

**A.B.C (TRANSPORT COMPANY) LTD
VS
MISS BUNMI OMOTOYE**

SC. 177/2011

IN THE SUPREME COURT OF NIGERIA

HOLDEN AT ABUJA

FRIDAY, 31ST MAY, 2019

BEFORE THEIR LORDSHIPS

**MUSA DATTIJO MUHAMMAD
KUMAI BAYANG AKAAHS
JOHN INYANG OKORO
SIDI DAUDA BAGE
UWANI MUSA ABBA-AJI**

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

ACTION: Negligence – Nature thereof – Whether there must be a proximity between plaintiff and defendant and a breach of the duty of care by defendant.

ACTION: Negligence – Where claimant did not produce the damaged goods – Whether such failure is not fatal to the case of the plaintiff.

APPEAL: Brief writing – Reply brief – When imperative – Nature and purport.

CONTRACT: Exemption clause – Where parties entered into two contracts with and without exemption clauses – Whether it was wrong for the trial court to apply the provisions of the exemption clause into an agreement not contemplated by the parties.

PRACTICE AND PROCEDURE: Appeal – Re-Evaluation of evidence on appeal – When an appellate court will embark on re-evaluation of evidence – Relevant principles.

PRACTICE AND PROCEDURE: Civil cases – Proof thereof – Nature of proof required – Whether must be on preponderance of evidence.

PRACTICE AND PROCEDURE: Negligence – Proof thereof – What plaintiff must establish.

PRACTICE AND PROCEDURE: Pleadings – Statement of defence – Where contain mere denials – Whether must answer points of substance to constitute a real defence.

PRACTICE AND PROCEDURE: Terms of contract – Parties are bound by the terms of their contract – Whether where any dispute arises, the terms of the contract will be a guide to its resolution.

Issues for Determination

- 1. Whether the Court of Appeal was justified in holding that the respondent proved her case against the appellant. (Grounds 1, 2 & 4).**
- 2. Whether the Court of Appeal was justified in holding that the High Court denied the respondent of a fair hearing in its findings on the exemption clause contained in Exhibits A and B respectively. (Ground 3).**

Facts of the Matter:

This appeal is against the judgment of the Court of Appeal, Port Harcourt Division, delivered on 18/6/2009, which set aside the judgment of the High Court of Rivers State, Port Harcourt that dismissed the claims of the respondent contained in the amended statement of claim dated 17/6/2003 at page 21 of the record as follows:

- (a) A declaration that the defendant was negligent in handling the goods belonging to the plaintiff which the defendant was to deliver from Lagos to Port Harcourt to the plaintiff covered by receipt on 27/7/2000, which caused damages to the goods.**
- (b) An order of the court compelling the defendant to pay to the plaintiff the following:**
 - (i) The sum of N117,000.00 (one hundred and seventeen thousand Naira) being the value of the goods damaged**
 - (ii) The sum of N4,700.00 (four thousand seven hundred Naira) being the cost of transport to and from Port Harcourt to Lagos.**
 - (iii) The sum of N1,000,000.00 (one million Naira only) being damages for loss of goodwill, loss of turnover on the goods and loss of profit.****TOTAL N1,121,700.00**

It is the fact that the respondent on 28/7/2000 travelled in one of the appellant's buses from Lagos to Port Harcourt with some goods she was to deliver to a customer but that the goods got damaged because of the negligence of the appellant, who placed them in a place where heat from the engine of the bus damaged them. After the close of the trial, the trial court

dismissed the respondent's suit in its judgment. Dissatisfied, she appealed to the lower court, which allowed her appeal and granted her reliefs save relief (b) of sub paragraph (iii) of the amended statement of claim. Dissatisfied, the appellant appealed to the Supreme Court.

Held: *(Unanimously dismissing the appeal)*

1. *When a reply brief is imperative*

The 5-page reply brief of the appellant filed on 1/8/2013 does not seem to raise up or address any fresh issue or point of law to the respondent's brief and therefore does not qualify as a reply brief. It is the general practice since the introduction of brief writing that there may be need for an appellant to file a reply brief when an issue of law or argument is raised in the respondent's brief, not necessarily being a mere repetition of what the appellant's brief contained. In other words, where a respondent's brief raises issues on points of law not covered in the appellant's brief, an appellant should file a reply to deal with such new points/matters. Filing of a reply brief even by the appellant, where desirable should not be used to either extend the scope of the arguments in the appellant's brief or to raise issues that did not arise as new issues or matters in the respondent's brief. See Per MUHAMMAD, J.S.C in SPDC & Ors vs. Agbara & Ors (2015) LPELR-25987(SC). (P.....Paras.....).

2. *Onus on plaintiff in an action for negligence*

It is the law therefore that in an action for negligence, the plaintiff must prove the following essential elements: (a) The existence of a duty of care owed to the plaintiff by the defendant. (b) Breach of that duty of care by the defendant. (c) Damages suffered by the plaintiff as a result of the breach by the defendant of that duty of care. See Edok Eter Mandilas Ltd. vs. Ale (1985) 3 NWLR (Pt. 11) 43, Okeowo vs. Chief Sanyaolu (1986) 2 NWLR (Pt. 23) 471, Agbonmagbe Bank vs. General Manager G.B. Ollivant Ltd. (1961) 1 ALL NLR 116, Mercantile Bank of Nigeria Ltd. vs. Abusomwan (1986) 2 NWLR (Pt. 22) 270.

3. *Appellant has a duty of care towards the respondent*

In order to establish negligence, one pertinent question arises for consideration and it is whether as between the alleged wrong doer and the person who has suffered damage, there is a sufficient relationship of proximity or neighborhood such that in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter. By the summations above, it cannot be argued that the respondent has proved against the appellant the existence of a duty of care owed to her, breach of that duty of care by the appellant and damages suffered by the respondent as a result of the breach by the appellant of that duty of care. (P.....Paras.....).

4. *The Defence must answer points of substance contained in the statement of claim.*
The mere fact that a defence or statement of defence is filed or denial is made does not amount to a real defence in law since cases are won based on preponderance of facts and evidence. Similarly, a defence that does not answer the points of substance is as good as no defence. A defendant usually sets out in his defence to answer the points of substance, to contradict and thus demolish the live issues on which the case will stand. If his defence fails to achieve that result, it will be as good as no defence. See Per OPUTA, J.S.C in Nwadike & ors vs. Ibekwe & ors (1987) LPELR-2087(SC). (P.....Paras.....).
5. *Effect of non-production of damaged goods*
The non-production of the damaged goods cannot be fatal or even affect the case of the respondent. The lower court was right in its finding on this issue. Moreover, civil cases are to be proved on balance of probality or preponderance of evidence by admissible evidence. The damaged goods were proved abundantly by the admission of DW1 of the damage and by Exhibits D1 and D3 being the photographs of the damaged goods attached to Exhibit D.
6. *Claimant preponderantly proved her case against appellant.*
The court below carried out a painstaking and sagely evaluation of both the documentary and oral evidence before it in reaching its decision especially its sound and erudite appreciation of the facts and evidence from pages 132-138 of the record. I am in agreement that the lower court is justified to hold that she preponderantly proved her case against the appellant. (P.....Paras.....).
7. *Parties are bound by the terms of their contract*
This unfortunately is not the case of the respondent. It must be noted that Exhibits A & B apply to transport ticket of passengers with their luggage. In the instant case however, the respondent entered into a separate contract for the carriage and delivery of her goods/luggage by the appellant evidenced vide Exhibit C from Lagos to Port Harcourt. Exhibit C was the receipt for the carriage of the respondent's goods from Lagos to Port Harcourt separately entered between the parties. Parties are bound by the terms of their contract and if any dispute should arise with respect to the contract, the terms in any documents which constitute the contract, are invariably the guide to its interpretation. See Per MOHAMMED, J.S.C in Onyekwelu vs. Elf Petroleum (Nig) Ltd. (2009) LPELR-2733(SC). (P.....Paras.....).
8. *There was no exemption clause in the contract between the parties*
It must be noted that it is because of the nature and class of goods the Respondent wanted to be carried and delivered to Port Harcourt and because of their safety and protection that she entered into a distinct contract with the

appellant evidenced by Exhibit C, separately paid for. There was or no exemption clause contained on Exhibit C for the exculpation of the appellant from liability to damage since it owed duty of care to the respondent for the safety of the goods. (*P.....Paras.....*).

Per Uwani (JSC)

“The trial court was manifestly in error to import the exclusion/exemption clause in Exhibits A & B into Exhibit C, being a separate category of contract. To read a meaning different from that contemplated by the parties in this case is what the lower court considered to be denial of fair hearing. I must without ado commend that the lower court did well to have discovered and sifted this error early enough which would have denied the respondent her right to fair hearing of her suit. This matter was well explained and reasoned by the lower court in the 2nd paragraph of page 138 thus:

The other issue raised by the appellant is whether the reliance by the lower (trial) court on Exhibit A, particularly the exemption clause contained therein did not occasion a miscarriage of justice. As observed earlier in this judgment; Exhibit A, which the learned trial judge referred to and relied on in his judgment at page 69 ... was the receipt for the appellant's outward journey from Port Harcourt to Lagos. It was not a return ticket. She had no complaint about that leg of journey. Her complaint arose from her return journey from Lagos to Port Harcourt, evidenced by Exhibits B and C respectively. Exhibit B is the receipt covering the return journey, while Exhibit C is the charge for the extra luggage. I agree with learned counsel for the appellant that the learned trial judge erred when he referred to and relied on Exhibit A and thereby came to wrong conclusion. The only relevance of Exhibit A was to show that the appellant traveled to Lagos on the respondents bus. (*P.....Paras.....*).

9. *When an appellate court will interfere in the re-evaluation of evidence*

There is apparently an operating and functional error based on the misconception of the facts and evidence by the trial court that majorly and grossly worked out injustice against the respondent and led to the loss and dismissal of her case before the trial court. Save for the lower court, she would have suffered an irredeemable injustice! An appellate court will not embark on a re-evaluation of the evidence led by the parties in the trial court simply because a party made an allegation of improper evaluation of evidence and formulated one of the issues for determination. An appellate court will only do so where a party

visibly demonstrates the perversity of the findings made by the lower court by showing that the lower court (i) made improper use of the opportunity it had of seeing and hearing the witnesses; or (ii) did not appraise the evidence and ascribe probative value to it; or (iii) drew wrong conclusions from proved or accepted facts leading to a miscarriage of justice. See Per OGUNBIYI, J.S.C in *Ali vs. State* (2015) LPELR-24711(SC).

I give a tap at the back to the lower court in stepping in to wrest justice for the respondent denied her by the trial court. (*P.....Paras.....*).

10. *Onus on plaintiff in an action for negligence*

The law is that a plaintiff who seeks to maintain an action against a defendant in negligence must proof the following:

- (a) the existence of a duty of care owed to the plaintiff by the defendant.
- (b) the breach of that duty; and
- (c) damages suffered by the complainant which must connect with that breach of duty of care.

See *Iyere v B. F. F. M. Ltd* (2008) 18 NWLR (Pt. 1119) 300; *P.S.H.S.M.B vs. Goshwe* (2013) 2 NWLR (Pt. 1338) 383.

In the instant appeal, evidence on record reveals that the appellant entered into a contract in Exhibit "C" for the transportation of those items from Lagos to Port Harcourt. In the light of that contract, it therefore owed the respondent a duty of care to deliver those items at Port Harcourt in good condition same as they were at the time they loaded in the vehicle at Lagos. The respondent has sufficiently proved that the appellant breached that duty of care and therefore must be responsible for the injury sustained. It is instructive to note that, in this kind of situation, the law of contract is primarily concerned with providing safeguards against commercial losses or reward of damages to assuage injury suffered. This is a clear case where the doctrine of *res ipsa loquitur* is applicable and the appellant should be held responsible for the injury suffered by the respondent.

I hold that the court below was properly guided in its review of the issues canvassed before it. It was right to set aside the judgment of the trial court and replace same with a judgment in favour of the respondent. This appeal has no merit and it is accordingly dismissed by me. (*P.....Paras.....*).

COUNSEL:

Emeka O. Nwagwu, (Esq.) for the appellant appearing with him: V. N. Onyeorioro
(Mrs.).

Benjamin Obiora, (Esq.) for the respondent.

MUSAABBAJI, (JSC) (DELIVERING THE LEAD JUDGMENT):

**ABIODUN OKE AYINDE
Vs.
THE STATE**

SC. 996/2015

IN THE SUPREME COURT OF NIGERIA

HOLDEN AT ABUJA

FRIDAY, 31ST MAY, 2019

BEFORE THEIR LORDSHIPS

**MUSA DATTIJO MUHAMMAD
KUMAI BAYANG AKAAHS
JOHN INYANG OKORO
SIDI DAUDA BAGE
UWANI MUSA ABBA-AJI**

**JUSTICE, SUPREME COURT
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CRIMINAL LAW AND PROCEDURE:- “Conspiracy” – Meaning – How established.

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

CRIMINAL LAW AND PROCEDURE:- Armed robbery – Onus on prosecution thereto – How discharged.

CRIMINAL LAW AND PROCEDURE:- Armed robbery – Proof thereof – Where prosecution did not tender the gun used in robbery – Whether there is no law which said that prosecution must tender the weapon used in robbery.

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

CRIMINAL LAW AND PROCEDURE:- Proof – Standard thereof – Whether prosecution is not required to prove case with absolute certainty – Rationale.

EVIDENCE:- Contradiction thereof – When does a piece of evidence contradict another – Whether it is when the evidence are by themselves inconsistent.

PRACTICE AND PROCEDURE:- Appeal – Concurrent findings – When can be justified.

PRACTICE AND PROCEDURE:- Appeal – Concurrent findings. – Attitude of Supreme Court thereto – Whether will not disturb except where they are perverse or had lead to miscarriage of justice.

Issue for Determination

Whether from the entirety of the evidence on record as well as material available, the respondent as prosecution established the offences of conspiracy to commit robbery and armed robbery against the appellant beyond reasonable doubt to warrant a dismissal of the appeal on 31st March, 2015.

Facts of the Matter

Held: *(Unanimously dismissing the appeal)*

1. *Supreme Court will not disturb concurrent findings except there are perverse or led to miscarriage of justice*

Let me start by stating that there are concurrent findings of the trial High Court and the court of appeal in this matter. The attitude of this court to concurrent findings of fact of the two courts below is well known and, that is, that this court will not disturb such findings unless the findings are perverse and/or leads to miscarriage of justice. See *Obasuyi & Anor Vs. Business Venture Ltd* (2000) 5 NWLR (at 658) 668, *Sobakin Vs. The State* (1981)5SC 75, *Ukaegbu & Son Vs. Ugoji & Ors* (1991) 6 NWLR (pt. 196)127 *Ferodo Ltd & anor Vs. Ibeto Industries Ltd* (2004)5 NWLR (pat 866) 317. (P.....para.....)

2. *When concurrent findings can be justified*

It must however be noted that concurrent findings on both issues of fact and law raised in a case can only be justified if they are well supported by the evidence on record. See *Olagunyi Vs. Oyeniran & ors* (1996) 6 NWLR (pt. 453)127, *Woluchem & ors Vs. Gudi & ors* (1981) 5 SC 291. (P.....para.....)

3. *Ingredients of armed robbery*

Having said that, it is no longer news that for the prosecution to establish the

offence of armed robbery against an accused person, it must lead credible evidence to prove the following.

1. That there was a robbery or series of robberies.
2. That the robbery robberies were armed robberies.
3. That the accused person was the robber or one of the robbers.

See *Emeka Vs. The State* (2014) 13 NWLR (Pt. 1425)614, *Afolalu Vs. The State* (2010) 5-7 SC (Pt. 11) 93, (2010)16 NWLR (Pt. 1220) 584, *Ikemson Vs. The State* (1989) 3 NWLR (Pt. 110) 455, *Eze Vs. FRN* (2017) LPELR - 42097 (SC); *Bozin Vs. The State* (1985) 2 NWLR (pt 8) 465. (*P.....para.....*)

4. *There is no law which states that prosecution must tender the weapons used in robbery*

With due respect to the submission by the learned counsel for the appellant on this issue, there is no law which states that the prosecution must tender the weapons used in the robbery before a case of armed robbery can be proved beyond reasonable doubt against an accused person. The circumstances of armed robbery does not permit a mandatory tendering of weapons used as the robbers usually flee with the weapons. see *Simon Vs. The State* (2017)LPELR-41988 (SC), *Chukwunyere Vs. The State* (2017) LPELR - 43725 (SC), *Peter Ogu Vs. Commissioner of Police* (2017) LPELR - 43832 (SC), *Olayinka Vs. The State* (2007) 30 NSCQR 149 at 162 - 163, (2007) 4 SC (Pt.1)210, *Ezene Vs. The State* (2017) LPELR - 41912 (SC), *Agugua Vs. The State* (2017) LPELR - 42021 (SC), *Alor Vs. The State* (1997) SC76.

In the instant case, the appellant is said to have escaped the scene of crime with the gun he used to rob PW1. Thus, apart from the fact that the appellant ran away with the weapon and disposed of same before he was arrested makes counsel's argument inconsequential. (*P.....para.....*)

5. *When does a piece of evidence contradict another*

I agree. But let me add that a piece of evidence contradicts another when it affirms the opposite of what that other evidence has stated, not when these is just a minor discrepancy between them. Two pieces of evidence contradict one another when they are by themselves inconsistent. A discrepancy may occur when a piece of evidence says or contains some differences in details. There is no doubt that when two or more persons are called as witnesses to say what they saw on a particular incident, there are bound to be discrepancies in those testimonies in respect of details.

Courts of law should therefore concentrate on material facts and not on peripherals that have no bearing on the substance of the case. See *Egwumi Vs. The State* (2013)13 NWLR (pt 1372)525, *Gabriel Vs. The State* (1989)5 NWLR

(Pt. 122) 457 *Uwagbue Vs. The State* (2008)12 NWLR (Pt. 1102)621; *Ochemaje Vs. The State* (2008)15 NWLR (Pt. 1109)57, *Ejeka Vs. The State* (2003) 4 SCNJ 161.

The time referred to by both PW1, and Pw3 refer to early morning hour, not noon or midnight. All agree it took place early in the morning. Therefore, the much weather made on the issue is of no moment. The PW1 testified clearly how she was robbed of her N9,000=by the appellant and his two other friends. She told the trial court how the appellant pointed a gun on her ears. Thereafter, they pushed her into a drainage. There is no evidence to controvert this. She warned PW2 about the presence of armed robbers in the street he wanted to enter. PW2 decided to dare them with his car. He hit the robbers with his car and wounded them which led to the arrest of two immediately. Appellant who was less wounded escaped but was arrested in his house with the help of the other two. Appellant says he was an innocent motorcyclist who carried a passenger to the area but was hit by the PW2. Appellant has however not told the court how his passenger was able to know him and locate his house. (*P.....para.....*)

6. *Proof beyond reasonable doubt does not mean proof beyond all shadow of doubt.* I am strongly persuaded to agree with the court below that the defence of the appellant was an afterthought. I also agree that the prosecution proved the case against the appellant beyond reasonable doubt. Proof beyond reasonable doubt does not mean proof beyond all doubt or all shadow of doubt. It simply means establishing the guilt of the accused person with compelling and conclusive evidence, a degree of compulsion which is consistent with a high degree of probability. See *Nwaturuocha Vs. The State* (2011) 6 NWLR (Pt. 1242)170, *Ajayi Vs. The State* (2013) 9 NWLR (Pt. 1360) 589, *Alabi Vs. The State* (1993)7 NWLR (pt 307)511, *Nasiru Vs. The State* (1999) 2 NWLR (pt 589)87, *Akalezi Vs. The State* (1993) 2 NWLR (Pt. 273) 1. (*P.....para.....*)

7. *The meaning of "Conspiracy"*
There must have been what is called in law-conspiracy. Conspiracy has been defined as an agreement by two or more persons to commit an unlawful act or a lawful act with unlawful means coupled with an intent to achieve the agreement's objective. See *Ajayi Vs. The State* (2013) 9 NWLR (Pt. 1360) 589, *The State Vs. Salawu* (2011)18 NWLR (Pt. 1279) 580.

The offence of conspiracy is usually shrouded in secrecy. Therefore, it is established once it becomes clear to the court that the conspirators knew of the existence and the intention or purpose of the conspiracy. In most cases, conspiracy is inferred or presumed. *Afolabi Vs. The State* (2013)13 NWLR (Pt. 1371)292, *Oswagwu Vs. The State* (2013) 1-2 SC (Pt. I) 37, *Lawson Vs. The State* (1975) 4 SC 115, *Murnuni Vs. The State* (1975) 6 SC 79.

In the instant case, there is no doubt that the appellant and the other

two robbers had reached an agreement to commit armed robbery before they met that morning at the scene of crime with a gun and robbed the PW1 of her money. I am satisfied to agree with the court below that the prosecution proved the offences of armed robbery and conspiracy against the appellant. I also agree that the offences were proved beyond reasonable doubt. Accordingly, I resolve this issue against the appellant. (P.....para.....)

8. *Prosecution not to prove its case with absolute certainty*
It needs be said that the prosecution is not expected to prove its case with absolute certainty as absolute certainty is the prerogative and preserve of the Eternal God and beyond the realm in any human adventure of which the administration of criminal justice is one of its components. (P.....para.....)
9. *What prosecution must do to discharge onus of proof in a charge of armed robbery*
It is with that in focus at all times that the onus placed on the prosecution merely admits a high degree of probability. To state it another way is to say that what the prosecution needs do to discharge the burden of proof for a charge of conspiracy and armed robbery was to show in keeping with Section 135 Evidence Act 2011 thus:- (a) There was a robbery or series of robberies, (b) The accused was one of the robbers or the robber (c) That the accused or one of the robbers was armed. See Per PETER-ODILI, J.S.C in Nomayo Vs. State (2018) LPELR-44729(SC). (P.....para.....)

Lead Judgement:

Representations

O. Ekisola (Esq.) for the appellant.

Dr. Olumide Ayeni (Esq.) Attorney General of Ogun State with Olusegun T, Olaotan (Esq.)- Director Legal Drafting, Attorney DPP, Adekunle Manowa, PSC, Mary Warribo (Miss) (pre legal practitioner) for respondent. 9

JOHN INYANG OKORO, JSC (Delivered the lead Judgment):

ALHAJI ABUBAKAR ABDULKADIR

Vs.

- 1. ALHAJI TUKUR MOHAMMED**
- 2. SAVANNAH BANK OF NIGERIA**
- 3. ATTORNEY GENERAL OF KADUNA STATE**
- 4. DIRECTOR-GENERAL BUREAU FOR
LANDS & SURVEY**

SC.50/2007

IN THE SUPREME COURT OF NIGERIA

HOLDEN AT ABUJA

FRIDAY, 3RD MAY, 2019

BEFORE THEIR LORDSHIPS

**OLABODE RHODES-VIVOUR
CHIMA CENTUS NWEZE
AMINA ADAMU AUGIE
EJEMBI EKO
PAUL ADAMU GALUMJE
SIDI DAUDA BAGE
UWANI MUSA ABBAJI**

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

APPEAL:- Brief writing – Reply brief – Nature and necessity – Whether should be restricted in replying new issues raised in the respondents brief.

APPEAL:- Respondents notice – Nature and purport – Whether meant to retain the judgment but have it varied on other grounds.

APPEAL:- Respondents notice – Where the judgment of the trial court is perverse – Whether an appellate court cannot affirm same on any other ground.

APPEAL:- Brief writing – Reply brief – Purpose thereof – Where repetitive of appellants argument and verbose – Whether not purpose of a reply brief.

CONVEYANCING:- Mortgage – Where a mortgagee has exercised his power of sale and sold the mortgage property – Whether the mortgagor has lost his equity of redemption.

CONVEYANCING:- Mortgage – Where a mortgagee has exercised his right of sale – Sale marked with irregularity contrary to auctioneers law – Whether irregularities cannot vitiate sale in the absence of fraud.

