. N.A.I.C. (supra).**

> **"It is now settled law that Section 2 of the Public Officers (Protection) Act and all such enactments similarly worded like it, for example, Section 26(1) (a) and (b) of the Nigerian Agricultural Insurance Act (supra) do not apply to cases of contract ...**
>
> **To hold otherwise would be to negate the general principles upon which the law of contract is based. "**

A host of authorities were quoted in the judgment, including the Construzioni Generali case (supra); Salako Vs. L.E.D.B. & Anr. (1953) 20 NLR 169; Osun State Govt. Vs. Dalami (Nig) Ltd. (2007) 9 NWLR (Pt. 1038) 66 @ 83 - 84 F —E; Ugwuanyi Vs. NICON Insurance Plc.(2013) 11 NWLR (Pt. 1366) 546 @ 612E - 615F.

The case of **Amadi Vs. NNPC (2000) FWLR (Pt. 9) 1527,** relied upon heavily by learned counsel for the appellant, was considered by this court in **Ugwuanyi Vs. Nicon Insurance Plc (supra).** His Lordship, Rhodes-Vivour, JSC had this to say:

> **"The issue before the court (in Amadi's case) was whether the pre-action notice served on the respondent contained the information**

> **as provided by Section 11(2) of the NNPC Act and not whether the NNPC Act extended to suit of breach of contract of employment. This court set aside the decision of the Court of Appeal and ordered the case heard by another judge of the Lagos High Court after finding that all the requirements of Section 11(2) of the NNPC Act had been met by the plaintiff. If ever there was a case most irrelevant to the issue under consideration, Amadi Vs. NNPC supra is that case. The issue in this case, once again, is whether a plaintiff who sues on a specific contract (a contract of employment) needs to serve pre-action notice on the defendant while in Amadi's case, a pre-action notice was served, but did the pre-action notice contain the required information as provided by Section 11(2) of the NNPC Act. That was the issue."**

In overturning the concurrent findings of the two lower courts, His Lordship held at page 617 B - C of the report:

> **"Concurrent findings of the courts below are that where a plaintiff's claim is for a specific contract or whatever claim, he mu-st serve on the defendant a pre-action notice, as provided by Section**

26 of the NICON Insurance Act before the court can have jurisdiction to hear his suit. This finding, confirmed by the Court of Appeal is perverse in the light of the reasoning in N.P.A. Vs. Construzioni Generali supra which states clearly that Section 97 of the Ports Act and similar enactments are not intended by the legislature to apply to specific contracts."

The case of **N.P.A Vs. Lotus Plastics Ltd (supra)** was cited with approval.

In Ugwuanyis case (supra) the court was also invited to depart from its decision in **N.P.A. Vs. Construzioni Generali (supra).** It declined to do so on the ground that it is good law and reflects how similar provisions have been decided in this and other jurisdictions.

I shall toe the same line in this appeal. The appellant has failed to satisfy me that the decision is wrong in law. In the final analysis, I hold that the transaction between the parties, being one of simple contract and having not expressly incorporated them as terms of their contract, the provisions of Section 12(2) of the NNPC Act are not applicable. The respondent's suit was properly instituted before the trial court. I therefore resolve this sole surviving issue against the appellant. The appeal fails and is hereby dismissed. The judgment of the lower court is affirmed.

Costs of N500,000.00 are awarded against the appellant and in favour of the respondent.

Kudirat Motonmori Olatokunbo Kekere-Ekun

Justice, Supreme Court

JOHN INYANG OKORO, (JSC): I read in draft the illuminating judgment of my learned brother, Kudirat M. O. Kekere-Ekun, JSC just delivered. I agree entirely with the reasons leading to the conclusion that there is no merit in this appeal and deserves an order of dismissal. I have nothing new to add. Therefore I adopt the lead judgment as mine. I also abide by the order as to costs.

Appeal dismissed.

John Inyang Okoro
Justice Supreme Court

AMINA ADAMU AUGIE, (JSC): I had a preview of the lead Judgment just delivered by my learned brother, Kekere-Ekun, JSC, and I agree with him that this appeal lacks merit because the respondent's suit was properly instituted before the trial court. He dealt with this issue squarely, and I have nothing useful to add. Thus, I also dismiss this appeal and affirm the judgment of the Court of Appeal. I also abide by the consequential orders made in lead judgment, including the order as to costs.

Amina Adamu Augie,

Justice, Supreme Court

PAUL ADAMU GALINJE, (JSC): I have had the privilege of reading in draft, the judgment just delivered by my learned brother, Kudirat Motonmori Olatokunbo Kekere-Ekun, JSC and I agree that the appeal lacks merit and should be dismissed. It is accordingly dismissed by me. The judgment of the lower court is affirmed. I endorse the consequential order made as to costs.

Paul Adamu Galumje
Justice, Supreme Court

ABCDEFGH

1. AFOLABI FAJEBE
(Substituted for his father,
Alfred Olaiya Fajebe
(deceased) by order of Court
dated 28/1/2013)
2. Mopelola Fajebe
(Substituted for her mother,
Madam Ade Oyegunle (deceased)
by order of Court dated 28/1/2013

VS.

ISAAC ADEBAYO OPANUGA
(Substituted for his father
Michael Opanuga (deceased)
by Order of Court dated 4/2/2003

SC. 130/2010

IN THE SUPREME COURT OF NIGERIA
HOLDEN AT ABUJA

FRIDAY, 11TH JANUARY, 2019

BEFORE THEIR LORDSHIPS

OLABODE RHODES-VIVOUR	**JUSTICE, SUPREME COURT**
MARY UKAEGO PETER-ODILI	**JUSTICE, SUPREME COURT**
KUMAI BAYANG AKAAHS	**JUSTICE, SUPREME COURT**
JOHN INYANG OKORO	**JUSTICE, SUPREME COURT**
AMIRU SANUSI	**JUSTICE, SUPREME COURT**

ACTION: Determination thereof – Whether matter should be determined on their merit rather than on technicalities.

APPEAL: Issue for determination – Where issue does not arise from grounds of appeal – Argument thereon – Whether should be discountenanced.

APPEAL: Issues for determination – Where respondent filed issues not arisen from

grounds of appeal – Whether improper without filing a cross appeal or respondent notice.

APPEAL: Notice of appeal – Amendment of notice – Refusal thereto – Where lower court did not give any reason for refusal to amend notice of appeal – Whether not proper.

APPEAL: Notice of appeal – Where valid – Whether can be amended.

PRACTICE & PROCEDURE: Application for extension of time where lower court refuses application for extension of time without reason – Lower court proceeds to dismiss the entire appeal rather than application – Whether not proper.

PRACTICE & PROCEDURE: Extension of time – Applicant avers ill health of counsel – Averment not controverted – Whether it will be in the interest of substantial justice to allow appeal determined on its merit.

PRACTICE & PROCEDURE: Extension of time – Inadvertence of counsel when viewed within circumstances, exculpating in content is to bend favourably for applicants.

PRACTICE & PROCEDURE: Notice of appeal – Amendment thereof – Whether a valid notice of appeal can be amended at any time where it is not intended to over reach the respondent.

Facts of the matter

The applicants/appellants filed a motion at the Court of Appeal Lagos division, praying the court for the following reliefs:-

(i) An order to amend the notice of appeal
(ii) Leave to raise a new issue on appeal
(iii) Leave to file additional grounds of appeal
(iv) Extention of time to file briefs of argument
(v) Deeming the notice of appeal already filed as properly filed and served
(vi) Deeming the additional grounds filed and as properly filed and served.

On 16th January 2008, the Court of Appeal delivered its ruling in which it held that the record of appeal was transmitted four years ago and the present application was brought four years after the transmission of the record of appeal. It refused the

prayers and dismissed the appeal under the inherent powers of the court.
Being dissatisfied, the appellants/applicants appealed to the Supreme Court.

Held: *(Unanimously allowing the appeal)*

1. *Where respondent filed issues outside grounds of appeal*
In this appeal, the respondent neither filed a cross-appeal nor a respondent's notice. It is therefore not permissible for him to raise an issue not predicated on the ground of appeal filed by the appellants. See: Nzekwu Vs. Nzekwu (1989) 2 NWLR (Pt. 104) 373; Adhekegba Vs. Minister of Defence (2013) 17 NWLR (Pt. 1382) 126. Any issues which are not connected or related to the grounds of appeal are irrelevant, go to no issue and the arguments thereon should be discountenanced by this court. See: SHITTA-BEY VS. A-G FEDERATION (1998) 10 NWLR (PT. 570) 392; AMADI VS. N.N.P.C (2000) 10 NWLR (PT. 674) 76; IBATOR VS. BARAKURO (2007) 9 NWLR (Pt. 1040) 475. *(P12 paras B - E.)*

2. *Effect on arguments where issues do not relate to grounds of appeal*
It is the first issue in the respondent's brief that bears relevance to the complaint laid out in the ground of appeal. The other two issues cannot be said to relate to the ground and so the arguments in those issues have to be discountenanced. *(P13 para B)*

3. *A valid notice of appeal can be amended*
Granted that the respondent had filed a motion dated 8th June, 2006 praying the lower court to strike out the appeal which preceded the appellants' motion of 11th January, 2008, the normal practice of the Court of Appeal is to hear the application which seeks to preserve the appeal rather than take the motion to strike out the appeal. And in considering the application to amend the notice of appeal, the court should examine the original grounds of appeal to see if there is a ground that would sustain the appeal. Once a notice of appeal is valid, it can be amended at any time before the appeal is heard. Such amendment should not be made to overreach the respondent, but only to serve the ends of justice and ensure that the complaints of the appellant against the judgment appealed are laid and ventilated before the court. See: OKPALA VS. IBEME (1989) 2 NWLR (PT. 102) 208; ADELAJA VS. ALADE (1994) 7 NWLR (PT. 358) 537; PHARMATEK IND. PROJECTS LTD VS. OJO (1996) 1 NWLR

(PT. 424) 332 AND F.B.N PLC VS. MAY MEDICAL CLINICS & DIAGNOSTIC CENTRE LTD (2001) 9 NWLR (Pt. 717) 28. *(P 17 paras D - G)*

4. *The lower court did not give any reason for refusal to amend notice of appeal*
No reason whatsoever was given by the lower court in its refusal to allow the appellants to amend the notice of appeal. The reason for the refusal to grant the application was as to the filing of the appellants' brief which was not filed for a period of four years after the appeal had been entered. The refusal should affect only prayer 4 in the motion. Even if the appellants had filed their brief of argument, they were entitled to amend the brief to accommodate the ground for which the notice of appeal was being amended and since they had not filed the appellants' brief they were entitled to an extension of time to file the appellants' brief after filing the amended notice of appeal. There was no justifiable reason for refusing the application in its entirety and further dismissing the appeal. *(P18 paras A - D)*

5. *Court has moved away from technical justice*
The crux of the matter is based on the appellants positing in their affidavit in support of the application for extension of time to file the brief of argument was due to the ill-health of their counsel which assertion was not controverted. This solid undisputed fact taken within the backdrop of the stance of the court including the Supreme Court that the fault of counsel, be it blunder, inadvertence of mistake cannot be an obstacle to a hapless litigant in such a way as to deny him the right to ventilate or defend his case. The reason is because the court has moved away from the realm of technicalities but stands for substantial justice which will enable the court allow the trashing out of all parts of the case and a decision either way made. *(Pp 22 - 23 paras G - C)*

6. *Matter should be determined on merit rather than on technicalities*
It is trite that our courts have moved away from the realm of technicalities to substantial justice. This court in a plethora of decisions has held that matters should rather be determined on their merits and not on technicalities. *See AMAECHI VS. INEC (NO. 3) (2007) 18 NWLR (Pt. 1065) 105; BALONWU VS. OBI (2007) 5 NWLR (Pt. 1028) 488 AT 542.*
In this case, the court below did not give any reason for refusing to allow the appellants to amend the notice of appeal. The appeal was dismissed,

not on the merit. I agree with the appellant's counsel that, what the court below could have done, in extreme term, could have been to dismiss the Motion on Notice filed on 11th January, 2008 and not the appeal itself. *(Pp 24 - 25 paras F - A)*

7. *A valid notice of appeal can be amended at any time*

Again, the position of the law as correctly stated by my learned brother is that once a notice of appeal is valid, it can be amended at any time before hearing as long as such amendment is not intended to overreach the respondent. The learned justices of the court below have not stated their reason for refusing to allow the amendment sought by the applicant and the reason for dismissing the appeal in its entirety. I am therefore of the considered view that justice has not been served the appellants by what transpired at the court below more elaborately recounted in the lead judgment. *(P 25 paras A - C.)*

Representation

I.T.E. Thomas (Esq.) with Agan Tem (Esq.) for the Appellant.
Babajide Ojo (Esq.) with D.O. Ademola (Esq.) for the Respondent

1. ALHAJI MANSUR AHMED
2. MRS. DOROTHY AJIJOLA
3. KADUNA TEXTILES LIMITED
4. H. H. HOLDINGS
(THE REPRESENTATIVES OF DEBANTURE HOLDERS AND OTHER CONTRIBUTORS OF SACRED HEART SCHOOL, KADUNA)

VS

THE REGISTERED TRUSTEES OF ARCHDIOCESE OF KADUNA OF THE ROMAN CATHOLIC CHURCH

SC. 365/2007

IN THE SUPREME COURT OF NIGERIA
HOLDEN AT ABUJA

FRIDAY, 11TH JANUARY, 2019

BEFORE THEIR LORDSHIPS

WALTER SAMUEL NKANU ONNOGHEN	**CHIEF JUSTICE OF NIGERIA**
MUSA DATTIJO MUHAMMAD	**JUSTICE, SUPREME COURT**
JOHN INYANG OKORO	**JUSTICE, SUPREME COURT**
PAUL ADAMU GALUMJE	**JUSTICE, SUPREME COURT**
SIDI DAUDA BAGE	**JUSTICE, SUPREME COURT**

APPEAL: Concurrent findings – Where sound and proper – Whether Supreme Court will not interfere therewith.

CONSTITUTIONAL LAW: Fair hearing – Effect of violation thereof – Whether it is immaterial whether the same decision would have been arrived at without the absence of the departure from the essential principles of justice – The principle in ***Adigun vs. A.G Oyo State (1987) 1 NWLR (Pt.53) 678.***

CONSTITUTIONAL LAW: Fair hearing – Denial thereof – Where appellant deliberately failed to call evidence to prove case – Whether does not amount to breach of fair hearing.

COURT: Fair hearing – Breach thereof – How determined – Whether it is the

impression of a reasonable man on the proceeding that is the determining factor – Principles in ***Idakwo vs. Ejiga (2005) 48 W.R.N. 23.***

LEGAL PRACTITIONERS: Address of counsel – Where appellant did not call evidence but rested his case on the case of respondent – Appellant counsel submitted written address –Whether address of counsel cannot substitute for evidence.

LEGISLATION: Enacted Law – Regulation 5(2) of the Education (General) Regulations 1964, – Validity thereof – Where contravenes S.6(6) a & b and 236 CFRN 1999 – Whether void to the extent of its inconsistency.

PRACTICE AND PROCEDURE: Breach of fair hearing – Where there is breach of principles of fair hearing in a proceeding – Whether a decision arrived thereby is no decision – The principles in ***Adigun vs. A-G, Oyo State (1987) NWLR (Pt. 53) 709.***

PRACTICE AND PROCEDURE: Fair hearing – Application thereof – Whether must be exercised within the framework of the law, regulatory and procedural provisions.

PRACTICE AND PROCEDURE: Fair hearing – Breach thereof – Attitude of appellate court thereto – Whether the appellate court will scrutinize the proceeding to see whether the result of the case would have been the same even if the breach of the principle of fair hearing had not occurred.

PRACTICE AND PROCEDURE: Pleadings – Where evidence is not led in support thereof – Implication – Whether pleadings are deemed abandoned.

PRACTICE AND PROCEDURE: Pleadings – Where not admitted by the opposing party – Whether must be established by evidence – Failure thereto – Effect.

Issues for determination

1. **Whether the right of appellants as to fair hearing has been breached by deliberate choice of not adducing any evidence in support of amended statement of defence which was deemed abandoned.**
2. **Whether in the circumstances of this case the concurrent**

findings and conclusion of the trial High Court and Court of Appeal on ownership or proprietorship of the disputed primary can be disturbed.

3. **Whether the provisions of Regulation 5(1) of the Education (General) Regulations 1964, NNLN 62 of 1964, are capable of ousting the judicial powers and jurisdiction of the High Court of Justice Kaduna State by virtue of the combined effect of Section 6(6)(a) & (b) and 236 of the Constitution of the Federal Republic of Nigeria 1999."**

Facts of the matter

The plaintiffs/appellants filed an action against the defendants/respondents at the Kaduna State High Court in Suit No. KDH/256/84 the action relates to the ownership of Sacred Heart Primary School Kaduna.

At the end of trial, the court dismissed the plaintiff's action. They unsuccessfully appealed to the Court of Appeal Kaduna Division, hence this further appeal to the Supreme Court.

Held: *Unanimously dismissing the Appeal)*

1. *Effect where evidence is not led in support of pleadings*

A party has a choice in the mode and manner of conducting its defence in a suit. What is paramount is that the trial court must have afforded all parties equal opportunity to present or defend their cases. The lead judgment of Jega JCA (of blessed memory) says it all, I quote:

"It is also worthy of note that the appellant filed a one hundred and eleven paragraph averments in their joint statement of defence as amended and claimed seven declaratory reliefs. The appellant never led a dot of evidence to back the one hundred and eleven averments (sic) in their pleadings. It is trite to say that the effect of a failure to lead evidence in support of any averment in pleading is deemed to have been abandoned. See ABUSOMWAN vs. M.B.N LTD (1987) 6 SCNJ 146 at 158; F.C.D.A. vs. Naibi (1990) 3 NWLR (Pt. 138) 270, BALOGUN vs. Amubikanhun (1985) 3 NWLR (Pt. 11) 27, NWABUOKU vs. OTTIH (1961) 1 All NLR 507, AKANBI vs. ALAO (1989) 3 NWLR (Pt. 108) 118."

(Pp 51 - 52 Paras F - C).

2. *Right of fair hearing must be exercised within the frame work of the law,*

regulatory and procedural provisions

The above finding of the lower court is sound and unassailable in law. Rights of the fair-hearing are such that must be exercised within the confines of law, regulatory and procedural provisions as may be applicable to the particular case.

I have taken a great deal of time, efforts and space in this judgment to carefully review and distil facts and arguments of the parties on issue one, being the primary and central in this appeal. To start with, this issue revolves around the cardinal principle of justice – fair hearing. The court has over the years consistently maintained that the principle of fairness is sacrosanct in our judicial system and it must as a matter of constitutional obligation be observed by a judicial umpire. *(P 52 Paras C - F).*

3. *Effect where principles of natural justice have been violated*

The Supreme Court in **ADIGUN vs. A.G, OYO STATE** (1987) 1 NWLR (Pt. 53), page 678 paragraph G, per Obaseki, JSC further had this to say on principles of natural justice;

> **"If the principles of natural justice are violated in respect of any decision, it is indeed immaterial whether the same decision would have been arrived at, in the absence of the departure from the essential principles of justice, the decision must be declared to be no decision."** *(P 52 Paras F - H).*

Per Bage JSC

"The principle of natural justice and fairness are crucial and sacrosanct in our judicial system and adjudicatory functions at all level of the judicial hierarchy. It must as a matter of constitutional obligation be observed by all judicial officers. This is because fairness and natural justice requires that a party to a cause, or a party who ought reasonably to be a party in the suit, must be given the opportunity to put forward his cases or defence freely and fully. See KANO NATIVE AUTHORITY vs. RAPHAEL OBIORA (1959) 4 FSC 226; (1959) SCNLR 577 cited with approval by Iguh, JSC in EKIYOR & ANOR. vs. BOMOR (1997) 9 NWLR (Pt. 519) 1 at 14.

The above reinforces the need to do substantial justice irrespective of provocation or procedural obstacles hurled on the path of a judge on the highway of justice. The principle of fair hearing as enshrined under the Constitution of the Federal Republic of Nigeria, 1999 as amended

(CFRN, 1999) also leaves the court with little choice in ensuring fair-hearing, Section 36(1) of the CFRN, 1999 provides thus:

"In the determination of his civil rights and obligations, including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such manner as to secure its independence and impartiality."

(P 53 Paras A - F).

4. *An unfair method cannot produce a fair result*

The question of fairness of proceedings is quite separate from the question of the merit of the trial court's decision. When a question of fairness of hearing arises in a case, the appellate court has a duty to scrutinize the proceedings to see whether the result of the case would have been the same even if the breach of the principle of fair hearing had not occurred. It is immaterial if, speculatively, the same decision would have been arrived at had the hearing not been tainted by unfairness, this is because, by its application, a breach of fair-hearing leads to the inevitable conclusion that 'an unfair method cannot produce a fair result. The proper thing must be done by sending the case back for re-trial or re-hearing. *(Pp 53 - 54 Paras F - B).*

5. *How to determine whether there is breach of fair hearing*

A judicial proceeding is liable to be set-aside or reversed on the slightest likelihood of bias. This court has a firm and settled position for determining if there is likelihood of bias. In ABIOLA vs. FEDERAL REPUBLIC OF NIGERIA (1995) LPELR-41 as follows, this court held that:

"….In considering whether there was a real likelihood of bias, the court does not look at the mind of the chairman of the tribunal, or whoever it may be, who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would, or did, in fact favour one side at the expense of the other. The court looks at the impression which would be given to other people. Even if he was as impartial as could be, nevertheless, if right minded persons would think that, in the circumstances, there was a real likelihood of bias, on his part, then he should not sit. And if he does sit, his decision cannot stand." Per BELLO, C.J.N (P. 15, paras. A-D)."

