

AMINU BASHIR IBRAHIM

Vs.

- 1. BABANGIDA ALASAN YAKUDIMA ABOALLAH –
CROSS APPELLANT**
- 2. ALL PROGRESSIVE CONGRESS**
- 3. INDEPENDENT NATIONAL ELECTORAL
COMMISSION**

SC. 465/2019

IN THE SUPREME COURT OF NIGERIA

HOLDEN AT ABUJA

FRIDAY, 14TH JUNE, 2019

BEFORE THEIR LORDSHIPS

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

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

APPEAL:- Grounds of appeal – Rules of formulation – Purpose thereof.

ELECTION:- Pre-election matter – Cause of action thereto – When cause of action arises – Whether on the date the event, decision or action complained of occurred.

ELECTION:- Primary election – Choice of candidates thereof – When there is no breach of the guidelines and constitution of a political party – Whether the court has no power to question.

EVIDENCE:- Document – Proof thereof – Whether a document is the best proof of its contents.

EVIDENCE:- Proof – Document – Whether oral evidence cannot vary or contradict the contents of a document – Exception thereto.

*STATUTE:- CFRN 1999 (as amended) – Section 66(f) thereof – Resignation therein –
When notice of resignation takes effect.*

Issue for Determination

Whether the lower court was right in upholding that the 1st respondent was validly nominated as the 2nd respondent's candidate/flag bearer.

Facts of the Matter

Held: *(Unanimously dismissing both the main appeal and the cross appeal)*

1. *A document is the best proof of its content*

It is now firmly settled that documentary evidence is the best evidence. In fact, the document being the best proof of its contents, no oral evidence will be allowed to discredit or contradict the said contents except in cases where fraud is pleaded. See Per OGBUAGU, JSC, in SKYE BANK & ANOR Vs. AKINPELU (2010) LPELR-3073 (SC). The appellant neither presented another documentary or oral evidence to contradict this in any

manner whatsoever but rather confirmed same to be true.
(P.....para.....)

2. *Oral evidence cannot vary or contradict the content of a document*
Exhibit C clearly demonstrates that the 1st respondent had at all time been screened and cleaned by the North-West screening committee. Since there is no any other document contradicting this, it must be accepted as it is. Thus, oral evidence cannot be used to vary or contradict the contents of documentary evidence, except where fraud is pleaded. See Per KEKERE-EKUN, JSC, in ARIJE Vs. ARIJE & ORS (2018) LPELR-44193 (SC).
(P.....para.....)
3. *When a court has no power to question the choice of candidates by a political party.*
It is thus the political party (the 2nd respondent in this case) that knows if it really screened and cleared the 1st respondent to contest and not the appellant. the choice of candidates by political parties for elective office being a political issue is governed by the rules, guidelines and constitution of the political party concerned and is a matter of internal affairs of the political party concerned. It is not to be questioned before any court as it is non-justiciable. Furthermore, no member of a political party has the *locus standi* to question the party's prerogative right on the issue of its choice of candidates for elective office not even in the face of breaching of its rules and regulations. The redress available to such a member who is aggrieved and who has suffered any damage as a result of refusing him nomination and sponsorship lies in damages against the political party and subject to the provision of the party constitution, rules and regulations. The political party is the proper body or person to know which of the aspirants it has cleared for the primaries and general election afterwards. So long as the guidelines and constitution of the political party are not violated or breached, the court has no power to question the choice of a party's candidate presented for election. See Per KEKERE-EKUN, JSC, in PDP & ORS Vs. EZEONWYKA & ANOR (2017) LPLER-42563 (SC). (P.....para.....)
4. *Purpose of rules of appellate procedure on formulation of grounds of appeal*
The attack on the 2 grounds of cross appeal cannot also hold water since they are far-fetched with what is before me. At least, the cross respondent had not been misled by what the essence and substance of the grounds of

the cross appeal mean. Technicality is being given a pride place in relation to substantial justice. In this case at hand, the mere fact the perfunctory use of the word “the learned justices of the Court of Appeal erred in law” in both grounds of cross appeal cannot make it incompetent as what is paramount or important is if the ground would clearly show what the complaint of the cross appeal is. The test being whether the responding side is left in doubt as to what is the substance of the complaint. It follows that once there is the required clarity and specificity in the ground and there is compliance with the rules of court in its formulation, that ground cannot be labeled incompetent. The rules of appellate procedure relating to formulation of grounds of appeal are primarily designed to ensure fairness to the other side. The application of such rules should not be reduced to a matter of mere technicality, whereby the court will look at the form rather than the substance. The prime purpose of the rules of appellate procedure, both in the Supreme Court and in the Court of Appeal, that the cross appellant in this case shall file a notice of cross appeal which shall set forth concisely the grounds which he intends to rely upon on the cross appeal; and that such grounds should not be vague or general in terms and must disclose a reasonable ground of cross appeal, is to give sufficient notice and information to the other side, of the precise nature of the complaint of the cross appellant and consequently, the issues that are likely to arise on the cross appeal. Any ground of cross appeal that satisfies that purpose should not be struck out notwithstanding that it did not conform to a particular form. In *AIGBOBAHI Vs. AIFUWA* (2006) 6 NWLR (Pt. 976) 270 at 294, per Onnoghen, JSC, warned against the technical approach in the defeat of justice and the main aim of administration of justice is the ensuring that no party is shut out of a hearing. See also Per PETER-ODILI, JSC in *KLM ROYAL DUTCH AIRLINES Vs. ALOMA* (2017) LPELR-42588 (SC). (*P.....para.....*)

5. *When cause of action arises in a pre-election matter*
Section 285(9) of the Constitution (as amended) provides inter alia:

...a pre-election matter shall be filed within 14 days from the date of the occurrence of the event, decision or action complained of.....

By section 285(9) of the Constitution (as amended), only 14 days is

event, decision or action complained of. Although the primary election took place on 3/10/2018, being the occurrence of the event, the decision or action complained of, which cause of action to sue began to accrue to the cross respondent was on 15/10/2018 when the cross respondent made a written statement to the effect that it was not his name that was submitted to INEC but that of the cross appellant as APC candidate for Dala Federal Constituency of Kano State. Thus, by the complaint of the cross respondent as deposed by him, failure to replace the 1st respondent with the cross appellant, as at the last day for effecting such change being 17/11/2018 by the 2nd respondent despite written assurances contained in its letter, was what gave the cross appellant cause of action to sue. Therefore, his suit filed on 30/11/2018, 13 days after, was within the statutory time frame from the date the cause of action arose. Therefore, the suit was filed by the cross respondent 13 days after the facts and events giving rise to the cause of action were completed and the cause of action to sue accrued to the cross respondent. This issue is against the cross appellant. (P.....para.....)

6. *When is the effective date of notice of resignation?*

On the issue that the cross respondent/appellant as plaintiff had no *locus standi* to institute this suit at the Federal High Court because he is still a public officer working with the Nigeria Customs service as Assistant Superintendent of Customs (1) contrary to section 66(f) of the Constitution, the evidence before me is that the cross respondent exhibited his letter of resignation and acknowledgement of same, which suffices to preponderate evidence in his favour that he had duly resigned his appointment from the date it was received as endorsed thereon. Besides, apart from the pay slip which the cross appellant relies on, there is no rebuttal to such evidence and claim. Resignation need not be formally accepted before it took effect. See Per KALGO, JSC, in YESUFU Vs. GOVERNOR OF EDO STATE & ORS (2001) LPELR- 3226 (SC). A notice of resignation is effective, not from the date of the letter or from the date of the purported acceptance, but from the date the letter was received by the employer or his agent. See W.A.E.C Vs. OSHIONEBO (2006) 12 NWLR (Pt. 994) 258. Resignation takes effect from the date notice is received by the employer or its agent. Resignation dates from the date notice was received. There is absolute power to resign and no discretion to refuse to accept notice. This issue is resolved against the cross appellant. (P.....para.....)

Representations:

Nureini Jimoh, with Najib Hamisu, Abubakar Nuhu Ahmad, Usman Abayomi and Zainab Maiyaki, for the appellant/cross respondent.

Ibrahim Garaba Waru, for the 1st respondent/cross appellant.

Ibrahim Barkindo, with Abdulhalim Adamu, for the 2nd respondent.

UWANIMUSAABBAAJI, JSC(Delivered the lead judgment):

1. **BCE CONSULTING ENGINEERS**
2. **BCE CONSULTANT ENGINEERING**

(A partnership firm otherwise known as BCE Consultant Engineers)
joined by the order of the Court of Appeal, made on 10th November, 2003)

VS

NIGERIAN NATIONAL PETROLEUM CORPORATION

SC.422/2011

IN THE SUPREME COURT OF NIGERIA

HOLDEN AT ABUJA

FRIDAY, 5TH JULY, 2019

BEFORE THEIR LORDSHIPS

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

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

*ACTION:- Cause of action – Meaning – The principle in **Egbe Vs. Adefarasin (1987) 1 NWLR (Pt. 47) 1 at 20.***

ACTION:- Cause of action – Meaning.

*AMENDMENT:- Effect thereof – Whether an amended process dates back to the date it was originally filed – The principle in **Vulcan Gases Ltd. Vs. Gesellschaft Fur Ind. Gasverwertung A.G (2001) 9 NWLR (Pt. 719) 610***

COURT:- Federal High Court – Jurisdiction thereof – Where a party sues for declaratory action against the executive Act of the Federal Government or any of its agencies – Whether the Federal High Court has jurisdiction.

*COURT:- Federal High Court – Jurisdiction thereof – Where a party challenges the administrative act of an agency of the Federal Government – Whether action comes within exclusive jurisdiction of the Federal High Court – The principle in **Nepa Vs. Adegbero (2002)18 NWLR (Pt. 798) 79.***

*COURT:- Federal High Court – Jurisdiction thereof – Where a party files an action for declaration against an agency of the Federal Government – Whether it falls within the exclusive jurisdiction of the Federal High Court – The principle in **Wema Securities and Finance Plc Vs. Nigeria Agricultural Insurance Corp. (2016) 16 NWLR (Pt. 1484) 93.***

COURT:- Federal High Court – Jurisdiction thereof – Where action is a declaratory relief against an agency of a Federal Government – Whether Federal High Court has jurisdiction.

COURT:- Federal High Court – Jurisdiction thereof – Where performance of appellant's obligation is related to existence of the oil field – Whether Federal High Court has jurisdiction to deal with oil field mines and power.

COURT:- Jurisdiction – How determined – Whether to consider the averments in the statement of claim or deposition in an affidavit in an originating summons.

COURT:- Jurisdiction thereof – How determined – Whether fundamental claim in the plaintiff relief cannot be subordinated under ancillary relief.

*COURT:- Supreme Court – Exercise of power under S. 22 of the Supreme Court Act – Criteria thereto – The principle in **Peter Obi Vs. INEC & Ors (2007) 11 NWLR (Pt. 1046) 560.***

STATUTE:- Supreme Court Act – S. 22 thereof – Nature and application.

STATUTE:- Supreme Court Act – S.22 thereof – Where action was initiated by originating summons – Whether Supreme Court can rehear same without taking oral evidence.

WORDS AND PHRASES:- Ancillary – Meaning

*WORDS AND PHRASES:- Arises from – Meaning – S.7(3) of federal High Court Act considered – The principle in **Patkun Industries Limited Vs. Nigershoes Ltd (988) 5 NWLR (Pt. 93) 138.***

*WORDS AND PHRASES:- Pertain – Meaning – The principle in **Mpigi Barry Vs. Eric (1998) 8 NWLR (Pt. 562) 404.***

Issue for Determination

- 1. Whether the lower court was right when it held that the trial court lacked the requisite jurisdiction to entertain the suit filed by the appellant.**
- 2. Whether the Lower court was right when it held that the contract entered into by the 1st appellant, a foreign company without incorporation in Nigeria was illegal and unenforceable.**

Facts of the Matter

This is an appeal against the decision of the Court of Appeal or court below or lower court , Lagos Division.

The suit before the trial court was commenced by the 1st appellant vide an originating summons filed before the Federal High Court, Lagos seeking inter alia, certain declarations that the respondent (then defendant) unlawfully terminated a Consultancy Service Agreement (at pages 9-27 of the record of appeal) entered into between the 1st appellant and the respondent by a letter dated 7th July 1999. The 1st appellant claimed declarations with respect to the Consultancy Service Agreement, specific performance of the Consultancy Service Agreement, the sum of US\$807,694.50 (Eight Hundred and Seven Thousand, Six Hundred and Ninety Four Dollars Fifty cents) being the total value of outstanding claims on invoices submitted by the

1st appellant and in the alternative the sum of US\$28,139,965.50 Twenty Eight Million, One Hundred and Thirty Nine Thousand, Nine Hundred and Sixty Five Dollars and Fifty cents or its Naira equivalent being special damages for the illegal cancellation of the Consultancy Services Agreement. The learned trial judge granted the 1st appellant's motion ex-parte seeking leave to serve a motion on notice along with the originating summons, leave to serve the originating summons and all other court processes on the respondent at National Petroleum Investment Management Services (NAPIMS) Plot 1637, Adetokunbo Ademola Street, Victoria Island, Lagos and an order of interim injunction.

The 1st appellant also filed a motion on notice dated 4th April 2000 seeking an order of interlocutory injunction restraining the respondent from acting or giving effect to its letter dated 7th July 1999, cancelling the contract between itself and the 1st appellant although it commenced the action almost one year after it received the letter of termination.

The respondent thereafter filed a motion on notice dated 26th July 2000 seeking the following reliefs:-

- 1. An order pursuant to Order 2 Rule 2 and Order 3 Rule 2 of the Federal High Court (Civil Procedure) Rules 2000 striking out this suit as incompetent on the following grounds:-**

- i) The plaintiff is not a juristic person and so is not competent to bring this suit;
 - ii) An originating summons is not an appropriate mode of commencing this suit; and;
2. An order pursuant to Section 13 of the Nigerian National Petroleum Corporation Act Cap 320, Laws of the Federation of Nigeria, 1990 Edition and Order 13, Rule 8 of the Federal High Court (Civil Procedure) Rules 2000, rescinding its "Order made ex-parte on the 10th day of July 2000 granting leave to the plaintiff "to serve the originating summons and all other court processes herein on the 1st defendant by delivering the same at the Nigerian National Petroleum Corporation (NAPIMs), Plot 1637 Adetokunbo Ademola Street, Victoria Island, Lagos Nigeria" as having been made without the jurisdiction to do so and setting aside as invalid service of the originating summons and supporting affidavit (sic) motion on notice and its supporting affidavit and other documents purported to have been effected on the defendant in this suit at the said Lagos address pursuant to the said order hereby sought to be rescinded".

Held: *(Unanimously allowing the appeal)*

1. *How to determine jurisdiction of court*

Indeed, it is now trite in law that the claim of the plaintiff that determines the jurisdiction of the court and to determine the issue of jurisdiction recourse goes to the facts pleaded in the statement of claim as well as the claim endorsed on the writ of summons and in a case such as the present where the matter was initiated by originating summons, the fact in the affidavit in support takes the place of pleadings and from those affidavit averments are found whether or not there is jurisdiction in the court to entertain the matter before it. See *Adeyemi Vs. Opeyori* (1976) 9-10 SC 31; *Tukur Vs. Government of Gongola State* (1989) 4 NWLR (Pt.117) 517; *Mustapha Vs. Governor of Lagos State* (1987) 2 NWLR (Pt.58) 539; *Financial Merchant Bank Ltd. Vs. Nigerian Deposit Insurance Corporation* (1995) 6 NWLR (Pt.400) 226 at 240. (*P.....para.....*)

2. *Definition of Cause of Action*

What the court is faced with as the cause of action is the cancellation decision of the respondent of the consultancy services agreement for the Bonga OPL 212 Field Development Project allegedly done on the orders of the Federal Government in a way that violated the right of fair hearing of the appellants to make representations *over* the issue upon which the cancellation was made.

The definition of the phrase "cause of action" has been made in

numerous judicial authorities but I shall refer just to one which seems to me to capture the core of what the phrase means. (P.....para.....)

3. *Meaning of Cause of Action*

In EGBE Vs. ADEFARASIN, this court per Oputa JSC said of the phrase "cause of action" as follows:

"Now, let us look at the meaning of cause of action. It is admittedly an expression that defies precise definition. But it can safely be defined as the fact or facts which establish or give rise to a right of action. It is the factual situation which gives a person a right to judicial relief. A cause of action is to be distinguished from a right of action. A right of action is the right to enforce presently a cause of action. In other words, a cause of action is the operative fact or facts (the factual situation) which give rise to a right of action which itself is a remedial right."
(P.....para.....)

3. *What was before court was not a simple contract*

I am inclined to the views expressed in the submissions of learned senior advocate for the appellants that the Court of Appeal had taken a rather simplistic view of the plaintiff's action at the trial court and that by all accounts the matter did not relate to a simple contract as viewed by the Court of Appeal. My reasons for saying so are set out in a summarized way of what was before court which are as follows:-

- (a) that it entered into a consultancy services agreement with the respondent which is a statutory body and an agency of the Federal Government of Nigeria, some time about 20th May 1999;
- (b) that the consultancy services were to be rendered in respect of the Bonga OPL 212 Field Development Project;
- (c) that after the contract had come into existence, the Federal Government set up a presidential panel under the chairmanship of one Mr. Christopher Kolade to review, inter alia, contracts entered into by the Federal Government and its agencies including the respondent;
- (d) that the panel did not issue any notice or summons to the appellants in respect of the Consultancy Services Agreement and the appellants did not appear before nor

- make any representation to the panel in respect of the contract, by reason of which the appellants' fundamental right to fair hearing was violated;
- (e) that despite the fact that the contract was not affected by the proceedings of the panel, the respondent purported to cancel the agreement on the order of the Federal Government; and
 - (f) it was in the light of the foregoing facts that the appellants instituted their claim against the respondent in the Federal High Court. (*P.....para.....*)

4. *Action was a declaratory relief against an agency of the Federal Government*
 It seems to me that the court below veered off course, taking the narrow path leading to the ancillary reliefs in determining that the trial court lacked jurisdiction. In doing so the lower court lost sight of the fundamental issue before the court which is the reason given by the respondent for the cancellation of the Consultancy Services Agreement which the appellants are challenging taken alongside the fact that the respondent is an agency of the Federal Government and the action is for declarative and injunctive reliefs against an executive decision or action of the agency which action clearly brought it within the exclusivity of the jurisdiction of the Federal High Court. Also the contract as seen in the record was one entered into by the respondent pursuant to its statutory power under the Nigerian National Petroleum Corporation Act. Again on the burner is the action involving a claim for the enforcement of the fundamental right to fair hearing of the appellants before the cancellation. (*P.....para.....*)

5. *Fundamental claim cannot be subordinated under ancillary relief*
 It follows that the fundamental issue in the claim of the plaintiff cannot be subordinated under an ancillary relief such as the court below posited. See *Nwafia Vs. Ububa (1966) NMLR 219 at 221-222.*

It is difficult to align with the view that the matter principally before the trial court was a simple contract in the light of the core of what is being controverted. (*P.....para.....*)

6. *The nature and purport of S. 251(1) of CFRN 1999 (as amended)*
 In this regard, I shall refer to Section 251 (1) of the Constitution of the Federal Republic of Nigeria 1999 (as amended) and to be referred to, as the case may be simply as CFRN and I shall quote it for ease reference and it is as follows:-

"251 (1) Notwithstanding anything to the contrary contained in this Constitution and in addition to such other jurisdiction

as may be conferred upon it by an Act of the National Assembly, the Federal High Court shall have and exercise jurisdiction to the exclusion of any other court in civil cases and matters;

- (r) any action or proceeding for a declaration or injunction affecting the validity of any executive or administrative action or decision by the Federal Government or any of its agencies". (P.....para.....)

7. *Federal High Court has jurisdiction in matters relating to oil field mines and power*
Thus the Consultancy Services Agreement cannot stand without the BONGA OPL 212 Oilfield and the performance of the appellants' obligation under the Agreement is dependent on the existence of the Oil Field.

For effect, the Federal High Court is a creation of Section 249 (1) CFRN and then Section 7 of the Federal High Court Act Cap F12 Laws of the Federation 2004, endows exclusive original jurisdiction to the Federal High Court in regard to matters and civil causes - "mines and minerals (including oil fields, oil mining, geological surveys and natural gas)". It needs be noted that Section 7 (1) (n) of the Federal High Court Act is a verbatim reproduction of Section 251 (1) (n) CFRN. (P.....para.....)

8. *Meaning of arises from under S.7(3) of Federal High Court Act*

Section 7 (3) of the Act provides for how the jurisdiction of the court is to be construed and in this is embedded the principal relief and the ancillary. This brings to the point where the phrase, "ancillary to" has to be defined.

In seeking to determine the connotations of the words "relating to", "arising from" and "ancillary to" as used in Section 7 (3) of the Act. The Supreme Court in the case of Patkun Industries Limited Vs. Niger Shoes Ltd (1988) 5 NWLR (Pt.93) 138 per Karibi-Whyte JSC at 151 stated thus:-

"Something arises from another when it is traceable to that other thing from which it is said to arise from".

The word 'arise' means "a thing is said to arise from another if it "originates" springs or results from another", See Olaniyi Vs. Adetunji (2008) All FWLR (Pt.439) 98. See also Shell Petroleum Development Co (Nig.) Ltd Vs. Maxon (2001) 9 NWLR (Pt.719) 541 per Pats-Acholonu JCA (as he then was) where he said thus:-

"To my mind the expression 'arising from' connotes and denotes emanating from or springing or having its offshoot from. The term means something which is a direct offshoot of

matter". (P.....para.....)

9. *The meaning of pertain*

In **MPIGI BARRY Vs. ERIC** (1998) 8 NWLR (Pt.562) 404 the Court of Appeal, per Nsofor, JCA stated that:

"Chambers 20th Century Dictionary page 996 defines "pertain" to mean "to belong to, relate". In Oxford Advanced Learner's Dictionary of Current English, page 629, the term of word, "pertain" is defined to mean "to belong as part of accessory; have reference to".

What of the words "connected with" as used in the Decree 60 of 1991 (see Section 7 (1) supra)". The term "connect". also a simple English word, in the very form, derives from Latin, "connectere connesum" (verb) meaning to "to the or fasten together; to establish a relationship between, to associate".

See also Chambers Twentieth Century Dictionary page 275.

It follows, therefore from the above simple and rather elementary analysis, that the matter in the context discussed above, shall be something which "belongs to" or "related to", something which "belongs as a part or accessory" or "has reference" to mines and minerals including oil fields, oil mining, geological surveys in order to be "pertaining to" Section 7(1) of Decree No.60.

Similarly the operation or matter, in order to be "connected with mines and minerals including oil fields, oil mining, geological surveys" etc, within the context of Section 7 (1) of Decree NO. 60 of 1991 ought to be a something, which is "tied to" or "fastened together with" or, a something which "establishes a relationship between" or "associate with" mines and mineral is including oil fields, oil mining, geological surveys etc. Once this relationship of being "connected with" or "pertaining to" is established on the facts, the matter in my view, falls within the cold embrace of the Decree and the Federal High Court shall have exclusive jurisdiction in that particular case". (P.....para.....)

10. *The meaning of Ancillary*

See also **THE SHELL PETROLEUM DEVELOPMENT COMPANY OF**

NIGERIA LIMITED Vs. SIRPI-ALUSTEEL CONSTRUCTION LIMITED (2007) 1 NWLR (Pt.1D67) 128 to the word "ancillary", the Court of Appeal said, in the case of NIGERIAN DEPOSIT INSURANCE CORPORATION Vs. SAVANNAH BANK (NIG.) PLC (2003) 1 NWLR (Pt.801) 31.1 at page 422 of the report per Oduyemi, JCA as follows:-

"Ancillary" is defined at page 78 of the 5th Edition of Black's Law Dictionary as:

"Aiding, attendant upon; describing a proceedings attendant upon or which aids another proceeding considered as principal. Auxiliary or subordinate".

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

11. *Federal High Court has jurisdiction in respect of the executive or administrative decision of the Federal Government or any of its agencies.*

At the risk of repetition, Section 251 (1) (r) CFRN, has vested exclusive jurisdiction in the Federal High Court in respect of any matter in which the Federal Government or any of its agencies is a party and the action is for declarative or injunctive reliefs affecting any executive or administrative action or decision of the Government or any of its agencies. (P.....para.....)

12. *Action is one within the exclusive jurisdiction of the Federal High Court*

This court in NEPA Vs. Edegero (2002) 18 NWLR (Pt.798) 79 per Ogundare JSC at page 95 explaining the purport of Section 230 (1) (s) of the 1999 Constitution as amended by Decree 107 of 1993, the precursor to Section 251 (1) (r) of the 1999 Constitution stated as follows:-

"It is not in dispute that the defendant - NEPA - is a Federal Government Agency, the two courts below made a finding of fact to this effect and this has not been challenged by the plaintiffs. It is also not disputed that the cause of action in this matter arose out of the administrative action or decision of the defendant. The action is for a declaration and an injunction and the principal purpose of it is to nullify the decision of the defendant terminating the appointments of the plaintiffs and others. In the light of all these therefore, the action on hand came squarely within the provision of Section 230 (1) (s) of the 1999 Constitution. It would appear on the surface, therefore, that the action would be one within the exclusive jurisdiction of the Federal High Court. I have myself read the proviso to paragraphs (q), (r) and (s) of sub-Section 230 all over again; I can find no such exemption in it that would lead me to find to the

contrary. A careful reading of paragraphs (q), (r) and (s) reveals that the intention of the lawmakers was to take away from the jurisdiction of the State High Court and confer same exclusively on the Federal High Court and which the Federal Government or any of its agencies is a party. While in paragraph (s) talked of actions for declaration or injunction, the proviso extended this to actions for damages, injunction or specific performance. It did not say as the learned trial Judge, with profound respect, appeal to read into it that action for damages, injunction or specific performance against the Federal Government or any of its agencies could still come before a State High Court. I am of the view that the learned trial Judge was in error in his interpretation of the purport of the proviso".

See also **OSAKUE Vs. FCE ASABA (2010) 10 NWLR (Pt.1202) P.1; PROFESSOR ADEREMI DADA OLUTOLA Vs. UNIVERSITY OF ILORIN (2004) 18 NWLR (Pt.905) page 416. (P.....para.....)**

13. *Action for any proceedings for declaration against an agency of the Federal Government*
In WEMA SECURITIES AND FINANCE PLC Vs. NIGERIA AGRICULTURAL INSURANCE CORPORATION (2016) 16 NWLR (Pt.1484) 93, this court per Nweze JSC observed at page 134 as follows:-

"Section 251 (1) (r) adds an additional complexion to the above categories. It provides that the Federal High Court shall have and exercise jurisdiction to the exclusion of any other court in "(r) any action or proceeding for a declaration or injunction affecting the validity of any executive or administrative action or decision by the Federal Government or any of its agencies". In effect, in action under this class, the court would be required to resolve three sub- questions (i) whether the claim relates to the validity of any executive or administrative action or decision; (ii) if the either of the parties is the Federal Government or any of its agencies and (iii) the nature of the reliefs, that is, whether they are for declaration; injunction; damages or specific performance".

See also the following cases:

* **AHMD Vs. AHMED (2013) 15 NWLR (Pt.1377) P.274.**

* FAROUK SALIM Vs. CPC (2013) 6 NWLR (Pt.1351) P.501.

I agree with learned counsel for the appellants that in the instant case, the reliefs of the appellants, as can be found at pages 2-3 of the record of appeal, are essentially for declaratory and injunctive reliefs in respect of an executive decision or action of the respondent, which was manifested in its letter of 7th July 1999 contained at page 30 of the record of appeal. That being so, it is posited that the ingredients necessary for giving jurisdiction to the Federal High Court under Section 251 (1) (r) of the Constitution, to wit: party and subject matter, are present in this case. (*P.....para.....*)

14. *Contract has statutory flavour*

It needs be brought to the fore that the contract at the root of all this has statutory flavour, having been entered into by the respondent pursuant to its power under Section 6 (1) (c) of the Nigerian National Petroleum Corporation Act, which stipulates as follows:-

"The Corporation shall have powers to do anything which in its opinion is calculated to facilitate the carrying out of its duties under this Act, including without limiting to the generality of the following, the power to (c) enter into contracts or partnerships with any company, firm or person which in the opinion of the Corporation will facilitate the discharge of the said duties under this Act". (*P.....para.....*)

Per Odili (JSC)

In reiteration, is that the appellants' claim for the breach of their fundamental right to fair hearing by the respondent was borne out of the reliance by the respondent on the directive of the Federal Government of Nigeria to cancel the agreement in issue which agreement is one with statutory flavour and the breach of fundamental right is simply whether the Federal Government could have issued a directive for the cancellation of the appellants' contract with the respondent without giving the appellants an opportunity of being heard.