*CONVEYANCING:- Mortgage – Where a mortgagee has properly exercised his sale under a mortgage – Whether complaint of under value will not vitiate the sale – The principle in **Babatunde & Anor vs. Bank of the North Ltd & Ors (2011) LPELR-8249 SC.***

*CONVEYANCING:- Mortgage – Where a mortgagee properly exercised his right of sale under a mortgage – Whether a purchaser of the mortgage property is not a trespasser – The principle in **Babatunde & Anor vs. Bank of the North Ltd & Ors (2011) LPELR-8249 SC.***

*CONVEYANCING:- Mortgage – Where a mortgagor intends to redeem the mortgage property – Whether he must do equity by paying the mortgage sum – The principle in **Yaro Vs. Arewa Construction Ltd & Ors (2007) LPELR-3516 SC.***

CONVEYANCING:- Mortgage – Where a purchaser has bought a mortgaged property – Whether his title to the property cannot be impugned on the ground that no case has arisen authorizing the sale.

*CONVEYANCING:- Sale of mortgage property – Where sale of mortgage property is in violation of Section 19 of Auctioneers law – The principle in **Okonkwo Vs. Cooperative & Commerce Bank (Nig.)Plc & Ors (2003)8 NWLR (Pt. 822) at 347.***

*COURT:- Supreme Court – Where the court of appeal did not consider a preliminary objection on the ground that it was abandoned – Impropriety thereof – Whether Supreme Court should have the benefit of the opinion of an intermediate court in a point raised before it – The principle in **James Odunayo Vs. The State (1972) LPELR – 15509 SC.***

JUDICIAL PRECEDENT:- Previous decisions of Supreme Court – Whether Supreme Court will not depart from its previous decision unless it is shown that it is erroneous in law.

*LAND USE ACT:- Consent of Governor – Where parties enter into agreement to alienate – Whether such agreement is not invalidated by absent of Governor's consent – The principle in **Awojugbagbe Light Industries Ltd Vs. Chinukwe & Anor (1995).***

*LAND USE ACT:- Revocation of certificate of occupancy – Pre-requisites thereto – The principle in **Orianzi Vs. AG Rivers State & Ors (2017) LPELR-41737 SC.***

PRACTICE AND PROCEDURE:- Appeal – Preliminary objection – Purpose thereof – Whether aimed to terminate the appeal in limine and not directed against specific ground of appeal.

*PRACTICE AND PROCEDURE:- Appeal – Preliminary objection – Where a preliminary objection is incorporated in the respondent's brief – Whether failure of applicant to seek leave before moving the preliminary objection will not prevent court from considering same – The principle in **Maigoro Vs. Garba (1999) 10 NWLR (Pt. 624) 555.***

PRACTICE AND PROCEDURE:- Appeal – Preliminary objection thereto – Where a party argues his preliminary objection which was incorporated in his respondent brief with leave of court – Whether the preliminary objection is not deemed abandoned.

PRACTICE AND PROCEDURE:- Appeal – Preliminary objection – Procedure thereto – Where a respondent incorporates his preliminary objection in the respondents brief – Whether he is obliged to seek leave of court before arguing his preliminary objection.

PRACTICE AND PROCEDURE:- Appeal – Preliminary objection thereto – Where a respondents counsel fail to seek leave before arguing the preliminary objection in the respondents brief – Whether the said preliminary objection is deemed abandoned.

STATUTE:- Interpretation thereof – Approach thereto – Whether a statute must not be interpreted to defeat its purpose.

Issue for Determination

- 1. Whether the Court of Appeal was not in error when it failed to consider and adjudicate on the appellants preliminary objection against the 1st respondents ground of appeal in the court below and if resolved in the appellant's favour, whether the preliminary objection has merit? (Ground 2).**
- 2. Whether the court below was not in error when it held that the 1st respondents notice contending that the decision of the High Court be affirmed on other grounds was not properly before it and by so holding, whether the 1st respondent had not been denied of proper hearing and if resolved in the appellants favour, whether there was merit in the respondent's notice? (Ground 1,7, 8 & 9).**
- 3. Whether contrary to the decision of the court below, the plaintiff's equity of redemption was available and properly utilized since the mortgagor's title had not been extinguished or destroyed by the purported auction of the mortgaged property to the 1st respondent**

- herein? (Grounds 5 & 6).
4. Whether the court below was not in error when it held that the failure by the unpaid mortgagee to comply with all the conditions precedent set out in both the Auctioneers Law and the Land Use Act before purporting to sell off the disputed property did not vitiate the entire exercise? (Grounds 3 & 4)
 5. Whether the Court of Appeal was not in error when it failed to dismiss the appellant's appeal before it for lacking in merit? (Ground 10)

Facts of the Matter

The appellant as plaintiff at the trial court, sued the respondents (the then defendants) sometime in 1994 and sought for the following declaratory and injunctive reliefs as follows:

1. A declaration that the purported sale of the Plaintiffs property situate at No. 3 Kachia Road Shopping Centre, Kaduna South, Kaduna, covered by Certificate of Occupancy No.6500 carried out sometimes in June 1992 without the knowledge or consent of the plaintiff is unlawful, null and void, illegal contrary to existing Federal Legislations and contrary to the Deed of Legal Mortgage in that;
 - (a) The exercise of the power of sale is conditional upon compliance with mandatory processes of the Land Use Act.
 - (b) No consent was obtained until the 3rd of May 1994 after the plaintiff had liquidated the loan account which the property was tied.
 - (c) Even the consent obtained had been reversed by the Military Administrator of Kaduna State.
 - (d) Consequently at the time of the said transfer, the 1st defendant no longer had any right or title over the said property to transfer to the 2nd defendant.
2. A declaration that the said exercise of power of sale was vitiated by overt acts of bad faith and or fraud in that:
 - (a) The property was not sold for its market price
 - (b) No proper valuation was carried out so as to ascertain the true worth of the property
 - (c) No licensed auctioneer was appointed as required under the Auctioneers Law cap (sic) to carry out the auction.
3. A declaration that the Deed of Legal mortgage was void on account of the fact that at the inception of the transaction, there

- was no deposit of the Certificate of Occupancy.
4. A declaration that with the payment of the principal loan in the sum of N1.8m vide a cheque of N3.6m on 4/2/94 the property purportedly mortgaged stood released from the terms of the mortgage deed and the balance which consists of only interest elements can only be recovered through an action instituted in court.
 5. On account of declarations in 1, 2, 3 and 4 herein, an order setting aside the purported sale of the afore described property.
 6. A declaration that the 2nd defendant based on the foregoing and on the maxim NEMO DAT QUAD NON HABET did not and cannot acquire any title to the plaintiff's aforesaid property on the ground that steps leading to the purported sale was vitiated by the defendants breaches of statutory pre-conditions and the Deed of Legal Mortgage covering the property.
 7. A perpetual injunction restraining the Administrator of Kaduna State from cancelling or purporting to cancel the plaintiff's Certificate of Occupancy No. 6500 dated the 21st day of September 1978 or granting or purporting to grant a right of occupancy in the name of the 2nd defendant or in the name of any other person so long as the basis of the purported transfer is predicated on any purported transfer of title from 1st defendant to the 2nd defendant.
 8. An order of injunction restraining the 4th respondent acting in the name of the Administrator of Kaduna State from granting the 2nd respondent or purporting to grant him a right of occupancy over the said property and if already granted, an order setting aside the said grant.
 9. An order of injunction restraining the defendants particularly the 2nd defendant from taking possession of the afore described property or from using any court or tribunal to secure the said possession on ground that the 2nd defendant purported right is null and void in as much as it is based on any transaction between him and the 1st defendant or on the Deed of Legal Mortgage.

The 1st and 2nd respondents in their joint statement of defence denied the claims and counter-claimed as follows:

- a. The sum of N3,734,809.76k being outstanding balance in the plaintiff's account with the 1st defendant as at 27/9/96.
- b. Compound interest at the rate of 21% per annum from 27/9/96 to date of judgment and thereafter, interest to accrue at the rate of

10% until liquidation of the entire judgment debt.

- c. An order directing the plaintiff to return forthwith, the original copy of the Certificate of Occupancy No. 6500 to the 1st defendant.**

The facts are that the appellant at the trial court, who was a customer of the then Savannah Bank (The 2nd respondent herein) was granted credit facilities of N310,000 and tendered as security a C of O covering a landed property situate at No.3, Kachia Road, shopping complex, Kaduna South, Kaduna. Being unable to liquidate the loan, the bank advertised in a National Daily Newspaper "The Reporter" the sale of the mortgaged property by public auction fixed for 5/6/1992 and same was auctioned to the 1st respondent for N3. 7 after 2 days of the auction notice. After the auction sale, the 1st respondent applied for consent of assignment of title which was granted to him. However, in 1994, the appellant petitioned to the Military Administrator of Kaduna State in respect of the auction sale to the 1st respondent, who directed the 3rd respondent to postpone further action on the perfection of the assignment pending resolution. At the trial, the appellant called 2 witnesses to prove his claim while the 1st respondent called 2 witnesses while the 3rd and 4th respondents called a witness. The appellant got judgment at the trial court which was appealed by the 1st respondent. The lower Court of Appeal allowed the appeal and set aside the judgment of the trial court, hence the appeal to Supreme Court.

Held:*(Unanimously dismissing the appeal)*

1. *Where a reply brief is verbose and repetitive*

Briefs of argument filed by parties to an appeal are to assist the court in determining with precision and in a concise manner the real issues in controversy between the parties and to marshal their arguments and submissions in a way that makes it easy for the court to discharge this function, whereas reply briefs are for new issues arising from the respondent's briefs and arguments. Thus, where there are no new issues pumping up, a reply brief is not necessary. This therefore is impelling me to consider the reply briefs filed by the appellant to all the respondents' briefs having painstakingly read them through to discover that they are but rigmaroles around the same circumference of all the respondents' arguments without fishing out new issues or points of law. The appellant's learned senior counsel's 19-page reply brief dated 25/7/2016 and filed on 26/7/2016 to the 1st and 2nd respondents' briefs; and 15-page reply brief dated 28/9/2018 and deemed properly filed on 29/1/2019 to the 3rd and 4th respondents' joint brief are unnecessarily repetitive and verbose which is not the purpose of a reply brief. *(P.....para.....)*

2. *The nature and necessity of a reply brief*

A reply brief is necessary and usually filed when an issue of Law or argument

raised in the respondent's brief calls for a reply. Where a reply brief is necessary, it should be limited to answering new points arising from the respondent's brief. Although, an appellant's reply brief is not mandatory, where a respondent's brief raises issues or points of law not covered in the appellant's brief, an appellant ought to file a reply brief. It is not proper to use a reply brief to extend the scope of the appellant's brief or raise issues not dealt with in the respondent's brief. A reply brief is only necessary when an issue of law or argument in the respondent's brief calls for a reply. See Per RHODES-VIVOIR, J.S.C in CAMEROON AIRLINES Vs. OTUTUIZU (2011) LPELR-827(SC). The purpose of reply brief is to tackle new issues or argument raised in the respondents' brief of argument and not dealt with in the appellant's brief of argument otherwise a reply brief would be tantamount to a repetition of the appellant's main brief. In other words, it should not serve as a forum for reopening the appellant's case over again. And where it is coterminous in every respect with the appellant's main brief, it should be discountenanced. See Per Christopher Mitchell Chukwuma-Eneh, J.S.C .in YARO Vs. AREWA CONSTRUCTION LTD & ORS (2007) LPELR-3516(SC). Thus, this appeal shall therefore be considered discountenancing the appellants' 2 reply briefs. (P.....para.....)

3. *Procedure to be adopted by a party who incorporates a preliminary objection in his respondent's brief.*

It is without doubt that the appellant herein argued and incorporated his preliminary objection in his brief of argument and same was clearly adopted in the argument and "*urged the court to strike out the ground of appeal.*" The procedure of incorporating and arguing a preliminary objection in the respondent's brief of argument is now long settled, which is what the appellant's learned counsel herein had done at the lower court.

The simple issue nevertheless was whether he sought and obtained the leave of the lower court before the preliminary objection was moved and argued? The record is bereft of this and the learned counsel to all the respondents have seriously made this their issue. The lower Court of Appeal rightly also observed that the appellant herein did not seek nor obtain the *leave* of the lower court to argue and *move* its preliminary objection which caused and restrained it from considering the appellant's notice of appeal or grounds of appeal to be incompetent. The competence of the preliminary objection was thoroughly considered by the lower court of appeal at pages 490-496. The synopsis of what transpired is abundantly captured at page 496 of the last paragraph of the record of appeal. On 1/11/2006 when the appeal ripened for hearing, the appellant (the then 1st respondent) who incorporated the preliminary objection in his respondent's brief did not apply or seek the court's leave to move and argue same. It is on record at page 471-472 that the appellant

at the lower court argued the preliminary objection but the leave of the lower court was not sought. (P.....para.....)

4. *Effect of failure of counsel to seek leave before moving preliminary objection in his respondent's brief.*

Per Kekere-Ekun in REGISTERED TRUSTEES OF THE AIRLINE OPERATORS OF NIG Vs. NAMA (2014) LPELR- 22372(SC), held that the failure of learned counsel for the respondent to seek leave to move the objection at the hearing of the appeal, the objection was deemed to have been abandoned. The effect or consequence of a respondent to an appeal who has raised in his respondent's brief, a preliminary objection but who failed/neglected/refused to seek the leave of the court to move the objection before the hearing of the substantive appeal, is that the said preliminary objection, is deemed to have been abandoned and the Court will ignore or discountenance it. See Per OGBUAGU, JSC in A.G RIVERS STATE Vs. UDE & ORS (2006) LPELR- 626(SC). (P.....para.....)

Per Abba Aji (JSC)

Further, the preliminary objection was predicated on the fact that "some of the grounds have no relationship to the issue under which they have been argued." See page 12 of the 1st respondent's brief or paragraph 5 of page 420 of the record. Even if it was considered, it would not have disposed of the whole appeal which is the purpose of preliminary objection, since other grounds of the appeal would have saved and sustained the appeal. See NUT TARABA STATE & ORS Vs. HABU & ORS (2018) LPELR- 44057(SC). In the instant appeal, the appellant in his brief, particularly at paragraph 37 of page 20, reiterated that "some of the grounds have no relationship to the issue under which they have been argued." Although he was able to chronicle the errors from Ground 1 to 6, he nonetheless concluded at page 21 paragraph 38 of the brief that "From the foregoing, it is submitted that only Grounds 3 and 4 are in order and by extension issue 3 formulated therefrom. Your lordships are respectfully urged to strike out the other offending grounds and disregard arguments on issue Nos. 1 and 2 to which the said bad grounds are inescapably linked." It is thus true that some grounds of the appeal would have saved the appeal from being struck out in limine. The apposite step and procedure was a motion on notice and not preliminary objection. Same scenario came up in the case of NNPC Vs. FANFA OIL LTD. (2012) 5-7 MJSC, 1 at 29, wherein the Supreme Court per Rhodes-Vivour, JSC, had stated that preliminary objections are only filed against the hearing of an appeal and not against one or more grounds of appeal. If I may add to the above where as in this appeal the preliminary objection was filed against some grounds of appeal and there are other grounds of appeal that can sustain the appeal, a preliminary objection was inappropriate. The respondent ought to

have filed a motion on notice since the preliminary objection if successful would not have terminated the hearing of the appeal as there were other grounds of appeal to sustain the appeal.

The preliminary objection therefore has no merit at all but manifestly frivolous. This issue is resolved against the appellant.

Apparently on the record, there was the consideration of the motion/application to file the respondent's notice out of time which is always grantable at the discretion of the court. This application was dated 3/6/2005 contained at pages 370-376, which application graciously sailed through and was granted by the lower court in its ruling per Kereke-Ekun contained at pages 379-390. Although she delved and combed into the reason for filing a respondent's notice, it was a ruling like any other application for extension of time that reasons must be manifestly given why the discretion of the court must be exercised in favour of the applicant for coming out of the stipulated time for filing his motion. Indeed, the proceedings of 21/11/2005 was for a consideration of whether the appellant as 1st respondent made out a case for the grant of extension of time to file the respondent's notice and had nothing to do with the merit and competence of a respondent's notice. In fact, this was the dictum of the lower court at page 388 lines 5-15 of the record. I must wonder therefore why the appellant's learned counsel has belaboured the obvious at page 23 of his brief in paragraph 41 that *"the same division of the Court of Appeal has given conflicting positions in the same matter by way of considered decisions."* This is a misleading brouhaha. A counsel must not pull the wool in the eyes of the court at all cost in order to get judgment in his favour. It follows therefore that the fact that the application to file the 1st respondent's notice was discretionally granted the appellant at the lower court does not arm him to seek for another mile's walk from the lower court. This is not always the case in law. This was reiterated by this court in BUHARI Vs. INEC (2008) 19 NWLR (Pt.1120) 246 at 382 E-H, wherein it was decided amongst others that granting leave to file a process or motion out of time does not translate to granting the reliefs sought. (P.....para.....)

5. *Appellant could not properly urge that the judgment be sustained on other grounds*
I must again reiterate that a counsel must not think that every process he files must be accepted gullibly and sheepishly by the court.

On the ground of gross undervalue of the sale of the auctioned property, the lower Court of Appeal at pages 486-488, particularly from the 3rd paragraph and pages 531-534 thoroughly considered that ground of the notice to contend. In giving preference to Exhibit 29 as against Exhibit 26, the lower Court of Appeal at pages 531-541 elaborately sifted and strained the points why there was no such element of gross undervalue in the auction of the disputed property to the 1st respondent at the price of N3.7m. In fact, prior offers made to the

appellant were within the range of the auctioned price. Furthermore, the appellant was given the leverage and liberty to look for buyers himself and ample choices with regard to the liquidation of his indebtedness but failed to utilize them. How then can he complain to contend the judgment of the trial court on other grounds other than what the trial court came out with? (P.....para.....)

6. *Appellant never protested against the principal loan or interest*

On the 2nd leg of the ground of notice to contend based on the purported sale of the property itself as a breach of the fundamental covenants of the mortgage agreement Exhibit '1' in that the sum of money claimed upon which the property was purportedly sold was false and a misrepresentation of the indebtedness of the 1st respondent's debt, the appellant also contended that it should be affirmed on other grounds other than that given or affirmed by the trial court. This ground was also profoundly dilated on by the lower court at pages 534-538 of the record.

Thus, there was abundant evidence and facts to prove that the debt, either the principal or interest was admitted by the various acts and dealings of the appellant with the 2nd respondent. May I borrow the abstract of the lower court to demonstrate this when in the 2nd paragraph of page 538 from line 7 of the record, it highlighted thus:

It is pertinent to note that in all these exchanges of correspondences, there was no time the 1st respondent protested to the amount outstanding against him which covered both the principal loan and the accrued (sic) interest, he being an experienced and professional banker. DW1, in his testimony in court stated at that time up to February 1991, he did not repay the loan while interests continued to accrue on the principal sum to the tune of N5,075,345.14..."

This clearly shows that the appellant was only economical with the truth and facts of the case and would want another reason or ground other than what was factual to be affirmed or varied, which cannot be so in law. This was the observation and consideration of the lower court at pages 484 - 488, 531-543 of the record. The appellant as the 1st respondent wanted the lower court to consider other grounds in addition to the reasons and grounds advanced by the trial court for its judgment, which was rejected by the lower court. (P....para.....)

7. *The nature and purport of respondents' notice*

Notice to contend is not an opportunity or forum of eating your cake and at the

same time having it! You cannot seek to maintain the grounds and reasons of the trial court and still want other grounds and reasons for the judgment to be retained.

In a respondents' notice, a party seeks to retain the judgment appealed from but at the same time wants it varied. See Per MOHAMMED, J.S.C in EZE & ORS Vs. OBIEFUNA & ORS, (1995) LPELR-1191(SC). It is a means for fine-tuning a victory and not to destroy it. A respondent's notice is only available to vary and retain the judgment and not to reverse same. The appellant was only trying to reverse the judgment of the trial court by a misrepresentation of facts and circumstances. The lower court was right and I affirm same when it held at page 542 in the 2nd paragraph thus:

" ... for the reasons I gave above, I have not seen any valid and cogent reasons given in the Notice as would enable me affirm the decision of lower court "other than those given by it" I refuse to act on the notice for it is devoid of any merit... " (P.....para.....)

8. *Where respondents notice cannot be sustained*

Where in fact the judgment of a court is perverse, substantially and gravely without merit as in the present case, where the trial court goofed in the appreciation, comprehension and evaluation of the facts and the law, to affirm the judgment and vary it with some other grounds or reasons given by the trial court will be antithetical' and' anachronistic' to justice, for a wrong and faulty foundation cannot give a sound and strong house. Therefore, there cannot be merit in the respondent's notice. (P.....para.....)

Per Abba Aji (JSC)

By the pleadings and evidence before me, it is true that before the auction sale, there were several correspondences between the appellant and the 2nd respondent before the auction of the disputed property to the 1st respondent in order to reach an amicable settlement. By Exhibit 12, the appellant implored for extension of time for the sale of the mortgaged property to the end of March, 1992 and the 2nd respondent acceded to the request even up to the 30/4/1992 vide a letter admitted as Exhibit 15. See pages 203 and 206 respectively of the record. At page 203 of Exhibit 12, the appellant offered that "I want to retain my building in whatever way I can, hence my decision to sell off all my shares elsewhere and pay you off.. I will therefore, find a buyer with a much more serious offer instantly. This is my other alternative." In reminding the appellant that the repayment of the loan took about 10 years, the 2nd respondent agreed to the request of the appellant and extended time for him. It is further in evidence that by Exhibits 2, 8, 10, 11, 12, 13, 14 15, 19 and 20, abundant and sufficient correspondences were exchanged between the parties with respect to the

settlement of the indebtedness of the appellant. Also, by Exhibits 11 and 14 at pages 202 and 205 respectively, there was the notice by the 2nd respondent to the appellant of selling off the property if the loan was not liquidated by 29/2/1992, which was duly acknowledged and appreciated by the appellant. All these prior notices and awareness to foreclose the equity of redemption of the appellant are clear and speak volumes against him. Additionally, the appellant himself admitted in evidence at page 42 line 14 of the record that "*as at December 1992, the payment I made was not sufficient to liquidate debt*". (P.....para.....)

9. *A mortgagor coming into equity to redeem must do equity*

It is the law that a mortgagor coming into equity to redeem must do equity and pay the principal interest and cost before he can recover the property which at law is not his. See Per CHRISTOPHER MITCHELL CHUKWUMA-ENEH, J.S.C in YARO Vs. AREWA CONSTRUCTION LTD & ORS (2007) LPELR-3516(SC). He further strongly stated the law thus:

"Relief (b) cannot be granted unless and until the mortgage debt is repaid to the last kobo; or the 2nd respondent (the mortgagee) has consented to granting of such order. There is no such consent here. The cases of Barclays Bank of Nig Ltd. Vs. Ashiru (supra) and Bank of New South Wales Vs. O'Connor (supra) have held that courts cannot compel a mortgagee to part with his security unless he has received his money which is not the case in this matter. This is so, even though, as a general rule, the mortgagor and all persons having any interests in the equity of redemption as the appellant here are entitled to redeem the mortgage." (P.....para.....)

10. *A purchaser who pays for a mortgaged property is not a trespasser*

Again, there is the "notice of sale of immovable property" contained at page 210 pasted at the premises of the mortgaged property, with the newspaper publication at page 211 of the record. This clearly shows that the appellant was about to lose his equity of redemption and to invoke the power of sale exercisable by the 2nd respondent. Yet, the appellant did nothing to redeem his property until after it was sold to the 1st respondent that he started crying foul without any evidence to support it. The law here is very handicapped to him and cannot come to his aid. He has nothing in fact to do with the 1st respondent in this case. This was emphasized by Per ADEKEYE, J.S.C in BABATUNDE & ANOR Vs. BANK OF THE NORTH LTD & ORS (2011) LPELR-8249(SC), wherein he held that:

"Before a mortgagee can pass a good title to a purchaser free from the equity of redemption- the right to exercise the power of

sale under a mortgage must have arisen, the mortgage debt must have fallen due. Any purchaser who bought a property sold by a legal mortgagee in exercise of his power of sale under a mortgage upon a default in repayment of a loan by the mortgagor is not a trespasser. Hence, once the precondition of notice of sale is given to the mortgagor by the mortgagee or his agent, preceded by a notice of demand of repayment of money lent to the mortgagor and the mortgagee proceeds to sell in good faith subsequent purchaser in good faith gets a good title and a court will not intervene in the sale only because the sale did not meet with the satisfaction of the mortgagor. " (P.....para.....)