The court went further to hold thus;

> **"There must be circumstances from which a reasonable man would think it likely or probable that the justice, or chairman, as the case may be, would, or did, favour one side unfairly at the expense of the other. The court will not enquire whether he did, in fact, favour one side unfairly. Suffice it that reasonable people might think he did. The reason is plain enough. Justice must be rooted in confidence: and confidence is destroyed when right-minded people go away thinking the judge was biased." Per BELLO, C.J.N. (Pp. 15-16, paras. F-A)."**
> *(Pp 54 - 55 Paras A - A).*

6. *Appellant failed to call evidence to prove their pleadings which does not amount to denial of fair hearing*

What transpired in this appeal is that the appellant elected not to call evidence and rested their case on the defence of the respondent. This, in my considered view does not amount to denial of right of fair-hearing as the appellant had wrongly alleged. As rightly held by the lower court, the effect of failure to lead evidence on averments is that the pleadings are deemed abandoned. This is not a new law, and cannot by stretch of imagination amount to a breach of fair-hearing. The trial court did not deny the right to the appellants; if a t all, the appellants "denied" the rights to themselves.

(P 55 Paras B - D).

7. *Counsel's address can never take the place of evidence*

There is enough facts and documentary evidence to show that the respondent adduced credible oral and documentary evidence to establish that the disputed school belongs to the Archdiocese of Kaduna. However, the appellants who made similar claim to the school tendered no evidence but merely rested their case on the defence of the respondent. While admitting that the appellants' counsel made written submission at trial, the law is settled that, counsel's address no matter how sound and logical, should never take the place of evidence. See REYNOLDS CONSTRUCTION CO. vs. R.B.B (1993) 6 NWLR (Pt. 297) 122, at pa 1228; ARCHIBONG vs. EDAK (2006) 7 NWLR (Pt. 980) 485, at page 502.
(P 55 Paras E - G).

8. *Concurrent findings are sound and proper*

Concurrent findings of the two courts below are sound and proper. The Supreme Court will only interfere with concurrent findings of facts made by the trial court and the Court of Appeal where such findings are perverse; or are not supported by the evidence; or are reached as a result of a wrong approach to the evidence; or as a result of a wrong application of evidence; or as a result of a wrong application of any principle of substantive law or procedure. None is the case in the instant appeal. See ARABAMBI vs. ADVANCE BEVERAGES IND. LTD. (2005) 19 NWLR (Pt. 959) 1 Per Onnoghen, J.S.C. (P. 46, C-E). See also OCHIBA vs. STATE 2011 12 SC (Pt. IV) P. 79; per Rhodes-Vivour, J.S.C. (Pp. 51-52, Paras. F-B). See also CAMEROON AIRLINES vs. OTUTUIZU 2011 12 SC (Pt. III) P. 200; OLOWU vs. NIG. Army 2011 12 SC (Pt. II) P. 1; AROWOLO vs. OLOWOOKERE & 2 ORS. 2011 11-12 SC (Pt. II) P. 98.

There are two concurrent finding of facts of the lower courts on the issue in this appeal. It has always been the practice of this court in such circumstances to decline to review the evidence a third time unless there is proof of miscarriage of justice or a violation of some principle of law or procedure, or if the finding is/was perverse. See CAMEROON AIRLINES vs. OTUTUIZU 2011 12 SC (Pt. III) p. 200; OLOWU vs. NIG. Army 2011 12 SC (Pt. II) p.1 AROWOLO vs. OLOWOOKERE & 2 ORS. 2011 11-12 SC (Pt. II) p. 98; OCHIBA vs. STATE 2011 12 SC (Pt. iv) P. 79" Per Rhodes-Vivour, J.S.C. (Pp. 51-52, paras. F-B). *(Pp 55 - 56 Paras H - B).*

It is my considered view that the judgment of the trial court cannot be faulted at all and the lower court was right in affirming and endorsing the findings of the trial court. This court will not ordinarily interfere with the concurrent findings of fact of the lower and trial courts unless it is shown that such findings are perverse and not based on the evidence led and accepted. In this appeal, the appellants have failed to convince me that this is a situation in which this court should interfere. In this case, the decisions and concurrent finings of the trial and lower courts remained unimpeachable. In view of this, I also resolve issue two in favour of the respondent. *(Pp 56 - 57 Paras F - A).*

9. *Effect where law contravenes the constitution*

This issue is somewhat finally settled and may not warrant citing any

legal authorities. The Constitution is the Supreme law of the land. The Constitution confers jurisdiction in the court. By the combined provisions of Section 1(1) and (3) of the Nigerian Constitution, any law or enactment that contradicts the provisions of the Nigeria Constitution shall, to the extent of its inconsistency, be null and void. Thus, the provisions of Regulation 5(1) of the Education (General) Regulations 1964, NNLN 62 of 1964, an existing law, cannot oust the judicial powers and jurisdiction of the High Court of Justice Kaduna State over the first and second claims of the plaintiff, as conferred by Section 6(6)(a) & (b) and 236 of the Constitution of the Federal Republic of Nigeria 1999.

The respondent's contention that, by virtue of Section6(6)(a)&(b) of the Constitution, the High Court is vested with constitutional powers and jurisdiction to hear and determine this suit notwithstanding the provisions of Education Regulation 1964 is sound, logical and valid, being the position of the law. See OLU OF WARRI vs. KPEREGBEYI (1994) 4 NWLR (Pt. 339) 416 and NANGIBO vs. OKAFOR (2003) 14 NWLR (Pt. 839) at 78. *(P 57 Paras C - G).*

10. *Attitude of Supreme Court to concurrent findings*

The findings of facts by the trial court was affirmed on appeal to the court below. It is therefore a case of concurrent finding of facts by the courts below.

Appellant, in urging the court to disturb the said concurrent finding assumed an uphill task. He failed to discharge the burden of showing sufficient evidence for the court to interfere with the finding. See Njoku & Ors. vs. Eme & Ors. 5 (1973) 8 SC. 366 at 306 Kule vs. Coker (1982) 12 SC 252 a t 271.

There is no reason assigned by learned counsel for appellants that the current findings are either perverse, or there is a substantial error in substantive or procedural law, which, it left uncorrected, will lead to injustice. See LOKOYI & Anor vs. OLOJO (1983) 14 SC 386. *(P 58 Paras D - F)***.**

Per Muhammad (JSC)

"It must be stressed that pleadings that have not been established by credible evidence are deemed abandoned. They go to no issue. See Miss Ezeanah vs. Alhaji Attah (2004) 2 SCNJ 200 at 235, Newbreed Org Ltd vs. Erhomosele (2006) 1984 (SC).

In the case at hand the trial court gave the respondent judgment on the basis of its pleadings and the evidence adduced in

proof thereof. The appellants as defendants chose not to lead evidence in proof of their pleadings. The lower court is right to have equally discountenanced the pleadings the appellants chose to rely on same not having been supported by evidence. See Jolayemi & Ors vs. Alaoye & Anor (2004) LPELR-1625 (SC) and Ademeso vs. Okoro & Ors (2005) LPELR-121 (SC).

Having themselves abandoned their cause. It is disingenuous for the appellants to accuse the two courts below of having breached their right to fair hearing. Their right under Section 36 of the 1999 Constitution requires that they be given the opportunity to state their case and no more. If they choose to abandon their cause after the opportunity has been extended to them they cannot, as it has now turned out, to legitimately make a case of breach of their right to fair hearing against the courts. The issue of fair hearing is not a dogma. It remains a question of fact which in the instant case has not been made out by the appellants. The facts on record show clearly that parties were given equal opportunity to put their case to the court before judgment was given. On that note the appeal must fail. See Pam & anor vs. Mohammed & anor (2008) LPELR-2895 (SC) and The Federal Government of Nigeria & ors vs. Zebra Energy Ltd (2002) 18 NWLR (Pt. 798) 162.

It is for the foregoing and mo re so the fuller reasons contained in the lead judgment that I also dismiss the appeal. I abide by the consequential orders reflected in the lead judgment. *(Pp 59 - 60 Paras B - A).*

11. Pleadings must be established by evidence

It is trite that pleadings are suggestion of counsel. They are not receivable as or tantamount to evidence. Indeed, the position of the law is that averments in pleadings, unless admitted by the opposite party must be established by evidence failing which they must be discountenanced as unsubstantiated for they cannot be construed as evidence. See *Odunsi vs. Bamgbala (1995) 1 NWLR (Pt. 374) 641 at 656-657; Akanmu vs. Adigun (1993) 7 NWLR (Pt. 304) 218 at 231 Akinfosile vs. Ijose (1960) 1 CNJ 129. In the case of Balogun vs. Amubikanhun (1989) 3 NWLR (Pt. 107) 18 SC,* this court held that:

"Averments in pleadings do not constitute evidence or proof. There is need to prove averments contained in a pleading by evidence unless otherwise admitted. Where no evidence is produced in support of pleading, the facts are deemed abandoned". **That being said, I am of the considered view, that the learned trial judge was right in law to**

grant the respondents' reliefs, same not being controverted by any evidence led by the appellants. In law, the appellants are deemed to have abandoned their pleadings having not led any form of evidence to support same. *(Pp 60 - 61Paras F - C).*

12. Appellant were not denied fair hearing

I agree with my learned brother, Bage, JSC that the decision of the learned trial judge, upheld by the court below does not amount to denial of appellants' right of fair-hearing neither does it occasion a miscarriage of justice. It is true, and I so hold that the trial judge did not deny the appellants' right to fair-hearing. They, on their own, abandoned their pleadings and rested their case on that of the respondent. They cannot blame any other person but themselves.

It is trite that this court will only interfere with or review the concurrent findings of facts of lower courts where there is proof that such finding of facts is perverse or there is a miscarriage of justice or there is a wrong application of any principle of law or procedure. In the instant case, I cannot find anywhere in the entire judgment of the learned trial judge, upheld by the court below, where the learned trial judge misapplied the law to render the judgment perverse or occasion a miscarriage of justice.

(P 61Paras D - G).

Representation

O. Benson with O.B. Osunbade, for the Appellant.

S. Atung with D. Toro, Q.E. Sylvester, for the Respondent.

CHIBUIKE OFORDIKE
VS
THE STATE

SC. 695/2016

IN THE SUPREME COURT OF NIGERIA
HOLDEN AT ABUJA

FRIDAY, 11TH JANUARY, 2019

BEFORE THEIR LORDSHIPS

WALTER SAMUEL NKANU ONNOGHEN	**CHIEF JUSTICE OF NIGERIA**
MUSA DATTIJO MUHAMMAD	**JUSTICE, SUPREME COURT**
KUMAI BAYANG AKAAHS	**JUSTICE, SUPREME COURT**
JOHN INYANG OKORO	**JUSTICE, SUPREME COURT**
CHIMA CENTUS NWEZE	**JUSTICE, SUPREME COURT**

APPEAL: Concurrent findings – Where appellant failed to discharge the onus of disproving concurrent findings – Effect.

APPEAL: Issues for determination – Where arguments are preferred which are not part of the issues formulated – Whether such arguments should be discountenanced.

CRIMINAL LAW & PROCEDURE: Confessional statement - Where objected to – Whether to conduct trial within trial – Purpose thereof.

CRIMINAL LAW & PROCEDURE: Rape – Corroboration thereof – Court can convict on the uncorroborated evidence of the prosecutrix in rape cases – Whether it is desirable that such evidence be corroborated in order to confirm in some material particulars.

CRIMINAL LAW AND PROCEDURE: Armed Robbery – Elements thereof – What prosecution must prove.

CRIMINAL LAW AND PROCEDURE: Confessional statement – Objection thereto – Where accused denies that he did not make a confessional statement – Whether in the circumstances trial within trial is not necessary.

CRIMINAL LAW AND PROCEDURE: Conspiracy – Proof thereof – Whether can be inferred from the conduct of the parties

CRIMINAL LAW AND PROCEDURE: Conviction – Confessional Statement of an accused – Court can convict based on the confessional statement of the accused alone – Requirement thereof.

CRIMINAL LAW AND PROCEDURE: Conviction – Evidence of a sole witness – Whether court can convict thereon.

CRIMINAL LAW AND PROCEDURE: Rape – Ingredients thereof – What prosecution must prove.

CRIMINAL LAW: Conspiracy – Meaning and Purport thereof.
WORDS AND PHRASES: Confessional statement – Meaning and nature.

Issues for determination

1. ***Whether the court below was right to uphold the appellant's conviction for conspiracy when the prosecution failed to discharge the burden of proof required by law to establish the offence of conspiracy.***
2. ***Whether the court below was right to uphold the appellant's conviction on the three counts for which he was charged based on exhibit A, his purported confessional statement, in all the circumstances.***
3. ***Whether the Court of Appeal was right when it upheld the appellant's conviction for armed robbery and attempted rape when the elements of both offences were not established by cogent evidence.***

Facts of matter

The accused appellant was charged on a three count of rape and armed robbery and conspiracy. It was alleged that the accused robbed Mrs. Dora Karawe who was on her way to Adult School of eth sum of 2,000 and dragged her to a nearby bush, where he raped her.

The accused was arrested and charged to the High Court. At the end of trial, the court convicted the accused/appellant and sentenced him to 10 years' imprisonment with hard labour, death by hanging and seven years' imprisonment with hard labour.

Aggrieved with the judgement of the trial court, the appellant unsuccessfully appealed to the Court of Appeal, hence this further appeal to the Supreme Court.

Held: *(Unanimously dismissing the appeal)*

1. *The meaning and purport of conspiracy*

Generally, conspiracy is an agreement by two or more persons to commit an offence or do an unlawful act, coupled with an intent to achieve the agreement's objective and action or conduct which furthers the agreement. The Oxford Advance Learners Dictionary 6th Edition also defines conspiracy as "a secret plan by a group of people to do something harmful or illegal."
(P 93 Paras C - D).

2. *Conspiracy can be inferred from the conduct of the parties*

In a charge of conspiracy, proof of actual agreement is not always easy to come by as such agreements are hatched in secrecy. Thus a trial court can infer conspiracy and convict on it if it is established to its satisfaction that the accused persons, pursued, by their acts, the same object, one performing one part of the act and the other performing the other part of the same act so as to complete their unlawful design. The offence of conspiracy is complete once a concluded agreement exists between two or more persons that share a common criminal purpose. It is immaterial that the persons had not met each other and concluded, an agreement can be inferred from what each person does or does not do in furtherance of the offence of conspiracy. See Adeleke vs. State (2013) 16 NWLR (Pt. 1381) 556, Oduneye vs. State (2001) 2 NWLR (Pt. 697) 311, (2001) LPELR-2245 (SC), The State vs. Salawu (2011) 18 NWLR (Pt. 1279) 580. *(P 93 Paras E - G).*

Per Okoro (JSC)

"In the instant appeal, the PW1 gave evidence of how the appellant and one other accosted her and robbed her of her bag and stole the sum of N2,000.00 in the bag at gun point and because the amount of money was not much the appellant decided to rape her in addition. The other accused person called Gedu raped her first while the appellant watched the road for him. Thereafter, the appellant took his turn but was cut short as passerby arrived the scene due to the alarm raised by the PW1. The PW1 and others pursued them and the appellant was arrested about 200 yards from the scene. He was then taken to the police station.

In Exhibit A, the confessional statement of the appellant, he gave a graphical account of how the offence was hatched and executed. Both the evidence of the prosecution witness i,e PW1 and

the confessional statement of the appellant (Exhibit A) clearly show that both the trial court and the court below were right in holding that the offence of conspiracy was proved against the appellant. All the acts performed by the appellant and Gedu were done in furtherance of the agreement to commit armed robbery and rape. They not only planned the robbery and rape, they actually performed it. As was rightly submitted by the learned counsel for the respondent, the totality of evidence assembled and the evaluation of same, leaves no modicum of doubt that there was indeed a meeting of the minds of the appellant and Gedu and an agreement manifested by their overt acts of robbing PW1 with a gun and broken bottles and also rapping her. I agree with the court below that the offence of conspiracy to commit armed robbery and rape as found by the trial court and affirmed by the court below was proved beyond reasonable doubt against the appellant". *(P 94 Paras A - G)*

3. *Arguments not part of an issue should be discountenanced*

This issue relates to whether Exhibit A, the confessional statement of the appellant was rightly admitted and relied upon. Therefore, all the arguments by the learned counsel for the appellant in respect of failure to call the IPO to testify and failure to produce the short gun and broken bottles go to no issue and is accordingly discountenanced as they were not part of this issue. *(P 96 Paras C - D).*

4. *The meaning and nature of a confessional statement*

The law is well settled on issues relating to admissibility or otherwise of confessional statements by accused persons. A confessional statement is a statement by an accused person which unequivocally confesses to the commission of an offence charged. Such a statement to be of any probative value, must be clear, precise and unequivocal. It must also be direct, positive and should relate to the accused person's own acts, knowledge or intention, stating or suggesting the inference that he committed the crime charged. See Akpan vs. The State (1992) 7 SCNJ 22, Yusuf vs. State (1976) 6 SC 167, Magaji vs. The Nigerian Army (2008) 8 NWLR (Pt. 1089) 338.

Where a confessional statement is voluntarily made, it is the best evidence which the trial court can rely to convict an accused person. But in most cases, at the trial, accused persons raise objection ranging from that they did not make the said statement or that they were coerced to make it or that they did not sign it. These are issues that are usually raised in court on a daily basis. *(P 96 Paras D - G).*

5. *The purpose of trial within trial*

The law is trite that in circumstance where the prosecution seeks to tender the confessional statement of an accused person and it is objected to and challenged on the ground that it was not made voluntarily, a trial within trial is conducted for the sole purpose of finding out if the statement was made voluntarily or whether the confessional statement was extracted from the accused by force or threat of punishment or by any form of inducement. If at the end of the trial within trial the trial judge is satisfied that the confessional statement was not voluntary, such a statement is not admissible in evidence. If on the other hand the statement is adjudged voluntarily made, it is admitted in evidence. In both cases the trial judge should rule on it accordingly and that brings the trial within trial to an end and the main trial continues. See Ibeme vs. The State (2013) 10 NWLR (Pt. 1362) 333, Solola & anor vs. State (2005) 11 NWLR (Pt. 937) 460, Federal Republic of Nigeria vs. Iweka (2013) 3 NWLR (pt. 1341) 285.

In the instant case, when the prosecution was to tender the confessional statement of the appellant, his counsel made the following statement at page 30 of the record of appeal:-

> ***"I object firstly, he said he did not sign the document and secondly he made a statement which was not read to him. It will be necessary to make further enquiry before it can be admitted."***

To the above request, the learned trial judge did not oblige but went ahead to admit the statement which was marked as Exhibit A. As was rightly held by the court below, that objection raised by the learned counsel for the appellant was not suggestive of any fact that the statement was involuntarily made by the appellant or that he was coerced into making same. What the learned counsel clearly projected was a total denial of the statement. There was no allegation of any brutality, coercion, threats or promise/inducement of any sort against the investigating police officer at the time he made the statement. *(P 97 Paras A - H).*

6. *When a trial within trial is not necessary*

The learned counsel for the respondent made it clear that denial of making a confessional statement is not synonymous with alleging that it was involuntarily made which I agree totally. This much was held by the court below in its judgment as found on page 139 of the record as follows:-

"In this appeal under consideration, it is clear on record that the appellant did not through his counsel and during the trial, particularly at the point when the prosecution applied to tender the said confessional statement object to its admissibility on the grounds that it was involuntarily made or obtained from him with coercion or as a result of threat to his life or promise of any advantage ….. In view of the foregoing a trial within trial is unnecessary and the trial court was right in its judgment." *(P 98 Paras A - D).*

Per Okoro (JSC)

"I agree entirely with the position taken by the court below because, as I have stated above, a trial within trial is necessary where the voluntariness of the making of a confessional statement by an accused person is in issue or raised by an accused person or his counsel. Where an accused person admits making the statement but contends or asserts that he did not make it voluntarily, but under duress or some other alleged influence, then a trial within trial will be conducted.

Where however as in this case, the objection to the admissibility in accused confessional statement is based on the grounds that it was not read over to him and that he did not make it, the statement is treated as a voluntary statement and is admissible without the court holding a trial within trial which is necessary only where the issue of involuntariness is raised. See Onyenye vs. The State (2012) 15 NWLR (Pt. 1324) 586 at 619 paragraphs A – C where this court set out the circumstances and effect of confessional statements obtained by duress and those merely retracted as follows:-

1. **Where the accused has clearly expressed his ordeal in the process of obtaining the statement accredited to him in effect that it was obtained by force, tricks or undue influence or any non-recognizable legal ways, there would be need for a trial within trial.**
2. **Where the accused retracted his confessional statement on the ground that it was not read to him before he signed it or that he never made it at all, the requirement of a trial within trial is not applicable.**

Learned counsel for the appellant compared the evidence of the appellant at the trial court in respect of the statement he made to the

police and the statement of objection made by his counsel when the prosecution applied to tender the said confessional statement during cross examination of the appellant. On page 30 of the record, both the cross examination of the appellant and the objection by his counsel can be clearly indentified. The appellant's answer to questions put to him by the prosecution is to the effect that he made a statement to the police but that it was not confessional. *(Pp 98 - 99 Paras D - E).*

7. Where a trial within trial is not necessary

Learned counsel also objected to the tendering of the statement alleging that the police did not read the statement to the appellant and that he did not sign it. This is clearly different from saying that he made a confessional statement under duress. Here, the appellant is saying he did not make a confessional statement at all. I agree therefore with the lower court which upheld the decision of the trial court that a trial within trial was not necessary. I also agree that the lower court was right when it affirmed the admission and reliance on the statement of the appellant as part of evidence against him. This issue is also resolved against the appellant. *(P 99 Paras E - G).*

8. Court can convict on the evidence of a sole witness

The law is trite that unless where the law prescribes otherwise, there can be a conviction based on the evidence of a sole witness. Such evidence of a sole witness must be cogent, strong, credible and reliable before a court can rely on it to found a conviction. See Oduneye vs. The State (2001) 2 NWLR (Pt. 697) 311, Abogede vs. State (1996) 5 NWLR (Pt. 448) 270 at 280, Ighalo vs. The State (2016) LPELR-40840 (SC).