It is as plain as daylight that the court below was wrong to hold that the Federal High Court lacked jurisdiction when the appellants' claim clearly fell within the provisions of Section 251 (1) CFRN.

The situation that has naturally sprung up is that issue 2 that has to do with whether or not the contract between the appellants and the respondent was illegal on the ground that the appellants were a foreign company not registered in Nigeria is a question that cannot wait. The reason is that the Court of Appeal was wrong to have held that jurisdiction did not enure in the Federal High Court and failed further to address the merits of the decision that emanated

from the trial court inspite of its holding that there was no jurisdiction as the Court of Appeal being an intermediate court should have gone into the merits of appeal though holding that jurisdiction in the court did not exist so as to enable the final decision to be handled fully by the Supreme Court which on its part and as the final arbiter with the overriding ultimate decision to decide on the issue of jurisdiction of the trial court and so on and if it holds that there was vires in that court of first instance would then decide on the merits of the case. On the other hand if the Supreme Court were to decide that indeed there was no power of adjudication in the Court of first instance would then without more strike out the suit and that would be the end of it. This latter position is not for the trial court or Court of Appeal as intermediate being not the final court.

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

15. *The nature and application of S. 22 of Supreme Court Act*

The situation that has cropped up in the prevailing circumstance is what this court should do since the Court of Appeal left unattended the appeal over the final decision of the trial High Court on the merit. A school of thought would urge that the matter be sent back or remitted to the Court of Appeal to do the needful and consider the merits of the appeal. One finds it difficult to flow along that way of thinking in the light of substantial justice being the guiding principle propelling adjudication especially at this level and in the unique situation of the facts of this case and the passage of time. (P.....para.....)

16. *Justification and application of S. 22 of the Supreme Court Act*

Also into the arena for consideration is the powers of the Supreme Court Act, which provision with the prescriptions seem to have had the exact position of things herein, in mind.

For clarity, I shall quote the said Section 22 of the Act which provides thus:-

Section 22 -

"The Supreme Court may from time to time make any order necessary for determining the real question in controversy in the appeal and may amend any defect or error in the record of appeal to enquire into and certify its findings on any question which the Supreme Court thinks fit to determine before final judgment in the appeal and may make an interim order or grant any injunction which the court below is authorised to make or grant and may direct any necessary inquiries or account to be made or taken and generally shall have full jurisdiction over the whole proceedings as if the proceedings to be instituted and prosecuted in the Supreme Court as a court of

first instance and may rehear the case in whole and in part or may remit it to the court below for the purpose of such rehearing or make or give such other directions as to the manner in which the court below shall deal with the case with the powers of that court."

Armed with the powers under Section 22 of the Supreme Court Act as quoted above, clearly two options for our purpose exist, one to send the case back to the Court of Appeal to hear the merits of the appeal de novo or to take on the garb of the court of first instance and rehear the matter. The latter option is the more attractive, seen in the prism of substantial justice when this court has to tackle head on, an infringement or wrong done to any person by redressing that infraction. It is true that it can be done by having the matter first taken up fully by the Court of Appeal leaving the open possibility of the aggrieved party after the decision of approaching the Apex Court for the full and final determination of the justice of the case. Therein arises the issues of how long a party has to wait to have his grievance attended to by the court with finality as in this case which has lingered on for nearly twenty (20) years and with the further possible rigmarole of a possible addition of maybe ten (10) years or more for remedy. This option x-rayed above taken in competitive analysis to the Supreme Court addressing the issues once and for all, not in vacuo but armed with statutory power of Section 22 of the Supreme Court Act. (*P.....para.....*)

17. *Proceedings will not involve the taking of oral evidence*

I take this latter route in the light of the provisions of Section 22 of the Supreme Court Act which extracts state thus:-

"The Supreme Court may from time to time make any order necessary for determining the real question in controversy in the appeal and may amend any defect or error in the record of appeal to inquire into and certify its findings on any question which the Supreme Court thinks fit to determine before final judgment to make or grant and may direct any necessary inquiries or account to be made or taken and generally shall have full jurisdiction over the whole proceedings as if the proceedings to be instituted and prosecuted in the Supreme Court as a court of first instance and may rehear the case in whole and in part "

This weapon enshrined by statute taken along the fact as in this instance where the proceedings were initiated by originating summons which is determined by the affidavit evidence in support and or against. The situation would have been different if the proceedings were by writ of summons

necessitating the taking of oral evidence, therein the Apex Court would have been shackled as the only opening would have been remitting to the court below or even trial court. Therefore, taking the stand of rehearing the matter as though of court of first instance and utilising the affidavit evidence.

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

18. *Criteria for exercise of the powers of the Supreme Court under S. 22*
I am emboldened in this regard with the laid down guiding principles already set down by this court at various occasions and I shall refer to just a few.

In the criteria for the exercise of the powers of this court under the Supreme Court Act in the case of Peter Obi Vs. INEC & Ors. (2007) 11 NWLR (Pt.1046) 560 at 639-640 Paras. H-B where Aderemi JSC summarized the conditions as follows:-

- "I) the lower court or trial court must have the legal power to adjudicate in the matter before the appellate court can entertain it.
- ii) the real issue raised by the claim of the appellant at the lower court or trial court must be seen to be capable of being distilled from the grounds of appeal.
- iii) all necessary materials must be available to the court for consideration.
- iv) the need for expeditious disposal of the case or suit to meet the ends of justice must be apparent on the face of the materials presented; and
- v) the injustice or hardship that will follow if the case is remitted to the court below must clearly manifest itself".

I further refer to the decision of this honourable court in Agbakoba Vs. INEC (2008) 18 NWLR (Pt.1119) 489 at 557.

It is humbly posited that the above conditions are adequately satisfied in the instant case especially in view of the fact that the record of appeal before this honourable court contains all necessary materials for the consideration and determination of the propriety of damages assessed and awarded by the trial court. It is therefore desirable and expedient that the nagging dispute can be resolved with the materials available, I shall go into the unattended Issue No.2.

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

19. *Contract was illegal*
See page 228 of the Record which contains the Certificate of Registration of the appellants in Nigeria. Thus the Certificate shows that the appellants were registered in Nigeria as at 6th August 1988, whereas the contract was entered into

on 20th May 1999.

Indeed, the court below was wrong in its conclusion on the legality or otherwise of the contract which it held to be illegal as it runs contrary to the case of **Total (Nig.) Plc Vs. Ajayi (2004) 3 NWLR (Pt.860) 270 at 291.** (P.....para.....)

Per Odili (JSC)

That decision, which is not contained in the record of appeal, is reported as **NNPC Vs. BCE (2004) 2 NWLR (Pt.859) P.1** shows that BCE Consultant engineering is a partnership firm otherwise known as BCE Consulting Engineers. There is no appeal pending in this court against the decision of the lower court. In this respect, it is an elementary principle of law that an order of court remains *valid* and subsisting until set aside. This principle was restated by this court in the case of **Nwora Vs. Nwabueze (2011) LPELR - 23008 (SC)** where **Chukwuma-Eneh, JSC** held that:

"And as held in the case of **Jimoh Akinfolarin & Ors. Vs. Solomon Oluwole Akinola (1999) 4 SCNJ 30 at 46:** "An order or judgment of a court of competent jurisdiction remains valid and binding on the parties concerned and privies until it is set aside by due process of law. Accordingly it must enjoy the legal presumption of regularity and must remain valid and binding on the parties concerned and their privies until it is set aside by the process of law." This court in the circumstances is bound to give effect to the said order, notwithstanding the applicants contention of not having been aware of the order."

See also:

- **AKINYEMI Vs. SOYANWO (2006) 13 NWLR (Pt.998) 496**
- **ODOGWU Vs. ODOGWU (1992) 2 NWLR (Pt.225) 539**
- **NIGERIAN ARMY Vs. GLORIA MOWARIN (1992) 4 NWLR (Pt.235) 345.**

I agree with learned silk for appellants that the respondent is estopped, in law, from contending in this court that BCE Consulting Engineers is different from BCE Consultant Engineering. Indeed, from the title of the present appeal, it is patently apparent that the 2nd appellant is described as BCE Consultant Engineering (a partnership firm otherwise known as BCE Consulting Engineering), which is in conformity with the Order of the Court of Appeal made on 10th November, 2003.

Secondly, by the amendment order that the Court of Appeal made on 10th November, 2003, the addition of BCE Consultant Engineering, whose

certificate of Registration appears at page 228 of the record of appeal, related back to 4th April, 2000 when the originating summons was filed at the trial court. (P.....para.....)

20. *Court process will date from the time it was originally filed.*
The effect of that amended process is that the court process so amended would date from the time it was originally filed. See **VULCAN GASES LTD. Vs. GESELLSCHAFT FUR IND. GASVERWERTUNG A.G (2001) 9 NWLR (Pt.719) 610**, where Iguh, JSC observed that:

"It is beyond dispute that an amendment relates back to the commencement of a suit. An order of amendment takes effect, not from the date when the amendment is made or granted but from the date of commencement of the action. In other words, once ordered, what stood before amendment is no longer material before the court and no longer defines the issues to be tried."

Consequently, the 2nd appellant is entitled to take benefit of the judgment of the trial court, notwithstanding that it was made before the joinder.

However, since this court has taken over the whole proceedings and considered all the materials available it has not been difficult to agree with what the trial court had done in its judgment which awarded the sum of \$22,630,000.00 or its naira equivalent then as general and compensatory damages using the current rate of exchange as at the date of the agreement. The justice of the case as at now is that the appellants are indeed on solid ground and the contract was and remains valid and the appeal is allowed. The prevailing circumstances make it imperative for an order of this court relating to the award of damages which I place at \$22,630,000.00 or its equivalent using the current rate of exchange in the officially recognised rate.

For clarity, the appeal is allowed and the respondent is to pay the sum of \$22,630,000.00 (Twenty-Two Million, Six Hundred and Thirty Thousand US Dollars) or its naira equivalent at the current rate prevailing in Nigeria.

Costs of N5,000,000.00 is awarded to the appellants to be paid by the respondent. (P.....para.....)

Representations:

**Tayo Oyetibo (SAN) for appellants and with him is Shakirudeen Mosobalaje.
O. Akoni (SAN) for respondent and with him B.B. Lawal and A.O. Utake.**

MARY UKAEGO PETER-ODILI, JSC (Delivering the lead judgment)

COMPACT MANIFOLD & ENERGY SERVICES LTD
Vs.
PAZAN SERVICES NIGERIA LTD

SC. 361/2017

IN THE SUPREME COURT OF NIGERIA

HOLDEN AT ABUJA

FRIDAY, 12TH JULY, 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

ACTION:- Preliminary objection – Nature and purpose

*ACTION:- Preliminary objection – Purpose – The principle in **Adejumo Vs. Olawaiye (2014) 12 NWLR (Pt. 142) 252.***

*ACTION:- Preliminary objection – Purpose – The principle in **KLM Royal Dutch Airlines Vs. Aloma (2017) LPELR – 42588.***

CONSTITUTIONAL LAW:- Fair hearing – Where party has ample opportunity to defend himself – Whether party cannot complain of denial of fair hearing.

EVIDENCE:- Electronic evidence – Whether admissible.

PRACTICE AND PROCEDURE:- Appeal – Preliminary objection thereto – Purpose – Whether to terminate the entire appeal and not only grounds thereto – Or. 2, r.9(1) Supreme Court Rules considered.

PRACTICE AND PROCEDURE:- Appeal – Where there are competent grounds of appeal – Whether such competent grounds of appeal can sustain an appeal.

SERVICE:- Hearing notice – None service – Whether will not vitiate trial in all cases – The principle in Compact Manifold & Energy Services Ltd Vs. Pazan Service (Nig.) Ltd (2017) LPELR – 41913.

SERVICE:- Hearing notice – Purpose thereof – Whether it is fundamental to the administration of justice.

SERVICE:- Hearing notice – Where serve through text messages – Whether good and sufficient service.

SERVICE:- Hearing notice – Where there is failure to serve hearing notice – Whether it is a jurisdictional question which can be raised for first at the Supreme Court.

SERVICE:- Notice of proceedings – Where a party is not given notice of proceedings – Whether failure renders such proceedings void.

SERVICE:- Phone call – Where service is made by phone call – Whether such service is a good service – The principle in ENL Consortium Ltd Vs. Shambilat Shelter (Nig.) Ltd (2018) LPELR-43902 (SC).

Issues for Determination

- 1. Whether the lower court was right to hold that the appellant was aware of the date the default judgment was entered when no hearing notice was served on the appellant.**
- 2. Whether the lower court was right to have upheld the default judgment entered against the appellant, when there was no proof of service of any hearing notice on the appellant before the trial court, as at the time the default judgment was entered.**
- 3. Whether from the material fact available in the record, the lower court came to a right decision when it held at page 804 of the record that the default judgment was entered within the three months' period of the commencement of case management conference (CMC) in accordance with the provisions of High Court of Lagos State (Civil Procedure) Rules, 2012.**

Facts of the matter

The respondent herein, as plaintiff at the High Court of Lagos State, claimed at paragraph 23 of its statement of claim filed on the 31st March 2014, the following reliefs:-

1. **The sum of N95,399, 765.28 and the sum of \$875,949.22, being the unpaid balance of money for the supply of scaffolding materials and services to the defendant for the Chevron EGP-3B project, offshore Warri Delta State.**
2. **The sum of N43,522,300.00 being the total cost of the unrecovered scaffolding materials and equipment in possession of the defendant at Chevron EGP-3G project, offshore Warri Delta State which have been rendered unfit and unstable due to salty water and high humidity at the project site.**
3. **An order for the release of 2 offshore material baskets belonging to the claimant still in NIWA yard ware house of the defendant in Warri.**

The appellant herein filed a statement of defence on the 3rd of October, 2014. The respondent filed a reply on the 29th December, 2014.

Issues having been joined, the case was set down for hearing before Oke Lawal J. on the 7th July, 2014. The appellant was not in court and was not represented by a counsel. Hearing notice was ordered to be served on the appellant and the matter was further adjourned to the 15th September, 2014 at the request of its counsel who informed the court that a move was being initiated for the matter to be settled out of court. The court did not sit on the 15th September, 2014 and the matter was adjourned to 13th October, 2014. On the said 13th October, 2014 Mr. Stephen Efedogor, learned counsel for the appellant applied for and was granted an adjournment in order to regularize the appellant's processes. On 20th November, 2014 when the case came up, learned counsel for the appellant instead of regularizing their processes, moved a motion urging the court to strike out the writ and the statement of claim for being irregular. The motion was heard and dismissed and the appellant was ordered to regularize its processes. The matter was then adjourned to 18th December, 2014 for mention and to hear the appellant's motion seeking to regularize its processes. On the 18th December 2014, appellant moved its motion for extension of time to file its statement of defence, and same was granted and the case was adjourned to 19th and 26th January, 2015 for hearing. On 11th February 2015, Okey Wali learned counsel for the plaintiff, now respondent informed the court about a possibility for settlement out of court. The case was then adjourned to 25th March, 2015 for report of settlement. On the 6th of May 2015, the court was informed of the parties failure to settle.

It was at this stage that parties were directed to file forms 17 and 18 which deal with issues for determination and answers and the matter was adjourned to 17th June, 2015 as agreed by counsel for respective parties. The respondent filed form 17 and 18 and the appellant also did the same, after having informed the court that it had paid N20,000.00 to the respondent. On the 24th November, 2015 the appellant's counsel drew the attention of the court to a motion he filed on the 17th June, 2015 in which he sought for an order of dismissal of the suit on the ground that same had been abandoned by the respondent.

The trial court took the application and dismissed it and the matter was adjourned to 15th of December, 2015 for case management conference. Learned counsel for the appellant filed a notice of appeal on the 2nd December, 2015 against the ruling of 24th November, 2015. After filing the appeal, the appellant failed to compile record. On the 15th December, 2015 when the case management conference was to commence, the appellant's counsel applied for adjournment, and the matter was adjourned to 26th January, 2016. On that day the case management conference went on and was later adjourned to 16th February, 2016. On that day the court did not sit and the registrar of the court sent fresh hearing notice to the parties, informing them that the matter had been adjourned to the 15th March, 2016 for continuation of the case management conference. On the appointed day when the matter came up for continuation of the case management conference, the appellant and his counsel were absent. The respondent applied for judgment under order 25 Rule 6 (2)(b) of the High Court (Civil Procedure) Rules 2015. The court granted the application and went on to enter judgment for the respondent herein. By a motion on notice filed on the 18th March 2016, the appellant prayed the court to set aside the judgment delivered on the 15th March, 2016. The application was refused. Appellant's appeal against the judgment of the Lagos State High

Court was on the 10th March, 2017 dismissed by the Court of Appeal, hence this appeal.

Held: (*Unanimously dismissing the appeal*)

1. *The nature and purpose of a preliminary objection*
A preliminary objection to the competence of an appeal, is an objection, if upheld, renders further proceedings before the court or tribunal unnecessary. Therefore, when it is raised, it must be resolved before venturing into the appeal. (P.....para.....)
2. *Competent grounds of appeal can sustain an appeal*
The respondent's notice of preliminary objection reads as follows:-

"TAKE NOTICE that the respondent herein shall, at or before the hearing of this appeal, raise and rely upon the following preliminary objection against the appellant's appeal and pray the honourable court for:-

AN ORDER striking out or dismissing the Appellant's appeal."

I have reproduced the grounds of objection elsewhere in this judgment. From the contents of the notice, it will appear that the objection is directed at the hearing of the appeal. However, learned senior counsel for the respondent/objector in his argument in support of the preliminary objection at pages 2-7 of the respondent's brief of argument, attacked only the 2nd, 3rd, 4th, 6th

and 7th grounds of appeal. The appellant's notice of appeal filed on the 13th March, 2017 contains eight grounds of appeal. Since no argument was preferred in respect of the 1st, 5th and 8th grounds of appeal by the learned senior counsel for the respondent/objector, it means those grounds are competent, as such they can sustain the appeal. (P.....para.....)

3. *The purpose of a preliminary objection*
Order 2 Rule 9(1) of the Supreme Court Rules (as amended 2014) provides as follows:-

"A respondent intending to rely upon a preliminary objection to the hearing of the appeal, shall give the appellant three clear days' notice thereof before the hearing, setting out the grounds of objection, and shall file such notice together with ten copies thereof with the Registrar within the same time. "
(*underlining is mine for Emphasis*).

The emphasis is that a preliminary objection can only be issued against the hearing of the appeal, and not against a selection of grounds of appeal, which even if it is upheld cannot terminate the appeal in limine. (P.....para.....)

4. *The purpose of a preliminary objection*
In *KLM Royal Dutch Airlines Vs. Aloma* (2017) LPELR - 42588 (SC), this court, per Kudirat Motonmori Olatokunbo Kekere-Ekun JSC at pages 6-7, paras D-B, held:-

"The purpose of a preliminary objection is to truncate the hearing of an appeal in limine. It is raised where the respondent is satisfied that there is a fundamental defect in the appeal that would affect the court's jurisdiction to entertain it. Where there are other grounds that could sustain the appeal, a preliminary objection should not be filed. Where the purpose of the objection is merely to challenge the competence of some grounds of appeal, the best procedure is by way of motion on notice. The reason is that the success of the objection would not terminate the hearing of the appeal. See *Odunukwe Vs. Ofomata* (2010)18 NWLR (Pt. 1225)404 at 423 C-F, *Ndigwe Vs. Nwude* (1999)11 NWLR (Pt. 626)314; *N.E.P.A. Vs. Ango* (2001)15 NWLR (Pt. 737)627; *Muhammed Vs. Military Administrator Plateau State* (2001)18 NWLR (Pt.744) 183." (P.....para.....)

5. *The purpose of preliminary objection*
See also the case of *Adejumo Vs. Olawaiye (2014)12 NWLR (Pt.142)252 at 279* where this court, per Rhodes-Vivour said:-

"A preliminary objection should only be filed against the hearing of an appeal and not against one or more grounds of appeal which are not capable of disturbing the hearing of the appeal..... Where a preliminary objection would not be appropriate process to object or show to the court defects in processes before it, a motion on notice filed complaining of a few grounds or defects would suffice."

From the authorities, I have highlighted above, it is clear that the preliminary objection in the instant case is inappropriate and same is liable to be struck out. Accordingly same is hereby struck out. (*P.....para.....*)

6. *None service of hearing notice is a jurisdictional issue*
Throughout the argument of the learned counsel for the appellant at the lower court, learned counsel did not deny knowledge of the fact that this matter was fixed for case management conference on the 15th of March, 2016. Learned counsel's argument concentrated on the fact that the service of process was not in conformity with order 7 Rule 13 of the Lagos High Court (Civil Procedure) Rules. In that regard, learned counsel cited *Okoye Vs. C.P.M.B. Ltd (2008)11 M.J.S.C. 76 at 88, paras C-D, Arabella Vs. NAIC (Supra), Ahmed Vs. Ahmed (Supra)* and.

In this court, learned counsel for the appellant has argued forcefully that no hearing notice was served on the appellant informing it or its counsel that the case was adjourned to 15th March 2016, the date the default judgment was entered. Learned counsel's argument in this court has clearly set out a scenario different from the appellant's argument. At the lower court, learned counsel for the appellant said the service was not in accordance with the law as such even if he knew the date the case was adjourned to, his failure to appear would have not been the reason for entering judgment in default of appearance.

Before this court, the story is that the date to which the case was adjourned was not communicated to him. Although receive of hearing notice is a new issue in this court, it can be raised without leave of the court, since it has bearing on the jurisdiction of the trial court, the court of appeal and this court. (*P.....para.....*)

7. *Service of hearing notice is fundamental to the administration of justice*
What then is the essence of hearing notice? The issue of service of hearing notice on a party notifying him of the hearing date of matters is very fundamental to

the administration of justice. It is the service of hearing notice that confers on the court the jurisdictional competence to entertain the matter before it. Thus where a matter is adjourned to a date other than the date the parties had previous notice of hearing, the court has a duty to notify them of the subsequent adjournment. The court should not predicate its decision on mere assumption that a party must have been served with court process at one stage and that he should be aware of the subsequent hearing dates. See *Obimonure Vs. Erinosh* (1966)1 ANLR 250, *Skenconsult (Nig.) Ltd Vs. Ukey* (1981)1 SC.6 *Wema Bank Nig; Ltd Vs. Odulaja* (2000) FWLR (Pt. 17) 13 8 (a) 142- 143. (*P.....para.....*)

8. *Parties were properly served with hearing notice*

In the instant case there is evidence that parties left their phone numbers with the registry of the court. The phone numbers were supplied for the purpose of communication between the parties in this matter and the registry. There is evidence that a text message containing 15th March, 2016 as the hearing date of this matter was sent to learned counsel for respective parties through their phone numbers. Clearly parties were properly served with hearing notice. I agree with the lower court that at this age of information technology super highway, it will be foolhardy for any litigant to insist on being served with hard copy hearing notice. Once a notice is sent to the GSM numbers supplied by the litigants, that is sufficient. Learned senior counsel for the respondent was served the same way appellant's counsel was served. At the lower court learned counsel for the appellant did not deny at the earliest opportunity that he did not receive any hearing notice. He only argued that the hearing notice was not served in accordance with the rules of Lagos State High Court. His sudden summersault before this court is an attempt to frustrate the speedy disposal of this case. From the history of this case, learned counsel for the appellant has not been forthright in pursuit of this case. Having therefore been properly served with hearing notice, the appellant's right of fair hearing has not been breached at all. The 1st and 2nd Issues are resolved against the appellant. (*P.....para.....*)

9. *Default judgment was not entered outside three months prescribed by law*

Learned counsel for the appellant has argued that what kick-started the case management conference in this case on appeal was not the order/directive of court, but the filing and service of form 18, signed by the Registrar of the trial court on the 7th of May, 2015 after pleadings were closed. Order 25 Rules 1 and 2 clearly provides 14 days within which a claimant shall apply for issuance of a case management conference notice as in form 17, after close of pleadings. From the history of this case where the appellant's herein erected road blocks to expeditious hearing and determination of this case, the normal schedules for applying for case management conference and disposal of the case within the prescribed period was clearly put asunder. This is the reason why the lower

court did not hide its displeasure with the conduct of the learned counsel for the appellant when it said:-

"It may be safely concluded that the appellant was technically planning to scuttle the proceedings so that the pre-trial conference will expire and that explains its application to go settle and refusal to come to court even when notified by the registrar of the court be low."

For all I have said, I entirely agree with the learned senior counsel that the default judgment was not entered outside the three months prescribed by the Lagos State High Court (Civil Procedure) Rules 2012. (P.....para.....)

10. *Fundamental nature of hearing notice*
Service of hearing notice before hearing any matter in court is fundamental to the exercise of court's jurisdiction over the matter before it. Hearing notice is the only legal means of informing a party who was absent from court of the return date. Where the court is satisfied that hearing notice had not been served on a party, it would not proceed with the business of the day. See Alhaji Auwalu Darma Vs. Ecobank Nig. Ltd (2017) 9 NWLR (Pt. 1571) 480 at 511; Nigerian Agricultural & Co-operative Bank Ltd Vs. Mr. Lewechi Ozoemelum (2016) 9 NWLR (Pt. 1517) 376. (P.....para.....)
11. *The service of hearing notice through text is good and sufficient notice*
In the instant appeal, there is evidence that a text message was sent by the registry of the court to the G.S.M. numbers provided by counsel to both parties informing them that the matter had been adjourned to 15th March, 2016 for continuation of the case management conference. The respondent (as plaintiff) attended court on the said 15th March, 2016 but the appellant stayed away. I hold the view that at this age of prevalence of information technology, the service of hearing notice through text message by the registrar of court is good and sufficient notice. (P.....para.....)
12. *Appellant cannot complain of denial of fair hearing*
Now, the question begging for answer is whether the appellant was denied fair hearing by the trial court. My answer to the above question is in the negative. The appellant cannot complain of denial of fair hearing when it had ample opportunity to defend itself but failed to avail itself of that opportunity. The settled position of the law is that once a trial court has given a party ample opportunity to defend himself and the party does not avail himself of that opportunity, then the party cannot complain that he was denied fair hearing. See Ogunsanya Vs. State (2011) 12 NWLR (Pt. 1261) page 401; Ordi Orugbo Vs.

Una (2002) 16 NWLR (Pt. 792) 175. (P.....para.....)

14. *Effect of failure to give notice of proceedings to a party*
Failure to give notice of proceedings to the opposing party in a case where service of process is required is a fundamental omission which renders such proceedings void. This is so because the court would have no jurisdiction to entertain it. Hearing notice is a document or information that emanates from the Registry of a court, giving legal notification to parties in a suit the dates on which the suit would be heard. Once a party or his counsel is served Hearing Notice they are both deemed to have actual knowledge of the date the suit would be heard, and if such a party decides to stay away from court he does so at his own peril. See Per Phodes-Vivour, JSC in DARMA Vs. ECO BANK (2017) LPELR-41663(SC). (P.....para.....)
13. *Electronic evidence is admissible*
Nevertheless, it is on record that the appellant was served or informed of the hearing date of 15/3/2016 via SMS. The Evidence Act has now taken notice of the technology age we are in that electronic evidence is now admissible. (P.....para.....)
14. *Phone call made of service is good service*
This was ably tackled by my learned brother, Per PETER-ODILI, JSC in ENL CONSORTIUM LTD Vs. SHAMBILAT SHELTER (NIG) LTD (2018) LPELR-43902(SC), when he pungently and rightly held:

"The point has to be made that the phone call made of service would ordinarily be of good service so long as the party is provided the notice at least 48 hours before the scheduled court date. The regularity of service is no longer jettisoned because it was made electronically as the current rules of court have ensured. See Order 2(c)(i) of the Court of Appeal, 2013 Rules."
(P.....para.....)
15. *When service of hearing notice will not vitiate trials*
The lower court in this case reported as COMPACT MANIFOLD & ENERGY SERVICES LTD Vs. PAZAN SERVICES (NIG) LTD (2017) LPELR-41913(CA), Per NIMPAR, JCA, observed and I adopt and agree

PINHEIRO (2001) 3 NWLR (Pt. 701) 552 @ 572 wherein the court held: "It is not in all cases that the absence of it will automatically vitiate trials in the context of Section 36 of the 1999 Constitution. A hearing notice is not therefore a

mandatory judicial process that must be issued and served in all cases. The requirement is a rule of the court not a statutory requirement. Rules of court are to aid the court in adjudication of cases. It is not to arm-twist the court into becoming a robot.” (P.....para.....)

Representations:

MR. L. I. T. Erhabor, with O. S. Ebhoman for the appellant, also appearing with him is Akor Dominic.