11. *Complaint of undervalue alone is not enough to vitiate mortgagee's power of sale*
The 2nd respondent's power of sale having arisen, the appellant cannot longer have the equity of redemption especially after the property has been sold off to a 3rd party without collusion or fraud. In fact, the 2nd respondent is not a trustee of the appellant in respect of the power of sale once that power has arisen and become exercisable. Thus, the allegation of fraud or collusion will always not favour the complainant. This was again observed by his lordship, ADEKEYE, J.S.C in BABATUNDE & ANOR Vs. BANK OF THE NORTH LTD & ORS (2011) LPELR- 8249(SC), thus:

"... Complaint of undervalue alone is not enough to vitiate the exercise of a mortgagee's power of sale. It must be shown that the sale was made at a fraudulent or gross undervalue. If a mortgagee exercises his power of sale bona fide for the purpose of realizing his debt and without collusion with the purchaser, the court will not interfere even though the sale be very disadvantageous to the mortgagor, unless the price is so low as in itself to be evidence of fraud. The court will always be on the lookout that mortgagee acts bona fide and observes reasonable precautions to obtain not the best price but a proper price, A.C.B. Ltd. Vs. Ihekwoaba (2003) 16 NWLR (Pt. 846) pg. 249. Ekaeteh Vs. Nigeria' Housing Development Society Ltd. (1973) 6 S.C 183 Rafukka Vs. Kurfi (1996) 6 NWLR (pt. 453) 235. "

It is in evidence, proved and pleaded by the respondents especially the 2nd respondent that the sale was done in good faith and without collusion. In fact, the allegation of fraud or collusion and under value price was never proved against the 2nd respondent. In the 4th paragraph of page 42 from line 12 of the record, PW1 during his cross-examination revealed inter alia that " ... the property had been sold. The property sold to 2nd defendant. I made effort to get in

touch of (sic) the 2nd defendant through one Ahmed Tijjani Abdulkadir. As at December 1992, the payment I made was not sufficient to liquidate debt." It is clear and apparent that the property and title have passed into the hands of the 1st respondent that the appellant is now gallivanting about for legal backup. He ought to have protected his right before the sale of the mortgaged property and not after it has gone into the hands of an innocent purchaser for value without any notice of encumbrances, which in this case there were none. This was similarly restated by per ADEKEYE, J.S.C in **BABATUNDE & ANOR Vs. BANK OF THE NORTH LTD & ORS (2011) LPELR-8249(SC)**, when he warned:

"The only obligation incumbent on a mortgagee in the exercise of his power of sale is that he should act in good faith. Whether selling under an express agreement as in this case in accordance with Clause 3(b) of the Deeds of Legal Mortgage made on 26/10/76 and 18/9/78 or statutory power, he may generally conduct the sale in such manner as he may think most conducive to his own benefit unless the deed contains any restrictions as to the mode of exercising the power, provided he acts bona fide and observes reasonable precautions to obtain not the "best price" but "a proper price". Undervalue alone is not enough to vitiate the exercise of a mortgagee's power of sale, it must be shown that the sale was made at a fraudulent or gross undervalue. A.C.B. Ltd. Vs. Ihekwoaba (2003) 16 NWLR (pt. 846) pg. 249. Ekaeteh Vs. Nigeria Housing Development Society Ltd. (1973) 6 SC 183. Rafukka Vs. Kurfi (1996) 6 NWLR (pt. 453) pg. 235. "
(P.....para.....)

12. *When the appellant lost equity of redemption*
As at 5/6/1992 when the mortgaged property was auctioned, the appellant remained indebted to the Bank and therefore lost the equity of redemption in the property immediately it was sold to the 1st respondent. Having held that the purported auction sale was not invalid, the appellant cannot and would not have retained any equity of redemption after the auction sale. Even if the Governor's consent was not obtained, there was ample evidence that the mortgage deed was executed between the parties. See AWOJUGBABGE LIGHT INDUSTRIES LTD Vs. CHINUKWU (1993) 1 NWLR (Pt.270) 609.
(P.....para.....)
13. *There was consent given by Military administrator*
Besides, by the pleadings of the 3rd and 4th respondents at the trial court particularly in page 21 in paragraph 8(d) of their joint statement of defence, they affirmed and averred that:

- (d) The 4th defendant relying on the application and upon fulfillment of both the 1st and 2nd defendants of its condition for the transfer gave its consent for the assignment per its letter to the 2nd defendant No. NCL/3371/64 of 3/5/94, which the Military Administration subsequently ordered to be suspended pending the resolution of all the issues raised in the plaintiffs letter of protest.

Expressly and by implication, there was therefore consent given by the Military Administration for the transfer of title in the mortgaged property in favour of the 1st respondent. At page 285 of the record, the letter or approval for consent reads: APPROVAL OF MORTGAGE ASSIGNMENT OF RIGHT OF OCCUPANCY NO.....NO. 6500 TO THE ALHAJI MUH. TUKUR ... The appellant shot himself at the foot when in admission to this averred at page 6 of the record in paragraph 24(d) of its amended statement of claim that:

- (e) It is averred that the Military Administrator of Kaduna State (who is the appropriate authority to grant and issue consent under the land Use Act except when he delegates) by a letter dated the 11th of May, 1994 directed the 4th defendant to withhold the grant of consent in this matter, which act has the following implications ...

This then means that consent was given but is only being withheld. Also at page 8 paragraph 31 (1) (C), he admitted that the consent was obtained and given but later reversed thus:

- (c) Even the consent obtained had been reversed by the Military Administrator of Keduna State.

In the above excerpt, it is clear that the approval given and issued at page 285 of the record was not revoked nor cancelled, thus the grant of the said consent subsists and is valid. (*P.....para.....*)

14. *Conditions for the revocation of a valid certificate of occupancy*
Assuming the said letter dated 11/5/1994 amounted to revocation of the Right of Occupancy inuring in favour of the appellant and against the 1st respondent, can it be said to be valid in law? Per EKO, J.S.C in *ORIANZI Vs. AG RIVERS STATE & ORS* (2017) LPELR-41737(SC), laid down the conditions for a valid revocation of Right of Occupancy *infra*:

The 1st respondent (as the 1st defendant) neither pleaded nor proved the facts establishing the prerequisites for proper revocation of the plaintiff/appellant's title under Sections 28 and 44 of the Land Use Act. The relevant provisions of Sections 28 and 44 of the Land Use Act are herein below reproduced, that is - 28(1) It shall be lawful for the Governor to revoke a right of occupancy for overriding public interest. (2) Overriding public interest in the case of a Statutory Right of Occupancy means - (a) - (b) the requirement of the land by the Government of the State or by a Local Government in the State, or the requirement of the land by the Government of the Federation for public purposes. (c) - (4) The Governor shall revoke a right of Occupancy in the event of the issue of a notice by or behalf of the President if such notice declares such land to be required by the Government for public purposes. (5) - (6) The revocation of a right of Occupancy shall be signified under the hand of a public officers duly authorized in that behalf by the Governor and notice thereof shall be given to the holder. 44. Any notice required by this Act to be served on any person shall be effectively served on him - (a) by delivering it to the person on whom it is to be served; or (b) by leaving it at the usual or last known place of abode of that person; or (c) by sending it in a prepaid registered letter addressed to that person at his usual or last known place of abode... The issuance of the mandatory or statutory notices under Sections 28 and 44 of the Land Use Act being conditions precedent for proper revocation of a Right of Occupancy in or over a landed property, and the revocation of the said Right of Occupancy are matters of fact which must be proved by the party asserting the revocation of a Right of Occupancy. The 1st respondent herein as the 1st defendant at the trial in his amended statement of defence, acknowledged that the plaintiff/appellant had a Right of Occupancy over the disputed property which was revoked. This fact is pleaded in paragraph 6 of his amended statement of defence, copied at pages 46 - 49 of the records, thus - 6. Paragraph 15 of the statement of claim is denied and in furtherance (sic) the 1st defendant shall contend at the trial that the plaintiff's Right of Occupancy having been revoked by the Military Governor, it was up to the plaintiff to make claims for compensation ... Revocation of the Right of Occupancy or title to landed property is not just a mere executive or administrative act that can be done in secret or in any surreptitious manner and later conveyed in official Government gazette. The title holder is not only entitled to the notice of the

proposed revocation with the public purpose for the revocation clearly spelt out therein, he is also entitled to be heard on the proposed revocation of his title. My firm view, on this, is that reading Sections 28 and 44 of the Land Use Act together with Section 36(1) of the Constitution the Governor when it behoves him to revoke any Right of Occupancy in or over any landed property has a duty to act quasi-judicially and in transparent manner. .. The revocation of a right of occupancy shall be signified under the hand of a public officer duly authorized in that behalf by the Governor and notice thereof shall be given to the holder ... Accordingly, whoever relies on the fact of the revocation of the plaintiff/appellant's Right of Occupancy must not only plead that fact of the revocation but must also lead evidence thereof to establish that the purported revocation of the Right of occupancy of the plaintiff/appellant was valid in law and existent in fact.

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

15. *Absence of governor's consent does not invalidate agreement to alienates*
Furthermore, the 4th respondent, through the Surveyor General issued a memo at page 289 of the record invalidating the old certificate of occupancy formally in the name of the appellant and re-issuance of a new certificate of occupancy in favour of the 1st respondent. Moreover, it is clear that the legal mortgage had been created between the appellant and the 2nd respondent over the property and that the auction sale was conducted which passed the title of the property to the 1st respondent as bona fide purchaser for value without notice, can then lack of consent or absence of it vitiate and invalidate the transaction? This caused his lordship, Per ANTHONY IKECHUKWU IGUH, J.S.C in AWOJUGBAGBE LIGHT INDUSTRIES LTD Vs. CHINUKWE & ANOR (1993) LPELR- 650(SC), to distil and clarify the matter thus:

"I am therefore of the firm view that Section 22(1) of the Land Use Act prohibits the alienation of a right of occupancy without the consent of the governor first had and obtained but does not prohibit agreement to alienate or in respect of terms and conditions for the purpose of effecting such alienation if and when the Governor gives his consent to the transaction in issue."

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

16. *He who comes to equity must do equity*
As to whether the non-compliance to the Auctioneers Law and the Land Use Act vitiated the sale to the 1st respondent, the law is settled on this. Moreover, the

circumstances playing out in this case cannot by any stretch of imagination favour the appellant. The appellant was not caught unawares by the sale of his property after he could not redeem same. There were correspondences and notices which he took for granted and to his disadvantage. In what way can he say he was unfairly treated? He who comes to equity must do equity. Having not paid and settled his debt, and with all the entreaties and caresses of the 2nd respondent on him, how was he shut out in the whole game and scenario? Although the sale was effected 2 days after the 7 days notice, no injustice was wrought on him. Thus, except the sale is tainted with fraud and collusion, which is absent herein, irregularity in an auction sale contrary to the provision of the Auctioneers Law and Land Use Act cannot vitiate the sale. See **OKONKWO Vs. CCB NIG. PLC (2003) 8 NWLR (Pt.822) at 347, A.C.B LTD Vs. IHEKWOABA & ORS (2003) 16 NWLR (Pt.846) at 249, IBIYEYE Vs. FOJULE (2006) 3 NWLR (Pt.968) at 640**. The lower court was therefore right to set aside the judgment of the trial court since the 1st respondent had validly acquired bona fide title to the auctioned property without notice of any fraud or collusion and to grant the relief sought by the respondents especially the 1st respondent. (P.....para.....)

17. *When Supreme Court will depart from its previous decision*
The call to depart from the decision in IBIYEYE Vs. FOJULE (2006) 2 SCNJ 1 will spell anarchy in judicial precedents and the world of justice. It must be noted that all the decisions and case laws in respect of sections 19, 20 and 21 of the Auctioneers Law concerning 7 days' notice and Section 44 of the Land Use Act are congruently congruous and mutually supportive and strongly advocate substantial justice. See OKONKWO Vs. CCB NIG. PLC (2003) 8 NWLR (Pt.822) at 347, A.C.B LTD Vs. IHEKWOABA & ORS (2003) 16 NWLR (Pt.846) at 249, IBIYEYE Vs. FOJULE (2006) 3 NWLR (Pt.968) at 640. Since there is no conflict there in them, the call for departure cannot be made. The Supreme Court may depart from its previous decisions where it is shown or demonstrated that the earlier decisions are either erroneous in law; reached per incuriam or occasioning a miscarriage of justice. See Per BAGE, J.S.C in SHEMA & ORS Vs. FRN (2018) LPELR-43723(SC). (P.....para.....)
18. *Auction sale was valid despite no compliance with auctioneers law*
The right and privilege here is not to the mortgagor or the appellant in the instant appeal but to the purchasers or the public to have adequate time to purchase the mortgaged property. The mortgagor herein (the appellant) by the records and evidence had sufficient and adequate notice of the auction sale, prior offer at N4m, even with extension of time but did not utilize it. By the dictum of Uwaifo, JSC in OKONKWO Vs. COOPERATIVE & COMMERCE BANK (NIG) PLC & ORS (2003) LPELR-2484(SC), the auction sale was valid

despite the non-compliance with the Auctioneers Law or Section 44 of the Land Use Act. It is an irregularity remediable to the mortgagor/appellant in damages. Per Uwaifo, JSC in OKONKWO Vs. COOPERATIVE & COMMERCE BANK (NIG) PLC & ORS (supra) gave the rationale and intent behind the non-compliance with the Auctioneers Law or Section 44 of the Land Use Act. Furthermore, this will go contrary to the provision in Section 21(1) of the conveyancing Act, 1988. Per OGUNDARE, J.S.C in ACB LTD & ORS Vs. IHEKWOABA & ORS (2003) LPELR-203(SC) expounded it thus:

“By virtue of Section 21(1) of the Conveyancing Act 1881 which is a statute of general application applicable in Imo State at all time relevant to this case, his title to the property cannot be defeated by the irregularity in the auction sale of 3/6/87. Section 21(1) provides: "Where a conveyance is made in professed exercise of the power of sale conferred by this Act the title of the purchaser shall not be impunged on the ground that no case has arisen to authorize the sale, or that due notice was not given or that the power was otherwise improperly or irregularly exercised, but any person damnified by an unauthorized or improper or irregular exercise of the power shall have his remedy in damages against the person exercising the powers." (P.....para.....)

Per Abba Aji (JSC)

From the findings of the learned trial judge the 3rd appellant is obviously a bona fide purchaser for value without notice of the irregularity of non-compliance of Section 19 by the 2nd appellant. As the property in question has been duly granted to the 3rd appellant following the auction sale and in accordance with the provisions of the Land Use Act, his title to the property remains valid. See Sanusi Vs. Daniel (1956) SCNLR 288 at 291; (1956) 1 NSCC; 85 at 88, (1956) 1 FSC 93 at 95 where Jibowu Ag. FCJ as he then was, said: "The appellant's complaint is against an irregular exercise of the power of sale on the ground that there was a contravention of Section 19(1) of the Sales by Auction Ordinance. It seems to me that the title of the 2nd respondent cannot be impunged since the property was conveyed to him and that the appellant's remedy is in damages against the 1st respondent as provided by Section 21(2) of the Conveyancing Act, 1881. Both the Supreme Court of Nigeria and the West African Court of Appeal came to the same conclusion in Momodu Raji Vs. M. Williams & Ors. 16 NLR 149 above referred to, and with the views expressed in the case by their Lordships I respectfully agree." See also Andrew N. Okonkwo Vs. Co-operative & Commerce Bank Nig. Plc & Ors. SC. 58/1998 delivered on 28/2/2003 per Uwaifo, JSC.” (P.....para.....)

19. *A statute must not be interpreted to defeat its purpose*
It is now firmly settled that in the interpretation of a statute, where its interpretation will result in defeating its object, the court would not lend its weight to such an interpretation. The language of the statute must not be stretched to defeat the aim of the statute. In other words, the interpretation which appears to defeat the intention of the legislature should be bye-passed in favour of that which would further the object of the Act. See Per OGBUAGU, J.S.C in ONOCHIE & ORS Vs. ODOGWU & ORS (2006) LPELR-2689(SC). This is the interpretation this honourable court chose in OKONKWO Vs. CCB NIG. PLC (2003) 8 NWLR (Pt.822) at 347, A.C.B LTD Vs. IHEKWOABA & ORS (2003) 16 NWLR (Pt.846) at 249, IBIYEYE Vs. FOJULE (2006) 3 NWLR (Pt.968) at 640, in deference to sections 19, 20 and 21 of the Auctioneers Law and 44 of the Land Use Act since they will be antithetical to justice and work injustice to a bona fide purchaser for value without notice. (*P.....para.....*)
20. *Effect of an auction sale which violates provisions of the auctioneers law*
These were further considered by Per SAMSON ODEMWINGIE UWAIFO, J.S.C in OKONKWO Vs. COOPERATIVE & COMMERCE BANK (NIG) PLC & ORS (supra), when he justified it thus:

“The only serious issues to be considered in this appeal are: (1) whether Section 19 of the Auctioneers Law, Cap. 12, Laws of Eastern Nigeria, 1961 applicable in Abia State was waived by the appellant by operation of clause 8 of Exhibit B; (2) whether such a statutory provision can be waived; (3) what is the effect of non-compliance with the provision. The provision of Section 19 reads thus: "No sale by auction of any land shall take place until after at least seven days' public notice thereof made at the principal town of the district in which the land is situated and also at the place of the intended sale. The notice shall be made not only by printed or written documents, but also by beat of drum or such other method intelligible to uneducated persons as may be prescribed as the divisional officer of the district where such sale is to take place may direct, and shall state the name and place of residence of the seller. " Although some aspects of this provision have become anachronistic owing to socio-political changes, it cannot be denied that the purpose of the provision is for the mortgagee to give adequate notice to the public of the proposed sale. It is not a notice intended to be given to the mortgagor. This is to ensure that a true public auction, where everyone interested in the property may have the opportunity to bid for it, is conducted for a fair deal,

devoid of unconscionable bargain through connivance or collusion. This is not a notice which can be waived by the mortgagor. Actually, it does not lie with him to do so as it is not meant for him. The court below was therefore in error to have held that the waiver contained in clause 8 of Exhibit B extended to Section 19. There is absolutely no connection between the two. The former is a waiver of a private right of the mortgagor. The latter is to ensure that the auction, to borrow the words of Lord Mansfield in *Bexwell Vs. Christie (1776)* 1. Comp. 395 at 396; 98 E.R. 1150, is not "a fraud upon the sale, and upon the public."

Per NIKI TOBI, J.S.C in the above case also justified the rationale behind the interpretation given above thus:

"The law of sale by auction or auction sale protects the purchaser and that is the basis of the principle of law that a mortgagor's right essentially is in damages. The law has an important qualification and it is that the purchaser must have bought the mortgaged property in good faith, that is bona fide and not in bad faith, that is, mala fide. The sympathies of the law on the purchaser will vanish the moment the court comes to the conclusion that the purchaser bought the property in bad faith. Bad faith on the part of the purchaser is a matter of fact to be deduced from the totality of the purchasing or buying conduct of the purchaser. Bad faith taints or better still, destroys a mortgage sale and therefore the property in the sale. While I agree that the principle of law of caveat emptor will apply in respect of sale of mortgage property to a bona fide purchaser, the purchaser has a legal duty to prove that he bought the property bona fide and without any element of bad faith. Where the court finds evidence of bad faith then, it is entitled to read mala fide into the transaction and that will be against the purchaser. There is yet another aspect. While I entirely agree with the position of the law that irregularities arising from the sale by way of lack of giving statutory notice to the plaintiff and sale of the property at a low price per se, may not vitiate sale of a mortgaged property, I think, and I feel very strongly that in order to enable the purchaser have the property for keeps, property must pass in the sale from the mortgagee to the purchaser. In other words, where in law property does not pass to the purchaser, what he has bought is a nullity ab initio. In such a situation or circumstance, a purchaser cannot be heard to rest his defence on good faith on his part. The defence of good faith in my humble opinion, will arise only when

- property can in law pass to the purchaser." (P.....para.....)**
21. *A preliminary objection is directed against the hearing of the appeal*
The objection argued at pages 420 & 421 was directed only against grounds I, 2, 5 & 6 of the grounds of appeal. By its nature a preliminary objection is directed against "the hearing of the appeal"; and not against some specified grounds of appeal where other valid grounds of appeal could sustain the appeal. In other words, the purpose of a preliminary objection is the contention that the appeal is incompetent or fundamentally defective; and if it succeeds, it puts an end in limine to the appeal: NEPA Vs. ANGO (2001) 15 NWLR (Pt. 737) 627; NDIGWE Vs. NWUDE (1999) 11 NWLR (pt. 626) 314.
A complaint that some of, and not all, the grounds are defective is not a preliminary objection to the hearing of the appeal. A respondent who intends to object to the competence of any ground of appeal must do so by motion on notice, and not by notice of preliminary objection.
The procedure the appellant adopted at pages 420 of the records whereby he attacked the competence of grounds 1, 2, 5 & 6 without filing motion on notice to specifically challenge those specific 4 grounds of appeal, was unavailing. (P.....para.....)
22. *Effect where a preliminary objection was moved without leave of court*
The lower court at pages 495 - 496 of the record the lower court discountenanced the preliminary objection on the ground that the learned counsel for the 1st respondent (now the appellant) "did not apply or seek leave of this court to move his preliminary objection which he merely incorporated in his brief of argument, before the hearing of the appeal." It was on this ground that the lower court took the stance that "his failure to do so would tantamount to (the) court deeming his preliminary objection to have been abandoned." (P.....para.....)
23. *Supreme Court should have the benefit of the opinion of an intermediate court in a point raised before it.*
I should think that the approach of the lower court as recorded at pages 495 - 496 of the record was rather too technical, as opposed to the current trend of doing substantial justice. For whatever the preliminary objection was worth the lower court, being an intermediate court, ought to have considered the preliminary objection, including its competence, even if it had come to the conclusion that it had been abandoned as it was urged to do by the appellant's counsel. By so doing the apex court would be given an opportunity, in its supervisory jurisdiction, to decide whether or not its decision to discountenance or strike it out for abandonment was correct or wrong. Doing so would have been in accordance with the admonitive view of SOWEMIMO, JSC in JAMES ODUNAYO Vs. THE STATE (1972) LPELR - 15509 (SC) at

page 8 -

There must be, and there are a number of cases where it is most desirable, especially in the case of an intermediate Court of Appeal, that the final Court of Appeal, which is the Supreme Court, should have the benefit of the opinion of that court on points raised before it, should it come up for further consideration by this court.

Since this dictum subsequent dicta of the Supreme Court seem now to have obligated the Court of Appeal, as an intermediate court, to "pronounce on all issues" raised before it: XTOUDOS SERVICE NIG. LTD. Vs. TAISEI W.A. LTD (2006) WRN 46 at 37; ADEGBUYI Vs. APC & ORS. (2014) LPELR - 24214 (SC) at 14; BRAWL SHIPPING (NIG) LTD Vs. F. I. ONWADIKE CO. LTD & ANOR. (2000) LPELR - 802 (SC); EDEM Vs. CANON BALLS LTD (2005) 6 SC (pt. II) 16; OSAREREN Vs. FRN (2018) LPELR - 43839 (SC). (P.....para.....)

24. *Failure to seek leave to argue a preliminary objection is fatal*
In MAIGORO Vs. GARBA (1999) 10 NWLR (pt. 624) 555 this court seems to have adopted a stance that once the respondent incorporated in his brief preliminary objection and arguments thereon which brief at the hearing of the appeal he adopted; the fact that he did not seek leave to move the preliminary objection by adopting the arguments on it, as are contained in his brief, will not derogate from the duty of the court to give consideration to the preliminary objection on its merits. Achike JSC spoke on this at pages 571 - 572 of the report thus:

Since the essence of a preliminary objection is to bring the objection to the appellant's notice before the appeal takes off, once such notice of objection is incorporated in the respondent's brief the appellant cannot be heard to deny being aware of the notice merely because it did not strictly conform with the specific procedural rule of court. That will be taking refuge under technical rule of procedure. Suffice to say that the courts for a long time have shifted emphasis from undue reliance on technicalities to doing substantial justice to the parties, having regard to the circumstances of the case.

