

**ABUBAKAR BALA
Vs.
THE STATE**

SC.233/2014

IN THE SUPREME COURT OF NIGERIA

HOLDEN AT ABUJA

FRIDAY, 5TH APRIL, 2019

BEFORE THEIR LORDSHIPS

**IBRAHIM TANKO MUHAMMAD
MARY UKAEGO PETER-ODILI
OLUKAYODE ARIWOOLA
AMIRU SANUSI
EJEMBI EKO**

**JUSTICE, SUPREME COURT
JUSTICE, SUPREME COURT
JUSTICE, SUPREME COURT
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JUSTICE, SUPREME COURT**

COURT:- Error of court – Whether it is not every error by the lower court that will vitiate the decision.

*COURT:- Lower court – Error thereof – Whether it is not every error by the lower court that will lead to its decision being set aside – The principle in **Azabada Vs. State (2014) 58 NSCQR 531***

CRIMINAL LAW AND PROCEDURE:- Culpable homicide – Duty on court thereto – Whether bound to consider all defences borne out by the evidence whether specifically raised by the accused or not.

*PRACTICE AND PROCEDURE:- Appeal – Error of lower court – Where a lower court commits an error that has not led to a miscarriage of justice – Whether its decision will not be set aside on appeal – The principle in **Azabada Vs. State (2014) 58 (Pt.2) NSCQR 531.***

STATUTE:- Penal code – S. 326 thereof – Nature and purport – Whether provides for mischief to property.

Issues for Determination

The learned justices of the Court of Appeal erred in law when they failed to consider the defence of "Private Defence of Property" provided pursuant to Sections 59, 66 and 67 of the Penal Code available to the appellant which was properly raised and argued before them. (Distilled from Ground 1).

The learned justices of the Court of Appeal erred in law when they affirmed the conviction of the accused by the trial court after coming to the conclusion that appellant was not guilty as charged. (Distilled from Grounds 2 and 3).

Facts of the Matter

This is an appeal against the judgment of the Court of Appeal Sokoto Division on the 28th day of March 2014, Coram: Jafaru Mika'ilu, Tunde O. Awotoye and James S. Abiriyi JJCA wherein the conviction of the accused by the trial court Per Zakari Isa Gulma J. for culpable homicide was affirmed but substituted the sentence of death for terms of imprisonment.

The appellant and the deceased were neighbours and on the 29th July, 2007 there was a heavy rainfall which brought about rain water flooding of the entire area with every household scampering to save their house from impending collapse as a result of the heavy water as the houses were built with mud and little resistance to withstand the heavy flooding.

The deceased family attempted to open the water way to enable the rainwater flow freely but the appellant objected claiming that the channel of the water way will flood his house and pull it down. The issue generated into a serious argument and confusion and consequently resulted into a fight, the result was that the accused hit the deceased with a stick and he died afterwards.

The case of the prosecution was that the accused deliberately hit the deceased unprovoked on the forehead with the stick with the intention to kill or with the knowledge that death was the probable consequence of his action which the appellant denied. The trial court adopted this position and consequently convicted the accused and sentenced him to death.

On appeal to the Court of Appeal, the appellant contended that he did not intend to kill the deceased and upbraided the trial court for rejecting his defence of provocation and defence of "Private Defence of property" available to him vide Sections 59, 66 and 67 of the Penal Code which clearly is an absolute defence to the charges preferred against him having regard to the circumstances of the case.

The Court of Appeal considered the defence of provocation raised by the appellant against the backdrop of the circumstances of the case and held that the

defence was available to the appellant but unfortunately declined to consider the other line of defence available to him; particularly the defence of "private defence of property" provided under Sections 59, 66 and 67 of the Penal Code.

The appellant dissatisfied with the decision of the court below has come before the Supreme Court.

Held: *(Unanimously dismissing the appeal)*

1. *S. 66(b) of the Penal Code did not apply*

From the evidence set up on either side it is clear that the defence of property from the point of the appellant and defence of his property of the deceased brought about the disagreement leading to the fight which ensued and so makes it difficult to ascribe mischief on the part of the appellant or even the intendment of death or grievous hurt as consequences that would arise. This is because an act done in the exercise of the right of self defence is not an offence and does not justify the exercise of the right of self defence in return and throws up the question as to what "mischief" the appellant was trying to prevent or defend. Therefore while the deceased and his brother, PW2 were trying to protect their house from collapse their actions were not criminal and so not within the contemplation of Section 66 (b) of the Penal Code.

It follows that while the action of the deceased and brother were not criminal the appellant could not rightly have available to him the defence of self defence and particularly in the light of the excessive harm he inflicted on the deceased. Therefore the appellant cannot seek the protection under Section 326 of the Penal Code to say he was trying to prevent or defend a mischief since in the first place, it was the hole he dug that brought the threat of flooding and the imminent collapse of the house of the deceased that triggered the fracas.
(P.....para.....)

2. *The nature and purport of S. 326 of Penal Code*

I shall quote the said Section 326 of the Penal Code thus:-

"326. Whoever with intent to cause or knowing that he is likely to cause wrongful loss or damage to the public or to any person causes the destruction of any property or any such change in any property or in the situation thereof as destroy or diminishes its value or utility or affects it injuriously, commits mischief".
(P.....para.....)

3. *Court is bound to consider all defences raised in the evidence*

The appellant had made a lot of fuss over whether or not the Court of Appeal addressed all the issues he raised including the defence of defence of private property which he alleges the court below did not consider. I agree that in all

trials of culpable homicide the court has the onerous duty to consider all the defences raised by the evidence even if the accused person specifically put up such defence or not, and whatever defence raised by an accused person however weak, inconsequential or lacking in sense it would appear to be, it must be given due attention and determined. This does not mean however that the court is under obligation to get into a fishing expedition for defences not borne out by the evidence on record. The essential thing expected of the court is that it is duty bound to fairly and impartially consider any defence raised by a person charged with crime no matter how weak, foolish, unfounded or conflicting that defence may be. Also any defence not raised by the accused person but which the court can see or discern from the evidence on ground should be considered by the court since it is the entitlement of the accused. See Umaru Adamu Vs. The State (2014) 58 (Pt.1) NSCQR 57; Irene Nguma Vs. A. G. Imo State (2014) 57 (Pt.11) NSCQR 1281. (P.....para.....)

4. *It is not every error by the lower court that will vitiate its decision*
The appellant has urged the court to set aside the decision of the lower court as according to the appellant that court failed to consider the defence of private property put up by the appellant as that failure led to a miscarriage of justice.

On this point I would want to place on record that it is not every error by a Lower court that would automatically lead to the vitiation of the judgment or decision of that court. In this, I have recourse to earlier decisions of this court for support. (P.....para.....)

5. *It is not every error committed by a lower court that would result in the decision being set aside by an appellate court*

In Azabada Vs. State (2014) 58 (Pt.1) NSCQR 531, this court held that:

"It is not every error committed by a lower court that would result in the decision being set aside by an appellate court. For an error to qualify as one that will inevitably lead to the setting aside of the decision/judgment, it must be substantial in nature and must have resulted in a miscarriage of justice. (P.....para.....)

6. *The court will not set aside a decision that has not led to a miscarriage of justice*
This court went on to say that:

"Where the error complained of is substantial and is likely to lead to a miscarriage of justice or has resulted in injustice, an appellate court will be eager to set aside the decision. However, where the error is not substantial or has in no way resulted in a miscarriage of justice to the appellant, as in the instant case, the

court will not set aside the decision because to do so will rather result in injustice to the respondent representing the society at law". (P.....para.....)

7. *Lower court considered all available defences*

It must be said that the circumstances envisaged in Azabada Vs. The State (supra) above cited is not operative here. This is because the right of private defence of property is not borne out by the evidence on record and the lower court adequately and strenuously considered that aspect and all the defences that could possibly enure for the appellant. It was for that reason that the Court of Appeal brought down the sentence to death meted out by the trial court to a term of imprisonment of 7 years on the ground that appellant in spite of the injury he inflicted with the big stick on the deceased which caused his death had not intended the demise of the deceased. This in spite of the fact that appellant was charged with culpable homicide punishable by death contrary to Section 221(b) of the Penal Code. I agree with learned counsel for the respondent that in reducing that sentence the court below had explored and considered all the defences available to the appellant and utilised the powers of the court under Section 19 (3) of the Court of Appeal Act in doing so.

In doing what it did, the court below acted judicially and judiciously in the exercise of the discretion within the law in the prevailing circumstances of the case which cannot be faulted.

In the light of the foregoing, this appeal lacks merit as it is a clear case of an appellant pushing his luck too far. The appeal is dismissed as I uphold the decision and sentence of 7 years imprisonment of the Court of Appeal which affirmed the conviction of the appellant even though it took a different turn in the sentencing from the trial court. (P.....para.....)

8. *Defence of private defence of property did not avail the appellant*

I do not, in the peculiar circumstances of this case, think that the defence of "private defence of property" avails the appellant. The deceased was equally entitled to the private defence of his own property against the tortuous, if not criminal, act of diverting flood water to his compound and thereby exposing same to the hazards posed by the rampaging flood water. (P.....para.....)

Per Eko (JSC)

"The prosecutor has not appealed the decision of the lower court. There appears from JOHNSON Vs. R. (1990) L.R. (Crim) 425, a decision of the Court of Appeal of the United Kingdom, that availed the prisoner a defence of "self-induced provocation". The appellant, Mr. Johnson, while drinking in a nightclub began to behave in an unpleasant manner and made violent threats towards the deceased and his girlfriend. A tense atmosphere developed in

which the appellant was taunted by the deceased's girlfriend and the deceased seized hold of the appellant and pinned him to the wall while holding a glass. Other people in the club persuaded the deceased to drop the glass and he obliged. When he dropped the glass the appellant suddenly produced a flick knife and stabbed the deceased to death. The appellant told the Police, extrajudicially, that he had been "glassed" and mugged before and was terrified of being "glassed" again and he carried the flick knife for his own protection. He was convicted for murder. On appeal, he contended that the issue of provocation should have been left to the jury to consider, but was not. The Court of Appeal agreed with him and held that since anything said or done which provoked a defendant to lose his self-control could amount to provocation; a defendant was entitled to rely on "self-induced provocation" i.e a reaction by another caused by defendant's conduct which in turn led to lose his own self-control, as a defence to a charge of murder. The Court of Appeal (UK) further reasoned that since the appellant was deprived of having his defence of provocation considered at the trial court the appeal would be allowed, and the conviction for murder would be quashed and a verdict of manslaughter substituted.

The decision in *JOHNSON Vs. R* (supra) was influenced greatly by the dictum of Lord Diplock in *DPP Vs. CAMPLIN* (1978) 2 All ER 168 at 173, (1978)AC 705 at 716.

that if there was any evidence that the accused himself at the time of the act which caused the death infact lost his self-control in consequence of some provocation however slight it might appear to the judge, he was bound to leave to the jury the question -- whether a reasonable man might have reacted to the provocation as the accused did.

I need to emphasise the raison d'etre of the *JOHNSON Vs. R* (supra) decision. And it is as Watkins, LJ stated at page 429 of the report, that is: "whether or not there were elements in the appellant's conduct which justified the conclusion that he had started the trouble and induced others, including the deceased, to act the way they did, we are firmly of the view that the defence of provocation should have been left to the jury" to consider, and that "since it is not possible for us to infer from their verdict that the jury inevitably would have concluded the provocation as well as self-defence had been disproved, the verdict for murder will be set aside". In otherwords, the non-consideration of that defence by the jury (trial Court) entitled the accused to the benefit of doubt.

In the instant case the defence counsel had prevailed on the trial court to consider the defence of provocation. In dismissing the defence the trial court, at page 93 of the record, stated that -

there is no evidence that the deceased attacked either (the) accused or indeed anyone else. Also as at the time the quarrel started, the accused was not holding the stick. It was later that the accused went back into his house and got the stick with which he hit the deceased. That therefore shows that the accused was not a grave and sudden provocation. It was pre-mediated.

The defence of self-defence was similarly dismissed by the trial court. The lower court, from the totality of the evidence available at the trial court, found that the evidence on the defence of provocation was not properly evaluated. On this ground it allowed, in part, the appeal of the accused against his conviction and death sentence and substituted a term of 7 years imprisonment for the death sentence. Before us the respondent, the prosecutor, had vigorously defended the further appeal of the accused person. He did not cross-appeal. In other words the prosecutor accepted the decision of the lower court.

I have nothing further to add to the judgment just delivered by my learned brother, MARY UKAEGO PETER-ODILI, JSC. I agree that there is no substance in this appeal on the issue of self-defence the appellant had canvassed in this appeal. The appeal is accordingly dismissed. (P.....para.....)

Representations

Adekola Mustapha for Appellant and with him is A. Ayopemi.

Lawal Hudu Garba DDPP Kebbi State Ministry of Justice for Respondent and with him is Shamsudeen Jaafar ADPP.

MARY UKAEGD PETER-ODILI, JSC(Delivered the Lead Judgment):

AINAOSANYANBI & ORS
Vs.
OKEOWO LASISI & ORS

SC. 152/2006

IN THE SUPREME COURT OF NIGERIA

HOLDEN AT ABUJA

FRIDAY, 12TH APRIL, 2019

BEFORE THEIR LORDSHIPS

IBRAHIM TANKO MUHAMMAD
MARY UKAEGO PETER-ODILI
KUDIRAT M. O. KEKERE-EKUN
AMIRU SANUSI
PAUL ADAMU GALUMJE

AG. CHIEF JUSTICE OF NIGERIA
JUSTICE, SUPREME COURT
JUSTICE, SUPREME COURT
JUSTICE, SUPREME COURT
JUSTICE, SUPREME COURT

COURT:- Application of equity and justice – Whether should ensure at all times that substantial justice is done between the parties.

COURT:- Examination of grounds of appeal – The mere description of ground of appeal as ground of law does not make it so – Whether court will examine the ground together with its particulars in order to determine its nature.

*PRACTICE AND PROCEDURE:- Appeal – Grounds of appeal – Classification thereof – Duty thereto – Whether to determine grounds of appeal together with its particulars and identify the substance of the complaint – The principle in **NNPC Vs. Famfa Oil Ltd (2012) All FWLR (Pt. 633-635) 204.***

*PRACTICE AND PROCEDURE:- Appeal – Grounds of appeal – Classification thereof – Relevant principles – The principle in **Ogbechie & Ors Vs. Onochie & Ors (1986) 2 NWLR (Pt. 23) 484.***

PRACTICE AND PROCEDURE:- Appeal – Grounds of appeal – Classification thereof – Where a ground complains of delay in filling the appeal – Whether it is a ground of mixed law and fact.

PRACTICE AND PROCEDURE:- Appeal – Grounds of appeal – Classification thereof – Where a ground complains of failure to file a counter motion – Whether it is a ground of fact.

PRACTICE AND PROCEDURE:- Appeal – Grounds of appeal – Classification thereof – Where a ground complains of failure to serve notice of brief of argument – Whether it is a ground of fact.

PRACTICE AND PROCEDURE:- Appeal – Grounds of appeal – Classification thereof – Where a ground raises the issue of technicality – Whether it is a ground of mix-law and fact.

PRACTICE AND PROCEDURE:- Appeal – Grounds of appeal – Classification thereof – How to determine grounds of law or facts.

PRACTICE AND PROCEDURE:- Appeal – Grounds of appeal – Failure to obtain leave where a ground raises the issue of mix law or fact – Whether renders such a ground incompetent.

PRACTICE AND PROCEDURE:- Appeal – Grounds of appeal – Ground of mixed law and fact – Where a ground complains of not prosecuting the appeal diligently – Whether it is a ground of mixed law and fact.

*PRACTICE AND PROCEDURE:- Appeal – Grounds of appeal – Grounds of law – How determined – The principle in **Nwadike Vs. Ibekwe (1987) 4 NWLR (Pt. 67) 718***

PRACTICE AND PROCEDURE:- Appeal – Grounds of appeal – Classification thereof – Whether it is the complaint to a ground that determines its classification.

*PRACTICE AND PROCEDURE:- Appeal – Grounds of appeal – How to determine matters of mixed law and fact or facts – The principle in **Metal Const. W. A Ltd. Vs. Migliore (1990) 1 NWLR (Pt. 126) 299.***

PRACTICE AND PROCEDURE:- Appeal – Grounds of appeal – Requirement thereof – Whether Supreme Court can dispense of leave in the interest of justice – S. 233(4) of CFRN 1999 considered.

PRACTICE AND PROCEDURE:- Appeal – Right of appeal – Where grounds involve mixed law and fact or facts alone – Whether leave of court is thereby required.

PRACTICE AND PROCEDURE:- Appeal – Where grounds are of law alone – Whether leave is not required thereby – S. 233(2) of CFRN 1999 considered.

PRACTICE AND PROCEDURE:- Preliminary objection – Purpose – Whether has to be determined first before the appeal.

STATUTE:- CFRN 1999 (as amended) – S. 233(3) thereof – Nature of right of appeal.

STATUTE:- CFRN 1999 (as amended) – S.233 (4) thereof – Application for leave to appeal – When Supreme Court may dispense of same – Interpretation thereof.

Issues for Determination

- (1) The appellant's did not seek and obtain leave in respect of their grounds of appeal for effective argument of same before this honourable court.**
- (2) The appellant's did not notify the respondent's or their counsel while compiling the record of appeal to the Supreme Court thereby deducting some vital document substantiating the respondents.**

Facts of the Matter

The plaintiffs' now respondents' sued the defendants', now appellants' before a Lagos High Court on a writ of summons filed on 4th October 1985 claiming:

- 1. The forfeiture of the defendants tenancy in the piece or parcel of land situate lying and being at Magbon, Oreile-Agege in the Lagos State on the ground of misconduct by the defendants' in that the defendants' are challenging the title of the plaintiffs' (their landlords to the said piece or parcels of land).**

The defendants' counter-claimed against the plaintiffs' for:

- 1. A Declaration that the defendants'/counter-claimants' are entitled to the statutory rights of occupancy in respect of the land in dispute as confirmed by several plans including Plan No. CD, 36/71 dated 28th March, 1968 and drawn by Oku Daodu, Licensed Surveyor.**
- 2. A perpetual injunction restraining the plaintiffs' and their agents from committing any acts of trespass or further act of trespass on the land in dispute or any part of the Osanyanbi family land.**
- 3. An Order dismissing the case of the plaintiffs' in its entirety with substantial cost to be awarded in favour of the defendants'/counter-claimants'.**

The plaintiffs' called four witnesses in proof of their case while the defendants' called three witnesses. Eleven documents were admitted as exhibits.

In a considered judgment delivered on 19th December 1996, Phillips J (as she then was) of a Lagos High Court entered judgment for the plaintiffs'.

On 18th September 1997 the learned trial judge granted the defendants' a stay of execution of the judgment pending the determination of the appeal that was filed on 5th March 1997.

By motion on notice filed on 18th July 2005, in the Court of Appeal the plaintiffs'/respondents' sought for an order dismissing the appeal for want of diligent prosecution. After listening to Mr. R. Olusegun Raji, learned counsel for the respondents'/applicants' and Mr. V.O. Ogunade for the appellants' the Court of Appeal observed in a ruling delivered on 15th February, 2006. The Court of Appeal dismissed this appeal, hence the further appeal to the Supreme Court.

HELD: (*Unanimously striking out the appeal*)

1. *The purpose of preliminary objection*

It is long settled that a preliminary objection must be determined before the appeal is considered. The reason is simple. The purpose of a preliminary objection is to convince the court that the appeal is fundamentally defective. If the preliminary objection succeeds the appeal would no longer be heard. It would be struck out. I must further observe that a preliminary objection is only filed when its success would bring the hearing of the appeal to an end. If the respondents' complain about the grounds of appeal that are bad, but there are some grounds that can sustain the appeal, a motion on notice and not a preliminary objection should be filed against the defective grounds of appeal.

In this case the complaint is against all the grounds of appeal. A preliminary objection is thus appropriate. See *Isah Vs. INEC (2016) 18 NWLR (Pt. 1544) p.175*; *B.O.I. Ltd Vs. Awojugbagbe Light Ind. Ltd (2018) 6 NWLR (Pt. 1615) p.220. (P.....para.....)*

2. *The nature and purport of S. 233(3) of CFRN 1999*

Section 233(3) of the Constitution states that:

(1) Subject to the provisions of subsection (2) of this section, an appeal shall lie from the decisions of the Court of appeal to the Supreme Court with the leave of the court of Appeal or the Supreme Court.
(*P.....para.....*)

3. *Necessity for leave to appeal*

Leave means permission. Where the grounds of appeal involve questions of law alone no leave is required, and the Supreme Court would have jurisdiction to

hear such an appeal, but where the grounds of appeal are based on facts, or mixed law and facts the Supreme Court would have jurisdiction to hear such an appeal if and only if leave was obtained. If leave is not obtained the appeal is incompetent and liable to be struck out. See *Nwadike Vs. Ibekwe* (1987) 4 NWLR (Pt. 67) p.718; *Obatoyinbo Vs. Oshatoba* (1996) 5 NWLR (Pt. 450) p.531; *Nwaolisah Vs. Nwabufoh* (2011) LPELR 2115. (*P.....para.....*)

4. *What court should do to determine the nature of grounds of appeal*
In *NNPC Vs. Famfa Oil Ltd* (2012) All FWLR (Pt. 633-635) p.204.
I said that:

“At times the difference between a ground of law and a ground of mixed law and facts can be very narrow. Labelling a ground of appeal error of law, or misdirection may not necessarily be so. The application is irrelevant in determining whether a ground of appeal is of law or mixed law and fact....

The court should examine the grounds and their particulars and identify the substance of the complaint. In that way the issue of whether a ground of appeal is of law or mixed law and fact would be resolved. Identifying a ground of appeal on facts is easier.” (*P.....para.....*)

5. *Principles relating to classification of ground of appeal*
In *Ogbechie & Ors Vs. Onochie & Ors* (1986) 2 NWLR (Pt. 23) p.484. Eso JSC adopted the explanation given by the authors of the Law Quarterly Review, Vol. 100 of October 1984 thereby providing an illuminating guide on this issue of classification of grounds of appeal of law, mixed law and facts/or and facts.

The authors explained as follows:

1. If the tribunal purports to find that particular events occurred, although it is seised of no admissible evidence that the events did in-fact occur, it is a question of law. But where admissible evidence has been led, its assessment is entirely for the tribunal; in otherwords, it is a question of fact.
2. If the tribunal approached the construction of a legal term of art in a statute on the erroneous basis that the statutory wording bears its ordinary meaning, it is a question of law.
3. If the tribunal approaches the construction of a statutory word or phrase bearing an ordinary meaning on the erroneous basis that it is a legal term of art, it is a legal term of art, it is a question of law.
4. If the tribunal, though correctly treating a statutory word or

phrase as a legal term of act, errs in elucidation of the word or phrase, it is a question of law.

5. If the tribunal errs on its conclusion (that is, in applying the law to the facts) in a case where this process requires the skill of a trained lawyer, it is error of law.
6. If in a case where a conclusion can as well be drawn by a layman (properly instructed on the law) as by a lawyer, the tribunal reaches a conclusion which cannot reasonably be drawn from the facts as found, in that event, the superior court has no option but to assume that there has been some misconception of the law. But the issue may admit of more than one possible resolution. The inferior tribunal's conclusion may be one of the possible resolutions: Yet it may be a conclusion which the superior court (had it been seised of the issue) would not have reached. Nevertheless, the inferior tribunal does not err in law. The matter is one of degree, and a superior court with jurisdiction to correct only errors of law will not intervene. (*P.....para.....*)

6. *Nature of grounds of law*

In Nwadike Vs. Ibekwe (1987) 4 NWLR (Pt. 67) p.718

This court further explained that:

- (a) It is an error in law if the adjudicating tribunal took into account, some wrong criteria in reaching its conclusion.
- (b) Several issues that can be raised on legal interpretation of deeds, documents, term of arts and inference drawn therefrom are grounds of law.
- (c) Where a ground deals merely with a matter of inference, even if it be inference of fact, a ground framed from such is a ground of law.
- (d) Where a tribunal states the law in point wrongly it commits an error in law
- (e) Where the complaint is that there was no evidence or no admissible evidence upon which a finding or decision was based, same is regarded as a ground of law.
- (f) If a judge considers matters which are not before him and relies on them for the exercise of his discretion, he will be exercising same on wrong principles and this will be a question of law.

All that I have been saying explains in detail how to go about, or what should be

considered before the distinction is made. They make the exercise clear and easier to understand. (P.....para.....)