Ordinarily, the credibility of evidence does not depend on the number of witnesses who testify on a particular issue, but, it depends on whether the evidence of a single witness is believable and accepted by the court and if so believed by the court, then it is sufficient to ground a conviction. See Ali vs. The State (1988) 1 NWLR (Pt. 68) 1, Lase vs. The State (2017) LPLER-42468 (SC), Abogede vs. The State (1996) 4 SCNJ 227.

Looking at the evidence of the only witness i.e PW1, it is very clear that she gave her evidence of what happened to her for which she gave a vivid and unshakeable evidence of what each accused did to her within the period the crime lasted. When her evidence is weighed and/or compared with the confessional statement of the appellant, one does not have any reason to fault the decision of the

learned trial judge.
(P 104 paras A - F)

9. *Accused can be convicted based on his confessional statement alone*

I have already stated in the second issue that the confessional statement of the appellant i.e Exhibit A was properly adopted and relied upon by the learned trial judge as affirmed by the court below. The law is also trite that an accused person can be convicted based on his confession alone. In such situation, there is however the need to test the truth of the confession in the light of other credible evidence before the court. Such test as enunciated in the case of R. vs. Skyes (1913) 8 CAR page 233 may include the following:-

1. **Whether there is anything outside the confession to show that it is true.**
2. **Whether it is corroborated.**
3. **Whether the statement made in it are in fact true as far as they can be tested.**
4. **Whether the accused had the opportunity of committing the crime.**
5. **Whether the confession is possible.**
6. **Whether it is consistent with other facts which have been ascertained and which have been proved.**

See also Onyenye vs. The State (supra), Alarape vs. The State (2001) 5 NWLR (Pt. 705) 79, Dawa & anor vs. The State (1980) S 236 page 267. *(Pp 105 - 106 Paras F - D).*

10. Elements of armed robbery

The law is very trite that in a charge of armed robbery, the prosecution must prove that:-

1. **There was robbery or series of robberies.**
2. **That the robbery or each robbery was an armed robbery.**
3. **That the accused was one of those who took part in the armed robbery.**

See **Afolalu vs. The State (2010) 16 NWLR (Pt. 1220)** page **584, Ikaria vs. The State (2014) 1 NWLR (Pt. 1389) 639, Agugua vs. The State (2017) LPLER-42021 (SC).**

From the evidence of PW1 and the confessional statement of the appellant, the three ingredients of the offence of armed robbery are complete. *(Pp 106 - 107 Paras F - A).*

11. *The ingredients of rape*

On the conviction for attempt to commit rape, it is trite that where an accused person is prevented from committing the complete offence, a conviction for attempt to commit the offence may be sustained. To succeed on a charge of rape, the prosecution must lead evidence to prove the following:-

1. **That the accused had sexual intercourse with the prosecutrix.**
2. **That the act of sexual intercourse was done without the consent or that the consent (if any) was obtained by fraud, force, threat, intimidation, deceit or impersonation.**
3. **That the prosecutrix was not the wife of the accused.**
4. **The accused had the means rea, the intention to have sexual intercourse with the prosecutrix without her consent or that the accused acted recklessly not caring whether the prosecutrix consented or not.**
5. **That there was penetration** See **Afor Lucky vs. The State (2016) LPELR-40541 (SC), Ezigbo vs. The State (2012) 16 NWLR (Pt. 1326) 318.** *(P 107 Paras A - F).*

Per Okoro (JSC)

"However, where an accused person is prevented from committing the complete offence, a conviction for attempt to commit the offence may be sustained. The last act by the accused person immediately before the main act that would have resulted in the commission of the offence is an attempt to commit the offence. In the instant case, although the PW1 stated that the appellant actually penetrated her, the appellant in Exhibit A said he was about to penetrate. The learned trial judge gave him the benefit of the doubt in view of the fact that both PW1 in her testimony before the court and in Exhibit A the confessional statement of the appellant, it is clearly shown that the appellant's penis could not attain erection immediately but had to be caressed by PW1 before it kick started like the old Moris Minor Lorry which had to be wound up as generator to start the engine. In the process, Gedu gave signal that "yawa don gas" meaning "alarm don blow". At that stage he put on his dress and joined Gedu to escape. Unfortunately for him, he was pursued and arrested. He joined Gedu to drag the PW1 into the bush, joined in tearing the lady's dress and pant, watched the environment for Gedu to rape the PW1 and thereafter "climbed" her only to experience low current. Had Gedu not signal him of persons coming to the rescue of the PW1, the appellant could have completed the act of rape. He was, in my

opinion properly convicted of attempt to commit rape. The court below was also right to affirm his conviction for attempted rape. *(Pp 107 - 108 Paras F - D).*

12. *Appellant was properly convicted for armed robbery and attempted rape*
Learned counsel for the appellant had argued that since the learned trial judge rejected the evidence of PW1 that there was penetration, he ought not to have convicted the appellant for attempted rape. I think the said argument is puerile. The appellant stated in Exhibit A that he "climbed" PW1 to have sex with her only that his penis could not attain erection immediately. The PW1 said that she helped to kick start the penis out of fear. For me, had the learned trial judge convicted the appellant for rape, I will have no problem because the PW1 who is the owner of her body testified that there was penetration. That notwithstanding, I am satisfied to agree with the court below that the learned trial judge was right to convict the appellant for the offence of armed robbery and attempted rape. The prosecution had no business calling many witnesses having been satisfied that the case could be proved with the evidence of the sole witness and the confessional statement of the appellant. This issue is also resolved against the appellant.

In summary, I hold that there is no merit in this appeal. It is accordingly dismissed. I affirm the judgment of the lower court delivered on 14th June, 2016 in Appeal No. CA/B/57C/2011. *(Pp 108 - 109 Paras D - A).*

13. *Appellant failed to discharge onus of disproving concurrent findings*
The learned trial judge made findings of fact and applying the relevant law, convicted the appellant. The Court of Appeal affirmed the decision of the trial court. By this appeal appellant invites the court to disturb the concurrent findings of the trial court and affirmed by the lower court. He has failed to demonstrate a substantial case in substantive or procedural error which, if not corrected, will lead to injustice. See LOKOJI & ANR. vs. OLIJO (1983) 8 SC. 61 at 68. There is no showing that the concurrent findings are perverse or not based on evidence before the court. *(P 110ParasC - E).*

14. *It is desirable to corroborate the evidence of prosecutrix on rape*
I wish to add for emphasis that although corroboration is not essential to secure conviction in an offence of rape and the evidence

kick start the penis out of fear. For me, had the learned trial judge convicted the appellant for rape, I will have no problem because the PW1 who is the owner of her body testified that there was penetration. That notwithstanding, I am satisfied to agree with the court below that the learned trial judge was right to convict the appellant for the offence of armed robbery and attempted rape. The prosecution had no business calling many witnesses having been satisfied that the case could be proved with the evidence of the sole witness and the confessional statement of the appellant. This issue is also resolved against the appellant.

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14. *It is desirable to corroborate the evidence of prosecutrix on rape*

I wish to add for emphasis that although corroboration is not essential to secure conviction in an offence of rape and the evidence of a sole witness, in this case the prosecutrix, is cogent, strong and credible would suffice; nevertheless it is desirable that such evidence be corroborated in order to confirm in some material particulars, not only that the offence has been committed but that it was the accused who committed it. See: Iko vs. State (2001) 14 NWLR (Pt. 732) 221; Ogunbayo vs. State (2007) 8 NWLR (Pt. 1035) 157.

The retracted confessional statement Exhibit "A' of the appellant provided the desired corroboration. The evidence of PW1 also corroborates Exhibit "A". *(P 110 paras B - D)*

Per Okoro (JSC)

"From the evidence of PW1, the appellant was arrested about 200 yards from the scene of the robbery which was not far from where she was raped by the appellant and the co-conspirator, Gedu.

The appellant admitted extorting N40 from the prosecutrix before taking her to the bush to rape her. It was his co-conspirator, Gedu who first raped the prosecutrix while he kept watch to alert Gedu of anyone approaching the scene and it was when he took his turn to rape the prosecutrix that the intruder came. While Gedu escaped, he was not that lucky.

The learned trial judge reviewed the evidence both oral and documentary which was adduced at the trial and held that the testimony of the prosecutrix is the same in all material particulars with Exhibit "A" which he found to be a confessional statement. He considered the credibility of the evidence of PW1 and concluded that the evidence was credible and from the demeanour she displayed in the witness box, she was frank and forthright. The identity of the appellant was not in issue since he was caught whilst his accomplice escaped. These findings could not be faulted on appeal. The lower court found that a court of law can act on the evidence of a single witness if such witness is believed and the case is established beyond reasonable doubt and proceed to convict the accused on it. The lower court found that the confessional statement Exhibit "A" was correctly admitted in evidence and relied upon by the trial court.

The failure to call the IPO to testify and be cross-examined by the defence and the non-tendering of the torn skirt, knicker and pant used by PW1 did not diminish the evidence called by the prosecution and so the conviction of the appellant for conspiracy to commit robbery, robbery and attempted rape based on Exhibit "A' and the evidence of the victim of the robbery was well made out.

The appeal therefore is devoid of merit. Consequently I endorse my learned brother, Okoro JSC's order dismissing the appeal and affirming the conviction for armed robbery, conspiracy to commit robbery and attempted rape together with the sentences passed by the trial court in Charge No. EHC/52C/2005 and affirmed by the lower court in appeal No. CA/B/57C/2011 on 14 June, 2016. The appeal is accordingly dismissed". *(Pp 110 - 111 Paras D - F).*

Per Nweze JSC

"My Lord, Okoro JSC, obliged me with the draft of the leading judgment just delivered. I agree with His Lordship that this appeal is devoid of merit and should, therefore, be dismissed.

This contribution is limited only to the answer to the question of the distinction between an allegation of involuntariness of a confessional statement and a denial of its authorship: a distinction which has been made several times yet counsel keep bringing it up.

The lower court's approach to this question at page 139 of the record, although, correct is tedious and dreary. I have thus decided to restate it here.

It is a positive rule of our accusatorial jurisprudence that no statement of an accused person is admissible against him unless it is shown by the prosecution to have been made voluntarily. This principle is as old as the Laws received from England. In England, the principle is as old as Hale, *Gbadamosi and Anor vs. State (1992)* LPELR-SC. 290/1991, citing *Ibrahim vs. R.* (1914) AC, 609; *Ikpasa vs. State*[1981] 12 SC 300, 29; *John Dawa and Anor vs. State* (supra) at 258; *Auta vs. State* [1975] 1 Al NLR 163, 169.

The question of involuntariness, often, arises where an accused person alleges that he was subjected to torture in the making of a confessional statement. In other words, though, he made the statement, it was not product of his free will since he was forced to make it, *Mbang vs. State* [2013] 7 NWLR (Pt. 1352) 48; *Ibeme vs. State* [2013] 10 NWLR (Pt. 1362) 333; *Olatunbosun vs. State* [2013] 17 NWLR (Pt. 1382) 167.

In this sort of situation, the trial court is under obligation to conduct a trial-within-trial (also known as *voire dire* or mini trial) to determine the veracity or otherwise of the claim. As this court (per Nweze, JSC) explained in *Dairo vs. FRN* (2015) LPLER-24303 (SC) 44 – 45; C-F:

….the *raison d'etre* of the evolution of the mini trial or *voire dire* procedure is to arm the trial court with a procedural mechanism for sifting the chaff of involuntary, and, hence, inadmissible evidence from the wheat of admissible evidence whose cogency and probative value are indubitable. The cases on this point are legion: they are countless. Only one or two of them will be cited here, *Ogudo vs. The State* [2011] 12 SC (pt. 1) 71; *Ibeme vs. The State (2013)* LPELR-2013 (SC); *Auta vs. State* [1975] 4 SC 125; *Effiong vs. State* [1998] 8 NWLR (Pt. 562) 362; *Lasisi vs. State* (2013) LPELR-2018 (SC) 29; *The State vs. Rabiu* (2013) LPELR-1998 (SC); *Ogudu vs. The State* (2011) LPELR-860 (SC); *Nwangbomu vs. State* [1994] 4 NWLR (Pt. 327) 380; *Ogunye vs. State* [1999] 5 NWLR (Pt. 604) 548, 570.

Scholars are, also, unanimous on this issue, I.H. Dennis, *The Law of Evidence* [Second Edition] (London: Sweet and Maxwell, 2002)184; L.O. Aremu, "The Voluntariness of Confessions in Nigerian Law, *"in 1977 – 1980 Nigeria Law Journal,* 32;' J. Amadi, *Contemporary Law of Evidence in Nigeria* [Vol. 1] (Port Harcourt: Pearl Publishers, 2011) 324; M.A. Owoade, "Voluntariness of Confession in Nigeria Law – Need for Reform, "in 1987 *Nigerian Current Law Review* 179.

On the other hand, a retraction or denial of a confessional statement does not affect its admissibility, *Mbang vs. State* (supra). In other words, where an accused person denies his confessional statement, the trial court has no obligation to conduct a trial within trial, *Mbang vs. State* (supra); *Abdullahi vs. State* [2013] 11 NWLR (Pt. 1366) 435.

This has long been settled in the very old cases of *R. vs. Sapele and Anor* (1952) 2 FSC 74; *R. vs. Itule* (1961) All NLR 462; the relatively old decisions of *Ikpasa vs. The State* [1981]12 SC 300; *Akpan vs. State* (1992) LPELR-381 (SC) 36; *Osakwe vs. State* [1994] 2 SCNJ 57; *Nwangbomu vs. The State* [1994] 2 NWLR (Pt. 327) 380; *Bature vs. State* [1994] 1 NWLR (Pt. 320) 267; *Eragna and Ors vs. The AG, Bendel* (1994) LPELR-(SC) 30; *Idowu vs. State* [1998] 11 NWLR (Pt. 574) 354; as well as the more recent decisions of *Silas Sule vs. State* (2009) LPELR- 3125 (SC) 28-30, G-B; *FRN vs. Iweka* (2011) LPELR-9350 (SC) 53; *Oseni vs. The State* (2012) LPELR-7833 (SC) 22 – 23. *(Pp 111 - 114 paras G - B)*

Per Nweze (JSC):

"As has been well-settled, a confession, if voluntary, is deemed to constitute a relevant fact as against only the person who made it, hence, it is admissible against that person, only, *Nsofor vs. State* [2004] 18 NWLR (Pt 905) 292; *Lasisi vs. State* [2013] 9 NWLR (Pt. 1358) 74; *Saidu vs. State* [1982] 4 SC 41; *Adebayo vs. AG, Ogun State* [2008] 2 SCNJ 352.

As a corollary, the courts are bound to reject an accused person's confession which eventuated from torture, duress, threat or inducement, *Ehot vs. State* [1993] 4 NWLR (Pt. 290) 644; *Nwosu vs. State* [1986] 4 NWLR (Pt. 35) 348; *Odeh vs. FRN* [2008] 13 NWLR (Pt. 1103) 1. The only process of determining the voluntariness of a confession is through a trial-within-trial, *Mbang vs. State* [2013] 7 NWLR (Pt. 1352) 48, 72. This is, also, the only process of testing the admissibility of a confession where it is challenged on the grounds of threat, undue influence, duress etc, *Nsofor vs. State* [2004] 18 NWLR (Pt. 905) 292; *Auta vs. State* [1975] 4 SC 125; *Gbadamosi vs. State* [1991] 6 NWLR (Pt. 196) 182.

As indicated earlier, a retraction or denial of a confessional statement does not affect its admissibility, *Mbang vs. State* (supra). In other words, where an accused person denies his confessional statement, the trial court has no obligation to conduct a trial within trial, *Mbang vs. State* (supra); *Abdullahi vs. State* [2013] 11 NWLR (Pt. 1366) 435; *R. vs. Sapele and Anor* (supra); *R. vs. Itule* (supra); *Ikpasa vs. The State* (supra); *Akpan vs. State* (supra); *Osakwe vs. State* (supra); *Nwangbonu vs. The Sate* (supra); *Bature vs. State* (supra); *Eragna and Ors vs. The AG, Bendel* (supra); *Idowu vs. State* (supra); *Silas Sule vs. State* (supra); *FRN vs. Iweka* (supra); *Oseni vs. The State* (supra).

In the latter situation, that is, where an accused person retracts or resiles from his confessional statement, the trial court would be, perfectly, right to admit it and determine the weight to be attached to it in its judgment. For this purpose, it [the trial court] would, consider issues, such as the ones indicted hereafter.

They are: whether there is anything outside the confession which may vindicate its veracity; whether it is corroborated in any way; whether its contents, if tested, could be true; whether the defendant had the opportunity of committing the alleged offence; whether the confession is possible and the consistency of the said confession with other facts that have been established, *Osetola and Anor vs. The State* (2012) LPELR-9348 (SC) 32 – 33 G-D; *Kareem vs. FRN* [2002] 7 SCM 73; *Akpan vs, The State* [2001] 11 SCM 66.

These principles which were enunciated in *R. vs. Sykes* (1913) 8 C.A.R. 233, 236 have been, consistently, endorsed by our superior courts, *Kanu vs. the King* (1952) 14 WACA 30; *The Queen vs. Obiasa* (1962) 2 All NLR 645; [1962] 1 SCNLR 137; *Obosi vs. The State* (1965) NMLR 119; *Onochie and Ors vs. The Republic* (1966) NMLR 307; *Jafiya Kopa vs. The State* (1971) 1 All NLR 151 *Dawa vs. The State* [1980] 8 -11 Sc 236; *Ejinima vs. The State* [1991] 5 LRCN 1640, 1671; *Arthur Onyejekwe vs. The State* [1992] 4 SCNJ 1, 9; [1992] 3 NWLR (Pt. 230) 444; *Aiguoreghian and Anor. vs. The State* [2004] 3 NWLR (Pt. 860) 367; [2004] 1 SCNJ 65; [2004] 1 SC (Pt. 1) 65. *(Pp 114 - 115 Paras B - G).*

Representation

Chijioke O.P. Emeka (Esq.) with S.T. Oyerinde (Esq.) for the appellant.

O.F. Enenmo (Esq.) Director Appeals Delta State Ministry of Justice with Charles O. Agbagwu Asst. Director and E.E. Erebe Chief State Counsel for the Respondent.

FRANK AMAH

VS

FEDERAL REPUBLIC OF NIGERIA

SC. 567/2016

IN THE SUPREME COURT OF NIGERIA
HOLDEN AT ABUJA

FRIDAY, 11TH JANUARY, 2019

BEFORE THEIR LORDSHIPS

MARY UKAEGO PETER-ODILI	**JUSTICE, SUPREME COURT**
OLUKAYODE ARIWOOLA	**JUSTICE, SUPREME COURT**
KUDIRAT MOTONMORI OLATOKUNBO KEKERE-EKUN	**JUSTICE, SUPREME COURT**
AMIRU SANUSI	**JUSTICE, SUPREME COURT**
EJEMBI EKO	**JUSTICE, SUPREME COURT**

ACTION: Preliminary objection thereto – Procedural Defect – Whether to be raised at the preliminary stage of proceedings.

CONSTITUTIONAL LAW: CFRN 1999 (as amended) – S. 174 (1) b & c thereof – Power of the Attorney – General to initiate criminal proceedings – Whether not exclusive to his office.

CONSTITUTIONAL LAW: CFRN 1999 as amended – Ss. 174 (1) B & C and 211 thereof – Powers of the Attorney – General of the Federation and of the state – Whether the power to institute criminal proceedings is not exclusive to the office of the Attorney – General – The principle in ***Saraki vs. FRN (2016) 3 NWLR (Pt. 1500)531.***

CONSTITUTIONAL LAW: Power of Attorney – General of a state – Delegation thereof – S. 211 CFRN 1999 (as amended) – Whether power to delegate is not restricted only to officers in the chambers of the attorney – General – The principle in ***Amadi vs FRN (2008) 12 SC (P. 111) 55.***

COURT: Competence thereof – Factors to be considered – The principle in ***Madukolu vs. Nkemdilim (1962) 2 SCNLR***

COURT: Jurisdiction – Objection thereto – Whether can be raised at any time even for the first time on appeal.

COURT: Jurisdiction – Procedural defect thereon – Whether can be waived if not raised promptly.

CRIMINAL LAW AND PROCEDURE: No case submission – Duty of court thereto.

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

CRIMINAL LAW AND PROCEDURE: No case submission – When will be upheld by court – Relevant considerations thereof.

CRIMINAL LAW AND PROCEDURE: Preliminary objection – Defect in information – When to object – S. 167 Criminal procedure law of Lagos state – When a preliminary objection is waived – The principles in ***Sani vs. Okene L.G.T.C. (2008) LPELR – 2003 (SC);***

CRIMINAL LAW: Conversion – Nature thereof – Relevant principles.

CRIMINAL LAW: Stealing – Elements thereof.

EVIDENCE: Presumption – Where an Attorney – General performs an official act – Whether there will be presumption of regularity – Whether the act cannot be questioned by any court.

PRACTICE AND PROCEDURE: Preliminary objection – Appellant failed to raise procedural defect as a preliminary objection – Appellant raised defect for the first time on appeal – Whether not proper.

STATUTE: EFCC Act – Prosecutorial powers therein – Whether EFCC can prosecute an offence dealing with financial crime in any law in Nigeria – Principle in ***Shema vs. FRN (2018) 1 Sc. (Pt 1) 1 at 38 – 39.***

WORDS & PHRASES: Preliminary objection – Meaning & Purport.

*WORDS AND PHRASES**: Prima facie** – Meaning – The principle **in Orji Uzor Kalu vs. FRN (2016) LPELR - 40108 (Sc).***

Issues for determination

1. Whether based on provisions of the Constitution of the Federal Republic of Nigeria, 1999 as amended and the EFCC Act, 2004, as well as the decided cases on the issue, the lower court was not right when it held that the respondent can prosecute the appellant for stealing under the Criminal Code of Lagos State. (Ground 1 & 2).
2. Whether the Court of Appeal was not right when it overruled the trial court, that the respondent has adduced a *prima-facie* evidence which required some explanations from the appellant. (Grounds 3 & 4).

Facts of the matter

The accused appellant and one other Chyfrank Nigeria Plc were arraigned before the High Court of Lagos State, Ikeja Judicial Division on a six count charge.