The learned jurist then added that the "respondent's failure to comply with the procedural provisions under (the rules) will not derogate from the duty of (the) court to give consideration to the preliminary on its merit". Ejiwunmi, JSC at page 570 of the report had earlier spoken in the same refrain. I am therefore

emboldened to say that the lower court, at pages 495 - 496 of the Record, was in error when it declared that the appellant, as the 1st respondent, had abandoned his preliminary objection, notwithstanding that his senior counsel had at 472 of the record, in adopting the 1st respondent's brief, drew attention to the preliminary objection therein and had urged "the court to strike out the (offensive) grounds of appeal." (P.....para.....)

25. **Objections should not have been brought by way of notice of preliminary objection I had earlier stated that the preliminary objection argued by the appellant, as the 1st respondent, was unavailing, since the 4 grounds of appeal challenged could not have terminated the appeal in limine. The objection thereto should not have been brought by way of notice of preliminary objection but by way of motion on notice. Upon my perusal of the appellant's brief, it is my considered view that the appellant has failed to show in this appeal in what manner he suffered any miscarriage of justice by the failure of the lower court to consider his preliminary objection. (P.....para.....)**
26. *The appellant was not denied fair hearing*
The complaint under issue 2 revolves round the 1st respondent/appellant's notice to contend at the lower court that the judgment of the trial court be affirmed on grounds other than the grounds the judgment was predicated on. The lower court notwithstanding its reasoning that the notice was improper still considered it on the merits and thereafter dismissed it. By this, the issue is no longer that the appellant, on the notice to contend, was denied fair hearing. He was not. (P.....para.....)

Per Galumje (JSC)

The appellant who was unable to liquidate the facilities extended to him by the 2nd respondent, suggested the sale of the mortgaged property as a viable option for the repayment of the facility. He was given an option to sell the property and pay his indebtedness to the 2nd respondent within a specified period. By a letter dated 16th April 1992 and admitted as Exhibit 15, the 2nd respondent acceded to the request of the appellant for extension of time for the sale of the mortgaged property and the time to do so was extended to 30th April, 1992. After the expiration of the dead line, with no payment, 2nd respondent rightly advertised the mortgaged property for sale. The mortgaged property was sold to the highest bidder. Appellant can therefore not be heard to complain that the mortgaged property was undervalued. From the facts of this case, the lower court was not in error when it allowed the 1st respondent's appeal. My learned brother, Abba Aji has adequately resolved all the issues submitted for determination of this appeal in such a way that I have nothing useful to add. (P.....para.....)

Lead Judgement:

Representations:

P. B. Daudu, (Esq.), with A. M. Isah, (Esq.), T. E. Iyoha- Asagie, (Esq.), and J. S. Ajileye, (Esq.), for the appellant.

Yunus Ustaz Usman, (SAN), with Zainab Atuba, (Esq.), Dr. Aisha Maikudi, (Esq.), and J. Z. Malleks, (Esq.), for the 1st respondent.

**O. I. Habeeb, (Esq.), with Y. Ajibola, (Esq.), for the 2nd respondent
Abdullahi Yahya, (Esq.), for the 3rd respondent.**

UWANI MUSA ABBAAJI, JSC (Delivered the lead judgment)

**ALHAJI FATAI O. YUSUF
Vs
MOBIL OIL NIGERIA PLC**

SC. 526/2012

IN THE SUPREME COURT OF NIGERIA

HOLDEN AT ABUJA

FRIDAY, 17TH MAY, 2019

BEFORE THEIR LORDSHIPS

**OLUKAYODE ARIWOOLA
MUSADATTIJO MUHAMMAD
JOHN INYANG OKORO
CHIMA CENTUS NWEZE
AMINA ADAMU AUGIE**

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

ACTION:- Originating processes – Where signed by a firm – Whether such processes are incompetent and invalid.

COURT:- Approach to justice – The era of technical justice is gone but now the area of substantial justice – Whether substantial justice can only be attained not by bending the law but by applying it as it is.

*JUDICIAL PRECEDENT:- Signing of originating document – Permissible signature therein – The principle in **Okafor Vs. Nweke (2007) NWLR (Pt. 1043) 521.** – Whether has been followed by judicial authority.*

*LEGAL PRACTITIONERS:- Signing of originating document – S. 2(1) and 24 of Legal Practitioners Act – Non compliance therewith – Whether affect the jurisdiction of the court as a matter of substantive law and not as a matter of procedural law – The principle in **First Bank of Nig Plc Vs. Alhaji Salman Maiwada (2012) LPELR – 9713***

LEGAL PRACTITIONERS:- Signing of originating process – S. 2(1) and 24 of Legal Practitioners Act – Whether it is only persons whose names appear on the roll are eligible to sign originating processes

*PRACTICE AND PROCEDURE:- Amendment – Application thereto – Where it is intended to over-reach the respondent – Whether will not be granted – The principle in **Yusuf Vs. Adegoke (2007) 11 NWLR (Pt. 1045) 332.***

PRACTICE AND PROCEDURE:- Amendment – Effective date thereof – Whether takes effect from the date of the original document.

PRACTICE AND PROCEDURE:- Amendment – Where a process is incompetent ab initio – Whether cannot be amended.

*PRACTICE AND PROCEDURE:- Amendment – Where an originating summons is signed by a firm – Whether it is fundamentally defective and cannot be cured by amendment – The principle in **Ministry of Works and transport Adamawa State Vs. Yakubu (2013) 6 NWLR (Pt. 1351) 481.***

PRACTICE AND PROCEDURE:- Amendment – Where it will prejudice or over-reach the other party – Whether such amendment will not be granted.

Issues for Determination

Whether the applicant's fourth amended statement of claim dated 15th February, 2005 being manifestly and incurably defective having been signed by a law firm, is capable of being amended in terms of the application or at all?"

Facts of the Matter

Held:*(Unanimously dismissing the application)*

1. *Persons entitled to practice as barristers and solicitors in Nigeria*

In view of the fact that both parties are *ad idem* that the documents sought to be further amended were signed by a law firm and as such incompetent, I do not intend to say more on it except to add that by Sections 2(1) and 24 of the Legal Practitioners Act, Cap L 11 LFN 2004, only persons whose names are on the roll of legal practitioners are entitled to practice as barristers and solicitors in Nigeria, and are entitled to sign processes accordingly. For the avoidance of doubt, let me reproduce these sections of the Act for ease of reference:-

Section 2(1) - Subject to the provisions of this Act, a person shall be entitled to practice as a barrister and solicitor if, and only if, his

name is on the roll.

24. Legal Practitioner means a person entitled in accordance with the provisions of this Act to practice as a barrister or as a barrister and solicitor either generally or for the purpose of any particular office or proceedings."
(P.....para.....)

2. *Processes signed in the name of a law firm is incompetent, null and void*
There are clear decisions of this court on the issue of the signing of court processes in the name of a law firm which cannot be found on the roll of legal practitioners. In all these decisions this court has categorically held that processes signed in the name of a firm were incompetent, null and void *ab initio*. See Okafor Vs. Nweke (2007) 10 NWLR (pt. 1043) 521, Oketade Vs. Adewunmi (2010) 8 NWLR (pt. 1195) 63, SLB Consortium Ltd Vs. NNPC (2011) 9 NWLR (pt. 1252) 317, First Bank Nigeria Plc Vs. Maiwada & ors (2012) LPELR - 9713 (SC). Okarika & ors Vs. Samuel & anor (2013) 7 NWLR (pt 1352) 19, Bank of Industry Ltd Vs. Awojugalaba Light Industries Ltd (2018) LPELR - 43812 (SC).

Thus, the 3rd and 4th amended statement of claim in the instant case, which should have been signed by a legal practitioner, was signed by a law firm of "Ayinde Sanni & Co." rendering them incurably defective and incompetent. In fact that is the reason the appellant/applicant has brought this application to amend the two processes. But the question is, can an incompetent process be amended? *(P.....para.....)*

3. *An incompetent process cannot be amended*
In Union Bank of Nigeria Ltd Vs. Chukwuelo Charles Ogbob (1995) 2 NWLR (pt. 380) 647, this court held that, to obviate ambiguity or to aver some more facts, a party may amend his pleadings under certain principles before the end of hearing or judgment and sometimes on appeal. See also IBWA Vs. Oguma (1986) 2 NWLR (pt. 20) 124 CA, Salami Vs. Oke (1987) 4 NWLR (pt. 63) 1. However the process sought to be amended must be competent and valid before it can be given a hearing by the court. In other words, the court will have no jurisdiction to hear and determine an incompetent process. I made this point very clear in Union Bank of Nigeria Plc Vs. Alhaji Sadiku Lawai (2011) LPELR - 8879 (CA) at page 10 paragraphs E – F when I stated as follows:-

"Where however a court process is fundamentally defective *ab initio*, it is incompetent and does not exist at all in law. Consequently, such an incompetent process cannot be amended."

The truth must be told that where a writ of summons or statement of claim is incompetent, as in this case, the court would lack the jurisdiction to entertain the matter. Where the matter is heard and determined on the incompetent process, the court would have engaged in a wasteful judicial exercise, no matter the efforts put in it. The entire proceedings are void and liable to be set aside.

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

4. *Where an originating process is signed by a firm it is fundamentally defective and cannot be cured by amendment*

In Ministry of Works and Transport, Adamawa State Vs. Yakubu (2013) 6 NWLR (pt. 1351) 481 at 496, this court held thus:-

"My Lords, I would have ended this judgment here, but for the submission of the respondent counsel that the said originating process was amended and as such it does not form basis upon which the case was tried and determined. The questions that easily come to mind are that can an incompetent originating process or processes be amended? No doubt, the learned counsel of the respondent pretends not to appreciate the fundamental nature of an originating process. That fatal effect of signing of an originating process by a law firm is that the entire suit was incompetent *ab initio*. It was dead at the point of filing. This highlights the painful realities that confront a litigant when counsel fails to sign processes as stipulated by law.

The originating process, as in this case, is fundamentally defective and incompetent. It is inchoate, legally non-existent and can therefore not be cured by way of an amendment. See NNB Plc Vs. Denclag Ltd (2005) 4 NWLR (pt. 916) 549..... Following from the above stated principles, I also set aside the processes and proceedings of the trial court being incompetent and a nullity. The judgment of the lower court is also set aside for lack of jurisdiction.

See also Kida Vs. Ogunmola (2006) 13 NWLR (pt. 997) 377 at 394 paragraphs E - F.

The legal consequence of all I have said above is that no amendment howsoever can cure the appellant/applicant's 4th amended statement of claim which is void *ab initio*. As was observed by the learned counsel for the respondent, an amendment of the 4th amended statement of claim, even if it was validly signed, is itself incompetent because its precursor, that is, the 3rd amended statement of claim that was purportedly amended was, admittedly

incompetent, having also been signed on behalf of the applicant by the law firm of "Ayinde Sanni & Co." There is no doubt whatsoever that the 4th amended statement of claim was void *ab initio*. (P.....para.....)

5. *Amendment takes effect from the date of the original document sought to be amended*
One other issue is that the appellant/applicant admitted in paragraph 3(j) of his supporting affidavit that the judgment of the trial court in this matter was based on the incompetent 4th amended statement of claim. It could not have been otherwise because the principle of law governing amendment is that an amendment duly made takes effect from the date of the original document sought to be amended, and this applies to every successive further amendment of which ever nature and at whatever stage it is made. Therefore, when a writ of summons or statement of claim, as in this case, is amended, it dates back to the date of the original issue of such writ or filing of the statement of claim. Consequently, the action will continue as if the amendment has been inserted from the beginning. See Victor Adegoke Adewunmi & Anor Vs. The Attorney General of Ekiti State (2002) 2 NWLR (pt. 751) 474, (2002) 1 SC page 47, Oguma Vs. IBWA (1988) 1 NWLR (pt. 73) 658, Sneade Vs. Wotherton (1904) 1 KB 297; Britania U Nig Ltd Vs. Seplat Petroleum Dev. Company Limited & Ors (2016) LPELR -40007 (SC), UBA Plc Vs. Abdullahi (2003) 3 NWLR (pt. 807) 359 paragraphs C - F.

The law is quite clear that once an amendment is ordered, what stood before amendment is no longer material before the court and no longer defines the issues to be tried. It takes effect from the commencement of the action. See Vulcan Gases Ltd Vs. Gesellschaft Fur Industries, Gasverwertung AG (GIV) (2001) 5 SC (pt. 1) 1, (2001) 9 NWLR (pt. 719) 610, Col. Rotimi Vs. MacGregor (1974) 11 SC 133 at 152, Osita Nwosu Vs. Imo State Environmental Authority (1990) 2 NWLR (pt. 135) 688. In view of this position of the law, the argument by the learned counsel for the appellant that the 4th amended statement of claim was not his originating process has no weight and flies in the face of reason. See Registered Trustees Airlines Operators of Nigeria Vs. Nigeria Airspace Management Agency (2014) 8 NWLR (pt. 1408) page 1, (2014) LPELR - 22372 (SC) at pages 17 - 18 paragraphs B - A. (P.....para.....)

6. *Court will not grant an amendment if it will over-reach and or prejudice the other party*

Although courts of law are always willing to grant an amendment in order to aid the justice of the case, an amendment will not be granted if it is to over-reach and/or prejudice the other party. In the instant case, the respondent had filed notice of preliminary objection to the hearing of this appeal on the issues sought to be amended by the appellant/applicant before he decided to file this application. This is a clear case of the appellant working to over-reach and

frustrate the case of the respondent. The court will not grant amendment in such circumstance. (P.....para.....)

7. *Where an application for amendment is designed to over-reach the respondent, the court will not grant the application*

This court made the point clear in Yusuf Vs. Adegoke (2007) 11 NWLR (pt. 1045) 332 at 370 paragraphs B - E per Tobi, JSC when His Lordship held thus:-

"The law is not rigid as that. Because the law recognizes a possible lapse or failure of human memory, it has worked out procedures for amendment of pleadings to accommodate any possible lapse of failure. But the amendment of pleadings is not open ended, in the sense that an applicant can always succeed in his application for amendment. For instance, where an application for amendment is designed to over-reach the respondent, the court will not grant the application, this arises when the applicant cleverly anticipates the core of the case of the respondent and seeks the amendment to frustrate the case with the result that the respondent fails at the end of the day. An over-reaching conduct is a circumventing conduct to outwit the adverse party by cunning or artifice. It is designed to defeat the object or objective of the respondent's case by going too far, in the sense of destroying the core or fulcrum of the respondent's case."

See also His Lordship's views in *Akaninwo Vs. Nsirim (2008) All FWLR (pt. 410) 610 at 659 paragraphs D - F. (P.....para.....)*

8. *Permissible signatures on court processes*

Okafor Vs. Nweke (supra), has, actually, assumed a pre-eminent position in the jurisprudence of permissible signatures on court processes. Cases that have followed that authority are legion: they are many, SLB Consortium Ltd Vs. NNPC [2011] 9 NWLR (pt. 1252) 317; Ogundele Vs. Agiri [2009] 12 SC (pt. 1) 13; Oketade Vs. Adewunmi [2010] 8 NWLR (pt. 1195) 63; [2010]2-3 SC (pt. 1) 140; First Bank of Nig Plc Vs. Alhaji Salman Maiwada (supra); Alawiye Vs. Ogunsanya (2012) LPELR-SC.229/2007; Braithwaite Vs. Skye Bank (2012) LPELR-SC.325/2010; NNB Vs. Denclag (2005) 4 NWLR (pt. 916) 549; SPDC Ltd Vs. Sam Royal Hotel Nig Ltd [2016] 2-3 SC (pt. 111) 1, 27-28 and so.

What is more, from the consistent posture of this court in SLB Consortium Ltd Vs. NNPC (supra); Ogundele Vs. Agiri (supra); Oketade Vs. Adewunmi (supra); First Bank of Nig Plc Vs. Alhaji Salman Maiwada (supra); Alawiye Vs. Ogunsanya (supra); Braithwaite Vs. Skye Bank (supra), the

applicant's submissions to the contrary are, clearly, preposterous.
(P.....para.....)

9. *S. 2(1) and 24 of the Act affect the jurisdiction of the court as a matter of substantive law and not as a matter of procedural law*

In First Bank of Nig Plc Vs. Alhaji Salman Maiwada [supra]; this court elevated the position to the level of substantive law beyond procedural technicalities. Listen to the court's reasoning:

The decision in Okafor Vs. Nweke (supra), although it has not specifically adverted to the two earlier decisions of [The Registered Trustees Vs. Akindele (1967) 1 ANLR 110] and Cole Vs. Martins (supra), as it has not expressly overruled any of them, nonetheless, it has decided that the provisions of Sections 2(1) and 24 of the Act affect the jurisdiction of the court as a matter of substantive law and not as a matter of procedural law (and so as in certain cases they cannot be waived). Clearly the decision in Okafor Vs. Nweke has, impliedly, abandoned and dissented from the decisions of the two cited cases as no longer good precedent to follow.

See, First Bank of Nig Plc Vs. Alhaji Salman Maiwada (supra)

In other words, FBN Plc and Anor Vs. Alhaji Salman Maiwada (supra) has, finally, dispelled any lingering uncertainty as to its imprimatur on the said Okafor Vs. Nweke (supra). Interestingly, in that case [FBN Plc and Anor Vs. Alhaji Salman Maiwada (supra)], an eminent panel of seven distinguished Justices of this court, unanimously, endorsed the court's earlier decision.

... it is now settled that all court processes ... must be signed in the manner as prescribed by the Act, that is to say, by a person qualified as a legal practitioner and enrolled in the Supreme Court of Nigeria. Any court processes' signed in the business names of a firm's name... having been rendered incurably defective *ab initio* are liable to be struck out.

See, FBN Plc and Anor Vs. Alhaji Salman Maiwada (supra) (P.....para.....)

10. *The age of technical justice is gone but substantial justice has to be applied within the ambit of the law*

Truth told, that this issue goes beyond technicality has been re-iterated by this court in *FBN Plc and Anor Vs. Alhaji Salman Maiwada (supra)*. Hear this ratiocination on this point

I agree that the age of technical justice is gone. The current vogue is substantial justice. See: Dada Vs. Dosumu [2006] 12 PNJSC 115. But substantial justice can only be attained not by bending the law but by applying it as it is; not as it ought to be. There is nothing technical in applying the provisions of Sections 2(1) and 24 of the Legal Practitioners Act as it is drafted by the legislature. The law should not be bent to suit the whims, and caprices of the parties/counsel. One should not talk of technicality when a substantive provision of the law is rightly invoked.

FBN Plc and Anor Vs. Alhaji Saman Maiwada (supra)

The implication of all I have said above is that the third and fourth amended statement of claim, in the instant case, signed by "Ayinde Sanni and Co.," is unknown to our law, SLB Consortium Ltd Vs. NNPC(supra); Ogundele Vs. Agiri (supra); Oketade Vs. Adewunmi (supra); First Bank of Nig Plc Vs. Alhaji Salman Maiwada (supra); Alawiye Vs. Ogunsanya (supra); Braithwaite Vs. Skye Bank (supra). The application for amendment is, therefore, un-grantable. (P.....para.....)

Lead Judgement:

Representations:-

O. J. Owonikoko, (SAN) with T. P. Olatunde-Fasogbon and M. K. Fidelis for the appellant/applicant.

Ime Edem-Nse (Esq.) with Ikechukwu Duru and Modestus Alozie for the respondent.⁹

JOHN INYANG OKORO, JSC (Delivered the Lead Judgment):

1. **ALL PROGRESSIVE CONGRESS (APC)**
 2. **AHMED MOHAMMED MUNIR**
- Vs.**
1. **ENGR SULELMAN ALIYULERE**
 2. **INDEPENDENT NATIONAL ELECTORAL COMMISSION (INEC)**

SC.222/2019

IN THE SUPREME COURT OF NIGERIA

HOLDEN AT ABUJA

FRIDAY 10TH MAY 2019

BEFORE THEIR LORDSHIPS

**OLABODE RHODES- VIVOUR
MARY UKAEGO PETER-ODILI
OLUKAYODE ARIWOOLA
CHIMA CENTUS NWEZE
AMINA ADAMU AGUIE**

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

Issues for Determination

1. **Whether the lower court was right in holding that the suit filed by the 1st respondent is not statute barred in the light of the provisions of Section 285 (9) of the Constitution (fourth alteration No.21) Act, 2017.**
2. **Whether the lower court was right in its interpretation of the provision of Section 87(10) of the Electoral Act, 2010 (as amended) regarding the sponsorship of candidate for the 1st appellant when it held that the 1st respondent is the nominated candidate of the 1st appellant in the Lere Federal Constituency for the Membership of House of Representatives in the 2019 General Elections.**

Facts of the Matter

On 11th April, 2019 I dismissed the appellants' appeal to this court. I then indicated that I would give reasons for the judgment on a later date. I now give those reasons.

The All Progressive Congress (APC) fixed its primaries for 7th October 2018. The 2nd appellant and the 1st respondent, both members of the APC were interested in representing their party for Lere Federal Constituency of Kaduna State in the Federal House of Representatives. Both of them were cleared by the party to participate in the primaries and both of them participated in the primaries. At the conclusion of the primaries the 1st respondent was declared the winner, but in a strange turn of events it was the 2nd appellants' name that was sent by the APC to INEC as the APC candidate for the Lere Federal Constituency. Alarmed, the 1st respondent filed an originating summons on 30th October 2018.

In response to the originating summons, the 1st and 2nd respondents who were the 1st and 2nd defendants before the trial court filed a motion on notice on 3rd December 2018 wherein they sought for an order striking out the suit for want of jurisdiction.

In a considered ruling delivered on 14 January 2019 D.S Wyom J of a Kaduna High Court found merit in the 1st and 2nd respondents' objection to jurisdiction. In the final paragraph of the judgment his lordship said:

“In the final analysis, and in view of all the above, I find merit in the motion on notice filed by 1st and 2nd defendants/applicants' dated 30/11/18 and filed on 3/2/018. Accordingly suit No. ICDA/KAD/1102/2018 Engr. Suleiman Aliyu Lere Vs. All Progressive Congress (APC) & 2 ors is hereby struck out for want of jurisdiction of this court.”

Dissatisfied with the ruling of the trial court, the 1st respondent filed an appeal. It was heard by the Court of Appeal, (Kaduna Division). That court set aside the ruling of the trial court on jurisdiction and proceeded to enter judgment in favour of the appellant (now the 1st respondent). This appeal is against that judgment.

Held: *(Unanimously dismissing the appeal)*

1. *Meaning of pre-election matters*

Pre-election matters are as the name implies matters that occurred before the election proper. They are live issues that must be heard and a judgment delivered.

Litigation arising from party primaries e.g. substitution of candidates. Complains about the conduct of primaries are pre-election matters. See *Uwazurike Vs. Nwachukwu* (2012)12 SC (Pt.1) p.200 ; *Emeka Vs. Okadigbo & 4 ors* (2012) 7 SC (Pt.1) p.1; *Ehiboh Vs. Abia & 2 ors* (2012) 7 SC (Pt.111) p.122; *Marwa & anor Vs. Nyako & 9 ors* 1SC (Pt.111) p.44; *CPC & anor Vs. Ombugadu & anor* (2013) 7 SC (Pt. 1) p.119

This case is a pre-election matter. The 1st respondent won the APC primaries for the Lere Federal Constituency. He was declared winner of the primaries by this party, the APC (the 1st appellant) but the name of the 2nd appellant was sent to the 2nd respondent as APC's candidate for the General Elections which held in February 2019. A clear case of substitution. (P.....para.....)

2. *Elements of cause of action*

Cause of action is the entire set of circumstances giving rise to an enforceable claim and consist of two elements namely:

- (a) the wrongful act of the defendant which gives rise to the cause of complaint, and**
- (b) the consequential damage**

Cause of action is the factual situation which entitles one person to obtain a remedy from another person in the court. Any act on the part of the defendant which gives the plaintiff his cause of complaint is a cause of action. See Ademora Vs Ajufu (1988) 3 NWLR (Pt.80)p.1; Thomas Vs. Olufosoye (1986)1 NWLR (Pt.18) p.669; Adekoya Vs. F.H.A. (2008)11 NWLR (Pt.1099)p.539; A.G. Rivers State Vs. A.G Bayelsa State (2012) 7 SC (pt.11) p.110

The 2nd appellant and the 1st respondent are members of the APC (1st appellant). Both of them contested the party's primaries for the Lere Federal Constituency. The 1st respondent won, but it was the 2nd appellant's name that was sent to the 2nd respondent as the winner of its primaries and its candidate for the general election. The 1st respondent has a cause of action. The act of forwarding the name of the 2nd appellant to INEC as the APC's candidate when he did not win the party's primaries give the 1st respondent who won the primaries his cause of complaint. (P.....para.....)