7. *A ground of mixed law and fact*
Applying the principles laid out above, Ground 1 raises the question of not prosecuting the appeal diligently. This is a question of mixed law and fact. (P.....para.....)
8. *A ground of mixed law and fact*
Ground 2 questions the delay in filing appeal. This is a question of mixed law and fact. (P.....para.....)
9. *A ground of facts*
Ground 3 raises the issue of not giving the appellant the opportunity to present its counter motion. This is a question of fact.
10. *A ground of facts*
Ground 4 raises the issue of not being served notice to file brief of argument. This is a question of fact. (P.....para.....)
11. *A ground of mixed law and fact*
Finally ground 5 raises the issue of allowing the issue of technicality to defeat the justice of the case, is a question of mixed law and fact. (P.....para.....)
12. *The nature and purport of S. 233(4) of CFRN 1999 (as amended)*
All the grounds of appeal are grounds of mixed law and fact or fact. They are caught by Section 233(3) of the Constitution.
Before I conclude, learned counsel for the appellant relied on section 233(4) of the Constitution to support his argument that leave was unnecessary. It reads:

- (2) **The Supreme Court may dispose of any application for leave to appeal from any decision of the Court of appeal in respect of any civil or criminal proceedings in which leave to appeal is necessary after consideration of the record of the proceedings if the Supreme Court is of opinion that the interests of justice do not require an oral hearing of the application.**

Section 233(3) of the Constitution is mandatory. That is to say where the grounds of appeal are of mixed law and fact leave must be obtained while its discretionary under Section 233(4) of the Constitution.

This court can exercise its discretion and dispense with leave where the grounds of appeal are mixed law and fact if satisfied that it is in the interest of justice. (P.....para.....)

13. *Court should ensure justice*

This court and indeed all courts are courts of justice and equity. They should ensure at all times that substantial justice is done between the parties. The role of courts in this regard have been stated and repeated in a plethora of cases. See Bello Vs. A.G. Oyo State (1986) 12 SC p.1; Ogunbi Vs. Kosoko (1991) 8 NWLR (Pt. 210) p. 511; Panache Communications Ltd Vs. Aikhomu (1994) 2 NWLR (Pt. 327) p.420; Fawehinmi Vs. Akilu (1989) 3 NWLR (Pt.112) p.643; Nishizawa Vs. Jethwani (1984) 12 SC p.235. (P.....para.....)

Per Phodes (JSC)

Is this a case where in the interest of justice this court should exercise its discretion and allow the appellants' to appeal as provided by Section 233(4) of the Constitution. This is clearly not such a case. The facts reveals that the appellants' have used the rules of court to their own advantage. They have frustrated the respondents' for over thirty years by denying them the use of their land. It would amount to monumental injustice to exercise discretion in favour of the appellants' who are not deserving of it. It is the respondents' that deserve justice and not the appellants'.

This court would never exercise discretion in favour of the appellants' on these facts that cry out for justice for the respondents'.

The response by learned counsel for the appellants' to the preliminary objection is without substance. There would be no need to consider the second ground of the preliminary objection. Since I have found that the five grounds of appeal are caught by Section 233(3) of the Constitution, they are hereby struck out on the preliminary objection of learned counsel for the appellants'.

(P.....para.....)

14. *Requirement for leave*

Section 233(2) of the Constitution provides for appeals which are as of right and on issues of law alone. Any appeal which does not fall within the provisions of Section 233(2), requires the leave of the Court of Appeal or of this court to be valid. The requirement for leave is mandatory and a condition precedent to the exercise of the court's discretion to hear the appeal. Where the grounds of appeal are on facts or mixed law and facts, leave must be obtained. Failure to seek and obtain leave renders the appeal incompetent and liable to be struck out. See: Akinyemi Vs. Odua Investment Co. Ltd. (2012) 1 SC (Pt. iv); Idika Vs. Erisi (1982) 5 SC (Reprint) 323; Nwaolisa Vs. Nwabufoh (2011) 14 NWLR (Pt. 1268) 600. (P.....para.....)

15. *The mere description of a ground of appeal as ground of law does not make it so*
It is important to note that the mere description of a ground of appeal as being an error of law does not make it so. The court will examine the grounds along with their particulars to determine the exact nature of the complaint See: Ojemen & Ors. Vs. Momodu & Ors. (1993) LPELR - 2371 (SC) @ 27-28 O-B; U.B.N. Plc Vs. Sogunro (2006) 16 NWLR (Pt.1006) 504. If there is a ground of appeal which is of law alone, it is sufficient to sustain the appeal notwithstanding the fact that there are other incompetent grounds of fact or of mixed law and fact for which leave ought to have been obtained. The incompetent grounds would be struck out and the appeal determined on the ground of law alone. (P.....para.....)

Per Rhodes (JSC)

“In the instant appeal, my learned brother, OLABODE RHODES-VIVOUR, JSC has set out in detail the grounds of appeal as contained in the appellant's notice of appeal along with their particulars. I agree with him that all the grounds of appeal raise issues of fact or of mixed law and fact, for which the leave of this court ought to have been sought and obtained. Indeed, in their reply brief, the appellants do not deny the fact that they failed to obtain the requisite leave. They however seek the court's indulgence, relying on Section 233(4) of the Constitution to waive their non-compliance in the interest of justice.

Again, I am in complete agreement with my learned brother that having regard to the antecedents of this case and the fact that the appellants have used the court process to frustrate the respondents, who obtained judgment in their favour as far back as 1996, it would not be in the interest of justice to waive compliance with the Constitutional provision in their favour. (P.....para.....)

Per Nweze (JSC)

“In *Utoo Vs. APC and Ors* (SC. 93/2017 delivered on April 20, 2018), this court [per Nweze, JSC] explained that:

... the difficulty in typologising grounds of appeal into grounds of law *simpliciter* and grounds of mixed law and facts has long been acknowledged in Anglo-Nigerian procedural jurisprudence. In England, this difficulty was acknowledged as early as 1919, if not earlier, *Clarke Vs. Edinburgh etc Tramways* (1919) SC (H.L) 35; also, *Currie Vs. Inland Revenue Commission* (1921) 2 KB, 536; *Cooper Vs. Stubbs* (1925) 2 KB 277; *Benmax Vs. Austin Motors Co Ltd* (1945) All ER 326; *Edwards (Inspector of Taxes) Vs. Beirstows and Anor* (1955) 3 All ER 48.

This state of affairs prompted the very scintillating expose on the subject by C. T. Emery and Professor B. Smythe in their article titled, "Error of Law in Administrative Law," in *Law Quarterly Review* Vol. 100 (October 1984).

Although this court confessed its difficulty in distinguishing between a ground of law from a ground of mixed law and fact, *Ogbechie Vs. Onochie* [1986] 1 NWLR (pt.70) 370 and, approvingly, adopted the above academic treatise of C. T. Emery and Professor B. Smythe in *Ogbechie Vs. Onochie* at 490-493, per Eso, JSC, the problem still persisted and triggered off a frequency of appeals on this point, *Nwadike and Ors Vs. Ibekwe and Ors* (1987) LPELR - 2087 (SC) 42- 43.

Other examples include: *UBA Ltd Vs. Gmbh & CO* [1989]3 NWLR (pt.110) 374, 391-392; *Obatoyinbo Vs. Oshatoba* [1996] 5 NWLR (pt. 450) 531, 548; *MDPDT Vs. Okonkwo* [2001] 3 KLR (pt.117) 739 etc. (*P.....para.....*)

16. *Principles of classification of grounds of appeal*

The main purpose of the examination will- be to find out whether - if from the said grounds, it is evident that the lower court misunderstood the law or whether the said court misapplied the law to the facts which are already proved or admitted. In any of these two instances, the ground would qualify as a ground of law. (*P.....para.....*)

17. *It is the complains in a ground that determine its nature*

On the other hand, if the ground complains of the manner in which the lower court evaluated the facts before applying the law, the ground is of mixed law and fact. The determination of grounds of fact is much easier.

Simply put, these *formulae* simply mean that it is the essence of the ground; the main grouse: that is, the reality of the complaint embedded in that name, that determines what any particular ground involves, *Abidoye Vs. Alawode* [2001] 3 KLR (pt. 118) 917,919; *NEPA Vs. Eze* [2001]3 NWLR (pt. 701) 606; *Ezeobi Vs. Abang* [2000]9 NWLR (pt. 672) 230; *Ojukwu Vs. Kaine* [2000] 15 NWLR (pt. 691) 516.

In effect, it is neither its cognomen nor its designation as 'Error of Law' that determines the essence of a ground of appeal, *Abidoye Vs. Alawode* (supra) 927; *UBA Ltd Vs. Gmbh and Co* [1989]

(supra) 374, 377; *Ojemen Vs. Momodu* [1983] 3 SC 173.

... it is true that this court does not possess the jurisdiction to hear an appeal on grounds of mixed law and facts, unless leave has been sought and obtained, *Uchendu Vs. Ogboni* [1999]5 NWLR (pt.603) 337; *Irhabor Vs. Ogaïamien* [1999]8 NWLR (Pt. 616) 517; *Ukpong and Anor Vs. Commissioner for Finance and Economic Development* [2006] 19 NWLR (pt. 1013) 187

As shown in the leading judgement, all the grounds of appeal are grounds of mixed law and facts or of fact *simpliciter*. Section 233(3) of the Constitution of the Federal Republic of Nigeria, 1999, as amended, applies here. (P.....para.....)

18. *Effect of failure to obtain leave for a ground of appeal*

It is settled that the failure to obtain leave of the court below or this court where a ground of appeal raises questions of fact or mixed law and fact, renders the appeal grossly incompetent - see *Akpasubi Vs. Umweni* (1982) 11 SC 113, wherein Eso, JSC, observed as follows -

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. (P.....para.....)

Per Augie (JSC)

“Certainly, it is not easy to decipher a question of law from a question of fact. But this court has laid down guidelines in numerous cases, which set out the parameters, for navigating a way to finding answers - see *Board of Custom & Excise Vs. Barau* (1982) NSCC (Vol. 13) 358, and *Dairo Vs. Union Bank* [supra], ((2007) 16 NWLR (Pt. 1059) 99, wherein this court listed the following principles to serve as a guide:

- i. 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. See *Maigoro Vs. Garba* (1999) 10 NWLR (Pt. 624) 555.
- ii. 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 - *Maigoro Vs. Garbo* (supra).
- iii. 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).
- iv. Where evaluation of evidence tendered at the trial is exclusively questioned, it is a ground of fact simpliciter - *Ogbechie Vs. Onochie*.
 - v. 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 simpliciter. See *Nwadike & ors. Vs. Ibekwe & Ors.* (1987) 12 SC (Pt. 1) 164.
 - vi. 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.
 - vii. Several issues that can be raised on legal interpretation of deeds, documents, term of art, words or phrases, and inferences drawn therefrom are grounds of law. See *Ogbechie Vs. Onochie* (supra).
 - viii. 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).
 - ix. 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 with approval an article by C. T Emery in Vol. 100 LQR held:

If the Tribunal purports to find that particular events occurred although it is seised of no admissible evidence that the events did in fact occur, it is a question of law.
(P.....para.....)

19. *How to determine matters of law and facts*
And Metal Const. W.A. Ltd. Vs. Migliore Inre Ogundare (1990) 1 *NWLR* (Pt. 126) 299, wherein this court per Obaseki, JSC, very aptly explained 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. The interpretation of documents is always a question of law. 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 law a particular decision or disposal of the case before the court. 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. In many circumstances, questions of mixed fact and law arise. A decision of a trial Judge is normally a mixed finding.

In this case, there is no question that all the grounds of appeal raise questions of fact, which has been brought to this court without leave. So, this court lacks jurisdiction to look into any of the questions raised. The preliminary objection is sustained, and the appeal is struck out. (*P.....para.....*)

Per Musa Abba Aji (JSC)

“There is no doubt that the question of determining whether a complaint in an appeal raises question of law alone or mixed law and facts is a difficult one. This court in plethora of decided authorities laid down guidelines or guiding principles on how to determine which ground of appeal is of law alone or which one is of mixed law and facts. For instance, the test put forward by Esho JSC (as he then was of blessed memory) in the case of OGBECHIE Vs. ONOCHIE (1986) 2 NWLR (Pt.23) 484 had given an insight on how to determine it, when the learned jurist stated thus:- "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 misapplication of the law to the facts already proved or admitted, in which case, it would be question of law or one that would require questioning the evaluation of facts by the lower tribunal before the application of the law in which case it would amount to question of mixed law and fact. The issue of pure facts is easier to determine. See also Per SANUSI, J.S.C in ALLANAH & ORS Vs. KPOLOKWU & ORS (2016) LPELR-40724 (SC). (*P.....para.....*)”

Per Musa Abba Aji (JSC)

“With a microscopic scrutiny of what the appellants' learned counsel has presented as his grounds of appeal, I boldly state that all the 5 grounds are in

the realm of mixed law and facts. Can the leave of this court then be dispensed with contrary to Section 233(3) of the Constitution? Even in this court, leave is required from the appellants' learned counsel to raise grounds of mixed law and facts in order to arm, equip and pave the way for him to argue his appeal. This having not been done, his appeal cannot therefore be entertained.

The purpose of a preliminary objection to an appeal is to contend that the appeal is incompetent or fundamentally defective, which, if it succeeds, would put an end to the appeal. A preliminary objection to be successful ought to be taken against the hearing of an appeal and not against one or more grounds of appeal which are not capable of disturbing the hearing of the appeal. It is incumbent on a court therefore to out rightly consider the preliminary objection raised by a respondent. On determining it, one way or the other, the court will proceed to either strike out the appeal or consider same on its merit. See Per OGUNBIYI, J.S.C in PETGAS RESOURCES LTD Vs. MBANEFO (2017) LPELR-42760 (SC).

The appellants' learned counsel never cared to seek for the leave of this honourable court for his grounds of mixed law and facts to be argued before this court and therefore having not done that, his appeal is incompetent to be heard and considered. *P.....para.....*)

Representation:

Nil

OLABODE RHODES VIVOUR, JSC (Delivered the Lead Judgment):

BI – COURTNEY LIMITED
Vs.
1. THE ATTORNEY GENERAL OF THE FEDERATION
2. ASSET MANAGEMENT CORPORATION OF NIGER

SC. 770/2014

IN THE SUPREME COURT OF NIGERIA
HOLDEN AT ABUJA

ON FRIDAY, 5TH APRIL, 2019

BEFORE THEIR LORDSHIPS

IBRAHIM TANKO MUHAMMAD
MARY UKAEGO PETER-ODILI
OLUKAYODE ARIWOOLA
AMIRU SANUSI
EJEMBI EKO

JUSTICE, SUPREME COURT
JUSTICE, SUPREME COURT
JUSTICE, SUPREME COURT
JUSTICE, SUPREME COURT
JUSTICE, SUPREME COURT

APPEAL:- Interested party – Leave to appeal – Where to first bring the application – Whether the application must first be made to the High Court Order 7 Rule 4 of the Court of Appeal Rules 2011.

*APPEAL:- Interested party – Time within which to seek leave to appeal – Whether there is no time limit within which an applicant may seek leave to appeal as an interested party – The principle in **Re: Madaki (1996) 7 NWLR (Pt. 459) 153 at 164.***

APPEAL:- Leave to appeal as an interested party thereto – Failure to obtain leave – Whether the effect is to deprive the court of jurisdiction.

APPEAL:- Party – Joinder of interested party – Conditions thereof – Whether must first seek and obtain leave.

*CASE LAW:- Failure by the court to pronounce on issues properly placed before it – The principle in **Unical Vs. Akintunde (2013) 3 NWLR (Pt. 1340) 1 at 25.***

*CASE LAW:- The principle in **Chief Onwuka Kalu Vs. Chief Victor Odili & Ors (1992) LPELR 1653.***

*CASE LAW:- The principle in **Madukolu Vs. Nkemdilim (1962) SCNLR 314.***

COURT:- Action – Competence thereof – Where issues of competence are raised – Whether must first be resolved – Whether a decision founded on an incompetent action is a nullity.

PRACTICE AND PROCEDURE:- Leave of court – Failure to obtain where required – Whether will be fatal to the case of the applicant.

*RULES OF COURT:- Court of Appeal Rules 2011 – Order 7 Rule 4 thereto – Implications of the principle in **Kalu Vs. Odili (1992) 5 NWLR (Pt. 240) 130 at 173.***

RULES OF COURT:- Court of Appeal Rules, 2011 – Order 7 Rule 4 thereto – Provision thereof.

Issues for Determination

Facts of the Matter

This is an interlocutory appeal against the ruling of the Court of Appeal, Abuja Division (“the lower or court below”) delivered on the 29th day of November, 2013 wherein, it granted leave to the 2nd respondent to appeal as an interested party against the post judgment ruling of the Federal High Court (the trial court).

The appellant as plaintiff, instituted this action against the 1st respondent at the Federal High Court (trial court) by way of originating summons filed on 23/1/2009 seeking to enforce a concession agreement dated 24th of April, 2003 entered into between the appellant and the Federal Government in relation to the Lagos Murtala Mohammed International Airport. The learned trial judge entered judgment in favour of the appellant.

Held: *(Unanimously allowing the appeal)*

1. *Effect of failure to obtain leave where required*

The question of seeking leave by an applicant where the law enjoins it/him to do so is very important as failure to seek and obtain such leave will be fatal to the case of the applicant and would render its application incompetent and liable to be struck out under Section 15 of the Court of Appeal Act and Order 4 Rule 1 of Court of Appeal Rules. Any party seeking to be joined in an appeal as an interested party must first of all seek and obtain leave of either the High Court or the Court of Appeal. See **Yakubu Vs. Govt of Kogi State (1995) 8 NWLR (Pt.414) 386.** *(P.....paras.....)*

2. *Conditions to be met by a person who seeks to be joined as an interested party in an appeal*
By the provisions of Section 243 (a) of 1999 Constitution, as amended, right of appeal is conferred on applicant from the decisions of the High Court to the Court of Appeal. It however provides that such right of appeal, can only be exercised by a party in court proceedings with leave of the High Court or of the Court of Appeal at the instance of a person appealing as a non-party whose name is not shown in the record as in this instant case. This issue of seeking and obtaining leave in order to appeal as an interested party, is the first hurdle to be crossed by such applicant in addition to other conditions. Another condition to be met in order to be joined as interested party either as appellant or respondent is that, it must show that its interest is genuine and similar to the interests of the party you seek to join. (P.....para.....)
3. *Effect of failure to seek and obtain leave to appeal as an interested to is deprive the court of jurisdiction*
As I posited above, in this instant appeal, it is apparent, obvious and clear that the 2nd respondent failed to first of all seek and obtain leave to appeal as interested party either at the trial court or the court below. Its application filed before the court below is therefore ab initio, incompetent for among other reasons, failure to seek and obtain leave to appeal as party interested. The failure to seek and obtain that leave therefore deprives the lower court of the requisite jurisdiction to consider and determine the application right from the outset as required by Section 243 of the 1999 Constitution. (P.....para.....)
4. *Effect of failure of the court to pronounce on issues brought before it.*
It is necessary to resort to some decided cases of this court on issues brought before the court and what the court's duties are thereby. In the case of UNICAL Vs. Akintunde (2013) 3 NWLR (Pt. 1340) 1 at 25 this court held thus:-
- “It is a court's duty to pronounce on every issue properly pleaded before it for consideration and determination before arriving at a decision, and where it has failed to do so, it leads to a miscarriage of justice apart from as in the instant case breaching the right of the appellant to fair hearing. The court's duty to pronounce on every issue raised before it is fundamental”. (P.....para.....)**
5. *Order 7 Rule 4 of Court of appeal Rules, 2011*
In this case, AMCON in instituting the application had not sought leave of either the Federal High Court or the Court of Appeal, thus Order 7 Rule 4 of the Court of Appeal, 2011 i.e the operative rules at the material time had been breached.

The said rules provided thus:-

“Wherever under these rules an application may be made either to the court below or to the court, it shall not be made in the first instance to the court except where there are special circumstances which make it impossible or impracticable to apply to the court below”. (P.....para.....)

6. *S. 243 of CFRN 1999*

Also to be said is that AMCON failed to comply with the constitutional provision on applications such as made. Section 243 of the 1999 Constitution (as amended) provides that:

“Any right of appeal to the Court of Appeal from the decisions of the Federal High Court or a high court conferred by this constitution shall be:

- (a) exercisable in the case of civil proceedings at the instance of a party thereto, or with the leave of the Federal High Court of the high court or the Court of Appeal at the instance of any other person having an interest in the matter....**
- (b) Exercised in accordance with any act of the National Assembly and rules of court for the time being in force regulating the powers, practice and procedure of the Court of Appeal”. (P.....para.....)**

7. *The implication of Order 7 Rule 4 of the Court of Appeal Rules 2011*

The implication of Order 7 Rule 4 of the Court of Appeal Rules 2011 is that an application for leave to appeal as an interested person being an application which may be made either to the trial court or the Court of Appeal, such an application cannot be validly made in the first instance to the lower court. This scenario has been explicitly explained in a lot of judicial pronouncements and I shall refer to a few.

In Kalu Vs. Odili (1992) 5 NWLR (Pt. 240) 130 it held at page 173, paras F-G, this honourable court held in respect of a similar application that:

“... So even though the courts, the high court and the Court of Appeal have concurrent jurisdiction in the matter in the sense that both have the jurisdiction to grant leave, the rule made under the authority of the constitution itself directs that the application shall first be made in the high court. The provisions are clear. So any application filed in the Court of Appeal in the first instance is

one filed by non-compliance with the rule”.

The Supreme Court explained further that:

**“Learned counsel for the appellant was therefore in error when he submitted that the appellant had a right to elect in which of the two courts he could file his application. Such is contrary to the letters of the constitution and the rule which should be read together with them. The application could have been rightly filed in the Court of Appeal if special circumstances making it impossible or impracticable to have filed the application first in the high court were shown. None was however shown”.
(P.....para.....)**

8. *No time limit to seek leave to appeal as an interested party*

The courts have gone further to explain that passage of a long time is not the special circumstance envisaged in the rules as AMCON had sought to push forward as reason for not fulfilling the condition precedent of seeking leave at the trial court to enter as an interested party for the purpose of the appeal.

In the decision of this court. In RE: Madaki (1996) 7 NWLR (Pt. 459) 153 at 164 paras A-B, it was held that:

“Neither the constitution nor the Court of Appeal Act or the Court of Appeal Rules prescribe any period within which an interested party may bring an application for leave to appeal as 'a person having an interest in the matter'. So that when the applicant/respondent brought this application in the court below seeking (1) Extension of time within which to apply for leave to appeal... he misconceived the procedure and acted wrongly to have asked for extension of time to seek leave to appeal as an interested party”.

In Chukwu Vs. INEC (2014) 10 NWLR (Pt. 1415) 385 at page 439, paras C-D, Kekere-Ekun JSC held inter alia that:

“Pursuant to Section 243 (1) (a) of the constitution, a party interested in an appeal, who was not originally a party to the decision complained of, must first seek leave to appeal as an interested party. There is no time limited within which the application for leave to appeal as an interested party may be brought”. (P.....para.....)

9. *Condition precedent for leave to appeal as an interested person*
There is a condition precedent to be fulfilled by an applicant of such application for leave to appeal as an interest person.

Section 243 (a) provides as follows:

“Any right of appeal to the Court of Appeal from the decision of the Federal High Court or a high court conferred by this constitution shall be:-

- (a) exercisable in the case of civil proceedings at the instance of a party thereto, or with the leave of the Federal High Court, or high court, or the Court of Appeal at the instance of any other person having an interest in the matter.....”**

There is no doubt that the 2nd respondent had sought leave of the court below to appeal to the court as an interested party against an order of a trial court which it believed affected its interest. However, that right of appeal to the court below is required by the same constitution to be exercised in accordance with any Act of the National Assembly or Rules of Court guiding the practice and procedure of the court below. Hence, the application of the 2nd respondent to the court below filed on 20/10/2012 for leave to appeal as an interested party was brought pursuant to Order 7 of the Rules of the Court below.

Order 7 Rule 4 of the Rules of Court of Appeal, 2011, then the Operatives Rules, (now Order 6 Rule 4 of 2015 Rules) of the Court of Appeal provides as follows:

“Whether under these rules an application may be made either to the court below (that is the Federal High Court or State High Court) or to the court, it shall not be made in the first instance to the court except where there are special circumstances which made it impossible or impracticable to apply to the court below. (Federal High Court or State High Court) (Brackets mine). (P.....para.....)”