O. Wali SAN, with S. E. Nworie for the respondent.

PAULADAMU GALUMJE, JSC(Delivering the lead judgment)

DALHATU M. SAKI

Vs.

- 1. ALL PROGRESSIVE CONGRESS (APC)**
- 2. OSENI YAKUBU**
- 3. INDEPENDENT NATIONAL ELECTORAL COMMISSION**

SC. 608/2019

**IN THE SUPREME COURT OF NIGERIA
HOLDEN AT ABUJA**

FRIDAY, 19TH JULY, 2019

BEFORE THEIR LORDSHIPS

**OLABODE RHODES-VIVOUR
MARY UKAEGO PETER-ODILI
KUDIRAT M. O. KEKERE-EKUN
AMIRU SANUSI
EJEMBI EKO**

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

ACTION:- Cause of action – How determined – Whether cause of action and defence thereto are distinct.

ACTION:- Cause of action – Meaning and accrual thereof

ACTION:- Commencement thereof – Originating summons proceedings – Whether not appropriate where there is conflicting affidavit evidence.

COURT:- Court of Appeal – Jurisdiction thereof – S. 15 Court of Appeal – Whether cannot exercise jurisdiction beyond its power under S. 15 of Court of Appeal.

COURT:- Court of Appeal – Powers under S. 15 of Court of appeal Act – Whether not exercisable where action is statute barred.

ELECTION PETITION:- Statute barred – Where election petition was filed more than 180 days – Whether it has become statute barred by virtue of 285(10) of the constitution.

JUDGMENT AND ORDERS:- Order of retrial – Whether not exercisable where suit has become statute barred.

STATUTE:- CFRN 1999 (as amended) – S. 285(10) thereof – Time standard in election petition – Nature and imperatives.

STATUTE:- Court of Appeal act – S. 15 thereof – Condition necessary for its application.

STATUTE:- Court of Appeal Act – S. 15 thereof – Nature and purport.

Issue for determination

Facts of the matter

Held: *(Unanimously striking out the appeal)*

The meaning of an accrual of cause of action

The accrual of the cause of action is the event whereby 2 cause of action ripens or matures and becomes complete so that the aggrieved party can begin to maintain his action thereon: SAMSON OWIE Vs.. SOLOMON IGHIWI (2005) 1 SC (Pt. 3) 16. The cause of action is an embodiment of factual situation which gives the plaintiff the right to complain at the court of trial and maintain an action on it. A cause of action is the factual situation on which the plaintiff relies to found his suit and sue against the defendant. As Karibi-Whyte, JSC put it in OGBIMI Vs. BEAUTY OLOLO (1993) LPELR - 2280 (SC) a cause of action comprises "any facts relied upon by the plaintiff resulting from the action of the defendant which gives rise to a justifiable complaint". (P.....para.....)

2. *How to determine cause of action*

It is therefore from the complaint of the plaintiff that the cause of action is determined. It is not from the denial or the defence of the defendant that the court deciphers or fishes out the cause of action or the complaint of the plaintiff that enables him to file or maintain the action. The cause of action and the defence thereto are quite distinct.

In the instant appeal the concurrent findings of fact that the appellant's cause of action was, or arose from, the primary election of 3rd October, 2018 that the result declared on 4th October, 2018 are clearly perverse. The complaint of

the appellant on which he predicated his suit was the alleged submission of the 2nd respondent's name to INEC (the 3rd respondent) by the 1st respondent on 18th October, 2018. The appellant asserted that he was the person who won the primary election and that he was so declared on 4th October, 2018. His complaint was not about the primary election and the result of the same declared on 4th October, 2018. His complaint was that: notwithstanding that he allegedly won the primary election, and the fact was allegedly affirmed by the 1st Respondent's Appeals Committee, the 1st respondent unlawfully, on 18th October, 2018, submitted the name of the 2nd respondent to the 3rd respondent (INEC). The proof of the assertion is entirely a different matter. For purposes of the preliminary objection the governing or material fact is his assertion and complaint that the 1st respondent unlawfully submitted, on 18th October, 2018, the name of the 2nd respondent to INEC as the candidate of the 1st respondent. On this note I will allow the appeal on the issue 1. That is, whether the lower court was right when it held that the appellant's cause of action arose on 3rd October, 2018 instead of 18th October, 2018 when the name of the 2nd respondent, and not that of the appellant, was forwarded by the 1st respondent to the 3rd respondent, as the 1st respondents senatorial candidate? Holding that the lower court was not right in so finding and declaring I hereby resolve the said issue in favour of the appellant. (P.....para.....)

3. *The nature and purport of S. 15 Court of Appeal Act*
Section 15 of the Court of Appeal Act provides:

15. The Court of Appeal may, from time to time, make any order necessary for determining the real question in controversy in the appeal, and may amend any defect or error in the record of appeal, and may direct the court below to inquire into and certify its findings on any question which the Court of Appeal thinks fit to determine before final judgment in the appeal, and may make an interim order or grant any injunction which the court below is authorised to make or grant and may direct any necessary inquiries or accounts to be made or taken, and, generally shall have full jurisdiction over the whole proceedings as if the proceedings had been instituted in the Court of Appeal as court of first instance and may re-hear the case in whole or in part or may remit it to the court below for the purpose of such re-hearing or may give such other directions as to the manner in which the court below shall deal with the case in accordance with the powers of that court, or, in the case of an appeal from the court below, in that court's appellate jurisdiction, order the case to be re-heard by a court of competent jurisdiction. (P.....para.....)

4. *Court of Appeal cannot exercise jurisdiction beyond S. 15 of Court of Appeal Act*
The powers and jurisdiction vested in the Court of Appeal by virtue of Section 15 of the Court of Appeal Act are the "full jurisdiction over the whole proceedings as if the proceedings (at the trial court) had been instituted in the Court of Appeal as a court of first instance". The provision also vests in the Court of Appeal the power to re-hear the appeal before it and "deal with the case in accordance with the powers of" the trial court. The Court of Appeal can therefore not act or exercise jurisdiction in excess of the powers and jurisdiction vested in it by Section 15 of the Court of Appeal Act. Doing otherwise will clearly be *ultra vires* its powers and jurisdiction. Its jurisdiction and powers for purposes of pre-election matters are co-terminus with the powers and jurisdiction of the trial court the appeal emanated to it. The Court of Appeal, in respect of appeals coming to it and arising from pre-election matters from the trial court, the same being re-hearing, cannot exercise powers and jurisdiction not vested in the trial court, appeals being only by way of re-hearing.
(P.....para.....)
5. *The nature and purport of S. 285(10) of CFRN 1999*
My Lords, Section 285 (10) of the 1999 Constitution, as amended, is germane to issue 2 canvassed before us. it provides:-
A court in every pre-election matter shall deliver its judgment within 180 days from the date of filing of the suit.
"A court" here refers to the trial court. It is distinct from the lower court that exercises only appellate or supervisory jurisdiction over the trial court.
(P.....para.....)
6. *Court of Appeal has no jurisdiction under S. 15 of Court of Appeal Act where the action is statute barred.*
Now, I come back to Section 15 of the Court of Appeal Act, which for the purposes of this appeal has to be read together with Section 285(10) of the 1999 Constitution, as amended, for purposes, particularly, of its limitation intent and purpose. The lower court cannot exercise any powers or jurisdiction purportedly under Section 15 of the Court of Appeal Act if the cause of action is statute barred by dint of Section 285(10) of the 1999 Constitution, as amended.
(P.....para.....)
7. *Conditions necessary for the application of S. 15 of Court of Appeal Act*
Decisions of this court are abound on the interpretation of Section 15 of the

Court of Appeal Act. They include INAKOJU Vs. ADELEKE (2007) 4 NWLR (Pt. 1025) 423, OBI Vs. INEC (2007) 11 NWLR (Pt.1046) 560; AMAECHI Vs. INEC (2008) 5 NWLR (Pt. 1080) 227; AGBAKOBA Vs. INEC (2008) 18 NWLR (Pt. 1119) 489; EZEIGWE Vs. NAWAWULU (2010) 4 NWLR (Pt. 1183) 159. In EZEIGWE Vs. NAWAWULU (supra) at pages 203 - 204, Onnogen, JSC (as he then was) citing with approval previous decisions of this court, stated that for the provisions of Section 15 of the Court of Appeal Act to apply, the following conditions must exist, to wit -

- a. the lower court or trial court must have the legal power to adjudicate in the matter before the appellate court can entertain it;**
- b. the real issue raised by the claim of the appellant at the lower court or trial court must be seen to be capable of being distilled from the grounds of appeal;**
- c. all necessary materials must be available to the court for consideration.**
- d. the need for expeditious disposal of the case or suit to meet the ends of justice must be apparent on the face of the materials presented; and**
- e. the injustice or hardship that will follow if the case is remitted to the court below must be clearly manifest.**

Flowing from conditions (c), (d) & (e) above the further condition should be that the facts or evidence on the printed record should be well settled and / or undisputed from the trial or lower court. (P.....para.....)

8. *Originating summons proceedings was inappropriate*
In the instant appeal the trial court made no findings of fact from the hotly contested and/or the hostile averments in the affidavits and exhibits in support of the originating summons and the counter affidavits and the set of documentary evidence produced by the respondents, as the defendants. When averments in the affidavits of contending parties persist in violent disagreements it becomes unsafe and indeed impossible for the court, in the face of such violent disagreements, to prefer from the affidavits, the position of one to the other. The trial court could not, in the circumstance of this case, resolve the conflicting affidavits and the various documentary evidence without the parties calling oral evidence to resolve the conflict: ATANDA & ANOR Vs. TAIWO AKUNYUN & ORS. (1988) LPEIR - 588 (SC) at page 23. Accordingly, the Court of Appeal would similarly not be in a good stead, in the peculiar circumstances of this case, to determine the suit on its merits, by invoking Section 15 of its enabling Act, only on the printed record. In the face of these violently hostile and conflicting affidavit evidence the originating summons procedure was clearly not the appropriate process for the

determination of all the issues in the suit at the trial court. The suit, no doubt requires ordering of pleadings and the taking of oral evidence on the pleadings. (P.....para.....)

9. *Suit has become statute barred*

Next is whether the trial court, as it stands now, would have the vires to entertain the suit in view of Section 285(10) of the Constitution, as amended, that requires the trial court to deliver its judgment in this pre-election matter "within 180 days from the date of filing of the suit". The suit having been filed on 30th October, 2018 the 180 days elapsed on or about 27th April, 2019. Accordingly, as at 5th May, 2019 when the Court of Appeal heard the appeal and 20th May, 2019 when it delivered the judgment, the subject of this appeal, the suit had become statute barred by effluxion of time, if it were still remaining at the trial court. Ordering trial de novo would no longer be feasible. As the trial court lacked the vires to entertain or continue with the suit after 27th April, 2019, so also will the lower court lack the vires to entertain it even if Section 15 of the Court of Appeal Act were invoked. I am therefore of the considered and firmed view that issue 2 shall be, and it is, resolved against the appellant.

The effect of Section 285(10) of the 1999 Constitution, as amended, in view of the peculiar facts of this case, is that the suit having become statute barred shall be, and it is hereby, struck out. Parties shall bear their respective costs. (P.....para.....)

Per Vivour (JSC)

I intend to comment on Section 285 (10) of the Constitution (see Fourth Alternation, No.21) Act, 2017. Subsection (10) states that:

(10). A court in every pre-election matter shall deliver its judgment in writing within 180 days from the date of filing the suit.

The appellant filed this suit in the trial court on 30th October, 2018 and judgment was delivered by that court on 13th March 2019. On 5th May 2019 an appeal on that judgment was heard in the Court of Appeal. Judgment of the Court of Appeal was delivered on 20th May 2019. On 5th May 2019 when the appeal was heard in the Court of appeal that was the 188th day since the filing of the suit in the trial court on 30th October, 2018. (P.....para.....)

10. *No order of retrial where suit has become statute barred*

This court found as a fact that the suit was not decided on the merits. That is to say there was no decision by the trial court as to who between the appellant and the 2nd respondent won the primaries. This court cannot send the case back to the trial court since the 180 days provided by subsection 10 of Section 185 had

since lapsed. The court no has jurisdiction to decide that very important issue. The suit is statute barred. Looking into the substance of the suit is a futile exercise. (P.....para.....)

Representations:

Sarafa Yusuf, (Esq.) with M. O. Lawai, (Esq.), R. A. Bawa, (Esq.), and M. Yahaya Mavo, (Esq.), for the appellant

Abdulwahab Mohammed, (Esq.), with S. Omole, (Esq.), for the 2nd respondent

Chief A. A. Adeniye with Umar Abdulhameed, (Esq.), for the 2nd respondent

Clement Erohubie (Esq.), with J. Idakoji, (Esq.), and R. Ejioghene (Esq.), for the 3rd respondent.

EJEMBI EKO, JSC (Delivering the lead judgment):

1. EZENWO NYESOM WIKE
2. PEOPLES DEMOCRATIC PARTY

Vs.

1. ELVIS S. CHINDA
2. INDEPENDENT NATIONAL ELECTORAL COMMISSION (INEC)

SC.606/2019

IN THE SUPREME COURT OF NIGERIA

HOLDEN AT ABUJA

MONDAY, THE 15TH JULY, 2019

BEFORE THEIR LORDSHIPS

IBRAHIM TANKO MUHAMMAD
MARY UKAEGO PETER-ODILI
OLUKAYODE ARIWOOLA
PAUL ADAMU GALUMJE
UWANIMUSA ABBAJI

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

ACTION:- Election petitions – Whether they are sui generis – Implication thereof.

APPEAL:- Notice of appeal – Defect thereof – Whether makes appeal incompetent.

APPEAL:- Notice of appeal – Purport and meaning thereof.

*APPEAL:- Notice of appeal – Where wrongly headed – Whether does not fetter an appeal – The principle in **Orunonye Onwunali Vs. The State (1982) LPELR-2724 (SC); (1982) 9 SC.***

COURT:- Incompetent proceedings – Approach thereto – Where proceedings became manifestly incompetence – Whether court can so motu terminate such proceedings.

COURT:- Supreme Court – Whether has inherent power to set aside its decision in appropriate cases.

ELECTION PETITION – Whether they are unlike other civil cases – Implication.

ELECTION PETITION:- Amendment thereof – Where party was out of time before applying for amendment in an election petition – Whether order of amendment so granted is incompetent.

JUDGMENT AND OTHERS:- Other of amendment in election petition – Where the Court of Appeal granted an order of amendment in an election petition – Whether order was made without jurisdiction.

LEGAL PRACTITIONERS – Conduct of cases – Election petitions – Whether counsel will be more careful in handling election petitions which sui generis.

PRACTICE AND PROCEDURE:- Amendment – Whether not easily granted in an election petition – Relevant considerations.

*PRACTICE AND PROCEDURE:- Appeal – Notice of appeal – Whether a fundamentally defective notice of appeal cannot be cured by amendment – The principle in **Odoemena Nwaigwe & Ors Vs. Nze Edwin Okere.***

PRACTICE AND PROCEDURE:- Election petitions – Notice of appeal thereto – Where notice of appeal in election petition is improperly headed – Whether such a notice is incompetent.

WORDS AND PHRASES:- “Valid notice” – Meaning and purport.

Issue for Determination

"Whether the lower court was right in refusing to set aside its ruling granting the 1st respondent leave to amend his notice of appeal when the original notice of appeal was incurably defective and when the time allowed by Section 285 (11) of the Constitution to file the said notice of appeal in pre-election matter had expired - (Grounds 1,2 and 3)"

Facts of the Matter

This is an appeal against the ruling of the Court of Appeal, Abuja Judicial Division sitting in Abuja. The said ruling had arisen from the appellants' application filed on 23rd April, 2019 wherein they had prayed the court below for an order setting aside its ruling earlier made on 11th April, 2019 in Appeal NO.CA/A/280/2019 wherein the lower court granted leave to the 1st respondent to amend his notice of appeal dated 19th March, 2019 but filed on 20th March, 2019.

The appellants had contended that the said ruling was given without jurisdiction on

the part of the court below. But they were overruled and the application was dismissed for lacking in substance. The court below had held the appeal competent.

The 1st respondent had instituted an action as plaintiff, by originating summons filed on 26/11/2018 against the instant appellants as 2nd and 3rd defendants. In its judgment delivered on 8/03/2019, the trial court had dismissed the action of the 1st respondent. That led to an appeal filed against the said judgment. The appellants herein had challenged the originating process of the 1st respondent's appeal for being incompetent.

Having realized the point of complaint of the appellants herein, the 1st respondent had filed an application to amend the said notice of appeal. The said application was moved and granted on 11th April, 2019 allowing the amendment sought to the notice of appeal. An amended notice of appeal was later filed on 12th April, 2019.

Held: *(Unanimously allowing the appeal)*

1. *Appeal in a pre-election matter must be filed within 14 days from the date of the complaint appeared for.*

There is no doubt, the 1st respondent appreciated that there was a defect in the notice of appeal he filed on 20/3/2019, hence his application to the court below for leave to amend same.

The law is clear and unambiguous, that an appeal in a pre-election or election related matters must be duly filed within 14 days from the date of the judgment being appealed. It is very clear on the record that the 1st respondent promptly filed a notice of appeal to the ruling of the trial court given in favour of the appellants dismissing his case. The said notice of appeal was filed on 20/3/2019. (P.....para.....)

2. *The nature and purport of a notice of an appeal*

Generally, a notice of appeal is simply a document filed with a court and served on the other parties, stating an intention to appeal against a trial court's judgment or order. See; Black's Law Dictionary, 9th Edition. In other words, a notice of appeal is said to be the spinal cord of an appeal. It is the foundation upon which an appeal is based. It is the originating process which sets the ball rolling for the proper, valid and lawful commencement of an appeal. (P.....para.....)

3. *Effect of defect in notice of appeal*

Where a notice of appeal is defective, no proper appeal can stand. It will become non-existent and as the saying goes, something cannot be put on nothing, and be expected to stay, it will fall or collapse. See; J. A. Aderibigbe & Ors Vs. Tiamiyu Abidoye (2009) 10 NWLR (Pt.1150) 592; (2009) LPELR - 140 (SC); Okotie Vs. Olughor (1995) 5 SCNJ, 217; Thor Ltd Vs. First City Monument Bank Ltd (2002) 2 SCNJ 85; Macfroy Vs. UAC Ltd. (1962) A.C. 152. (P.....para.....)

4. *Meaning of a valid notice*
What then is a valid notice? Valid Notice means, more than correct in form; it means correct in substance as well as in form. See; Sammon Vs. Byrne (1926) IR 411 at 420; Words and Phrases legally defined. (P.....para.....)
5. *Wrongly heading of an appeal does not fetter hearing*
There is no doubt, as earlier noted, that the 1st respondent's notice of appeal that was filed on 20/3/2019 was defective having been headed in the trial Federal High Court, when the appeal was to the court below. I am not unaware of the decision of this court in Orunonye Onwunali Vs. The State (1982) LPELR -2724 (SC); (1982) 9 SC (Reprint) 48 wherein Eso, JSC had opined that this court has in the case of Nofiu Surakatu Vs. Nigerian Housing Development Society Ltd & Anor (1981) 4 SC 26, overruled Addis Ababa Vs. Adeyemi (1976) 12 SC 51, and that since then technical grounds like wrongly heading of an appeal does not fetter hearing an appeal on merit. (P.....para.....)
5. *Election petitions are not like other civil cases*
However, it must be noted that the instant case is unlike other civil or criminal cases. Ordinarily, in other civil and criminal matters technically defective process, such as wrongly headed notice of appeal can be properly amended with the leave of court, within the time to file the notice of appeal. But the instant case is unlike any other ordinary civil or criminal matter. It is sui generis and of special nature. It is time bound. As I stated earlier, it is clear that the said defective notice of appeal was filed within the prescribed 14 days. But can it be said to be a valid notice of appeal? Not being correct in substance as well as in form, it cannot be said to be a valid notice, being of a special class. (P.....para.....)
6. *Election matters are sui generis*
In Nyesom Vs. Peterside & Ors (2016) LPELR - 40036 (SC) this court had held thus:
"It is well settled that election matters are sui generis with a special character of their own, quite different from ordinary civil or criminal proceedings. They are governed by their own statutory provisions regulating their practice and procedure. (P.....para.....)
7. *Defective notice of appeal was not before court*
See; Bala Hassan Vs. Babangida Aliyu (2010) 17 NWLR (Pt.1223) 547, Per Onnoghen, JSC (as he then was).
It is clear from the record, that the 1st respondent's application for leave

of the court below to amend the defective notice of appeal, was filed outside the 14 days the law prescribed for the filing of appeal in the instant case. It goes without saying, that as at the time the application was placed before the court below, the applicant was already out of time to file his appeal. The court below therefore lacked the required competence to consider the application not having been filed within 14 days prescribed by the law. Can the court below, therefore, be right to have considered the 1st respondent's application to amend his defective notice of appeal? The answer is straight in the negative. The notice of appeal upon which the application was based cannot be said to be before the court, in the circumstance of this case. No other process can be properly placed on the said defective notice of appeal. (P.....para.....)

8. *Notice of appeal improperly headed in election petitions are in competence*
Considering the sui generis nature of pre-election and election related matters, this court had recently in a number of cases struck out appeals where the Notices of Appeal were found to be improperly or wrongly headed or titled, in contravention of or not in compliance with the Rules of Court. (P.....para.....)
9. *Application for amendment in election petition cannot be granted*
In APC & Anor Vs. PDP & Anor (unreported) appeal NO.SC.295/2019 delivered on 11/4/2019, the names of certain numbers of the respondents were left out from the Notice of Appeal as the names appeared on the processes before the court below. The appellant sought to amend the said Notice of Appeal to bring in the left out names of the respondents. The application was refused and the appeal was struck out. (P.....para.....)
10. *Amendment refused in an election petition*
Similarly, in Barrister Abdulmalik Mohammed Vs. Hon. Garba Ors (unreported) appeal No.SC.501/2019 delivered on 11th June, 2019 the appellant had wrongly sought reliefs "from the Court of Appeal "instead of" reliefs sought "from the Supreme Court." These defects were noticed by the parties after the expiration of the prescribed time to file the appeal and indeed at the hearing of the appeals. Amendment sought was refused and the appeal was struck out. (P.....para.....)
11. *Counsel to be careful in election petitions*
Counsel are expected to be more diligent in the way they handle cases of their clients, in particular, sui generis cases, to prevent this avoidable, embarrassing and costly mistakes in the processes filed in court. (P.....para.....)
12. *Fundamentally defective notice of appeal cannot be cured by an amendment*
In Odoemena Nwaigwe & Ors Vs. Nze Edwin Okere, this court, per Onnoghena,

JSC (as he then was) opined, inter alia, as follows:

"It is settled law that you cannot amend a fundamentally defective document such as a notice of appeal, so as to infuse life into it. In other words, a fundamentally defective notice of appeal cannot be cured by an amendment of same. You can only validly amend a valid notice of appeal not a fundamentally defective one, which in the eye of the law is non-existent or dead."

See; *Atuyeye Vs. Ashamu*(1987) 1 SC 333 at 358; (1987) 1 NWLR (Pt.49) 267. (P.....para.....)

13. *Approach of court when proceedings are incompetent*

I am of the firm view that the court below ought not to have countenanced the application for leave to amend the notice of appeal at the time the 1st respondent brought the application, even where the respondents to the application did not object.

It has long been settled and it is clear that, "a court is not only entitled but bound to put an end to proceedings if at any stage and by any means it becomes manifest that they are incompetent. It can do so on its own initiative, even though the parties have consented to the irregularity, because mere acquiescence does not give jurisdiction". See; *Westminster Bank Ltd. & Anor Vs. Edwards' & Anor* (1942) AC 529 at 536; Per Lord Wright; *Western Steel Works Ltd & Anor Vs. Iron & Steel Workers Union of Nigeria & Anor* (1986) 3 NWLR (Pt.30) 617 at 627. (P.....para.....)

14. *Order of court was granted without jurisdiction*

By virtue of the defective and incompetent notice of appeal court below was robbed of the competence and jurisdiction to hear any matter on the appeal, much more granting leave to amend the notice of appeal. The order was granted without jurisdiction, to say the least.

The appellants had applied to the court below to set aside that order granting leave to the 1st respondent to amend the defective notice of appeal but were overruled leading to the instant appeal.

There is no doubt that the court below has the power to set aside its own order which was made without jurisdiction *ex debito justitiae*. See; *Offordile Vs. Egwuatu* (2006) 1 NWLR (Pt.961) 429; *Menakaya Vs. Manakaya* (2001) 16 NWLR (Pt. 738) 200; *Ogueze Vs. Ojiako* (1962) 1 SCNJR 112. (P.....para.....)

15. *Supreme Court has inherent jurisdiction to set aside its decision in appropriate cases*
Indeed even this apex court has the inherent power and jurisdiction to set aside

its decision in appropriate cases. In particular, when the order or judgment has been obtained by fraud, practised on the court by one of the parties. See; *Alhaji Taofeek Alao Vs. African Continental Bank Ltd.* (2000) 9 NWLR (Pt.672) 264; (2000) 6 SC (Pt.1) 196; (2000) 8 WRN 96; (2000) LPELR - 408 (SC).

The appellants' application seeking an order of the court below to set aside its order granting the 1st respondent leave to amend the notice of appeal was properly brought before the court but unlawfully and improperly overruled and dismissed by the court.

The sum total of what has been said is that this appeal is meritorious and deserves to be allowed. Accordingly, without any further ado, this appeal shall be and is hereby allowed. (*P.....para.....*)

16. *Court will decline jurisdiction in the election matter where there is delay*
Time is of the essence in every pre-election matter being peculiar and sui generis, and as a general rule, where a party is guilty of undue delay in instituting a pre-election matter and pursuing same on appeal, the court will decline jurisdiction to hear and determine same. See also Per ONNOGHEN, JSC in *GWEDE Vs. INEC & ORS* (2014) LPELR-23763(SC). (*P.....para.....*)
17. *Party was out of time before applying for amendment*
In the present appeal, the 1st respondent applied to amend the notice of appeal on 8/4/2019 before the lower court which notice of appeal was filed on 20/3/2019 and the amendment was granted on 11/4/2019. As at the time the 1st respondent/applicant applied for the amendment before the lower court, he was already out of time to file his appeal. It was indeed caught up in the mire and quagmire of constitutional bar and limitation provided under section 285 (11) of the 1999 Constitution (as amended).
In the same vein, because of the very nature of pre-election matters, amendments or unnecessary amendments can be a clog to the wheel of justice and therefore technicalities may be allowed to fast tract and expedite the determination of pre-election and election matters. (*P.....para.....*)
18. *Amendment cannot be granted in election petition cases.*
The heading "FEDERAL HIGH COURT, HOLDEN AT ABUJA" instead of "COURT OF APPEAL" may appear a misnomer and mistake remediable by amendment. However, if this is permitted, many respondents will frustrate the cases of petitioners or parties aggrieved with pre-election or election issues. Thus, the hammer of technicality must swing on anyone who disobeys or fails in diligent prosecution. Thus, this court cannot allow a party or his counsel to go unscathed for his unsavoury and careless attitude in prosecuting his case at the detriment of the adverse party or opponent. This court has laid the foundation and precedent that such cannot be taken as a mere irregularity but a defect that

is incurably bad.

Thus, the Notice of Appeal wrongly headed "FEDERAL HIGH COURT, HOLDEN AT ABUJA" goes to the root of the originating process or notice of appeal and makes it incompetent. In the very recent case of Barrister Abdulmalik Mohammed Vs. Hon. Garba & Ors, SC. 501/2019 delivered on 11/6/2019, wherein the appellant wrongly sought reliefs "from the Court of Appeal" instead of from the "Supreme Court", this seemingly and inconsequential defect was the bane to the case of the appellant and the straw that broke the camel's back.

The appellants' appeal therefore must succeed. I align myself with the reasoning and conclusion reached by my learned brother, Ariwoola, JSC, in the lead judgment allowing the appeal. (*P.....para.....*)

Representations:

Chief F. O. Orbih, (SAN) with Chidiebere P. Aninuoya (Esq.), Desmond Orbih (Esq.), and Ashoug C. Ukwayi (Esq.), for the appellants.

A. G. William-Wobodo (Esq.), for the 1st respondent.

Wale Abee Ajayi (Esq.), with N. A. Ojile (Esq.), for the 2nd respondent.