3. *How to determine if a suit is statute barred*

In Asaboro Vs. Pan Ocean Oil Corp Nig Ltd (2017) 7 NWLR (Pt. 1563) p. 42. Peter-Odili JSC explained how to determine if a suit is statute barred. She said:

"To determine whether an action is statute barred, the court examines the originating process, statement of claim, together with the evidence on record where that has taken place, to know when the wrong in question occurred and compare it with the dates the originating processes were filed in court."

See also Egbe Vs. Adefarasin (1985) 16 NSCC (Pt. 1) p. 643.; Obiefuna Vs. Okoye (1961) All B,L.R. p. 351. (P.....para.....)

4. *Proceedings should not be brought after the prescribed time*
The well settled position of the law is that where a statute provides that certain actions are to be brought within a prescribed period after the cause of action accrues to the plaintiff, proceedings should not be brought after the time prescribed by the statute. (P.....para.....)
5. *Purpose of limitation period*
The real purpose of the limitation period is to protect the defendant from the injustice of having to face a stale claim. If a claim is brought a long time after the events in question, there is a strong likelihood that evidence which was available earlier may have been lost and the memories of witnesses may have faded. Limitation is thus a procedural defence. Actions brought outside the limitation period are statute barred. (P.....para.....)
6. *Deposed facts not controverted are taken as true*
The affidavit in support of the originating summons and the further affidavit are unchallenged. I must at this stage comment on the affidavits.
Where facts deposed to in an affidavit have not been controverted such facts must be taken as true except they are moonshine. Where the only affidavit (as in this case) before the court are those filed by the applicants, and they are not controverted, the facts contained in them must be taken as true. (P.....para.....)
7. *Facts admitted by the opposite party*
A fact admitted by the opposite party is deemed to have been established without further proof. Where the opposing party fails to file a counter-affidavit to contest the depositions in the plaintiff's affidavit the contents of the plaintiff's affidavit would be deemed unchallenged and undisputed. Documents attached to an affidavit are part of the affidavit. See S.E.S. Newspaper Corp & Anor Vs. Anwara (1975) 9 NSCC p. 288; Alagbe Vs. Abimbola (1978) 2 SC p. 39; Inegbedion Vs. Selo-Ojemen & Anor (2013) 1-2 SC (Pt. 11) p.59. (P.....para.....)
8. *Clear and unambiguous words in statute should be read and construed without any interpretation or embellishments*
Where the words used in a statute are clear and free from ambiguity they should be read and construed as it is without any interpretations or embellishments. The words should be given their ordinary meaning except where such a construction would be ridiculous, not logical and sensible. See A.G. Anambra State Vs. A.G. Federation (1993) 6 NWLR (Pt.302) p.692; Mobil Vs. F.B.I.R (197) 3 SC p.53; Tariola Vs. Williams (1982) 7 SC p.27. (P.....para.....)

9. *When the domestic or internal affairs of a political party is not justiciable*
Before General Elections are held, political partys' hold primaries for the sole purpose of nominating from among its members, candidates to represent the party ,e.g. for Governor, The Senate and House of Representatives. The primaries are held in accordance with the Constitution of Nigeria, the party's Constitution, party guidelines and the Electoral Act.
Party guidelines are similar in most of the political partys'. Candidates are expected to obtain expression of interest and nomination forms, present their certificate for verification and appear before a screening committee. This is the stage at which the domestic or internal affairs of the political party are not justiciable. The courts will not dabble into how a member of the party is screened, or why a member was not cleared by the party to contest the primaries. Put in another way before a member of the party is cleared the party has the power to disqualify their member, and is answerable to no one including the courts. A dissatisfied members remedy is to leave the party and seek his political ambitions somewhere else. But once a member is cleared to contest the primaries, he becomes an aspirant. (P.....para.....)
10. *When a political party can apply to court for remedy*
If he contest the primaries, but complains about the conduct of the primaries, that any of the provisions of the Electoral act and the guidelines of his political party was not complied with in the selection or nomination of the aspirant who emerged at the primaries, his remedy is to apply to the federal High Court or State High Court or a High Court of the federal capital Territory for redress. See Section 87(9) of the Electoral Act. (P.....para.....)
11. *When a political party should submit the name of the winner of it primaries to INEC – S. 87(4)(c)(ii) Electoral Act.*
If a winner emerges from the primaries and the party announces him as the winner of the primaries, (in some party, a certificate of return is issued to the winner of the primaries by the returning officer) and there is no complaint from any of the aspirant about the conduct of the primaries, there is only one duty left for the party to do, and that is to submit the name of the winner of the primaries to Independent National electoral Commission (INEC) as its candidate for the General Elections. The candidate whose name is submitted to Independent National Electoral commission (INEC) represents the party for the post he contested and won at the party primaries. Section 87(4)(c)(ii) of the Electoral act states that:
"(ii) the aspirant with the highest number of votes at the end of

voting shall be declared the winner of the primaries of the party and the aspirants name shall be forwarded to the Commission as the candidate of the party."
(P.....para.....)

12. *The only instance where the name of candidate other than the winner of the primaries will be forwarded to INEC*

In **Olugbemi Vs. Lawrence (2017) 16 NWLR (Pt.1591) p. 209**. Galumje JSC said that:

"The only instance where the name of a candidate other than the candidate that won the Primaries Election will be forwarded to Independence National Electoral Commission (INEC) is where the candidate that won the election withdrew his candidature by notice in writing signed by him and delivered by himself to the Political Party that nominated him for the election or where he dies before his name is submitted to Independence National Electoral Commission (INEC) or after the name has been submitted and before the elections."

It is so clear that the above does not apply to the winner of the Primaries. (i.e. the 1st respondent). At no time did he withdraw his candidature, or is he dead. Section 87 (4) (c) (ii) of the Electoral Act must be complied with. The Court of Appeal was correct in its findings and conclusions.

There is absolutely no merit in this appeal. The judgment of the Court of appeal is correct and is the true position of the law. (P.....para.....)

13. *How the period of limitation in limitation statute is determined*

This court has severally placed on record the mode of identifying when a cause of action accrued for the purpose of computing the period of limitation in accordance with a statute. In this, I will call in aid the case of Elabanjo Vs. Dawodu (2006) 15 NWLR (Pt.1001) 76 at 123 thus:-

"Guided by the decision of this court in Egbe Vs. Adefarasin (No.2) (supra), the period of Limitation in any Limitation Statute is determined by looking at the writ of summons and the statement of claim alleging when the wrong was committed which gave rise to the cause of action, and by comparing that date with the date on which the writ of summons was filed. If the time on the writ of summons is beyond the period allowed by the Limitation Law, the action is statute-barred".

Similarly it was held by this court in the case of **Mulima Vs. Usman (2014) 16 NWLR (Pt.1432) 160 at 199, thus:-**

"It follows closely that in considering whether an action to enforce a legal right is statute barred, the court should confine itself to the averments in the writ of summons and the statement of claim which allege the factual situation that gave rise to the cause of action".

See Omotayo Vs. Nigerian Railway Corporation (1992) 7 NWLR (Pt.254) 471; Egbe Vs. Adefarasin (supra); Union Bank of Nigeria Plc Vs. Romanus Umeoduagu (2004) 13 NWLR (Pt.890) 352". (P.....para.....)

14. *Effect must be given to clear and unambiguous provisions of statutes – The principle in Saleh vs. Abah (supra)*

This court has stated again and again on what the court should do with interpretation of statutes or constitutional provisions as the case may be. See Saleh Vs. Abah (2017) 12 NWLR (Pt.1578) 100 at 159 paras C - H thus:

"It is certainly a cardinal principle of interpretation that where in their ordinary meaning provisions are clear and unambiguous, effect must be given to them without resorting to any aid internal or external. It is the duty of the court to interpret the words of the law maker as used. Those words may be ambiguous, but even if they are, the power and duty of the court to travel outside them on a voyage of discovery are strictly limited".

See also APC Vs. Karfi (2018) 6 NWLR (Pt.1616) at 508 paras F-G; Chigbu Vs. Tonimas (Nig.) Ltd (2006) 9 NWLR (Pt.984) 189 at 205 para 5; Ugba Vs. Suswan (2013) 4 NWLR (Pt.1345) 427 at 465 para C; Amadi Vs INEC (2013) 4 NWLR (Pt.1245) 595 at 635 paras A-C. (P.....para.....)

15. *Issue of jurisdiction can be raised at any time and in any form, including orally – principle in Edem vs. Ayi (supra)*

It is well settled that the issue of jurisdiction can be raised at anytime and in any form including orally. See the case of Edem Vs. Ayi (2017) 4 NWLR (Pt.1555) 171 at 183 C-G, thus:-

“It is indeed, quite pedestrian, as was noted by the trial tribunal, that the issue of jurisdiction is a threshold issue. The Supreme Court has, time without number, held that the issue of jurisdiction

is so fundamental that it can be raised at anytime. It can be raised suo motu by the court or even viva voce by any of the parties. Once it becomes apparent that a court or tribunal, as in this case, has no jurisdiction, the matter should be raised and determined timeously in the interest of justice, Petrojessica Enterprises Ltd Vs. Leventis Technical Co Ltd. (1992) LPELR-2915 (SC), (1992) 5 NWLR (Pt.244) 675; Egharevba Vs. Eribo (2010) 9 NWLR . (Pt.1199) 411 SC.

A trial conducted without jurisdiction amounts to a nullity and indeed is a waste of precious time and money. The issue of jurisdiction can therefore be raised at any stage of the proceedings, even on appeal; Nwora Vs. Nwabueze (2011) 15 NWLR (Pt.1271) 467 SC; Adegoke Vs. Adibi (1992) 6 SCNJ 136; (1992) 5 NWLR (Pt.242) 410; Olutola Vs. University of Ilorin (2004) 20 NSCQR 256, (2004) 18 NWLR (Pt.905) 416. Therefore, upon the challenge to its jurisdiction being raised outside the pre-hearing session, the tribunal acted in the interest of justice in granting leave to the 1st respondent to move the motion. The decision of the tribunal to set aside its proceedings in the face of the obvious constitutional breach in its composition cannot be faulted". (P.....para.....)

16. *The consequence of a court continuing a case where it lacks jurisdiction is a nullity – The principle in Galadima vs. Tambal (supra)*

The special nature of issue of jurisdiction is captured in the decision of this court in the case of Galadima Vs. Tambal (2000)11 NWLR (Pt.677) 1 at 15 - 16, wherein it was stated thus:-

"The crux of the complaint in this appeal is that the trial area court No.1 in Zaria City was the wrong venue for commencing the land suit. Clearly, it is a 'jurisdictional issue. Issue on the court's jurisdiction is very pivotal and fundamental. Because of its fundamental nature, on the authorities, it can be raised at any stage of the trial or even on appeal, and even before the apex court. The reason for this latitude to jurisdiction issue is obvious. A court that lacked jurisdiction to entertain a suit, either as a trial or appellate court, is incompetent to pronounce a judgment against a court to decide on the issue of jurisdiction. The consequence of court continuing a case where it lacks jurisdiction is, as it were, like the court embarking on a frolic which would indisputably result in a nullity for which an appellate court, so invited, would have no

compunction whatsoever to declare null and void.

Jurisdictional question, be it in criminal or civil matter, has this same devastating consequence. An attack or question as to jurisdiction cannot be properly glossed over by any court once it is raised by the defendant or the respondent. The procedure by which such a fundamental issue is raised may not be in consonance with the stipulated rules of court for questioning a decision of the court, nevertheless, that will never be allowed to defeat the right to question the jurisdictional defect. To do so is unwittingly to postpone the doom's-day. See *Owoniboys Technical Services Ltd Vs. John Holt Ltd.* (1991) 6 NWLR (Pt.199) 550, *Ezomo Vs. Oyakhime* (1985) 1 NWLR (Pt.2) 195; *State Vs. Onagoruwa* (1992) 2 NWLR (Pt.221) 33, *Madukolu Vs. Nkemdilim* (1962) 1 All NLR (Pt.4) 57 and *Okafor Vs. A.G. Anambra State* (1991) 6 NWLR (Pt.200) 659.

It is necessary to caution that whenever there is a challenge to jurisdiction the court should expeditiously attend to it in limine, particularly if the case is at the trial stage and even if the case is at the appeal stage, as is the case in the appeal in hand. Finally, it is important to state that jurisdictional issue being so pivotal can be raised suo motu by the court so by the court so long as the parties are accorded the opportunity to react to the issue.

No doubt, the proper way for the respondents to question any aspect of a judgment that is substantially in his favour is to file a cross-appeal or file a respondent's notice with regard to that complaint. A preliminary objection to the hearing of an appeal is a special procedure whereby a respondent may contend the competence of the appeal which, if upheld, has the effect of striking out the appeal. Such is the intendment of Order 2 Rule 9 (1) of the Supreme Court Rules (as amended in 1999). Be that as it may, it seems quite clear that a challenge to the court's jurisdiction is, as earlier noted, pivotally fundamental and can pass as sui generis in terms of the procedure adopted to raise it. In the instant case, the trial court's jurisdiction was raised at the Court of Appeal rather irregularly by a preliminary objection. The Court of Appeal appreciating the enormity of the jurisdictional issues raised and did not allow it to be treated with such levity. Rather, the court ordered that the parties should file briefs of argument so that the serious issue of jurisdiction of the trial court would be copiously

ventilated and adequately considered by virtue of its expansive power under Section 16 of the Court of Appeal Act, 1976 as well as Order 3 Rule 23 of the Court of Appeal Rules, 1981 as amended". (Underlining supplied for emphasis). (P.....para.....)

17. *Issue of jurisdiction must first be tackled by going into originating process, statement of claim and evidence or affidavit including statement of defence if available*
I have quoted extensively the judicial authorities earlier enunciated to underscore the importance of jurisdiction in the administration of justice for which it is always given a pride of place to have the issue ventilated in order that the court does not operate in vain having laboriously entertained or considered a piece of litigation only to find it had no vires in the first place to go into the matter and the action no matter how much time and space had been given it would come to naught. Therefore once the issue of jurisdiction is brought up it must be first tackled by going into the originating process, statement of claim and the evidence or affidavit evidence that may have been filed including even the statement of defence if available. See Asaboro Vs. Pan Ocean Oil Corp (Nig.) Ltd. (2917) 7 NWLR (Pt.1563) 42. (P.....para.....)
18. *Annexure to affidavit forms part of affidavit*
Again to be said is that the annexures to the affidavit formed part of the affidavit and within the scope of what the court would consider in determining whether or not the action is statute barred. See NEC Vs. Wodi (1989) 2 NWLR (Pt.104) 444 at 455; South Eastern State Newspaper Corporation & Anor. Vs. Edet Asuquo Anwara (1975) 1 All NLR (Pt.1) 38 at 44. (P.....para.....)
19. *Political parties seeking to nominate candidates for election hold primaries for and forward the name of the winner of the primary election to INEC – S. 87 (4)(c) Electoral Act*
The court has not shied away with stating the policy with regard to the sponsorship of candidates by political parties and in doing so decries the arbitrary use of power by political parties while recognising the discretion of the political parties in the choice of candidates for elections.
In line with the position on this issue the Electoral Act 2010 Section 87 (1) provides that political parties seeking to nominate candidates for elections under this Act shall hold primaries for aspirants to all elective positions.
Section 87 (4) (c) of the Electoral Act 2010 (as amended) provides as follows:-

"87 (4) (c) -

In the case of nomination to the position of a candidate to the

senate, House of Representatives and State House of Assembly, a political party shall, where it intends to sponsor candidates.

- (i) hold special congresses in the Senatorial District, Federal Constituency and the State Assembly Constituency respectively, with delegates voting for each of the aspirants in designated centre on specified dates; and
- (ii) the aspirant with the highest number of votes at the end of voting shall be declared the winner of the primaries of the party and the aspirants name shall be forwarded to the commission as the candidate of the party".
(Underlining mine).

By the provision of Section 84 (c) (ii) of the Electoral Act, 2010 (as amended) it is mandatory for a political party to forward the name of the winner of the Primary Election to the 2nd respondent as its candidate. (P.....para.....)

20. *Aspirants who complain against primaries may apply to the federal High Court or state High Court/FCT High Court – S. 87(9) Electoral Act.*

Furthermore, Section 87 (9) of the Electoral Act 2010 (as amended) provides:-

“Notwithstanding the provision of this 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 may apply to the Federal High Court or the High Court of a State or FCT for redress”. (P.....para.....)

21. *Political parties must obey the Electoral law, its constitution and guidelines in the conduct of its primaries – The principle in PDP Vs. Sylva (supra)*

In the case of PDP Vs. Sylva (2012) All FWLR (Pt.637) 603 at 634, wherein the Supreme Court held thus:

"Nomination or sponsorship of a candidate for election is a political matter solely within the discretion of the party, and this is so because the sponsorship or nomination of a candidate is a pre-election affair of a party. But where the political party conducts its primary and a dissatisfied contestant at the primary complains about the conduct of the primary, the courts have jurisdiction, by virtue of the provisions of Section 87 (9) of the Electoral Act, to examine if the conduct of the primary election was in accordance with the party's constitution and

guidelines. This is so because in the conduct of its primaries the court will never allow a political party to act arbitrarily or as it likes. A political party must obey its own constitution"
(P.....para.....)

22. *The courts have jurisdiction to see if a political party complied fully with legislation and its constitution on the issue of its nomination – The principle in Uzodinma Vs. Izunaso (No.2) (supra)*

This court held that there was justiciable action under Section 87 (9) of the Electoral Act 2010 (as amended). The Supreme Court relied on its earlier judgment in Uzodinma Vs. Isunaso (No.2) (2011) 17 NWLR CPt.1275) 30 at 60 paras B-F per Rhodes-Vivour JSC.

"But where the political party nominates a candidate for an election contrary to its own Constitution and guidelines a dissatisfied candidate has every right to approach the court for redress. In such a situation, the courts have jurisdiction to examine and interpret relevant legislations to see if the political party complied fully with Legislation on the issue of nomination. The courts will never allow a political party to act arbitrarily or as it likes. Political party must obey their own constitution, and once this is done there would be orderliness, and this would be good for politics and the country".

See also Ukachukwu Vs. Peoples Democratic Party (2014) All FWLR (Pt.728) 887; (2014) 17 NWLR (pt.1435) 134 at 204.

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

23. *Cause of action consists of the wrongful act of the defendant and the consequent damage*

A cause of action is the bundle or aggregate of facts, which gives the plaintiff a substantive right to make the claim for the relief or remedy being sought. It consists of the wrongful act of the defendant, which gives the Plaintiff his cause of complaint and the consequent damage - see Adesokan Vs. Aderegolu (1997) 3 NWLR (Pt. 493) 261, Aghanelo Vs. UBN (2000) 4 SC (Pt. 1) 233, Oduntan Vs. Akibu (2000) JSC (Pt. 1) 106, A.G. Fed. Vs. ANPP (2003) 12SCNJ 67 and Cookey Vs. Fombo (2005) 15 NWLR (Pt. 947) 182 SC . (P.....para.....)

24. *Right of action accrue when the person who sues becomes aware of the wrong – Principle in Mulima vs. Usman (supra)*

A right of action can only accrue when the person, who sues becomes aware of

the wrong see Jalico Vs. Owoniboys Tech. Serv (1995) 4 NWLR (Pt.391) 53, UBN Vs. Umeoduagu (2004) 13 NWLR (Pt. 890) 352 and Mulima Vs. Usman (2014) 16 NWLR (Pt.1432) 160, wherein Okoro, JSC, said:

“I think it is only reasonable and just that a party can only sue when he becomes aware that his right has been tampered with, for, as long as he is unaware that someone has dealt with his property inconsistent with his ownership, he cannot sue as you cannot shave a man's hair in his absence. (Ppara.....)

Lead Judgement: OLABODE RHODES- VIVOUR, (JSC)

Representations:

O. I. Habeeb for the appellants Ss. Shuaibu, A. A. Orire, with him.

I. K. Bawa (SAN) for the 1st respondent.

S. Yusuff, A. M. Jega, F. D. Birmah, M. Lawal, with him.

A. Onyeri for the 2nd respondent.

1. ALL PROGRESSIVE CONGRESS (APC)
2. INUWA ABDULKADIR [1ST NATIONAL VICE CHAIRMAN...
NORTH WEST ZONE OF APC

Vs.