10. *Where an application for leave to appeal as interested party must first be made*
The learned counsel for the 2nd respondent had argued that an applicant for leave to appeal as an interested party could bring the application before either the trial high court or the court below. And that all the law requires is for the party to seek leave before the appeal is filed.

I am not in the slightest doubt, that this is a misconception, to say the least, by the respondent's counsel. In Chief Onwuka Kalu Vs. Chief Victor Odili & Ors (1992) LPELR 1653; (1992) 6 SCNJ 76; (1992) NWLR (Pt. 240) 130,

this court per; Nnaemeka-Agu, JSC opined, inter alia, as follows:

“... Even though the two courts, the high court and the Court of Appeal have concurrent jurisdiction in the matter in the sense that both have the jurisdiction to grant leave, the rule made under the authority of the constitution itself directs that the application shall first be made in the high court. The provisions are clear. So any application filed in the Court of Appeal in the first instance is one filed by non compliance with the rule. Learned counsel for the appellant was therefore in error when he submitted that the appellant had a right to elect in which of the two courts he could file his application. Such is contrary to the letters of the constitution and the rule which should be read together with them. The application could have been rightly filed in the Court of Appeal if special circumstances making it impossible or impracticable to have filed the application first in the high court were shown. None was however shown.” (P.....para.....)

Per Olu Ariwoola JSC

I agree with the appellant as argued in paragraph 4.1.13 of the brief of argument that from the review of the record, in particular, the paragraphs of the affidavit of one Ifeanyi Odom, a legal practitioner in the Law Office of Kola Awodein & Co. Solicitors to the applicant, the only reason conceived by the 2nd respondent as special circumstance for applying directly to the court below was that time for appealing against the ruling had lapsed. The reason relied on by the 2nd respondent on the application, was a misconception, to say the least, in that the law is trite that time, indeed, does not run against an applicant seeking leave to appeal as an interested party as required by law and the rules of court.

In Re: Madaki (1996) 7 NWLR (Pt. 459) 153, this court, per Uwais, CJN opined as follows:

“Neither the constitution nor the Court of Appeal Act or the Court of Appeal Rules prescribe any period within which an interested party may bring an application for leave to appeal as a person having an interest in the matter. So that when the applicant/respondent brought this application in the court below seeking extension of time within which to apply for leave to appeal... He misconceived the procedure and acted wrongly to have asked for extension of time to seek leave to appeal as an interested party.” (P.....para.....)

11. *When a court is said to be competent*

Since the decision of this court in **MADUKOLU Vs. NKEMDILIM (1962) SCNLR 314** the law is settled on when a court is competent to exercise its jurisdiction on the following three principles, that is –

- (a) When the subject matter of the dispute is within the court's jurisdiction;
- (b) Whether there is any feature in the case that prevents the court from exercising its jurisdiction; and
- (c) Whether the case comes before the court initiated upon due process of law and upon fulfillment of any condition precedent for it to exercise its jurisdiction. *(P.....para.....)*

12. *Issue of competence must first be dealt with.*

Once, from the foregoing, the action is incompetent and/or is not properly constituted the court lacks jurisdiction or competence to entertain it. For this reason, once an issue of competence of the action originated is raised, the issue must be dealt with and resolved first by the court the action is subsisting before on the cause list since any proceeding and/or decision founded on an incompetent action are a nullity, no matter how well conducted: **OFIA Vs. EJEM (2006) 5 SCNJ 188 at 196.** *(P.....para.....)*

Representatios:

O. Akoni (SAN) with him B.B. Lawan (Esq.), A.O. Utake (Esq.), H.K. Salani (Miss), and U.F. Hussain (Esq.) for the appellant.

Ituah Imhanze with him Matthew Echo, and Princewell Akinseye George, for the 1st respondent.

A.B. Anachebe (SAN) with him F.C Anachebe (Mrs), A.O. Okpallah (Esq.), Charles Jibuaku (Esq.) and B.O. Anachebe for the 2nd respondent.

AMIRU SANUSI, JSC (Delivered The Lead Judgment)

This is an interlocutory appeal against the ruling of the Court of Appeal, Abuja Division (“the lower or court below”) delivered on the 29th day of November, 2013 wherein, it granted leave to the 2nd respondent to appeal as an interested party against the post judgment ruling of the Federal High Court (the trial court).

BRIEF FACTS

The appellant as plaintiff, instituted this action against the 1st respondent at the Federal High Court (trial court) by way of originating summons filed on 23/1/2009 seeking to enforce a concession agreement dated 24th of April, 2003 entered into between the appellant and the Federal Government in relation to the Lagos Murtala Mohammed International Airport. The learned trial judge entered judgment in favour of the appellant.

Dissatisfied with the judgment of the trial court, the 1st respondent filed an appeal at the court below which said appeal is pending. The appellant, owing to the failure of the 1st respondent to comply with the judgment of the trial court brought an application before the Federal High Court seeking it to direct the 1st respondent to set off the sum of N132,540,580,304:00 being the total sum, including the interest that had accrued, due and payable to the appellant from the Federal Government between the period of 7th May 2007 to 6th May, 2011. The court granted the order and the enrolled order can be found at pages 280-281 of the record.

Aggrieved by the grant of that order AMCON filed an application at the court below for leave to appeal as an interested party. He submitted that the reason perceived by AMCON as special circumstances is to the effect that, time for appealing against the trial court's judgment had lapsed and therefore incapable of contesting a special circumstances within the purview of the rules of the Court of Appeal. He submitted further, that time does not run against a person seeking leave to appeal as an interested party and that AMCON's reliance on the so called expiration of time is misplaced. He referred to the decision of the Supreme Court. In *RE-MADAKI* (1996) 7 NWLR (Pt. 459) 153 at 164.

He also cited and relied on the case of *CHUKWU Vs. INEC* (2014) 10 NWLR (Pt 1415) 385 at 439. Learned counsel also contended that the court below ignored this position and proceeded to grant the application, he argued that instead of the court to consider the competence of the application, it chose to delve into whether the trial court's order (s) were final or interlocutory, an issue raised and determined suo motu. He argued that the court may raise an issue suo motu, but the parties must be given an opportunity to address it thereon in order not to breach the rules of fair hearing. He argued that the error of the lower court became more pronounced when it allowed the issue raised suo motu, to influence its decision without affording parties the opportunity of being heard. He submitted that even if it was necessary to determine whether the trial court's order was final or interlocutory. The Supreme Court had given a direction. He referred to the case of *OMONUWA Vs. OSHODIN* (1985) 2 NWLR (Pt. 10) 924.

He therefore submitted that the court below erred in its conclusion that the trial court's order was final when the said order merely gave directions on how the declaration of rights has already been given in the substance or final judgment. He argued that a critical

- A** examination of reliefs sought by AMCON clearly reveals that they are vague, especially prayers 1, 2 & 3, as there is no description of the particulars of the order or decision which AMCON sought to appeal against. He therefore submitted that the deficiencies in prayers 1, 2 & 3 of the application invariably affect the sustainability of prayers 4 and 5 of the application. He contended that prayer 5 (for stay of execution)
- B** ought to fail as no similar application had first been made to the trial court, contrary to Order 7 Rule 4 of the Court of Appeal Rule referred to above. He urged the court to resolve this issue in favour of the appellant.

ISSUE NO 2

- C** This issue is whether AMCON had disclosed any justifiable reason to necessitate the grant of the application.

On this issue the appellant's counsel argued that AMCON has failed to disclose any interest capable of justifying the grant of the application as there is no monetary order made against AMCON. He referred to the ruling of the court below at

- D** page 209 of the record and submitted that no monetary order (specific or otherwise) was made against AMCON by the trial court. He also referred to the trial court's order at page 208 of the record and submitted that the above order could not under any guise qualify as a specific monetary order against AMCON, but the order was expressly and specifically directed against the Federal Government as represented by the Attorney
- E** General of the Federation. He argued that the order directs the AGF to set off the sum of #132,540, 580,304.00 as sum agreed as being due from the appellant to any agency of the Federal Government. He argued further, that the order did not in any way deprive AMCON of its entitlement to any legitimate funds. He submitted that the mere mention of AMCON as one of the agencies of the Federal Government for the purpose
- F** of the set off contemplated in the order, does not necessarily translate to a distinct order made against AMCON. He referred to the case of CHUKWU Vs. INEC (supra) and submitted that AMCON disclosed no interest.

He also referred to the case of A.G Rivers State Vs. AG Akwa Ibom State & Ors (2011) 8 NWLR (Pt. 1248) 31 and submitted that attorney general of the Federation is the proper party to be sued in any action against the Federal Government or any of its agencies.

- G**
- He contended also that AMCON also failed to disclose any viable grounds of appeal as an interested party because the processed grounds of appeal exhibited in its application contains a sole ground of appeal which highlights the excerpt of the trial court's order which mentioned that AMCON as an agency of the Federal Government, but the AMCON is rather entitled to be paid by Federal Government any debt owed it by the appellant. He then urged the court to resolve the issue in favour of the appellant and to allow the appeal.

- H**
- In response to the argument in the brief of argument of the appellant's learned counsel, the learned counsel to 1st respondent distilled sole issue for determination.

The lone issue deals with whether the court below was wrong in granting the 2nd

JOHN KAYODE FAYEMI

Vs.

- 1. ADEBAYO SEGUN ONI**
- 2. ALL PROGRESSIVE CONGRESS (APC)**
- 3. INDEPENDENT NATIONAL ELECTORAL COMMISSION (INEC)**

SC. 206/2019

IN THE SUPREME COURT OF NIGERIA

HOLDEN AT ABUIA

WEDNESDAY, 17TH APRIL, 2019

BEFORE THEIR LORDSHIPS

**IBRAHIM TANKO MUHAMMAD
JOHN INYANG OKORO
AMIRU SANUSI
EJEMBI EKO
PAUL ADAMU GALUMJE**

**AG. CHIEF JUSTICE OF NIGERIA
JUSTICE, SUPREME COURT
JUSTICE, SUPREME COURT
JUSTICE, SUPREME COURT
JUSTICE, SUPREME COURT**

*CASE LAW:- Court – Approach to justice – Whether court do not exist to punish parties – The principle in **Cropper Vs. Smith (1884) 26 QBD***

ELECTION PETITION:- Qualification of candidate – Where a party contends that votes cast for a candidate were invalid as a result of his non-qualification to contest – Whether such a claim comes within Section 87(9) of the Electoral Act 2010.

*ELECTION:- Qualification thereto – Whether it is a primary and post-primary election matter – The principle in **Dangana & Anor Vs. Usman & Ors (2013) 6 NWLR (Pt. 1349) 50.***

PRACTICE AND PROCEDURE:- Appeal – Concurrent findings – Attitude of the Supreme Court – Whether will intervene where perverse.

PRACTICE AND PROCEDURE:- Appeal – Issues for determination – Where a respondent did not file a cross appeal or a respondent's notice – Whether he cannot formulate issues outside the grounds of appeal filed by the appellant

*PRACTICE AND PROCEDURE:- Sheriffs and Civil Process Act – Section 97 thereof – Where a party contends that a writ is not properly endorsed under Section 97 of Sheriffs and Civil Process Act – Whether such writ should be admitted as exhibit and then submissions made thereon – The principle in **Adegoke Motors Ltd Vs. Adesanya & Anor (1989) 20 NSCC (Pt. 11) 327***

SERVICE:- Originating process – Where address of service outside jurisdiction was later amended for service within jurisdiction – Whether endorsement under Section 97 of Sheriffs and Civil Process Act no longer necessary.

*STATUTE:- Section 97 of Sheriffs and Civil Process Act – Nature and purport – The principle in **Izeze Vs. INEC (2018) 11 NWLR (Pt. 1629) 110***

*STATUTE:- Section 97, Sheriffs and Civil Process Act – Interpretation thereof – The principle in **Adegoke Motors Ltd Vs. Adesanya & Anor (1989) 20 NSCC (Pt. 11) 327***

Issues for Determination

- 1. Whether having regard to the facts and circumstances of this appeal, and the decisions of this honourable court in the cases of **Izeze Vs. INEC (2018) NWLR (Pt. 1629) 110** and **PDP Vs. INEC (2018) NWLR (Pt. 1634) 533**, the court below was not wrong by holding that the presence of the 2nd and 3rd respondents on the originating summons and the amendment of same had cured the non-compliance with the mandatory provision of Section 97 of the Sheriffs and Civil Process Act) when the lower court never granted an order to change the address for service on the appellant from Ekiti State to FCT Abuja where the originating summons was issued.**
- 2. Whether the court below was right by holding that the case of the 1st respondent can be accommodated under Section 87(9) of the Electoral Act 2011 (as amended) thereby conferred jurisdiction on the lower court, when the issue of eligibility/qualification of the appellant to contest in the primary election of the 2nd respondent is an internal affair of the 2nd respondent and has nothing to do with the conduct of the primary election itself. And whether the court below was right by not following this honourable court's decision in **PDP Vs. Ezeonwuka (2018) 3 NWLR (Pt. 1606) 187** inspite of the clear admission of the 1st respondent that the primary election was conducted in strict compliance with the**

provisions of the Electoral Act and the 2nd respondent 's guidelines.

Facts of the Matter

The 1st respondent in this appeal, commenced action at the Federal High Court, Abuja against the appellant herein as well as the 2nd and 3rd respondents by originating summons dated 21st of June, 2018 and filed on the 22nd June, 2018, in which he posed some questions for determination and claimed some declaratory reliefs, directions and injunctive orders. The address for service of the originating summons on the appellant was given as "Isan Ekiti, Ekiti State or c/o Ekiti State APC Secretariat, Ajilosun, Ado-Ekiti." The address for service on the 2nd respondent as endorsed on the originating summons is All Progressives Congress (APC) National Secretariat, No. 40 Blantyer Street Wuse II, Abuja, FCT. On the 3rd respondent, the address for service was given as – National Independent Electoral Commission, Nation Headquarters, Abuja.

The bailiff could not effect personal service of the originating summons on the appellant. By a motion ex parte dated and filed on the 9th of August 2018, the 1st respondent sought for and was granted an order of substituted service of the originating summons on the appellant by delivering the process through the National Secretariat of the 2nd respondent in Abuja FCT. The 2nd respondent in that application is the "All Progressives Congress (APC)" and the order for substituted service was made on the 20th August, 2018. The appellant, in line with the order of the Federal High Court presided over by Dingba J. was served through the National Secretariat of the 2nd respondent on the 27th August, 2018. The proof of service is contained in the affidavit of service deposed to by Kenneth Kenter a bailiff of the Federal High Court on the 28th August, 2018.

By another motion on notice filed on the 3rd September, 2018, the 1st respondent sought for and was granted leave to amend the originating summons on the 5th of September, 2018. The amended originating summons, gave the address of service on the appellant as "c/o All Progressives Congress (APC) National Secretariat No. 40 Blantyer Street, Wuse II, Abuja FCT."

By a notice of preliminary objection dated the 21st of September 2018, the appellant herein, who was the 1st respondent at the trial court challenged the jurisdiction of the Federal High Court to entertain the suit before it and sought for an order striking out the suit on the following grounds:-

1. That the appellant's address for service subscribed on the originating summons issued on the 22nd June, 2018 is "ISAN EKITI, EKITI STATE OR C/O EKITI STATE APC SECRETARIAT, AJILOSUN, ADO-EKITI.
2. The originating summons was meant for service outside the Federal Capital Territory, Abuja where the originating summons

was issued.

3. **The originating summons was issued without the requisite endorsement thereon to the effect that "the originating process was issued in FCT Abuja and to be served on Dr. Kayode Fayemi in Isan Ekiti or Ado Ekiti, Ekiti State" as required by the provision of Section 97 of the Sheriffs and Civil Process Act."**

The preliminary objection was heard and in a reserved and considered ruling delivered on the 10th December, 2018; Agomoh J overruled it on the following grounds:-

1. **That the preliminary objection filed on the 24th of September, 2018 was to the originating summons which had since been amended on the 5th of September, 2018 and it is therefore not in existence.**
2. **The suit is a pre-election matter over which he has jurisdiction to hear and determine.**

The appellant was dissatisfied with the ruling of the trial court. Being aggrieved he filed an appeal at the Ekiti Division of the Court of Appeal and submitted three issues for determination of the appeal. The appeal was heard and in a unanimous decision of the lower court (Coram: Jauro, Agim and Lamido JJCA) delivered on the 12th February 2019, the three issues submitted by the appellant were resolved against him, and the appeal was dismissed. The present appeal is against that decision.

HELD: *(Unanimously dismissing the appeal)*

1. *Effect where a respondent did not file a cross appeal or a respondent's notice*
Where the respondents have not filed a cross appeal, and have also not filed a notice of intention to rely on other grounds in urging the court to sustain the decision against which the appeal lies, they cannot formulate issues outside the grounds of appeal filed by the appellant. The reply briefs are clearly not necessary before I do the needful. (P.....para.....)
2. *The nature and purport of Section 97 of the Sheriffs and Civil Process Act*
Section 97 of the Sheriffs and Civil Process Act provides as follows:-

" 97... Every writ of summons for service under this part out of the state or the Capital Territory in which it was issued shall, in addition to any other endorsement or notice required by the law of such state or the Capital Territory, have endorsed thereon a notice to the following effect (that is to say).

This summons (or as the case may be) is to be served out of thestate (or as the case may be)..... And in the..... state (or as the case may be). "

The provision of Section 97 of the Sheriffs and Civil Process Act as reproduced above has been subjected to scrutiny in a number of decisions of this court. In Izeze Vs. INEC (supra) which was cited and relied upon by learned counsel for the appellants, this court per Rhodes- Vivour, JSC said:-

"If an originating process is valid any defect in service is a mere irregularity which may make such an originating process voidable but certainly not void. When the words used in Section 97 of the Sheriffs and Civil Process Act are given their ordinary plain meaning without embellishments, it becomes very clear that the provision is mandatory. Service of all originating process without the endorsement as clearly stated under Section 97 supra is not an irregularity. It is a fundamental defect which renders the originating process void."

In this same case, my lord, Rhodes- Vivour, JSC said:-

"Applying for leave to issue and serve the amended originating summons on 10th April, 2015; a day after the said process was issued and served amounts to seeking permission after the act is done. Leave must be obtained before service is effected. Service of an invalid amended originating summons on the 1st and 2nd defendants is akin to no service at all. "

In Izeze Vs. INEC (supra) originating summons was issued out of the registry of the Federal High Court, Warri Judicial Division on the 9th April, 2015. It was signed by a judge and counsel on the same 9th April, 2015. It had no mandatory endorsement as required by Section 97 of the Sheriffs and Civil Process Act. The 1st respondent INEC and the 2nd respondent PDP had their respective addresses for service at Abuja a city outside Delta State. An amended originating summons was filed on the 2st May, 2015. The addresses for service remained the same and there was no endorsement. Learned counsel filed a motion ex - parte on 10th April, 2015 for leave to issue and serve the originating summons on the 1st and 2nd defendants in Abuja, outside jurisdiction. This court held that applying for leave to issue and serve the amended originating summons on 10th April, 2015, a day after the said process was issued and served amounts to seeking permission after the act had been done. (*P.....para.....*)

3. *Procedures where writ is not properly endorsed under Section 97 of the Sheriffs and Civil Process Act*

In Adegoke Motors Ltd Vs. Adesanya & Anor (1989) 20 NSCC (Pt. 11) 327 this court per Oputa JSC said:-

"If a writ is not properly endorsed as required by Section 97 of the Sheriffs and Civil Process Act, such a writ should be properly tendered and made an exhibit in the case. When the case goes on appeal, the appellate court will then easily refer to the exhibit and: receive submission on it." (P.....para.....)

4. *Originating summons was not served on the appellant on the address endorsed on it*

In the instant case the originating summons that was issued from the Federal High Court, Abuja had three defendants clearly endorsed thereupon. The appellant whose address for service was given at Isan Ekiti, Ekiti State or C/O Ekiti State APC Secretariat Ajilosun, Ado Ekiti was never served with the originating summons at the stated address for service.

The addresses for service on the 2nd and 3rd respondents, were within the Federal Capital Territory. The originating summons that contained the name of the appellant and the 2nd and 3rd respondents required no endorsement in line with Section 97 of the Sheriffs and Civil Process act before service on them. To that extent the said originating summons cannot be null and void.

The originating summons could only be declared null and void and same could not be amended, if it had been served at the address outside the FCT where it was issued. That is the decision in Izeze Vs. INEC (supra). (P.....para.....)

5. *Endorsement under Section 97 was unnecessary*

Even when the 1st respondent obtained an order for substituted service, the originating summons was not served at the Ekiti address, as such there was still no service on the appellant. 1st respondent found that it was impossible for the originating summons to be served at Ekiti. He now applied and was granted leave to amend the originating process. The amended originating summons was filed on the 10th of September, 2018. The appellant did not challenge the ruling which granted the leave to amend the originating summons. The amended originating summons contained address for service on the appellant at Abuja within jurisdiction as such the requirement for endorsement under Section 97 of the Sheriffs and Civil Process Act was unnecessary. Learned counsel's argument is stationed on the initial originating process which had undergone amendment before the appellant's preliminary objection which was filed on the 24th September, 2018. The preliminary objection was against the competence of

the initial originating summon which was no longer the relevant process in the case. (P.....para.....)

6. *Effect of an amendment of a court process*

The law is settled that an amendment of a court process goes to the roots or the day the original process was filed. See Salami Vs. Oke (1987) 4 NWLR (Pt. 63) 1 at 17; Jatau Vs. Ahmed (2003) FWLR (Pt. 151) 1837 at 1896. Where an initial originating process has been amended, it is the amended copy that is a live document. The initial process ceases to be of any consequence or valid in the matter. (P.....para.....)

7. *Conduct of a Lawyer in his professional capacity*

In appearing in his professional capacity before a court or Tribunal, a lawyer shall not with knowledge of invalidity of a document, cite or make reference to that document. See Rule 32(3)(g) of the rules of professional conduct for Legal Practitioners 2007. Learned counsel for the appellant is insisting that Section 97 of the Sheriffs and Civil Process Act prohibits an amendment to an originating summons that is defective, by reason of the failure to endorse it before it is served outside jurisdiction. I think this is taking that section out of context. (P.....para.....)

8. *Courts do not exist for the sake of discipline*

In Cropper Vs. Smith (1884) 26 QBD 700 7 Bowen L.J had this to say:-

"Now I think it is a well-established principle that the object of courts is to decide the right of the parties, and not to punish them for the mistakes which they make in the conduct of their cases I know of no kind of error or mistake which, if not fraudulent ... the court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy and I do not regard such amendments as a matter of favour or grace ...

It seems to me that as soon as it appears that the way in which a party has framed his case will not lead to a decision of the real matter in controversy, it is as much a matter of right on his part to have it corrected, if it can be done without injustice."
(P.....para.....)

9. *Courts are invested with wide powers of amendment of pleadings to avoid miscarriage of justice*

The principle enunciated above was adopted in the Nigerian case of Okeowo &

Ors Vs. Migliore & Ors (1979) LPELR - 2441 (SC), where this court, per Idigbe JSC held:-

“As is well known, the common rule of pleadings is that a party is bound by his own pleading. The strict application of this rule is capable sometimes of leading to miscarriage of justice, hence the courts have been invested with wide powers of amendment of pleadings. And so under the general powers of amendment vested in them, the courts for the purpose of determining the real question controversy between the parties, or of correcting any defect or error in proceedings before them can, at any stage of the said proceedings either of their own motion or on the application of any of the parties thereto order any document in the proceedings to be amended on such terms as to costs as may appear to them to be just.”

The 1st respondent's effort in this case was geared towards getting the matter heard. There is no evidence that by the filing of the originating summons and its subsequent amendment, the appellant suffered miscarriage of justice. The difference between this case and the case of Izeze Vs. INEC (supra) is that the unendorsed process was served outside jurisdiction in Izeze' s case, whereas in the present case there is no such service before the amendment. The order for amendment covered the amended originating summons including the address for service in Abuja. The service of the originating summons in Abuja in line with the court order was valid and sustainable. (P.....para.....)

10. *The nature and purport of Section 87(9) of the Electoral Act 2010*
Section 87(9) of the Electoral Act 2010 (as amended) provides as follows:-

"Notwithstanding the provisions of the Act or rules of a political party, an aspirant who complains that any of the provisions of this Act and the guidelines of a political party has not been complied with in the selection or nomination of a candidate of a political party for election, may apply to the Federal High Court of a state or FCT for redress." (P.....para.....)