Both accused pleaded not guilty. At the trial, the prosecution called witnesses and tendered some exhibits. The accused persons also tendered some exhibits during cross-examination. At the close of prosecution case, the accused successfully made a no case submission. Aggrieved by this decision, the prosecution appealed to the Court of Appeal. The Court of Appeal partly allowed the appeal. The first respondent has now appealed against this decision to the Supreme Court.

Held: *(Unanimously dismissing the appeal)*

1. *What determines competence of court*

   This submission is derived from settled principles that govern jurisdiction, as stated in: Madukolu Vs. Nkemdilim (1962) 2 SCNLR 341, to wit:

   A court is competent when:

   a. it is a properly constituted as regards numbers and qualifications of the members of the bench, and no member is disqualified for one reason or the other,

b. the subject matter of the case is within jurisdiction, and <u>there is no feature in the case which prevents the court from exercising its jurisdiction;</u> and

<u>c. the case comes before the court initiated by due process of law, and upon fulfillment of any condition precedent to the exercise of jurisdiction.</u>

It was also held per Bairamian, JSC that *"any defect in competence is fatal, for the proceedings are a nullity, however well conducted and decided; the defect is extrinsic to the adjudication."* See also: A.G. Lagos State Vs. Dosunmu (1989) 6 SC (Pt. II) 1. *(Pp 157 - 158 paras H - E)*

2. *Issues of jurisdiction can be raised at any time even for the first time on appeal*

If indeed there has been an omission to fulfill a condition precedent to the exercise of the court's jurisdiction, it would not matter at what stage of the proceedings the objection is raised, as the proceedings would be a nullity. Jurisdiction is a threshold issue. This is why it has been held severally by this court that an objection to the court's jurisdiction can be raised at any stage of the proceedings and even for the first time on appeal to the Supreme Court. See: Petrojessica Ent. Ltd. Vs. Leventis Technical Co. Ltd. (1992) 5 NWLR (Pt. 244) 675; Elabanjo Vs. Dawodu (2006) 15 NWLR (Pt. 1001) 76; Nwankwo & Ors . Vs. Yar'adua (2010) 12 NWLR (Pt. 1209) 518.

However, where the defect complained of is procedural, the complaint must be made timeously otherwise the party complaining would be deemed to have acquiesced in the irregularity and waived his right to complain. See: Madukolu Vs. Nkemdilim (supra); Duke Vs. Akpabuyo L.G. (2005) 19 NWLR (Pt. 959) 130; Saude Vs. Abdullahi (1989) 4 NWLR (Pt. 116) 387; Okoye Vs. The State (1972) ANLR 938.

The first issue to consider is the extent of the power of the Attorney-General of the Federation or of a state to undertake criminal prosecution. *(Pp 158 - 159 paras E - B)*

3. *Power of Attorney General to initiate criminal proceeding is not exclusive to his office*

Section 174 (1)) (b) & (c), which refers to proceedings initiated by

"any other authority or persons", is a clear indication that the power of the Attorney-General, Federal or State, to institute criminal proceedings is not exclusive to his office. See: FRN Vs. Adewunmi (2007) 4 SC (Pt. III) 30 @ 42 – 43 & 53 – 54; Saraki Vs. FRN (2016) 1 – 2 SC (Pt. V) 59 @ 105 Lines 9 – 27; 167 lines 22-27. *(P. 160 paras C - D)*

4. *The Attorney General can delegate his authority to prosecute not only to officers in his ministry or chambers*

In Amadi Vs. FRN (2008) 12 SC (Pt. III) 55, this court had cause to resolve an issue almost identical to the issue in contention in this appeal. In that case, an amended information was filed against the appellant before the High Court of Lagos State in the name of the Federal Republic of Nigeria (FRN) for offences committed under the Advanced Fee Fraud and Other Related Offences Act Cap. A6 Vol. 1, LFN 2004 and under the Criminal Code Law of Lagos State Cap. C17 Laws of Lagos State, 2003. The appellant's contention was that it is only the Attorney-General of the State or an officer in his department to whom he had delegated his powers who could undertake criminal proceedings before any court in Nigeria, other than a Court Martial, for offences created by or under any laws of the State House of Assembly.

The Attorney-General of Lagos State had issued a fiat (Exhibit A) to the Chairman of the EFCC and the Attorney General of the Federation delegating his prosecutorial powers in relation to offences under the Criminal Code Law and Criminal Procedure Law of Lagos State to them. It was argued that the Federal Republic of Nigeria had no authority to prosecute him notwithstanding the fiat, as the delegation of power was addressed specifically to the Chairman of the EFCC and the Attorney-General of the Federation. The contention was that the learned state counsel who signed the information was neither the Chairman of the EFCC nor the Attorney-General and it could therefore not be presumed that the delegation of authority applied to him.

In resolving the issue, this court, per Mukhtar, JSC (as he then was) reproduced an excerpt of the fiat issued by the Attorney-General of Lagos State at page 66 of the report thus:

> **"I therefore have his further instructions to inform you that in the spirit of our collective resole to reverse the**

country's negative image, he does formally (sic) delegate his prosecutorial powers in relation to offences under the Criminal Code Law and Criminal Procedure Law of Lagos State to both the Attorney-General of the Federation and the Economic and Financial Crimes Commission effective from the date of this letter."

After considering the arguments of learned counsel on the validity or otherwise of the delegation of power vide Exhibit A, His Lordship endorsed the submission of learned counsel for the respondent to the effect that the use of the word "may" in Section 211 of the Constitution does not restrict the delegation of the Attorney-General's powers to only officers in his department and furthermore, on the authority of Nafiu Rabiu Vs. The State (1980) 12 SC (Reprint) 85; (1980) NSCC 291; State Vs. Ilori (1983) NSCC 69 and Ibrahim & Anor. Vs. The State (1986) 1 NSCC 231, the powers of an Attorney-General under Sections 174 and 211 of the Constitution cannot be questioned by any court. The fiat issued by the Attorney-General of Lagos State was held to be valid.

At page 68 lines 9 – 32 (supra), the reasoning of the Court of Appeal was quoted with approval as follows:

"The position in criminal trial is different. In view of the high premium attached to speedy disposal of criminal cases, the Attorneys" Generals of the states delegate their powers to the various states commissioners of police who institute and prosecute criminal matters in the name of the Commissioners of Police. Such powers are also delegated to the Federal Board of Internal Revenue, Nigeria Customs Service and lately EFCC by the Attorney-General of the Federation. This arrangement is made possible subject to the provision of Sections 174(1) (b), (c) and 211 (1) (b), (c) of the Constitution of the Federal Republic of Nigeria, 1999, which provide that the Attorney-General of the Federation or State, as the case may be shall have power or take over and continue any such criminal proceedings instituted by <u>any other authority or person</u>, and to discontinue at any stage before judgment is delivered any such criminal proceedings instituted or undertaken by <u>any other authority or person.</u>" *(Underlining by his lordship)* *(Pp 160 - 162 paras D - H)*

5. *The powers of Attorney General cannot be questioned by any court*
By virtue of Section 168 (1) of the Evidence Act, 2011, there is a presumption of regularity in favour of any official act carried out by the Attorney-General. It follows therefore, that in the absence of proof that the said fiat has been expressly revoked by the Attorney General of Lagos State, the authority delegated to the EFCC to prosecute offences under the Criminal Code Law of Lagos State remains sacrosanct and cannot be questioned by any court. *(P. 163 paras A - B)*

6. *EFCC can prosecute any offence dealing with financial crimes in any law in Nigeria*
The authority of the EFCC to prosecute offenders in the name of the Federal Republic of Nigeria for offences constituting financial crimes committed under the Criminal Code or the Penal Code was further acknowledged by this court in its recent decision in: Shema Vs. FRN (2018) 1 SC (Pt. 1) 1 @ 38 – 39, where it was held, *inter alia,* per Bage, JSC:

> **"… I wish to reiterate the well settled position of this court in Nyame Vs. FRN (2010) 3 SC (Pt. 1) 78.**
> **In this case, this court indicated and very clearly, that there is nothing here that prevents the EFCC from prosecuting offenders in the name of the "Federal Republic of Nigeria" being the agency responsible for co-ordinating the various institutions involved in the fight against money laundering and enforcement of all laws dealing with economic and financial crimes in the Federal Republic of Nigeria by virtue of Section 1(2) (c) of the EFCC Act.**

The effect of our clear and [un]ambiguous stance in Nyame Vs. FRN (supra) and which we have no reason to depart from, is that <u>the commission (The EFCC) is the coordinating agency for the enforcement of the provisions of any other law or regulation on economic and financial crimes, including the criminal code and the penal code. The commission has power under Section 13(2) of the Act to prosecute offences so long as they are financial crimes."</u> (Emphasis mine) *(Pp 163 - 164 paras C - B)*

7. *A.G. of Lagos state can validly delegate authority to EFCC*

The decision of this court in Amadi Vs. FRN (supra) and Shema Vs. FRN (supra) constitute a complete answer to the first issue for determination in this appeal. The presumption, which has not been rebutted, is that the EFCC has the requisite authority, donated by the Attorney-General of Lagos State, to prosecute the appellant for offences allegedly committed under the Criminal Code Law of Lagos State. The authority cannot be questioned. As rightly held by the lower court, this court has taken judicial notice of the fact of the delegation, which is binding on all. *(P 164 paras B - D)*

8. *Procedural jurisdiction of a court should be raised at the preliminary stage*

On the appropriate stage to raise an objection of this nature, this court in Amadi's case (supra) relying on Section 167 of the Criminal Code Law, held that it amounts to an objection to a defect on the face of the charge, which ought to have been raised immediately after the charge was read. In other words, it is a procedural issue that does not affect the jurisdiction of the court to hear the case. I am guided by that decision in this case. *(P 164 paras D - F)*

9. *Principles relevant to no case submission*

The purport of a no case submission is that, in law, there is no evidence on which, even if believed, the court could convict. See: Ibeziako Vs. C.O.P. (1963) 1 All NLR 60; Adjidagba Vs. I.G.P. (1958) 3 FSC 5; Tongo Vs. C.O.P. (2007) 12 NWLR (Pt. 1049) 525; Fagoriola Vs. FRN (2013) 17 NWLR (Pt. 1383) 322.

The question whether or not the evidence is believed is immaterial and does not arise. Furthermore, the credibility of the witnesses is not in issue. It is also important to note that at the stage of a no case submission the court is not required to express an opinion on the evidence before it. The reason is that at that stage, the trial has not been concluded. See: Adeyemi Vs. The State (1991) 6 NWLR (Pt. 195) 1; Agbo Vs. The State (2013) 11 NWLR (Pt. 1365) 377; Igabele Vs. The State (2006) 6 NWLR (Pt. 976) 100; Aituma Vs. The State (2007) 5 NWLR (Pt. 1028) 466. *(Pp 169 - 170 paras F - C)*

10. *When a no case submission will succeed*

A submission that the accused has no case to answer will succeed in

the following circumstances:

a. Where the prosecution fails to prove an essential element of the offence;

b. Where the evidence led by the prosecution has been so discredited as a result of cross-examination, or is so manifestly unreliable that no reasonable tribunal would safely convict on it.

See: Ajiboye Vs. The State (1995) 8 NWLR (Pt. 414) 408 @ 414 – 415; Daboh Vs. The State (1977) 5 SC 197 @ 209; Tongo Vs. C.O.P. (supra); Ajuluchukwu Vs. The State (2014) 13 NWLR (Pt. 1425) 641; C.O.P. Vs. Amuta (2017) LPELR-41386 (SC) @ 28 – 29 G – F. *(P 170 paras C - F).*

11. The nature and purport of offence of conversion

It has been held that in the case of conversion, it is immaterial whether the thing converted is taken for the purpose of conversion or whether it is at the time of the conversion in the possession of the person who converts it. It is also immaterial that the person who converts the property is the holder of a power of attorney for the disposition of it, or is authorised to dispose of the property. See: Oyebanji Vs. The State (2015) LPELR-24751 (SC) @ 16 – 17 A- B; (2015) 14 NWLR (Pt. 1479) 270; Kenneth Clark & Anor. Vs. The State (1986) 4 NWLR (Pt. 35) 381; Mohammed Vs. The State (2000) FWLR (Pt. 30) 2623 @ 2626; Ayeni Vs. The State (2016) LPELR-40105 (SC) @ 26 B – E. *(P 172 paras C - E)*

12. Elements of the offence of stealing

The ingredients of the offence of stealing are:

(i) Ownership of the thing stolen;

(ii) That the thing stolen is capable of being stolen;

See: Adejobi Vs. The State (2011) 12 NWLR (Pt. 1261) 347; Oshinye Vs. C.O.P. (1960) 5 SC 105; Ayeni Vs. The State (supra).

It cannot be disputed that the sums of N86,900,000.00 and N7,900,000 referred to in counts 5 and 6 are capable of being stolen. The evidence led by the prosecution also showed that out of the sum of N102,400,000.00 paid by PW3, Donatus Duru, to Chyfrank Nig. Plc purportedly for the purchase of No. 7 Bell Avenue on behalf of Alhaji Abubakar Mallam, the appellant, who is the alter ego of Chyfrank Nig. Plc., withdrew the sums stated in counts 5 and 6, paid same to the Federal Government Implementation Committee and

purchased on his own behalf House No. 22 Thompson Avenue, Ikoyi, Lagos. The long and the short of the evidence led by the prosecution is that the appellant converted the money received from PW3 for a particular purpose to his own use. PW3's money never reached its intended destination.

There was *prima facie* evidence that as far as counts 5 and 6 are concerned, there was an intention by the appellant to use the money collected from PW3 for his own use. PW4, Alhaji Abubakar Mallam, in whose name the sum of N102,400,000.00 was collected testified that he knew nothing about the transaction. In his statement, Exhibit 52, tendered by the prosecution, the appellant admitted that he did not know Alhaji Abubakar Mallam. There is thus *prima facie* evidence of a fraudulent intent. *(Pp 172 - 173 paras F - E)*

13. *Duty of court on a no case submission*

It is my considered view that the submissions are not apposite at this stage. All that the court is required to do when a no case submission is made is to determine whether the evidence adduced by the prosecution is sufficient to warrant an explanation from the accused person.

The court below carefully examined the evidence on record and rightly, in my view, concluded that a *prima facie* case has been made out in respect of counts 5 and 6 of the information sufficient to warrant the appellant being called upon to make his defence therein. The appellant has not persuaded me to interfere with the sound reasoning of the court below. This issue is accordingly resolved against the appellant.

In conclusion, the appeal lacks merit. It is accordingly dismissed. The judgment of the lower court remitting the case to the Chief Judge of Lagos State for assignment to another Judge of the High Court for trial on count 5 and 6 is hereby affirmed. *(Pp 173 - 174 paras F - C)*

14. Power of Attorney General to institute criminal proceedings is not exclusive to his office

This court in Saraki Vs. FRN (2016) 3 NWLR (Pt. 1500) 531 at 627 per Kekere-Ekun JSC had this to say on the issue:-

"Section 211 of the Commission made identical

provisions for the office of the Attorney General of a state in relation to offences created by or under any law of the House of Assemble. Section 174(1) (b) & (c), which refers to proceedings initiated by "any other authority or persons", is a clear indication that the power of the Attorney General to institute criminal proceedings is not exclusive to his office." *(P. 181 paras A - D)*

Per Odili (JSC)

"**The current position of the law which has been given a seal of authority by the recent decisions of this court is that the courts have moved away from the requirements that the Attorney General of the Federation or of the State must grant fiat to EFCC before it could prosecute economic and financial crimes. See Dariye Vs. FRN (2015) 2 SC (Pt. 1) 120; Kalu Vs. FRN 1-3 SC (Pt. 1) 162; Nyame Vs. FRN (2010) 3 SC (Pt. 1) 8.**

Clearly it is in the trial court's attempt to bypass the principle of stare decisis which would have guided that court into the application of the case of Amadi Vs. FRN (2008) 18 NWLR (Pt. 1119) 259 and in taking the wrong turn the trial court went into the error of a wrong conclusion. For full measure, I shall quote the said principle in Amadi (supra) thus:-

"The position in criminal trial is different. In view of the high premium attached to speedy disposal of criminal cases, the Attorney General of the states delegate their powers to the various State Commissioners of Police who institute and prosecute criminal matter in the name of such commissioners of police. Such powers are also delegated to the Federal Board of Internal Revenue, Nigeria Customs Service and lately EFCC by the Attorney General of the Federation. This arrangement is made possible subject to the provisions of Sections 174(1)(b) (c) and 211 (1) (b) (c) of the Constitution of the Federal Republic of Nigeria 1999 which provide that the Attorney General of the Federation or State, as the case may be, shall have power to take over and continue any

such criminal proceedings instituted by any other authority or person, and to discontinue at any stage before judgment is delivered any such criminal proceedings instituted or undertaken by him or any other authority or person".

In the final analysis, the Court of Appeal was right in its review of what the trial court did and set the record straight by upturning that earlier decision. This issue is resolved against the appellant." *(Pp 181 - 182 paras D - F)*

15. Elements of offence of stealing

The essential elements of the offence of stealing for which the appellant was charged in counts 5 and 6 are thus:-

1. Ownership of the thing stolen.

2. That the thing stolen is capable of being stolen.

3. That the accused person has the intention of permanently depriving the owner of the thing stolen.

4. That the accused was dishonest.

5. That the accused unlawfully appropriated the thing stolen to his own use.

See the cases of Babalola Vs. State (1989) 4 NWLR (Pt. 115) 264; Onwudiwe Vs. FRN (2006) 10 NWLR (Pt. 988) 382; Adejobi Vs. State (2011) 12 NWLR (Pt. 1261) 347; Oyebanji Vs. State (2015) LPELR-24751 (SC). *(Pp 183 - 184 paras F - C)*

16. The nature of a no case submission

The nature of a no case submission is that at this stage where the court is satisfied that a prima facie case has been made out, the less said the better since the coast is still open for the accused with the possibility of a successful defence and so in order not to compromise his innocence the court is mindful of not going astray by venturing into conclusions which jeopardize that defence. All one can say at this point is that what the prosecution has placed on the table are concrete enough to propel the accused to be called upon to proffer his defence to either demolish that case of the prosecution or present a defence that holds no light to the case of the prosecution.

In the main all I can say is that indeed the court below was right to say a prima facie case has been made out against the accused appellant to which a defence from him is required. *(P 184 paras C -*

F)

17. Powers of the Attorney-General of a state

The prosecutorial powers of the Attorney-General of Lagos State, or any other State, under the Constitution are vested by Section 211 of the Constitution, 1999, as amended. Section 211 of the Constitution provides-

211.(1) The Attorney-General of a State shall have power –

(a) to institute and undertake criminal proceedings against any person before any court of law in Nigeria, other than a court-marshal, in respect of any offence created by any law of the House of Assembly;

(b) to take over and continue any such criminal proceedings that may have been instituted by any other authority or person; and

(c) to discontinue at any stage before judgment is delivered any such criminal proceedings instituted or undertaken by him or any other authority or person.

(2) The powers conferred upon the Attorney-General under subsection (1) of this section may be exercised by him in person or through officers of his Department.

(3) In exercising his powers under this section, the Attorney-General of a state shall have regard to the public interest, the interest of justice and the need to prevent abuse of legal process. *(P 186 paras B - H)*

18. Issue of procedural defect was not raised at the trial

The appellant concedes that the Attorney-General of Lagos State is authorised by Laws of Lagos State to issue fiat to the Economic and Financial Crimes Commission (EFCC) authorising the latter to prosecute state offences. The appellant however, argues disingenuously that unless and until the EFCC shows or tenders before the trial high court of Lagos State the fiat duly issued to it by the Attorney-General of Lagos State, the trial High Court lacks jurisdiction to entertain the prosecution initiated by the EFCC for state offence(s). The appellant did not raise this as a preliminary objection at the trial High Court at the time of his arraignment. He raised it only on appeal.

The issue is procedural. The best time to raise such preliminary

issue or objection is at the time of arraignment, before the pleas are taken, and not as a ground of appeal challenging the subsequent decision on a no-case submission. *(P 187 paras A - D)*

19. *The nature and purpose of a preliminary objection*
The word "preliminary" connotes a first or initial stage. Preliminary objection therefore connotes the objection that is taken first at the initial stage of proceedings to the competence of the proceedings as initiated. A successful preliminary objection terminates and or truncates the proceedings at that juncture: SANI Vs. OKENE L.G. TRADITIONAL COUNCIL (2008) LPELR-2003 (SC); NIDOCCO LTD Vs. GBAJABIAMILA (2013) LPELR-20899 (SC). *(P 187 paras D - F)*

20. *Preliminary objection could be subject to waiver*
Section 167 of the Criminal Procedure Law (CPL) of Lagos State provides –

> **167. Any objection to a charge for any formal defect on the face thereof shall be taken immediately after the charge has been read over to the accused and <u>not later.</u>**

Preliminary objection, therefore, could be waived. Tobi, JSC, in SANI Vs. OKENE L.G. T.C (supra), acknowledges the consequence of not raising preliminary objection timeously thus:-

> **A preliminary objection should be taken first in time <u>because it could be liable to time in our adjectival law.</u> Perhaps, apart from preliminary objection as to the <u>jurisdiction</u> of the <u>Court,</u> most others are liable to time and <u>could be subject of waiver.</u>** *(Pp 187 - 188 paras F - B)*

Per Eko (JSC)
"Reference to "jurisdiction" in the dictum is no doubt reference only to substantive jurisdiction, and not procedural jurisdiction which can be waived. The latter, not the former, can be waived: ATTORNEY-GENERAL KWARA STATE Vs. ALHAJI SAKA ADEYEMO & ORS. (2016) LPELR-4147 (SC). Generally, the consequence of a party not raising a preliminary objection, which he is entitled to raise, is the presumption that the right has been

abandoned or waived: MAGIT Vs. UNIVERSITY OF AGRICULTURE, MAKURDI (2005) 19 NWLR (Pt. 959) 211.