1. SENATOR KABIRU GARBA MARAFA
2. ALH. SIRAJO GARBA
3. ALH. MUHAMMAD JIMA
4. YAKUBU MUKHTAR
5. BELLO ABUBAKAR
6. ZUBAIRU MUSAB.
7. ALH. HAMZA TUKUR
8. AUWALU ALHAZAI
9. NASIRU MOHAMMED FARU
10. HON. ALH. SALISU AMINU
11. SA'IDU BARE BARI
12. UMAR HASHIMU
13. ALH. SANI GOBIRAWA
14. ALH. SANI GYARE KADAURI
15. ALH. MUSASAMARU
16. MUSA ABDULLAHI NAHUCE
17. BASHAR ABDULLAHI
18. ADAMU RABIU TSIKAU
19. SHAFI'IMUSA
20. ABUBAKAR UMAR
21. MOHAMMED SANI
22. BUHARI ABDULLAHI
23. JUNAIDU MOHAMMED
24. AMINJU ABUBAKAR WUYA
25. AHMAD SIASKI
26. YUSUF BABAN RAGO
27. SARKI NAYALWA
28. ZAYYANU DAHIRU
29. LAWAL DAN MALIKI
30. BELLO SHEHU
31. DAN MALIKI

32. UMMARU BUZU
33. AISHA BALA
34. UMAR SHUAIBU
35. DAN JA'ORINI
36. LAWALI MOHAMMED YARGEDA
37. SHUGABA DAAIKI
57. ALH. HAMISU MAIAIKI
38. MURTALAA. MANDE
40. MAMUDA SADA
41. ALH. HASSAN ABDLLAHI
42. ALH. BELLO MAIYARMAKA
43. ABUBAKAR KOKARI
44. ALH. BELLO DIUMMA
45. ALH. IBRAHIM IMAM
46. AMINU IBRAHIM
47. SHEHU UMAR
48. MUSADOGO
49. SANI BATURE
50. HASSAN GARBA ZUBU
51. JABIR UMAR
52. SHEHU TAJA
53. MALAMI SULAIMAN
54. ABUBAKAR BAWA
55. SANI BATURE
56. ABUBAKAR MUH'D
58. ALH. SANAMILAM. GIDA
59. SANIA. DAHIRU
60. SANI BALASANKALAWA
61. ALH. AMINU KURAR MOTA
62. ALH. DAYABO WAZOJI
63. UMMARU ABDULLAHI
64. ALH. ISAH MAIDAJI
65. ABUBAKAR AHMAD JAURI
66. GARBASARKIN RUWA
67. MUSALABBO GAMO
68. AUWALIALIYU

69. BELLO IBRAHIM
70. SAYYADI ABUBAKAR
71. BELLO USMAN
72. YUNUSA USMAN
73. BELLO SIYAMMA
74. DAHIRU ABDULLAHI
75. RABIU HAMZA
76. SHEHU HALIDU
77. MUSALUMU GYALANGE
78. ALH. ISAH DAN LARABAWA
79. ALH. LAWALI JIKA
80. ABDUL' AZIZ BARAU MALAMZA
81. USMAN MUHAMMAD ALTINE
82. SURAJU MUHAMMAD
83. KHALID BUHARI
84. ANAS ABUBAKAR
85. RABI' I SHUGABA
86. JAMILU MUHAMMAD
87. BALASABO
88. YUSUF ADAMU
89. MALAM FALALU MATOYA
90. ALIYU MUH'D SIGARI
91. SULAIMAN BALA
92. BELLO BARAU
93. SANIDAN ABU
94. ALIYU SIFAWA
95. DAHIRU HALILU
96. ATTO USUMAN
97. SALISU SAMA'ILA
97. UMARU MALAM MAGAMI
98. DAHIRU ZAKARI
99. BASHAR MOHAMMED
100. SALE MOH'D DANBA'U
101. LAWALI DAN MAIGORO
102. MAI IDRIS MUSA
103. ABUBAKAR YARRUWA

104. TUKUR LUNGUFARU
105. ALIYU MAIMAI
106. HASSAN AHMAD
107. YUNUSA ABDULLAHI
108. ALH. IBRAHIM NAKATSALLE
109. ATTAHIRU RABIU
110. SAHABIDANDA
111. ABDULLAHI USMAN
112. SAMAILA SANI BINGI
113. ALHAJI DANJUMAMAFI
114. ALH. SADO GARBA
115. LAWALI BALA
116. ALH. SHEHU ABI
117. MANU NATA'ALA
118. GADO MAIMODI
119. ABDURRAHMAN SHINGE
120. WAKKALAKARINGUGA
121. ANARUWANATA KWAIRE
122. SURAJO AHMAD
123. YA'UNAMA
124. ALH. SADIKU KATURU
125. AKILU SULAIMAN
126. ALH. ISAH BAKAWI
127. ALH. GARBADANILA
128. RABIU IBRAHIM
129. SANI MUSA
130. ALH. GARBA WANKE
131. SARKIN PAWA DAN ABU
132. ALH. MAMMAN NA'ISA
133. ALH. SAHABI KILLUTU
134. BARA'U ALIYU
135. MAL. DAYYABU ALARAMA
136. ALH. ABDULKADIR LIMAN
137. ALH. ABDULSALAM ABUBAKAR
138. ALIYU SAYYADI
139. SULE MUHAMMAD

- 140. AMADU SARKIN**
(for themselves and all other aspirants/candidates who paid prescribed fees for procurement of nomination forms for purpose of contesting the 1st defendant's 147 Nos. Local Government Executive Committees and State Executive Committee Election held on 5th, 12th and 19th June, 2018 in Zamfara State, but were wrongly excluded or prevented from participating by voting or being voted for.)
- 141. SANUSI LIMAN DAN ALHAJI**
142. ALHAJI BABANGIDA ABDULLAHI
143. KAIRU MANDE CHAFE,
Chairman APC Tsafe LG, (suing for themselves and on behalf of All State APC members)
- 144. HON. MUKHTAR SHEHU IDRIS**
145. HON. IKIRA ALIYU BILBIS
146. HON. TIJANI YAHYA KAURA
147. HON. ABDUL-AZIZ YARI ABUBAKAR
148. HON. SANUSI GARBARIKIJI
149. HON. ABDULMALIK ZUBAIRU
150. HON. HUSSAINI ABUBAKAR MARIKI
151. HON. IBRAHIM MUH'D B/MAGAJI
152. HON. MUTTAKA MUH'D RINI
153. HON. AHMAD SHARU ANKO
154. HON. UMARU JIBO BUKKUYUM
155. HON. MUSTAPHA GADO ANKA
156. HON. MUH'D SANIAHMAD SANI
157. HON. KABIRU MOYI B/MAGAJI
158. HON. YAHAYA JIBRIL BUKKUYUM
159. HON. TUKUR MUH'D DANTASAWA
160. HON. IBRAHIM MUH'D K/KOSHI
161. HON. YAKUBU IBRAHIM NABATURE
162. HON. ALIYU MUH'D GAYERI
163. HON. ALIYU MUH'D FALALE
164. HON. SANUSI MUH'D LIMAN
165. HON. DALHATU MUHAMMED MAGAMI
166. HON. LAWAL M. LIMAN

167. HON. ABUBAKAR IDRIS KURYA
168. HON. YAHAYA SHAHU MARADUN
169. HON. YAHAYA ABDULLAHI GORA
170. HON. HARUNA ABDULLAHI D/SADAU
171. HON. IBRAHIM ABU MARU
172. HON. SHEHU BELLO MAI WURNO
173. HON. ALIYU ANGO KAGARA
174. HON. ISAH ABDULMUMINU
175. HON. ALIYU ABUBAKAR MC
176. HON. ALIYU ABUBAKAR DANJIBGA
177. HON. MANIR ALIYU G/JAJA
178. HON. YUSUF AHMED MORIKI
179. INDEPENDENT NATIONAL ELECTORAL
COMMISSION (INEC)
180. HON. SANI JAJI

SC.377/2019

IN THE SUPREME COURT OF NIGERIA

HOLDEN AT ABUJA

FRIDAY, 24TH MAY. 2019

BEFORE THEIR LORDSHIPS

**IBRAHIM TANKO MUHAMMAD
OLUKAYODE ARIWOOLA
JOHN INYANG OKORO
PAUL ADAMU GALUMJE
UWANI MUSA ABBAJI**

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

*APPEAL:- Reply brief – Purpose – Whether filed when an issue of law raised in the respondents' brief requires rebuttal – The principle in **Musaconi Ltd Vs. Aspinall 2013 LPELR-20745 (SC)**.*

APPEAL:- Reply brief – Purpose – Whether meant to answer to new issues raised by the respondent and not to improve arguments on the issues already canvassed by the appellant.

*COURT:- Evaluation of evidence – It is the trial court that evaluates evidence and ascribes probative value – Whether an appellate court will interfere only where the trial court has failed to perform its role – The principle in **Fashanu Vs. Adekoya (1974) 1 All NLR (Pt.1) 35 at 41.***

COURT:- Evaluation of evidence – This is the primary duty of a trial court – Whether an appellate court is in the same position as a trial court to evaluate documentary evidence.

ELECTION PETITION:- Amendment thereof – Nature and purport of paragraph 14(2)(a) and (b) of the Electoral Act 2010 – Whether does not allow any amendments after the time prescribed for presentation of petitions.

*ELECTION PETITION:- Amendment thereof – No amendment whatsoever shall be entertained by the tribunal after the expiration of the period within which to present an election petition – Whether no court or tribunal has jurisdiction to grant leave for amendment – The principle in **Oke & Anor Vs. Mimiko & Ors (2013) LPELR – 20645 (SC)***

*ELECTION PETITION:- Jurisdiction thereof – Section 87(9) of the Electoral Act 2010 – The principle in **Emeka Vs. Okadigbo (2020) 18 NWLR (Pt. 1331) 55.***

*ELECTION PETITION:- Leave to appeal – Section 233 (3) of CFRN 1999 – Whether does not apply to elections and election related matter – The principle in **Orbih Vs. Mbakwe (1984) LPELR 2172 (SC)***

*ELECTION PETITION:- Whether they are sui generis – The principle in **Hassan Vs. Aliyu & Ors. (2010) 17 NWLR (Pt. 1223) 547.***

*ELECTION PETITION:- Amendment thereof – Whether application for extension of time and order to call additional witnesses are not permitted in election petitions after expiration of time for filing petitions – The principle in **Adenigba & Anor Vs. Omworare & Ors (2015) LPELR 40531.***

ELECTION PETITION:- Nature thereof – Whether distinct from the ordinary civil proceedings – Implication thereof.

ELECTION:- Conducted by parties – Whether the only valid primaries are those conducted by National Executive Committee of the party.

ELECTION:- Conduct of primaries – Section 87(i) of Electoral Act 2010 considered – It is mandatory for a political party to conduct primaries – Whether a political party

which did not conduct primaries will not participate in the general election.

*ELECTION:- Conduct of primaries – Where State Executive Committee of a party conducts primaries – Whether such primaries are illegal – The principle in **Emenike Vs. PDP & Ors (2012) 12 NWLR (Pt. 1315) 556 at 602.***

ELECTION:- Failure to present candidate – Where a political party fails to present a candidate for an election – Whether such a political party cannot be declared winner of the election.

ELECTION:- Political parties – Conduct thereof – Whether political parties must not act arbitrarily but within the confines of their constitution, guidelines and Electoral Act.

ELECTION:- Political parties – Whether political parties are bound by their constitution and guidelines.

PRACTICE AND PROCEDURE:- Appeal – Admissibility thereof – Where parties didn't raise objection to the admissibility of exhibits at the trial court – Whether it will be too late to raise such objection on an appeal.

PRACTICE AND PROCEDURE:- Appeal – Fresh issue on appeal – Whether an appellant cannot raise an issue on appeal which he did not raise at the trial court except an issue involving substantial question of law.

PRACTICE AND PROCEDURE:- Appeal – Issues thereof – Where issues for determination are formulated from incompetent grounds of appeal – Whether such issues are incompetent and liable to be struck out.

PRACTICE AND PROCEDURE:- Appeal – Preliminary objection thereto – Procedure therefore – Whether counsel should incorporate their preliminary objection into their final briefs – Rationale

STATUTE:- Electoral Act 2010 – Section 87(9) thereof – Whether an aggrieved party can invoke it to ventilate his grievances.

Issues for Determination

Whether considering the evidence before the trial court the lower court was right when it held that the Appellant did not conduct primaries from which candidates emerged for the 2019 general election. "

Facts of the Matter

Held: *(Unanimously dismissing the appeal)*

1. *An appellant will not be allowed to raise an issue on appeal that was not raised at the trial court.*

In K. Apene Vs. Barclays Bank of Nigeria & Anor (1977) 11 NSCC 29, this court had this to say:-

"The general rule adopted in this court is that an appellant will not be allowed to raise on appeal a question which was not raised or tried or considered by the trial court, but where the question involves substantial points of law, substantive or procedural and it is plain that no further evidence could have been adduced which would affect the decision one way or the other, the court will allow the question to be raised and the points taken in order to prevent an obvious miscarriage of justice." See Shonekan Vs. Smith (1964) ALL NLR 168; Stool of Abinabina Vs. Chief Kojo Eyinadu (1953) A.C 209 at 215. (P.....para.....)

2. *Election petitions are distinct from the ordinary civil proceedings*
However, this court in a number of decided cases has held that election petitions are distinct from the ordinary civil proceedings. See Orbih Vs. Mbakiwe & Ors (1984) EPELR (SC); Onitoy Vs. Benson (1960) SCNLR 314 at 317. (P.....para.....)

3. *Election matters are sui generis*
In Hassan Vs. Aliyu & Ors (2010) 17 NWLR (Pt. 1223) 547, this court per Onnoghen JSC (as he then was) said:-

"It is settled law that in an election or election related matter, time is of the essence, I will add that the same applies to pre-election matters. Election matters are sui generis, very much unlike ordinary civil or criminal proceedings." (P.....para.....)

4. *The nature and purport of paragraph 14(2)(a) &(b) of the Electoral Act*
By paragraph 14 (2)(a) and (b) of the Electoral Act 2010, after the expiration of the prescribed period for the presentation of Election Petition, no amendment shall be made. For avoidance of doubt, the paragraph aforesaid provides as follows:-

- "14. (2) *After the expiration of the time limited by:-***
- (a) Section 134(1) of this Act for presenting the election petition, no amendment shall be made.**
 - (i) introduction any of the requirements of subparagraph (i) of paragraph 4 of this schedule not contained in the original petition filed, or**
 - (ii) effecting a substantial alteration of the ground for, or the prayer in, the election petition, or**
 - (iii) except anything which may be done under the provisions of subparagraph (3) of this paragraph, effecting a substantial alteration of or addition to, the statement of facts relied on to support the ground for, or sustain the prayer in the election petition; and**
 - (b) Paragraph 12 of the schedule for filing the reply, no amendment shall be made:-**
 - (i) alleging that the claim of the seat or office by the petitioner is incorrect or false; or**
 - (ii) except anything which may be done under the provisions of subparagraph (3) of this paragraph, effecting any substantial alteration or addition to the admissions or the denials contained in the original reply filed, or to the facts set out in the reply."**

Subparagraph 1 of paragraph 4 of the 1st Schedule to the Electoral Act referred to in Paragraph 14 (2)(a)(i) of the same schedule spells out the contents of election petition. Also subparagraph 3 of Paragraph 14 is no longer part of the Electoral Act, and Paragraph 12 deals with filing of replies.

Section 134 of the Electoral Act 2010 as mention in paragraph 14 (2)(a) of the same schedule was deleted by Section 32 of the Electoral (amendment) Act 2010. This section dealt specifically with the time for presentation of Election Petition. It was deleted, because the time for presentation of election petition has been altered from 21 days to fourteen days by Section 285(9) of the Electoral Act (as amended). The deletion of Section 134 of the Act has not

obliterated the mandatory provision under Paragraph 14 of the first schedule to the constitution that after the expiration of prescribed period for presentation of election petition, no amendment shall be allowed.

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

5. *No amendment whatsoever shall be entertained by the tribunal after the expiration of the period within which to present an election petition.*

In Oke & Anor Vs. Mimiko & Ors (2013) LPELR - 2064S (SC) this court, while commenting on paragraph 14(2)(a) and (b) of the first schedule to the Constitution had this to say:-

By the provision of paragraph 14(2)(a) and (b) of the first schedule to the Electoral Act 2010 (as amended) no amendment whatsoever shall be entertained by the tribunal after the expiration of the period within which to present an election petition. If the tribunal is prohibited from authorizing an amendment after the expiration of the prescribed period for the presentation of election petition, it therefore follows that the appellate courts will have no jurisdiction to grant leave for an amendment of the petition, especially where such amendment seeks to alter the contents of the grounds upon which the decision of tribunal was based." *(P.....para.....)*

6. *Applications for extension of time and order to call additional witnesses are not permitted in election petition after expiration of time for filing petitions*

It is in that regards that I had in Adenigba & Anor Vs. Omoworare & Ors (2015) LPELR 40531 (CA) stated as follows:-

"Applications for extension of time and order to call additional witnesses and to file additional witnesses statements after the prescribed period for bringing election petitions are not permitted, because election matters are time bound and by reason of their being sui generis the procedures in handling them are more strict than ordinary civil matters. "

The appellants' application to raise fresh issue therefore is devoid of any merit and same is accordingly dismissed. Having dismissed the application, the 2nd, 7th and the 12th grounds of appeal, which contain the fresh issues and the argument in support of these issues are incompetent. According they are hereby struck out. *(P.....para.....)*

7. *Arguments in respect of preliminary objection should be incorporated in*

respondent's brief.

These documents are very unnecessary, especially the originating summons and the judgment of the lower court. Since the preliminary objection was not directed at them. This court has also directed counsel to incorporate argument in respect of their preliminary objection into their final briefs of argument in order to arrest proliferation of briefs of argument. Learned senior counsel does seem to be comfortable with such directives, and by so arguing the preliminary objection separately, he has created more papers to consider in this appeal. This type of practice, especially in pre-election matter that requires very little time for its disposal, tend to put more than necessary pressure on a judge.
(P.....para.....)

8. *The provisions of S. 233(3) of CFRN does not apply to elections and election related matters.*

Section 285(11) of the 1999 Constitution, as altered by the 4th Alteration Act provides as follows:-

"An appeal from a decision in a pre-election matter shall be filed within 14 days from the date of delivery of the judgment appealed against. "

I have stated elsewhere in this judgment that election or pre-election matters are in a class of their own and that time is of the essence in courts proceedings in relation to election matters. I also said that election matters are different from ordinary civil matters, This being so, the provision of Section 233 (3) of the Constitution does not apply to elections and election's related matters. I am fortified by the decision in *Orbih Vs. Mbakwe* (1984) LPELR 2172 (SC) where *Bello, JSC* (as he then was) of blessed memory held:-

"In the same vein as in the former constitution, the 1979 Constitution made special provisions for the jurisdiction of the courts to hear and determine election petitions at the first instance and on appeal. Section 236 of the Constitution conferred on the High Court of a state unlimited jurisdiction to hear and determine any civil or criminal proceedings, subject to the provisions of the constitution. Section 237 then conferred jurisdiction on the competent High Court to deal with election petitions. The same distinction was manifested in the appellate jurisdiction of the Federal Court of Appeal and of this court. While appeals as of right were covered by Section 220 (1)(a) to (d) and Section 213 (2) (a) to (d) in the Federal Court of Appeal and in this court respectively, Section 220 (f) and Section 213 (2) (e) confers the right of appeal to the Federal Court of Appeal and to

this court in respect of election petitions. From the provisions of the constitution referred to above, I am of the opinion that election petitions were special proceedings completely divorced and separated from civil proceedings within the context of Section 267 of the Constitution ... "

Section 27 of the National Identity Management Commission Act of 2007 and its regulations are not part of the rules of this court and can therefore not apply to the processes filed in this court. Clearly I find no merit in the preliminary objection, accordingly same is hereby overruled. (P.....para.....)

9. *Effect where issues are formulated from incompetent grounds of appeal*
I will now go ahead to consider the appeal after having sorted out the preliminary issues. Before I do that I wish to state clearly that the second issue for determination of this appeal is formulated from the 2nd and 7th grounds of appeal, as indicated in the appellants brief of argument. Also the 3rd issue for determination of this appeal is formulated from the 12th ground of appeal. Elsewhere in this judgment I adjudged grounds 2, 7 and 12 to be incompetent and they were accordingly struck out, as the application to regularize them was not successful. These two issues which have been formulated from incompetent grounds of appeal are themselves incompetent, They are accordingly struck out. (P.....para.....)
10. *Reply brief is not meant to improve issues already canvassed by appellant.*
Learned senior counsel for the appellants filed reply briefs to the briefs filed on behalf of 1st - 140th respondents, 179th respondent as well as the brief filed by 180th respondent. I have read through the reply briefs. The reply brief to the 1st to 140th respondents are directed at the issues formulated from the incompetent 2nd, 7th and 12th grounds of appeal which were struck out. The argument in the reply brief is therefore irrelevant. The issues canvassed in the reply brief to 179th and 180th respondents' briefs of argument are a rehearse of the argument in the appellants brief. The essence of a reply brief is to answer to the new issues raised in the respondents brief of argument. It is not meant to improve on the issues already canvassed by the appellant. (P.....para.....)
11. *When a reply brief is necessary*
In Musaconi Ltd Vs. Aspinall 2013 LPELR-20745 (SC) this court per Ariwoola JSC said:-

"A reply brief of argument is therefore filed when an issue of law or arguments raised in the respondents' brief calls for a reply in rebuttal. In other words, a reply brief is expected to and should

deal with only new points arising from the respondents' brief of argument. When no new point has been raised in the respondents' brief of argument, a reply brief becomes otiose and the court will be entitled to discountenance it. It has been held that a reply brief is not a repair kit to correct or put right an error or lacuna in the appellant. " See *Yadis (Nig) Ltd Vs. Great Nigeria Insurance Company Ltd (2007) 14 NWLR (Pt. 1055) 584 (SC)* *Dairo Vs. Union Bank & Anor (2007) 16 NWLR (Pt. 1059) 99 (SC)* *Onwudiwe Vs. FRN (2006) 10 NWLR (Pt. 988) 382 (SC)*. (P.....para.....)

12. *The trial court decision was perverse*
In resolution of the argument canvassed before the lower court on whether the 1st appellant did conduct primary election in Zamfara State between the 3rd - 7th October, 2018, the lower court made reference to the exhibits tendered and admitted before the trial court as well as the various statutes dealing with primary election of political parties and came to the following conclusion.

"It is apparent from the decision of the lower court that attention was not accorded to the materials before it, the lower court failed to properly evaluate the evidence and come to a conclusion, this is certainly a case of the lower court shutting its eyes to the obvious, and remained persistently on the path of error thereby giving a decision that is perverse, a decision that is different from what is reasonable or required, a decision that is against the weight of evidence. The law is settled that where the trial court fails to properly evaluate the evidence placed before it, the appellate court is in as good position as the trial court to re-evaluate the evidence placed before it to ensure that justice is done to the parties." (P.....para.....)

13. *It is the trial court that evaluates evidence and ascribes probative value.*
I entirely agree with the lower court on this score. In *Fashanu Vs. Adekoya (1974) 1 ALLNLR (Pt. 1) 35 at 41*, this court held:-

"The appeal before us clearly attacks the findings of facts and seriously challenges the judgment in an area which is only narrowly open to a Court of Appeal. The appraisal of oral evidence and ascription of probative value to such evidence is the primary duty of a tribunal of trial and a Court of Appeal would only interfere with the performance of that exercise of the trial court had made an imperfect or improper use of the opportunity

of hearing and seeing the witnesses or where the trial court has drawn wrong conclusions from accepted or proved facts".

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

14. *An appellate court is in the same position as a trial court to evaluate documentary evidence*

In other words, an appellate court has no jurisdiction to interfere with the assessment and evaluation of evidence of a trial court in the absence of special circumstances warranting such interference.

See Adeyeye & Ors Vs. Adesanya & Ors (2001) 5 NSCQR 522; Eki Vs. Giwa (1977) 11 NSCC 96. This principle of non-interference with the assessment of evidence and ascription of probative value to the evidence of the trial court, generally concerns oral evidence by witnesses whose demeanour the trial court is required to observe and draw conclusions.

However where the evidence is documentary, the appellate court is in a position to look at it and comment freely, since it is entitle to look into its file and make use of its contents. Even where the trial court improperly evaluates oral evidence before it and reaches a decision that is perverse, an appellate court has absolute jurisdiction to interfere with the performance of the trial court.
(P.....para.....)

15. *Effect where a political party fails to conduct primaries*

Now in the instant case, the appropriate place to start is to find out how a candidate for general elections emerge from their political parties. Section 87 of the Electoral Act 2010 (as amended) provides as follows:-

"87 (1) A political party seeking to nominate candidates for elections under this Act shall hold primaries for aspirants to all elective positions. "

This provision is mandatory and it is therefore the only way to sponsor candidates for general elections in this country. Where a political party fails to conduct primaries, then it is apparent that that political party cannot participate in the general elections. For this reason all the political parties have promulgated their constitutions and guidelines where the procedure for selection of candidates for general elections are provided. *(P.....para.....)*

16. *Political parties are bound by their constitution and guide lines*

This court has spoken loud and clear that political parties are bound by their constitutions and guidelines. See Amaechi Vs. INEC (2008) 5 NWLR (Pt. 1080) 227 Emenike Vs. PDP & Ors (2011) LPELR 19752 (CA). Paragraph 14 of the guidelines of the 1st appellant provides as follows:-

"14 ELECTORAL PROCESS:

- (a) There shall be a 7 member election committee for each state, who must be persons of proven integrity.
- (b) The members of the committee are to be recruited from outside the state of their assignment, comprising of a chairman, secretary and 5 other members.
- (c) The committee shall be responsible for the overall conduct of the exercise in the state.
- (d) The committee shall supervise the Local Government and ward Election Committees
- (e) The Committee shall collate results from all the Local Governments.
- (f) The final result of the election shall be collated on the State declaration of election results. " (P.....para.....)

Per Galumje (JSC)

"By Exhibit 7, it is very clear that primary elections were not conducted by the 1st appellant. This fact is buttressed by a letter from the Acting Secretary of the 179th respondents, which was admitted and marked Exhibit 4.

At paragraph 2 and 4 of Exhibit 4, a letter that was addressed to the chairman of the 1st appellant, it was stated clearly that the report received from INEC Office in Zamfara showed clearly that no primaries were conducted in Zamfara State and that being so, the party will not be fielding candidates at the general elections. Learned counsel for the appellants is insisting that there was primary election in Zamfara State. The only evidence at his disposal is the so called primary election that was conducted by the state chapter of the 1st appellant under the directive of the Governor of Zamfara State.

The letter that conveyed the list of the successful candidates at the primary was signed by Lawal M. Liman, State Chairman of the 1st appellant and the letter is Exhibit 6. Paragraph 14 (D) of the 1st appellant's guidelines provides that the membership of the various Electoral Committees shall be as constituted by the National Working Committee (acting on behalf of INEC). (P.....para.....)

17. *A primary conducted by a state executive committee of a party is illegal*
In Emenike Vs. PDP & Ors (2012) 12 NWLR (Pt. 1315) 556 at 602, this court, per Rhodes-Vivour JSC said:-

"Primaries, which the appellant participated in was illegal, it having been conducted by the State Executive Committee of the

PDP." See Sadiq Yar'adua & Ors Vs. Yandoma & Ors (2015) 4 NWLR (Pt. 1447) 123 at 182.

By Exhibits 6, 7, 7A and 7B, it is so clear that the 1st appellant did not conduct primary election in Zamfara State. (P.....para.....)