11. *Qualification to contest primary election is not an internal affair of the party*
I do not agree with the learned counsel that qualification to contest primary election is an internal affair of the party. On the contrary qualification of a candidate is both pre and post -election matter that can be challenged either in the Federal or State High Court or the Tribunal. In Dangana & Anor Vs. Usman

& Ors (2013) 6 NWLR (Pt. 1349) 50 this court, per Onnoghen JSC (as he then was) held:-

"An issue of qualification of a candidate to contest an election under the Electoral Act, 2010 (as amended) is both a pre-election and an election matter which both the High Courts and the relevant Election Tribunals have jurisdiction to hear and determine. Where an aggrieved party decides to go through the High Court to challenge or question the qualification of such a candidate, his right of appeal terminate at the Supreme Court. Where however, he decides to go through the Election Tribunal route and the election to which the issue relates is a National or State Houses of Assembly Election, then, his quest for justice constitutionally terminates at the Court of Appeal by operation of Section 246(3) of the 1999 Constitution (supra). On the other hand if the election being questioned is a Governorship Election, then the issue of qualification as a ground of questioning the election can be canvassed up to the Supreme Court by virtue of Section 233 (1)(iv) of the said 1999 Constitution. The jurisdiction to hear and determine the issue of qualification of a candidate in an election is therefore parallel-one through the High Courts and the other through the Election Tribunal. It is common knowledge that parallel lines never meet. That being the case it is demonstrably clear that a journey which started in an Election Tribunal in petition challenging the election of a senator on grounds of qualification, can never end up at the Supreme Court simply because the issue is a pre-election matter over which the High Court also have jurisdiction. " (P.....para.....)

12. *Case of 1st respondent falls within Section 87(9) of the Electoral Act 2010 (as amended)*

By the nature of the claim at the trial court, it is very clear that the case of the 1st respondent was rightly accommodated under Section 87 (9) of the Electoral Act 2010 (as amended) , thereby conferring jurisdiction on the two lower courts as well as this court. One of the 1st respondent's claim against the appellant reads as follows:-

"A declaration that the 941 vote credited or recorded as votes cast for the 1st by the 2nd defendant election committee headed by Al-Makura at the 12th May, 2018 APC Governorship Primary Election for the purpose of determining the 2nd defendant's candidate for the 14th July, Election for the office of Governor

Ekiti State are void, invalid and wasted, the 1st defendant having not met the minimum qualification to contest in the said primaries election.” (P.....para.....)

13. *Successful conduct of primary election is not a bar to question the qualification of the winner*

The successful conduct of Primary Election as in this case, is not a bar to question the qualification of a candidate who was declared as the winner, since qualification is both a pre and post election matter.

In PDP Vs. Ezeonwuka (supra) the claim by the petitioners in the PDP's primary election for nominating its candidate for Orumba North/South Federal Constituency of Anambra State was that he won majority of the votes cast, but that his name was not sent to the Independent National Electoral Commission (INEC). Clearly the facts of that case is different from the instant case, where the claim is that the appellant was not qualified to contest the Primary Election by reason of his failure to resign from his appointment as minister. Since the facts in PDP Vs. Ezeonwuka are different from the facts of this case, the lower court was perfectly right by not following the decision of the earlier case. The appellant in my view has not made out a case for this court to overturn the decision of the court below. (P.....para.....)

14. *Attitude of Supreme Court to concurrent findings*

The law is settled that where there is sufficient evidence to support concurrent findings by the two lower courts, such findings should not be disturbed unless there is substantial error apparent on the record. In other words, this court will only act to the contrary where the findings of the lower courts have been shown to be perverse or some miscarriage of justice or some material violation of some principle of law or of procedure is occasioned. See Amadi Vs. Nwosu (1992) 6 SCNJ 59. The trial court and the lower court have made concurrent findings in this matter. I have no reason to interfere with these findings. This issue is resolved against the appellant and in favour of the respondents. Having resolved the two issues submitted for determination of this appeal against the appellant, this appeal I shall be and it is hereby dismissed. (P.....para.....)

Per Okoro (JSC)

“There is no doubt that the 1st respondent was unable to serve processes on the appellant personally at the address provided in Ekiti State. He then obtained an order to serve the appellant by substituted means through the 2nd respondent's Secretariat in Abuja. That is to say, address for service on the appellant changed with the grant of the ex-parte motion for substituted service. Thus, the amended originating summons contained address for service on the appellant care of the secretariat of the second respondent in Abuja which is within the jurisdiction of

the trial Federal High Court. What this means is that the requirement for endorsement of the writ under section 97 of the Sheriffs and Civil Process Act for service outside jurisdiction was no longer necessary.

Secondly, having amended the initial originating summons, the address on the said initial originating summons having changed from Ekiti State to Abuja, the address at Ekiti State was no longer relevant. The reason is that an amendment of a court process takes effect on the date the originating process was filed. See *John Oforishe Vs. Nigerian Gas Company Ltd.* (2017) LPELR - 42766 (SC), *Rotimi & ors Vs. Macgregor* (1974) 11 SC, 133, *Salami Vs. Oke* (1987) 4 NWLR (Pt. 63) 1. (*P.....para.....*)

Per Eko (JSC)

“The effect of the amendment is to completely obliterate the address for service endorsed on the original originating summons and substituting therefore the address for service within the FCT. The indubitable fact is that the appellant, pursuant to the order for substituted service, was served the originating summons within the FCT, and not outside the FCT. The order granting leave to the 1st respondent to amend the originating summons on 5th September, 2018, was no doubt a consent order. Accordingly, it no longer lies in the mouth of the appellant to say that the originating summons was not amended with his concurrence and that the address for service on him of the said originating process was not within the FCT.

The requirement for a minimum of 30 days, In Section 99 of the Act, is no more than to give the defendant outside the State of origin of the Originating process or other process sufficient time to arrange himself to appear in the court of origin of the process requiring his appearance.

The preliminary objection was predicated on non-compliance with Section 97 of the Sheriff and Civil Process Act. Equity follows the law. It therefore looks at the substance and not at the form. Section 97 of the Act appears to me to dictate the form an originating process for service outside the state of origin should take or look.

I agree that the original originating summons for service on the appellant was originally intended to be served on the appellant in Ekiti State outside the FCT. However, it was not infact served in Ekiti State, as intended, but within the FCT in compliance with the order for substituted service. That is the singular fact that removes this originating summons served on the appellant within the FCT from the intendment of Sections 97 and 99 of the Sheriffs and Civil Process Act. The originating summons (before its amendment) in form appears to come within the letters of Section 97 of the Act. However in substance and actuality, the service of the said process completely removes it from the letters of Section 97, 98 and 99 of the Act; the order for substituted service having permitted the service of the process within the FCT. And infact the service was effected within

the FCT.

The appellant had also consented to the order that granted leave for the amendment of the originating summons whereby the service of the process within the FCT had thus been regularised with the amendment. This fact distinguishes this case from *SKENCONSULT NIG. LTD Vs. UKEY (1981) NSCC 1 and IZEZE Vs. INEC (2018) NWLR (pt. 1629) 110* wherein the processes had in fact been served on the defendants outside the State of their origin and it was the fact of such service that galvanised the preliminary objection.

The objection in the instant was belated. It was raised after the service of the process within the FCT in compliance with the order for substituted service and after the appellant had consented to the amendment of the originating summons by which the address for service on the appellant/objecter had been formally situated within FCT from where the originating summons was issued.

The second ground on which the preliminary objection was predicated is the appellant's erroneous assumption that the Federal High Court lacked jurisdiction to entertain the grievance of the 1st respondent. Section 87(9) of the Electoral Act, 2010, as amended, vests in the High Courts, including the Federal High Court jurisdiction to entertain the suit of "as aspirant who complains that any of the provisions of this (Electoral Act) and the GUIDELINES of a political party has not been complied with in the selection or nomination of a candidate of a political party for Election - ."

The 1st respondent, as an aspirant and the plaintiff at the Federal High Court, had complained that the appellant (also an aspirant) was not eligible under the extant APC guidelines, to be considered and/or elected as the APC's Governorship Candidate in the general election and that his election on 12th May, 2018 as the nominated candidate of the APC was in violation of Article 2 of the said APC (2nd respondent's) guidelines. The appellant's objection, on this ground, was a gross misconception of Section 87(9) of the Electoral Act, 2010, as amended, read with Article 2 of the APC (2nd respondent's) guidelines allegedly flouted by the 2nd respondent.

The sum total of all I have been saying is that the preliminary objection, the subject of this appeal, was frivolous and vexatious, That is what makes this appeal a gross abuse of the court's process.

(P.....para.....)

Representation

Chief R. O. Balogun with A.D. Olaniyi, (Esq.); A. A Orire, (Esq.); R. W. Medupin, (Esq.) and E. H. Agbile, (Esq) for the appellant.

Chief A. A. Adeniyi with Niyi Idowu, (Esq.); Gani Faniyi, (Esq.); Polycarp Nwachukwu, (Esq.) and for the 1st respondent.

Babatunde John Kwame Ogala, (Esq.) with Dare Oketade, (Esq.); Julius Ishiola,

**(Esq.) and Agharese Precious, (Esq.) for the 2nd respondent.
Francis C. Iwuji for the 3rd respondent.**

PAUL ADAMU GALINJE, (JSC) Delivered the Lead Judgment):

**OGUNLEYE SANMI
VS
THE STATE**

SC. 653/2016

IN THE SUPREME COURT OF NIGERIA

HOLDING AT ABUJA

FRIDAY, 12, APRIL, 2019

BEFORE THEIR LORDSHIPS

**OLABODE RHODES-VIVOUR
KUDIRAT M. O. KEKERE EKUN
CHIMA CENTUS NWEZE
AMINA ADAMU AUGIE
PAUL ADAMU GALUMJE**

**JUSTICE SUPREME COURT
JUSTICE SUPREME COURT
JUSTICE SUPREME COURT
JUSTICE SUPREME COURT
JUSTICE SUPREME COURT**

COURT: Supreme Court – Jurisdiction thereof – Whether does not have jurisdiction to entertain appeal from the decision of the trial court.

CRIMINAL LAW AND PROCEDUR: Alibi – How properly raised –Duty on prosecution thereto.

CRIMINAL LAW AND PROCEDURE: Armed robbery – Ingredients thereof – What prosecution must prove.

*CRIMINAL LAW AND PROCEDURE: Alibi – How properly raised – Whether police should not be involved in a wild goose chase for the whereabouts of the accused person – The principle in **Ochemaje vs. State (2008) 15 NWLR (pt. 1109) 57.***

CRIMINAL LAW AND PROCEDURE: Alibi – Purport and significance.

*CRIMINAL LAW AND PROCEDURE: Confessional statement – Retraction thereof – Where accused retracts his confessional statement – Whether no issue of admissibility is raised thereby – The principle in **State vs. Salawu (2011) 18 NWLR (pt. 1279) 883.***

CRIMINAL LAW AND PROCEDURE: Determination of signature, words and finger prints – Duty of court thereto – Whether application has to be made to the court in exercise of it's power under section 101 of Evidence Act 2011.

CRIMINAL LAW AND PROCEDURE: Determination of signature, words and finger impressions – Procedure thereof – Where court proceeds thereto without any application from any of the parties – Whether it amounts to descending into the arena of conflict.

CRIMINAL LAW AND PROCEDURE: Investigating officers – Evidence thereof – Where the initial investigating police officer was not called as a witness – Whether it is not fatal to the case of prosecution.

CRIMINAL LAW AND PROCEDURE: Presumption of innocence – Onus on prosecution thereto – Whether to rebut presumption of innocence of the accused under section 36(5) of CFRN 1999 as amended – How discharged.

CRIMINAL LAW: Defences – Alibi – Whether does not avail where the accused was fixed at the scene of crime.

EVIDENCE: Admissibility – Where a duplicate copy of a confessional statement is certified – Whether such a duplicate copy is admissible.

EVIDENCE: Determination of signature, words and finger impressions – Section 101(1) and (2) of Evidence Act 2011 considered – Procedure thereof.

EVIDENCE: Secondary evidence – Nature and types thereof – Section 87 of evidence act 2011 considered.

EVIDENCE: Secondary evidence – Where a confessional statement in a case file is lost – Whether it is a public document which can be proved by secondary evidence – Section 89© of Evidence Act considered.

PRACTICE AND PROCEDURE: Appeal – Formulation of omnibus ground – Whether the omnibus ground in a civil appeal is different from that in a criminal appeal.

PRACTICE AND PROCEDURE: Appeal – Grounds of appeal – Where no issues are formulated from grounds of appeal – Whether such grounds are deemed to have been abandoned.

PRACTICE AND PROCEDURE: Appeal – Issue for determination – Competency thereof – Whether for issues for determination to be competent they must be formulated from grounds of appeal.

PRACTICE AND PROCEDURE: Appeal – Issues for determination – Where an issue is formulated from an incompetent and competent grounds of appeal – Whether such an issue is incompetent.

*PRACTICE AND PROCEDURE: Appeal – Issues for determination – Where issues formulated at the Supreme Court question the decision of the trial court – Whether supreme court has no jurisdiction thereto – The principle in **Francis Nwanezie vs. Nuhu Idris & Anor (1993) 3 NWLR (pt. 279) 1.***

PRACTICE AND PROCEDURE: Appeal – Omnibus ground – Whether does not require particulars.

PRACTICE AND PROCEDURE: Appeal – Omnibus ground – Whether not suitable were there has been no evaluation of evidence and ascription of probative value.

PRACTICE AND PROCEDURE: Appeal – Where a ground of appeal does not attack judgments appealed against – Whether such a ground is incompetent and liable to be struck out.

STATUTE: Robbery and Firearms Special Provisions Act – Section 1(1) and (2) thereof – Nature and purport – Penal provisions for offences under the act.

STATUTE: Robbery and Firearms Special Provisions Act – Section 5(b) thereof – Nature and purport – Effect of conspiracy to commit an offence under the act.

WORDS AND PHRASES: Alibi – Meaning

Issues for Determination

- 1. Whether Exhibit A was validly relied upon by the lower court to have upheld the conviction of the Appellant.**
- 3. Whether the defence of alibi raised by the Appellant, was properly considered by both the trial court and the lower courts below would avail the appellant.**

Facts of the Matter

The Appellant herein was arraigned on a two counts charge of conspiracy to commit armed robbery and armed robbery under Section 6(b) and 1(2)(a) of the Robbery and Firearms (Special Provisions) Act, Cap. R. 11 Vol. 14 Laws of the Federation of Nigeria 2004 before the High Court of Ondo State, holding at Akure on the 8th day of May, 2013. Appellant pleaded not guilty to the charge.

In order to prove its case prosecution called three witnesses. PW1 and PW3 are husband and wife who were the victims of the robbery incidence, while the 3rd prosecution witness is the policeman who carried out investigation into this case, and recorded the statement of the Appellant. The statement which was endorsed by a superior police officer

because it was said to be confessional, was admitted in evidence and marked **Exhibit A**, while the endorsement, or attestation made on **Exhibit A** was admitted in evidence and marked **Exhibit A**.

The Appellant testified in his defence and called no additional witness. In a reserved and considered judgment delivered on the 27th day of January, 2004, **Kolawole J.** found the Appellant guilty on both counts and sentenced him to death, by hanging until he be dead.

The Appellant, being aggrieved, appealed to the court of Appeal, Akure Division. The appeal was heard. In a reserved and considered judgment, delivered on the 1st of July, 2016, the lower court, in a unanimous decision dismissed it for lacking in merit. Once again, the Appellant is dissatisfied with the decision of the lower court. Being aggrieved, he has brought this appeal to the Supreme Court.

Held: *(Unanimously dismissing the appeal).*

1. *Effects where a ground of appeal does not attack the judgment appealed against*
Grounds of appeal are the complaints of the appellant on the judgment against which the appeal lies. For them to be valid and 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, same become incompetent and are liable to be struck out.

In the instant appeal, the notice of appeal clearly states that the appeal is against the decision of the Court of Appeal. However, the 7th ground of appeal is not directed against the decision of that court. For the avoidance of doubt the 7th ground of appeal is hereunder reproduced for clarity as follows:-

“7 The Appellant the virtue of Section 36 of the 1999 Constitution as amended is not expected to prove his innocence rather it is the duty of the Respondent in line with Section 131, 133 and 135 of the Evidence Act, 2011 to prove the Appellant guilty beyond reasonable doubt”

This ground of appeal complains about the duty of the prosecution to prove the case against the Appellant beyond reasonable doubt. Learned counsel for the appellant has not stated how the lower court failed to determine correctly the question whose responsibility it is to prove the case against the appellant beyond reasonable doubt. Clearly, the said ground of appeal not being against the decision of the lower court, against which the appeal lies, is 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 SC NLR 188. (P.....Paras.....)*.

2. *Omnibus ground in a civil appeal is different from that in a criminal appeal*
Accordingly the 7th ground of appeal is hereby struck out.
The 8th ground of appeal is a ground known to civil appeals only. It reads as follows:-

“8. The judgment of the lower court is against the weight of evidence on the record.

PARTICULARS OF ERRORS

- 1. The evidence of the Appellant was not properly evaluated and appraised by the lower court.**
- 2. The judgment of the lower court is in utter contradictions with the evidence on Record.**
- 3. The decision of the lower court cannot be supported by the weight of evidence on the Record.**
- 4. There is no evidence which supports the finding of the lower court.**
- 5. When the evidence adduced by the Appellant is weighted against that given by the Respondent the judgment rendered to the Respondent is against the totality of the evidence on the Record.**
- 6. By reason of the premise of sub-paragraphs 1 – 7 above, the judgment of the lower court is unreasonably unwarranted and unmeritorious.”**

A criminal appeal on the facts is not quite the same as an appeal on the facts in a civil case. In a civil appeal, the general ground is that the judgment is against the weight of evidence, whilst in a criminal appeal it is that the verdict is unreasonable or cannot be supported having regard to the evidence. Civil matters are decided on the preponderance of evidence, that is, when the evidence adduced by the appellant is weighed against the which is adduced by the respondent. In criminal cases the court does not embark on such exercise, instead, the prosecution must prove his case beyond reasonable doubt. So it is wrong to couch a ground that is not in conformity with this proof. See *Atuyeye&Ors. vs. Ashamu (1987) 18 NSCC (Pt. 1) 117 at 118 – 119. (P.....Paras.....)*.

3. *Where the omnibus ground is inapplicable*
The 8th ground of appeal has not accused the lower court or any court for that matter of committing error in the way it attended to the decision of the trial court. The need for particulars of error as enumerated in support of the 8th ground of appeal does not raise at all. It is a wasteful exercise from which no

benefit has accrued to the Appellant.

Finally on the 8th ground of appeal, omnibus ground of appeal is not suitable at this stage, as assessment of evidence and ascription of probative value to such evidence was carried out at the trial court. I find the 8th ground of appeal incompetent and accordingly same is struck out as well. (P.....Paras.....).

4. *Effect where an issue is formulated from an incompetent and competent grounds of appeal*

The 4th issue for determination of this appeal is distilled from the incompetent grounds 7 and 8 as well as competent grounds 9 and 10 of the grounds of appeal. Clearly, there is no way I can sift out arguments in respect of the competent grounds of appeal from incompetent grounds of appeal in the circumstance of this appeal. Accordingly, the 4th issue for determination of this appeal, having been distilled from incompetent and competent grounds of appeal, is incompetent as well. (P.....Paras.....).

5. *For issues for determination to be competent must be formulated from grounds of appeal.*

The 2nd issue for determination of this appeal, does not arise from the 1st, 5th and 6th grounds of appeal as proposed by the learned counsel for the appellant. For clarity, this issue is reproduced hereunder as follows:-

“Whether Exhibit A (not a certified true copy) the appellant's purported confessional statement to the police) was properly admitted in evidence under the Evidence Act, 2011 and relied upon.”

This issue as couched is not related to the 1st, 5th, and 6th grounds of appeal.

For issues for determination of appeal to be competent, they must be formulated from the grounds of appeal. They must be based on and related to or arise from the grounds of appeal. See *Idika & Ors vs. Erisi & Ors (1988) 2 NWLR (Pt. 78) 563; Akpan vs. Bob & Ors (2010) 17 NWLR (Pt. 1223) 421.* (P.....Paras.....).

6. *Supreme Court has no jurisdiction to entertain appeal from decision of the trial court*
As can be seen, all the grounds I have reproduced hereinabove complain of error on the part of the lower court, whereas the issue so distilled from them talked about improper admission of Exhibit A, the confessional statement of the appellant, an act which did not take place at the Court of Appeal. It is therefore crystal clear that the issue does not arise from those grounds of appeal.

This court therefore has no jurisdiction to entertain any issue in appeal which complains against the decision of the trial court. (P.....Paras.....).

7. *Effect where an issue formulated at the Supreme Court questions the correctness of the decision at the trial court.*

In Francis Nwanezie vs. Nuhu Idris & Anor (1993) 3 NWLR (Pt. 279) 1 at 12 Karibi-Whyte in the leading judgment of this court stated the law as follows:-

“The determination of the 1st Respondent's first issue is outside the jurisdiction of this court. This court can only exercise jurisdiction in respect of decisions of the Court of Appeal.

The first issue is questioning the correctness of the judgment of the High Court. The ground of appeal filed is concerned with the error of the court below. The formulation of the first issue therefore did not arise from the ground of appeal filed.”

This observation is exactly what happened in the present case where the 1st, 5th and 6th grounds of appeal complained of the errors of the learned justices of the Court of Appeal in their judgment now on appeal, but the learned Appellant's counsel in framing the 2nd issue for determination of this appeal, turned his complaint against the judgment of the trial court over which this court does not have jurisdiction. See *Harriman vs. Harriman* (1987) 3 NWLR (Pt. 60) 244 at 257; *Ibori vs. Agbi* (2004) 6 NWLR (Pt. 868) 78 at 142 – 143. (P.....Paras.....).

8. *Grounds of appeal are deemed abandoned where no issues are formulated therefrom*
This is where counsel who appear before this court must be careful in the way and manner papers relating to appeals are drafted. It appears some counsel hardly take sufficient pains in drawing up grounds of appeal and issues arising therefrom. These are very important processes that open up the appeal for hearing before this court. Where they are defective, this court will not hesitate in striking them out on the ground that they are incompetent. The 2nd issue is accordingly struck out. As it is, no issues have been formulated from the 1st, 5th and 6th grounds of appeal. They are deemed abandoned and liable to be struck out. Accordingly, same are hereby struck out. (P.....Paras.....).

9. *Burden on a party who alleges commission of a crime*
By the provision of Section 135 (1) and (2) of the Evidence Act, 2011, the burden of proving that any person has been guilty of a crime or wrongful act is on the person who asserts it, whether the commission of such act is or is not directly in issue in the action. See *Adamu vs. A.G. of Bendel State* (1986) 2 NWLR (Pt. 22) 284; *Akpan vs. The State* (1990) 7 NWLR (Pt. 160) 101; *Sunday Amala vs. The*

State (2004) 6 SCNJ 79 at 88; The State vs Olatunji (2003) 2 SCNJ 65.
(P.....Paras.....).

10. *Onus on prosecution to rebut presumption of innocence*

Section 36(5) of the Constitution of the Federal Republic of Nigeria 1999 provides that every person who is charged with a criminal offence shall be presumed innocent until he is proved guilty. Flowing from above, the burden or proof in criminal cases is 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. Where the prosecution fails to prove its case beyond reasonable doubt, the accused must be discharged.

In the instant case, the appellant was charged, tried and convicted for offences of conspiracy to commit armed robbery and armed robbery contrary to Section 6(b) and 1 (2)(a) of the Robbery and Firearms (Special Provisions) Act, Cap R11 Vol. 14 Laws of the Federation of Nigeria 2004. The sentence of death by hanging, that was handed down on the appellant by the trial court was affirmed by the lower court. This is no doubt the highest punishment known to our criminal law. A court must therefore resort to such punishment only if the prosecution has proved its case beyond reasonable doubt. (P.....Paras.....).

11. *The nature and purport of section 5(b) of Robbery and Firearms Special Provision Act 2004*

Section 5 (b) of the Robbery and Firearms Act 2004 provides as follows:-

“Any person who conspires with any person to commit such an offence whether or not he is present when the offence is committed, shall be deemed to be guilty of the offence as a principal offender and shall be liable to be proceeded against and punished accordingly under this Act.” (P.....Paras.....).