OLUARIWOOLA, JSC (Delivering the lead judgment):

**EMEGU ODEY
VS**

THE STATE

SC. 67/2014

**IN THE SUPREME COURT OF NIGERIA
HOLDEN AT ABUJA**

FRIDAY 25TH MAY, 2018

BEFORE THEIR LORDSHIPS

OLUKAYODE ARIWOOLA	JUSTICE, SUPREME COURT
KUMAI BAYANGAKAAHS	JUSTICE, SUPREME COURT
KUDIRAT MOTONMORI OLATOKUNBO KEKERE-EKUN	JUSTICE, SUPREME COURT
AMINA ADAMU AUGIE	JUSTICE, SUPREME COURT
PAUL ADAMU GALINJE	JUSTICE, SUPREME COURT

CRIMINAL LAW AND PROCEDURE: No case submission – No prima facie case and proof – Distinction thereof – Whether prima facie case does not mean proof.

CRIMINAL LAW AND PROCEDURE: No case submission – Prima facie case – Meaning.

CRIMINAL LAW AND PROCEDURE: No case submission – Proof thereof – Whether the standard of proof required in a no case submission is not proof beyond reasonable doubt.

CRIMINAL LAW AND PROCEDURE: No case submission – Ruling thereon – Nature – Whether shall be as brief as possible – Rationale.

CRIMINAL LAW AND PROCEDURE: No Case submission – Situations where application can be upheld.

CRIMINAL LAW AND PROCEDURE: No case submission – Where the evidence adduced by prosecution has been so discredited under cross – examination and manifestly unreliable – Whether a submission of a no case will be upheld.

CRIMINAL LAW: Stealing – Ingredients thereof.

STATUTES: Criminal Code of Cross River State – S. 286 thereof – Purport.

WORDS AND PHRASES: Malicious – Meaning.

WORDS AND PHRASES: Unlawful assembly – Meaning – S. 69 of the Criminal Code Law of Cross River State.

Issue for determination

Whether the learned justices of the Court of Appeal were right in holding that the evidence before the learned trial court discloses a *prima facie* case against the appellant, necessitating the appellant being called to offer defences/explanations.

Facts of the matter

The appellant and 14 others were charged before the High Court of Cross River State for unlawful assembly and malicious damage to property and stealing contrary to section S20(6), 70, 451 and 390(9) respectively of the criminal Code Cap. 16 Vol.3 Laws of Cross River State of Nigeria, 2004. In prove of its case, the prosecution called five witnesses. the defence made a No case submission on behalf of all the accused persons. The trial court overuled the No case submission. The appellant and his co-accused person unsuccessfully appealed to the Court of Appeal Calabar Division hence this further appeal to the Supreme Court.

Held: *(Unanimously dismissing the Appeal)*

1. *The purport of no case submission under the criminal code*
Section 286 of the Criminal Code provides as follows:
“286. If at the close of the evidence in support of the charge, it appears to the court that a case is not made out against the defendant, sufficient to require him to make a defence, the court shall, as to that particular charge, discharge him.” (P247 Paras B - C).
2. *When to uphold a no case submission*
Where an accused person invokes this provision at the close of the prosecution's case, it is known in law as a no case submission. It is settled law that a no – case submission will be upheld in the following circumstances:
 1. **Where there has been no evidence to prove an essential element in the alleged offence;**
 2. **When the evidence adduced by the prosecution has been**

so discredited as a result of cross-examination or is so manifestly unreliable that no reasonable tribunal could safely convict on it.

See: Daboh vs. The State (1977) LPELR – 904 (SC); (1997) 5 SC (Reprint) 122; Ibeziako vs. C.O.P. (1963) 3 SCNLR 47.

A no case submission means that there is no evidence upon which, even if the court believed it, it could convict. At the stage of a no case submission, the question whether or not the court believes the evidence led does not arise nor is the credibility of the witnesses or weight to be attached to the evidence to be determined at the stage. See: Ekwunugo vs. F.R.N. (supra) at 638 E – H; Ajiboye vs. The State (1995) 8 NWLR (Pt. 414) 408; Ajidagba vs. I.G.P. (1958) SCNLR 60. (P 247 Paras D - H).

3. *Nature of ruling on a no case submission*

It is also pertinent to note that the ruling on a no case submission must be as brief as possible so as not to jeopardize the merit of the substantive case in the event that the submission does not succeed. See: Ekwunugo vs. F.R.N. (supra); Ajiboye vs. The State (supra); Adama vs. The State (2017) LPELR – 42266 (SC) @ 45 -47 D – B; Ubanatu vs. C.O.P. (2000) 2 NWLR (Pt. 643) 115. (Pp 247 - 248 Paras H - A).

4. *Meaning of a prima facie case*

What constitutes a *prima facie* case when a submission of no case to answer has been made has been explained in a plethora of decisions of this court. Although there is no precise definition, a *prima facie* case has been held variously to mean that there is ground for proceeding, that the evidence led by the prosecution is good and sufficient on its face, that it is a case in which there is evidence which will suffice to support the allegation made in it and which will stand unless there is evidence to rebut the allegation. See: Ajidagba vs. Police (supra); Ajiboye vs. The State (supra); Agbo vs. The State (2013) 11 NWLR (Pt. 1365) 377; Ubanatu vs. C.O.P. (supra). (P 248 Paras A - C).

5. *Prima facie case does not mean proof*

It is also the position of the law that a *prima facie* case is not the same as proof, which comes later when the court has to determine whether the accused is guilty or not. See: Oko vs. The State (supra); Kalu vs. FRN & Ors (2016) LPELR – 40108 (SC) @ 16 – 17 E – A.

In keeping with the admonishment of the courts, the ruling of the trial court was brief. The learned trial judge was careful not to allow himself to be lured into a

consideration of the merit of the case. (P 248 Paras E - D).

6. *The meaning of unlawful assembly*

Unlawful assembly is defined in Section 69 of the Criminal Code as follows:

“69. When three or more persons, with intent to carry out some common purpose, assemble in such a manner, or being assembled, conduct themselves in such a manner as to cause persons in the neighbourhood to fear on reasonable grounds that the persons assembled will tumultuously disturb the peace or will by such assemble needlessly and without any reasonable occasion provoke other persons tumultuously to disturb the peace, they are an unlawful assembly.

It is immaterial that the original assembly was lawful if, being assembled, they conduct themselves with a common purpose in such a manner as aforesaid.

An assembly of three or more persons who assemble for the purpose of protecting any house against persons threatening to break and enter the house in order to commit a felony or misdemeanor therein is not an unlawful assembly.” (Pp 251 252 .Paras E - B).

7. *Prosecution made out a prima facie case*

His Lordship found that there was *prima facie* evidence in support of the count of unlawful assembly. The court below agreed with the learned trial judge that the prosecution had made out a *prima facie* case in respect of the charge for unlawful assembly. (P 252 Para G).

8. *The standard of proof required in a no case submission*

Learned counsel for the appellant has challenged these findings on the ground that there was no evidence from any witness testifying to the fact that he/she was in palpable fear of a disturbance of the peace. The submission of learned counsel in my considered view goes to proof of the offence beyond reasonable doubt. As laid down in the authorities earlier cited, the standard of proof required at the stage when a no case submission is made is not proof beyond reasonable doubt. This is because at that stage the court has not heard all the evidence. The prosecution is only required to establish a *prima facie* case i.e. to adduce enough

evidence to warrant an explanation from the accused person. I agree with the lower court that the trial court rightly held that a *prima facie* case of unlawful assembly was made out. (Pp 252 .Paras H - B).

9. *The nature of s. 451 on malicious damage*

Section 451 of the Criminal Code provides:

“451. Any person who willfully or unlawfully destroys or damages any property is guilty of an offence, which unless otherwise stated, is a misdemeanor, and he is liable, if no other punishment is provided, to imprisonment for two years.”

Learned counsel for the appellant has stated what, in his view, are the elements of this offence. I have referred to them earlier. I do not agree with him that the prosecution is required to prove damage to the property by a particular method. All that the prosecution is required to establish for a *prima facie* case to be made out is that the destruction of the property concerned was willful and unlawful. Willful means voluntary and intentional. Black's Law Dictionary, 8th Edition defines “malicious” as “substantially certain to cause injury; without just cause or excuse.” Malicious damage therefore means voluntary and intentional damage without just cause or excuse, which is certain to cause injury. (P 253 Paras B - F).

10. *The nature of s. 383 of criminal code of Cross-River on stealing*

Section 383 (1) & 390 (a) of the Criminal Code provide:

“383 (1). A person who fraudulently takes anything capable of being stolen, or fraudulently converts to his own use or to the use of any other person anything capable of being stolen, is said to steal that thing.

390. Any person who steals anything capable of being stolen is guilty of a felony and is liable, if, no other punishment is provided, to imprisonment for three years.

(a) If the thing stolen is of the value of one thousand naira or upwards, the offender is liable to imprisonment for seven years.” (P 254 Paras A - D).

11. *The ingredient of the offence of stealing*

The ingredients of the offence are: (1) the ownership of the thing stolen; (2) that the thing stolen is capable of being stolen and (3) the fraudulent taking or conversion. See: Oshinye vs. C.O.P. (1960) 5 SC 105; Chianugo vs. The State

(2002) 2 NWLR (pt. 750) 225; Ayeni vs. The State (2016) LPELR – 40105 (SC) @ 12A–B. (Pp 254-255 Paras E-F).

12. *Prima facie case of stealing was made out*
With due respect to learned counsel, he could not be further from the correct position of the law. As stated earlier, at this stage, the court is not called upon to determine the credibility of the witnesses nor to evaluate the evidence. It is simply to determine whether, upon the evidence adduced before it, some explanation is required from the accused person. See: Ekwunugo vs. F.R.N. (supra), Ajiboye vs. The State (supra); Ajidagba vs. I.G.P. (supra).
From the evidence adduced I agree with the two lower courts that a *prima facie* case of stealing was made out sufficient to warrant an explanation from the appellant. (P 255 Paras D - E).
13. *Appellant did not discharge onus*
Again, I am unable to find any fault with the concurrent findings of the two courts. I also agree with the lower court that the appellant has not been able to show that the evidence of the witnesses was so discredited as a result of cross examination that no reasonable tribunal could safely convict on it. I am not persuaded that the concurrent findings of the two lower courts are perverse. I agree with their Lordships that the prosecution has made out a *prima facie* case against the appellant sufficient to warrant his being called upon to offer some explanation by way of defence. (P 256 Paras A - B).
14. *Where evidence adduced by prosecution has been so discredited under cross-examination*
The law is settled that a submission made by the accused will be upheld in situations where the evidence adduced by the prosecution had been so discredited under cross-examination and is so manifestly unreliable that no reasonable tribunal could safely convict on it. A submission of no case to answer will be sustained when the essential elements of the offence with which the accused is charged have not been established by prosecution. See: Ibeziako vs. C.O.P. (1965) 1 All NLR 60; Daboh vs. State (1977) All NLR 146. An accused person under the adversarial system is not required to prove his innocence. However, where the prosecution establishes a *prima facie* case against the accused, it is then he is required to give an explanation by entering into his defence. See: Mohammed Abacha vs. State (2002) 11 NWLR (Pt. 779) 437. It should be noted that establishing a *prima facie* case cannot be equated with having to prove the case beyond reasonable doubt as the trial judge at that stage

A cannot determine the credibility of the witnesses or evaluate the evidence called, but simply that on the evidence before the court, some explanation is required from the accused person. See: *Ajidagba vs. I-G P (1958) SCNLR 60; Okoro vs. State (1988) 5 NWLR (Pt. 94) 255; Ekwunugo vs. Federal Republic of Nigeria (2008) 15 NWLR (Pt. 1111) 630.*

B There was sufficient evidence adduced by the prosecution on the four count charge of conspiracy, unlawful assembly, malicious damage to property and stealing contrary to sections 420(6); 70; 451 and 390(9) respectively of the Criminal Code Cap. 16 Vol. 3 Laws of Cross River State of Nigeria 2004 against the appellant and the other accused person requiring them to enter into their defence. (*Pp 256 - 257 Paras F - C*).

Representation

A.O. MOGBOH JNR. for the appellant with F.I. Asogwa Jnr.

GREGORY OKEM (ESQ.), DPP Ministry of Justice Cross River State for the respondent.

D **KEKERE-EKUN, (JSC) (Delivering the Lead Judgment):** The appellant and 13 others were charged before the High Court of Cross River State on a 4 count charge of conspiracy, unlawful assembly, malicious damage to property and stealing contrary to Sections 520 (6), 70, 451 and 390 (9) respectively of the Criminal Code Cap. 16 Vol. 3 Laws of Cross River State of Nigeria, 2004 (hereinafter referred to as the Criminal Code). All the accused persons pleaded not guilty to each of the counts. The appellant was the 8th accused. The prosecution called 5 witnesses. At the close of its case, a submission of no case to answer was made on behalf of all the accused persons. The no case submissions were overruled on 5/3/2012. The appellant and his co-accused were called upon to enter upon their defence. They appealed to the Court of Appeal, Calabar Division. Their appeal was dismissed on 19/11/2013. The appellant is still aggrieved and has further appealed to this court.

E At the hearing of the appeal on 1/3/2018. A. O. Mogboh Jnr. leading F. I. Asogwa Jnr. adopted and relied on the appellant's brief, which was deemed filed on 20/10/2016 in urging the court to allow the appeal. Gregory Okon Esq., Director Public Prosecution in the Ministry of Justice, Cross River State adopted and relied on the respondent's brief deemed filed on 1/3/2018 in urging the court to dismiss the appeal.

F Learned counsel for the appellant distilled two issues for the determination of the appeal:

G **H** **1. Whether or not the essential elements of the offences of conspiracy, unlawful assembly, malicious damage and stealing have been proved by the respondent against the appellant in the circumstances of this case.**

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- A** 2. **Whether the learned justices of the court below were right in dismissing the appeal of the appellant and holding that there is (sic) *prima facie case* against the appellant for conspiracy, unlawful assembly, malicious damage and stealing as alleged by the complainant when the prosecution failed to prove the essential elements of the offences as alleged, and when the evidence of the prosecution witnesses is manifestly unreliable such that no reasonable tribunal could safely convict on it.**
- B**

C Learned counsel for the respondent formulated a single issue thus:

D **Whether the learned justices of the Court of Appeal were right in holding that the evidence before the learned trial court discloses a *prima facie case* against the appellant, necessitating the appellant being called to offer defences/explanations.**

The issue formulated by learned counsel for the respondent is concise and fully addresses the two issues distilled on behalf of the appellant. I adopt the sole issue formulated by the respondent in the resolution of this appeal.

E On behalf of the appellant, A. O. Mogboh Jnr. addressed the offences with which the appellant was charged serially. With regard to the offence of conspiracy, he referred to Section 520 (6) of the Criminal Code Cap. 16 Vol. 3 Laws of Cross River State of Nigeria 2004 for the definition of the offence and relied on the cases of **Nwankwo vs. FRN (2003), 4 NWLR (Pt. 809) 1** and **R. vs. Aspinal (1876) QB 48 @ 58** for his contention that in order to prove conspiracy the prosecution must establish that there was an agreement on the part of all the accused persons to take part in the acts for which they were charged i.e. unlawful assembly, malicious damage and stealing. Referring to the case of: **State vs. Salau (2011) LPELR – 8252 (SC)**, he submitted that there was no direct evidence upon which to invite the appellant to give evidence in rebuttal.

G On the count for unlawful assembly he referred to Section 70 of the Criminal Code and submitted that the essential elements of the offence, which must be proved by the prosecution are:

- H** 1. **That the assembly of the accused persons was with intent to carry out some common purpose in such a manner as to cause persons in the neighbourhood to fear on reasonable grounds that the persons so assembled would tumultuously disturb the peace, or**
- I** 2. **That the assembly would needlessly and without reasonable cause provoke other persons to disturb the peace; or**
3. **That such assembly was conducted in such a manner as to cause**

A persons in the neighbourhood to fear on reasonable grounds that the people so assembled would disturb the peace.

He submitted that there was no evidence before the trial court to show that the accused persons (including the appellant) gathered with intent to carry out a common purpose or to cause people in the neighbourhood to fear that a disturbance of the peace was imminent. He submitted that what was revealed by the evidence was that the crowd was already allegedly breaking houses and therefore it was a completed act without evidence of any common intent. He contended that the prosecution ought to have called witnesses (any of the neighbours) to testify to the fact that they were in palpable fear of a disturbance of the peace.

B He observed that none of the 5 witnesses who testified for the prosecution was described as a neighbour or as being in the vicinity of the incident.

On the count for malicious damage he referred to Section 451 of the Criminal Code and the definition of malicious damage as defined in Black's Law Dictionary, 5th Edition. He submitted that to secure a conviction the prosecution must prove beyond reasonable doubt that the appellant caused the damage willfully and with malicious intent. He submitted that the test of what is unlawful is objective to: **R. vs. Cunningham (1957) 2 QB 396**. He also referred to Sections 451 and 410 of the Criminal Code. He submitted that for an act to be willful it must be shown:

E a) that there was an actual intention to do the particular kind of harm that was done and

b) that there was recklessness as to whether harm should occur or not.

The elements of an unlawful act, he submitted on the other hand, are:

- F a) Damage to property by a particular method;**
- b) The damage must be on an identifiable property and is willful; and**
- c) The damage to the property is without the consent of the owner and it must be established that the damage was occasioned by the accused person.**
- G**

He submitted that the prosecution was not able to establish any of the ingredients of the offence and failed to make out a *prima facie* case against the appellant. He contended that there were contradictions in the evidence of PW1 and PW2, which raises some doubt and urged that the doubt be resolved in the appellant's favour.

H On count 4, which was for stealing contrary to Section 390 (9) of the Criminal Code, he referred to Section 383(1) of the Code and submitted that what the prosecution was required to establish was that the appellant had the intention of carrying away, without right or leave and with intent to keep or make use of same, the item he is alleged to have stolen, wrongfully. He contended that in the absence of any eye witness account of the commission

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A of this offence, the prosecution had failed to prove an essential element of the offence and there was no basis for the appellant to have been called upon for his defence. He referred to: **Ekwunugo vs. F.R.N. (2008) 15 NWLR (Pt. 1111) 360** for the position of the law regarding a no case submission. He also referred to **Ajufo vs. The State (2013) LPELR 20279 (CA)** and **Daboh vs. The State (1977) 5 SC 122**. On what constitutes a *prima facie* case, he relied

B on the Indian case of **STAR. SIGH vs. Jitendrana – Thsen (1931) 1 L.R. 59**.

He submitted that in the instant case the prosecution failed to adduce sufficient evidence to warrant the appellant being called upon to defend himself. He referred to Section 286 of the Criminal Procedure Act Cap. 41 Laws of the Federation of Nigeria (LFN) 2004 and the case of **Agbo vs. The State (2013) LPELR – 20388 (SC); Ibeziako vs. C.O.P. (1963) 1 ALL NLR 61; Atano vs. A.G. Bendel State (1988) 2 NWLR (Pt. 75) 201**. He argued that the evidence adduced by the prosecution has been so discredited as a result of cross examination and was so manifestly unreliable that no reasonable tribunal could safely convict on it. He maintained that none of the prosecution witnesses mentioned that appellant except to the extent that he was part of the tumultuous crowd. He urged the court to allow the

D appeal.

In reply, learned counsel for the respondent submitted that the law is settled that the standard of proof in a criminal trial is beyond reasonable doubt and that the prosecution must establish a *prima facie* case before the accused can be called to enter his defence. He acknowledged the fact that an accused person, under our adversarial system, is not required

E to prove his innocence. He referred to **Abacha vs. The State 11 NSCQR 345**. He agreed with learned counsel for the respondent that it is only when the essential elements of the offence or offences with which an accused person is charged have been established by the prosecution that he could be called upon to enter his defence.

Learned counsel submitted that on the offence of conspiracy the learned trial judge

F was satisfied from the evidence of PW1 and PW2 that conspiracy could be inferred from their evidence of having seen the appellant at the village square with his co-accused who all proceeded to damage PW2's house. He noted that at the stage of a no-case submission the prosecution is not expected to prove its case beyond reasonable doubt but is only required lead evidence to establish the essential elements of the offence. On proof of conspiracy, he

G submitted that contrary to the submission of learned counsel for the appellant, it is not necessary to prove that the conspirators met physically and agreed to commit the crime. He submitted that it is sufficient that have a common criminal desire. In support of this submission, he cited the case of **Nwosu vs. The State (2004) ALL FWLR (Pt. 218) 916 H; Ogbu vs. The State (2007) ALL FWLR (Pt. 361) 1651; Oyeneye vs. The State (2012) 7 – 7**

H **MJSC (Pt. II) 121**.

On *prima facie* evidence to establish unlawful assembly, he referred to the evidence of PW1 at page 63 lines 6-12 and 23-27 of the record. He also referred to the evidence of PW2 at page 67 lines 27-30 of the record. He contended that the lower court rightly held that

I the prosecution had made out a *prima facie* case.

A He submitted that the evidence of PW1 regarding the gathering of the accused persons, including the appellant, in the village square on 10/5/2010 chanting war songs and armed with sticks and cutlasses had the effect contemplated by Section 59 of the Criminal Code in the neighbourhood. He relied on **R.V. vs. Eyo (1962) ALL NLR 515 @ 525**. He also referred to the evidence of PW2 whose property was damaged.

B On malicious damage, learned counsel submitted that there was evidence that fixed the appellant at the scene and which required some explanation from him.

With regard to the charge for stealing he submitted that PW2, the victim of the offence testified that all the items alleged to have been stolen were in the house at the time it was destroyed and could not be found thereafter.

C He submitted that the two lower courts made concurrent findings of fact on the existence of a *prima facie* case against the appellant, which ought not to be interfered with, not having been shown to be perverse. He referred to **Afolalu vs. The State (2010) 43 NSCQR 227 @ 234; Ezeokonkwo vs. Okeke (2002) 9 M JSC 189 @ 195**.

Section 286 of the Criminal Code provides as follows:

D “286. **If at the close of the evidence in support of the charge, it appears to the court that a case is not made out against the defendant, sufficient to require him to make a defence, the court shall, as to that particular charge, discharge him.”**

E Where an accused person invokes this provision at the close of the prosecution case, it is known in law as a no case submission. It is settled law that a no – case submission will be upheld in the following circumstances:

3. Where there has been no evidence to prove an essential element in the alleged offence;

F **4. When the evidence adduced by the prosecution has been so discredited as a result of cross-examination or is so manifestly unreliable that no reasonable tribunal could safely convict on it.**

G **See: Daboh vs. The State (1977) LPELR – 904 (SC); (1997) 5 SC (Reprint) 122; Ibeziako vs. C.O.P. (1963) 1 SCNLR 99.**

A no case submission means that there is no evidence upon which, even if the court believed it, it could convict. At the stage of a no case submission, the question whether or not the court believes the evidence led does not arise nor is the credibility of the witnesses or weight to be attached to the evidence to be determined at the stage. **See: Ekwunugo vs. F.R.N. (supra) at 638 E – H; Ajiboye vs. The State (1995) 8 NWLR (Pt. 414) 408; Ajidagba vs. I.G.P. (1958) SCNLR 60.**

H It is also pertinent to note that the ruling on a no case submission must be as brief as possible so as not to jeopardize the merit of the substantive case in the event that the

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A submission does not succeed. **See: Ekwunugo vs. F.R.N. (supra); Ajiboye vs. The State (supra); Adama vs. The State (2017) LPELR – 42266 (SC) @ 45 -47 D – B; Ubanatu vs. C.O.P. (2000) 2 NWLR (Pt. 643) 115.**

What constitutes a *prima facie* case when a submission of no case to answer has been made has been explained in a plethora of decisions of this court. Although there is no precise

B definition, a *prima facie* case has been held variously to mean that there is ground for proceeding, that the evidence led by the prosecution is good and sufficient on its face, that it is a case in which there is evidence which will suffice to support the allegation made in it and which will stand unless there is evidence to rebut the allegation. **See: Ajidagba vs. Police (supra); Ajiboye vs. The State (supra); Agbo vs. The State (2013) 11 NWLR (Pt. 1365)**

C 377; Ubanatu vs. C.O.P. (supra).

It is also the position of the law that a *prima facie* case is not the same as proof, which comes later when the court has to determine whether the accused is guilty or not. **See: Oko vs. The State (supra); Kalu vs. FRN & Ors (2016) LPELR – 40108 (SC) @ 16 – 17 E – A.**

In keeping with the admonishment of the courts, the ruling of the trial court was brief.

D The learned trial judge was careful not to allow himself to be lured into a consideration of the merit of the case.

The brief facts of the case, as stated by PW2, Ogamode Iwoko Ipuole at pages 88-90 of the record are as follows:

E “PW2: sworn by a gun and states in English Language. Ogamode Awoke Ipuole, lives at Echumofana, farmer and Traditional Ruler, Clan Head of Ochuminaku and Village Head of Oloko Oguobe.

F My community drove me out of the community that I should not be their chief again. I was Village Head of Oloko Oguobe for 39 years because I was driven out. I have been Clan Head for 20 years.

I know PW1.

G I know accused persons.

H On 23/3/2010 I was invited to Yala Local Government Council where I was told there was a petition against me. All Clan Heads of Yala Local Government Area were there in the Palace of the Paramount Ruler of Yala. The meeting tried to stop my people but they were adamant. There 8th accused was threatening me through the window that they will deal with me if I return to Oloko Oguobe. In the night the DPO sent a team to Oloko Oguobe and the villagers fought with the police. The fighting got to Echumofana where I was and I heard people say I brought a thief to rub them. They did not however enter the compound where I was sleeping. They excommunicated me and members of my family

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A from anything in Oloko Oguobe. My wife and children could not buy “akara” at the play ground.

B In the evening of 9/5/2011 my wife did not bring food for me at Echumofana, I was hungry so I left Echumofana at 5.45 a.m. to hide under darkness to my house at Oloko Oguobe. I hid in my sitting room. From there I heard the town crier, Adamade calling on people to come out that the matter must end that day. Adamade called my junior wife who refused to go to him. Adamade said if she did not go to him he will do whatever he liked to her.

C I heard 6th accused (Catechist) shouting “Holy Ghost Fire.” That everything will end that day. I heard 1st accused calling people to come up “Everybody move up.” They moved and got to my gate. There 6th accused broke the shrine where I pray for the village. 5th accused had a stick with which he broke down my latrine (toilet). They were streaming in. I escaped through a back door in my hose into the next compound and into the bush. I saw all the accused persons. There were others I could not identify properly because I was afraid.

D I did not park my things from Oloko Oguobe Village to Echumofana. Two of my wives and their children were at Oloko Oguobe.

E Before the incident of 10/5/2010 when the threat was on they removed a wife I married from Oloko Village from my house and took her away.

F I had the following in my house amongst others:-

G 3 Grinding Machines

8 Cushion Chairs

My Box

12 Goats which were tied

H There were three grasses (huts) and five zinc houses in my compound. I went back and saw the destruction done to my houses. All the houses were destroyed.

.....

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A Accused persons removed my things from my house at Oloto.

PW1, a son of PW2 and an eye witness to the event testified that he saw all the accused persons during the incident. He was specific as to the roles played by them.

Section 520 (6) of the Criminal Code provides:

B “520. Any person who conspires with another to effect any of the following purposes –**(6) to effect any unlawful purpose:**

..... is guilty of a misdemeanor and is liable to imprisonment for two years.”

C In Busari vs. The State (2015) LPELR – 24279 (SC), this court held as follows:

“Conspiracy is an agreement of two or more persons to do an act which is an offence to agree to. Evidence of direct plot between the conspirators is hardly capable of proof. The bottom line of the offence is the meeting of the minds of the conspirators to commit an offence and meeting of the minds need not be physical. Offence of conspiracy can be inferred by what each person does or does not do in furtherance of the offence of conspiracy.”

E See also: Nwosu vs. The State (2004) 15 NWLR (Pt. 897) 466; Oduneye vs. The State (2001) 2 NWLR (Pt. 697) 311.

At the stage of a no case submission, therefore, all that is required is that the evidence adduced suggests that there was a meeting of the minds to do an unlawful act. What are the unlawful act alleged in this case? They are unlawful assembly, malicious damage and stealing contrary to Sections 70, 451 and 390 (9) of the Criminal Code respectively.

F Unlawful assembly is defined in Section 69 of the Criminal Code as follows:

“69. When three or more persons, with intent to carry out some common purpose, assemble in such a manner, or being assembled, conduct themselves in such a manner as to cause persons in the neighbourhood to fear on reasonable grounds that the persons assembled will tumultuously disturb the peace or will by such assemble needlessly and without any reasonable occasion provoke other persons tumultuously to disturb the peace, they are an unlawful assembly.

H It is immaterial that the original assembly was lawful if, being assembled, they conduct themselves with a common purpose in such a manner as aforesaid.

I An assembly of three or more persons who assemble for the

A purpose of protecting any house against persons threatening to break and enter the house in order to commit a felony or misdemeanor therein is not an unlawful assembly.”