18. *Where parties didn't raise objection to the admissibility of exhibits at the lower court*
Learned senior counsel for the appellants argued forcefully that the judgment of the lower court was based on inadmissible exhibits. I do not think this issue was raised and determined at the trial court and the lower court. It can therefore not be raised here without the leave of the court. Even at that if parties did not raise any objection to the admission of the various exhibits considered in this appeal, it is late in the day to condemn them as being illegal. (P.....para.....)
19. *Exhibit were not made in contemplation of the action*
The contention of the learned counsel is that apart from Exhibit 6, all other exhibits were made during the pendency or in anticipation of the suit, as such they are not admissible. I find this argument really funny. Exhibits 3, 4, 7, 7A and 7B were not made in contemplation of the appellants' pre-emptive suit. I am still surprised that a party that claims to have emerged victorious in primary elections which they say were legal, had no cause to go to court. Their resort to court action barely a day after the so called primary election is a reflection of the attitude of combative politics of politicians who think they can commit illegality and hope to procure court's protection. (P.....para.....)
20. *A party that has no candidates in an election cannot be declared the winner of the election*
For the avoidance of doubt, a party that has no candidates in an election cannot be declared the winner of the election. This being so the votes credited to the alleged candidates of the 1st appellant in the 2019 general elections in Zamfara State are wasted votes. For that reason it is hereby ordered that candidates of parties other than the 1st appellant with the highest votes and the required spread stand elected into the various offices that were contested for in Zamfara State in the 2019 General Elections. (P.....para.....)

Per Galumje (JSC)

The democratic system this country has adopted was borrowed from the United States of America and other Democratic Nations of Europe. Those from whom we borrowed this system are steadily forging ahead in all areas of endeavour in order to create a stress free and economically viable nations. For this great country, some politicians either are ignorant of what party politics is, or out of

mischief, have continuously dragged this nation backward. If care is not taken, this class of politicians will drag this nation to the stone age, where all of us will be consumed. I once again, as this court has consistently preached, urge this class of politicians to play the game according to law and guidelines which they themselves have enacted. It is only when this is done that sanity will take center stage in the domestic and international affairs of this great nation.

The 1st - 140th respondents as well as the 180th respondents shall be entitled to the cost of prosecuting this appeal which I assess at Ten Million Naira (N10,000,000.00) against the appellants. (P.....para.....)

21. *Political parties must not act arbitrary but within the confines of their constitution*
This court has held in several cases that when it comes to issues relating to the selection and nomination of candidates for an election, political parties must not act arbitrarily but within the confines of their Constitution and electoral guidelines and in accordance with the provisions of the Electoral Act. Political parties must obey their Constitution and electoral guidelines. See Ayogu Eze Vs. PDP & Ors (2018) LPELR -44902. Senator Abubakar Saddiq Yar'Adua & Ors Vs. Senator Abdu Umar Yandoma & Ors (2015)4 NWLR (Pt. 1448)123. Pages 182-183; Emeka Vs. Okadigbo (2012)18 NWLR (Pt. 1331)55. (P.....para.....)
22. *An aggrieved party can invoke the provisions of Section 87(9) of the Electoral Act*
Where a political party fails to comply with the provisions of its constitution and electoral guidelines, an aggrieved candidate who contested in that primaries is empowered to ventilate his grievance before the Federal High Court, a State High Court or High Court of the FCT and have that court invoke the provision of Section 87 (9) of the Electoral Act accordingly. Section 87(1) of the Electoral Act, 2010 (as amended) already reproduced in the lead judgment, mandates a political party seeking to nominate candidate or candidates for elections to hold primaries for all elective positions.
It is instructive to note that, in line with the law, the 1st appellant formulated its guidelines for the conduct of its primaries and paragraph 14 thereof spells out rules to be followed for the valid conduct of its primaries.
Now, the question to be asked is whether the primary election conducted by the state chapter of the 1st appellant under the directive of the Governor of Zamfara State on 7th October, 2018 was valid in view of the party's guidelines for conduct of primary elections and the Electoral Act, 2010. From the record before this court, it is clear that the primary election in issue was not conducted by the committees constituted by the National Working Committee of the party under the leadership of Engineer Abubakar Fari and Major General Abubakar Mustapha Gana. (Rtd.), but by the state chapter of the 1st appellant under the leadership of the State Chairman, Lawal M. Liman and under the instruction of

the state Governor. I am of the opinion that the said primary election was conducted at variance with the party's guidelines and therefore cannot be considered to be valid. (P.....para.....)

23. *The jurisdiction of a court under Section 87(9) of the Electoral Act*
In the case of *Emeka Vs. Okadigbo* (supra) this court per Rhodes-Vivour, JSC held at pages 88-89 as follows:

"But where the political party conduct its primaries and a dissatisfied contestant at the said primaries complains about the conduct of the primaries, the courts have jurisdiction by virtue of the provision of Section 87 (9) of the Electoral Act to examine if the primaries were conducted in accordance with the Electoral Act, the Constitution and Guidelines of the party. The reason is simple. The courts will never allow a political party to act arbitrarily or as it likes. A political party must obey its own Constitution."

The above has always been the position of this court and has not changed. A political party must obey its own constitution. In the instant case, I agree with my learned brother in his conclusion that this appeal lacks merit.
(P.....para.....)

Per Abba Aji (JSC)

Besides, paragraph (b) of the 1st appellant's guidelines on electoral process, provides that *"the members of the committee are to be recruited from outside the state of their assignment, comprising of a chairman secretary and 5 other members"*. Furthermore, paragraph 14 (D) provides for the constitution of the membership of the various Electoral Committees to be by the National Working Committee acting on behalf of NEC. Nevertheless, the list of the candidates in the kangaroo primary election so purportedly held was signed by one Lawal M. Liman, the State Chairman of the APC, contrary and ultra vires to the party guidelines. Per *JOHNAFOLABI FABIYI, J.S.C in EMENIKE Vs. PDP & ORS (2012) LPELR- 7802(SC)*, forcefully declared the matter thus:

"The courts have no power to compel a political party to sponsor a candidate outside the thin and limited powers conferred under Section 87 of the Electoral Act, 2010 (as amended). The jurisdiction of the court relates to whether complaints in respect of primary election for nomination of a candidate were conducted in line with the provisions of the Electoral Act, 2010 (as amended), the party constitution and the party guidelines. For a clear view and resolution of the central issue, I shall start with the applicable

law on the point. I wish to reproduce section 87(4)(b) and (9) of the Electoral Act 2010 (as amended). "Section 87(4) (b) - In the case of nominations to the Position of governorship candidate, a political party shall, where they (sic) intend to sponsor a candidate:- (i) Hold a special congress in the State Capital with delegate voting for each aspirant at the congress to be held on a specify (sic) date appointed by the National Executive Committee (NEC) of the party. (ii) The aspirant with the highest number of votes at the end of voting shall be declared the winner of the primaries of the party and the aspirant's name shall be forwarded to the Independent National Electoral Commission as the candidate of the party for the particular state. (9) 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 or the High Court of a State or FCT for redress. From the above, it occurs to me that for a complaint to come within the narrow compass of the above provision of the law and be cognizable by a court, the aspirant must show clearly and without any equivocation that the National Executive Committee of the political party conducted a primary election in which he was an aspirant and that the primary election was conducted in breach of specified provisions of the Electoral Act/ Election Guidelines. Put in another way, the law provides that a candidate with the highest votes cast at a primary election organized by the National Executive Committee of the 1st respondent to the knowledge of the 3rd respondent can approach the court for redress if he is excluded by the party." (*P.....para.....*)

24. *The only valid primaries are ones conducted by the National Executive Committee of the party*

Put more clearly, per BODE RHODES-VIVOUR, JSC in the case supra strongly and headlong stated that:

"It must be elementary now, that the only valid primaries is the one conducted by the National Executive Committee of the PDP. The primaries, which the appellant participated in was illegal, it having been conducted by the State Executive Committee of the PDP. That explains why the appellant's case crumbled like a park of cards with concurrent findings of fact by the courts below stating the obvious position of the law."

Lead Judgement: PAULADAMU GALINJE, (JSC)

Representations:

D. D. DODO, (SAN) with Abdullahi M. Aliyu, (SAN); Nasir Abdu Dangiri, (SAN); Terhemba Gbashima and Samson Eigege for the appellant.

Chief Mike Ozekhome, (SAN) with Chief Ferdinand Orbi, (SAN); Sylva Ogwemoh, (SAN) and John Shaka (Esq.) and Muhammad Nuhu (Esq.) for the 1st – 140th respondents.

Prince L. O. Fagbemi, (SAN) with Mahumd Abubakar Magaji; (SAN); Chief H. O. Afolabi and Hakeem Thomas Ojo for the 141st - 178th respondents.

Mr. T. M Inuwa, (SAN) with Alhassan A. Umar and Abdulaziz Sani (Esq.) for the 179th respondent

Mr. J. E. Ochidi with A. A. Jibrin; A. O. Otitoju and Abimbola Daniel for the 180th respondent.

JAFAR SANI BELLO

Vs.

- 1. ABBAK. YUSUF**
- 2. PEOPLES DEMOCRATIC PARTY [PDP]**
- 3. INDEPENDENT NATIONAL ELECTORAL COMMISSION [INEC]**

SC. 363/2019

IN THE SUPREME COURT OF NIGERIA

HOLDEN AT ABUJA

FRIDAY, 24TH MAY, 2019

BEFORE THEIR LORDSHIPS

**MARY UKAEGO PETER-ODILI
MUSADATTIJO MUHAMMAD
KUDIRAT M. O. KEKERE-EKUN
EJEMBI EKO
UWANI MUSA ABBA AJI**

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

ACTION:- Cause of action – Limitation of time thereof – Whether time begins to run against a plaintiff from the date the cause of action occurred.

ACTION:- Cause of action – When accrues – Whether arises on the date the breach occurred.

ACTION:- Cause of action – When does it arise – Whether it is on a date or from the time when the breach of any duty or act occurs.

ACTION:- Cause of action – Where statute barred – Implication thereof.

ACTION:- Cause of action and right to sue – Whether the two phrases are interchangeable.

ACTION:- Limitation thereof – Connotation – Whether it postulates a statutory period after which a law suit cannot be brought in court.

ACTION:- Limitation thereof – When time begins to run – Whether it is when all facts have

*occurred which entitled a plaintiff to sue – The principle in **Fadare and Ors Vs. A.G Oyo State (1982) NSCC 52***

ACTION:- Limitation thereof – Where action is statute barred – Whether trial court lacks jurisdiction thereto.

ACTION:- Limitation thereof – Where an event occurred claimant became aware of the event on a later date – Whether limitation law does not commence to run from the date of the appellant's knowledge.

ACTION:- Originating summons – Cause of action thereto – How determined – Whether to consider the reliefs and averments in the affidavit.

*ELECTION PETITION:- Computation of time thereto – Whether the date of the happening of event shall not be excluded in an election related matter – The principle in **Okechukwu Vs. INEC (2014) 17 NWLR (Pt. 1436) 255.***

ELECTION PETITION:- Limitation thereof – How time is computed – Whether the date on which results were announce is inclusive in the computation of time.

ELECTION PETITION:- Limitation of action thereto – Section 285(9) CFRN 1999 as altered – Where plaintiff brings his action when he became aware of his substitution – Whether knowledge is not a precondition for the application of section 285(9) of the constitution as altered.

ELECTION:- Cases therefrom – Sui generis – Whether rules applying to ordinary civil cases do not apply to election related cases.

STATUTE:- CFRN 1999 – Section 285(9) as altered – Nature and purport – Limitation of time for filing election petitions.

*STATUTE:- CFRN 1999 (as amended) – Interpretation thereof – Whether to interpret it without importing or imputing words not used therein – The principle in **Obusez Vs. Obusez & anor. (2007) LPELR – 2179.***

*STATUTE:- Limitation laws – Construction thereof – Whether to be construed beneficially but without importing strange conditions into them – The principles in **Ajibona Vs. Kolawole (1996) 10 NWLR (Pt. 476) 22.***

STATUTE:- CFRN 1999 – Section 285 (9) – Time for filing pre-election matter – Nature and purport.

WORDS AND PHRASES:- Cause of action – Meaning – The principle in case cited

Issues for Determination

- “(1) Whether the learned justices of the lower court were right in holding that 4th October 2018 was the day when the cause of action of the appellant arose despite his clear depositions in paragraph 15, 15(a) 15(c) and 15(d) of the 2nd affidavit in support of the originating summons in his judgment.**
- (2) Whether the learned trial justices of the lower court were right in disregarding the Supreme (sic) cases on computation of time in pre-election matter, which held time runs from the day of the act which day is not excluded.”**

Facts of the Matter

Held: *(Unanimously dismissing the appeal)*

1. *The meaning of cause of action*
The phrase "cause of action" has been defined by this court, see FRED EGBE Vs. HON. JUSTICE J. A. ADEFARASIN (1987) LPELR - 1032 (SC), as the fact or facts which establish or give rise to a right of action. It is the factual situation that gives an aggrieved person the right to judicial relief. Cause of action is constituted by the entire set of circumstances which give rise to an enforceable claim. See ALHAJI WADA KUSADA Vs. SOKOTO NATIVE AUTHORITY (1968) LPELR - 25424 (SC) and CHIDI B. NWORIKA Vs. MRS ANN ONONEZE-MADU & ORS (2019) LPELR - 46521 (SC). (P.....para.....)
2. *How to determine cause of action*
It is settled law that the totality of the plaintiff's claim determines his cause of action. In the case at hand where appellant's action is pursuant to an originating summons, his reliefs and the averments in his supporting affidavit delineates his cause of action. See AG FEDERATION Vs. AG ABI STATE & ORS (2001) LPELR - 24862 (SC) and OWURA & ANOR Vs. ADIGWU & ANOR (2017) LPELR - 42763 (SC). (P.....para.....)
3. *Cause of action arises on the date of the breach of duty*
Again, it is trite that a cause of action arises on the date or from the time the breach of duty occurs which warrants the person adversely affected by the breach or the injury therefrom to sue in a law court to assert or protect his legal right that has been violated. Thus, a cause of action enures to the plaintiff the

very moment a wrong is done to him by another which fatal situation entitles the former to seek relief in the law court by way of enforcement. See **ATTORNEY GENERAL OF THE FEDERATION Vs. AG ADAMAWA STATE (2014) LPELR 2322 (SC)** and **ALHAJI HANAFI ZUBAIR Vs. ALHAJIABDULLAH ATANDA KOLAWOLE (2019) LPELR - 46928 (SC)**.
(P.....para.....)

4. *Time begins to run against a plaintiff from the date the cause of action occurred*
This court has also held in decisions too numerous to call that time begins to run against a plaintiff, for the purpose of limitation, from the date the cause of action accrues which, generally, is the date on which the incident or event giving rise to the cause of action occurs. See JOHN EGBOIGBE Vs. NNPC (1994) LPELR - 992 (SC) and ACTION CONGRESS OF NIGERIA & ANOR Vs. INEC (2013) LPELR - 20300 (SC). (P.....para.....)
5. *Cause of action and right to sue are interchangeable*
It must be stressed that it is his "cause of action" that creates his "right to sue" and that the two phrases are interchangeable. For the purpose of the limitation put in place by Section 285(9) of the 1999 Constitution as altered, therefore, it is permissible to talk in terms of when time begins to run against appellant's "cause of action" or his "right to sue". If caught up by the prescribed limitation his "cause of action" completely dissipates in the same way his right to sue becomes unenforceable. (P.....para.....)
6. *Time for filing every pre-election matter*
Section 285 (9) of the 4th alteration to the 1999 Constitution (as amended) which provides for the limitation to appellant's cause of action reads:-

“(9) Notwithstanding anything to the contrary in this Constitution, every pre-election matter shall be filed not later than 14 days from the date of the occurrence of the event, decision or action complained of in the suit.”
(P.....para.....)
7. *The findings of the lower court cannot be interfered with*
I entirely agree with learned counsel to the 1st and 2nd respondents that the lower court's findings learned appellant's counsel contends are perverse remain unassailable. Again, having evolved in complete obedience to earlier decisions of the apex court, learned counsel to the 1st and 2nd respondents is correct to insist that the findings cannot be interfered with. (P.....para.....)
8. *The two lower courts were right in the interpretation fo section 285(9) of the*

constitution

Section 285 (9) of the 1999 Constitution as altered which application to appellant's suit by the two lower courts renders the cause of action therein unenforceable is clear and unambiguous. In ascribing to the words which make up the section their literal meaning, the two courts remain within the bounds set by this court in that regard. See RABIU Vs. STATE (1980) 8 - 11 SC 130 and AG FEDERATION Vs. AG LAGOS STATE (2013) LPELR - 20974 (SC). The words "event, decision or action", the two courts are right, refer to a plaintiff's cause of action on the basis of which his right to sue enures. Appellant's cause of action is the alleged participation of the 1st respondent, while in breach of Section 8(8) of 2nd respondent's

Constitution and paragraph 23(a) and (b) of its Electoral Guidelines for primary elections, in the party's Kano State Gubernatorial primary election that held on 2nd October 2018. Learned appellant's counsel insists that the lower court is wrong to have found appellant's action statute barred by reference to 2nd October 2018 instead of the 4th of October 2018 that the appellant became aware of the 1st respondent's non-compliance with the party's Constitution and Electoral Guidelines. (*P.....para.....*)

9. *Knowledge of party of the accrual of cause of action is not a condition for the operation of S. 285(9) of CFRN*

I am unable to agree with learned counsel that appellant's cause of action begins to run, by virtue of the limitation prescribed under Section 285(9) of the 1999 Constitution as altered, from the time he becomes aware of 1st respondent's non-compliance which, on the latter's participation in the primary election, creates appellant's right to sue. The clear and unambiguous section neither makes knowledge on the part of the appellant a pre-condition to the filing of his action nor excludes the date his cause of action accrues in the determination of when time begins to run against him. By the section, appellant's knowledge of 1st respondent's non-compliance with 2nd respondent's Constitution and Electoral Guidelines is immaterial. To hold that time begins to run against the appellant only on his becoming aware of 1st respondent's non-compliance and further exclude the date appellant's cause of action accrues, in determining when limitation begins to run against him, is to read into the section what it does not contain. No court has the jurisdiction of doing so. See DANGANA & ANOR Vs. USMAN & ORS (2012) LPELR -25012 (SC) and GANA Vs. SDP & ORS (2019) LPELR - 47153 (SC). By the section, the limitation period is 14 days and since neither knowledge nor the date of the accrual of the cause of action is made a precondition for the determination of the period, the lower court in excluding appellant's knowledge of 1st respondent's non-compliance and taking into cognisance the date his cause of action arises in its computation of the limitation period is beyond reproach.

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

10. *Limitation laws should be construed beneficially but not to import strange conditions into them*
In AJIBONA Vs. KOLAWOLE (1996) 10 NWLR (Pt. 476) 22 at 36 this court per Ogwuegbu JSC held:

"The limitation law and all laws of this description ought to receive beneficial construction. They should be construed liberally but not in such a way as to read into them words not intended by the law makers as the majority decision of the court below portrayed. All limitation laws have for their object the prevention of the rearing up of claims that are stale. To contend that the defendant must prove plaintiff's knowledge of such adverse possession for time to start to run, or the defendant's presence on the land is to import a strange condition into the limitation law. See Sosan & Ors Vs. Odemuyiwa & ors. (1986) 3 NWLR (Pt. 27) 241 at 256."

Kutigi JSC (as he then was and now of blessed memory) in his contribution opined at page 37 of the report thus:-

"I also agree that the defendant having lived in his house on the land in dispute for over twelve years before the suit was filed, the limitation period under the limitation Law would in addition run in his favour whether or not the plaintiff was aware of such adverse possession by the defendant."

See also ALHAJIA. W. ODEKULEKUN Vs. MRS. COMFORT O. HASSAN & ANOR (1997) 12 NWLR (Pt. 531) 56.

The lower court in affirming the trial court's decision has kept faith with the binding decisions of this court. Appellant's two issues, it follows, fail and are resolved against him. His unmeritorious appeal is dismissed at a cost of N500,000.00k in favour of the 1st & 2nd respondents and the concurrent decisions of the lower courts are hereby further affirmed. (P.....para.....)

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11. *Cause of action did not arise when appellant got the knowledge of the event or issue.*
Having set out the decisions of the two courts below albeit excerpts thereof which anyway showcase the raison d'etre of the judgments or decisions or conclusions, it has to be said that it is difficult to push forward the position as espoused by the appellant that the cause of action arose when the appellant

realised or got the knowledge of the event or issue. The reason is simple and logical as it is to render uncertain and tied to people's convenience whenever a party decides to activate a court process depending on his subjective whim. The implication being that the statute of limitation would start to run at the point when the plaintiff/appellant in this instance puts across as time of becoming aware of the happening of the event that he is aggrieved over. That position of uncertainty will aid indolence and give a one sided subjective advantage to a party to the detriment of the other side. (*P.....para.....*)

Per Odili (JSC)

“It is now trite and even an over flogged cliché that equity does not aid the indolent. That is to say that if such a subjective stance is allowed to stand would encourage and breed uncertainty in the polity and create the ludicrous situation where a person can wake up a year or more after an election and swearing into an elective position to have a challenge to his nomination by way of substitution fort election that brought the person to power. The possible angles abound in this uncertainty and easily lead to a chaotic scenario where the populace is not sure if a said elected person can remain there on sit within a given period or even after he had had his tenure expended to have the intimacy of the occupation of the position challenged at any time. The law cannot recognise or endorse such a speculative situation and so everyone or I daresay, every stake holder must be watchful or vigilant of his legal rights. See *Okorocho Vs. PDP (2015) 1 EJSC 1 at 45; Hassan Vs. Aliyu & Ors. (2010) LPELR - 1357.*

What I am trying to say is that the stance of the appellant that the 4th October, 2018 when the appellant claimed to become aware that the 1st respondent had not rejoined the party cannot be the date of the cause of action's accrual giving rise to his right to initiate the action for judicial relief. The correct situation in my view borne out of the record and sustained by the relevant legislations is that the cause of action arose if there was one at the date of the primary election and the result declared or announced which is the 2nd October 2018 and taking that date as pointer. It needs be reiterated that by the time the appellant as plaintiff commenced his action by originating summons on the 16th October 2018 he was way out of the 14 days prescribed under Section 285 (9) of the 4th Alteration to the Constitution of the Federal Republic of Nigeria 1999 (as amended). (*P.....para.....*)

12. *How time is computed in an electoral action*

It is to be noted that in the computation of time in an electoral action including the pre-election one such as the present in the light of the constitutional alteration referred to as 4th Alteration the computation includes

the very date on which the results were declared. This is further highlighted under Section 141 of the Electoral Act 2006. I place reliance on *Garba Vs. Adua* (2011) 13 NWLR (Pt.1263) page 1 at 17-18; Section 2185 (9) of the 4th Alteration to the Constitution of the Federal Republic of Nigeria 1999 (as amended) which provides thus:-

"285 (9) - Notwithstanding anything to the contrary in this constitution, every pre-election matter shall be filed not later than 14 days from the date of the occurrence of the event, decision or action complained of in the suit". (P.....para.....)

13. *When action is statute barred the trial court lacks jurisdiction*
The provision of Section 285 (9) are simply in plain language self explanatory and needs no outlandish interpretation on it. Indeed the situation is cut and dried as the suit at the trial court was statute barred and the jurisdiction of the court well ousted thereby. The follow up being that the trial court lacked jurisdiction and the court below was right in affirming same. (P.....para.....)
14. *The nature and purport of Section 285(9) CFRN 1999 as altered*
Section 285(9) of the 4th Alteration to the 1999 Constitution provides:

"Notwithstanding anything to the contrary in this Constitution, every pre-election matter shall be filed not later than 14 days from the date of the occurrence of the event; decision or act complained of."
(P.....para.....)
15. *When does a cause of action arise*
It has been held severally by this court that a cause of action arises on a date or from the time when the breach of any duty or act occurs, which warrants the person who is adversely affected by such breach, to institute an action to protect his legal right which has been breached or violated. A cause of action arises as soon as the combination of facts giving the right to complain accrued or happened. See: *A.G. Adamawa State Vs. A.G. Federation* (2014) LPELR - 2322 (SC) @ 52 A - C; *Woherem JP Vs. Emereuwa & Ors.* (2004) 8 SCM 45, *UBN Plc Vs. Umeoduagu* (2004) 13 NWLR (Pt. 890) 352. (P.....para.....)
16. *Time begins to run when all facts have occurred which entitled a plaintiff to sue*
On when time begins to run for the purpose of a limitation law, this court in: *Fadare and Ors. Vs A.G., Oyo State* (1982) NSCC 52 @ 60, referred to the case of *Board of Trade Vs. Cayzer, Irvine land Co. Ltd.* (1927) A.C. 610, where it was held:

"Time therefore begins to run when there is in existence, a person who can sue and another who can be sued, and all facts have happened which are material to be proved to entitle the plaintiff to succeed".