The appellant seems, erroneously though, to think that the jurisdiction of the Lagos State High Court to entertain the offences under the Criminal Code Law of Lagos State is co-terminous with the powers the prosecutor has to prosecute a particular offence. I dare say that the power EFCC has to prosecute state offences upon the fiat of the Attorney-General of the state is not what determines the jurisdiction of the trial court, which is completely extrinsic and is vested either by the constitution or any other statute. By way of analogy, where in a civil cause or matter a party has no *locus standi* to prosecute a particular cause of action, the court is not deprived or denied its substantive jurisdiction. It is only the plaintiff, who lacks the standing to prosecute the cause of action before it, that is denied the right to prosecute the defendant on the cause of action. Locus Standi is attached to the cause of action, and not the substantive jurisdiction of the court vested by statute. Issues raised on want of locus standi are merely procedural.

The appellant is not suggesting that the EFCC is, by law, barred from prosecuting state offences at the State Courts. The appellant under the issue 1 is only questioning the procedure the EFCC must follow before initiating prosecution of state offences. That is, that it must first obtain the fiat of the Attorney-General of the state before doing so, and show evidence of it to the court. Until the issue of not previously obtaining fiat is raised, the court presumes the prosecutor (EFCC) before it possesses the necessary power to prosecute. Sections 131 & 132 of the Evidence Act, 2011 enure against the objector and they obligate him to establish that no fiat, in the first place, was obtained. It is not enough to assert baldly, without proof unless the fact is admitted, that the prosecutor, here the EFCC, did not first obtained the fiat of the Attorney-General of Lagos State to prosecute state offences. The law is trite and settled that a bare statement of fact from the Bar has no force of legal evidence: ONU OBEKPA Vs. COMM OF POLICE (1980)) 1 NCR 113. In ANYEBE Vs. THE STATE (1986) 1 SC 37; (1986) 1 NWLR (Pt. 14) 139 the DPP of Benue State conceded or admitted the fact that the state prosecutorial authorities had no previous fiat of the Attorney-General of the Federation to prosecute the appellant for the Federal offence of illegal possession of firearms. In the instant

case, the EFCC insisted that the Attorney-General of Lagos State formally delegated to it, by his instrument of 12th May, 2004, to prosecute the appellant for state offences. That defence made it incumbent on the appellant by dint of SS. 131 & 132 of Evidence Act, 2011, to prove the contrary that he asserted. *(Pp 188 - 189 paras B - H)*

21. *Attorney-General gave his fiat to the prosecution of the appellant*
The fact that the Attorney-General of Lagos State took no steps, under Section 211(2)(b) & (c) of the Constitution, to take over or discontinue the proceedings against the appellant at the Lagos State High Court further raises or reinforces the presumption that he gave his fiat for the prosecution of the appellant. it is for the appellant, asserting the contrary, to rebut the presumption by empirical evidence. The decision of this court in AMADI Vs. FRN (2008) 18 NWLR (Pt. 1119) 259 to the effect that there is no need for "the tendering of the fiat in or before the court, being general power of delegation" gives further credence to this presumption.
Accordingly, I resolve this issue against the appellant, and in favour of the respondent. *(P 190 paras A - C)*

22. *The meaning of* ***prima facie***
My Lords, once the prosecution, from the totality of the evidence led against the accused person is able to make a case warranting the accused person to make some explanations or refute the evidence against him a prima facie case is said to have been made against him. That is why Galadima, JSC in ORJI UZOR KALU Vs. FRN (2016) LPELR-40108 (SC), stated that *prima facie* means the establishment of a legally required rebuttable presumption. I am satisfied that, on the totality of the evidence the respondent adduced against the appellant, a *prima facie* case had been made out against him to warrant his being called upon to offer a defence. The evidence established a good ground for the case to proceed or for the proceedings against the appellant to continue: AJIDAGBA Vs. IGP (1958) SCNLR 50; UBANATU Vs. THE COMM. OF POLICE (2000) FWLR (Pt. 1) 138 at 150 – 152; IKOMI Vs. THE STATE (1986) 3 NWLR (Pt. 28) 340. *(P 191 paras D - G)*

Representation
G.C. UGOCHUKWU (ESQ.) for the Appellant.
S.K. ATTEH (ESQ.) for the respondent with T.J. Banjo (Esq.) and G.C. Akaogu (Esq.)

MATI MUSA
VS

THE STATE

SC. 902/2014

IN THE SUPREME COURT OF NIGERIA
HOLDEN AT ABUJA

FRIDAY, 11TH JANUARY, 2019

BEFORE THEIR LORDSHIPS

WALTER SAMUEL NKANU ONNOGHEN	**CHIEF JUSTICE OF NIGERIA**
MUSA DATTIJO MUHAMMAD	**JUSTICE, SUPREME COURT**
KUMAI BAYANG AKAAHS	**JUSTICE, SUPREME COURT**
JOHN INYANG OKORO	**JUSTICE, SUPREME COURT**
CHIMA CENTUS NWEZE	**JUSTICE, SUPREME COURT**

COURT: Findings – What amounts to a perverse findings – Whether will not be countenanced by the supreme court even if affirmed by the Court of Appeal.

CRIMINAL LAW AND PROCEDURE: Contradictions – Where there are contradictions in the evidence of prosecution witnesses – Whether it is only material contradictions that will create doubt in the mind of the court.

CRIMINAL LAW AND PROCEDURE: Conviction – Where an accused makes a confessional statement – Whether can be convicted solely on the confessional statement if properly proved.

CRIMINAL LAW AND PROCEDURE: Perverse findings – Where the trial court failed to consider a defence of provocation raised by the evidence – Whether Court of Appeal right to intervene on ground of perversity.

CRIMINAL LAW AND PROCEDURE: Proof – Burden of Proof – How discharged.

CRIMINAL LAW AND PROCEDURE: Proof – Criminal cases – Burden of proof thereto – Whether lies on the prosecution and does not change.

CRIMINAL LAW: Defences – Provocation – Where an accused successfully pleads the defence of provocation – Whether it does not completely exculpate him from criminal liability.

CRIMINAL LAW: Defences – Provocation – When sustainable.

EVIDENCE: Admissibility – Where photograph is tendered without the negative – Whether it is necessary to call the photographer to testify.

EVIDENCE: Admissibility thereof – Distinction between evidence which is by law inadmissible in all circumstances and evidence which is admissible in certain situations – Implication of distinction – Whether evidence which is by law inadmissible in all circumstances cannot be countenanced on appeal even where a party has consented to its admissibility and also the issue of its admissibility can be raised on appeal – The principles in ***Unity life and fire insurance company Ltd vs. International bank of West Africa (2001) LPELR – 3412 (SC) (2001) NWLR (Pt. 713) 610****.*

EVIDENCE: Confession – Confessional evidence – Whether remains the best form of evidence – Rationale.

PRACTICE AND PROCEDURE: Document – Admissibility thereof – Where appellant did not raise an objection to the admissibility of confessional statement – Whether cannot now raise it on appeal.

PRACTICE AND PROCEDURE: Evidence – Evaluation thereof – Whether the primary duty of a trial court – Attitude of appellate court thereto.

Issue for determination

Whether by (sic) the available evidence on the records, it (sic) can justifiably sustain a conviction of the appellant on the substituted charge of culpable homicide not punishable with death under Section 224 of the Penal Code."

Facts of the matter

The accused appellant was arraigned before the Katsina State High Court for the offence of culpable homicide punishable with death under section 221 of the Penal Code. It was alleged he caused the death of Salihu Yusuf by hitting him with a stick on a head.

The prosecution called six witnesses and tendered four exhibits, while the accused appellant testified on his behalf. At the end of trial, the accused was found guilty and convicted accordingly on appeal to the Court of Appeal, his death sentence was substituted to 10 years' imprisonment still aggrieved, the accused appellant has now appealed to the Supreme Court.

Held: *Unanimously dismissing the appeal)*

1. *Burden of proof in criminal cases lies on the prosecution*
   Both sides are right that the burden of proof of the offence with which the lower court convicted the appellant lies on the respondent and same does not shift. See Aruna & anor vs. The State (1990) LPELR-568 (SC) and Okashetu vs. State (2016) LPELR-40611 (SC). *(P210 Paras C - D).*

2. *How to discharge the burden of proof placed on prosecution*
   Again, counsel are right that in discharging the burden the law places on the respondent herein to prove the case against the accused by relying on:-

(a) **The direct evidence of eye witnesses**

(b) **Circumstantial evidence and/or**

(c) **The confessional statement of the accused. See Olabode Abirifon vs. The State (2013) 13 NWLR (Pt 1372) 619 and Freeborn Okiemute vs. The State (2016) LPELR-40639 (SC).** *(P 210 Paras D - F).*

3. *Only material contradictions will create doubt in the mind of the court*
   The law further requires that whatever evidence the respondent relies on in proving its case against the appellant it must be bereft of substantial contradictions. Only material contradictions in respect of a fact in issue creates doubt in the mind of the court thereby destroying the case sought to be established against an accused. Thus only such material contradictions which affect live issues to which they relate avail an opposing party thereby entitling the appellate court to interfere with the judgment on appeal giving the

miscarriage of justice they occasion. See Maiyaki vs. The State (2008) LPELR-1823 (SC), Sele vs. The State 1 SCNJ (Pt 1) 15 at 22 – 23 and **Usiobaifo & anor vs. Usiobaifo (2005) LPELR-3424 (SC).** *(Pp 210 - 211 Paras F - B).*

4. *The nature of confessional evidence*
It is also trite that confession remains the best form of evidence against the accused for no rational being, all things being equal, says anything against his interest. See Adebayo vs. The State (2014) LPELR-22988 (SC) and **Olanipekun vs. State (2016) LPELR-40597 (SC).** *(P 211 Paras B - C).*

5. *Appellant cannot raise an objection on admissibility on appeal*
I agree with learned respondent's counsel that it is not that exhibits 2A, 2B and 3 are in any event inadmissible. No. Rather, it is that the exhibits are admissible under certain conditions. *(P 211 Paras E - F).*

6. *Appellant cannot object to the admissibility of a document for the first time on appeal*
It is settled law that the appellant herein who was represented by counsel at the trial court and raised no objection when the exhibits were tendered to be admitted, even though the conditions precedent have not been met, cannot now raise the objection on appeal. *(P 211 Paras F - G).*

7. *Distinction between evidence which is inadmissible by law and evidence which is inadmissible in certain circumstances*
In Unity Life and Fire Insurance Company Ltd vs. International Bank of West Africa (2001) LPELR-3412 (SC) (2001) NWLR (Pt 713) 610 this court in restating the principle has held at pages 21-22; page 627 of the reports as follows:-

> **"A distinction must however, be drawn between where the evidence complained of is one which by law is prima facie admissible albeit under stipulated conditions as against where such evidence is by law inadmissible in any event and in all circumstances. In the latter class of cases, such evidence ought never to be acted upon by any court of law whether, of first instance or of appeal, and it is immaterial that its admission in evidence was**

by the default or consent of the party complaining in failing to raise the necessary objection at the appropriate time. In other words, where the evidence complained of is by law inadmissible in any event and all circumstances, the evidence cannot be acted upon by any court of law even if the party complaining failed to raise any objection or consented to the admission of such evidence in the proceeding. The appellate court in such circumstance is duty bound to entertain a complaint on the admissibility of such evidence by the trial court, reject it if it finds it absolutely inadmissible in any event and in all circumstances and decide the case on the legal evidence before the court….."

See also Sadiku Osho & anor vs. Michael Ape (1998) LPELR-2800 (SC), Etim vs. Ekpe (1983) 1 SCNLR 120. *(P 211 - 212 Paras G - G).*

8. *Evaluation of evidence is the primary duty of the trial court*

Evaluation of evidence and the ascription of probative value is the primary duty of the trial court that saw and assessed the credibility of the witnesses. The appellate court that does not enjoy this much advantage cannot, on the basis of the cold facts on record, interfere with the trial court's findings of fact unless it finds the findings to be perverse. *(Pp 212 - 213 Paras G - A).*

9. *What amounts to a per verse findings*

A court's findings are perverse where they are speculative, not being based on any evidence or because the court had taken into account matters which it ought not to or shut its eyes to the obvious. Because of the miscarriage of justice they occasion, perverse findings do not sustain a judgment on appeal even if same had been upheld by the Court of Appeal. See Jolayemi & ors vs. Alaoye & anor (2004) 12 NWLR (Pt 887) 322 and **Akinlagun & ors vs. Oshoboja & anor (2006) LPELR-348 (SC).**

I entirely agree with learned respondent's counsel that the appellant does not benefit from the application of any of the foregoing recounted principles.

PW1, PW2, PW3 and PW4 have all testified that they saw the appellant hit the deceased with a stick and that the deceased died the following day. In exhibits 4A and 4B, his extra judicial confessional

statement, the appellant has admitted hitting the deceased with a stick on his forehead and that death of his victim had occurred thereafter. *(P 213 Paras A - E).*

10. *Court of Appeal rightly intervened where the trial court ignored a possible defence raised by evidence*

The instant appeal is informed by the foregoing lower court's interference with the judgment of the trial court. I entirely agree with learned respondent's counsel that the application of the principles of law already cited in this judgment still leaves the appellant bare.

The findings of the lower court the appellant contests clearly arise from the court's application of correct principles to the evidence on record. The evidence on record suggests a defence in favour of the accused which the trial court discountenanced in its judgment. The appellate court is duty bound and is right to have so interfered with the trial court's perverse judgment by taking into consideration the suggested defence ignored by the trial court in arriving at a just conclusion. See Suleiman Danta Annabi vs. The State (2008) 13 NWLR (Pt. 1103) 179 and Osuagwu vs. The State (2016) LPELR-40836 (SC).

With the law not on the side of the appellant, the lone issue for the determination of the appeal is accordingly resolved against him and the unmeritorious appeal dismissed. The lower court's conviction and sentence of the appellant under Section 224 instead of 221, with his defence of provocation having been made out, is further affirmed. *(Pp 215 - 216 Paras G - D).*

11. When it is necessary to call a photographer to testify

I agree that the lower court rightly substituted a conviction for culpable homicide punishable with death under Section 221 Penal Code with that of culpable homicide not punishable with death under Section 224 of the Penal Code having considered the defence of provocation raised by the appellant in his oral evidence in court. The trial judge did not advert his mind to the defence raised by the accused. If the respondent felt the judgment of the trial Judge in convicting and sentencing the appellant to death for culpable homicide under Section 221 was properly done, it must file a cross-

appeal showing that the trial court duly considered the defence of provocation but rejected it. Photographs taken of the deceased's corpse are secondary evidence. They become admissible only when the negative is also tendered and their inadmissibility has nothing to do with the maker or photographer. However in this age of digital photography where the negatives are stored electronically, it becomes necessary for the photographers to be called to testify. *(P 217 Paras A - E).*

12. *Effect of a successful plea of provocation*
It is instructive to note that the defence of provocation does not exculpate an offender from criminal liability, rather it minimizes or reduces the sentence. Where an accused charged with homicide or murder successfully raises a defence of provocation, as in the instant case, that defence does not exculpate him of punishment but merely reduces culpability to manslaughter which carries a term of imprisonment unlike murder which is punishable by death. See the cases of Akang vs. State (1971) 1 All NLR 48; Shande vs. State (2005) 12 NWLR (Pt 939) 301. *(P 219 Paras B - D).*

13. *When a plea of provocation is to be sustained*
Note that for the defence to avail the accused, the accused must have committed the offence:-
- **(a) in the heat of passion.**
- **(b) it must have been caused by a sudden provocation**
- **(c) the act must have been committed before there is time for the passion to cool.**
- **(d) the accused must have lost self-control**
- **(e) the degree of retaliation by the accused person must be proportionate to the provocation offered.**

See **Afosi vs. State (2013) 13 NWLR (Pt. 1371) 329.** *(P 219 Paras D - G).*

14. *An accused can be convicted on his confessional statement alone*
Again, it is trite that an accused person can be convicted on his confession alone once it is properly proved and admitted in evidence. See Karimu Sunday vs. The State (2017) LPELR-42259 (SC). In the instant case, the appellant confessed to hitting the deceased with a

stick which incident led to his death. The prosecution's witnesses (PW1, PW2, PW3 and PW4) all testified to having witnessed the incident. I agree with the respondent that an offence may be proved either by direct evidence of eye witnesses, compelling circumstantial evidence, lawful confessional statement of the accused or a combination of any of the three.

I am of the considered view that the appellant cannot be exculpated of the offence of homicide merely by a successful defence of provocation. The learned justices below correctly countenanced his defence which was overlooked at the trial court. I therefore affirm the conviction and sentence passed on the appellant under section 224 of the Penal Code by the court below. I hold that this appeal is lacking in merit and is hereby dismissed by me. *(Pp 219 - 220 Paras G - D).*

Representation

CHIEF GIDEON MUSA KUTTU with S.S. Gomper, Sarah Farinto, for the Appellant.

ABDURAHMAN UMAR DPP KATSINA STATE with A.L. Buhari CSC, Sani Dan Mallam P.S.C. (Katsina State), for the Respondent.

MISS TUTU DAWODU
VS
1. MRS. JOKOTADE ISIKALU
2. MRS. ADETOLA ISHOLA
3. MRS. ABIODUN OKE

SC. 142/2012

IN THE SUPREME COURT OF NIGERIA
HOLDEN AT ABUJA

FRIDAY, 11TH JANUARY, 2019

BEFORE THEIR LORDSHIPS

WALTER SAMUEL NKANU ONNOGHEN	**CHIEF JUSTICE OF NIGERIA**
MUSA DATTIJO MUHAMMAD	**JUSTICE, SUPREME COURT**
KUMAI BAYANG AKAAHS	**JUSTICE, SUPREME COURT**
JOHN INYANG OKORO	**JUSTICE, SUPREME COURT**
AMIRU SANUSI	**JUSTICE, SUPREME COURT**

PRACTICE AND PROCEDURE: Filing fees – Where a party pays less than what is assessed as filing fees – Whether the proper order will be for the party to make for the balance.

PRACTICE AND PROCEDURE: Proof – Document – Onus of proof thereon – Whether onus of proof lies on a party propounding a document and once this is done onus shifts on the party attacking it.

PROBATE: Will – Validity thereof – Whether a person who desires to make a Will must satisfy procedure provided by law otherwise the Will will be invalid – S. 1 of Wills Law of Lagos State considered.

PROBATE: Will – Validity thereof – Whether must be free from suspicion and suspicious circumstances.

PROBATE: Will – Where there is a short fall of subscribing witnesses contrary to the Wills Law of Lagos State – Effect.

STATUTE: Wills law of Lagos State – S. 1 thereof – Whether testamentary intention of a deceased person must comply with the provisions of the Wills law.

STATUTE: Wills Law of Lagos State – S. 4© thereof – Mandatory Requirement for two witnesses to attest to a will – Non compliance therewith – Whether makes will invalid.

Issues for determination

1. ***Both parties having agreed that Madam Adeline Kasumu made a Will, whether the appellant sufficiently propounded the Will, and that the Will is in the circumstances valid….***
2. ***Whether the failure of the respondents to pay summons fees in respect of the reliefs for account, specific performance and for general damages endorsed on their statement of claim which were not claimed in the originating summons renders the process incompetent in so far as those reliefs are concerned or not…***

Facts of the matter

The plaintiff/respondent instituted an action at the High Court of Lagos State in suit No. ID/748/1993 claiming that the subject matter of the suit is a family property. Both plaintiffs and defendants are the grand children of the original owner.

However, the defendant/appellant claimed sole or exclusive ownership by virtue of the contents of a will. In their writ of summons, the plaintiffs claimed some declaratory reliefs against the defendants in respect of the registered property of Late Madam Adeline O. Kasumu situate at No. 19 Igbosere Road Lagos, in which the plaintiffs claimed as joint owners. On their part, the defendant filed a counter claim against the plaintiffs and relied on the contents of a will and sought some declaratory and injunctive reliefs as well as damages for trespass against the plaintiffs.

The trial court declared the will invalid. Consequently, the defendants unsuccessfully appealed to the Court of Appeal Lagos division, hence this further appeal to the Supreme Court.

Held: *(Unanimously dismissing the appeal)*

1. *The nature and purport of S. 1 of Wills Law of Lagos State.*

By the provisions of section 1 of the Wills Law of Lagos State:

> **"It shall be lawful for every person to bequeath or dispose by his will executed in accordance with the provisions of this law, all property by which he is**

entitled to either in law or equity, or at the time of his death."

This means that a person who desires to make a Will must satisfy the requirements of law for the Will to be valid, else it will be invalid. *(P238 Paras A - C)*

2. *Onus of proof on a person propounding a document*

The burden, however, for the proof of validity of a document (will), the genuineness or authenticity thereof lies on the person propounding it and once this is satisfied, the burden is cast upon those attacking it: See ITA vs. DADZIE (2000) 4 NWLR (Pt. 652) page 168.

In the instant case, the respondents have made a claim in respect of their entitlements pertaining to the property on the ground that it is family property- the subject matter covered by exhibit Td1.

Appellant denied the entitlement and asserted that there was no such entitlement, as there was a Will which had bequeathed the said property to her mother solely and with her mother's death, she was now a sole beneficiary. It is therefore a case of communal (family) ownership against personal/individual ownership of property.

Respondents therefore denied the validity of the Will, exhibit TD1, while appellant said it was valid. *(P 238 Paras C - G).*

3. *Will to be valid must comply with the provisions of the Wills Law*

It is trite law that for a will or testamentary intention of a deceased person which ought to be respected, to be given effect to, there must be absolute compliance with the requirements of the Wills law. The provisions of the Wills Law, as in all laws, where they are clear and unambiguous must be given their ordinary and literal meaning: See Attorney General of the Federation vs. The Guardian Newspaper (1999) 9 NWLR (Pt. 618) at 187 in the case aforesaid IGUH, JSC at page 264 had this to at:

> **"And where the words used or the provisions of any section of the law are clear and unambiguous, they must be given their ordinary meaning unless of course, this would lead to absurdity or be in conflict with other provisions of that law."** *(Pp 238 - 239 Paras G - B).*

4. *Where there is short fall of subscribing witnesses*

Now, exhibit TD1 under consideration fell short of the mandatory minimum of two (2) required subscribing witnesses as required by section 4(1) of the Wills Law Cap 194 Laws of Lagos State 2003. This short fall of subscribing witnesses was also confirmed by the testimony of the defendant now appellant herein, at the trial that the Will was neither signed by the testator nor executed by the attesting witnesses (see page 149 of the record – first 3 lines thereof).