12. *Punishment for offences under the robbery and firearms special provisions Act Section 1(1) and (2) of the same Act provides as follows:-*

“(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 twenty-one years.

(2) If–

(a) any offender mentioned in subsection (1) of this section is armed with any firearms or any offensive weapon or is in company with any person so armed, the offender shall be liable upon conviction under this Act to be sentenced to death. (P....Paras.....).

13. *Ingredients of offence of armed robbery*
For the prosecution to prove the offence of armed robbery it must establish the following ingredients.

1. **That 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. (P.....Paras.....).**

14. *No issue of admissibility is made where accused retracts his confessional statement*
The procedure concerning a situation where an accused person denies making a confessional statement has long been settled by this court. In State vs. Salawu (2011) 18 NWLR (Pt. 1279) 883 at 905 paras G – H this court said:-

“The Settled principle of law is that where, in a criminal trial, a statement allegedly made by an accused person is sought to be tendered in evidence and the accused person challenges it by denying ever making it, there is no issue of admissibility raised thereby and the court will be at liberty to admit it. The court's duty then would be to determine at the conclusion of the case whether or not the accused person made the statement.” See Dawa & Anor vs. The State (1980) NSCC 334 at 345; Solomon Eliot vs. State (1993) 4 NWLR (Pt. 290) 644 at 659; Ikpasa vs. A.G. Bendel State (1981) 9 SC 7 at 28; Ogunye vs. State (1999) 5 NWLR (Pt. 604) 548 at 570.

In the instant case, the appellant denied making Exhibit A, the confessional statement allegedly made by him, at the time the prosecution applied to tender the said Exhibit A in evidence. The trial court was right when it admitted the confessional statement and marked it Exhibit A, since the Appellant did not complain that the statement was made under duress, threat or some form of inducement. The issue of whether the statement was corroborated or not was a matter to be decided at the conclusion of the case. From the proceedings at the trial court, I am of the firm view that the learned trial judge adhered to the relevant guiding principles of criminal law and procedure, when he admitted in evidence the confessional statement of the Appellant. (P.....Paras.....).

15. *The nature and types of secondary evidence*
A Photostat document is a secondary evidence of the original document. By Section 87 of the Evidence Act 2011, secondary evidence includes:-

- (a) **Certified copies given under the provisions hereafter contained in this Act;**

- (b) **Copies made from the original by mechanical or electronic processes which in themselves ensure the accuracy of the copy, and copies compared with such copies;**
- © **Copies made from or compared with the original;**
- (d) **Counterparts of documents as against the parties who did not execute them; and**
- (e) **Oral accounts of the contents of a document given by some person who has himself seen it. (P.....Paras.....).**

16. *Duplicate copy of confessional statement which is certified is admissible*
By Section 88 of the Evidence Act, documents shall be proved by primary evidence, except those documents which the Evidence Act specifically provides that they can be proved by secondary evidence. The trial court found that the original file that contained the confessional statement of the Appellant was lost and that Exhibit A, although retrieved from a duplicate file was duly certified and therefore admissible. (P.....Paras.....).

17. *Where secondary evidence may be given*
Section 89 (c) of the Evidence Act provide as follows:-

“Secondary evidence may be given of the existence, condition or contents of a document when the original has been destroyed or lost and in the latter case all possible search has been made for it.”

The police officer through whom Exhibit A was tendered, clearly told the court that the original case file was lost and all efforts to trace same proved abortive. Apart from the fact that the original case file was lost, the statement of the appellant that was kept in the police file is a public document. By Section 89 (e) of the Evidence Act, it can be proved by secondary evidence in line with Section 105 of the Evidence Act which provides as follows:-

“Copies of documents certified in accordance with Section 104 may be produced in proof of the contents of the public documents or parts of the public documents or parts of the public documents of which they purport to be copies.”

For all I have said here, the trial court acted within the criminal law and procedure when it admitted Exhibit A. The lower court was in a firm ground when it refused to disturb the procedure adopted at the trial court. (P.....Paras.....).

18. *Determination of signature, words and finger impression*
Learned counsel's argument is predicated on Section 101 (1) and (2) of the Evidence Act which provides as follows:-

“101 – (1) In order to ascertain whether a signature, writing, seal or finger impression is that of the person by whom it purports to have been written or made, any signature, writing, seal or finger impression admitted or proved to the satisfaction of the court to have been written or made by that person may be compared with the one which is to be proved although that signature, writing, seal or finger impression has not been produced or proved for any other purpose.

(2) The court may direct any person present in court to write any words or figures or to make finger impressions for the purpose of enabling the court to compare the words, figures or finger impressions so written with any words, figures or finger impressions alleged to have been written or made by such person;

Provided that where a defendant does not give evidence he may not be so directed to write such words or figures or to make finger impressions." (P.....Paras.....).

19. *The court must be called upon to determine signature words and finger impressions under section 101 of Evidence Act 2011*

As laudable as the provision of Section 101 of the Evidence Act is, parties to a case must present a request to the court for comparison of signature, before a court can employ its discretion to grant or refuse such a request. There is no evidence that the trial court was called upon to embark on such exercise by any of the parties. The procedure is very clear as I have stated elsewhere in this judgment, and that is where an accused person denies making a statement, the courts are enjoined to admit the statement and consider the weight to be attached to it at the end of trial. (P.....Paras.....).

20. *Courts are forbidden from descending into arena of conflict*

To embark on the exercise of comparing signatures will have the effect of descending into the arena of contest, where none of the parties has requested for such an exercise. Courts are forbidden from descending into the arena of contest and conducting cases for any of the parties. See *Godwin Josiah vs. The State* (1985) 1 SC 406 at 443; *David Uso vs. C.O.P* (1972) 11 SC 37 at 46 - 47.

The lower court was never urged to compare the Appellant's signature

on his notice of appeal with the signature on Exhibit A, as such ground of appeal was not put before it for determination. The exception to the provision of Section 101 of the Evidence Act is that the party requesting for comparison of signature must have given evidence before the court. The lower court did not hear evidence from any of the parties and was therefore not in a position to direct for signature comparison. An appellate court is only concerned with matters that are properly placed before it. It has no jurisdiction over a decision against which there is no appeal to it. See *Abdulkareem vs. Incar Nigeria Ltd* (1984) 15 NSCC 603 at 617 paragraph 5; *Sodeinde vs. Registered Trustees Ahmadiyya Movement in Islam* (1982) 2 SCNLR 284 at 326. (P.....Paras.....).

21. *The fact that the initial police investigating officer was not called as a witness is not fata to the prosecution's case.*

Learned counsel for the Appellant argued forcefully that the prosecution's failure to call the initial police investigating police officer as a witness is fatal to the prosecution's case. I do not think learned counsel is right. The fact that the initial police investigating officer was not called as a witness is not fatal to the prosecution's case. The Nigerian Police is an institution, where any of its officers can take over investigation of a case from another officer and indeed produce documents that were executed by the previous officers and tender them in court for the purpose of proving the prosecution's case. (P.....Paras.....).

22. *Appellant was identify by Pw1*

I think learned counsel misunderstood the evidence of PW1. Although PW1 stated that he switched off the lights in his room, he testified that the Appellant led him to his wife's room and subsequently to his mother's room where there was light and it was there he identified the Appellant. At page 16 of the record of this appeal, PW1 said:-

“He said I should lead him on tour of the house. I was led to the room of my wife, my wife woke up. The young man led me, my wife and my children to the sitting room of my mother. There was electricity in the sitting room. The young man told us to lie down at the sitting room. There was another of the intruders in the sitting room before we got there. The person held an object which I cannot describe because I did not see it properly.”

Clearly by touring the house, there were instances where they were found at a well illuminated areas where it was possible for PW1 to identify the appellant. (P.....Paras.....).

23. *There was no contradiction in the prosecution's case*
I have indeed not found any contradiction in the prosecution's case. Blessing Idowu who was first arrested on the day of the incidence made his statement in which he implicated the Appellant. Thereis clear evidence that the Appellant was arrested almost a year after the incidence and that is why the date on Exhibit A is consistent with the facts disclosed in this case. (P.....Paras.....).

24. *The purport of defence of alibi*
The defence of alibi means that when the offence was committed, the accused person was elsewhere, as such it was impossible for him to have committed the offence. Alibi is within the personal knowledge of the accused person and so it is his duty to give full particulars of where he was and with whom he had been. These particulars of his where-about are to enable the police to investigate his claims of being elsewhere.

In the instant case, the Appellant said he was in Lagos. There was no specific address and with whom he was. Clearly there was no way the police could have initiated an investigation in order to ascertain the truth or otherwise of his claim. Moreover, the defence of alibi was not timeously raised when the Appellant was arrested as nothing like that is reflected in Exhibit A. See Ebenehi & 1 Or vs. The State (2009) ALL FWLR (Pt. 486) 1825 at 1833 para C - E, where this court had this to say:-

“It is trite law that for the defence of alibi to be properly raised, it must be, raised at the earliest opportunity when an accused person is confronted by the police with the commission of an offence, so that the police will be in 'a position to check the alibi.”

The trial court and the lower court in my view properly considered all the defences raised by the Appellant.

Apart from the evidence of the Appellant where he said, his landlady called him when he was in Lagos, learned counsel for the Appellant neither raised the defence of alibi at the trial court nor was the said defence of alibi raised at the lower court. The fact that he was in Lagos at the time he was called without more, does not create a defence of alibi, as the date on which he was called is not given and there is no evidence that the call was made on the day the offence was committed. The 3rd issue is accordingly resolved against the Appellant. (P.....Paras.....).

25. *Tendering of a secondary evidence of a public document*
I agree with my learned brother, that not only was there sufficient credible evidence before the court as to why the original copy of Exhibit A could not be tendered, the certified photocopy tendered met the requirements of Section 89

(e) of the Evidence Act, 2011 which permits the tendering of secondary evidence of a public document. Section 90 (c) of the Evidence Act is emphatic that the only type of secondary evidence admissible in respect of a public document is a certified true copy thereof, as provided for in Section 87 of the Act. See: *Udo vs. The State* (2016) LPELR - 40721 (SC) @ 12 -13 B-C; *Araka vs. Egbue* (2003) LPELR - 532 (SC) @ 14 A-D; *Iteogu vs. LPDC* (2009) 12 SC (Pt.1)1. (P.....Paras.....).

26. *Retraction does not affect admissibility*
Exhibit A was therefore properly admitted in evidence.
 The fact that the appellant claimed that Exhibit A was not his statement does not affect its admissibility. The court is entitled to admit it in evidence and consider it along with other evidence led in the case in determining the weight to attach to it. (P.....Paras.....).
27. *Defence of alibi does not avail where accused was fixed at the scene of crime*
In the instant case, not only did the appellant confess to his participation in the crime, he was fixed at the scene by PW1 who was able to identify him because there was light in his mother's room where he was led by the appellant and because he removed his mask. Having been fixed at the scene, the defence of alibi could not avail him.
 The court below was perfectly in order in refusing to interfere with the findings of the trial court.
 I hereby dismiss the appeal for these and the fuller reasons well set out in the lead judgment. The judgment of the lower court affirming the conviction and sentence of the appellant is affirmed. (P.....Paras.....).
28. *Secondary evidence of a public document is admissible*
The law is that, in the absence of the original document, only, properly, certified copies are admissible as secondary copies of public documents "but no other kind of secondary evidence," *G and T. I. Ltd and Anor vs. Witt and Bush Ltd*(supra); *Araka vs. Egbue* [2003] 33 VVRN 1; *Minister of Lands, Western Nigeria vs. Azikiwe*[1969J 1 All NLR 49;*Nzekwu. vs. Nzekwu* [1989] 2 NWLR (pt 104) 373; *Tabik Investment Ltd and Anor vs. Guarantee Trust Bank P/c*[2011] 6 MJSC (pt 1) 1, 21; *Dagaci of Dere vs. Dagaci of Ebwa* [2006J 30 WRN 1; *Iteogu vs. LPDC* (2009) 17 NWLR (pt 1171) 614, 634 etc.
 Exhibit A, being a public document, was certified. The said certified copy was, therefore, rightly, admitted as a secondary copy of the said public document. *G and T. I. Ltd and Anor vs. Witt and Bush Ltd* (supra); *Araka vs. Egbue* (supra); *Minister of Lands, Western Nigeria vs. Azikiwe* (supra); *Nzekwu vs. Nzekwu* (supra); *Tabik Investment Ltd and Anar vs. Guarantee Trust Bank Plc* (supra); *Dagaci of Derevs Dagaci of Ebwa* (supra); *Iteogu vs. LPDC* (supra).

(P.....Paras.....).

29. *The meaning of alibi*

Take the issue of *alibi* for instance. The Appellant claimed that he was elsewhere, and *alibi* is Latin for *elsewhere*," The defence of *alibi* is based on the physical impossibility of an Accused being guilty by placing him in another location at the relevant time. It also means "*the fact or state of having been elsewhere when an offence was committed*" - see Black's Law Dictionary, 8th Ed.

(P.....Paras.....).

30. *Proper procedure for raising alibi*

Once the defence of *alibi* is properly raised during investigations, it is the duty of the Police to investigate it and for the Prosecution to disprove it. But for the defence of *alibi* to be worthy of investigation, it must be precise and specific in terms of the place that the Accused was and the person or persons he was with and possibly what he was doing there at the material time - see *Shehu vs. State (2010) 8 NWLR (Pt. 1195) 112.* (P.....Paras.....).

31. *Police should not be involved in a wild goose chase for the where about of the accused person.*

Ochemaje vs. State (2008) 15 NWLR (Pt. 1109) 57, wherein this Court, per Tobi, JSC expatiated on the issue as follows –

It is not the law that the Police should be involved in a wild goose chase for the whereabouts of an Accused person at the time the crime was committed. No. That is not the function or role of the Police. The Accused must give specific particulars of where he was at the material time to enable the Police move straight to that place to carry out the investigation required by law. That was not the situation in this case. The above aparty investigation is not a necessity if the evidence unequivocally points to the guilt of the accused person, either in the evidence of the witnesses or under cross-examination by the evidence of the accused or his witness.

(P.....Paras.....).

Representation

PATRICK E. OGANWU (ESQ), with Usman O. Sule (Esq.); Agada Glachi, (Esq.); Johnson Oko Ochai, (Esq.) and Hafast I. Usman for the Appellant.

R.POLATUBORAESQ for the Respondent.

ADAMU GALINJE, (JSC) (DELIVERING THE LEAD JUDGMENT):

1. OKWARA AGWU
2. INNOCENT OBINNA
3. CHARLES ONUMARA
4. OPARAOCHALUIZ GARBA
5. OBIAKOR EDWIN
6. EKEH SPEAR
VS
JULIUS BERGER NIGERIA PLC

SC.197/2011

IN THE SUPREME COURT OF NIGERIA

HOLDEN AT ABUJA

FRIDAY, 17TH MAY, 2019

BEFORE THEIR LORDSHIPS.

OLABODE RHODES-VIVOUR	JUSTICE, SUPREME COURT
JOHN INYANG OKORO	JUSTICE, SUPREME COURT
CHIMA CENTUS NWEZE	JUSTICE, SUPREME COURT
AMINA ADAMU AUGIE	JUSTICE, SUPREME COURT
PAUL ADAMU GALUMJE	JUSTICE, SUPREME COURT

APPEAL: Grounds of appeal – Essence thereof – Whether to give notice to the adverse party of what should be expected at the appellate court.

APPEAL: Grounds of appeal – Nature thereof – A ground must challenge the decision appealed against – Whether this principle does not extend to a ground challenging jurisdiction of court.

MASTER AND SERVANT: Termination of employment – Attitude of court thereto – Whether court will not compel an employer to retain employee it does not need.

*PRACTICE AND PROCEDURE: Interlocutory proceeding, - Whether court should not decide substantive issues during interlocutory proceedings – The principle in **F.S.B International Bank Ltd vs. Imano (Nig) Ltd (2000) 11 NWLR (Pt. 679) 620.***

PRACTICE AND PROCEDURE: Interlocutory applications – Where a court determines an interlocutory application – Whether it is not proper for court to make comments that will prejudge the substantive issues.

*PRACTICE AND PROCEDURE: Jurisdiction – How raised – Whether can be raised at anytime even for the first time at the Supreme Court – The principle in **FHA vs. Kalejaiye (2010) 19 NWLR (Pt. 1226) 147.***

WORDS AND PHRASES: “Interlocutory” – Meaning.

*WORDS AND PHRASES: “Vague” – Meaning – The principle in **Lagga vs. Sarhuna (2008) 16 NWLR (pt. 1114) 427.***

Issue for Determination

- i. Whether the Court of Appeal was correct in law to have dismissed the appellants preliminary objection against the respondent's appeal at the court below.**
- ii. Whether their Lordships, the learned justices of the Court of Appeal were correct in the circumstances of the appeal before their Lordships to have set aside the decision of the learned trial judge and ordered for a retrial of the substantive suit before another Judge on the ground that the learned trial judge decided the substantive suit of the appellants as endorsed on their writ of summons before the trial court when it is obvious that the respondent took laws into its hand in order to foist upon the trial court a fait accompli by declaring the appellants redundant during the pendency of the appellants suit and motion on notice seeking for injunctive orders to restrain the respondent from declaring the appellants redundant pending the determination of the substantive suits.**
- iii. Whether the Court of Appeal was correct in the circumstances of the appeal before it to have held that the learned trial judge went beyond the reliefs sought on the motion paper thereby becoming a father Christmas.**

Facts of the Matter

Held: *(Unanimously dismissing the appeal)*

1. *A ground of appeal must constitute a challenge against the decision appealed from except a ground challenging jurisdiction*

The first arm of the argument of the Learned Counsel for the appellant is based on the general rule that a ground of appeal against a decision must relate to the decision and should constitute a challenge to the ratio of the decision. This is a well settled proposition of Law in respect of which there can hardly be a departure. See *Egbe vs. Alhaji* (1990)1 NWLR (Pt.128)546, *Saraki vs. Kotoye* (1992)9 NWLR (Pt.264)156. For every general rule there is an exception, in order to accommodate certain unforeseen circumstances. Where a ground of appeal questions the jurisdiction of a court, it does not matter whether the issue of jurisdiction constituted the ratio of that decision or not, such a ground of appeal cannot be said to be incompetent by reason that it does not arise from the decision and constitute a challenge to its ratio decidendi. In *Kalajaiye Vs. LPDC & 1 or* (unreported Appeal No.SC.429/ 2015) delivered on 15th March 2019 the issue of change in the quorum of the LPDC was not the ratio of the decision of the LPDC, yet it was the only ground upon which the appeal was determined by this court.

The ground of appeal against which the appellants hinge their argument complained that the lower court had no jurisdiction to decide substantive matter at interlocutory stage. This court in a number of decisions has held that courts are not allowed to delve into or decide the main complaint at an interlocutory stage. See *FSB International Bank Nig. Ltd vs. Imam Nig. Ltd* (2000)11 NWLR (Pt.679)620 at 639, *A.G. Kwara State & Anor. vs. Lawal & Ors* (2017) LPELR-4234 (SC) *Egbe vs. Ongoun* (1972) 1 All NLR (Pt. 1) 99, *Qjukwu vs. Governor of Lagos State* (1986) 3 NWLR (Pt.26) 39, *Olaniyi vs. Aroyehun* (1991)5 NWLR (Pt.194) 652, *Madubuike vs. Madubuike* (2001)9 NWLR (Pt.719)698 at 707. (*P.....Paras.....*).

2. *Trial court decided substantive matters in an interlocutory application* Before the trial court were substantive suit initiated by writ of summons and a motion on notice which were filed on the 1st of July 1999. Both processes prayed for injunctive orders restraining the respondent from declaring the appellants redundant and ejecting them from their official quarters. The motion of 4th of October 2000 sought for reinstating the appellants and deeming them as employees of the respondent. Clearly the writ of summons, and the motion of 1st July 1999 as well as the motion of 4th October 2000 sought to perpetuate the appellants on their jobs. The language used in the three process is a matter of semantics, as there does not seem to be so much difference in the prayers. It is therefore not out of place if any of the parties complained that the trial court decided the claims endorse on the writ when it ruled on the application of 4th

October 2000. As I have stated elsewhere in this judgment, the first ground of appeal at the lower court being a jurisdictional question, or issue, same can be raised at any stage of proceedings including the appellate court for the first time. See Nwankwo & ors vs. Yar'adua & ors (2010) 12 NWLR (Pt. 1209)518. (P.....Paras.....).

3. *Jurisdiction can be raised at any time even for the first time at the Supreme Court*
In FHA vs. Kalejaiye (2010) 19 NWLR (Pt.1226)147 at 164 para b, this court, per Rhodes Vivour JCS said:-

"The issue of jurisdiction can be raised for the first time in any court and at any stage of the proceedings and in the Supreme Court for the first time."

Jurisdiction is a threshold issue and it is so fundamental in that where a court has no jurisdiction to determine an issue, the entire proceedings and judgment will be an exercise in futility. Once the issue of jurisdiction is raised, the court is bound to examine whether it is spurious or genuine ground. In the instant case, the lower court was right when it overruled the preliminary objection in order to consider the complaint embedded in the first ground of appeal. (P.....Paras.....).

4. *Meaning of Vague*
Any ground of appeal or any part thereof which is not permitted under the rule maybe struck out by the court of its own motion or on application by the respondent. Vague is defined by the Black's Law Dictionary 9th Edition to mean 'imprecise, not sharply outlined, indistinct, uncertain. A vague ground of appeal was defined by this court in the case of Lagga vs. Sarhuna (2008) 16 NWLR (Pt.1114)427 at 471-472 paras H-B as follows:-

"A ground of appeal is vague if it is allusive, ambiguous, broad, debatable, disputable, evasive and inexact and complains about matters peripheral to the live issues."

Muhammad JSC (as he then was who read the lead judgment, at page 456 paras D - G said:-

"A vague ground of appeal is that which is imprecise, not cogent, not concise, it is inaccurate, verbose, large, rigmarole, vague, which is capable of making the Appeal court or the respondent to the appeal not to understand what it exactly connotes, although order 8 rule 2 (3) and (4) of the Supreme Court Rules require a ground of appeal to be precise and accurate, that does not mean

that any slight non-compliance thereof shall render the ground incompetent.

The whole purpose of a ground of appeal is to give sufficient notice and information to the respondent of the precise nature of the appellant's complaint against the judgment appealed against. All the rules relating to formulation or drafting of ground of appeal are primarily designed to ensure fairness to the other side. No court should rely on mere technicalities to shut out an intending appellant." (P.....Paras.....).

5. *The essence of a ground of appeal is to give notice to the adverse party of what he is expected to encounter at the appellate court. *
Arising from the authority of Lagga vs. Sarhuna (Supra) it is plain that substantial justice should not be sacrificed on the altar of technicalities or irregularities where such irregularities have not occasioned a miscarriage of justice. The essence of a ground of appeal is to give notice to the adverse party of what he is expected to encounter at the appellate court. Once it is clear and fully understood by the opponent, it cannot be declared incompetent. The appellants have not complained that they did not understand what the ground meant. I have read through the first ground of appeal at the lower court and I find that it is clear unambiguous and it did not mislead the appellants herein. The lower court was therefore correct in law to have dismissed the appellant's preliminary objection against the respondent's appeal at the lower court. The first issue is resolved against the appellant. (P.....Paras.....).

6. *Court must avoid the determination of a substantive issue at interlocutory stage*
The law is settled that in dealing with any interlocutory application the court should not delve into the substantive issues. A court must avoid the determination of a substantive issue at interlocutory stage. It is never proper for a court to make pronouncement in the course of interlocutory proceedings on issues capable of prejudging the substantive issues before the court. See Consortium MC vs. NEPA (1992) 6 NWLR (Pt.246) 132, Barigha vs. PDP & 2 ors (2012) 12 SC (Pt.v) 1, Mortune vs. Gimba (1983) 4 NCLR 237 at 242. I do agree with the lower court that the trial court in deciding the interlocutory application before it went on to comment extensively on the substantive matter that were sought for in the writ of summons. In an interlocutory matter, courts are enjoined to talk less in the determination of the prayers submitted for resolution. Where the prayers overlap with the substantive claims, it is safer to refuse such application and order for the hearing of the substantive matter. I am of the firm view that the justices of the lower court were correct when they set aside the decision of the trial court and ordered for a trial of the substantive suit

before another judge. (*P....Paras.....*).