B The learned trial judge, at pages 97-98 of the record held as follows on the charge of unlawful assembly:

C “..... the test is whether the assembly gives grounds to persons in the neighbourhood to fear that it will commit or provoke a tumultuous breach of peace. In *R. V. Eyo* (1962) 1 ALL NLR 515 it was held that the distinction between unlawful assembly and riot under the code is that unlawful assembly gives ground to fear a tumultuous disturbance of the peace whereas riot requires that the peace shall actually be disturbed in a tumultuous manner.”

D His lordship reproduced part of the testimony of PW1 where, in his evidence in-chief, he stated: *I saw a large crowd including the accused persons. They carried sticks and cutlasses” and under cross examination, “I met the crowd there. They were already breaking houses when I got there.”* He also referred to the evidence of PW1 wherein he stated;

E “I heard the 6th accused (Catechist) shouting 'Holy Ghost fire'. That everything will end that day. I heard the 1st accused calling people to come up. “Everybody move up.” They moved and got to my gate.”

F His Lordship found that there was *prima facie* evidence in support of the count of unlawful assembly. The court below agreed with the learned trial judge that the prosecution had made out a *prima facie* case in respect of the charge for unlawful assembly.

G Learned counsel for the appellant has challenged these findings on the ground that there was no evidence from any witness testifying to the fact that he/she was in palpable fear of a disturbance of the peace. The submission of learned counsel in my considered view goes to proof of the offence beyond reasonable doubt. As laid down in the authorities earlier cited, the standard of proof required at the stage when a no case submission is made is not proof beyond reasonable doubt. This is because at that stage the court has not heard all the evidence. The prosecution is only required to establish a *prima facie* case i.e. to adduce enough evidence to warrant an explanation from the accused person. I agree with the lower court that the trial court rightly held that a *prima facie* case of unlawful assembly was made out.

H Section 451 of the Criminal Code provides:

I “451. Any person who willfully or unlawfully destroys or damages any property is guilty of an offence, which unless otherwise stated, is a misdemeanor, and he is liable, if no other punishment is provided, to

A imprisonment for two years.”

Learned counsel for the appellant has stated what, in his view, are the elements of this offence. I have referred to them earlier. I do not agree with him that the prosecution is required to prove damage to the property by a particular method. All that the prosecution is

B required to establish for a *prima facie* case to be made out is that the destruction of the property concerned was willful and unlawful. Willful means voluntary and intentional. Black's Law Dictionary, 8th Edition defines “malicious” as “substantially certain to cause injury; without just cause or excuse.” Malicious damage therefore means voluntary and intentional damage without just cause or excuse, which is certain to cause injury. The

C learned trial judge held at page 98 of the record;

D “Count 3 is for malicious damage to property. PW1 and 2 said they saw the accused persons destroying the property of PW2. Counsel for the accused persons fell into error in his address when he went into how the property was damaged: whether by breaking down or by fire. This is not the stage for that. Section 451 of the Criminal Code Law under which the charge is laid does not make such distinction. There is *prima facie* evidence put in by the prosecutor that the accused and others destroyed PW2's house. A *prima facie* case is a case which the accused persons can be convicted, if believed. Accused persons are called upon to offer their defence.”

E

This finding, which was affirmed by the lower court below is unassailable. Section 383 (1) & 390 (a) of the Criminal Code provide:

F “383 (1). A person who fraudulently takes anything capable of being stolen, or fraudulently converts to his own use or to the use of any other person anything capable of being stolen, is said to steal that thing.

G 390. Any person who steals anything capable of being stolen is guilty of a felony and is liable, if, no other punishment is provided, to imprisonment for three years.

H (b) If the thing stolen is of the value of one thousand naira or upwards, the offender is liable to imprisonment for seven years.”

The ingredients of the offence are: (1) the ownership of the thing stolen; (2) that the thing stolen is capable of being stolen and (3) the fraudulent taking or conversion. See:

I Oshinye vs. C.O.P. (1960) 5 SC 105; Chianugo vs. The State (2002) 2 NWLR (pt. 126)

A 347; Ayeni vs. The State (2016) LPELR – 40105 (SC) @ 12 A – B.

The learned trial judge held at pages 98. 99 of the record:

“Count 4 is for stealing:

- 1. Daylong motorcycle**
- 2. 12 goats**
- 3. 2 bicycles**
- 4. Dried bush meat from PW2.**

PW2 said the above items were in his house when the accused persons destroyed his house and that after the destruction, he could no longer find those items in his house. That is prima facie evidence of stealing those things.”

The court below upheld this finding. Learned counsel for the appellant submitted *inter alia* (the brief is neither paginated nor paragraphed) as follows:

“Before a prima facie case can be established, the essential ingredients of the alleged offence must firstly be proved by the prosecution....Before the court can deduce whether a prima facie case has been established against the appellant, he must have been linked inextricably with the offence and the essential ingredients proved against him; the evidence must have been adduced, evaluated and then the court will determine whether it believes the evidence or not in determining whether a prima facie case has been established.”

With due respect to learned counsel, he could not be further from the correct position of the law. As stated earlier, at this stage, the court is not called upon to determine the credibility of the witnesses nor to evaluate the evidence. It is simply to determine whether, upon the evidence adduced before it, some explanation is required from the accused person. See: *Ekwunugo vs. F.R.N. (supra)*, *Ajiboye vs. The State (supra)*; *Ajidagba vs. I.G.P. (supra)*.

From the evidence adduced I agree with the two lower courts that a *prima facie* case of stealing was made out sufficient to warrant an explanation from the appellant.

On the count for conspiracy, the learned trial judge held at page 99 of the record:

“Count 1 is one of conspiracy. The evidence of PW1 & 2 is that the accused persons gathered at the village square and from there moved on to damage the house of PW2. A court can infer conspiracy from the fact of doing things together. Upon that inference, I can convict the accused persons, so they owe me an explanation which I call upon them now to offer.”

A The court below at page 207 of the record held:
“In particular, the High Court is right in ruling that the offence of conspiracy can, in law, be inferred from the facts and evidence of the conduct of the appellants and does not require proof of express agreement between and by them.”

B Again, I am unable to find any fault with the concurrent findings of the two courts. I also agree with the lower court that the appellant has not been able to show that the evidence of the witnesses was so discredited as a result of cross examination that no reasonable tribunal could safely convict on it. I am not persuaded that the concurrent findings of the two lower courts are perverse. I agree with their Lordships that the prosecution has made out a *prima facie* case against the appellant sufficient to warrant his being called upon to offer some explanation by way of defence.

The sole issue in this appeal is resolved against the appellant. The appeal lacks merit and is hereby dismissed.

D The judgment of the lower court is affirmed.
Appeal dismissed.

Kudirat Motonmori Olatokunbo Kekere-Ekun
Justice, Supreme Court

E BAYANGAKAAHS, (JSC): My learned brother, Kekere-Ekun JSC made available to me the leading judgment in this appeal. He found no merit in the appeal and accordingly dismissed it. I agree that the appeal lacks merit and I too dismiss it.

The appeal is against the decision of the lower court which affirmed the ruling of the learned trial judge who dismissed the submission of no case to answer made by the accused/appellant.

F The law is settled that a submission made by the accused will be upheld in situations where the evidence adduced by the prosecution had been so discredited under cross-examination and is so manifestly unreliable that no reasonable tribunal could safely convict on it. A submission of no case to answer will be sustained when the essential elements of the offence with which the accused is charged have not been established by prosecution. See: **Ibeziako vs. C.O.P. (1963) 1 All NLR 60; Daboh vs. State (1977) All NLR 146.** An accused person under the adversarial system is not required to prove his innocence. However, where the prosecution establishes a *prima facie* case against the accused, it is then he is required to give an explanation by entering into his defence. See: **Mohammed Abacha vs. State (2002) 11 NWLR (Pt. 779) 437.** It should be noted that establishing a *prima facie* case cannot be equated with having to prove the case beyond reasonable doubt as the trial judge at that stage cannot determine the credibility of the witnesses or evaluate the evidence called, but simply that on the evidence before the court, some explanation is required from the accused person. See: **Ajidagba vs. I-G P (1958) SCNLR 60; Okoro vs. State (1988) 5**

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A NWLR (Pt. 94) 255; Ekwunugo vs. Federal Republic of Nigeria (2008) 15 NWLR (Pt. 1111) 630.

There was sufficient evidence adduced by the prosecution on the four count charge of conspiracy, unlawful assembly, malicious damage to property and stealing contrary to sections 420(6); 70; 451 and 390(9) respectively of the Criminal Code Cap. 16 Vol. 3 Laws of

B Cross River State of Nigeria 2004 against the appellant and the other accused person requiring them to enter into their defence.

The appeal by the appellant therefore lacks merit and it is hereby dismissed.

K. B. Akaahs
Justice, Supreme Court

C ADAMU AUGIE, (JSC): I read in draft the lead judgment delivered by my learned brother, **Kekere-Ekun, JSC**, and I agree with his reasoning and conclusion, which I hereby adopt, as I have nothing useful that I can add to it. The sole issue in this appeal is resolved against the appellant. The appeal lacks merit and it hereby dismissed.

D The judgment of the lower court is affirmed. Appeal dismissed.

Amina Adamu Augie,
Justice, Supreme Court

E ADAMU GALINJE, (JSC): I have had the privilege of reading in draft, the judgment just delivered by my learned brother Kekere-Ekun JSC and I agree with the reasoning contained therein and the conclusion arrived thereat. My learned brother has, with utmost diligence, resolved all the issues submitted for determination of this appeal in such a way that I have nothing useful to add.

F The interlocutory appeal, herein is a clear waste of time that would have been used to determine the substantive case. The lower court would have, by virtue of a paragraph 4 (e) of the Court of Appeal (Fast Track) Practice Directions 2014, asked the appellant to go back to the trial court to stand his trial, at the end of which he could apply for consolidation of the main appeal and the interlocutory appeal for hearing. Paragraph 4 (e) of the Practice Directions provides as follows:-

H “Active case management includes discouraging interlocutory appeals and requiring parties, except in the most deserving cases, to subsume their interlocutory matters under a final appeal or under the substantive suit at the trial court.”

I find this appeal lacking in merit and same is dismissed by me as well.

Paul Adamu Galinje,
Justice, Supreme Court.

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**ERASTUS B.O. AKINGBOLA
VS.
THE FEDERAL REPUBLIC OF NIGERIA**

SC. 306/2015

**IN THE SUPREME COURT OF NIGERIA
HOLDEN AT ABUJA**

FRIDAY 18TH MAY 2018

BEFORE THEIR LORDSHIPS

**IBRAHIM TANKO MUHAMMAD
OLUKAYODE ARIWOOLA
KUMAI BAYANG AKA' AHS
PAUL ADAMU GALINJE
SIDI DAUDA BAGE**

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

CONSTITUTIONAL LAW: Fair hearing – Breach thereof – Whether vitiates proceedings no matter how well conducted

*CONSTITUTIONAL LAW: Fair hearing – Meaning thereof – The principle in **Arion & Ors. vs. Muraimo Elemo & Ors (1983) 1 SC 13.***

*CONSTITUTIONAL LAW: Natural justice – Breached thereof – Where there is a breach of natural justice in proceedings – Whether it does not matter if the decision would have been same without the breach – The proceeding will still be declared a nullity – The principle in **Adigun v. A.G Oyo State (1987) 1 NWLR (pt. 53) 678.***

COURT: Approach to justice – Court to entertain an application only on merit – Whether not to act as father Christmas.

COURT: Approach to justice – Courts now to do substantial justice – Whether not to rely on technicalities.

COURT: Bias – Where the learned trial judge descends into the arena – Whether it removes his toga of impartiality and violates his oath of office as a judicial officer.

COURT: Object thereof – Whether not to punish party for their mistakes but to decide on

*their legal rights – The Principle in **Ojah vs. Ogboni (1976) 10 SC 244 at 247.***

*PRACTICE AND PROCEDURE: Appeal – Where the notice of appeal is wrongly headed – Whether it does not make the appeal incompetent – The principle in **Regd. Trustee, A.O.U vs. N.A.M.A (2014) 8 NWLR (pt. 1408) 1.***

PRACTICE AND PROCEDURE: Court – Bias thereof – How determined – Relevant considerations.

PRACTICE AND PROCEDURE: Fair hearing – Breach thereof – Duty on appellate court – Whether will scrutinize the proceedings to see if the result of the case would have be OF the same even if the breach of the principle of fair hearing had not occurred.

PRACTICE AND PROCEDURE: Natural justice – Principles thereof – Fundamental nature – Whether court to observe.

STATUTE: CFRN 1999 (as amended) – S.36(1) thereof – Right to fair hearing – Nature and purport.

Issues for determination

1. **Whether the lower court was right in holding that the court of first instance denied the respondent its constitutional right of fair hearing when the learned judge dismissed the charge against the appellant and discharged the appellant. (Grounds 1 and 2).**
2. **Whether the lower court was right in holding that there was no basis for the decision of the court of first instance (Ground 3).**
3. **Having regard to the peculiar circumstances of this case, whether the judgment delivered by the lower court is null and void (Ground 4).**

Facts of the matter

The accused appellant was charged for sundry financial crimes bordering on his activities as the then Managing Director of the Defunt Intercontinental Bank Plc pursuant to the complaints of the Central Bank of Nigeria. However during the pendency on the charge. A complaint was made to the Nje against the conduct of the trial Judge. in Furtherance , the respondent filed an application before the trial court urging him to disqualify himself from further participation in the proceedings. However, the learned trial judge dismiss the application which, prompted eh respondent ot appeal to the Court of Appeal. The Court of Appeal upheld the appeal of the respondent. The appellants on record has no appeal to the Supreme Court.

Held: *(Unanimously dismissing the appeal)*

1. *Courts to observe principles of natural justice*

The court has over the years consistently maintained that the principle of natural justice is sacrosanct in our judicial system and it must as a matter of constitutional obligation be observed by a judicial umpire. This court in **ADIGUN vs. A.G, OYO STATE (1987) 1 NWLR (Pt. 53), page 678 paragraph G**, per Obaseki JSC further had this to say on principles of natural justice:-

“If the principles of natural justice are violated in respect of any decision, it is indeed immaterial whether the same decision would have been arrived at, in the absence of the departure from the essential principles of Justice, the decision must be declared to be no decision”.

The principle of natural justice and fairness are crucial and sacrosanct in our judicial system and adjudicatory functions at all level of the judicial hierarchy. It must as a matter of constitutional obligation be observed by all judicial officers. This is because fairness and natural justice require that a party to a cause, or a party who ought reasonably to be a party in the suit, must be given the opportunity to put forward his case or defence freely and fully. See **KANO NATIVE AUTHORITY vs. RAPHAEL OBIORA (1959) 4 FSC 226; (1959) SCNLR 577** cited with approval by Iguh, JSC in **EKIYOR & ANOR. vs. BOMOR (1997) 9 NWLR (Pt. 519) 1 at 14. (P 282 Paras A - F)**.

Per Baje (JSC)

What transpired in this appeal leaves sour taste in the mouth of the Nigerian judiciary. It is quite uncharacteristic of a judicial officer to raise issues as to, and proceed to declare with finality, without hearing or scrutiny, on vital issues such as:

- i) **The competence of the Prosecution's Counsel.**
- ii) **The need to direct the AGF to disband/sack/debrief the Prosecution team.**
- iii) **The need to declare the Prosecution team as a drain on the public purse.**
- iv) **The self-structured allegation of the trial Judge of perceived “campaign” by the prosecution team “to scandalize the court”.**
- v) **The need to bar the prosecution team from being “given further audience” before the Federal High Court in relation to the**

charges against the appellant.

- vi) **The need to terminate or dismiss the amended charge and to discharge the appellant even before the appellant could make his plea to the amended charge”.**

Those are far-reaching 'findings' and conclusions made without hearing the adverse side. It appears to me that personal grievances have been needlessly infused into sacred judicial function by the learned trial judge. (Pp 282 - 283 paras F - C).

2. *The object of Court is not to punish parties but to decide on their legal rights.*
By the nature and given the over arching nature of the premise on which the learned trial judge dismissed the charge and discharged the appellant as stated above, it is apparent that the learned trial Judge allowed emotions or personal feelings as a result of perceived errors, delays and/or lack of diligence of the prosecution team to determine the road he travelled in doing justice; this should not be so. It is so patently wrong and unnecessary. I wish to draw on the wisdom of this honourable court in the following dictum of Madarinkan, JSC (Blessed memory) in OJAH vs. OGBONI (1976) 10 sc 244 AT PAGE 247:-

“I think it is a well established principle that the object of courts is to decide the rights of the parties and not to punish them for mistakes which they make in the conduct of their cases by deciding otherwise than in accordance with their rights... I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy...”

The above reinforces the need to do substantial justice irrespective of provocation or procedural obstacles hurled on the path of a Judge on the highway of justice. The principle of fair hearing as enshrined under the Constitution of the Federal Republic of Nigeria, 1999 as amended (CFRN, 1999) also leaves the court with little choice in ensuring fair-hearing. (P 284 Paras B - H).

3. *The Nature and purport of S.36(1) of CFRN 1999 (as amended)*
Section 36(1) of the CFRN, 1999 provides thus:-

“In the determination of his civil rights and obligations, including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such a manner as to secure its independence and impartiality.”(*Pp 284 - 285 Paras H - A*).

4. *Meaning of fair hearing*

Impartiality is lost when a judge accused counsel of perceived negative or annoying attitude which the judge proceeded to summarily punish or sanction by making far-reaching declarations as outlined above, and capping it up by making pronouncements by way of final decision on the substantive case. This is a reckless judicial extremism. This noble court has held in the locus *classicus* case of *ARIORI & ORS. vs. MURAIMO ELEMO & ORS.* (1983) 14 SC 1 at 24 per Obaseki JSC (*supra*), that fair hearing means a trial conducted according to all the legal rules formulated to ensure that justice is done to the parties to the cause. (*P 285. Paras A - C*).

5. *The absence of fair hearing vitiates proceedings no matter how well conducted*
Similar position was reiterated by this court in the case of *EKPETO vs. WANOGHO* (2005) 3 W.R.N 75 on principle of fair hearing, thus:-

“There is no doubt at all that the principle of fair hearing is fundamental to all court procedure and proceedings, and like jurisdiction, the absence of it vitiates proceeding well conducted”.

See also *SALU vs. EGEIBON* (1994) 6 NWLR (Pt. 348) 23 at 40, *CEEKAY TRADERS LTD. vs. GENERAL MOTORS CO. LTD.* (1992) 2 NWLR (Pt. 222) 132, *ATANO vs. A-G., BENDEL STATE* (1988) 2 NWLR (Pt. 75) 201. Per Kalgo, JSC (Pt. 85) lines. 5-1. (*P 285 Paras C - F*).

6. *Effect of absence of natural justice in proceedings*

This court has left no one in doubt, going by the decision in *ADIGUN vs. A.G. OYO STATE* (1987) 1 NWLR Pt. 53, Page 678 paragraph G, per Obaseki JSC (*supra*) on principles of natural justice, that:-

“If the principles of natural justice are violated in respect of any

decision, it is indeed immaterial whether the same decision would have been arrived at, in the absence of the departure from the essential principles of justice, the decision must be declared to be no decision.” (P 285 Paras F - H)

7. *Duty of appellate court where issue of fair hearing arises*

The question of fairness of proceedings is quite separate from the question of the merit of the trial court decision. When a question of fairness of hearing arises in a case, the appellate court has a duty to scrutinize the proceedings to see whether the result of the case would have been the same even if the breach of the principle of fair hearing had not occurred. It is immaterial if, speculatively, the same decision would have been arrived at had a hearing not tainted by unfairness taken place. This is because, by its application, a breach of fair-hearing leads to the inevitable conclusion that 'an unfair method cannot produce a fair result.’’ The proper thing must be done by sending the case back for re-trial or re-hearing. See: IDAKWO vs. EJIGA (2005) 48 W.R.N 23 where this court opined on the duty of court where question of fair hearing arises; Per Ayoola, JSC (pages 31-32) lines 25-40. (Pp 285 - 286 Paras H - B).

8. *How appellate court determines likelihood of bias*

A judicial proceeding is liable to be set aside or reversed on the slightest likelihood of bias. This court has a firm and settled position for determining if there is likelihood of bias. In ABIOLA vs. FEDERAL REPUBLIC OF NIGERIA (1995) LPELR-41 as follows, this court held that:-

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“...In considering whether there was a real likelihood of bias, the court does not look at the mind of the justice himself or at the mind of the chairman of the tribunal, or whoever it may be, who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would, or did, in fact favour one side at the expense of the other. The court looks at the impression which would be given to other people. Even if he was as impartial as could be, nevertheless, if right minded persons would think that, in the circumstances, there was a real likelihood of bias, on his part, then he should not sit. And if he does sit, his decision cannot stand.” Per Bello, (C.J.N. (page 15, paragraphs A-D))”.

The court went further to hold thus:

“There must be circumstances from which a reasonable man would think it likely or probably that the justice, or chairman, as the case may be, would, or did, favour one side unfairly at the expense of the other. The court will not enquire whether he did, in fact, favour one side unfairly. Suffice it that reasonable people might think he did. The reason is plain enough. Justice must be rooted in confidence: and confidence is destroyed when right-minded people go away thinking the Judge was biased.” Per BELLO, C.J.N. (Pages 15-16), paragraphs F-A). (P 286 Paras C - I).

9. *Court of Appeal was right to scrutinize proceedings*
I am in total agreement with the scrutiny of the court below on the proceedings and decisions of the learned trial judge delivered on 2/4/2012. What transpired in the proceedings of the trial court formed the basis of the instant appeal from trial court to the court below and further to this court. The court below had done the right and most appropriate thing by scrutinising same to establish the allegation of bias and a breach of fair hearing. As stated above, once lack of fair-hearing and allegation of bias is made, the duty of the Appellate court is to scrutinise the proceedings, beyond technicalities or legal and procedural distortions. I am satisfied that the court below did exactly that at pages 15 to 119 of its decisions as contained at pages 387-390 of the record of appeal, which has been quoted extensively above. In view of the foregoing, issue one is resolved in favour of the respondent. (P 287. Paras A - C).
10. *When judicial discretion is said to be properly exercised*
Assuming the above are true, which is doubted, it would amount to a judge sitting in justice over his cause, and a further violation of the principle of natural justice which I had sufficiently amplified above. Nothing could be misplaced as the contention of the appellant that dismissing a charge and absolving the appellant of the allegation levied against him amounted to the exercise of 'judicial discretion' when no such request or prayer was specifically sought from the learned trial judge.
Judicial discretion and inherent powers of court must be exercised in the context of the justice of the particular case. For a judicial discretion to be properly exercised, it must be founded upon the facts and circumstances presented to the court from which the court must draw a conclusion governed

by law and nothing else. See the case of **ARINZE vs. FIRST BANK NIG. LTD.** (2004) 12 NWLR (Pt. 888) 663 at 673, 75, 79; (2004) 5 SC 100; (2004) 7 SCNJ, 361 at 372 per Akintan JSC. (Pp 288 - 289 Paras H - C).

11. *Court to decide case only on the merit and application brought before it*
 The trial judge became a Santa Claus (Father Christmas) of sort, granting orders the appellant did not specifically seek, ostensibly in the exercise of judicial discretion. This, in my considered view, is most inappropriate as it has no basis in law or logic. It is the duty of the Court to entertain and decide a case only on the merit of any application brought before it by any party. See the case of **ERIOBUNA vs. OBIORAH** (1999) 8 NWLR (Pt. 616) 622. See also **OJO vs. ABOGUNRIN** (1989) 5 NWLR (Pt. 120) 162, **UGO vs. OBIEKWE** (1989) 1 NWLR (Pt. 99) 566; **ILODIBIA vs. NCC LTD.** (1997) 7 NWLR (Pt. 512) 174; **UDOM vs. E. MICHELITTI AND SONS LTD.** (1997) 8 NWLR (Pt. 516) 187; **OLAOPA vs. OAU ILE-IFE** (1997) 7 NWLR (Pt. 512) 204; **EZEAKABEKWE vs. EMENIKE** (1998) 11 NWLR (Pt. 575) 529.

In view of the foregoing, I resolve issue two in favour of the respondent. This in effect means issue two is resolved against the appellant. (P 289 Paras B - F).

Per Baje (JSC)

Issue three represents a typical case of unintended error of the court which is neither meant nor targeted at inflicting hardship or injustice on any of the parties to the appeal save for courting technicalities to defeat the ends of justice. In **OYEYEMI & ORS vs. OWOEYE & ANOR** (*SUPREME COURT SUIT NO. SC/102/2013*). I have had cause to state the position of law and attitude of this court to justice and the need to avoid technical justice in whatever coloration it might be presented. For the avoidance of doubt, I wish to restate that:-

“Our duty as an Apex Court is to do substantial, justice-stark justice, based on fairness which to all intent and purposes, seeks to not only ensure fairness in dispensing justice, but which is manifestly seen and duly acknowledged by all and sundry as justice both in content and context. We are not judicial technicians in the workshop of technical Justice. The jurisprudence or logic of our reasoning is and as humanly possible, would be devoid of technicalities.” (P 291 - 292 Paras F - A).

12. *Courts now to do substantial justice*

The need to do substantial justice and avoid delving into the error of technicalities is well settled. This court has shown the way, and all courts below the judicial hierarchy should abide by embracing the trends of deliberately shifting away from narrow technical approach to doing substantial justice irrespective of obstacles and hindrances. See for example the case of MAKERI SMELTING CO. LTD. vs. ACCESS BANK (NIG.) PLC (2002) 7 NWLR (Pt. 766) 447 at 476-417. This case, like the Oyeyemi's case, amplified the attitudinal disposition of the court against deciding cases on mere technicalities. The attitude of the courts now is that cases should always be decided, wherever possible on merit.

Even in cases where errors of omission or commission called blunders have been made, it is unjust to hold that because blunders have been committed, the party blundering is to incur the penalty of not having the dispute between him and his adversary determined upon the merits. See also AJAKAIYI vs. IDEHAI (1991) 8 NWLR (Pt. 364) 504, ARTRA IND. LTD. vs. N.B.C.I (1997) 1 NWLR (Pt. 483) 574, DAKAT vs. DASHE (1997) 12 NWLR (pt. 531) 46; BENSON vs. NIGERIAAGIPCO. LTD (1982) 5 S.C. 1". (P 292 Paras B - F).

13. *Wrong heading of appeal does not render it incompetent*

As rightly held by this court in REGD. TRUSTEE, A.O.N. vs. N.A.M.A (supra), per Okoro JSC, where the parties to an appeal are not in doubt but the appeal is wrongly headed, it cannot affect the competency of the case. I also wish to amplify this position by quoting from the decision of this court in the suit, per Peter-Odili, JSC, thus:

"It is now settled law that an appeal is a continuation of the case from the court of trial to and the appeal does not stand alone as an independent process without the linkage to the proceedings in the court of first instance. It is therefore with that fact that the wrong heading of a party at the appeal stage as happened in this instance in the court below would not have the effect of rendering the appeal incompetent or described as an appeal against a person, as that against a party unknown to law which would have the effect of a fatality..."

Clearly, no injury is intended or inflicted on the parties by the inadvertence of stating the name of respondent as EFCC at the lower court as against the Federal Republic of Nigeria. At every stage of the matter, from the trial court up to this stage of the appeal here at the Supreme Court; the facts,

issues, parties and records have been consistent as to the intended parties. It is my considered position on issue three, that no one is left in doubt that this appeal arose from the case of the Federal Republic of Nigeria and Erastus B. O. Akingbola. Therefore, I also resolve issue three in favour of the respondent.

In view of the foregoing, and having resolved all three issues in this appeal in favour of the respondent. (*Pp 292 - 293 Paras F - D*).

14. *Trial Court descends into the arena*

From the record reproduced above, the learned trial judge needlessly descended into the arena to pour vituperations on the team of prosecuting counsel on their unfitness to prosecute and thereby removed his toga of impartiality. No matter the level of provocation engendered by the lack luster attitude displayed by the prosecuting team in delaying the prosecution of the accused culminating in the announcement of learned counsel of their desire to appeal the ruling of 31 January, 2012, this does not warrant the action taken by the learned trial judge in the matter. Rather than act judicially in accordance with his oath of office, the learned trial judge constituted himself into a military dictator that is known for spewing out orders that cannot be challenged. A judicial officer worth his salt of answering to the appellation 'honourable' should not have descended so low to cast aspersion on the competence of the prosecuting team and directing the AGF to disband them. This is judicial tyranny and a clear case of bias has been displayed by the learned trial judge.

The court below was absolutely right to have allowed the appeal since there was complete absence of justice in what the trial judge did. (*P 397 Paras C - F*).