Based on the above reasons, I agree completely with the argument of the learned counsel for respondents and rely on section 4(1) (b) of the Wills Law of Lagos State and Okelola vs. Boyle supra in coming to the conclusion that the said Will is invalid for want of due execution Issue No. 1 is therefore answered in the negative and in favour of the respondents. *(P 239 Paras C - E).*

Per Muhammed (JSC)

"I must stress that an overriding condition for the validity of a will is that it must be completely free from any suspicion or suspicious circumstances whatsoever and the court, unless the suspicion or suspicious circumstances is removed, will pronounce against it and refuse probate. See Madam Olufunso Okelola vs. Miss Adebisi Boyle (1998) LPELR-2439 (SC). It is for the purpose of eliminating such suspicion or suspicious circumstances from the will that the Wills Law of Lagos State Cap W2, Laws of Lagos State provides that a will shall only be valid if:

(a) It is in writing.

(b) It is signed by the testator or signed in his name by some other person in his presence and by his direction in such a place on the Will so that it is apparent on the face of the Will that the testator intended to give effect by the signature of the writing signed as his Will;

(c) The testator makes or acknowledges the signature in the presence of at least two witnesses present at the same time.

(d) The witnesses attest and subscribe the Will in the

presence of the testator but no form of attestation or publication shall be necessary."

The evidence on record shows clearly that the witnesses to exhibit TDI, the Will in contention, did not attest and subscribe to the will in the manner provided for in the foregoing statute. It cannot, contrary to what the appellant asserts, be said to be valid. *(Pp 241 - 242 Paras H - F).*

5. *Effect where a party pays less than that assessed as filling fee*

I have perused the arguments of the respective counsel on this issue relating to payment of the statutory fees. I have also perused the record of appeal and observed that the statement of claim was filed on 9th December, 1993 and the payment of sums of money and its endorsement are indicated thereon.

That being the case, I agree with the leaned respondents' counsel submissions that appropriate filing fees were paid for the processes. Granted without conceding that the amount paid was lower than what was required, the appropriate order is for the respondents to make up the balance of the filing fees – which unfortunately learned counsel for appellant has failed to state.

In the circumstance, it is my considered view that issue 2 lacks merit and should and is hereby resolved against appellant. *(Pp 240 - 241 Paras G - B).*

6. *Will did not comply with S. 4© of Wills Law of Lagos State*

It is not in doubt that the Will (Exhibit TD1) on which the appellant staked her claim to exclusive ownership of the property was faulty because section 4© Wills Law of Lagos State Cap W2 Laws of Lagos State which requires that the testator makes or acknowledges the signature in the presence of at least two witnesses present at the same time was not fulfilled.

Since this was not done, the trial court nullified the Will and the property in dispute could no longer be held exclusively by the appellant. The Court of Appeal rightly affirmed the decision of the trial court. There is no reason why this Court should tamper with the judgment. *(P 243 Paras E - G.).*

Per Okoro (JSC)

"Evidence on record indicate that the Will of Madam Adeline O. tendered in evidence was not in compliance with the above provision of the Law in that it was not subscribed to by witnesses as provided by the law. It is the law that where the words used or the provisions of any section of the law are clear and unambiguous, they must be given their ordinary meaning unless of course, this would lead to absurdity or be in conflict with other provisions of the law. ***See Attorney General of the Federation vs. The Guardian Newspaper (1999) 9 NWLR (Pt. 618) 187.***

It is the contention of the respondents [as defendants at the trial court] that the said Will of Madam Adeline O. has fallen short of the requirements of the Wills Law of Lagos State, same not being subscribed to by witnesses, thus it is invalid.

I agree with the submission of the respondents that the Will, exhibit TD1 is short of the requirements of the law. It is trite that for a Will or the last testament of the deceased person to be given effect to, there must be absolute compliance with the Wills Law. Exhibit TD1relied upon by the appellant is not in absolute compliance with the Wills Law of Lagos State and therefore invalid". *(Pp 245 - 246 Paras F - C.).*

Representation

O.J. FASANMI (ESQ) for appellant.

A.M. MAKINDE (ESQ) for respondent.

RAHMAN BROTHERS LIMITED

VS

NIGERIAN PORTS AUTHORITY

SC. 410/2010

IN THE SUPREME COURT OF NIGERIA
HOLDEN AT ABUJA

FRIDAY, 11TH JANUARY, 2019

BEFORE THEIR LORDSHIPS

WALTER SAMUEL NKANU ONNOGHEN	**CHIEF JUSTICE OF NIGERIA**
MUSA DATTIJO MUHAMMAD	**JUSTICE, SUPREME COURT**
KUMAI BAYANG AKAAHS	**JUSTICE, SUPREME COURT**
JOHN INYANG OKORO	**JUSTICE, SUPREME COURT**
AMIRU SANUSI	**JUSTICE, SUPREME COURT**

COURT: Federal High Court – Jurisdiction thereof – S.251(1) of CFRN 1999 (as amended) – Nature and Imperatives.

COURT: Jurisdiction – Federal High Court – S. 251(1) of CFRN 1999 (as amended) – Whether Federal High Court does not have jurisdiction to entertain simple contracts or actions based on torts.

COURT: Jurisdiction – Federal High Court – S.251 of CFRN 1999 (as amended) – Whether the Federal High Court does not have jurisdiction to entertain any matter not within its exclusive jurisdiction under S. 251 of CFRN 1999.

COURT: Jurisdiction – Federal High Court – Where a party is an Agency of the Federal Government – Whether that alone does not determine the jurisdiction of the Federal High Court as the subject matter before the court is also relevant.

COURT: Jurisdiction – Fundamental nature thereof – When raised in a proceedings – Need to be resolved first – Rationale thereof.

Issues for determination

1. **Whether the Court of Appeal rightly or wrongly set aside the award of special damages of N242,530,889.50 made in favour of the appellant by the trial court on the ground that being an item of special damages same was neither specially pleaded nor strictly proved….**
2. **Whether the learned justices of Court of Appeal were correct or incorrect in entering judgment in favour of the respondent/cross appellant on its counter claim for the sum of N1,317,123.00 as arrears of rent….”**

(a) For the Cross Appeal:

3. **Whether the Court of Appeal rightly or wrongly held that the trial court had the jurisdiction to entertain the appellant's claim which is essentially based on the tort of negligence….**
4. **Whether the Court of Appeal rightly or wrongly held that the appellant is entitled to general damages of N20 million for negligence….**
5. **Whether the learned justices of the Court of Appeal were right or wrong in their rejection of the cross-appellant's submission that in the light of clause IV of Exhibit DW/1, the cross-appellant is not liable to the appellant for the fire incident….**
6. **Whether the learned justices of the Court of Appeal, on the state of the pleading and scanty evidence placed before it, rightly held the cross appellant liable for negligence…”**

Facts of the matter

The Plaintiff/appellant field an action at the Federal High Court Benin City in Suit No. FHC/B/CS/11/1998, against the defendants/respondents.

In the said suit, the plaintiffs/ appellant claimed against the defendants jointly and severally certain sum of money for negligence as a result of outbreak of fire that destroyed plaintiff goods. The second respondent however, counter claimed against the plaintiff seeking for certain reliefs.

The respondents gave the plaintiff storage facilities at Warri Port for storage of teak log for export. The parties entered into an agreement where the plaintiff entered into a contract of indemnity against fire in favour of the second respondent.

The plaintiff/appellant claimed that the teak log where burnt by hush fire and the respondents (Landlords) were negligent and failed to put off the fire. At the end of trial, the plaintiff claims were dismissed. The Court of Appeal affirmed the decision of the trial court, hence this further appeal to Supreme Court.

Held: *(Unanimously dismissing the appeal)*

1. *Fundamental nature of jurisdiction*

It is settled law that the question of jurisdiction is fundamental and crucial to adjudication and that the very fact of its absence automatically results in a nullity of proceedings no matter how well conducted. It is for the above reasons that it is further settled law that when raised in a proceeding, it must be specifically dealt with and resolved. See Onyema vs. Oputa (1987) 3 NWLR (Pt. 60) 259; A.G of the Federation vs. Sode (1990) 1 NWLR (pt. 128) 580, Ishola vs. Ajiboye (1994) 6 NWLR (Pt. 352) 506; Madukolu vs. Nkemdilim (1962) 2 SCNLR 374. *(P 269 Paras B - D).*

2. *The nature of jurisdiction of Federal High Court under s.251(1) of the CFRN 1999 as amended.*

Section 251(1) of the 1999 Constitution, as amended governs the jurisdiction of the Federal High Court and provides as follows:-

"(1) Notwithstanding anything to the contrary contained in this Constitution and in addition to such other jurisdiction as may be conferred upon it by an Act of the National Assembly, the Federal High Court shall have and exercise jurisdiction to the exclusion of any other court in civil cases and matters –

(a) **relating to the revenue of the Government of the Federation in which the said Government or any organ thereof or a person suing or being sued on behalf of the said Government is a party;**

(b) Connected with or pertaining to the taxation of companies and other bodies established or carrying on business in Nigeria and all other persons subject to Federal taxation;

(c) connected with or pertaining to custom and excise duties and export duties, including any claim by or against the Nigerian Customs Service or any member or officer thereof, arising from the performance of any duty imposed under any regulation relating to customs and exercise duties and export

duties.

(d) Connected with or pertaining to banking, banks, other financial institutions, including any action between one bank and another, any action by or against the Central Bank of Nigeria arising from banking foreign exchange, coinage, legal tender, bills of exchange letters of credit, promissory notes and other fiscal masseurs: provided that this paragraph shall not apply to any dispute between an individual customer and his bank in respect of transactions between the individual customer and the bank.

(e) **arising from the operation of the Companies and Allied Matters Act or any other enactment replacing the Act or regulating the operation of companies incorporated under the Companies and Allied Matters Act;**

(f) any Federal enactment relating to copyright, patent, designs, trade-marks and passing-off, industrial designs and merchandise marks, business names, commercial and industrial monopolies, combines and trusts, standards of goods and commodities and industrial standards;

(g) any admiralty jurisdiction, including shipping and navigation on the River Niger or River Benue and their affluents and on such other inland waterway as may be designated by any enactment to be an international waterway, all Federal ports, (including the constitution and powers of the ports authorities for Federal ports) and carriage by sea;

(h) diplomatic, consular and trade representation;

(i) citizenship, naturalization and aliens, deportation of persons who are not citizens of Nigeria, extradition, immigration into and emigration from Nigeria passports and visas;

(j) **bankruptcy and insolvency;**

(k) aviation and safety of aircraft

(l) arms, ammunition and explosives;

(m) drugs and poisons;

(n) mines and minerals (including oil fields, oil mining, geological surveys and natural gas)

(o) weights and measures:

(p) the administration or the management and control of the Federal Government or any of its agencies;

(q) subject to the provisions of the Constitution, the operation

and interpretation of this Constitution in so far as it affects the Federal Government or any of its agencies;

(r) any action or proceeding for a declaration or injunction affecting the validity of any executive or administrative action or decision by the Federal Government or any of its agencies; and

(s) such other jurisdiction civil or criminal and whether to the exclusion of any other court or not as may be conferred upon it by an Act of the National Assembly: provided that nothing in the provisions of paragraphs (p), (q) and (r) of this subsection shall prevent a person from seeking redress against the Federal Government or any of its agencies in an action for damages, injunction or specific performance where the action is based on any enactment, law or equity.

(2) **The Federal High Court shall have and exercise jurisdiction and powers in respect of treason, treasonable felony and allied offences.**

(3) 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 subsection (1) of this section."

There is no doubt that respondent/cross appellant is a Federal Government Agency but it is the contention of learned senior counsel for respondent/cross appellant that the status of the said respondent/cross appellant as a Federal Government Agency, without more, does not confer the requisite jurisdiction on the Federal High Court to hear and determine the action as constituted particularly as the cause of action before the trial court is grounded on negligence and landlord and tenant relationship. There is no allegation of breach of statutory duty placed on the respondent/cross appellant by the respondent in the statement of claim neither was any issue joined thereon. *(Pp 269 - 273 Paras D - D).*

3. Court of appeal was in error to hold that Federal High have jurisdiction

The substance of the ground challenging the jurisdiction of the trial court in this matter is subject-matter jurisdiction i.e whether the Federal High Court has jurisdiction to hear and determine an action based simply on negligence on the part of a landlord to prevent a fire from spreading to and destroying the properties goods of the tenant

in possession.

It is for the above established facts that I hold the considered view that the lower court was in error in relying on the case of NPA PLCCC vs. LOTUS PLASTICS LTD, supra, as well as NEPA vs. EDEGBERO, supra in coming to the conclusion that trial court has jurisdiction to hear and determine the action. *(P 273 Paras D - G).*

4. *The relationship between the parties is contractual*

I agree with the submission of learned senior counsel for respondent/cross appellant that ……

> **"the relationship between the appellant and the respondent is purely contractual. There existed a Landlord and Tenant relationship between the parties whereby in consideration of rent and royalties paid by the appellant; the respondent let out a space at the Warri Port where the appellant stacked its teak logs of wood in order to prepare and export them overseas. The negligence which was the appellant's cause of action, is an offshoot of the contractual relationship which resulted in the appellant's plea that as its landlord, the respondent owed her a duty of care to put out the fire. The respondent allegedly breached the duty of care which resulted in the destruction of the appellant's teak logs of wood….."**

See paragraph 5.5 at page 20 of the *"respondent's brief in response to appellant's brief dated 9th March, 2012 and Cross appellant's brief in respect of the notice of cross appeal filed on 12th March 2012."*
(P 274 Paras B - G).

5. *It is not only the nature of parties that determines the jurisdiction of the Federal High Court.*

Once again I have to repeat that though the respondent is an agency of the Federal Government by virtue of which it is subject to the jurisdiction of the Federal High Court in appropriate cases, that fact alone is not enough to confer jurisdiction on the Federal High Court in all cases. In addition to the above, the subject matter of the action must also fall within the jurisdiction of the court (Federal High Court) in order to enable the court exercise its jurisdiction unhindered. The jurisdiction of the Federal High Court is therefore

exercisable over the parties and subject matter of the suit. See:

1) **DG S.S.S. vs. Ojukwu (2006) 13 NWLR (Pt. 998) 575 at 586 – 587, Paras. G-C**
2) **NEPA vs. Edegbero (2002) 12 SC (Pt. 11) 119 @ 133 Per Tobi, J.S.C.**
3) **Mudiaga Erhueh vs. INEC (2003) 5 NWLR (Pt. 812) 70 at 76**
4) **Onuorah vs. Kaduna Refining Company Limited (2005) 6 NWLR (Pt. 921) 393 at 405**
5) **National Union of Electricity Employees Association vs. Bureau of Public Enterprises (2010) 2-3 SC 27 at 67.**

It is for the above reasons that I hold the considered view that the trial court lacked the jurisdiction to hear and determine the suit as constituted and that the lower court is in error in holding otherwise.
The cross appeal therefore succeeds on this issue and the claim and counter claim of the parties before the trial court in suit No. FHC/B/CS/II/1998 are hereby struck out for want of jurisdiction. *(Pp 274 - 275 Paras G - F).*

6. *Federal High Court does not have jurisdiction to entertain simple contract or negligence.*

The issue the appeal raises, the question of the jurisdiction of the Federal High Court over matters of simple contracts, has long been settled. Simply put, section 251 of the 1999 Constitution as amended which prescribes the jurisdiction of the court does not cover simple contract and or negligence emanating from such a contract that forms the subject matter of the instant matter. See Onuorah vs. Kaduna State Refinery and Petro Chemical Company (2005) 6 NWLR (Pt. 921) 391, Ports and Cargo Handling Services Company Ltd & Ors vs. Migfo Nigeria Ltd & anor (2012) LPELR-9725 (SC).
In the instant case where both the claim and counter claim are founded on simple contract, the trial Federal High Court lacks jurisdiction. The lower court's decision to that end is unassailable. *(P 276 Paras A - D).*

Per Akaahs (JSC)

"I agree with the submission of Professor Taiwo Osipitan SAN, learned counsel for the cross-appellant that the lower court was in error when it held that the Federal High Court had jurisdiction to hear and determine the suit as constituted

because the respondent/cross-appellant is an agency of the Federal Government. The action which the appellant instituted was predicated on the tort of negligence. The trial court must have jurisdiction over the subject matter before she can competently assume jurisdiction over the case. The relationship between the parties was that of landlord and tenant and therefore contractual and the alleged negligence was an offshoot of that contract. The subject matter of the cause of action namely the tort of negligence is completely outside the jurisdiction conferred on the Federal High Court under the Constitution (Suspension and Modification) Decree 107 of 1993 which has been reproduced as section 251 (1) of the 1999 Constitution.

It is for this reason that I am entirely in agreement with my Noble Lord, Onnoghen CJN that the trial court lacked the jurisdiction to hear and determine the claim and counter-claim of the parties in suit No. FHC/B/CS/11/1998. *(Pp 277 - 278 Paras D - A).*

7. *Fundamental nature of jurisdiction*

As rightly stated by the learned Chief Justice, it is settled law that the question of jurisdiction is fundamental and crucial to adjudication. Whenever the question of jurisdiction is raised in a proceeding, it must be specifically dealt with and resolved before any other thing. See ***Madukolu vs. Nkemdilim (1962) 2 SCNLR 374.*** *(P 279 Paras A - B).*

8. *Federal High Court have jurisdiction only in respect of matters listed within S. 251 of CFRN 1999 (as amended)*

The law is that it is not the rules of court that vest jurisdiction in the court but the statute creating the court. Thus, in determining the jurisdiction of the Federal High Court, it is the provision of section 251 of the 1999 Constitution of the Federal Republic of Nigeria (as amended) that would be applicable. In the case of *Felix Onuorah vs. Kaduna Refining and Petrochemical Co. Ltd (2005) 2 SC. (Pt. 11) 1: (2005) Vol. 6 MJSC 132 this court per Edozie, JSC held at page 154* that: *"by section 230 (1) (p) of the 1979 Constitution as amended, now section 251 (1) (p) of the 1999 Constitution, the Federal High Court is vested with exclusive jurisdiction, inner alia, on matters pertaining to the administration or management and control of the Federal*

Government or any of its agencies. The plaintiff/applicant's claim does not fall within the ambit of this sub-section and therefore all the submissions of counsel with respect to whether the defendant/respondent is a subsidiary or an agent of NNPC are irrelevant. It is, therefore, my view that the court below was right in holding that the Federal High Court lacked jurisdiction to entertain the plaintiff/applicant's case." In the same case, Akintan, JSC held at pages 148-149 that: "a close examination of the additional jurisdiction conferred on the Federal High Court Section 230 (1) (q), (r) and (s) of Decree No. 107 of 1993 and by the 1979 Constitution clearly shows that the court was not conferred with jurisdiction to entertain claims founded on contract as in the instance case. In other words, section 230 (1) provides a limitation to the general and all-embracing jurisdiction of the state High Court because the items listed under the said section 230(1) can only be determined exclusively by the Federal High Court. All other items, not included in the list would therefore still be within the jurisdiction of the State High Court. In the instant case, since disputes founded on contracts are not among those included in the additional jurisdiction conferred on the Federal High Court, that Court therefore had no jurisdiction to entertain the appellant's claim.
"See also Warri Refining & Petrochemical Co. Ltd vs. GECMEP (Nig.) Ltd (2017) LPELR-42664.

In view of the above reason, I am of the considered view that the trial court lacked jurisdiction to entertain the suit of the appellant same bothering on breach of contract and negligence. Therefore, the cross appeal is hereby allowed. The claim and counter-claim in *suit No. FHC/B/CS/11/1998* is hereby struck out for lack of jurisdiction. *(pP 279 - 280 paras B - E)*

Per Sanusi (JSC)
"The gravamen or crux of the core issue in this appeal as fought by learned counsel to the parties, is whether the Federal High Court, where the suit was instituted had jurisdiction to determine it.

There is no gain saying that looking closely at the subject matter of the suit, it clearly pertains to a claim relating to tort of negligence and breach of contract. By the provisions of Section 230(1 of the Constitution of Federal Republic of Nigeria 1979 which later metamorphosed into Section 251(1) of the 1999 Constitution of

the Federal Republic of Nigeria, the Federal High Court has exclusive jurisdiction on, among others, matters relating to <u>the administration or management and control of the Federal Government or any of its agencies.</u>

Now looking closely at the claims presented in the suit before the trial court as ably and adequately reproduced in the lead judgment of my learned brother, the CJN, one is left with no iota of doubt that such claims do not fall within the jurisdiction of the Federal High Court as rightly held by the court below. See Onuorah vs. Kaduna Refining and Petrochemical Co. Ltd (2005) 6 MJSC 132. The trial court therefore lacks jurisdiction to entertain and determine the suit filed before it, as rightly held by the lower court.