Per Galumje (JSC)

“The second issue is resolved against the appellant. The 3rd issue for determination has raised nothing substantially new from the second issue. It has been well covered in the determination of the second issue. The learned trial judge in his ruling clearly went beyond the reliefs sought on the motion paper by advocating that the respondent took the Laws into its hands in order to foist upon the trial court a *fait accompli* by declaring the appellants redundant during the pendency of the appellant's suit. The issue of declaration of the appellants redundant was the subject matter of the writ and the motion filed on the 1st of July 1999. The Court of Appeal was right when it held that the trial judge went beyond the reliefs sought on the motion paper. Although there was a pending suit before the trial court in which the appellants sought for injunctive orders to restrain the respondent from declaring the appellants redundant, no injunctive order had been made by the time the appellants were declared redundant. The respondent was aware of the pending suit, by reason of the service of the court processes on it. Since it failed to stay action pending the determination of the suit, the best option opened to the appellant was to initiate contempt proceedings against the respondent. (*P.....Paras.....*).

7. *A court will not compel an unwilling employer to retain employees it does not need.*
The respondent is a public liability company. The appellants were its employees. A court will not compel an unwilling employer to retain employees it does not need. The only thing a court can do is to order for payment of all entitlement of the employees, based on the provisions of the contract of employment. I think the order made by the trial court for deeming the appellant as the employees of the respondent was beyond its powers, and the lower court was right when it set those orders aside. (*P....Paras.....*).
8. *Court should not prejudge the substantive matter during interlocutory proceedings.*
With regard to appellants' issues 2 and 3, the position of the law is that in determining any interlocutory application pending trial of substantive case, care should be taken not to make pronouncements which may prejudice the trial of the claims filed and still pending before the court. To do otherwise is to prejudge the matter in respect of which evidence is yet to be led. See *F.S.B. International Bank Ltd vs. Imano (Nig) Ltd (2000) 11 NWLR (pt 679) 620*; *Agbaje vs. Ibru Sea Foods Ltd (1972) 5 SC 50*; *Globe Fishing Industries Ltd vs. Coker (1990) 7 NWLR (pt 162) 265*.

In the instant appeal, the appellants took out a writ of summons against the respondent wherein they sought perpetual injunction restraining the respondent from declaring the appellants redundant and ejecting them from

their official quarters. They also filed a motion on notice on 1/7/99 seeking interlocutory injunction restraining the respondent from declaring the appellants redundant and ejecting them from their official quarters. They further filed another motion on 4th October, 2000 seeking an order reinstating the appellants and deeming them employees of the respondent. In deciding the motions of 1st July, 1999 and 4th October, 2000, the trial court somewhat delved into the substantive matter canvassed in the writ of summons. The Court of Appeal was right to hold that the learned trial court was wrong to have delved into the substantive suit. (*P.....Paras.....*).

9. *Court should not decide substantive case during interlocutory proceedings*
In the case of F.S. B. International Bank Ltd vs. Imano (Nig) Ltd (supra) this court per Achike, JSC held at page 639 as follows:-

"it is erroneous for a court, whether trial or appellate, in determining an interlocutory matter to succumb to the temptation of deciding the substantive case that is yet to be agitated by the parties. "

The issue of declaration of the appellants redundant and reinstating them in the employ of the respondent were issues to be determined in the substantive matter and not at the interlocutory stage. The trial court was therefore wrong to have determined those issues at the interlocutory stage. (*P....Paras.....*).

10. *Court not to make any interlocutory ruling that will prejudice the hearing of the substantive case.*

The simple response to the submissions on these issues is that it must not be forgotten that the principle of law has, always, been that, in an interlocutory application, certain boundaries must not be crossed, A trial court, or an appellate court, must desist-from making any finding, in any interlocutory Ruling, which may prejudice the substantive case, Ojukwu vs. Governor of Lagos State [1986] 3 NWLR (pt. 26) 39; Elufioye vs. Halilu [1993] 6 NWLR (Pt. 301) 570; Odutola end Anor vs. First Bank and Anor [2000] 4 NWLR (pt. 653) 341; Hashim vs. Minister FCT [2002] 15 NWLR (pt. 789) 159; Ogunsola vs. Usman [2002] 14 NWLR (pt. 788) 636; *North-South Petroleum Nig. Ltd. Vs. FGN* [2002] 17 NWLR (pt. 797) 639.

The reason for this wise and prudent rule is that:

... at the stage of an application for interlocutory injunction pending the determination of the substantive suit, the only evidence is the incomplete and un-tested affidavit evidence and a court should at that stage refrain from making pronouncements on

issues to be decided in the substantive suit... Also at the stage of an application for an interlocutory injunction, the Court should avoid the resolution of complex and intricate issues of facts since at that stage the veracity of the affidavit evidence would not have been tested in cross-examination,

D.P.C.C vs. B.P.C Ltd [2008] 4 NWLR (pt 1077) 376, 412- 413; F-D; Ndigwe vs. Ibekendu [1998] 7 NWLR (pt. 558) 486, 501; Brown vs. Brown [1994] 7 NWLR (pt. 355) 217; Ojukwu vs. Military Governor of Lagos State (supra); Obeya Memorial Hospital vs. A.G. Federation [1987] 3 NWLR (Pt. 60) 325; Kotoye vs. Saraki [1994] 7 NWLR (pt. 357) 414.

The court of trial was, therefore, wrong to broach and determine the status of the appellant as a redundant staff and the prospect of his reinstatement with the respondent - issues which could only be determined at the substantive stage of the trial. On the above authorities, this was, clearly, unwarranted, Ndigwe vs. Ibekendu (supra); Brown vs. Brown (supra); Ojukwu vs. Military Governor of Lagos State (supra); Obeya Memorial Hospital vs. A.G. Federation (supra); Kotoye vs. Saraki (supra). (*P....Paras.....*).

11. *Meaning of "Interlocutory"*

The word, "*interlocutory*" means interim or temporary; not constituting a final resolution of the whole controversy - Black's Law Dictionary, 9th Ed. Since the interlocutory applications are usually dealt with before the substantive suit, the law is that a court should not say anything at that stage of the proceedings that would jeopardize the just and proper determination of the suit after the trial.

Simply put, the Court must not determine substantive issues at the interlocutory stage of the proceedings - see *Mortune vs. Gambo (1979) LPELR-1913(SC)*.

In this case, the trial court, in deciding the said interlocutory application, went on to comment on the substantive prayers sought in the writ of summons, therefore, the Court of Appeal was right to set aside the trial court's decision. (*P.....Paras.....*).

Representations

S. C. PETERS (ESQ.), with Hilary Ugwu (Esq.), Joshua Akor (Esq.), Dirrine Davies (Esq.), and E. B. Ezekiel (Esq.), for the appellants.

L. OLASEINDE KARIM (ESQ.), and Joseph Oche (Esq.), for the respondent.

ADAMU GALINJE, (JSC) (DELIVERING THE LEAD JUDGMENT):

The appellants herein were staff of the respondent before they were declared redundant. The respondent had industrial problem with its workforce in Abuja, that led to the closure of its activities on the 16th June 1999. By a circular dated 28th of June 1999, the respondent informed its workers that payment of salaries, wages and redundancy benefit for the period ending on 15th June, 1999 will be made on the 30th June, 1999, 2nd of July 1999 and 3rd of July 1999. By paragraphs 9 and 10 of the said circular, the workers were further informed as follows:-

- "9. In spite of the illegal strike which cancels payment in lieu of notice, the management has directed the grant of notice of payment to those declared redundant.**
- 10. Workers living in company's Quarters have to vacate their quarters within a period of two days after payment. "**

The respondent's workers felt threatened by the circular as they did not know who would be declared redundant. They collectively took out a writ of summons in a representative capacity on the 1st July, 1999 in which they claimed the following reliefs:

- d) Perpetual injunction restraining the defendant, their (Sic) agents, servants, privies, howsoever described from forcefully ejecting the plaintiffs and members of their families from any of their official quarters/residences.**
- e) An order of perpetual injunction restraining the defendant, their (Sic) agents, servants, privies howsoever described from declaring any of the plaintiffs redundant without first of all following the due process of the law as stipulated in the various Acts and also the constitution of the Federal Republic of Nigeria, 1999.**
- f) An order compelling the defendant company to pay the plaintiffs the sum of ten million naira (10,000,000.00) only being the cost of hiring the services of a solicitor to pursue this matter consequent upon the threat to illegally declare the defendants (Sic, plaintiffs) redundant and to illegally force them out of their residence/official quarters."**

This writ of summons was not accompanied with a statement of claim. The appellants also filed a motion on notice on the 1st of July 1999, in which they sought for the following:

-

- "a) An interlocutory orders restraining the defendant/ respondent, either by themselves, (Sic) servants, agents, privies assign, howsoever described from unlawfully ejecting or any other way**

interfering with the quiet possession, occupation and use of the plaintiffs'/applicant's official quarters located in the Federal Capital Territory and Suleja pending the final determination of the substantive suit before this honourable court.

- d) An order of interlocutory injunction restraining the defendant, their (Sic, its) agents, servants and/ or any person howsoever described from unlawfully declaring any of the plaintiffs'/applicants redundant pending the final determination of the substantive suit before this honourable court.**
- e) An order of interlocutory injunction restraining the defendant, its servants, agents, privies however described from interfering with any of the rights and privileges due to the plaintiffs'/applicants as workers/servants of the defendant company pending the final determination of the substantive suit pending before this honourable court."**

The writ of summons and the motion were served on the respondent on the 1st of July 1999. As a follow up, Mr. S. C. Peters, learned counsel for the appellants' wrote two letters dated the same 1st July 1999 to the respondent, warning it of the consequences of declaring any of the workers redundant during the pendency of the suit and the motion on notice. The respondent ignored the court processes and went on to declare the appellants' redundant on the 2nd and 3rd July, 1999 and paid their entitlements which they collected. After a futile attempt to commit the respondent for contempt of court and invoking the interference of the police in the activities of the respondent, learned counsel for the appellant, by a motion on notice filed on the 4th of October 2000 at the High Court of the Federal Capital Territory, sought for the following reliefs:

- "a). An order of the honourable court reinstating the plaintiffs'/applicants to the employment of the defendant/respondent pending the final determination of the substantive suit pending before the honourable court.**
- b). An order of the honourable court deeming the plaintiffs'/applicants as due employees of the defendant respondent at all times material to the commencement of this action."**

The defendant/respondent opposed the application by filing counter affidavit. After resolving some preliminary issues, the motion was heard on the 26th April, 2000 and in a reserved and considered ruling delivered on the 30th May 2001, the trial court granted to the six Appellants' only the reliefs sought on the following terms:-

"In the circumstances therefore the declaration of redundancy against these plaintiffs/applicants which was made on the 2nd and 3rd July, 1999 after the filing of this action on the 1/7/99 amounts to the respondents taking into their hands a matter which is subjudice.

They are therefore deemed to be in the service of the defendant/respondent Julius Berger Plc until the final determination of the substantive suit. The application therefore succeeds on this ground and the respondent is to afford the applicants all rights, duties, responsibilities and privileges of their offices to which they are entitled or responsible prior to the commencement of this suit. The plaintiffs/applicants shall, if they collected any terminal benefit refund same forth-with to the respondent and let the statusquo ante bellum be maintained pending the determination of the substantive suit."

The respondent was thoroughly dissatisfied with the ruling of the trial court. Being aggrieved, it appealed to the Court of Appeal (the lower court) and submitted one issue for determination of its appeal in the following words:-

"Whether or not the trial court in granting the order of interlocutory injunction exercised its judicial discretion properly or acted in wrong principle."

The appellants herein were also dissatisfied with certain aspect of the ruling. They also filed an appeal at the lower court. The two appeals which were filed at the Court of Appeal Abuja Division were transferred to the Kaduna Division of the Court of Appeal and were renumbered as **CA/K/250/2003** and **CA/K/260/2003**.

The two appeals were heard by a panel of Justices of the lower court comprising of Mary Peter-Odili JCA (as he then was) who presided and J. T. Tur and O. F. Ogbuinya JJCA. In their unanimous judgment delivered on the 9th day of May 2011, the two appeals were allowed. The ruling and orders of the learned trial Judge were set aside. The suit was remitted to the trial court to be heard by another judge.

It is against the judgment of the lower court that this appeal is brought to this court. In their amended notice of appeal, filed on the 2nd of November 2011, the appellants raised fourteen grounds of appeal.

Parties filed and exchanged briefs of argument. At page 7 of the appellant's brief of argument settled by S. C. Peters Esq., of Counsel to the appellants, the following issues are submitted for determination of this appeal:-

"(i) Whether the Court of Appeal was correct in law to have dismissed the appellants preliminary objection against the

1. REV. (DR.) C.J. UWEMEDIMO
2. COMMANDCLEM NIG. LTD
Vs.
MOBIL PRODUCING (NIG) UNLIMITED

SC.69/2011

IN THE SUPREME COURT OF NIGERIA

HOLDEN AT ABUJA

FRIDAY, 3RD MAY 2019

BEFORE THEIR LORDSHIPS

OLABODE RHODES-VIVOUR
OLUKAYODE ARIWOOLA
CHIMA CENTUS NWEZE
AMINA ADAMU AUGIE
EJMBIEKO

JUSTICE, SUPREME COURT
JUSTICE, SUPREME COURT
JUSTICE, SUPREME COURT
JUSTICE, SUPREME COURT
JUSTICE, SUPREME COURT

*CASE LAW:- Waiver – Where a party did not waive service – Whether party can contend non service – The principle in **Oyeyemi Vs. Owoeye (2017) 12 NWLR (Pt. 1580) P. 364.***

COURT:- Supreme Court – Power to set aside its own judgment – Conditions therefor.

COURT:- Supreme Court – Power to set aside its own judgment – Whether limited to minor slips that do not fundamentally or structurally alter the judgment.

EQUITY:- Estoppel by conduct – Where a party has filed a notice of withdrawal with the intention that it should be acted upon by court and parties – Whether it should estopped from re-opening the case – Section 169 of Evidence Act considered.

*EQUITY:- Waiver – Conditions thereto – The principles in **Ariori Vs. Elemo (1983) 14 NSCC (Pt. 1)***

EQUITY:- Waiver – Where a party submits to proceedings without being served – Whether such party has waived his right to service.

JUDGMENT AND ORDERS:- Appeal – Dismissal thereof – Where an appeal is dismissed on merit – Whether it operate as estoppel and courts functus officio.

LEGAL PRACTITIONERS:- Authority of counsel – Whether includes power to compromise action.

PRACTICE AND PROCEDURE:- Appeal – Notice of withdrawal thereof – Where a party files notice of withdrawal at the Supreme Court registry and serve on the other party – Whether it automatically abates the appeal.

PRACTICE AND PROCEDURE:- Appeal – Striking out of appeal – Or. 8 r. 6(i) Supreme Court rules – Requirement to show exceptional circumstances – The meaning of exceptional circumstances.

PRACTICE AND PROCEDURE:- Appeal – Withdrawal thereof – Conditions thereto – Or. 8 r. 6(i) of the Supreme Court rules considered.

*PRACTICE AND PROCEDURE:- Appeal – Withdrawal thereof – Or. 8 r. 6(1) Supreme Court rules – The principle in **Edozien & Ors Vs. Edozien (1993) LPELR 1020.***

PRACTICE AND PROCEDURE:- Application for re-listment – When an appeal is withdrawn in lieu of settlement – Whether there is no exceptional circumstances for re-listing the appeal.

RULES:- Supreme Court rules – Or. 8 r. 8(4) thereof – Power to restore appeal struck out.

Issues for Determination

Whether this court has jurisdiction to relist the appellants' appeal that was dismissed on 5th May, 2014.

Facts of the Matter

Held: *(Unanimously dismissing the application)*

1. *Condition necessary for a withdraw of an appeal*

Now, Order 8 Rule 6(i) of the Supreme Court Rules states that:

- (i). An appellant may at any time before the appeal is called on for hearing serve on the parties to the appeal and file with the Registrar a notice to the effect that he does not intend further to prosecute the appeal"**

The following conditions must co-exist before Order 8 Rule 6 (i) is applicable.

- (a) There must be an appeal by the appellant.**
- (b) There must be a withdrawal of the appeal in the words of Form 19, 20 or such words indicating that there is no intention further to prosecute the appeal.**
- (c) The withdrawal may be made at any time before the appeal is called on for hearing.**
- (d) The notice of withdrawal must be served on the parties to the appeal.**
- (e) The notice of withdrawal must be filed.**

On (a) there is an appeal by the appellant. It is SC.69/2011.

On (b) there was a withdrawal of the appeal in the words of Form 19, 20 indicating that there is no intention further to prosecute the appeal. The notice of withdrawal on which this appeal was dismissed on 5th May, 2014 was filed in this court on 24th March 2011 and brought under Order 8 Rule 6 of the Supreme Court Rules.

On (C) "at any time before the appeal is called for hearing in Order 8 Rule 6(i) of the Supreme Court Rules covers the period when the appeal is entered but before it is called for hearing"

An appellant who desires to withdraw his appeal may at any time before his appeal is called for hearing unilaterally give a notice of withdrawal, that he does not intend to further prosecute the appeal, and that is what the appellants' learned counsel did by filing notice of withdrawal on 24th March, 2011.

On (d) the respondent was not served with the notice of withdrawal. On (e) the notice of withdrawal was paid for and filed in the Supreme Court Registry on 24th March, 2011 at 10.05 a.m. See Exhibit "SI2".

It is clear that there was strict compliance with (a), (b), (c) and (e). There was non-compliance with (d) that is to say the notice of withdrawal was not served on the respondent.

It has been long settled that the issue of service of process is an essential aspect of our procedural law as it is a jurisdictional issue. The court has no jurisdiction over a litigant who has not been served. Service of a process in all proceedings except in ex parte proceedings is fundamental to the assumption of jurisdiction. See S Kenconsult (Nig) Ltd Vs. Ukey (1981) 1SC P.4; ACB Vs. Losada (1995) 7 SCNJ p.158; Auto Import Export Vs. Adeyemi (2003)1 SCN p.154; Agip (Nig) Ltd & 8 Ors Vs. Ezendu & 9 Ors (2010) 1 SC (Pt.ii) p.98.

(P.....para.....)

2. *Conditions for waiver*

However the court has jurisdiction over a litigant who is not served process but submits to the jurisdiction of the court. That is to say the litigant waives service. In *Ariori Vs. Elemo* (1983) 14 NSCC p.1. The concept of waiver was explained thus:

The following two elements must be present to constitute a waiver, whether express or implied. The party against whom the doctrine is raised.

- (a) Must be aware of the act or omission and**
- (b) Must do some unequivocal act adopting or recognizing the act or omission. See further *Bank of the North Ltd Vs. Alhaji Balayan* (2001) 6SCM p.10.; *N.B.C.I. Vs Integrated Gas (Nig) Ltd* (2005) 2SCM p.67. *(P.....para.....)***

3. *A party who submit to court without being served has waived service*

If I may add, waiver may be implied from words or conduct that is inconsistent with the continuance of the right.

Despite the fact that Dr. E. Atake SAN was not served with the notice of withdrawal he said that non service of the process on him was of no consequence.

Learned counsel for the respondent was aware that the appellants' did not serve him or his clients with the notice of withdrawal of the appeal, By taking part in the proceedings or never complaining about non service of the process on him amounts to an unequivocal act adopting or recognizing the omission to serve him. By learned counsel for the respondent's words and conduct he waived service. *(P.....para.....)*

4. *Effect where an order of dismissal after an appeal is heard on merit*

On these facts, the proceedings of 5th May 2014 in which this court dismissed the appeal in the absence of service of the notice of withdrawal on the respondent was flawless since the respondent waived service.

Whether this court has jurisdiction to set aside its ruling rendered on 5th May 2014 and restore to the cause list, for hearing on the merits the appellants' appeal i.e. SC.69/2011.

After an appeal is dismissed and the appellant desires to revive his appeal, he can succeed depending on the nature of the dismissal. When an appeal is heard

on the merits and thereafter an order of dismissal is made, such an order is final and operates as estoppel per rem judicatam. The party that lost or all partys' are barred from re-litigating the same subject matter. The court is functus officio. The order of dismissal is final forever. See Alhaji MM. Dingyadi & anor Vs. INEC & 2 Ors (2011) 4 SC (Pt.1) p.1; ACB Vs. Losada Nig Ltd & anor (1995) 7 SCNJ p.185. (P.....para.....)

5. *Conditions when Supreme Court can set aside its own judgment*
However the Supreme Court has inherent power to set aside its judgment even if given on the merits.

1. **Where the judgment is obtained by fraud.**
2. **Where the judgment is a nullity.**
3. **Where the judgment was given without jurisdiction**
 .(P.....para.....)

6. *When an appeal at the Supreme Court is abated*
Under Order 8 Rule 6(i) of the Supreme Court Rules once the appellant files the notice of withdrawal of the appeal in the Supreme Court Registry and the said process is served on the respondent with the clear words on the process that the appellants' do not intend to prosecute this appeal any further, the appeal is deemed to have been dismissed and hearing of the appeal abates. See Edozien Vs. Edozien (1993) 1NWLR (Pt.272) p.678; Ezomo Vs. AG Bendel State (1986) 4NWLR (Pt.36) p.448; Majekodunmi Vs. WAPCO (1992) 1NWLR (Pt.219) p.564. (P.....para.....)

7. *The nature and purport of Or, 8 r. 8(4) of Supreme Court rules*
Order 8 Rule 8 (4) of the Supreme Court Rules states that:

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

The judgment dismissing an appeal, withdrawn is not a judgment on the merits. See Okenwa Vs. Military, Gov of Imo State & Ors (2001) 1 SCM p. 120. Where an appeal has not been heard, as in this case and it is withdrawn and dismissed under Order 8 Rule 6(i) of the Supreme Court Rules, it can be restored to the cause list if the applicant can show exceptional circumstances to justify the grant of the application. (P.....para.....)

8. *The meaning of “exceptional circumstances”*

Exceptional circumstances simply means that the applicant shows sufficient and good cause why the appeal should be restored. It is only then that the court, if satisfied would exercise its discretion to restore the appeal that was withdrawn and dismissed on terms as to costs. According to Mr. P. Erokoro SAN this application to restore the appeal to the cause list became necessary as a result, of the hardship being suffered by the appellants' who had acted in good faith when they filed the notice of withdrawal of the appeal in the hope of reaching an amicable settlement, having been persuaded by the former President and by the respondent's letter that had implied a willingness to settle if the appeal is withdrawn. No exceptional circumstances has been shown in this case and so no indulgence can be given. This court has jurisdiction to revive and restore to the cause list appeal No: 69/2001 dismissed by this court on 5th May 2014. If exceptional circumstances are shown. Reasons given by counsel for filing a notice of withdrawal does not make any positive impression on the court. When counsel files a notice of withdrawal which clearly states:

"Take notice that pursuant to Order 8 Rule 6 of the Supreme Court Rule, the appellants' do not intend to prosecute this appeal any further."

It can only mean what it says and that is that the appellants' do not intend to prosecute the appeal. It is not the business of this court to find out why the appellants' filed a notice of withdrawal. The reason for withdrawing the appeal is clear on the face of the process. No exceptional circumstance has been presented before this court to justify a reversal of the order of dismissal rendered on 5th May 2014. (P.....para.....)

9. *The principle in Oyeyemi Vs. Owoeye (2017) 12 NWLR (Pt. 1580) 364*

In Oyeyemi Vs. Owoeye (2017) 12 NWLR (Pt.1580) p.364. The 1st respondent did not waive service. He contested the validity of the notice of withdrawal of the appeal, because it was not served on him. Non service was an issue. In this appeal, service was waived by the respondent, so it was no longer mandatory as in the Oyeyemi Vs. Owoeye case. (P.....para.....)

10. *Effect of withdrawing of an appeal in lieu of settlement*

Withdrawing an appeal in the belief that, that would show sincerity in settlement is not a good explanation or a good cause to justify the act. It shows lack of experience. An appeal is withdrawn after parties have been able to settle,

not before. **Withdrawing the appeal in the way in which it was withdrawn is a clear indication that the appellants' did not want to continue with the appeal. It remains dead for all time.**

For these reasons the preliminary objection is over ruled. The court has jurisdiction to hear an application to revive an appeal dismissed after a notice of withdrawal was filed under Order 8 Rule 6 (i) of the Supreme Court Rules. Motion filed on 17th October 2017 is, hereby dismissed since no exceptional circumstance was shown to restore the appeal dismissed on 5th May 2014. (P.....para.....)

11. *When a notice of an appeal is withdrawn in Supreme Court*

The notice of withdrawal clearly evinces the intention NOT TO PROSECUTE THIS APPEAL ANY FURTHER. It was intended to be notice to both the court and the respondent that the appellant intended no longer to prosecute the appeal any further.