A Representation

F. O. Fagbohungebe (SAN) with A. Adeniran, for the appellant
J.B. Daudu (SAN) with him E.C. Ukala (SAN), O.J. Iheko and A. Adedeji, for the respondent.

- B DAUDA BAGE, (JSC) (Delivering The Lead Judgment):** This is an appeal against the judgment of the Court of Appeal, sitting in Lagos. The judgment that formed the basis of this appeal was delivered on 20th February, 2015 in Appeal No. CA/L/161/2013, and same is contained at pages 373-399 of the record of appeal. In its judgment, the court below set-aside the decision of the trial Judge and ordered that the substantive matter, that is Charge No. FHC/L/443c/2009 – **FEDERAL REPUBLIC OF NIGERIA vs. DR. ERASTUS B. O. AKINGBOLA** be remitted back to the Federal High Court where the matter was initially heard for accelerated hearing by another judge of that court.

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A To demonstrate his dissatisfaction with the judgment of the lower court, the appellant filed an appeal through a notice of appeal of two (2) grounds dated 26th February, 2015 but filed on 27th February 2015. However, the appellant beefed-up his position by filing an amended notice of appeal of four (4) grounds dated 29th March, 2016 but filed on 30th March, 2016.

B In Ground one, the appellant argued that the lower court erred in law, by quoting page 19 of the judgment of the lower court, to the effect that the learned Justices of the Court of Appeal held that:-

C **“there is no question that the learned trial Judge denied the appellant a fair hearing when it (sic) proceeded to dismiss the charge and discharged the respondent without a word from it or an application on which to base its decision to so do”.**

D In ground two, the appellant indicated that the lower court erred in law, by quoting page 20 of the judgment of the lower court, to the effect that the learned court held that:

E **“In this case, I am sure that any bystander, who watched what transpired that day in court, would certainly come away with the impression that the appellant did not get a fair hearing. It's ruling is a nullity, and I so hold.”**

F Ground three of the appellant's amended notice of appeal contended that the lower court erred in law when the learned Justices of the Court of Appeal held at page 19 of the judgment of the court that there was no basis for the learned trial judge's decision. Ground four introduced a new dimension. In ground (4) of the amended notice of appeal, the appellant stated that the lower court erred in law in delivering judgment in favour of the Economic and Financial Crimes Commission which was not a party to the case before the court. At this juncture, I will attempt to briefly state the facts of this appeal to synchronize the above background with the arguments/submissions of the parties to this appeal.

G **Summary of Facts:**

H The appellant herein was charged with sundry financial and economic crimes bordering on his activities as the then Managing Director of the defunct Intercontinental Bank Plc pursuant to the complaints of the Central Bank of Nigeria, in the exercise of its statutory functions relating to banking supervision. The appellant was arraigned on 13 August, 2010 to face charges of financial and monetary improprieties filed against him by the respondent as contained in the amended information charge dated 13th December, 2010 as replicated at pages 115-125 of the record of appeal.

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A During the pendency of the charge at the trial court, a complaint was made to the National Judicial Council (N.J.C) and the Chief Judge of the Federal High Court on the conduct of the trial judge over certain developments relating to proceedings in the appellant's trial. The complaints are contained at pages 186-187 of the record of appeal. Acting further to its complaint, the respondent filed a motion seeking the disqualification of the learned trial

B Judge from further adjudicating over the matter on the basis of the likelihood of bias. The motion and affidavit in support are contained at pages 192-196 of the record.

On 31st January 2012, the learned trial judge summarily dismissed the motion while the respondent herein (being complainant/applicant) filed an appeal and a motion for stay of further proceedings in the matter. The ruling dismissing the application for refusal and motion for stay are contained at pages 244-249 and 250-259 respectively. The compilation of record of appeal was delayed, and/or allegedly frustrated by refusal of access to the official case file. And from what transpired in the proceedings contained at pages 268-272 of the record of appeal, particularly page 269, the trial Judge ruled and directed that the Hon. Attorney-General of the Federation (A.G.F) should disband, sack and debrief the prosecution team made up of five (5) Senior Advocates of Nigeria (SANs) for what the learned trial judge deemed 'incompetence' and 'serial abuse' of process.

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The learned trial judge also proceeded to dismiss the charge filed by the respondent against the appellant, as clearly documented at page 271 of the record of appeal. This formed the basis of the appeal filed by the respondent at the court below dated 10th April, 2012 but filed 11th April, 2012 vide a notice of appeal of two grounds, which appeal was upheld by the court below in its judgment of 20th February, 2015. The views and position expressed by the court below in the said judgment led to the instant appeal.

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F **Issues for Determination:**

To crystallize the hearing and determination of this appeal, the appellant filed at 33-page brief of argument dated 16th March, 2016 but filed on 18th March 2016. The appellant's brief was deemed properly filed and served by this court on 4th October, 2017. The respondent's 32-page brief of argument is dated 22nd day of January, 2017; filed 22nd December, 2017 and deemed properly filed and served by this court on 31st January, 2018. In the exercise of right of further response, the appellant filed a reply brief of 27 pages dated 5th February, 2018 and filed on 7th February, 2018

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At page 6 of its appellant's brief of argument, the appellant herein formulated three issues for determination from the four grounds contained in its amended notice of appeal, thus:-

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- I** “1. Whether the lower court was right in holding that the court of first instance denied the respondent its constitutional right of fair hearing when the learned judge dismissed the charge against the appellant and discharged the appellant. (Grounds 1 and 2).
2. Whether the lower court was right in holding that there was no basis for

- A** **the decision of the court of first instance (Ground 3).**
- 3. Having regard to the peculiar circumstances of this case, whether the judgment delivered by the lower court is null and void (Ground 4)”.**

B On its part, the respondent indicated its desire to adopt the three issues formulated in the appellant's brief for the purpose of determining this appeal. On my part, since the parties are *ad idem* as to the issues they desire this court to determine for the purpose of doing justice to this appeal, our job is made relatively easier. The three issues formulated are clear, direct and mutually agreeable by the parties, and I also adopt same for the purpose of determining this appeal.

C **Consideration and Resolution of the Issues:**

ISSUE 1:

D **“Whether the lower court was right in holding that the court of first instance denied the respondent its constitutional right of fair hearing when the learned judge dismissed the charge against the appellant and discharged the appellant.”**

E In his argument on issue one, the appellant proceeded to analyse the judgement of the court below as contained at pages 373 to 399 of the record of appeal. The appellant referred to and quoted the decision of the court below at page 390, which reads thus:

F **“...There is no question that the learned trial Judge denied the appellant a fair hearing when it proceeded to dismiss the charge and discharge (sic) the respondent without a word from it or any application on which to base its decision to so do. The decisions of a court are not made up in the air. They must have a foundation; something on which to base the decision...”**

G The appellant contended that in determining the veracity or propriety of the reason for the decision of the lower court, this honourable court must consider the entire record of proceedings at the court of trial. The appellant then proceeded with a self appraisal or evaluation of the facts as contained in the records of proceedings at pages 8 to 11 of the appellant's brief of arguments. The appellant then submitted that the lower court was grossly in error in setting aside the decision of the learned trial judge on the ground that the respondent was not given the opportunity to move its application for stay of proceedings before dismissing the charge against the appellant. It was contended by the appellant that, from the records, it is apparent that the respondent was given ample opportunity to proceed with the arraignment and trial of the appellant but also deliberately refused and/or neglected

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A to do so.

Based on the above, the appellant urged this court to reverse the decision of the lower court on issue one by placing reliance on the cases of **UKACHUKWU vs. PDP** (2014) 17 NWLR (Pt. 1453) 134; **INAKOJU vs. ADELEKE** (2007) 4 NWLR (Pt. 1025) 423; and **INEC vs. MUSA** (2003) 3 NWLR (Pt. 806) 72.

B While making further submissions on issue one, the appellant quoted extensively and emphasized on the decision in **INAKOJU vs. ADELEKE** (supra) per Niki Tobi, JSC. The learned Senior Counsel submitted on behalf of the appellant that the decision of the lower court was erroneous and perverse. The appellant argued that it was particularly perverse because, amongst other things, it does not draw from the evidence on record, as held in the case of **NOBIS-ELENDU vs. INEC** (2015) 16 NWLR (Pt. 1485) 197, where the court (in **Nobis-Elendu's case**) explained the basis and meaning of 'perverse' as relating to judicial proceedings.

C It is further contended by the appellant that since the respondent had opted to file an application for stay of proceedings and also by refusing to move same, it was proper for the learned trial judge to dismiss the charge before the court and discharging the appellant. The learned Senior Counsel to the appellant submitted further that, in the circumstances of this case, the order of dismissal of the charge made by the learned trial Judge would only operate as striking-out, same not having been made by the trial judge on the merits.

D The appellant further contended as to issue one that the lower court misapplied the doctrine of fair hearing to the facts of the case and referred to and quoted extensively from the decision of this court in the case of **PAM & ANOR. vs. NASIRU MOHAMMED & ANOR.** (2008) 16 NWLR (Pt. 1112) 1, per Oguntade JSC. Reliance was also placed by the appellant on section 36(4) of the Constitution as well as the cases of **MFA vs. INONGHA** (2014) 4 NWLR (Pt 1397) 343 and **REGISTERED TRUSTEES, A.O.N. vs. NAMA** (2014) 8 NWLR (Pt. 1408) 1.

E The appellant acknowledged that part of the reasons for the decision of the lower court in allowing the appeal was that the trial judge dismissed the charge and discharged the appellant without any application made to the court to that effect. However, the appellant countered this by submitting that an application needs not be made by a party (the appellant in the instant case) before the court can dismiss the charge against the appellant and discharge the appellant altogether. The learned senior counsel to the appellant argued that a court has inherent powers to strike-out a case for want of diligent prosecution or for any reason.

F On the scope and extent of the inherent powers of court, the appellant relied on the cases of **NSITF vs. IYEN** (2014) 9 NWLR (Pt. 1412) 323; **UNIVERSAL OIL LTD vs. NDIC** (2008) 6 NWLR (Pt. 1083) 254; **ABACHA vs. THE STATE** (2001) 3 NWLR (Pt. 699) 35. Reliance was also placed on order 56 Rule 1 of the Federal High Court (Civil Procedure) Rules, 2009, which states thus:

G **“Subject to the rules, the court may in all cases and matters make any order which it considers necessary for doing justice, whether the order**

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A has been expressly asked for by the person entitled to the benefit of the order or not.”

The appellant relied on the Supreme Court decision in *MFA vs. INONGHA* (supra) per Onnoghen JSC (as he then was, now CJN) at page 372 and submitted that fair hearing is not a one way traffic. The appellant submitted in the alternative that assuming, but without conceding, that the learned trial Judge had a duty to hear the respondent before making relevant orders, such cannot be basis for the lower court setting aside of the said order as it is not every mistake or error in a judgement that will result in an appeal being allowed. The appellant relied on the case of *C.G.G (NIG.) LTD vs. IDORENYIN* (2015) 13 NWLR (Pt. 1475) 149.

B In concluding arguments on issue one, the appellant urged this court to resolve issue one in appellant's favour and allow the appeal, set aside the decision of the lower court and restore the orders made by the trial court (court of first instance) dated 2nd April, 2012.

C In its response to issue one, the respondent acknowledged at page five (5) of its respondent's brief that the appellant has correctly identified the two main component elements of issue one to be:-

- D**
- E** “(i) That the court of first instance did not hear the respondent before proceeding to dismiss the charge; and;
 - (ii) That there was no application to the learned Judge to dismiss the charge before he proceeded to do so. The respondent submits that the finding of the court below represents the correct position of law and urged this court to uphold it.”

F The respondent contended further that the role of the judge is not that of a “go-getter” who employs his dexterity, skill and experience to formulate cases for parties, and cited the case of *COMMISSIONER FOR WORKS, BENUE STATE vs. DEVCON LTD* (1988) 3 NWLR (Pt. 83) 407 at 420 to back up its submission. Allusions were also made to the case of *NIGERIAN HOUSING DEV. SOCIETY LTD vs. MUMUNI* (1977) 2 SC (reprint) at page 30 and 42, and *ADENIJI vs. ADENIJI* (1972) 1 All NLR (Pt. 1) 307 at 305.

G The respondent placed further reliance on the case of *THE STATE vs. OLADIMEJI* (2003) 14 NWLR (Pt. 839) at 57 and quoted extensively from the decision of this Court per Iguh JSC, at 74 and 75. The respondent asserts that the learned trial judge was in grave error of justice, as held by the court below, when he launched himself into scrounging and cadging for grounds upon which to dismiss the charges against the appellant even when in the absence of any application by the appellant.

H The respondent contended that the law is settled that even where the court finds the need to raise a point *suo motu*, it is not only desirable but pertinent to place the point properly before the parties to enable them address the court on same. Doing otherwise, the respondent submits, would amount to abdication of jurisdiction on the part of the court and a denial of the

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A parties' right to a fair hearing. On this position, the learned counsel to the respondent relied on the case of *F.R.N vs. MOHAMMED* (2004) All FWLR (Pt. 730) 1234 at 1269, per Mohammed JSC.

B On the question of whether the Court of Appeal was right when it came to the conclusion that the court of first instance did not hear the respondent before proceeding to dismiss the charge, the respondent contended that it is clear that the learned trial Judge did not hinge the dismissal on refusal or failure of the respondent to move the motion for stay, going by what transpired in the proceedings at pages 269-272 of the record of appeal. Counsel to the respondent emphasized that the lower court was right when it observed at pages 387 and 388 that:-

C **“...He never said or indicated that he was not ready to take the motion... it is unfair, in my view for him to accuse the appellant's Counsel of provoking the learned trial judge when he refused to move the motion. The appellant's counsel did not refuse or say that he was not ready to move the motion for stay that was in the process of being heard that day. The truth of the matter is that the learned trial judge got angry...in his anger, he lost sight of the fact that there was a pending application for stay before the court...”**

E The respondent's counsel reiterated that the real issue of denial of fair hearing to the respondent had to do with the fact that the learned trial judge raised *suo motu* certain grouses and complaints against the prosecution which include:

- F**
- “i) The competency of the prosecution's counsel**
 - ii) The need to direct the AGF to disband/sack/debrief the prosecution team.**
 - iii) The need to declare the prosecution team as a drain on the public purse.**
 - iv) The learned trial judge's perceived “campaign” by the prosecution team “to scandalize the court”.**
 - G v) The need to bar the Prosecution team from being “given further audience” before the Federal High court in relation to the charges against the appellant.**
 - H vi) The need to terminate or dismiss the amended charge and to discharge the appellant even before the appellant could plead to the amended charge.”**

I The respondent contended that the above were the issues, grievances and matters on which the learned trial judge based his decision to dismiss the charge against the appellant, all which, according to the respondent, were matters raised by the learned trial judge and

A resolved by himself. In his conclusion on the issue, the respondent submitted that the decision of the Court of Appeal that the respondent was denied fair hearing was unassailable, and urged this court to uphold it in its entirety. The learned respondent's counsel placed before this court for consideration, the cases of **FRN vs. MOHAMMED (supra)**; **ACHIAPKA vs. NDUKA** (2001) 14 NWLR (Pt. 734) 632 at 664 per Iguh JSC; **B UWAZURUONYE vs. GOV. IMO STATE** (2013) 8 NWLR (Pt. 1355) 28 at 49-50, per Onnogben JSC (Supra); **HALILCO (NIG.) LTD. vs. EQUITY BANK** (2013) 12 NWLR (Pt. 1367) 1 at 11; **EGBUCHU vs. CONTINENTAL MERCHANT BANK PLC AND 2 ORS** (2016) 8 NWLR (Pt. 1513) 192 at 208 and 213 and **MABAMIJE vs. OTTO** (2016) 13 NWLR (Pt. 1529) 171 at 195.

C In its reply brief, **(which also covered issue two below, and is hereby adopted and incorporated in resolving issue two)**, the appellant contends still that the respondent was unwilling and not ready to prosecute its case. The appellant further stated, at page 12 of the reply that the respondent's appeal to the court below was unnecessary as a fresh team of legal practitioners could have been appointed to take over the prosecution of the appellant as directed by the learned trial judge. The appellant urged this court to discountenance the narratives of the respondent in this appeal.

D The appellant replied to the issue raised in paragraph 9 at pages 8 and 9 of the respondent's brief alleging that the trial judge "launched himself into scrounging and cadging" for grounds upon which to dismiss the charge by stating that the case cited by the respondent are grossly irrelevant in the circumstance and cannot avail the respondent. The appellant replied that it was within the discretion of the learned trial judge to dismiss the charge before him and also discharge the appellant, albeit, without an acquittal at the material time. The contention of the appellant is that the appellant needs not specifically apply for coercive powers of court to punish a party which is in abuse of its power or in contempt of court, placing reliance on **PALMER vs. STOOKE & ANORS. (1953) 14 W.A.C.A 133**, and **AKILU vs. FAWEHINMI (No. 2) (1989) 2 NWLR (Pt 102) 122**. In sum, the appellant urged this court, in its reply brief, to ignore the respondent's submissions on issue one, and reverse the decision of the lower court on the same issue.

E I have taken a great deal of time, effort and space in this judgement to carefully review and distill facts and arguments of the parties on issue one, being the primary and central issue in this appeal. To start with, this issue revolves around the cardinal principle of justice and fairness – fair hearing. The court has over the years consistently maintained that the principle of natural justice is sacrosanct in our judicial system and it must as a matter of constitutional obligation be observed by a judicial umpire. This court in **ADIGUN vs. A.G, OYO STATE** (1987) 1 NWLR (Pt. 53), page 678 paragraph G, per Obaseki JSC further had this to say on principles of natural justice:-

I **“If the principles of natural justice are violated in respect of any decision, it is indeed immaterial whether the same decision would have been**

A arrived at, in the absence of the departure from the essential principles of Justice, the decision must be declared to be no decision”.

The principle of natural justice and fairness are crucial and sacrosanct in our judicial system and adjudicatory functions at all level of the judicial hierarchy. It must as a matter of constitutional obligation be observed by all judicial officers. This is because fairness and natural justice require that a party to a cause, or a party who ought reasonably to be a party in the suit, must be given the opportunity to put forward his case or defence freely and fully. See **KANO NATIVE AUTHORITY vs. RAPHAEL OBIORA** (1959) 4 FSC 226; (1959) SCNLR 577 cited with approval by Iguh, JSC in **EKIYOR & ANOR. vs. BOMOR** (1997) 9 NWLR (Pt. 519) 1 at 14.

C What transpired in this appeal leaves sour taste in the mouth of the Nigerian judiciary. It is quite uncharacteristic of a judicial officer to raise issues as to, and proceed to declare with finality, without hearing or scrutiny, on vital issues such as:

- D**
 - vii) **The competence of the Prosecution's Counsel.**
 - viii) **The need to direct the AGF to disband/sack/debrief the Prosecution team.**
 - ix) **The need to declare the Prosecution team as a drain on the public purse.**
- E**
 - x) **The self-structured allegation of the trial Judge of perceived “campaign” by the prosecution team “to scandalize the court”.**
 - xi) **The need to bar the prosecution team from being “given further audience” before the Federal High Court in relation to the charges against the appellant.**
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 - xii) **The need to terminate or dismiss the amended charge and to discharge the appellant even before the appellant could make his plea to the amended charge”.**

G Those are far-reaching 'findings' and conclusions made without hearing the adverse side. It appears to me that personal grievances have been needlessly infused into sacred judicial function by the learned trial judge. I cannot agree less with the learned Justices of the court below in their decision on this issue as contained at pages 387 to 389 of the record of appeal. The court below rightly observed, and I adopt same that:-

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I “...The first question that jumps out is – did the appellant's counsel refuse to move the application for stay as alleged by the respondent... He never said or indicated that he was not ready to take the motion, and did not expressly state, as argued by the respondent, that he had no

A instructions to argue same... it is unfair in my view, for him to accuse the appellant's counsel of provoking the learned trial Judge when he refused or say that he was not ready to move the motion for stay that was in the process of being heard that day. The truth of the matter is that the learned trial judge got angry over what he described in his ruling as a persistent campaign by the prosecution “to scandalize the court rather than mount a serious and professionally competent prosecution of the accused”...He was angry and overreacted. In his anger, he lost sight of the fact that there was a pending application for stay before the court being heard, and that he has only just allowed an amendment of the charge that was yet to be read to the respondent.... True enough, it is quite human for a judge to be angry, however, as Niki Tobi said in his book – The Nigerian Judge, the word *anger* is only one letter short of *danger*, and one letter different from *angel*; and since the community of any angry people is a 'danger' centre, a Judge should try as much as he can to ensure his court is not a 'danger' centre... judges are, therefore, enjoined not to lose their temper in court so that the composure required to administer justice may not depart from the temple of justice...”

E By the nature and given the over arching nature of the premise on which the learned trial judge dismissed the charge and discharged the appellant as stated above, it is apparent that the learned trial Judge allowed emotions or personal feelings as a result of perceived errors, delays and/or lack of diligence of the prosecution team to determine the road he travelled in doing justice; this should not be so. It is so patently wrong and unnecessary. I wish to draw on the wisdom of this honourable court in the following dictum of Madarinkan, JSC (Blessed memory) in **OJAH vs. OGBONI** (1976) 10 sc 244 AT PAGE 247:-

G “I think it is a well established principle that the object of courts is to decide the rights of the parties and not to punish them for mistakes which they make in the conduct of their cases by deciding otherwise than in accordance with their rights... I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy...”

H The above reinforces the need to do substantial justice irrespective of provocation or procedural obstacles hurled on the path of a Judge on the highway of justice. The principle of fair hearing as enshrined under the Constitution of the Federal Republic of Nigeria, 1999 as amended (CFRN, 1999) also leaves the court with little choice in ensuring fair-hearing.

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A Section 36(1) of the CFRN, 1999 provides thus:-

B **“In the determination of his civil rights and obligations, including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such a manner as to secure its independence and impartiality.”**

C Impartiality is lost when a judge accused counsel of perceived negative or annoying attitude which the judge proceeded to summarily punish or sanction by making far-reaching declarations as outlined above, and capping it up by making pronouncements by way of final decision on the substantive case. This is a reckless judicial extremism. This noble court has held in the locus *classicus* case of **ARIORI & ORS. vs. MURAIMO ELEMO & ORS.** (1983) 14 SC 1 at 24 per Obaseki JSC (supra), that fair hearing means a trial conducted according to all the legal rules formulated to ensure that justice is done to the parties to the cause. Similar position was reiterated by this court in the case of **EKPETO vs. WANOGHO** (2005) 3 W.R.N 75 on principle of fair hearing, thus:-

D **“There is no doubt at all that the principle of fair hearing is fundamental to all court procedure and proceedings, and like jurisdiction, the absence of it vitiates proceeding well conducted”.**

E See also **SALU vs. EGEIBON** (1994) 6 NWLR (Pt. 348) 23 at 40, **CEEKAY TRADERS LTD. vs. GENERAL MOTORS CO. LTD.** (1992) 2 NWLR (Pt. 222) 132, **ATANO vs. A-G., BENDEL STATE** (1988) 2 NWLR (Pt. 75) 201. Per Kalgo, JSC (Pt. 85) lines. 5-1.

F This court has left no one in doubt, going by the decision in **ADIGUN vs. A.G. OYO STATE** (1987) 1 NWLR Pt. 53, Page 678 paragraph G, per Obaseki JSC (supra) on principles of natural justice, that:-

G **“If the principles of natural justice are violated in respect of any decision, it is indeed immaterial whether the same decision would have been arrived at, in the absence of the departure from the essential principles of justice, the decision must be declared to be no decision.”**

H The question of fairness of proceedings is quite separate from the question of the merit of the trial court decision. When a question of fairness of hearing arises in a case, the appellate court has a duty to scrutinize the proceedings to see whether the result of the case would have been the same even if the breach of the principle of fair hearing had not occurred. It is immaterial if, speculatively, the same decision would have been arrived at had a hearing not tainted by unfairness taken place. This is because, by its application, a breach of fair-

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A hearing leads to the inevitable conclusion that 'an unfair method cannot produce a fair result.' The proper thing must be done by sending the case back for re-trial or re-hearing. See: **IDAKWO vs. EJIGA** (2005) 48 W.R.N 23 where this court opined on the duty of court where question of fair hearing arises; Per Ayoola, JSC (pages 31-32) lines 25-40.

B A judicial proceeding is liable to be set aside or reversed on the slightest likelihood of bias. This court has a firm and settled position for determining if there is likelihood of bias. In **ABIOLA vs. FEDERAL REPUBLIC OF NIGERIA** (1995) LPELR-41 as follows, this court held that:-

C **“...In considering whether there was a real likelihood of bias, the court does not look at the mind of the justice himself or at the mind of the chairman of the tribunal, or whoever it may be, who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would, or did, in fact favour one side at the expense of the other. The court looks at the impression which would be given to other people. Even if he was as impartial as could be, nevertheless, if right minded persons would think that, in the circumstances, there was a real likelihood of bias, on his part, then he should not sit. And if he does sit, his decision cannot stand.”** Per Bello, (C.J.N. (page 15, paragraphs A-D))”

E The court went further to hold thus:

F **“There must be circumstances from which a reasonable man would think it likely or probably that the justice, or chairman, as the case may be, would, or did, favour one side unfairly at the expense of the other. The court will not enquire whether he did, in fact, favour one side unfairly. Suffice it that reasonable people might think he did. The reason is plain enough. Justice must be rooted in confidence: and confidence is destroyed when right-minded people go away thinking the Judge was biased.”** Per BELLO, C.J.N. (Pages 15-16), paragraphs F-A).

G I am in total agreement with the scrutiny of the court below on the proceedings and decisions of the learned trial judge delivered on 2/4/2012. What transpired in the proceedings of the trial court formed the basis of the instant appeal from trial court to the court below and further to this court. The court below had done the right and most appropriate thing by scrutinising same to establish the allegation of bias and a breach of fair hearing. As stated above, once lack of fair-hearing and allegation of bias is made, the duty of the Appellate court is to scrutinise the proceedings, beyond technicalities or legal and procedural distortions. I am satisfied that the court below did exactly that at pages 15 to 119 of its decisions as contained at pages 387-390 of the record of appeal, which has been quoted extensively above. In view of the foregoing, issue one is resolved in favour of the

A respondent.

ISSUE 2:

“Whether the lower court was right in holding that there was no basis for the decision of the court of first instance”

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In its submission on issue two, the appellant contended that a review of the proceedings would show that the learned trial judge had several reasons for dismissing the charge against the appellant. This include the fact that the prosecution team had chosen to embark on persistent campaign to scandalize the court; the court having taken notice of the fact that the appellant was also facing charges at the Lagos High Court for activities during his tenure as Managing Director and Chief Executive of Intercontinental Bank Plc

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The appellant also indicated that the learned trial judge noted and took into account in his ruling by dismissing the charge against the appellant, the fact that the prosecution team had indulged in acts of extreme professional incompetence without regard to the accused's right and the fact that the prosecution team had continued to indulge in extended campaign against the presiding judge. The appellant also argued that the trial judge took evidence of abuse of judicial process into consideration in his decision and relied on the case of **OLUSANYA vs. OSINLEYE** (2013) 12 NWLR (Pt. 1367) 148 on unfettered discretion of the court.

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The appellant contended further that what constitutes abuse of court process involves circumstances and situations of infinite variety and conditions and referred the court to a number of judicial authorities including **LOKPOBIRI vs. OGOLA** (2016) 3 NWLR (Pt. 1499) 328; **COMMISSIONER FOR EDUCATION, IMO STATE vs. AMADI** (2013) 13 NWLR (Pt. 1370) 133; **OGBORU vs. UDUAGHAN** (2013) 13 NWLR (Pt. 1370) 33; **ECHAKA CATTLE RANCH LTD. vs. N.A.C.B LTD** (1998) 4 NWLR (Pt. 547) 526; and **O.S.S.I.E.C. vs. NCP (supra)**.

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The appellant submitted that the respondent was indolent in prosecuting the matter before the learned trial judge and deliberately disobeyed the directive or order of the trial court. The appellant submitted further that, in any event, where a decision of a court is right, the reason given for so doing is immaterial. The appellant relied on the case of **DAIRO vs. U.B.N. PLC** (2007) S.C (Pt. II) 97 and urged this court to resolve issue two in favour of the appellant.

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In its reply on issue two, the respondent contended that the decision of the court below cannot be faulted. The respondent argued that there was nothing to show, from the record of proceedings, that the prosecution team ever engaged in any campaign to scandalize the learned trial judge. The respondent contended that the reliance placed by the appellant on the above cases would not avail as it was the appellant's counsel who inundated the court with series of applications, including the frivolous and needless objections.