The law is trite that jurisdiction is life wire or back borne of any suit. It gives life to the survival of an action in court of law and without it, it would be like an animal that has been drained of its blood. Any court that embarks on hearing and determination of a suit, no matter how well and beautifully, in which it lacks jurisdiction, it can be said to have embarked on a wasteful and futile exercise which could lead to wastage of its precious judicial time, because its decision must be struck out on appeal as in this instant case/suit. The subject matter of the suit filed before the Federal High Court falls squarely within the jurisdiction of State High Court and certainly NOT the trial Federal High Court, same being related to tort or simple contract". *(Pp 280 - 281 Paras G - H).*

Representation

P.O. JIMOH-LASISI, (SAN) for appellant with him are MESSRS S.A. MUSTAPHA; M.B. JIMOH-AKOGWU; OMANG C. OMANG & J.O. ACHA.
PROF OSIPITAN TAIWO, (SAN) for respondent with him are MESSRS A.M KAYODE; C.A. OFUEGBUNAM; F.P. CHORIO and ADEGOKE KAYODE

UNION BANK OF NIGERIA PLC

VS

1. CLEMENT NWANKWO
2. PAUL OKEKE

SC. 287/2006

IN THE SUPREME COURT OF NIGERIA
HOLDEN AT ABUJA

FRIDAY, 11TH JANUARY, 2019

BEFORE THEIR LORDSHIPS

WALTER SAMUEL NKANU ONNOGHEN	**CHIEF JUSTICE OF NIGERIA**
MUSA DATTIJO MUHAMMAD	**JUSTICE, SUPREME COURT**
JOHN INYANG OKORO	**JUSTICE, SUPREME COURT**
PAUL ADAMU GALUMJE	**JUSTICE, SUPREME COURT**
SIDI DAUDA BAGE	**JUSTICE, SUPREME COURT**

PRACTICE AND PROCEDURE: Proof – Special damages – When plaintiff bases special damages/claim on anticipated profit – Whether claim is speculative.

PRACTICE AND PROCEDURE: Award of special damages – Bank dishonoured cheque of plaintiff – Plaintiff allegedly lost profit as a result of the dishonoured cheque – Transaction leading to the lost of profit unknown to bank at the time of dishonouring cheque – Whether award of special damages against bank was remote.

PRACTICE AND PROCEDURE: Award of special damages – Whether special damages must not be awarded on incomplete or inconclusive facts given from memory.

PRACTICE AND PROCEDURE: Damages – Award of special damages – Interference by appellate court – Whether an appellate court will interfere in the award of special damages where the lower court wrongly exercised its discretion thereto.

PRACTICE AND PROCEDURE: Damages – Award of special damages – Where court awarded special damages to the plaintiff based on the occurrence of futuristic event – Whether special damages so awarded are speculative.

PRACTICE AND PROCEDURE: Proof – Special damages – Onus on claimant thereto – Whether onus lies on the claimant to prove strictly special damages – How discharged.

PRACTICE AND PROCEDURE: Proof – Special damages – Where court awarded special damages against a party who was not part of the contract which resulted in a breach – Whether special damages so awarded is remote and unforeseeable.

PRACTICE AND PROCEDURE: Proof – Special damages – Where plaintiff proofs special damages by mere Ipsa dixit without any documentary evidence – Impropriety thereof – Whether special damages must be the actual damages incurred and not damages to future or speculative income.

PRACTICE AND PROCEDURE: Proof – Special damages – Whether must be specifically pleaded and strictly proved.

PRACTICE AND PROCEDURE: Proof – Special damages – Where plaintiff makes a claim of special damages without any evidence to back up – Whether a court is not expected to act on unreliable and incredible evidence – The principle in Young vs. chevron (Nig) Ltd (2013) LPELR 22126;

PRACTICE AND PROCEDURE: Special damages – They are inferred from the nature of the act complained of – Whether capable of exact mathematical calculations.

Issues for determination

1. **Whether in the circumstances of this case, the sum of N3.5 million claimed by the respondents as special damages and awarded by the lower court was not too remote and was within**

the contemplation of the parties to the contract as at the point of entering into the contract.

2. **Whether the sum of N3.4 million claimed, proved and awarded was too remote having regard to the fact that, that was the loss incurred by the 1st respondent (who was a trader) as a result of wrongful dishonor of his (1st respondent's) cheque by the appellant.**

Facts of the matter

The plaintiff 1st Respondent sued the defendant/appellant at the Benue State High Court sitting at Makurdi, claiming a declaratory relief against the appellant for its failure to honour the plaintiff's cheque, whereas the plaintiff has sufficient fund in his account. The plaintiff also claimed three million Naira as damages for breach of contract, as well as an order of court stopping deductions of interest in respect of facilities granted to the plaintiff and nullification of the mortgaged argument he entered with the defendant. The defendant appellant filed a statement of defence and counter claimed against the plaintiff issues having been joined, the plaintiff, the stified in chief and called two witnesses, while the appellant also called two witnesses. At the end of trial, the court found the appellant liable for breach of contract and awarded against him 200,000 as damages. The court dismissed the claims for special damages and other reliefs claimed by the plaintiff, the counter claim of the defendants were also dismissed.

The parties appealed to the Court of Appeal. It is against the decision of the Court of Appeal that the defendant/appellant has now appealed to Supreme Court.

Held: *(Unanimously allowing the Appeal)*

1. *Burden on claimant to prove special damages*

The law is settled that where a party claims special damages, the burden is on him to prove the special damages to the last kobo. He has to do this by leading credible evidence most of the time by documents which show the actual loss he has suffered. See Arisons Trading & Engineering Co. Ltd vs. Military Governor Ogun State (2009) LPELR 554 (SC). Unchallenged ipse dixit evidence is not an automatic proof of special damages. *(P 303 Paras F - H).*

2. *Where the basis for special damages is speculative*

There was no invoice from Niyi Idowu Commercial Enterprises stating the actual price of the fish and there was no corroborative evidence that the retail price per carton of the fish in Gboko at the material time was N2,700. The profit margin alluded to by the 1st respondent is speculative and based on future transactions. How sure was the 1st respondent that the market forces were going to remain static throughout the transaction and that the transportation of the fish from Lagos to Gboko would remain incidence free? *(P 304Paras C - E).*

3. *Court is to act on credible and reliable evidence*

In Young vs. Chevron (Nig) Ltd (2013) LPELR 22126, the plaintiff set out the particulars of the crops that were destroyed in his farm and the expected earnings from those crops which he pleaded and gave evidence that the employees, agents, contractors and servants of the defendant had destroyed by setting fire to his farm. The learned trial judge found that the plaintiff had not proved the items of special damages, as the pleadings and depositions merely contain speculations as to the number of plants and the expected income. On appeal, the Court of Appeal held:-

> **"A court is not expected to believe and act on evidence that is manifestly incredible or unreliable, merely because the plaintiff said so; the evidence itself must be credible evidence, before it can be acted on by a court of law. What if the appellant had claimed that the farm produce he lost was worth a Billion naira, with nothing whatsoever to substantiate his claim, will a reasonable man expect the lower court to hand it to him just like that? No, he would have to show some proof that he is entitled to such an amount, and that is what was required of him – some evidence to back up his claims.'**

With this comment, the Court of Appeal dismissed the appellant's appeal on the issue of special damages. I agree and feel persuaded by the position of the Court of Appeal that mere ipse dixit where a claim is required to be proved by documentary evidence is not enough to prove special damages. I also agree that special damages

must be the actual damages incurred and not damages to future or speculative income. *(Pp 304 - 305 Paras E - D).*

4. *Nature of special damages*

As I have said elsewhere in this judgment, special damages are such claims as the law will infer from the nature of the act complained of. In other words special damages must flow from the act complained of in the ordinary course of events. They are exceptional in character and therefore must be specifically and specially claimed and proved strictly. Examples of such claims are out of pocket expenses or loss of earnings, incurred as a result of deliberate failure to honour agreement and are therefore capable of exact mathematical calculations. See Odulaja vs. Haddad (1973) 8 SC (Reprint) 614; Neka B.B.B Manufacturing Co. Ltd vs. A.C.B Ltd (2004) 2 NWLR (Pt. 858) 521. *(P 305 Paras D - G).*

5. *Special damages awarded was too remote*

The appellant was not a party to the negotiation to buy fish from Niyi Idowu Commercial Enterprises. Even though the appellant knew that the 1st respondent was carrying out the business of sale and stocking of fish, there is no evidence that this particular transaction was brought to its knowledge at the time the cheque was presented by the 1st respondent with instruction to prepare a draft in favour of Niyi Idowu Commercial Enterprises. Even if the appellant knew, there was no way it could have been held liable for a contract in which it was not a party. This is where I agree entirely with the learned counsel for the appellant that the special damages claimed by the respondents and awarded by the lower court was too remote as a consequence of the act of the appellant and that it could not have been foreseen at the time the 1st respondent's cheque was dishonoured.

The appellant was not a party to the negotiation for sale of fish, even though there was a contractual agreement between it and the 1st respondent. As between them, the lower court adjudged that there was a breach of contract, which breach was merely incidental to whatever might have happened between the 1st respondent and Niyi Idowu Commercial Enterprises. Parties are satisfied with the award of general damages and that is the end of the matter. The award of special damages by the lower court is clearly wrongful and so I hold. *(Pp 305 - 306 Paras G - E).*

6. *Special damages must not be awarded on incomplete or inconclusive facts*
Special damages cannot and must not be awarded on incomplete or inconclusive facts given from memory which have not been documented elsewhere. See Adim vs. NBC Ltd (2010) 9 NWLR (Pt. 1200) 543; Agbaje vs. James (1967) NMLR 49; Agunwa vs. Onukwue (1962) 2 SC NLR 345. *(P 306 Paras E - F).*

7. *When an appellate court can interfere in the award of damages*
Although an appellate court ought not upset an award of damages, in absence of special circumstances, I am of the firm view that the lower court wrongly exercised its discretion in award of special damages to the 1st respondent in the sum of N3,400,000.00. On the authorities of Ezekwe vs. Oromewo (1958) SCNLR 132; African Newspapers Ltd vs. Ciroma (1996) 1 NWLR (Pt. 423) 156; James vs. Mid-Motors (Nig) Ltd (1978) 11-12 SC 31; Onaga vs. Micho (1961) 2 SCNLR 101. I am in a position to upset the award made by the lower court on the basis of the reasons I have set out hereinabove. The 1st issue distilled by the appellant as well as the sole issue distilled by the respondent and the appellant's 3rd issue for determination of this appeal are hereby resolved against the respondents and in favour of the appellant. This being so, this appeal shall be and it is hereby allowed. *(Pp 306 - 307 Paras F - B).*

Per Onnoghen (CJN)

"I agree with the submission of learned counsel for appellant and my learned brother GALUMJE JSC in the lead judgment that the special damages claimed by 1st respondent and awarded by the lower court in its said judgment was too remote as a consequence of the act of the appellant in dishonouring the cheque in issue as same could not, from the facts on record, have been foreseen by the parties to the transaction: it was not within the contemplation of the parties at the time appellant refused/neglected to honour the said cheque.

Secondly, it is also clear from the facts that the loss allegedly suffered and claimed by 1st respondent as resulting from the dishonor of the cheque is not only speculative but grounded on futuristic occurrence of an event – a contemplated profit arising from his business.

Thirdly, the said special damages was in the facts and circumstances of the case not strictly proved as required by law.

Special damages are of exceptional character and must be specifically and specially claimed and strictly proved. For example claims for out of pocket expenses or loss of earnings resulting from the deliberate refusal to honour agreement and must be capable of exact mathematical calculations as decided by this court in a plethora of cases including ODULAJA vs. HADDAD (1973) 8 SC. (Reprint) 614; Neka B.B.B Manufacturing Co. Ltd vs. A.C.B Ltd (2004) 2 NWLR (Pt 858) 521 etc.

There is no evidence on record that appellant knew of or was party to the negotiation to buy frozen fish from Niyi Idowu Commercial Enterprises at the time the dishonoured cheque was presented to it by 1st respondent for a draft in favour of the said Niyi Idowu Commercial Enterprises. *(Pp 308 - 309 Paras E - D).*

8. *Special damages must be specifically pleaded and strictly proved*

The central issue this appeal raises has long been settled by this Court. It is indeed trite that a claim for special damages must not only be specifically pleaded item by item with corresponding monetary value of the claimed item, the items as particularized must further be proved by credible evidence for the court to grant the claim. Where special damages have not been specifically pleaded and proved, same shall not be granted. It follows that a claim for special damages succeeds only in respect of actual and not estimated or anticipated loss or profit. See Dumez vs. Ogboli (1977) 2 Sc 45, Okunzua vs. Amosu (1992) 6 NWLR (Pt. 248) 416 at 432 and **Anyanwu Cs. Uzowunaka (2009) 13 NWLR (Pt. 1159) 445.**

In the case at hand where the special damages of the sum of N3,400,000.00 (three million four hundred thousand Naira) claimed and awarded the respondent by the court below being speculative, learned appellant's counsel is right, the award must be interfered with for being perverse. *(Pp 309 - 310 Paras H - D)*