The respondent has good reasons to stoutly resist the restoration of the appeal dismissed upon notice of withdrawal of the same. This court, in EDOZIEN & ORS Vs. EDOZIEN (1993) LPELR - 1020 (SC); (1993) 1 NWLR (pt. 272) 67, per Olatawura, JSC, had commented on when an appeal is withdrawn under the rules of this court, thus-

When is an appeal withdrawn? In my view, an appeal is withdrawn under Order 8 Rule 6 (l) of the Rules of the Supreme Court when notice of withdrawal is filed by the party entitled to do so, in this case, the appellant. The filling of the notice implies full knowledge and the implication of the said notice. There can be no better manifestation of intention to withdraw an appeal than an appeal withdrawn by the appellant or by one of solicitors briefed by the party withdrawing the appeal. The court will believe in the sincerity of that intention. (P.....para.....)

12. *Power of counsel includes authority to compromise*

The posturing of the appellants/applicants that Prof. Tony Ukam, who settled both the notice of appeal and the notice of withdrawal, withdrew the appeal in error and or without authority or instruction is rather hard to believe, even if it is not preposterous. It is trite that the general authority counsel, retained in a matter before the court has, in relation to or as regards the matter includes the authority to compromise.

In any case the contention of the appellants/applicants that Prof. Tony Ukam had no instruction to withdraw the appeal was rendered nugatory by the further averment that the notice to withdraw was to pave way for an out of court settlement. In otherwords, the appeal was tactically withdrawn.

(P.....para.....)

13. *The principle of estoppels by conduct*

The appellants/applicants who are seeking an equitable remedy by this application cannot get the court to exercise its discretion in their favour by this unwholesome and manifest contradiction that smacks of an attempt to mislead the court.

Mr. Paul Erokoro, SAN, submitted that the appellants acted in good faith when they filed the notice of withdrawal. What that means is that they intended that this court, through its registry, and the respondent should not take the notice of withdrawal as a frivolous or flippant act or action. In other words, they intended that all concerned should take them to be serious in that move. Fair enough. That brings in estoppel by conduct under Section 169 of the Evidence Act that Provides-

When one person has, either by virtue of an existing court judgment, deed or agreement, or by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative in interest shall be allowed, in any proceeding between himself and such person or such person's representative in interest, to deny the truth of that things. (P.....para.....)

14. *Supreme Court has limited power to set aside its own judgment*

The submission that this court can set aside its own decision loses sight of the limited application of that principle or rule. The scope of that rule is limited to minor slips that do not fundamentally or structurally alter the judgment. (P.....para.....)

15. *When Supreme Court can set aside it previous judgment.*

Order 8 Rule 16 of the Rules of this court, though permitting it "to correct any clerical mistake or some errors arising from any accidental slip or omission," also expressly forbids it to "review any judgment once given or delivered" and vary any judgment or order made. The only other situation the court can set aside its decision or order is when the decision or order was rendered *ex debito justitiae*. That is when judgment was obtained by fraud; or the judgment is a nullity and the judgment was incompetent having been given without jurisdiction. The appellants, in this application, do not come on any of these grounds. The grounds they posit on; that is, that their erstwhile counsel, Prof. Tony Ukam, filed the notice of withdrawal in error and/or without instruction of his clients and at the same time to pave way for out of court settlement are

contradictory and unavailing. (P.....para.....)

16. *Respondent can waive right to service*

The appellants, conscious that an appeal withdrawn is deemed dismissed and the dismissal is final: AKUNEZIRI Vs. OKENWA & ORS (2000) LPELR - 393 (SC) and this court becomes *functus officio* thereby, have submitted that the notice of withdrawal, though filed, was not served on the respondent.

Order 8 Rule 6(1) of the Rules of this court is the fortress in which they refuge for this submission. It provides-

An appellant may at any time before the appeal is called on for hearing serve on the parties to the appeal and file with the Registrar a notice to the effect that he does not intend further to prosecute the appeal.

Dr. Atake, SAN of counsel to the respondent was right In his contention that the respondent, who should complain that he was not served, waived the right to service when the appeal was on 5th May, 2014, dismissed on the notice of withdrawal. The respondent, on the authority of ARIORI Vs. ELEMO (1983) 14 NSCC 1, can waive that right and he infact waived it. He participated in the proceedings culminating in the dismissal of the appeal on 5th May, 2014 without any objection that he was not served. He clearly consented to the withdrawal of the appeal and the order dismissing the appeal. (P.....para.....)

17. *Courts has limited power in respect to an appeal that is withdrawn.*

The decision to withdraw an appeal is that of the appellant and or his counsel. While the court, in appropriate cases *ex debito justitiae* can set aside its own decision, that jurisdiction does not extend to the court setting upon itself the jurisdiction to set aside the decision of an appellant himself to withdraw his appeal. The court also does not have the power to compel the decision of a litigant to appeal or not to appeal a decision he may be aggrieved with. (P.....para.....)

Representations:

P. EROKORO (SAN) for the Applicants' G.U. Nwaneri, S. Ofia, C. Udeogu & K. Odey, with him.

DR. E. ATAKE (SAN) for the respondent, O. Ibrahim, Miss E.A. Binitie.14

OLABODE RHODES- VIVOUR, JSC (Delivered the lead judgment)

: The application before us was filed by the appellants'/applicants'. It is brought under Order 2 Rule 28(1), Order 8 Rule 8 (4) of the Supreme Court Rules, Section 22 of the Supreme Court Act 2010 and under the inherent jurisdiction of this honourable court.

They seek an order of this honourable court restoring to the cause list for hearing on the merit their appeal dismissed by this honourable court on 5th May 2014 pursuant to their notice of withdrawal of appeal dated 17th March 2011.

In support of the application is a 21 paragraph affidavit deposed to by Dr. Akon Uwemedimo the first wife of the 1st appellant. It was filed on 17th October 2017. Annexed to the affidavit are documents marked Exhibit KGA1, KGA2, KGA3, and KGA4. A further affidavit also of 21 paragraphs was deposed to Prof. Tony Ukam, a legal practitioner, and filed on 11th January 2019. Learned counsel responded to preliminary objection in his written submission filed on 21st January 2019.

Replicando, learned counsel for the respondent filed a preliminary objection on 22nd January 2018. In support of the preliminary objection, Stephen Irhirhi, a litigation officer in chambers of learned counsel for the respondent deposed to a 7 paragraph affidavit. Annexed to the affidavit are documents marked "S11", "S12", "S13", "S14".

An 8 paragraph further affidavit deposed to by **Stephen Irhirhi** was filed on 1st February, 2019. Annexed to the further affidavit are documents marked, "S11", "S12", "S13", "S14", "S15", "S16", "S17", "S18", "S19".

Mr. P. Erokoro SAN, learned counsel for the applicants' and **Dr. E. Atake SAN**, learned counsel for the respondent filed written submissions. It is important that I refer to some revealing dates in this matter.

The notice of appeal was filed on 21st December, 2009. Notice of withdrawal of the appeal was filed on 24th March, 2011. The appeal was dismissed on 5th May 2014. This application to restore the appeal to the cause list was filed on 17th October 2017 and heard by this court on 4th February, 2019.

Before this application to restore the appeal to the cause list four similar applications were filed on 11th August, 2014, 26th February, 2015, 10th August 2015 and 2nd June 2016. They were all struck out. The notice of withdrawal filed on 24th March, 2011 reads:

"TAKE NOTICE that pursuant to Order 8 Rule 6 of the Supreme Court Rules; the appellants' do not intend to prosecute this appeal any further".

On 5th May 2014 the ruling of this court reads:

"There is nothing to be adjourned as the appeal withdrawn has ceased to exist. In the circumstances appeal No.SC 69/2001 withdrawn is hereby dismissed. "

The respondent filed a preliminary objection to this application. It seeks an order of this

SIR JUDE AGBASO

Vs.

1. **HON. SIMEON IWUNZE**
2. **HON IKENNA EMEH**
3. **HON. GREG OKEMILI**
4. **HON. INNOCENT EKEH**
5. **HON. KINGSLEY DIMAKU**
6. **HON. SAMUEL ANYANWU**
(Chairman and Members of the Special Ad Hoc
Committee to Investigate the Remote Cause(s) of
Stoppage/Abandonment of Work on some Roads
in Owerri, Oriu end Okigwe Municipalities
7. **HON. BENJAMIN UWAJUMOGU**
8. **IMO STATE HOUSE OF ASSEMBLY**
9. **THE HON. CHIEF JUDGE OF IMO STATE**
10. **COMMISSIONER OF POLICE, IMO STATE.**

SC. 747/2016

IN THE SUPREME COURT OF NIGERIA

HOLDEN AT ABUJA

FRIDAY 12TH APRIL 2019

BEFORE THEIR LORDSHIPS

MARY UKAEGO PETER-ODILI	JUSTICE, SUPREME COURT
OLUKAYODE ARIWOOLA	JUSTICE, SUPREME COURT
KUDIRAT M. O. KEKERE-EKUN	JUSTICE, SUPREME COURT
AMIRU SANUSI	JUSTICE, SUPREME COURT
PAUL ADAMU GALUMJE	JUSTICE, SUPREME COURT

APPEAL:- Time thereof – Section 27(2)(a) of Supreme Court Act – Whether allows three months period to appeal to the Supreme Court.

EVIDENCE:- Legal arguments and averments – Where an affidavit contains legal arguments and averments – Whether such legal arguments and averments are inadmissible and are liable to be struck out – Section 115(2) of Evidence Act 2011 considered.

PRACTICE AND PROCEDURE:- Appeal – Application for extension of time within which to appeal – Conditions thereto – Order 6 Rule 2(1) Supreme Court Rules considered.

PRACTICE AND PROCEDURE:- Appeal – Concurrent findings – Application for extension of time within which to appeal thereto – Conditions thereof – Or. 2 r. 32 Supreme Court Rules considered.

PRACTICE AND PROCEDURE:- Appeal – Extension of time thereto – Conditions thereof – Where time has elapsed before the bringing of the application – Whether long period of time is not a bar but one of the factors that may influence the application.

PRACTICE AND PROCEDURE:- Appeal – Extension of time thereto – Requirements – Whether those requirements must co-exist.

PRACTICE AND PROCEDURE:- Appeal – Extension of time thereto – Where a party avers ill health as a ground for delay – Whether it is necessary to attach documents to substantiate the claim.

PRACTICE AND PROCEDURE:- Appeal – Extension of time thereto – Where an applicant fails to satisfy the first requirement for extension of time – Whether consideration of the second requirement unnecessary – Rationale.

PRACTICE AND PROCEDURE:- Appeal – Extension of time thereto – Whether is discretionary to the court.

PRACTICE AND PROCEDURE:- Appeal – Extension of time thereto – Where applicant did not adduce good and sufficient reason for failure to appeal within the prescribed period – Whether they will be no consideration for inordinate delay on the part of the applicant.

PRACTICE AND PROCEDURE:- Extension of time within which to appeal – Conditions thereof – Or 31 r(1) and (2) Supreme Court Rules considered.

RULES OF COURT:- Supreme Court rules – Or.2 r.31(1)&(2) thereof – Conditions for enlargement of time.

STATUTE:- Right of appeal – CFRN 1999 (as amended) – Sections 233(2) and 233 (3) thereof – Nature and purport.

Issue for Determination

Whether the applicant has made out a good case for this application to be granted.

Facts of the Matter

Held: *(Unanimously dismissing the application)*

1. *Relevant materials for an application for extension of time within which to appeal- the provisions of Order 6 Rule 2(1) of the S.C. Rules.*
An application for, extension of time to seek leave to appeal is an application seeking the exercise of the court's discretion. As with all discretionary powers, it must be exercised judiciously and judicially. A party seeking the exercise of the court's discretion must place all relevant material before the court to justify the exercise in his favour. By order 6 Rule 2(1) of the rules of this court, the relevant materials include:
 - a) **The motion paper;**
 - b) **The relevant affidavit in support thereof;**
 - c) **The documents referred to and exhibited with the affidavit which must include true copies of the judgments with which the application is concerned, that is, both courts below and the court of first instance verified by affidavit/**
 - d) **The proposed grounds of appeal. (P.....para.....)**

2. *Provisions relating to right of appeal*
Section 233(2) of the 1999 constitution, as amended, sets out the circumstances in which an appeal from a decision of the Court of Appeal to the Supreme Court is as of right. Section 233(3) of the Constitution provides that any appeal that is not as of right, as provided in Section 233(2), shall be by leave, Where leave to appeal is required, the leave must be sought and obtained within the time prescribed by an Act of the National Assembly or by rules of court for the time being governing the powers practice and procedure of the Supreme Court. See Section 233(6) of the Constitution, as amended.
Section 27(2) (a) of the Supreme Court Act provides that, the time for

appealing against, a final decision is three months. The present application has been filed because the judgment appealed against is a final decision, the grounds of appeal are of mixed law and fact and therefore falls within Section 233(3) of the constitution and the applicant is outside the time prescribed for bringing the application. (P.....para.....)

3. *The nature and purport of Or 31 r(1) and (2) of Supreme Court Rules.*
Order 31 Rules (1) and (2) of the Rules of this court provides for the conditions that must be satisfied in an application for enlargement of time as follows:

"31 (1) The court may enlarge the time provided by these rules for the doing of anything to which these rules apply, or may direct a departure from these rules in any other way when this is required in the interest of justice:

(2) Every application for an enlargement of time in which to appeal or in which to apply for leave shall be supported by an affidavit setting forth good and substantial reasons for the failure to appeal or to apply for leave to appeal within the prescribed period. There shall be exhibited or annexed to such affidavit-

(a) a copy of the judgment from which it is intended to appeal;

(b) a copy of other proceedings necessary to support the complaints against the judgment; and

(c) grounds of appeal which prima facie show good cause why the appeal should be heard."

(P.....para.....)

4. *Conditions for application within which to appeal where there are concurrent findings.*

Order 2 Rule 32 provides specifically for an application for leave to appeal from concurrent findings of fact from two lower courts as follows:

"32 Where, in an appeal to the court from the court below, the court below, has affirmed the findings of fact of the court of first instance, any application to the court in pursuance of its jurisdiction under Section 233(3) of the Constitution for leave to appeal shall be granted only in exceptional circumstances.

The emphasis in the two rules is on good and substantial reasons for failure to appeal or apply for leave to appeal within the prescribed period and grounds of

appeal which *prima facie* show good cause why the appeal should be heard. The overriding consideration is that the applicant must show exceptional circumstances. (P.....para.....)

5. *Requirements and grounds for extension of time to appeal.*

Both learned counsel agree that the requirement of good and substantial reasons for failure to appeal within the prescribed time and grounds of appeal which *prima facie* show good cause why the appeal should be heard must co-exist. This is in keeping with numerous decisions of this court such as, in: Enyibros Foods Processing Company Ltd. & Anor. Vs. N.D.I.C. (2007) 9 NWLR (Pt. 1039) 216; Laferri Nig. Ltd. & Anor. Vs. NAL Merchant Bank Plc & Anor. (2015) LPELR - 24726 (SC) @ 48 - 49 C - A; F.H.A. & Anor. Vs. Kalejaiye (2010) LPELR - 1267 (SC) @ 14 - 15 C - A; R. Lauwers Import-Export Vs. Jozebson Ind. Co. Ltd (1988) 7 SC (Pt. III) 26; (1988) LPELR - 2934 (SC) @ 57 - 58 D - A; Adigwe Vs. F.R.N. (2016) LPELR - 24694 (SC) @. 16 - 18 C - B.

I have carefully examined the reasons advanced in the supporting affidavit, particularly paragraphs 6 (g) and 8, wherein it is averred that the failure to seek leave to appeal within the prescribed time was due to severe distractions arising from the applicant's political travails and ill health. (P.....para.....)

6. *No document attached to substantiate the claim of ill health*

I observe that there is no document attached to the supporting affidavit to substantiate the claim of ill health. There is also nothing to show when the applicant allegedly travelled to Europe to take care of his health as averred in paragraph 6(a) such as a copy of the relevant pages of his international passport. (P.....para.....)

7. *Applicant's allegation was debunked*

The contention that he was distracted by his political travails has been debunked by the 1st – 8th respondents in paragraphs 7, 8, 9, 10, 11 and 13 of their counter affidavit wherein they averred as follows:

- "7. The applicant herein filed 2 (two) suits at the High Court, one, an originating summons with Suit No: HOW/295/2013 and another application to enforce his Fundamental Rights in Suit No: HOW/174/2013 in 2013, shortly before he was impeached as the Deputy Governor of Imo State.**
- 8. Both suits were decided against him at the High Court.**
- 9. The applicant thereafter appealed against the 2 (two) decisions of the High Court. while Suit No:**

HOW/295/2013 which was filed via an originating summons, challenging his impeachment, culminated into **CA/OW/291/2013**, the Enforcement of Fundamental Rights proceedings filed by him i.e. **HOW/174/2013** culminated in **CA/OW/187/2013**.

10. **Judgment in both CA/OW/187/2013 and CA/OW/291/2013 were delivered on 20th November, 2014.**
11. The applicant further appealed against the judgment of the Court of Appeal delivered on 20th November, 2014 in **CA/OW/291/2013** to this honourable court in **SC. 50/2015**, but decided not to appeal against the decision in **CA/OW/187/2013/** delivered on the same day.
13. Therefore, contrary to the depositions in paragraphs 6 (a) - (h), 7 & 8 of the affidavit in support, I know as a fact that **Exhibit SC 2 (the judgment of the Court of Appeal) delivered on 20th November, 2014, attached to the affidavit in support of the application of the applicant was delivered on the same day as the judgment that gave rise to SC 50/2015.** (P.....para.....)

8. *Legal arguments and averments are hereby struck out.*

Learned counsel for the applicant has urged us to expunge, paragraphs 21, 22, 23 and 24 of the counter affidavit for being in breach of Section 115 (2) of the Evidence Act, 2011, as amended. I agree with him that the said averments do offend Section 115 (2) of the Act, as they are legal arguments and conclusions. The averments are accordingly struck out. The remaining paragraphs are sufficient to sustain the opposition to the application. (P.....para.....)

9. *Failure to meet the first requirement for extension of time makes consideration of second requirement unnecessary.*

The fact that judgment was delivered on the same day, 20th November 2014, by the same court in respect of two separate appeals filed by the applicant in CA/OW/187/2013 and CA/OW/291/2013 and that he chose to pursue only the appeal from the decision in CA/OW/291/2013 vide Appeal No. SC. 50/2015, while keeping the present appeal in abeyance, is a clear indication that the delay in bringing the present application was deliberate and self-induced. In the circumstances, the applicant has failed to satisfy the first requirement for the exercise of the court's reasons for the delay.

Since the two requirements must co-exist, it is hardly necessary to consider whether the grounds of appeal *prima facie* show good cause why the appeal should be heard. It is when the applicant has crossed the first hurdle that the court would proceed to examine the proposed grounds of appeal. The

proposed appeal is against concurrent findings of the two lower courts. I am not satisfied that any exceptional circumstances exist to warrant the grant of this application.

The application is refused and accordingly dismissed.
(P.....para.....)

10. *Power of court to extend time within which to appeal is discretionary*
This court has power to extend the time within which to seek leave to appeal but the indulgence is not made as of course as there are certain conditions that must be in place for the discretion of the court to be exercised in favour of the application.

There are firstly the existence of good and substantial reasons for failure to appeal within the prescribed period, and secondly the existence of grounds of appeal which prima facie show good cause why the appeal should be heard. See Adelekan Vs. Ecu-Line NV (2006) 12 NWLR (Pt.993) 33 at 47; Obikoya Vs. Wema Bank Ltd (1989) 1 NWLR (Pt.96) 157; Ibodo Vs. Enarofia (1980) 5-7 SC 42; Holman Bros (Nig.) Ltd Vs. Kigo (Nig) 8-11 SC 43; C. B. N. Vs. Ahmed (2001) 11 NWLR (Pt. 724) 369 at 393. (P.....para.....)

11. *The nature and purport of Or 2 Rule 31(1) & (2) of the Supreme Court Rule*
The guiding rule of the Supreme Court that operates in an application such as the present one is Order 2 Rule 31 (1) & (2) thereof thus:

Order 2, Rule 31 (1) & (2) of the Supreme Court provides as follows:

"The court may enlarge the time provided by these rules for the doing of anything to which these rules apply, or may direct a departure from these rules in any other way when this is required in the interest of justice.

Provided that in any civil proceedings, such enlargement of time or departure from the rules may be granted only in exceptional circumstances.

2. **Every application for an enlargement of time in which to appeal or in which to apply for leave shall be supported by an affidavit setting forth good and substantial reasons for the failure to appeal or apply for leave to appeal within the prescribed period“ (P.....para.....)**

12. *Length of time may not be a bar to an application of extension of time*

Having set out the submissions of counsel on either side along with the supporting and countering affidavit, what is paramount is that for an applicant to qualify for the favourable consideration of an application of this nature for extension of time to appeal, he must not be seen to have been tardy and advance substantial reasons why he should be given another chance inspite of the passage of time after the' expiration of time allowed to appeal. In this instance 22 months elapsed before the applicant started the process of this application. Though the length of the period that had passed before the application may not be a bar, it is however material to be part of the factors considered. See *Chukwu Vs. Omehia* (2013) 7 NWLR (Pt.1354) 463 at 479; *Bank of Baroda Vs. Merchantile Bank Ltd* (1987) 3 NWLR (Pt.60) 233 at 242-243; *Imegwu Vs. Okolocha* (2013) 9 NWLR (Pt.1359) 347 at 370 Per Ariwoola JSC. (P.....para.....)

Per Odili (JSC)

“The application under discourse was filed on 9/9/2016 a period of 22 months after the judgment of the Court of Appeal sought to be appealed against. Therefore, the applicant temporised and did not pursue the said application until 14 months after and by now 36 months has gone by since the lower court's judgment and considering the length and breadth of the supporting affidavit, nothing has been provided as to the compelling need to agitate the appeal against a decision delivered so long ago. It needs be reiterated for the umpteenth time that an application for extension of time as the one in hand is not granted just to satisfy a passing fancy without substance. The substantiality of the reason for the delay is crucial alongside, the matter for the appeal being cogent and substantial such that if not allowed a miscarriage of justice is occasioned. That is not the case here as the reason for the delay in appeal is not cogent and is even not sustainable since the same applicant had pursued a sister case, CA/OW/291/2013 which came to the Supreme Court and decided as SC/50/2015 meanwhile the case at hand at the court below CA/OW/187/2013 was delivered the same day at the Court of Appeal. Clearly the reason for the delay is not sustainable apart from the applicant not having shown the substantial and weighty nature of the grounds of the proposed appeal. See *Bank of Baroda Vs. Merchantile Bank Ltd* (supra), *Obikoya Vs. Wema Bank* (supra) 178; *Ibodo Vs. Enarofia* (1980) 5-7 SC 42; *Holman Bros (Nig.) Ltd Vs. Kigo (Nig.) Ltd* (1980) 8-11 SC 43.

In the final analysis, this application lacks merit and in line with the lead ruling, I too dismiss the application.” (P.....para.....)

13. *Prescribed period for giving notice of appeal or leave—S. 27(2)(a) SC Act.*
The prescribed period within which to appeal to this court from the Court of Appeal is three months. See Section 27(2)(a) of the Supreme Court Act which

provides thus:-

"The period prescribed for the giving of notice of appeal or notice of application for leave to appeal are in an appeal in civil case, fourteen days in appeal against an interlocutory decision and three months in an appeal against a final decision. "
(P.....para.....)

14. *Appellant did not adduce sufficient reason why he did not appeal within the prescribed period*

The applicant's reason for failure to appeal did not fall within the prescribed period of three months, as his relocation to Europe was effected after one year one month and eight days. An applicant must set forth good and substantial reasons why he did not appeal within the prescribed period. When that is done then any extra time after the prescribed period will be taken into account in considering whether there was inordinate delay on the part of the applicant.

Having failed to advance any reason for failure to appeal within the prescribed period, the question as to whether there was inordinate delay after the expiration of the prescribed period does not arise.

(P.....para.....)

Representations:

C.O.P. Emeka (Esq.) for the applicant with Tajudeen.

Folasade Mofolaju (Esq.) for 1st - 8th respondents with O. Abimbola and O. Oluwole-Akande (Esq.)

M.O. Nlemedim (Esq.) Ag. Attorney General, Imo State.