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I wish to observe that both parties have also generally relied and recounted facts and

A submissions made in respect of issue one for the purpose of resolving issue two. To this extent, I wish to adopt my factual expositions and evaluation of issues and submissions of both counsel made in respect of issue one for the purpose of aspects of issue two that overlap with issue one already resolved above.

B It is rather sad, to argue as the appellant did, that the charge had been rightly dismissed by the learned trial judge due to self-engrossed assumption of 'scandalising the court', pugnacious and unsolicited appraisal of learned SANs for the prosecution as 'indulging in acts of professional incompetence and/or myopic perception of 'indulging in an extended campaign against the presiding Judge as sadly argued at pages 23-25 of the appellant's brief in respect of issue two.

C Assuming the above are true, which is doubted, it would amount to a judge sitting in justice over his cause, and a further violation of the principle of natural justice which I had sufficiently amplified above. Nothing could be misplaced as the contention of the appellant that dismissing a charge and absolving the appellant of the allegation levied against him amounted to the exercise of 'judicial discretion' when no such request or prayer was specifically sought from the learned trial judge.

D Judicial discretion and inherent powers of court must be exercised in the context of the justice of the particular case. For a judicial discretion to be properly exercised, it must be founded upon the facts and circumstances presented to the court from which the court must draw a conclusion governed by law and nothing else. See the case of **ARINZE vs. FIRST BANK NIG. LTD.** (2004) 12 NWLR (Pt. 888) 663 at 673, 75, 79; (2004) 5 SC 100; (2004) 7 SCNJ, 361 at 372 per Akintan JSC.

E The trial judge became a Santa Claus (Father Christmas) of sort, granting orders the appellant did not specifically seek, ostensibly in the exercise of judicial discretion. This, in my considered view, is most inappropriate as it has no basis in law or logic. It is the duty of the Court to entertain and decide a case only on the merit of any application brought before it by any party. See the case of **ERIOBUNA vs. OBIORAH (1999)** 8 NWLR (Pt. 616) 622. See also **OJO vs. ABOGUNRIN** (1989) 5 NWLR (Pt. 120) 162, **UGO vs. OBIEKWE** (1989) 1 NWLR (Pt. 99) 566; **ILODIBIA vs. NCC LTD.** (1997) 7 NWLR (Pt. 512) 174; **UDOM vs. E. MICHELITTI AND SONS LTD.** (1997) 8 NWLR (Pt. 516) 187; **OLAOPA vs. OAU ILE-IFE** (1997) 7 NWLR (Pt. 512) 204; **EZEAKABEKWE vs. EMENIKE** (1998) 11 NWLR (Pt. 575) 529.

F In view of the foregoing, I resolve issue two in favour of the respondent. This in effect means issue two is resolved against the appellant.

H ISSUE 3

“Having regard to the peculiar circumstances of this case, whether the judgment delivered by the lower court is null and void”

I The main contention of the appellant on issue three is that the matter commenced at the trial court in the name of the Federal Republic of Nigeria and not in the name of the Economic and Financial Crimes Commission. The appellant contended that the notice of

A appeal with which the appeal was commenced at the court below also bore the name of the Federal Republic of Nigeria. However, the appellant contended that in the judgement delivered by the Court below, the Economic and Financial Crimes Commission was stated as the appellant, at pages 373 to 399 of the record of appeal.

B The appellant contended that the fact that the judgement was delivered in the name of a non-party is a fundamental error which borders on jurisdiction. The appellant subsequently forwarded a list of authorities in support of issue three by a letter dated 28th February, 2018 received on 20th March, 2018. The list contained **SHINNING STARS (NIG.) LTD. vs. A.S STEEL (NIG) LTD** (2011) 4 NWLR (Pt. 1238) 596; **EHIDIMHEN vs. MUSA** (2000) 8 NWLR (Pt. 669) 540; **IFEDAPO COMMUNITY BANK LTD vs. ETERNAL ORDER OF C&S CHURCH, SAKI BRANCH** (2001) 7 NWLR (Pt. 712) 508; **ESENEWO vs. UKPONG** (1999) 6 NWLR (Pt. 608), 611, and **IKPEAZU vs. OTTI** (2016) 8 NWLR (Pt. 1513) 38.

C The appellant also filed a list of additional authorities dated 20th February, 2018 and filed on the 21st February, 2018. The list contains six (6) additional authorities on which the appellant desired to rely for the purpose of this appeal. The list include **WIKE NYESOM vs. HON. DAKUKU PTERSIDE & 3 ORS** (2016) 1 NWLR (Pt. 1492) 71 at 101; **BERNARD LONGE vs. FIRST BANK OF NIGERIA LIMITED** (2010) 6 NWLR (Pt. 1189) 1 at 23, 55; **G&T INVESTMENT LTD vs. WITT & BUSH LTD** (2011) 8 NWLR (Pt. 1250) 500 at 532; **HARKA AIR SERVICES (NIG) LTD vs. EMEKA KEAZOR, ESQ.** (2011) 12 NWLR (Pt. 1264) 320 at 338; **MRS. MATILDA ADERONKE DAIRO vs. UNION BANK OF NIGERIA PLC & ANOR** (2007) 16 NWLR (Pt. 1059) 99 at 128; and **CAMEROON AIRLINES vs. MR. MIKE E. OTUTUIZU** (2011) 4 NWLR (Pt. 1238) 512 at 547. I have reviewed and taken cognizance of the six authorities in deciding this appeal.

D In its response to issue three, the respondent contended that it is incorrect to say that the Economic and Financial Crimes Commission was not a party to the matter since, as shown in the records, EFCC is a prominent party to the proceedings having commenced the charge against the appellant alongside the Honourable Attorney-General of the Federation and Minister of Justice in the name of the Federal Government of Nigeria.

E The respondent contended that the law is now settled that where parties to the appeal are not in doubt, the wrong heading of processes or proceedings therein cannot go to the competency of the court or its vires. Counsel cited the case of **REGD. TRUSTEE, A.O.N. vs. N.A.M.A** (2014) 8 NWLR (Pt. 1408) 1 at 30-31 and 48; **ORUONYE ORWUNNALI vs. THE STATE** (1982) 8 S.C. 95 at 96. The respondent then submitted in conclusion that misstating of the name of the appellant at the court below does not go to the competence of the court or steps taken or decision reached. This is because, according to the respondent, justice is not a fencing game in which parties engage themselves in an exercise of out-smarting each other in whirligig of technicalities. The respondent placed reliance on the cases of **REGD. TRUSTEE, A.O.N. vs. N.A.M.A (supra)**; **EMESPO J. CONT LTD. vs.**

I

A **CORONA S & CO.** (2006) 11 NWLR (Pt. 991) 365 and **AFOLABI vs. ADEKUNLE** (1983) 14 SCNLR 398 at 150 and urged this court to resolve issue three in favour of the respondent.

The appellant's reply brief also incorporated arguments in support of issue three. The appellant contended that referring to the EFCC as a 'prominent party' has no basis in law. The
B appellant further replied on issue three that judgment of a court cannot be regarded as a mere 'process' or 'proceedings' contrary to the contention of the respondent.

In its summary of arguments and final submissions on all three issues formulated for determination in this appeal, the appellant urged this court to resolve all three issues in favour of the appellant. On its part, the respondent also prayed in its summary of arguments and
C submission as well as conclusion by urging this court to resolve all three issues in favour of the respondent.

Issue three represents a typical case of unintended error of the court which is neither meant nor targeted at inflicting hardship or injustice on any of the parties to the appeal save for courting technicalities to defeat the ends of justice. In **OYEYEMI & ORS vs. D** **OWOEYE & ANOR** (*SUPREME COURT SUIT NO. SC/102/2013*). I have had cause to state the position of law and attitude of this court to justice and the need to avoid technical justice in whatever coloration it might be presented. For the avoidance of doubt, I wish to restate that:-

E **“Our duty as an Apex Court is to do substantial, justice-stark justice, based on fairness which to all intent and purposes, seeks to not only ensure fairness in dispensing justice, but which is manifestly seen and duly acknowledged by all and sundry as justice both in content and context. We are not judicial technicians in the workshop of technical Justice. The jurisprudence or logic of our reasoning is and as humanly possible, would be devoid of technicalities.”**

F

The need to do substantial justice and avoid delving into the error of technicalities is well settled. This court has shown the way, and all courts below the judicial hierarchy should
G abide by embracing the trends of deliberately shifting away from narrow technical approach to doing substantial justice irrespective of obstacles and hindrances. See for example the case of **MAKERI SMELTING CO. LTD. vs. ACCESS BANK (NIG.) PLC** (2002) 7 NWLR (Pt. 766) 447 at 476-417. This case, like the Oyeyemi's case, amplified the attitudinal disposition of the court against deciding cases on mere technicalities. The attitude of the
H courts now is that cases should always be decided, wherever possible on merit.

Even in cases where errors of omission or commission called blunders have been made, it is unjust to hold that because blunders have been committed, the party blundering is to incur the penalty of not having the dispute between him and his adversary determined upon the merits. See also **AJAKAIYI vs. IDEHAI** (1991) 8 NWLR (Pt. 364) 504, **ARTRAI IND.**
I

A LTD. vs. NBC (1997) 1 NWLR (Pt. 483) 574, **DAKAT vs. DASHE** (1997) 12 NWLR (pt. 531) 46; **BENSON vs. NIGERIAAGIP CO. LTD** (1982) 5 S.C. 1”

As rightly held by this court in **REGD. TRUSTEE, A.O.N. vs. N.A.M.A** (supra), per Okoro JSC, where the parties to an appeal are not in doubt but the appeal is wrongly headed, it cannot affect the competency of the case. I also wish to amplify this position by quoting from

B the decision of this court in the suit, per Peter-Odili, JSC, thus:

C “It is now settled law that an appeal is a continuation of the case from the court of trial to and the appeal does not stand alone as an independent process without the linkage to the proceedings in the court of first instance. It is therefore with that fact that the wrong heading of a party at the appeal stage as happened in this instance in the court below would not have the effect of rendering the appeal incompetent or described as an appeal against a person, as that against a party unknown to law which would have the effect of a fatality...”

D Clearly, no injury is intended or inflicted on the parties by the inadvertence of stating the name of respondent as EFCC at the lower court as against the Federal Republic of Nigeria. At every stage of the matter, from the trial court up to this stage of the appeal here at the Supreme Court; the facts, issues, parties and records have been consistent as to the intended parties. It is my considered position on issue three, that no one is left in doubt that this appeal arose from the case of the Federal Republic of Nigeria and Erastus B. O. Akingbola. Therefore, I also resolve issue three in favour of the respondent.

E In view of the foregoing, and having resolved all three issues in this appeal in favour of the respondent, I hold that this appeal fails in whole. This appeal lacks merit and is accordingly dismissed. The judgement of the lower court dated 20th February 2015 which declared the ruling delivered by the trial court on 2/4/2012 as being *impromptus* and a nullity is hereby affirmed. For the avoidance of doubt, I uphold the declaration of the lower court that the ruling of the trial court dated 2/4/2012 is a nullity. I order that Charge No. FHC/443C/2009 be remitted back to the Federal High Court, Lagos for expeditious trial before another Judge.

G There shall be no order as to costs.

Sidi Dauda Bage,
Justice, Supreme Court

H **I. T. MUHAMMED (JSC):** This is an appeal against the judgment of the Lagos Division of the Court of Appeal, delivered on the 20th February, 2015 in Appeal No. CA/L/161/2013. The appellants distilled three (3) issues for determination.

I 1. Whether the lower court was right in holding that the court of first instance denied the

- A** respondent its Constitutional right of fair hearing when the learned trial judge dismissed the charge against the appellant? (Ground 1 and 2)
2. Whether the lower court was right in holding that there was no basis for the decision of the court of first instance? (Ground 3)
- B** 3. Having regard to the peculiar circumstances of this case, whether the judgment delivered by the lower court is null and void (Ground 4)

I have had the advantage of reading before now, the judgment just delivered by my learned brother, Bage, JSC. I agree with his reasoning and conclusion that the appeal lacks merit and it should be dismissed. I, too, dismiss the appeal.

C

Ibrahim Tanko Muhammed
Justice, Supreme Court

OLUARIWOOLA, (JSC)

D

I had the privilege of reading in draft the lead judgment of my learned brother **Bage, JSC** just delivered. I am not in the slightest doubt that the trial Judge did not handle the matter is unmeritorious and should be dismissed. I have nothing more to add. I too will dismiss the appeal.

Accordingly, the appeal is dismissed. No order as to costs.

E

Olu Ariwoola
Justice, Supreme Court

F BAYANG AKAHHS (JSC): I read before now the judgment of my learned brother, Bage JSC, wherein he dismissed the appeal as lacking in merit. I am in total agreement with his reasoning and conclusion.

The facts leading to this appeal are contained in the record of appeal on what took place in court on 2/4/2012 reproduced on pages 268-272 as follows:

G

*“IN THE FEDERAL HIGH COURT
HOLDEN AT LAGOS, NIGERIA
ON MONDAY THE 2ND DAY OF APRIL, 2012
BEFORE THE HONOURABLE
JUSTICE CHARLES EFANGA ARCHIBONG
JUDGE*

H

*SUIT NO FHC/L/443C/2009
BETWEEN:*

FEDERAL REPUBLIC OF NIGERIA

COMPLAINANT

I

AND

A*DR. ERASMUS B. O. AKINGBOLA**ACCUSED*

Accused present

Godwin Obla Esq. for the State with him E. Okpe, A. Arowolo Esq. and O. Oshotuyi Esq.

B*Chief F. O. Fagbohunge SAN with him A. Shamsudeen Esq., Yomi Adediran and Michael Sunbola for the accused.***C***Court: RULING READ IN OPEN COURT**Obla: Before we take the motion for stay of proceedings, we wish to have your Lordship's indulgence to avail us the records of your Lordship to enable us to complete our compilation of record in respect of the appeal the prosecution has filed on the 7th day of February, 2012 against the ruling of your Lordship of 31st January, 2012.***D***Court: So you insist on that appeal.**Obla: Yes, those are my instructions. I am no. 5 in the hierarchy**Court: Rises; Judge goes into chambers.**Court Returns: Judge re-enters court.***E***Court: I direct the AGF to disband/sack/debrief the present prosecution team of some 5(five) SANS and their respective firms for being incompetent in their prosecution of the charges against the accused before this court. I direct the AGF to disband/sack/debrief the present prosecution team for serial abuse of process. They are a drain on the public purse, a fact the AGF should be mindful of now if he was not before. This Prosecution team has chosen to persist in a campaign to scandalize the court rather than mount a serious and professionally competent prosecution of the accused. This Prosecution team or any part of it SHALL NOT be given further audience in this court in relation to the charges against this accused either before this presiding judge or any other judge of the Federal High Court for the reasons I have given in the foregoing. Further I take judicial notice of the fact that the accused herein is presently facing charges before the Lagos State High Court, emanating from his tenure as Managing Director and Chief Executive of Intercontinental Bank Plc. The AGF may wish to regain control of this process; and his untrammled right to prosecute the Accused on whatever charge he chooses before any appropriate Court as forum. He can of course do so at any time of his choosing.***F****G****H****I***Meanwhile, the prosecution team presently employed, indulging their professional incompetence to the extreme have been unmindful of the accused rights to have the case against him clearly stated. They have*

A *been dismissive of his right to a “speedy” trial; which in reality should be the orderly, progressive consideration and determination of all matters raised by the adversaries, within the law and within the constitution, relating to charges against the accused and the prosecution/defence of same NOT to indulge in this extended campaign against the presiding justice. I therefore dismiss the accused accordingly; and leave the AGF to consider his options. An enrolled order shall be on the AGF. The prosecution team may leave my court. We shall be referring the conduct of the Learned SANS who led this prosecution team to the Privileges Committee for further consideration and determination of the issues that such conduct has raised. And we shall forward to the Committee the record of these proceedings. We shall further oblige the AGF with same. This Proceeding is at an end.*

Signed: Hon. Justice C. E. Archibong

Judge

2/4/12

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E From the record reproduced above, the learned trial judge needlessly descended into the arena to pour vituperations on the team of prosecuting counsel on their unfitness to prosecute and thereby removed his toga of impartiality. No matter the level of provocation engendered by the lack luster attitude displayed by the prosecuting team in delaying the prosecution of the accused culminating in the announcement of learned counsel of their desire to appeal the ruling of 31 January, 2012, this does not warrant the action taken by the learned trial judge in the matter. Rather than act judicially in accordance with his oath of office, the learned trial judge constituted himself into a military dictator that is known for spewing out orders that cannot be challenged. A judicial officer worth his salt of answering to the appellation 'honourable' should not have descended so low to cast aspersion on the competence of the prosecuting team and directing the AGF to disband them. This is judicial tyranny and a clear case of bias has been displayed by the learned trial judge.

F

G The court below was absolutely right to have allowed the appeal since there was complete absence of justice in what the trial judge did.

I therefore find no merit in this appeal and dismiss it accordingly.

K. B. Akaahs

Justice, Supreme Court

H

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

I The appellant, who was Managing Director of Intercontinental bank plc, was

A arraigned before the Federal High Court on a 26 counts charge of several financial crimes by the Economic and Financial Crimes Commission (EFCC). The trial suffered several adjournments and as a result, the Chairman of EFCC complained against the conduct of the trial judge to the Chief Judge of the Federal High Court and the National Judicial Council (NJC) and requested for reassignment of all EFCC cases.

B In furtherance of this complaint, the respondent filed a motion seeking for disqualification of the trial Judge from sitting on those matters. That application was dismissed on the 31st January, 2012. The respondent lodged an appeal against that ruling, and filed a motion for stay of proceedings. The compilation of the record of that appeal could not be completed by the registry for about two months as it was alleged that the learned trial Judge refused to release his record of proceedings.

C At the hearing of the main case on the 2nd April, 2012, the prosecution sought the indulgence of the learned trial Judge to make the record of proceedings available for the purpose of compiling the record.

D At that instance the trial Judge rose and went into his chambers. Some minutes later, he came into the court, and in a short ruling, he directed the Attorney-General of the Federation to disband the prosecution team. In addition his lordship dismissed the charges against the appellant. There was no application to dismiss the charges, and most of the adjournments were at the instance of the appellant. The failure of the trial Judge to call on the parties to address him on why he should not dismiss the appeal amounted to a denial of fair hearing. The lower court was therefore right in allowing the appeal. The wrong spelling of the names of the parties is a mere slip which does not affect the credibility of the notice of appeal. There is no basis for the decision of the trial court which was taken vividly in anger.

E For these few words and the more detailed reasoning in the lead judgment of my learned brother, Bage JSC, this appeal shall be and it is hereby allowed.

F I abide by all the consequential orders made in the lead judgment including order as to costs.

G **Paul Adamu Galinje**
Justice, Supreme Court.

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FIDELITY BANK PLC

VS

- 1. THE M.T. “TABORA”**
- 2. NORTHERN FOX SHIPPING N.V.
(THE OWNERS OF M.T. “TABORA”)**
- 3. ERES N.V. BELGIUM
(THE CHARTERER OF THE M.T. “TABORA”)**
- 4. THE MASTER OF THE M.T. “TABORA”**

SC. 106/2010

**IN THE SUPREME COURT OF NIGERIA
HOLDEN AT ABUJA**

FRIDAY, 18TH MAY, 2018

BEFORE THEIR LORDSHIPS

MARY UKAEGO PETER-ODILI	JUSTICE, SUPREME COURT
MUSA DATTIJO MUHAMMAD	JUSTICE, SUPREME COURT
KUDIRAT MOTONMORI OLATOKUNBO KEKERE-EKUN	JUSTICE, SUPREME COURT
CHIMA CENTUS NWEZE	JUSTICE, SUPREME COURT
EJIMBI EKO	JUSTICE, SUPREME COURT

*Appeal: Concurrent findings – Attitude of Supreme Court thereto – When it will interfere – The principles in **Military Governor, Lagos State vs. Adeyiga (2012) 5 NWLR (pt. 1293) 291.***

*CASE LAW: The principles in **Macfoy vs. U.A.C. Ltd (1961) 3 All E.R.1169 at 1172, (1962) A.C. 152** – Whether does not represent any good law in Nigeria – The principles in **Rossek vs. ACB Ltd (1993) 8 NWLR (pt. 312) 382.***

*JUDGMENT AND ORDERS: Ruling of Court – When trial court makes two rulings – Appellant appealed against the second ruling only – Whether appellant cannot formulate issue from the first ruling that is not appealed against – The principles in **SPDC (Nig) Ltd vs. X.M. Fed. Ltd (2006) 16 NWLR (Pt. 1004) 189.***

JUDGMENT AND ORDERS: Subsisting court order – Validity thereof – Whether there is a

presumption of its correctness – S.168(1) of the Evidence Act, 2011 – Principles thereof.

*JUDGMENT AND ORDERS: Validity thereof – Where there is no appeal against a judgment – Whether that judgment remains valid – The principles in **Mc Investment vs. C.I. & C.M Ltd (2012) 12 NWLR (pt. 1313) at 10.***

*JUDGMENT AND ORDERS: Void decision – Where court makes an order without jurisdiction – The order so made void – Whether it requires a formal order to set aside such a void order otherwise the void orders is presumed to be correct until set aside – The principle in **Oba Aladegbemi vs. Obafasanmade (1988) 3 NWLR (Pt. 81) 129.***

PARTIES: Consistency thereof – Whether parties should be consistent in the pursuit of their cases from trial to appeal – Not to aprobe and reprobate.

*PARTIES: Decision of Court – Obligation thereto – Party has obligation to obey every decision of a court – Whether such obligation extends even where a party perceived the decision to be wrong or illegal – The principle in **Akinyemi vs. Soyawo (2006) 13 NWLR (Pt. 998) 496.***

PARTIES: Failure to appeal against a decision – Where a party did not appeal against the decision of the Court – Whether he is deemed to have accepted same.

PRACTICE AND PROCEDURE: Default judgment – Non service of originating processes – Whether default judgment cannot stand.

PRACTICE AND PROCEDURE: Order of substituted service – Where court made an order of substituted service by DHL on the respondent – Court subsequently made ruling on 20th December, 2005 setting aside its earlier order of substituted service – This subsequent ruling alleged to be a nullity – Appellant filed a motion for judgment without setting aside the ruling of 20th December – Whether ruling of 20th December still subsists until set aside by the court on appeal – Implication thereof.

PRACTICE AND PROCEDURE: Supreme Court – Powers thereof – S.22 of Supreme Court Act – Whether cannot be invoked to do an act which the lower court has no jurisdiction to do.

PRACTICE AND PROCEDURE: Order of service – Where order of service made by court has been set aside – Whether the appellant cannot bring an application for judgment

for non-appearance where the order of service on defendant has been set aside – What appellant would have done in the circumstance.

PRACTICE AND PROCEDURE: Order of substituted service – Where court set aside its earlier order of substituted service on the respondent – Whether court cannot enter judgment against respondent for default of appearance.

SERVICE: Service of Originating Process – Failure thereto – Where a party failed to serve an originating summons – Whether robs trial court of jurisdiction.

Issues for determination

- 1. Whether the Court of Appeal misdirected itself and came to a wrong decision sustaining the respondent's preliminary objection to the appellant's appeal on the ground that the appellant did not appeal against the Federal High Court's ruling of the 20th December, 2005.**
- 2. Whether the Court of Appeal erred in law in holding that proceedings which were a nullity could not, unless appealed against, be set aside by the lower court and in failing to declare as a nullity the respondents' motion dated the 12th April, 2005 and filed before the writ of summons was served on the respondents, together with the ensuing proceedings before the Federal High Court.**
- 3. Whether the Court of Appeal erred in law in failing to enter judgment in favour of the appellant when it was patently clear that the respondent had no intention of entering an appearance to the suit or filing a defence thereto.**
- 4. Whether the Court of Appeal embarked on an irrelevant consideration of the law relating to service of a writ of summons in admiralty proceedings.**

Facts of the matter

The plaintiff appellant commence an action at the Federal High Court by a writ of summons. The writ of summons and other processes were to be served on the first respondent which unfortunately have sailed out of jurisdiction of the Federal High Court before the writ of summons was issued.

The plaintiff/appellant therefore filed a motion ex-parte to serve the first respondent out of jurisdiction. The application ex-parte as granted. However, the respondents applied to the trial court to set aside the order of service, meanwhile the plaintiff appellant applied to the

trial court by motion for judgment in Default of appearance, the application to set aside the order of service as granted. The respondent filed a preliminary objection challenging the motion for default judgement and contended that the trial could validly set aside its early order for service.

The trial court however refuse the application for judgment in default of appearance. The plaintiff/appellant unsuccessfully appealed to the Court of Appeal hence this further appeal to the Supreme Court.

Held: *(unanimously dismissing the appeal)*

1. *Where decision on service was set aside, the appellant cannot bring an application for default judgment*

The indubitable fact, as can be gleaned from this summarised despondent mood or frustration of the appellant, is that inspite of the bitter complaints of appellant that the learned trial judge was wrong in acceding to the application of the respondents to set aside the service of the processes ordered to be served on them through DHL Courier Mail Service, and ordering on 20th December, 2005 the setting aside the service, by DHL Courier Mail Services, of the writ of summons and the amended statement of claim on the respondents and the order that they enter appearance within 35 days, the orders made on 20th December, 2005 remain subsisting and extant. The ruling of 20th December, 2005 and the orders made therein have not been set aside. The hub question on which the entire superstructure of the appellant's appeals at the lower court and this court spins are the questions – does that decision subsist, and if it does, of what consequence or effect does it impact on the appellant's application for final judgment? The options open to the appellant, as a party aggrieved by that decision of 20th December, 2005 are two, but in alternative. That is: by way of an appeal or an application to the same court to have the decision and the orders therein set aside ex debito justitiae on grounds of jurisdiction ultra vires. There is no doubt that a judge, for the purpose of the latter option, has jurisdiction to set aside his judgment or ruling that is a nullity: *Ojiako vs. Ogueze* (1962) 1 S.C.N.L.R. 112; *Ekerete vs. Eke* (1925) 6 N.L.R. 118; *Siliyun vs. Danmashi* (1975) 1 N.M.L.R. 55. If the learned trial judge wrongly and without jurisdiction, as the appellant alleges, assumed jurisdiction to entertain the application resulting in his ruling 20th December, 2005 that decision would have been a nullity ab initio and an exercise in futility, which ex debito justitiae the said judge was entitled to set aside.

At the risk of repetition, the Ruling of 20th December, 2005 was not appealed. There was no application to have it set aside ex debito justitiae by any party aggrieved thereby. It has not been set aside. (*Pp 320 - 321 .Paras E - C*).

2. *Effect of a subsisting court judgment*

There is always, in this realm, a presumption in favour of the correctness of a court's judgment; and until that presumption is rebutted and the judgment set aside, it remains subsisting and prevailing between, and binding on, the parties. Consequently, it must be obeyed. Section 168(1) of the Evidence Act, 2011 (formerly Section 150(1) the Evidence Act, 2004) is enacted to provide emphatically that when any judicial act or order is shown to have been done in a manner substantially regular, it is presumed that formal requisites for its validity were complied with. The burden is on the party aggrieved by the judicial act, who thinks otherwise of its validity, to rebut this presumption and move for its setting aside. (P 321 Paras. C - E)

3. *A void decision of a court must be set aside by a formal order*

This is not the first time the issue: whether a judgment of a court of competent jurisdiction which a party assumes was per incuriam and a nullity ab initio does not need formal judicial steps taken to have it set aside is coming before this court. It was addressed in *Oba Aladegbemi vs. Oba Fasanmade* (1988) 3 NWLR (Pt. 81) 129, and Eso, JSC in his statement opined thus –

- For a court of competent jurisdiction, not necessarily of unlimited jurisdiction
- has jurisdiction to decide a matter rightly or wrongly. If that court never had jurisdiction in the matter, then its decision is, without jurisdiction, is void, but then should a court of law not even decide a point? That is, the court without jurisdiction decided without jurisdiction? Should the decision just be ignored? Surely it would not make for peace and finality which a decision of a court seeks to attain. It would at least be against public policy for persons, without a backing of the court, to pronounce a court decision a nullity, act in breach of the decision whereas others may set out to obey it. In my respectful view it is not only desirable but necessary to have such decisions set aside first – (Emphasis supplied)

This view, which not only has the support of the previous decision of the Privy Council in *Isaac vs. Robertson* (1984) 3 ALL E.R. 140, was cited with approval in the subsequent decision of this court (Full Panel) in *ROSSEK vs. A. C. B. Ltd* (1993) 8 NWLR (Pt.312) 382. (Pp 321 - 322 Paras F - C)

Per Eko (JSC)

“The appellant's counsel seems to have been carried away by the oft quoted dictum of Lord Denning, MR. in *MACFOY vs. U. A. C. LTD* (1961) 3 ALL E. R. 1169 at 1172; (1962) A. C. 152 to the effect that:

If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order to set aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court to declare it to be so.
(Emphasis supplied)

This dictum has been rejected in this jurisdiction, as can be seen from the dicta in *Oba Aladegbemi vs. Oba Fasanmade (supra)*, and *Rossek vs. A. C. B. Ltd (supra)*. It does not represent any correct principle of the law in this country. The majority opinion in *Rossek vs. A. C. B. Ltd (supra)* outrightly rejected the said view of Lord Denning, M. R, in *Macfoy vs. U. A. C. Ltd (supra)* maintaining that it will lead to anarchy. On this, the majority opinion (of 6 against 1) in *Rossek vs. ACB Ltd (supra)* is that: A judgment of a court of competent jurisdiction remains valid and binding unless and until it is set aside by an appeal court or by the court itself, where it acted without jurisdiction and there is an unqualified obligation on every person against whom the decision is giving to obey it; and that to hold otherwise is to clothe the person against whom a judgment is given with the discretion to decide, in his wisdom, that the judgment is invalid and not binding on him; and further that this will amount to an invitation to anarchy. (*P 322 Paras C - H*).