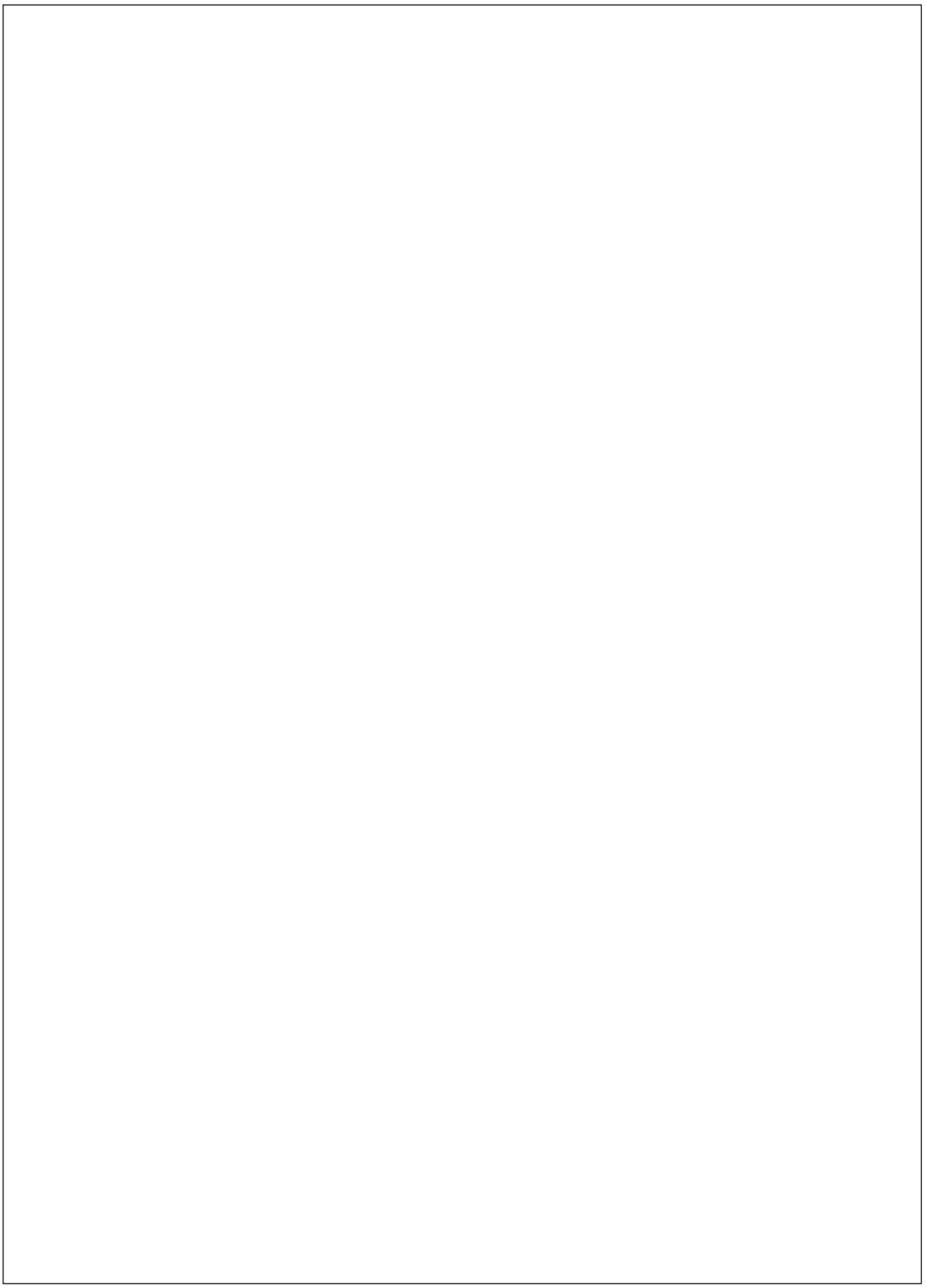
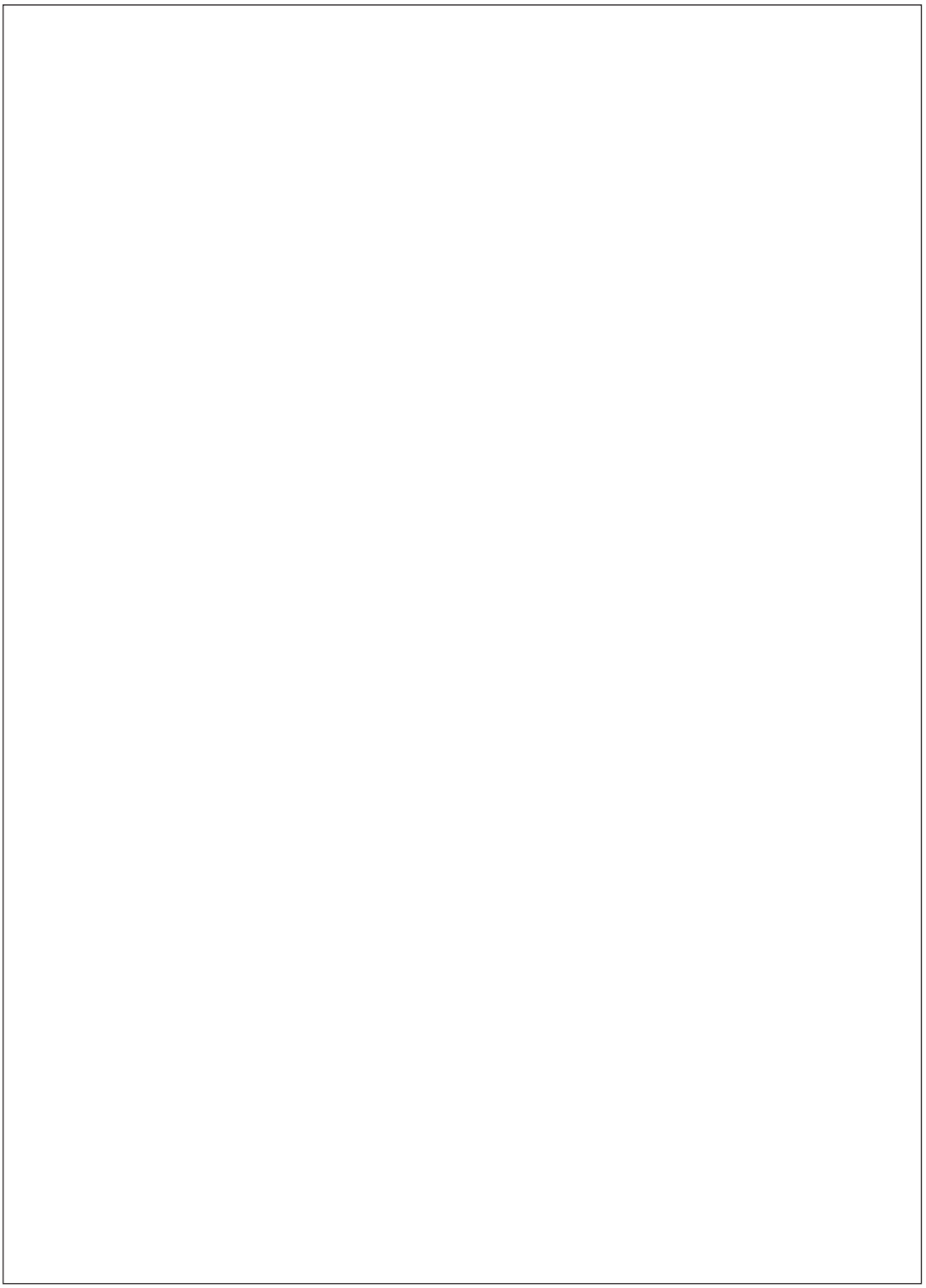
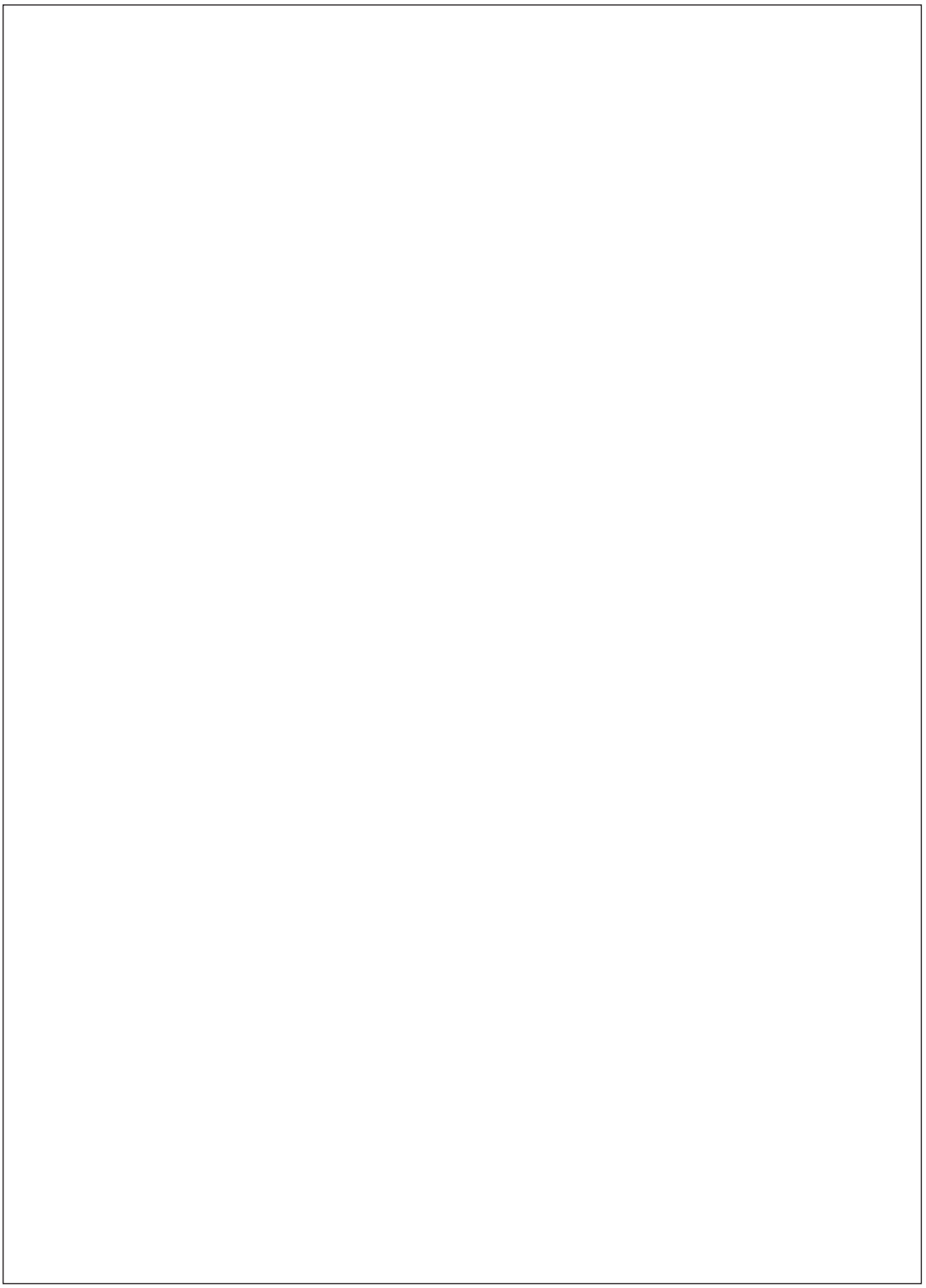
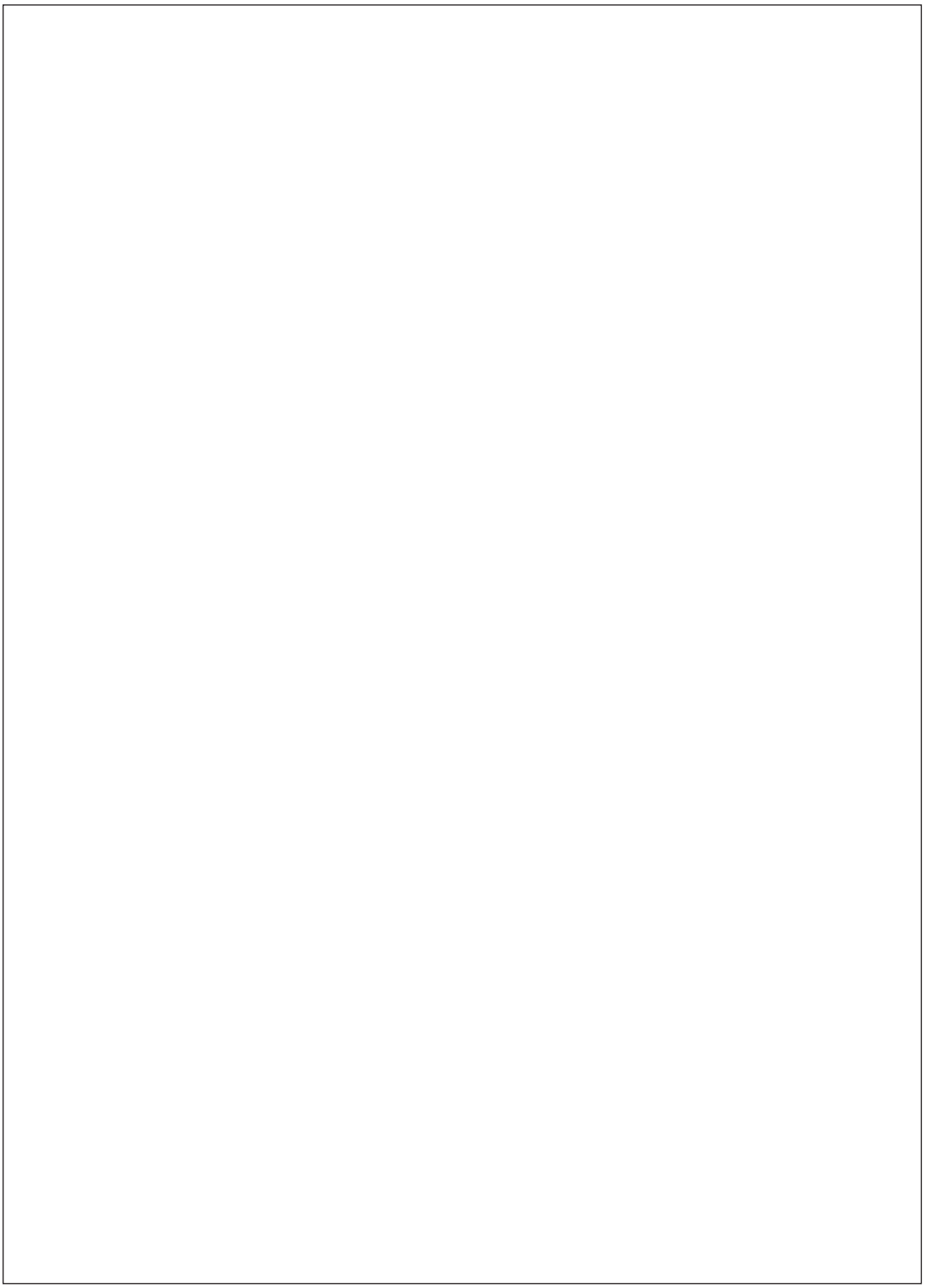
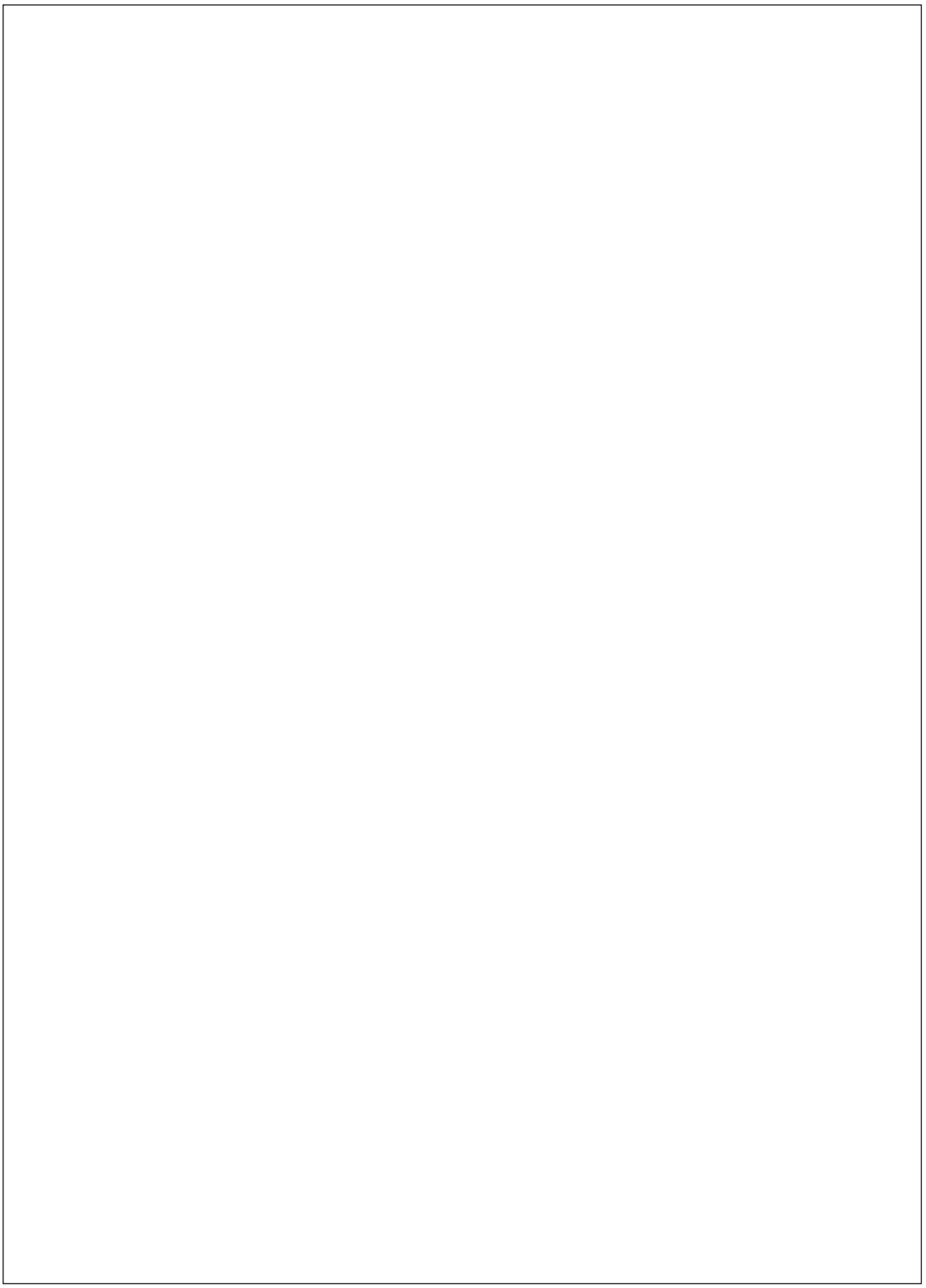
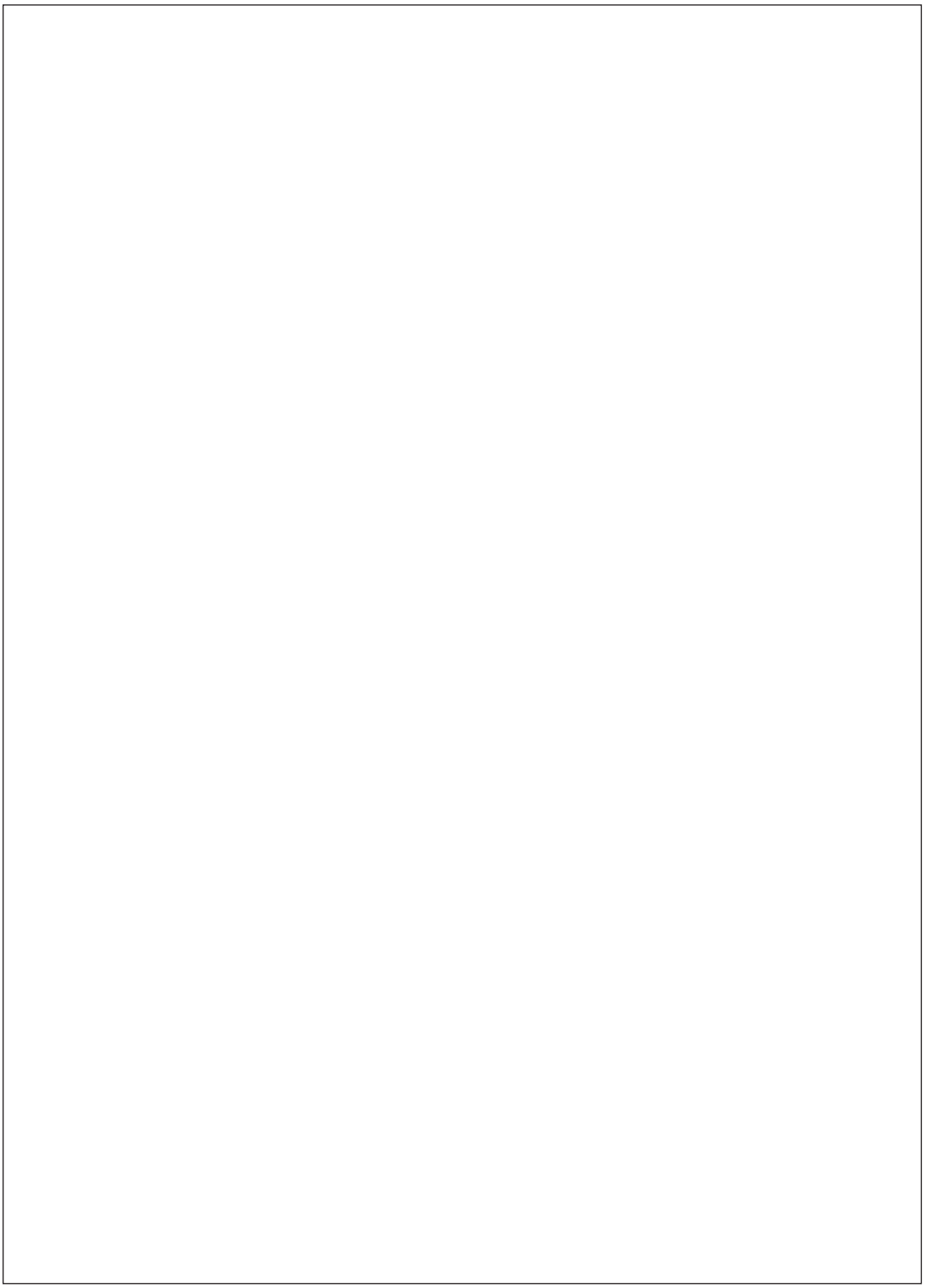
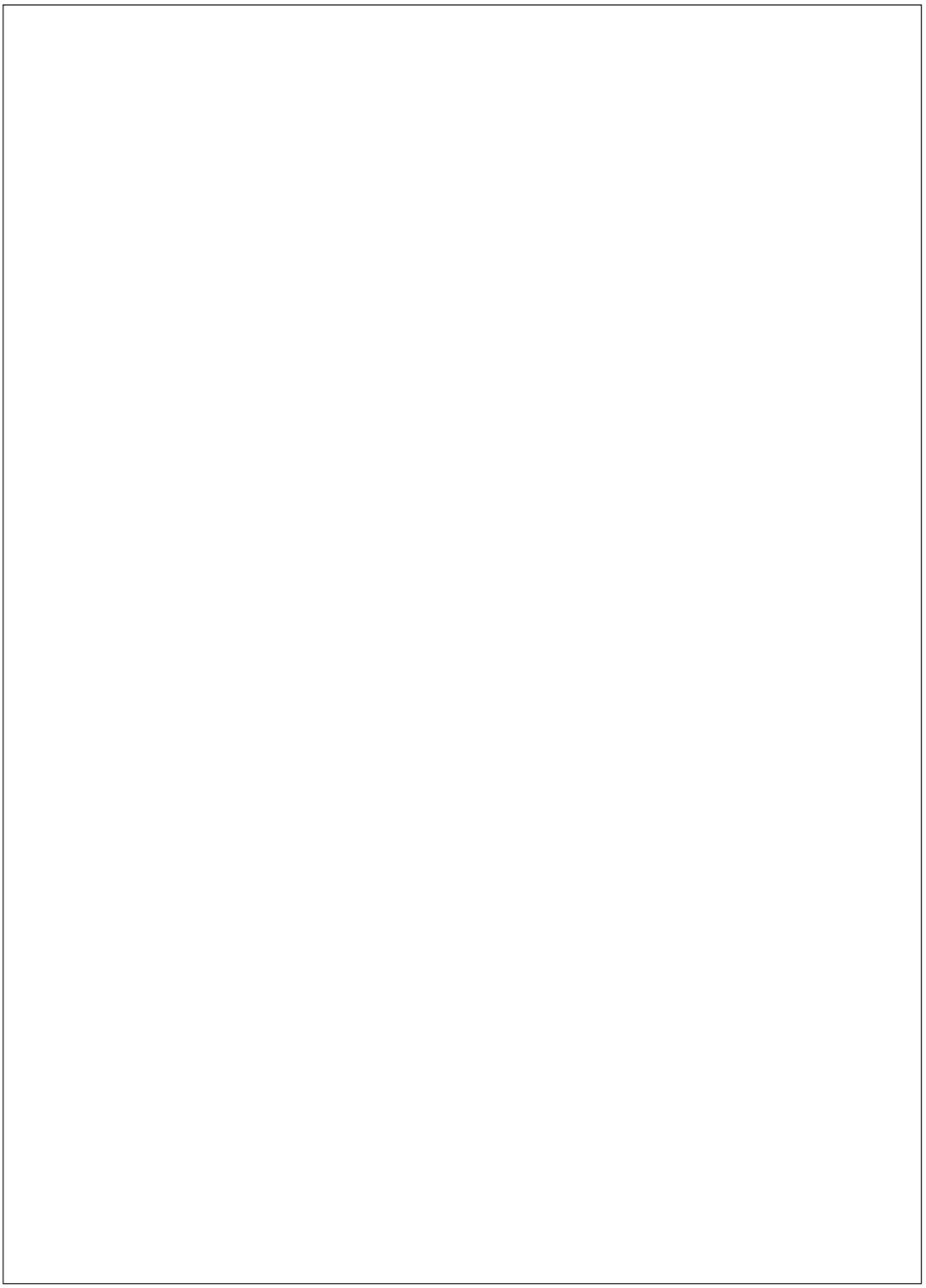
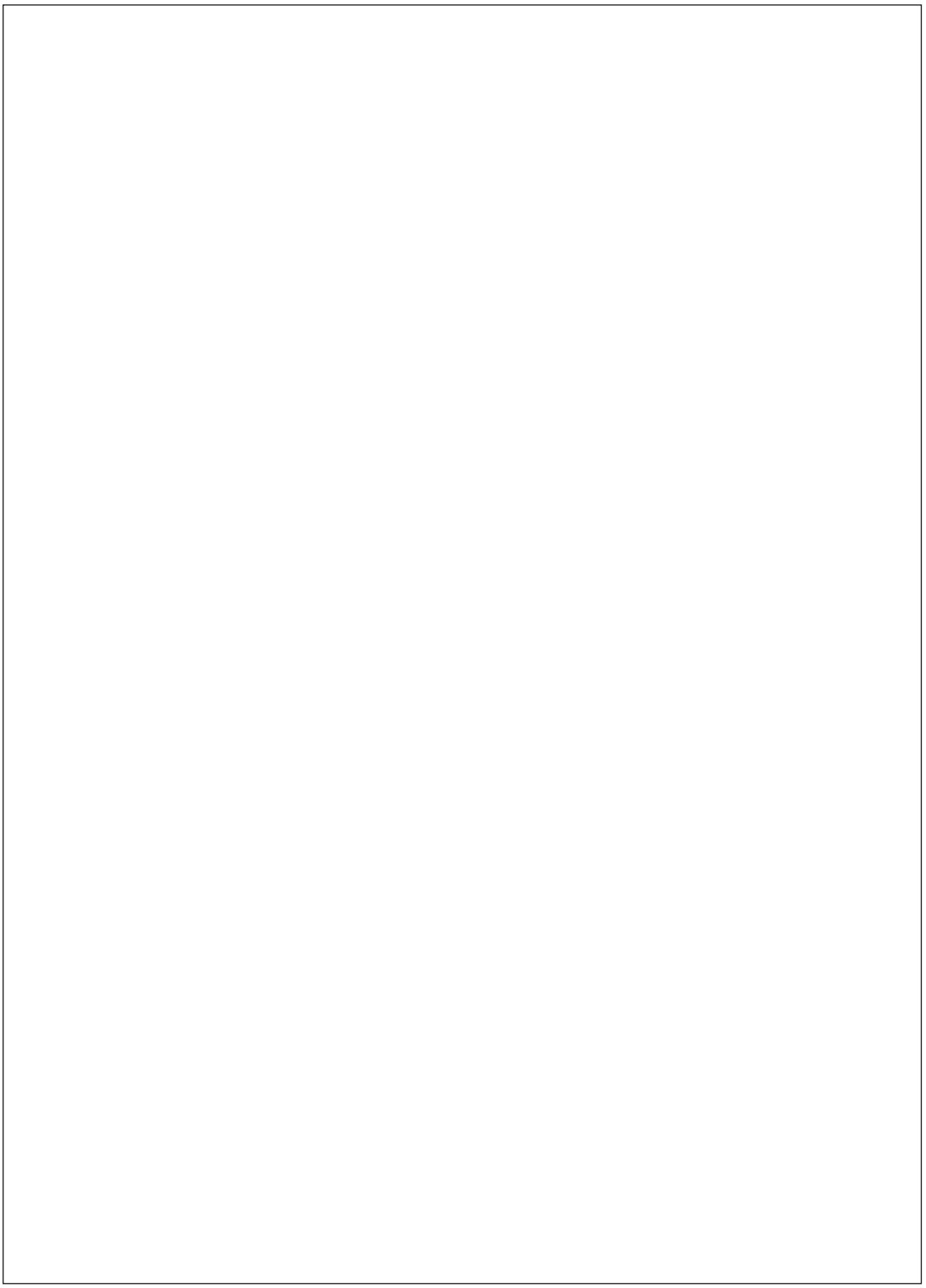
Per Okoro (JSC)

The law, as succinctly put by my learned brother is that a claim for award of special damages must not only be specifically pleaded but must be strictly proved. It is trite law that special damages will only be awarded if strictly proved. The plaintiff ought to sufficiently particularize the claim to enable the court decide whether all or part of its can be granted. The law does not envisage that a claim for an award of special damages must be proved beyond reasonable doubt. All that is required is that the plaintiff should establish his claim by credible evidence. ***See UBN vs. Odusote Bookstores Ltd. (1995) 9 NWLR (Pt. 421) 558. Okoronkwo vs. Chukwueke (1992) 1 NWLR (Pt. 216) 175; NA Ltd vs. Aiyeoribe (2000) 17 WRN 40 at page 53.***

In the instant case, the claim for the award of N3,400,000.00 as special damages was for estimated anticipatory profit. I agree with their lordships' reasoning in the case of *Young vs. Chevron (Nig.) Ltd 2013 LPELR- 22126* that special damages must be the actual damages incurred and not damages for speculative income. I also agree with the learned counsel for the appellant that special damages awarded by the court below to the 1st respondent was too remote and could not be foreseen as a consequence of the appellant's action at the time the 1st respondent's cheque was dishonoured. *(P 311 Paras B - G).*

Representation

MR. S.O. SIMON (ESQ) for the Respondents.

No appearance for the Appellant.

Registrar – Appellant was served on 12/10/2018