KUDIRAT MOTONMORI OLATOKUNBO KEKERE-EKUN, JSC (Delivered the Lead Judgment):

**THE STATE
Vs.
NURA BUHARI**

SC. 1095/2016

IN THE SUPREME COURT OF NIGERIA

HOLDEN AT ABUJA

FRIDAY, 12TH APRIL, 2019

BEFORE THEIR LORDSHIPS

**IBRAHIM T. MUHAMMAD
KUDIRAT M. O. KEKERE-EKUN
AMIRU SANUSI
PAUL ADAMU GALUMJE
SIDI DAUDA BAGE**

**AG CHIEF JUSTICE OF NIGERIA
JUSTICE, SUPREME COURT
JUSTICE, SUPREME COURT
JUSTICE, SUPREME COURT
JUSTICE, SUPREME COURT**

CRIMINAL LAW AND PROCEDURE:- Confessional statement – Conviction thereto – Whether conviction can be based solely on the confessional statement of the accused.

CRIMINAL LAW AND PROCEDURE:- Confessional statement – Objection thereto – Whether it is when the confessional statement is sought to be tendered and not thereafter.

*CRIMINAL LAW AND PROCEDURE:- Confessional statement – Veracity thereof – How determined – The principles in *R Vs. Sykes (1913) 8 Cr App Report 233*.*

CRIMINAL LAW AND PROCEDURE:- Conviction – Where a trial court basis conviction of the accused on corroborated confessional statement which was voluntarily made – Whether it was wrong for the Court of Appeal to set aside such conviction.

CRIMINAL LAW AND PROCEDURE:- Criminal cases – Proof thereof – Modes of proving criminal cases – Whether can be sufficiently proved by any of the modes.

CRIMINAL LAW AND PROCEDURE:- Criminal cases – Standard of proof thereto – Whether prove beyond reasonable doubt does not mean prove beyond all shadows of doubt.

CRIMINAL LAW AND PROCEDURE:- Culpable homicide – Elements thereof – What prosecution must establish.

EVIDENCE:- Confessional statement – Admissibility thereof – Whether admissible against the maker only except where a co-accused adopts it.

JUDGMENTS AND ORDERS:- Obiter dictum – Where trial courts makes comments on the state of the knife that was not tendered before him – Whether such comments are obiter.

STATUTE:- Evidence Act Sections 28 and 29 thereof – Nature and purport.

Issues for Determination

Whether the lower court was right to set aside the trial court's conviction and sentence of death passed on the respondent and substituting an order of discharge and acquittal?

Facts of the Matter

Held: *(Unanimously allowing the appeal)*

1. *In Criminal Proceedings the prosecution must establish the guilt of the accused person beyond reasonable doubt*

It is a settled principle of law that in criminal proceedings the prosecution must establish the guilt of the accused person beyond reasonable doubt. It is also well settled that proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt or beyond any iota of doubt. If the prosecution has led evidence that is cogent, credible and compelling, which points irresistibly to the guilt of the accused, it would have discharged the burden. Proof beyond reasonable doubt depends not on the quantity of witnesses for the prosecution but upon the quality of the evidence given. See: BASIL AKALEZI Vs. THE STATE (1993) 2 NWLR (Pt.273) 1; MICHAEL Vs. THE STATE (2008) 13 NWLR (Pt.1104) 361; SMART Vs. THE STATE (2016) LPELR-40728; NWATUROCHA Vs. THE STATE (2011) 6 NWLR (Pt.1242) 170. (P.....para.....)

3. *The nature and purport of Sections 28 and 29 of Evidence Act*
Section 28 and 29(1) and (2) of the Evidence Act, 2011, provides as follows:

"28. A confession is an admission made at any time by a person charged with a crime, stating or suggesting the inference that he committed the crime.

29. (1) In any proceeding, a confession made by a defendant may be given in evidence against him in so far as it is relevant to any matter in issue in the proceedings and is not excluded by the court in pursuance of this section.

(2) If, in any proceeding where the prosecution proposes to give in evidence a confession made by a defendant, it is represented to the court that the confession was or may have been obtained-

(a) by oppression of the person who made it; or

(b) in consequence of anything said or done which was likely, In the circumstances existing at the time, to render unreliable any confession which might be made by him In such consequence, the court shall not allow the confession to be given in evidence against him except in so far as the prosecution proves to the court beyond reasonable doubt that the confession (notwithstanding that it may be true) was not obtained in a manner contrary to the provisions of this section."

Thus, a confession is relevant and admissible in evidence if it is positive and direct and constitutes one or all the elements of the offence charged. The court must also be satisfied that it is unequivocal and that it was voluntarily made. See: IGBINOVIA Vs. THE STATE (1981) LPELR-1446 (SC) @ 17 B - D; (1981) 2 SC 5; YESUFU Vs. THE STATE (1976) 6 SC 163; ADEBAYO Vs. THE STATE (2014) LPELR - 22988 (SC) @ 55 - 56 F - A. Once admitted in evidence, a confessional statement forms part of the prosecution's case and its probative value will be considered alongside other evidence in the case. See: EGBOGHONOME Vs. THE STATE (1993) 7 NWLR (Pt.306) 383; NWACHUKWU Vs. THE STATE (2007) 17 NWLR (Pt.1062) 31; OSUNG Vs. THE STATE (2012) 18 NWLR (Pt.1322) 256; AKPAN Vs. THE STATE (2001) 15 NWLR (Pt. 737) 745. (P.....para.....)

4. *Time to object to the voluntariness of a confessional statement*
It must also be stated that the time to object to the voluntariness of a confessional statement is when it is sought to be tendered and not after it has been admitted in evidence. See: GODSGIFT Vs. THE STATE (2016) LPELR-40540 (SC) @ 31 B - C; OLALEKAN Vs. THE STATE (2002) 2 SCNJ 104; MUHAMMAD Vs. THE STATE (2017) LPELR-42098 (SC) @ 17- 18 C - B. It is quite clear from the record of proceedings that on 13/7/05 the respondent's statement recorded in Hausa language and its English translation (Exhibits E and E1) were admitted in evidence without objection. The allegation that the statement was obtained under duress made at the trial during the respondent's defence, was too late in the day.
The learned trial judge was right to have considered its probative value along with other evidence before him, its retraction at the trial notwithstanding. See: EGBOGHONOME Vs. THE STATE (supra). (P.....para.....)
5. *Conviction may be based solely on the confessional statement of an accused person*
As pointed out by the learned trial Judge, the prosecution relied mainly on the confessional statements of the appellant and his co-accused in securing their conviction. It is trite that a conviction may be based solely on the confessional statement of an accused person without corroboration if it is positive, direct and properly proved. See: MOHAMMED & ANOR. Vs. THE STATE (2007) LPELR-1894 (SC) @ 13 B - E; (2007) 11 NWLR (Pt.1045) 303; MILLA Vs. THE STATE (1985) 3 NWLR (Pt.11) 190; IKPO Vs. THE STATE (2016) LPELR-40114 (SC) @ 38 - 39 C - C. (P.....para.....)
6. *The tests the courts will apply to determine if a confession is probable*
It has been the practice of our courts over the years to be guided by the test laid down in R Vs. Sykes (1913) 8 Cr. App. Report 233, to satisfy itself that the' confession is probable before basing a conviction on it. The court is enjoined to consider the following:
- "i) Whether there is anything outside the confession which shows that it may be true;
 - ii) Whether the confessional statement is in fact corroborated;
 - iii) Whether the relevant statements of fact made in it are most likely true as far as they can be tested;
 - iv) Whether the accused had the opportunity of committing the offence;
 - v) Whether the confession is possible; and

- vi) **Whether the alleged confession is consistent with other facts that have been ascertained and established."**

See also: UBIERHO Vs. THE STATE (2002) 5 NWLR (Pt.819) 644 @ 655; NWACHUKWU Vs. THE STATE (Supra); LAWAL Vs. THE STATE (2016) LPELR-40633 (SC) @ 21 - 22 B; FABIYI Vs. THE STATE (2015) LPELR-24834 (SC) @ 33 - 34 E - D. (P.....para.....)

- 7. *What the prosecution must prove in a charge of culpable homicide*
In order to prove the offence of culpable homicide punishable with death under Section 221(b) of the Penal Code, the prosecution must prove beyond reasonable doubt:

- "a. The death of a human being;**
- b. That the death resulted from the act of the accused person;**
- c. That the act or omission of the accused which caused the death of the deceased was intentional with the knowledge that death or grievous bodily harm would be its probable consequence."**

See: MAIYAKI Vs. THE STATE (2008) 7 SC 128 @ 129; USMAN Vs. THE STATE (2013) 12 NWLR (Pt.1367) 76; ISMAIL Vs. THE STATE (2011) LPELR-9352 SC @ 18-19 F - C. (P.....para.....)

- 8. *Confessional statement is only admissible against the maker thereof unless adopted by a co-accused.*

It is relevant to note that the learned trial judge cautioned himself on the need to apply the test in R Vs. Sykes (supra) in determining the weight to be attached to the respondent's confessional statement. He found that aspects of the statement tallied with other evidence in the case, such as the evidence of PW.1 as to how he found the deceased. The evidence of PW.4 that blood stains were found about 100 metres away supports the respondent's statement that the deceased was initially dragged to the bush before being brought back to the office. The learned trial judge also found that each of the 1st, 2nd, 3rd, 4th, and 6th accused persons gave similar accounts in their statements as to how they broke into the shop but did not find money. How they beat the deceased, killed him and dragged his body to the bush and later brought him back to the office.

It is true that by virtue of Section 29(4) of the Evidence Act, 2011, where more than one person is charged with a criminal offence, a confessional statement by one of the accused is only admissible against the maker unless any of the other accused persons in whose presence the confession was made, adopts the statement by words or conduct.

In the instant case, there were 6 accused persons standing trial. Their

confessional statements were admissible against each of them and the court was entitled to consider the evidence outside those statements, which made it probable that they were true. What the court found was that each accused separately gave details of what transpired and named their co-accused. The court found that the individual statements tallied with other evidence led by the prosecution. Indeed, the lower court was of the same opinion. I refer to page 172 of the record. The submission of learned counsel for the respondent that the trial court relied on the confessional statements of his co-accused to convict the respondent, is misconceived. (*P.....para.....*)

9. *Objection was not raised when statement was been tendered*

I am inclined to agree with learned counsel for the appellant that the lower court erred in holding that Exhibits E and E1 could not be relied upon because they did not contain the respondent's personal information. No such objection was raised when the statements were tendered in evidence, It was never contended that the statements were not made voluntarily. Furthermore, the learned trial judge had properly subjected the statements to the relevant test and found the confession to be true. (*P.....para.....*)

10. *Comments made by trial judge is obiter*

It is pertinent to observe that the comments made by the lower court regarding the state of the knife allegedly recovered from the respondent were made obiter. This is because the knife was tendered and rejected and therefore did not form part of the prosecution's case. It was not before the court. Any comments on its condition are speculative and not borne out by the record. The court's observations In this regard must be and are hereby discountenanced.

In the instant case, the respondent unequivocally admitted the role he played in the death of the deceased. What the prosecution is required to do is to call the witnesses it considers necessary to discharge the burden of proving its case beyond reasonable doubt.

It would be recalled that the respondent, along with his co-accused, was also charged with attempted robbery punishable under Section 2(2) (b) of the Robbery and Firearms (Special Provisions) Act Cap. 398 Law of the Federation of Nigeria 1999 as amended. (*P.....para.....*)

11. *Confessional statement which was voluntarily made was sufficient to grant conviction*

The reasoning of the learned trial judge is sound and unassailable. The confessional statement of the respondent, which was corroborated by other established facts, which the court believed and found to have been voluntarily made, was sufficient to ground the conviction in this case. The failure of the maker of Exhibit L to testify, having regard to the facts and circumstances of

this case was not fatal.

I am therefore in agreement with learned counsel for the appellant that the lower court erred when it set aside the respondent's conviction and sentence. I hold that there is merit in this appeal. It is accordingly allowed. The judgment of the Court of Appeal, Kaduna Division, delivered on 12/6/2015 acquitting and discharging the appellant is hereby set aside. The judgment of the High Court of Katsina State delivered on 6/5/2009 convicting the appellant of culpable homicide punishable with death under Section 221(b) of the Penal Code and common intention to steal contrary to Section 2(2) (b) of the Robbery, and Firearms (Special Provisions) Act, and the sentence of death and life imprisonment respectively imposed on him, are hereby restored.
(P.....para.....)

Representations:

Fredricks E. Itula (Esq.), with P. E. Osai, for the appellant.

G. C. Ugochukwu (Esq.), for the respondent.

SIDI DAUDA BAGE, JSC (Delivered the Lead Judgment):

USMAN SAMINU (aka DANKO)

Vs.

THE STATE

SC.38/2016

IN THE SUPREME COURT OF NIGERIA

HOLDEN AT ABUJA

FRIDAY 17TH MAY, 2019

BEFORE THEIR LORDSHIPS

**OLABODE RHODES-VIVOUR
OLUKAYODE ARIWOOLA
CHIMA CENTUS NWEZE
AMINA ADAMU AUGIE
PAUL ADAMU GALUMJE**

**JUSTICE, SUPREME COURT
JUSTICE, SUPREME COURT
JUSTICE, SUPREME COURT
JUSTICE, SUPREME COURT
JUSTICE, SUPREME COURT**

CONFESSONAL STATEMENT:- Veracity thereof – How determined – Applicable tests.

CONSTITUTIONAL LAW:- Presumption of innocence – Implication on standard of proof – Relevant consideration

CRIMINAL LAW AND PROCEDURE:- Confessional statement – Admissibility thereof – Whether is not inadmissible merely because it was retracted.

CRIMINAL LAW AND PROCEDURE:- Confessional statement – Admissibility thereof – whether mere retraction does not make it inadmissible.

CRIMINAL LAW AND PROCEDURE:- Confessional statement – Conviction thereto – Whether a confessional statement alone can grant conviction.

CRIMINAL LAW AND PROCEDURE:- Conspiracy – Meaning and purport – Whether it is distinct and independent of the substantive charge – Implication thereof.

CRIMINAL LAW AND PROCEDURE:- Guilt of accused – Proof thereof – Different ways thereto.

CRIMINAL LAW AND PROCEDURE:- Indictment which contains conspiracy charge and substantive charge – Proper approach thereto – Whether the court is not to deal with the substantive charge first before proceeding to deal with the conspiracy charge.

CRIMINAL LAW AND PROCEDURE:- Proof thereof – What prosecution must establish.

*PRACTICE AND PROCEDURE:- Appeal – Concurrent findings – Interference therein – Whether Supreme Court will not interfere in concurrent findings except under special circumstances – The principles in **Ogundiyen Vs. State (1991) 3 NWLR (Pt. 181) 159***

WORDS AND PHRASES:- Confessional statement – Meaning – Section 29(1) of Evidence Act considered.

WORDS AND PHRASES:- Robbery and armed robbery – Distinction and meaning

Issue for Determination

“Whether the court below was right in affirming the decision of the trial court that the prosecution proved its case against the appellant beyond reasonable doubt, relying on the alleged confessional statement of the appellant. (Grounds 1,2,3 and 4).

Facts of the Matter

Held: *(Unanimously dismissing the appeal)*

1. *Proper approach to an indictment which contains conspiracy charge and substantive charge*

Generally, it is trite law that the proper approach to an indictment which contains conspiracy charge and substantive charges is to deal with the latter first, that is, the substantive charge and then proceed to see how far the conspiracy count has been made out in answer to the fate of the charge of conspiracy. (P.....para.....)

2. *Meaning and purport of conspiracy*

Conspiracy is an agreement between two or more persons to do an unlawful act. Therefore, failure to prove substantive offence does not, in any way, make conviction for conspiracy inappropriate, being a separate and distinct offence in itself, independent of the actual offence conspired to commit. See; Segun Balogun vs. A.G. Ogun State (2002) 2 SC (Pt.11) 89; (2002) 4 SCM 23; (2002) 2

SCNJ 196; Osetola vs. The State (2012) 17 NWLR (Pt.1329) 251; (2012) 12 SCM (Pt.2) 347. (P.....para.....)

3. *Meaning of Robbery and Armed Robbery*

The substantive offence in this case was armed robbery.

Robbery generally is the illegal taking of property from the person of another or in the person's presence by violence or intimidation. While armed robbery is robbery committed by a person carrying a dangerous weapon regardless of whether the weapon is revealed or used. See; Akeem Agboola vs. The State (2013) LPELR - 20652; (2013) 11 NWLR (Pt.1366) 619; (2013) 8 SCM 157; (2013) All FWLR (Pt.704) 139; (2013) 54 NSCQR (Pt.11) 1162; (2013) 5 SCNJ 653. (P.....para.....)

4. *The requirements for proving the offence of Armed Robbery*

It is trite law that for the prosecution to establish the offence of armed robbery, the following are required to be proved:-

- (a) **That there was infact a robbery or series of robberies;**
- (b) **That the robbery was an armed robbery;**
- (c) **That the accused person was the armed robber or one of the armed robbers.**

See; Bozin vs. State (1985) 2 NWLR (Pt.8) 465 at 467; Alabi vs. State (1993) 7 NWLR (Pt.307) 551; Olayinka vs. State (2007) 9 NWLR (Pt.1040) 561; (2007) 8 SCM 193; Osetola & Anor vs. The State (supra). (P.....para.....)

5. *Ways of proving the guilt of an accused person standing trial*

The law is settled that there are various ways of proving the quilt of an accused person standing trial. It can be proved by:

- (a) **Confessional Statement of an accused person;**
- (b) **Evidence of eye witness of the crime;**
- (c) **Circumstantial evidence.**

See; Agboola vs. The State (Supra); Nigerian Navy & Ors vs. Lambert (2007) 18 NWLR (Pt.1066) 300; Alufohai vs. The State (2014) 12 SCM (Pt.2) 122; (2015) 3 NWLR (Pt.1445) 172. (P.....para.....)

6. *The presumption of innocence in favour of an accused person*

Under our criminal justice system, an accused person is presumed innocent until the prosecution prove his guilt. Hence, an accused is not expected to prove his innocence before the law court. It is clearly the duty of the prosecution to

establish the charge against an accused beyond reasonable doubt. See; *Uche Williams vs. The State* (1992) 10 SCNJ 74; (1992) NWLR (Pt.261) 515; (1992) LPELR - 3492. (P.....para.....)

7. *Conditions for the admissibility of confessional statement of a suspect*
Ordinarily, a confessional statement of a suspect is admissible if it is direct and positive and relates to his own acts, knowledge or intention, stating or suggesting the inference that he committed the crime charged. See; Solomon Thomas Akpan vs. The State (1992) NWLR (Pt.248) ; (1992) & SCNJ 22; (1992) LPELR - 381. **And it is well settled that a confessional statement does not become inadmissible merely because it is subsequently retracted by the maker.** (P.....para.....)
8. *Definition of confessional statement*
Generally, by virtue of Section 29(1) of the Evidence Act, 2011, Laws of the Federation, a confessional Statement is an admission made at any time by a person charged with a crime, stating or suggesting the inference that he committed the crime. It is an extrajudicial statement made by an accused person to the Police containing assertion of admission showing that he participated in the commission of the offence for which he stands accused. Therefore, once admitting the charge or creating the impression that he committed the offence charged, the statement becomes confessional. (P.....para.....)
9. *Retraction of a confessional statement does not affect it's admissibility*
When a confessional statement has been proved to have been made voluntarily and it is positive, direct and unequivocal, it amounts to an admission of guilt and it is enough to sustain the conviction of an accused. Any subsequent retraction by the maker of such a statement, in the cause of the trial, does not affect the admissibility of such a confession. See; Egboghonome vs. The State (1993) 7 NWLR (Pt.306) 383; **Bature vs. The State** (1994) 1 NWLR (Pt.,320) 267; **Sotola vs. The State** (2014) 12 NWLR (Pt.1422) 613; (2014) 8 SCM 34; (2014) 50-6 SC (Pt.2) 68. (P.....para.....)
- 10.. *Approved confessional statement alone is sufficient to ground conviction without corroboration*
And it is well settled that once the court is satisfied with its truth, a proved confessional statement alone is sufficient to ground and support conviction without corroboration. However, the test for determining the veracity or otherwise of a confessional statement is to seek any other evidence, no matter how slight, of circumstances which make it probable that the confession is true. See; Asimiyu Alarape & Ors vs. The State (2001) LPELR - 412; (2001) S NWLR

(Pt.705) 79; (2001) 3 SCM 1; (2001) 2 SC 114.

As I stated earlier, the appellant's confessional statement, which was tendered and admitted in evidence without proper required objection was direct, cogent and positive enough to earn the appellant the conviction he got for the offence charged. *(P.....para.....)*

11. *The tests for verifying veracity or otherwise of a confessional statement*
However, notwithstanding the status of the confessional statement of the appellant, the court is enjoined to apply the required tests to the said confessional statement to verify the veracity or otherwise of the statement. The tests are:-

- (a) Whether there is anything outside the confession to show that it is true;**
- (b) Whether the statement is corroborated no matter how slight;**
- (c) the facts contained therein so far as can be tested, are true;**
- (d) Whether the accused person had the opportunity of committing the offence;**
- (e) Whether the confession of the accused person was possible;**
- (f) Whether the confession was consistent with other fact which has been ascertained and proved in the matter.**

See; Alarape & Ors vs. The State (supra) Akpan vs. State (2001) 11 SCM 66; (2001) 53 WRN 1; Osetola & Anor vs. The State (Supra).

On the record, the court below had found that the trial court recognized and applied the required tests earlier stated to the confessional statement credited to the appellant and admitted as Exhibits D & D1 and the court found corroborative evidence in the testimonies of the 1st, 3rd and 4th prosecution witnesses. *(P.....para.....)*

Per Ariwoola (JSC)

The court below also found as follows:

"The 1st, 3rd and 4th prosecution witnesses testified that they saw Indo Dago dead, lying in a pool of blood in her room. The 1st prosecution witness testified that he discovered that the door to the room of the deceased was removed and that she had a deep cut on her neck. These pieces of evidence corroborated the portion of the confessional statement of the appellant as how they gained entry

into the house of the victim and on the place of attack of the victim, i.e. her room and the part of the body of the victim that was stabbed, her neck."

On the above, the court below came to the conclusion that the findings of the trial court that the testimonies of the 1st, 3rd and 4th prosecution witnesses constitute independent evidence verifying the contents of the confessional statement cannot be faulted.

Further, the court below opined that the contents of the confessional statement Exhibit D1 proved the ingredients of the offences of conspiracy to commit armed robbery and of armed robbery with which the appellant was charged beyond reasonable doubt.

I am convinced that the appellant has not shown any cause to warrant the interference of this court with the concurrent findings of the facts of the two courts below. It is clear that the trial court rightly relied on the confessional statement of the appellant to convict him as charged. And the conviction and sentence were rightly affirmed by the court below.

In the final analysis, the sole issue distilled from the four grounds of appeal is resolved against the appellant. The appeal is liable to be dismissed and it is hereby accordingly dismissed.

In the circumstance, the judgment of the court below of 5th May, 2015 which had earlier affirmed the conviction and sentence of the appellant is affirmed. (P.....para.....)

12. *The Supreme Court is reluctant to interfere with concurrent findings of two courts below it*

As he pointed out, this court is always reluctant to interfere with the concurrent findings of the two courts below, and this is more so, when an appeal turns on the issue of credibility - see *Ogundiyan vs. State (1991) 3 NWLR (Pt. 181) 519 SC*, wherein Obaseki, JSC, observed:

Without any clear errors in law or fact leading to or occasioning miscarriage of justice, this court will not interfere with the concurrent findings. It is settled law that there must be clear proof of error either of law or of fact on record, which has occasioned miscarriage of justice before the Supreme Court can upset or reverse concurrent findings.

In other words, where there is sufficient evidence to support the concurrent findings of fact by two lower courts, such findings will not be disturbed unless there is significant error apparent on the record.

In this case, it is clear that the Prosecution established more than enough

evidence to support the concurrent findings of the trial court and Court of Appeal, and this court is not in the position to intervene. (*P.....para.....*)

Representation:

O. M. Atoyebi (Esq.) with O. O. Anjorin, I. H. Alia and M. I Hanson for the appellant.

Abdul Mohammed (Esq.) with C. N. Onyia (Esq.), M. K. Shitta, (Esq.), Ahmed Labbo (Esq.), and E. E. Inyang (Esq.) for the respondent.

OLU ARIWOOLA, JSC (Delivered the Lead Judgment)