Applying these principles to the facts of this case, the appellant's complaint is related to the 1st respondent's participation in the primaries that took place on 1st and 2nd October, 2018. The event/cause of action that gives the appellant the right to complain is the actual participation of the 1st respondent in the primaries conducted on 1st and 2nd October 2018. Section 285(9) of the 4th Alteration provides that a pre-election matter must be filed not later than 14 days from the date of the occurrence of the event, decision or action complained of. The act complained of is the failure of 1st respondent to comply with the provisions of Section 8(8) of the P.D.P's Constitution and Section 23(a) and (b) of its 2018 Primary Election Guidelines, which are conditions precedent to his eligibility to participate in the primaries. (P.....para.....)

17. *The rules applicable to ordinary civil proceedings do not apply to election related cases*

Section 285(9) of the 4th Alteration is quite clear and must be given its plain and ordinary meaning. It is evident from the wording of the provision that the date of the occurrence of the event complained of is inclusive in the calculation of when the cause of action arose.

Election and election related matters are *sui generis*. Because of their special nature, where time is of the essence, the rules applicable to ordinary civil suits do not apply. (P.....para.....)

18. *The date of happening of an event shall not be excluded in an election related matter*
His Lordship, Ariwoola, JSC had this to say on the issue in: *Okechukwu Vs. INEC (2014) 17 NWLR (Pt.1436) 255 @ 284 G-H:*

" ... Being aware of the sui generis nature of election and election related matters in which time is of the essence, and the stand of this court on the Interpretation Act, I hold no hesitation in concluding that the provisions of the Interpretation Act on computation of time shall not apply to the requirement of time by the Practice Directions. Time shall run, in the peculiarity of our Electoral Act, Practice Directions and the 1999 Constitution of Nigeria (as amended) from the day of the act and the day shall not be excluded."

The appellant's cause of action arose on 2nd October 2018. His originating summons was filed on 16th October 2018, more than 14 days from the date of the primaries. The two lower courts were therefore right in holding that the suit was statute barred and striking it out.

There is no justifiable reason to interfere with the concurrent findings of the two lower courts. I agree with my learned brother, MUSA DATIJO MUHAMMAD, JSC that this appeal is devoid of merit. It is hereby dismissed. (P.....para.....)

19. *The date of the occurrence of the event is inclusive*
The phraseology of Section 285(9) of the 1999 Constitution, as amended by the Fourth Alteration, leaves no doubt that the framers of the Constitution intend that—

Notwithstanding anything to the contrary in this Constitution, every pre-election matter shall be filed not later than 14 days from the date of the occurrence of the event, decision or action complained of in the suit.

Section 285(9) of the Constitution, as amended; contrary to the construction subversive of the clear provisions that the appellant wants this court to adopt, expressly states that "the date of the occurrence of the event, decision or action complained of" is inclusive.

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

20. *Approach of court to interpretation of the constitution*
In **OBUSEZ & ANOR. Vs. OBUSEZ & ANOR.** (2007) LPELR - 2179 (SC) this court, at page 20 thereof, the point very dearly -

The function of a court of law is to interpret the provisions of the Constitution in the clear tenor of the words contained in it. Court of law has no jurisdiction to import into the Constitution or impute into the Constitution words, which are not used therein. That will not bring out the intention of the makers of the Constitution and it is the duty of the court to interpret the Constitution in line with the words used and the intention of the Constitution.

The court, in its interpretative jurisdiction, is enjoined, when the provisions of the Constitution or Statute are clear and unambiguous, to give the provisions the meaning that accords with the natural ordinary grammatical meaning of

the provisions. In other-words, the court must not construe the provisions to mean what the provisions do not actually mean. Nor must the provisions be construed not to mean what they actually mean. This interpretational restraint on the court is an outflow from the basic function of the court which is only to declare what the law is, and not to make laws. Legislation or law making constitutionally belongs to another branch of government, but not to the judicature. (*P.....para.....*)

Per Eko (JSC)

“Indubitably, the event that the suit of the appellant was directed took place and was concluded on 2nd October, 2018. The appellant took out the suit on 16th October, 2018 - on the 15th day from the said 2nd October, 2018.

The appellant confronted with the objection to his suit, on the ground that it was statute barred by dint of Section 285(9) of the Constitution, as amended, contends that since, as averred in the supporting affidavit, he only got to know on 4th October, 2018 that the 1st respondent did not, by virtue of Section 8(8) of the PDP Constitution, and the Guidelines for the primary election, qualify to participate in the primary election, the cause of action for his action should be construed to have arisen from 4th October, 2018 when he was informed of the disqualification fact. He seems, through

his counsel, to argue that his ignorance of the law of his party (PDP) that allegedly disqualified the 1st respondent was an excuse. The argument is most puerile and disingenuous. Ignorance of the law is, of course, no excuse. I should think that the appellant, like every member of his party, particularly the aspirants seeking nomination like himself and the 1st respondent, should know beforehand the laws, particularly the party Constitution and Guidelines, as they affect their rights and obligations as members of the party.

Implicit in the puerile argument of the appellant is the outrageous suggestion that the National Constitution applies subject to the knowledge of the appellant of the fact upon which the provisions of the said constitution are invoked. It is on this fallacy that the appellant argues that his right to litigate on his cause of action arises from the date he gets to know that he can enforce his cause of action. He argues naively, if I may say, that the occurrence of the event that constitutes the cause of action is one thing, and that his knowledge of the fact that he can enforce his right to the cause of action is another. Unfortunately, the Constitution, in Section 285(9) thereof, provides emphatically that the suit in "every pre-election matter shall be filed not later than 14 days from the date of the OCCURRENCE OF THE EVENT, decision or ACTION", It is as plain and unambiguous as that.” (*P.....para.....*)

21. *A right of action is not independent of the cause of action*
This is argument on which he premised his contention that "there is clear

distinction between a cause of action and a right to - enforce the cause or the right of (sic: to) judicial relief in the plaintiff". A right of action is not independent of the cause of action. This court in ADIGUN Vs. AG. OYO STATE (1987) 1 NWLR (Pt. 53) 678 has held that a right of action consists in the fact which enables a person to bring a complaint before the court. The cause of action is a factual situation, the existence of which, entitles the Plaintiff to bring his complaint to the court to seek reliefs: THOMAS Vs. OLUFOSOYE (1968) 17 NSCC (Pt. 1) 323 at 331: (1986) 1 NWLR (Pt. 66) at 682. It is the cause of action that gives the plaintiff the right of action or the right to sue: SAVAGE Vs. UWAECHINA (1972) 3 SC 214 at 221.

I have, from the foregoing, sufficiently demonstrated how unavailing the appellant's puerile distinction between the cause of action and the right of action is. And on the facts, I agree with the lower court that the appellant's cause of action arose and accrued to him on 2nd October, 2018. (*P.....para.....*)

22. *The connotation of limitation of action*

The whole connotation of "Limitation" of action in respect of a given subject-matter postulates a statutory period after which a lawsuit or prosecution cannot be brought in court. It usually comes about by legislation [Statutes] and it can even be made by a written agreement between contracting parties. Thus, a statute of limitation is a law which bars claims after a specified period has elapsed. It establishes a time limit for suing in a civil case based on the date when the claim accrued. The purpose of such a statute of course, is to require diligent prosecution of known claims, thereby providing finality and predictability in legal affairs and ensuring that claims will be resolved in good time while evidence is reasonably available and fresh. See Per MUHAMMAD, J.S.C in AG ADAMAWA STATE & ORS Vs. AG FEDERATION (2014) LPELR- 23221(SC).

By Section 285(9) of the 4th Alteration to the 1999 Constitution (as amended), only 14 days is given for filing every pre-election matter from the date of occurrence of the event, decision or action complained of. The event herein was the primary election which took place on the 1st and 2nd October, 2018 and the result announced on 2/10/2018. Thus, it means that by the statute of limitation, herein section 285(9) of the 4th Alteration to the 1999 Constitution (as amended), any matter filed outside the circumference of 14 days from the date of the event or primary election has effluxed and lapsed. The statute of limitation is also a hook on the neck to all prosecutory layabouts and idlers who will want to resurrect an already dead case. The time herein started counting since on 2/10/2018 when the result was announced and expired on 16/10/2018. Thus, by instituting the action after 15 days from when the cause of action or the event occurred, the appellant was caught up by Section 285(9) of the 4th Alteration Act. (*P.....para.....*)

23. *Implication where cause of action is statute barred*

An action instituted after the expiration of the prescribed period is said to be statute-barred. The essence is that a legal right to enforce an action is not a perpetual right, but a right generally limited by statute. Therefore a cause of action is statute barred if legal proceedings cannot be commenced in respect of same because the period laid down by the Limitation Law had elapsed. The conspicuous effect of a Limitation Law is that legal proceedings cannot be properly or validly instituted after the expiration of the prescribed period. Secondly, the court is divested of its jurisdiction in the matter as it is no longer a live issue, it is dead in substance and in form. See Per ADEKEYE, J.S.C in AMADI & ANOR Vs. INEC & ORS (2012) LPELR-7831(SC). (P.....para.....)

Representations:

DR. N. A. ALIYU with Victor Izibili, for the appellant.

EYITAYO FATOGUN with Kelvin Ugiabe and Paschal Obuchi, for 1st - 2nd respondents.

S.M DANBABA for 3rd respondent.

MUSADATTIJO MUHAMMAD, JSC (Delivered the lead judgment):

**JESCO MARITIME RESOURCES LTD
VS**

- 1. THE M/T MOTHER BENEDICTA**
- 2. THE OWNERS OF M/T MOTHER BENEDICTA**

SC.342/2017

IN THE SUPREME COURT OF NIGERIA

HOLDEN AT ABUJA

FRIDAY, 12TH APRIL, 2019

BEFORE THEIR LORDSHIPS

**MARY UKAEGO PETER-ODILI
OLUKAYODE ARIWOOLA
KUDIRAT M. O. KEKERE-EKUN
AMIRU SANUSI
PAUL ADAMU GALUMJE**

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

*PRACTICE AND PROCEDURE: Appeal – Application for extension of time within which to appeal – Where applicant alleges that delay is based on inadvertence or mistake of counsel – Whether it is proper for counsel to refute or admit allegation – The principle in **Lauwers Import – Export vs. Jozebson Industries Co. Ltd (1988) 3 NWLR (pt. 83) 429.***

PRACTICE AND PROCEDURE: Appeal – Application for extension of time – Inadvertence or mistake of counsel – Application may be granted where delay is based on inadvertence or mistake of counsel – Whether must be substantial and acceptable to the court.

PRACTICE AND PROCEDURE: Appeal – Extension of time within which to appeal – Mandatory conditions thereto – Whether must be satisfied before court grants leave for extension of time to appeal.

PRACTICE AND PROCEDURE: Appeal – Interlocutory applications thereto – Whether it is proper to combine interlocutory appeal with appeal on the main claim in order to avoid inordinate delay.

PRACTICE AND PROCEDURE: Appeal – Leave to appeal – Where leave to appeal is required – Whether such leave must be obtained before the filing of notice of appeal.

PRACTICE AND PROCEDURE: Appeal – Extension of time within which to appeal – Onus on applicant – How discharged.

PRACTICE AND PROCEDURE: Discretionary powers – How exercised – Whether must be exercised judiciously and judicially on material facts.

RULES OF COURT: Supreme Court Rules – Order 2 Rule 31(2) thereof – Requirement for extension of time within which to appeal.

Issue for Determination

Whether the applicant satisfied the conditions for application of extension of time within which to appeal under order 2 Rule 31 of Supreme Court rules 1985 (as amended).

Facts of the Matter

Held: *(Unanimously dismissing the application)*

1. *Statutory provisions for application for extension of time*

Order 2 Rule 31(2) of the Supreme Court Rules (as amended in 2014) provides as follows:-

“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.....Paras.....)*.

2. *Discretionary powers of a court must at all times be exercised judiciously and judicially.*

Now, a grant or refusal of this application is within the discretionary powers of

this court. The law is settled that the discretionary powers of a court must at all times be exercised judiciously and judicially on material facts. See University of Lagos vs. M.I. Aigoro (1985) 1 NWLR (Pt. 1) 143 at 148; Adetutu vs. Aderohunmu (1984) 6 SC 92 at 108 – 109 (1984)1 SC NLR 515 at 523; Oguntimeyin vs. Gubere (1964) 1 ALL NLR 176 at 169-180; Adigwe vs. FRN (2015) LPELR 24694 (SC). (P.....Paras.....).

3. *Onus on applicant who applies for extension of time within which to appeal*
An application for extension of time to appeal is not granted as a matter of course. To succeed in an application for extension of time to appeal, the applicant must satisfy the following conditions:-
1. **Support his application with an affidavit setting forth good and substantial reasons for his failure to appeal or to apply for leave to appeal within the prescribed period.**
 2. **Set out grounds of appeal which prima facie show good cause why the appeal should be heard.**

These two conditions must be satisfied conjunctively or else the application will fail. See Bowaje vs. Adediwura (1976) 6 SC 143; Ibodo vs. Enarofia (1980) 5-7 SC 42; Mobil Oil (Nig) Ltd vs. Agadaigho (1988) 2 NWLR (Pt. 77) 383. (P.....Paras.....).

4. *Inadvertence or mistake of counsel may constitute a reason for granting an application for extension of time*
Generally an application for extension of time to appeal will be granted when the reasons for the delay in appealing within the prescribed period are attributable to mistakes, negligence or inadvertence of counsel. See Akinyede vs. Appraiser (1971) 1 All NLR 164 at 162; Doherty vs. Doherty (1964) 1 ALL NLR 292; Bowaji vs. Adediwura (supra). However, such reason must be substantial and acceptable to the court. Flimsy reasons such as the counsel was too busy and forgot to act, or that the learned counsel travelled and forgot to act are not acceptable.

The reason for the appellant's failure to appeal within the prescribed period in the instant application is not attributable to the applicant's counsel. By paragraph 5(a) of the affidavit in support of this application, Mr. Ikechukwu Ukadike, learned counsel for the applicant promptly and timeously notified the applicant on the 1st of July, 2016 that its appeal was dismissed on the same day. The applicants response dated 11th of July, 2016 did not reach its learned counsel. Therefore there is no way the reason for the delay in appealing within the prescribed period could be attributable to mistakes, negligence or

inadvertence of counsel. Paragraph 5 (c) and (d) of the supporting affidavit clearly shows that the applicant's counsel, by name Perpetual O. Nwuzuruike who misplaced it and did not bring it to the attention of the applicant's counsel. The clerk to the appellant's counsel is by the applicant's deposition accused of dereliction of duty and serious misconduct in the discharge of her duty. The said affidavit was not served on Perpetual O. Nwuzuruike, who is the only person that can deny or admit the contents of the affidavit as it affects her. (P.....Paras.....).

5. *Indictment against a counsel was not rebutted*

In Lauwers Import – Export vs. Jozebson Industries Co. Ltd (1988) 3 NWLR (Pt. 83) 429, the applicant who sought for extension of time to appeal at the Court of Appeal, deposed at paragraphs 20, 28 and 33 of the affidavit in support of its application as follows:-

- “20. That I do not know anything about court processes and procedures and I relied entirely on my solicitor, N.C.O Okwudili, Esq for my defence and guidance.**
- 28. That our former counsel N.C.O. Okwudili, Esq did not tell me or advise me and I did not know, not being a lawyer that we could appeal against the judgment.**
- 33. That our failure to appeal within time was due to no fault of ours, but due to inadvertence or an error on the part of our former solicitor in not appealing or advising us to appeal against the judgment”.**

The Court of Appeal considered the depositions as good reason for granting the application, and went on to grant same. Appellant who felt aggrieved, appealed to this court. In allowing the appeal, this court, per Agbaje JSC held:-

“There is clearly no iota of evidence of negligence or inadvertence against Mr. Okwudili in the matter before the lower court. Even if there was, one of the affidavit of the defendant which in my judgment, there is non, one would ordinarily require an affidavit from Okwudili admitting fault before such an allegation can be held to have been established by the defendant. There is no such thing in the instant case.” See Ogboru vs. Oduaghan (2013) 13 NWLR (Pt. 1370) 33 at 58; Banna vs. Telepower (Nig) Ltd.

The applicants affidavit in support of its application seriously indicted Perpetual O. Nwuzuruike for misconduct without giving her an opportunity of being heard. Since the allegations against Perpetual O. Nwuzuruike, the

clerk to the applicant's counsel has not been established, there is no reason upon which this court will grant this application. (*P.....Paras.....*).

The judgment against which the applicant seeks to appeal was delivered on the 1st of July, 2016. The instant application was filed on the 5th May, 2017. This clearly shows that the applicant was not diligent enough in following up the progress of the instruction which he gave through its letter of 11th of July 2016. A party who fails to find out the status of his case and gives all the necessary assistance to the counsel retained by him in order to successfully prosecute his case is himself guilty of negligence and the plea that the negligence of counsel cannot be visited on him cannot avail him. The applicant has failed to establish the allegation that Perpetual O. Nwuzuruike misplaced the letter of 11th July, 2016. From this finding, it is clear that the applicant has failed to set out good and substantial reason why it failed to appeal within the prescribed period. Since the first hurdle is not crossed, it will be useless to delve into the second condition which requires the applicant to furnish grounds of appeal which *prima facie* show good cause why the appeal should be heard. (*P.....Paras.....*).

6. *It is proper to combine an interlocutory appeal with appeal on the main claim*
The ruling against which the applicant appealed to the Court of Appeal and it is seeking to appeal to this court is interlocutory. The substantive case is still pending at the trial court. The trial court found that the second respondent is resident in Nigeria within the jurisdiction of the trial court and therefore cannot escape from whatever liability it will incur. This clearly is enough reason for the applicant to take up its grievances at this stage along with the appeal against the final decision in the main claim if the need arises in order to allow for expeditious determination of the applicant's main claim. It is unconscionable to pursue an interlocutory appeal which can be conveniently taken along with the appeal against the final decision, for the purpose of bringing about inordinate delay in the hearing and determination of the substantive claim. (*P.....Paras.....*).
7. *Leave to appeal must be obtained before the filing of notice of appeal*
I agree with learned counsel for the respondent that the position of the law as regards conditions precedent to the grant of an application for leave to appeal is clear and so where an appellant requires leave to appeal, leave must be obtained within the time frame allowed for appealing and before the filing of the notice of appeal. See Coker vs. UBA (1997) 2 NWLR (Pt.490) 641. (*P.....Paras.....*).
8. *Mandatory requirements for extension of time within which to appeal*
With the statutory provisions it needs no saying or for second guessing that an

application for leave to appeal can only be successful where the applicant can establish that the delay in bringing the application is neither willful nor inordinate. That is to say thus:-

- (a) that there are good and substantial reasons for failure to appeal within the period statutorily prescribed;**
- (b) that there are grounds which prima facie show good cause why the appeal should be heard.**

These two conditions must be satisfied before the court will exercise its discretion as to the grant of any application for extension of time or leave to appeal. I place reliance on *Yesufu vs. Co-operative Bank* (1989) 3 NWLR (Pt.110) 483 at 494 per Wali JSC, *Bowaje vs. Adediwuna* (1976) 6 SC 143; *Ibodo vs. Enarofia* (1980) 5-7 SC 42; *Lamai vs. Orbih* (1980) 5-7 SC 28. (*P.....Paras.....*).

Per Nweze JSC

“Bearing the above conditions in mind and placing them in context to the case in hand, the applicant did not explain with cogent reasons the inordinate delay in appealing the judgment of the Court of Appeal delivered on 1st July, 2016 because the applicant's counsel failed to follow up on his client after the initial update was purportedly sent to the client and upon the completion of its office renovation from 22nd July 2016 to May, 2017 when there was no response from the client. Furthermore, there is nothing in evidence to show that there was actually renovation work at the office of counsel at the material time.

Again to be said is that there are two legs to the conditions to be fulfilled by an applicant for extension of time for the application to succeed, the first being that there is deposition in the affidavit in support showing good and substantial reasons for the delay in filing the appeal and which reasons are convincing and not ousted by a countering deposition from the other side. The second leg is that the grounds of appeal proposed are on face value display good cause why the appeal should be heard. These two legs or conditions are conjunctively applying and must co-exist before the application would be adjudged successful. That cannot be said to be the case in this instance where applicants counsel failed to show due diligence and interest in filing an appeal after being instructed by the applicant nine (9) months after the said instruction. Assuming even inadvertence or mistake of counsel can be touted, the applicant, the owner of the process and aggrieved party did not show why there was no due enquiry from counsel for the silence over the process it assigned to counsel to get on the road. Another way of stating it is that the extension of time to appeal when the period provided had elapsed is not made off hand but has to be done in exceptional circumstances for that which the

supporting affidavit must establish. That has not happened here. See Agu vs. NICON Insurance Plc (2000) 11 NWLR (Pt.677) 187 at 194; Williams vs. Hope Rising Voluntary Funds Society (1982) 1-2 SC 145; Onagoruwa vs. I.G.P (1991) 5 NWLR (Pt.193) 593 at 767 & 772. (P.....Paras.....).

9. *Conditions for the grant of application must operate together*
The applicant in this case having not discharged the primary duty of explaining the cause, of the delay to appeal within the specified period pushing across a ground of appeal of great interest would not change the course of events since the two legs of the conditions precedent must operate together none missing in action as the applicant is clearly guilty of inordinate delay in bringing the application and the prevailing circumstances have not propelled mistake of counsel as excuse. See General Oil Ltd. vs. Oduntan (1990) 7 NWLR (Pt.163) 423 at 439; Ukwu vs. Bunge (1991) 3 NWLR (Pt.182) 677 at 689; Adegbite Alagbe vs. H. H. Samuel Abimbola & Ors. (1978) 2 SC 30; Bowaje vs. Adediwura (1976) 6 SC 143 at 147. (P.....Paras.....).

10. *Interlocutory appeals should not abort the substantive case*
The situation in this case in hand is all the more unfavourable to the applicant who failed woefully to explain the inordinate delay in appealing within the prescribed period in that the application stems from an interlocutory appeal of a Federal High Court ruling of 10th December 2009 and the substantive suit still pending and part-heard in that court of trial. This application therefore goes against the run of play in the policy decisions of the Court of Appeal and the Apex Court which decry the practice of counsel utilising these delaying manoeuvres to abort or frustrate proceedings that would easily be disposed of speedily and promptly hence the directive in the Supreme Court practice direction, 2013 for all interlocutory appeals be taken together with the substantive appeal in order to reduce delay occasioned at the lower courts and the justice of the matter attended to without delay. See Fagbenro vs. Orogun (1993) 3 NWLR (Pt.284) 662 at 673. (P.....Paras.....).

11. *Nature and purport of Order 2 Rule 31(1) and 32 of Supreme Court Rules*
Order 2 Rules 31(1) and 32 of the Supreme Court Rules provide as follows:

"31 (1) The Court may enlarge the time 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.

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.”

These provisions of our rules show that an application for extension of time to seek leave to appeal and other reliefs sought in the application before us will not be granted as a matter of course. The applicant must satisfy the court that there are exceptional circumstances to warrant the exercise of the court's discretion in his favour.

I agree with my learned brother that the applicant has failed to show any special or exceptional circumstances to justify the grant of this application. I also agree with His Lordship that a litigant, notwithstanding the fact that he has briefed counsel to represent him, has a duty to diligently follow up on his appeal to ensure that his instructions have been carried out. (*P.....Paras.....*).

Representations

Ikechukwu Ukadike, (Esq.) for the appellants.

E. Ize-Iyamu (Esq.) and O. Bolarunwa, (Esq.) for the respondents.

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