4. *Ruling of Court is subsisting until set aside*

The subsistence of the Ruling of the trial court delivered on 20th December, 2005 is not in any doubt. It has not been set aside. It, therefore, does not lie in the mouth of the appellant to say that the decision is not valid or binding. Until set aside the Ruling remains binding on the appellant for what it decided and ordered. The net result or consequence of that decision is that –

- I. the leave granted on 8th April, 2005 to the appellant, as the plaintiff, to serve the writ of summons, the amended statement of claim and other processes of that court on the respondents, as the defendants, out of jurisdiction by DHL Courier Mail Service; and
- II. the service on the respondents, if at all, by DHL Courier of the writ of summons, the amended statement of claim and the other processes in the suit and
- III. the order directing the respondents as defendants, to enter their appearance to the suit of the appellant within 35 days of the dispatch of the processes by DHL Courier

had been discharged or vacated, and they so remain. The subsistence and abidingness of the ruling of the trial court decision delivered on 20th December, 2005 completely knock out the bases the appellant stood to apply for final judgment in his suit against the respondent. (*Pp 322 - 323 Paras H - D*).

Per Eko (JSC)

“The appellant could only apply for final judgment upon the service of the originating process, the writ of summons specially endorsed with the statement of claim (as amended), on the respondents. The appellant seems to concede this point. He submitted, correctly, on the authority of *OKAFOR vs. IGBO (1991) 8 NWLR (Pt. 210) 476*, that the issuance, and service of the writ of summons on the defendant, are the conditions precedent to the exercise of the jurisdiction which the trial court may have over the subject matter of the action against the defendant; and that where there is evidence that service was not effected on the defendant any judgment emanating from such proceedings is a nullity. In my firm view, the trial court was right when it held that; having set aside the leave it granted to the appellant to service the writ of summons and the amended statement of claim on the respondents by substituted means (through DHL Courier) and having set aside the purported service on the respondent of the writ of summons and the amended statement of claim by DHL Courier it was “unable to enter final judgment for the plaintiff (appellant) against the defendants (respondents)” as its own order setting aside the order for service of the processes, and the service of the processes, on the respondents out of jurisdiction had not been set aside. The lower court on 19th March, 2009 finding the Ruling of the trial court delivered on 5th June, 2006 “unimpeachable” held that there was “no reason to disturb same”. I cannot agree more. The lower court cannot be faulted on this”.

As I demonstrated in the foregoing reasons, there is clearly no substance in this appeal and it is accordingly dismissed in its entirety. (*Pp 323 - 324 Paras D - A*)

5. *Parties have to be consistent in the pursuit of their cases from trial to appeal*
Having regard to these contending divergent positions on either side, one is reminded that it is a rudimentary principle of procedure that parties have to be consistent in their case at the trial court on appeal to the Court of Appeal and up to the Apex court. No party is allowed to approbate and reprobate over the same issue. This consistency has to be from first instance to the very end as an appeal does not change the nature or structure of the dispute between parties. This is because an appeal does not lead to a discolouration of the matter at the

beginning as the complaint remains what it is at every stage up to the conclusion of the appeal at the trial court or Court of Appeal or Supreme Court. See *Suberu vs. State* (2010) 8 NWLR (Pt.1197) 586 at 618; *Akpa vs. Itodo* (1997) 5 NWLR (Pt.506) 589; *Ngige vs. Obi* (2006) 14 NWLR (Pt.999) 1, *Oredoyin vs. Arowolo* (1989) 4 NWLR (Pt.114) 172; *Ajide vs. Kelani* (1985) 3 NWLR (Pt.12) 248; *Agidigbi vs. Agidigbi & 2 Ors* (1996) 6 NWLR (Pt.454) 300.

It is with the guiding principle above stated to the effect that an appeal is not a licence to change the course of the dispute or nature or substance but is a continuum from inception of the case from trial to the very end at the last appeal. (Pp 327 - 328 Paras G - C)

6. *A judgment remains valid where there is no appeal against that judgment*
This court almost in a similar circumstance in *MC Investment vs. C.I. & C. M. Ltd.* (2012) 12 NWLR (Pt.1313) 12 at 17 paragraph C held decisively as follows:

“Therefore, there being no appeal against the judgment of the trial court on the undefended suit on the merits in the absence of any defence to the suit, that judgment of 19th July, 1996 remains valid and cannot be disturbed on appeal” See also *Emeka vs. Okadigbo* (2012) 18 NWLR (Pt.1331) 55.

What I see before this court as background is appellant's application of 8th December, 2005 which gave rise to the ruling of 5th June, 2006 and which simply was to “enter trial judgment in default of appearance” and nothing else. (P 330 Paras C - E)

7. *Ruling of court not appealed against is valid and subsisting*
A scenario akin to the present showed up in the case of *SPDC (Nig) Ltd. vs. X. M. Fed.* (2006) 16 NWLR (Pt.1004) 189. In that case a ruling delivered by the court of first instance against the appellants on 12th June, 1996. The same appellant filed an application which was dismissed by the same trial court in its ruling delivered on the 8th October, 1998 on the grounds that the application was similar to the one which gave rise to the ruling of June 12, 1996. The appellant therein being aggrieved with the ruling of 8th October, 1998 appealed against it to the Court of Appeal against the earlier ruling of the court delivered on 12 June, 1996. The Court of Appeal struck out the appellant's issue which was a challenge or question to the ruling of 12th June, 1996 on the ground that the appellant had not appealed against the ruling of 12th June, 1996 and went ahead to dismiss the appeal. A further appeal to the Supreme Court was also dismissed on the same point which I shall refer to hereunder, viz:-

“I have earlier in this judgment gone through in some details what transpired in the “history” of the subject matter of this appeal. For the avoidance of doubt, the appeal to the court below was against the ruling of the trial court of 8th October, 1998 and not that of 12th June, 1996. I have earlier in this judgment reproduced part of the pronouncement of this court below at page 160 in particular in support of this that rather than the appellants appealing against the ruling of 12th June, 1996 laboured in vain, so to speak, and proceeded to appeal against that of 8th October, 1998 which was a ruling that the trial court refused to revisit a subject matter of the latter application of the appellants which it had already decided and ruled upon. Period! In other words until decision of the trial court of 12th June, 1996 is appealed against and set aside by the court below, that decision subsists and is binding on the appellants in particular or the parties in general. Surely, the court below was justified and right in my respectful view, in its holding that the trial court's decision of 12th June, 1996 operated as an estoppels to bar the appellants from making the application of 2nd January, 1997 which gave rise to the ruling of 8th October, 1998. I so hold” per Ogbuagu JSC at page 199. (Pp 330- 331 Paras E - E)

8. *A party cannot change its case as it goes-on on appeal*

The same route was followed by this court in the following cases among others, viz:- Owie vs. Ighiwi (2005) 5 NWLR (Pt.917) 184; M.B.N. Plc. vs. Nwobodo (2005) 14 NWLR (Pt.945) 379.

For effect I shall quote the prayer or relief of the appellant on the said motion paper thus:-

“An order granting leave to the plaintiff/applicant herein to enter final judgment as per the writ of summons and the amended statement of claim in this suit against the defendant/respondents herein in default of appearance”.

It is now trite that a case of a party is considered and granted on the relief he has asked for as the other party or opponent is entitled to know the case being presented and which he has to meet. This is an elementary but rather a fundamental principle of the adversarial system of adjudication that impels an applicant to be bound by the prayers in his motion. Therefore a party who has come before the court seeking a certain known relief cannot change that case at

will in each court as he goes along whether at the trial or on appeal. See Okoya vs. Santilli (1990) 2 NWLR (Pt.131) 172; A.C.B. Ltd. vs. A.G. Northern Nigeria (1969) NMLR 231; Ojoh vs. Kamalu (2005) 18 NWLR (Pt.958) 523; Zaboley Int'l Ltd. vs. Omogbehin (2005) 17 NWLR (Pt.953) 200.

Indeed, the argument of the respondents captures what is on ground, which is, that the appellant's appeal is against one ruling and in the same breath persuading the appellate court to set aside another distinct and separate ruling not appealed against. (Pp 331 - 332 Paras F - C).

9. *Where a party did not appeal against the decision of the court he deemed to have accepted it and will abide by it*

A presentation such as stated above made a showing in the case of Tomtech (Nig) Ltd. vs. FHA (2009) 18 NWLR (Pt.1173) 358 at 375 and this court deprecating that approach stated thus:-

“This is obviously erroneous. A party who disagrees with the decision of a court, has the right to appeal against same either of right or with the leave of court, except the decision is that of this court, which is considered final; it is wrong to challenge the decision of a court of law under the guise of a Preliminary Objection, whether written or oral since the lower court, by striking out motion of 13th October, 2003, became functus officio and cannot entertain any further proceedings in respect of the appropriateness of the order made therein. The only court competent to do so is an appellate court which can only review the decision upon a proper appeal against same.

Appellant could have appealed against the above decision of the lower court under either section 233(2) or 233(3) of the 1999 Constitution depending on whether his appeal falls within the category of appeals as of right or with leave of the courts but he did not utilize that opportunity. It is settled law that where a party fails, or decides not to appeal against any decision of a court of law, he is deemed to have accepted that decision and is consequently bound by it”. (P 332 Paras C - H)

10. *Every party has obligation to obey court's decision*

What obtains when there is a subsisting order of a court of competent jurisdiction is well stated in the case of Akinyemi vs. Soyawo (2006) 13 NWLR (Pt.998) 496 per Tabai JSC at page 514.

“It is a settled principle of law that every party to a suit, and

indeed every citizen, has an obligation to obey the subsisting court decision or order in the suit unless and until it is set aside. And the party's obligation to obey the decision is without regard to his perception about the irregularity or illegality of the decision as long as it subsists. See *Odogwu vs. Odogwu* (1992) 2 NWLR (Pt.225) 539; *Nigerian Army vs. Gloria Mowarin* (1992) 4 NWLR (Pt.235) 345. The appellant as a party in the case cannot claim ignorance of this decision of the Court of Appeal on the 15th July, 1999. He became aware or deemed to have become aware on the 15th July, 1999 that the court decided to keep the running of the 45 days in abeyance during the pendency of the motion for variation from the 17th March, 1999 to 15th July, 1999".(P 336 Paras A - E).

11. *Where supreme Court cannot invoke its powers under S. 22 of the Supreme Court Act.*
 The reality that cannot be wished away in the light of the facts available and the grinding principles is that the learned trial judge in his decision declining jurisdiction and affirmed by the Court of Appeal on the 1st respondent, M. T. Tabora, a vessel on the ground that the time the appellant commenced its action on the 17th November, 2002, the 1st respondent was not within the territorial waters of Nigeria and therefore out of the jurisdiction of the court and so the trial court could not competently enter judgment against it.

The situation makes baseless the invitation by the appellant that this court exercise its powers under section 22 of the Supreme Court Act to enter judgment against the respondents since the appellant had not appealed against the set aside orders for service made against the respondents, which brought to an end the issue which remains subsisting and valid for all time since it is believed to have been accepted by the appellant. (P 336 Paras E - I).

12. *Attitude of Supreme Court to concurrent findings of fact*
 For a fact what is before the Supreme Court is an appeal based on concurrent findings of facts of two courts below and I shall refer to the attitude of this court to such presentations.

In *Military Governor, Lagos State vs. Adeyiga* (2012) 5 NWLR (Pt.1293) 291 at page 339 of Mary Ukaego Odili Judgment 334 paras F-H, the Supreme Court held as follows:

“This is a case of concurrent findings of fact. The Supreme Court will not interfere with the concurrent findings of fact by the trial court and the Court of Appeal where there is sufficient evidence in support of such findings and where no substantial

error is apparent on the record such as miscarriage of justice and violation of some principle of law or procedure. See Ogunbiyi vs. Adewunmi (1988) 5 NWLR (Pt.93) pg.215; Shipcare Nig. Ltd. vs. The owners of the M/V Fortunato & Anor (2011) 2-3 SC (Pt.11) p.1; (2011) 7 NWLR (Pt.1246) 205; Ezeonwu vs. Onyechi (1996) 3 NWLR (Pt.438) p.499”.

Being well advised in the Policy Statements emanating from this court as adumbrated in the cases above cited and quoted extensively, there is no basis for any interference with what the two courts below did in their findings and conclusions which came from sound application of the law within the context of the facts available to them. (Pp 338 - 339 Paras H - E)

Per Kekere Ekun (JSC)

“I agree entirely with the court below that in the absence of an appeal against the ruling of the trial court delivered on 20/12/2005, the orders made therein are valid and subsisting. The foundation of the appellant's motion for default judgment was the existence of a competent suit with parties properly before the court. The service of originating processes on parties who ought to be served is indispensable in any adjudication. Failure to serve a process where service is required is so fundamental that the party not served and against whom any order is made in his absence is entitled to have the order set aside on the ground that a condition precedent to the exercise of jurisdiction by the court has not been fulfilled. See: Obimonure vs. Erinoshio (1966) 1 ALL NLR 245; Kida vs. Ogunmola (2006) 6 SCNJ 147 @ 174; National Bank of Nigeria Ltd. vs. Guthrie Nig. Ltd. & Anor. (1993) 3 NWLR (Pt.284) 643; Ihedioha & Anor. vs. Okorochoa & Ors. (2015) LPELR-40837 (SC) @ 69-70 B-A. (P 343 Paras D - F)

13. *When default judgment cannot stand*

The premise of an application for a default judgment is that the person against whom the order is sought has been duly served with the writ of summons and statement of claim and has failed to respond or file a defence. As service of those processes on the respondents and the order granting an amended statement of claim had been set aside, the application for default judgment had no leg to stand on.

The appellant's failure to appeal against the ruling of 20/12/2005 was fatal. I am of the considered view that the lower court was right when it upheld the respondents' preliminary objection to the appellant's motion for default judgment. (Pp 343 - 344 Paras G - A)

A Representation

Chief F. O. Offia with Victor Kanu, (Esq.), for the appellant.
Clement Onwuenwunor (Esq.), for the respondents

B **EJEMBI EKO, (JSC) (Delivering The Lead Judgment):** The appellant, as the plaintiff at the Federal High Court, Lagos, in an action in rem against the ship M.T. TABORA, took out a writ of summons on 17th December, 2002. The writ of summons was on 16th December, 2002, specially endorsed with the statement of claim. The writ and the statement of claim have thereon six (6) defendants, and they were to be served on the 1st, 2nd and 3rd defendants, respectively the vessel, THE M.T. TABORA, Northern Fox Shipping (the owners of M.T. TABORA) and Eres N.V. Belgium. The vessel M.T. TABORA was in the Nigerian Waters until 15th December, 2002 when it sailed out of Nigerian Territorial Waters. Thus, the vessel M.T. Tabora, the 1st defendant, having sailed out of Nigerian Territorial Waters and out of the jurisdiction of the Federal High Court a day before the action was filed on 16th December, 2002 and two days before the writ of summons against her was issued on 17th December, 2002.

D On 22nd March, 2005, because the writ of summons could not be served earlier, appellant, as the plaintiff, then filed a motion ex parte praying for leave of the Federal High Court for the writ of summons, the statement of claim and the other processes in the action to be served on the defendants, the respondents herein, out of jurisdiction. The application ex parte was granted on 8th April, 2005, for the 1st, 2nd, 3rd and 4th defendants to be served out of the jurisdiction of the trial Federal High Court "by DHL" on the 2nd defendant, Northern Fox Shipping, P.O. Box 3657, Williamson Curacao West Indies and Hansa Huis Earnest Van Dijikaai 10, Bus B, 2000 Antwerp Belgium – 10. It was further ordered "that the 1st, 2nd, 3rd and 4th defendants enter appearance within 35 days of the date of dispatch of the processes herein by DHL Courier." On the said 8th April, 2005, vide the same application, the 5th and 6th defendants were struck off the writ of summons, and consequently out of the action.

E On 12th April, 2005, the respondents, as the remaining defendants, applied to the trial court of an order setting aside the orders it made concerning them on 8th April, 2005. They had apparently become aware of the action pending against them. The trial Federal High Court heard the parties on the motion filed on 12th April, 2005. In its ruling delivered on 20th December, 2005 the trial Federal High Court granted the application, discharged the order made on 8th April, 2005 and set aside the order for service out of jurisdiction, through DHL Courier, the writ of summons and the processes in the action on the respondents, the remaining defendants.

F Meanwhile, before the ruling delivered on 20th December, 2005, the appellant, as the plaintiff had filed on 8th December, 2005 an application for final judgment alleging that the defendants had defaulted in entering appearance and filing their defence to its action. Against this motion, filed on 8th December, 2005, the respondents filed on 20th February, 2006 notice of preliminary objection. Both the application for final judgment and the preliminary

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A objection to it were very fiercely contested. The ruling on the preliminary objection was delivered on 5th June, 2006. The appellant, as the plaintiff, did not appeal the decision contained in the ruling of 20th December, 2005.

In its ruling delivered on 5th June, 2006 on the application for final judgment, the trial court refused the application on the grounds inter alia, at pages 129-130 of the record, that –

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This court having in its ruling of 20th December, 2006 held that its jurisdiction cannot be invoked IN REM against M. T. TABORA i.e. the 1st defendant and having set aside the leave granted to the plaintiff to amend its statement of claim upon which the plaintiff's motion is grounded and having set aside the purported service by DHL of the amended statement of claim on the defendants out of jurisdiction of this court, I am unable to enter final judgment for the plaintiff against the defendants on a writ of summons which has not been served and an amended statement of claim which has been set aside.

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The defendant's notice of preliminary objection is upheld. The plaintiff's motion on notice dated 8th December, 2005 is hereby dismissed. (Emphasis supplied)

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The appellant appealed the decision vide its notice of appeal filed on 13th June, 2006. The respondents also filed notice of preliminary objection to the appeal on the ground that the appellant did not appeal the decision of 20th December, 2005. The Court of Appeal, Lagos Division heard the appeal No. CA/L/551/2006, on 19th March, 2009 and dismissed it for lacking in merits; hence this further appeal. The appeal was brought on a total of 6 grounds of appeal. The parties, in their respective

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briefs, argued the appeal on four (4) issues formulated from the six (6) grounds of appeal. The issues are as follows –

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5. Whether the Court of Appeal misdirected itself and came to a wrong decision sustaining the respondent's preliminary objection to the appellant's appeal on the ground that the appellant did not appeal against the Federal High Court's ruling of the 20th December, 2005.

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6. Whether the Court of Appeal erred in law in holding that proceedings which were a nullity could not, unless appealed against, be set aside by the lower court and in failing to declare as a nullity the respondents' motion dated the 12th April, 2005 and filed before the writ of summons was served on the respondents, together with the ensuing proceedings before the Federal High Court.

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A 7. **Whether the Court of Appeal erred in law in failing to enter judgment in favour of the appellant when it was patently clear that the respondent had no intention of entering an appearance to the suit or filing a defence thereto.**

B 8. **Whether the Court of Appeal embarked on an irrelevant consideration of the law relating to service of a writ of summons in admiralty proceedings.**

C The fortune of this appeal turns on whether the 20th December, 2005 decision of the trial court was void ab initio and without more ineffectual? At the lower court the appellant's counsel was, at pages 298-299 of the record, reported to have adopted a stance –

D **The learned counsel for the appellant posed a few questions which I find interesting. The first question is whether a judge who has made an order for service of court's proceedings (sic: processes) on the respondents by Courier and at the same time ordering them to put up appearance within 35 days, can turn around to set aside the order pursuant to an application by a party who has not been served with the writ, and the learned judge based his ruling on factual allegations contained in the affidavit filed in support of the said incompetent motion? the 2nd question is, if the motion filed by respondents on the 12th April, 2005 seeking to set aside the service of the Writ was incompetent, since it was filed before service of the writ, can the learned judge entertain the said motion and rely on averments in the affidavit in support of same to annul retroactively the orders which he had previously made and which had been carried out? (Emphasis supplied)**

G The indubitable fact, as can be gleaned from this summarised despondent mood or frustration of the appellant, is that inspite of the bitter complaints of appellant that the learned trial judge was wrong in acceding to the application of the respondents to set aside the service of the processes ordered to be served on them through DHL Courier Mail Service, and ordering on 20th December, 2005 the setting aside the service, by DHL Courier Mail Services, of the writ of summons and the amended statement of claim on the respondents and the order that they enter appearance within 35 days, the orders made on 20th December, 2005 remain subsisting and extant. The ruling of 20th December, 2005 and the orders made therein have not been set aside. The hub question on which the entire superstructure of the appellant's appeals at the lower court and this court spins are the questions – does that

A decision subsist, and if it does, of what consequence or effect does it impact on the appellant's application for final judgment? The options open to the appellant, as a party aggrieved by that decision of 20th December, 2005 are two, but in alternative. That is: by way of an appeal or an application to the same court to have the decision and the orders therein set aside ex debito justitiae on grounds of jurisdiction ultra vires. There is no doubt that a judge, for the purpose of the latter option, has jurisdiction to set aside his judgment or ruling that is a nullity: **Ojiako vs. Ogueze (1962) 1 S.C.N.L.R. 112; Ekerete vs. Eke (1925) 6 N.L.R. 118; Siliyun vs. Mashi (1975) 1 N.M.L.R. 55**. If the learned trial judge wrongly and without jurisdiction, as the appellant alleges, assumed jurisdiction to entertain the application resulting in his ruling 20th December, 2005 that decision would have been a nullity ab initio and an exercise in futility, which ex debito justitiae the said judge was entitled to set aside.

C At the risk of repetition, the Ruling of 20th December, 2005 was not appealed. There was no application to have it set aside ex debito justitiae by any party aggrieved thereby. It has not been set aside.

D There is always, in this realm, a presumption in favour of the correctness of a court's judgment; and until that presumption is rebutted and the judgment set aside, it remains subsisting and prevailing between, and binding on, the parties. Consequently, it must be obeyed. Section 168(1) of the Evidence Act, 2011 (formerly Section 150(1) the Evidence Act, 2004) is enacted to provide emphatically that when any judicial act or order is shown to have been done in a manner substantially regular, it is presumed that formal requisites for its validity were complied with. The burden is on the party aggrieved by the judicial act, who thinks otherwise of its validity, to rebut this presumption and move for its setting aside.

E This is not the first time the issue: whether a judgment of a court of competent jurisdiction which a party assumes was per incuriam and a nullity ab initio does not need formal judicial steps taken to have it set aside is coming before this court. It was addressed in **F Oba Aladegbemi vs. Oba Fasanmade (1988) 3 NWLR (Pt. 81) 129**, and **Eso, JSC** in his statement opined thus –

G - **For a court of competent jurisdiction, not necessarily of unlimited jurisdiction**
H - **has jurisdiction to decide a matter rightly or wrongly. If that court never had jurisdiction in the matter, then its decision, without jurisdiction, is void. But then should a court of law not even decide a point? That is: the court without jurisdiction decided without jurisdiction? Should the decision just be ignored? Surely it would not make for peace and finality which a decision of court seeks to attain. It would at least be against public policy for persons, without a backing of the court, to pronounce a court decision a nullity, act in breach of the decision whereas others may set out to obey it. In my respectful view it is not only desirable but necessary to have such decisions set aside first**
 –(Emphasis supplied)

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A This view, which not only has the support of the previous decision of the Privy Council in **Isaac vs. Robertson (1984) 3 ALL E.R. 140**, was cited with approval in the subsequent decision of this court (Full Panel) in **ROSSEK vs. A. C. B. Ltd (1993) 8 NWLR (Pt.312) 382**.

B The appellant's counsel seems to have been carried away by the oft quoted dictum of Lord Denning, MR. in **MACFOY vs. U. A. C. LTD (1961) 3 ALL E. R. 1169 at 1172; (1962) A. C. 152** to the effect that:

C **If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order to set aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court to declare it to be so.** (Emphasis supplied)

D This dictum has been rejected in this jurisdiction, as can be seen from the dicta in **Oba Aladegbemi vs. Oba Fasanmade (supra)**, and **Rossek vs. A. C. B. Ltd (supra)**. It does not represent any correct principle of the law in this country. The majority opinion in **Rossek vs. A. C. B. Ltd (supra)** outrightly rejected the said view of Lord Denning, M. R, in **Macfoy vs. U.A. C. Ltd (supra)** maintaining that it will lead to anarchy. On this, the majority opinion (of 6 against 1) in **Rossek vs. ACB Ltd (supra)** is that: A judgment of a court of competent jurisdiction remains valid and binding unless and until it is set aside by an appeal court or by the court itself, where it acted without jurisdiction and there is an unqualified obligation on every person against whom the decision is giving to obey it; and that to hold otherwise is to clothe the person against whom a judgment is given with the discretion to decide, in his wisdom, that the judgment is invalid and not binding on him; and further that this will amount to an invitation to anarchy.

E The subsistence of the Ruling of the trial court delivered on 20th December, 2005 is not in any doubt. It has not been set aside. It, therefore, does not lie in the mouth of the appellant to say that the decision is not valid or binding. Until set aside the Ruling remains binding on the appellant for what it decided and ordered. The net result or consequence of that decision is that –

- G**
- IV. the leave granted on 8th April, 2005 to the appellant, as the plaintiff, to serve the writ of summons, the amended statement of claim and other processes of that court on the respondents, as the defendants, out of jurisdiction by DHL Courier Mail Service; and**
 - H**
 - V. the service on the respondents, if at all, by DHL Courier of the writ of summons, the amended statement of claim and the other processes in the suit and**
 - I**
 - VI. the order directing the respondents as defendants, to enter their appearance to the suit of the appellant within 35 days of the**

A **dispatch of the processes by DHL Courier**

had been discharged or vacated, and they so remain. The subsistence and abidingness of the ruling of the trial court decision delivered on 20th December, 2005 completely knock out the bases the appellant stood to apply for final judgment in his suit against the respondent.

B The appellant could only apply for final judgment upon the service of the originating process, the writ of summons specially endorsed with the statement of claim (as amended), on the respondents. The appellant seems to concede this point. He submitted, correctly, on the authority of **OKAFOR vs. IGBO (1991) 8 NWLR (Pt. 210) 476**, that the issuance, and service of the writ of summons on the defendant, are the conditions precedent to the exercise of the jurisdiction which the trial court may have over the subject matter of the action against the defendant; and that where there is evidence that service was not effected on the defendant any judgment emanating from such proceedings is a nullity. In my firm view, the trial court was right when it held that; having set aside the leave it granted to the appellant to service the writ of summons and the amended statement of claim on the respondents by substituted means (through DHL Courier) and having set aside the purported service on the respondent of the writ of summons and the amended statement of claim by DHL Courier it was “unable to enter final judgment for the plaintiff (appellant) against the defendants (respondents)” as its own order setting aside the order for service of the processes, and the service of the processes, on the respondents out of jurisdiction had not been set aside. The lower court on 19th March, 2009 finding the Ruling of the trial court delivered on 5th June, 2006 “unimpeachable” held that there was “no reason to disturb same”. I cannot agree more. The lower court cannot be faulted on this.

As I demonstrated in the foregoing reasons, there is clearly no substance in this appeal and it is accordingly dismissed in its entirety. Parties shall bear their respective costs.

F **Ejembi Eko**
Justice, Supreme Court

PETER-ODILI, (JSC): I am at one with my learned brother, Ejembi Eko JSC in the dismissal of this appeal and the reasonings from which the decision came about. To register that support I shall make some comments.

G This is an appeal by the appellant/plaintiff against the judgment of the Court of Appeal, Lagos Division or lower court or court below, Coram: O. Adamu JCA, P.A. Galinje JCA (as he then was) and D. Jauro JCA delivered on the 19th March, 2009 affirming the decision of Mustapha J (as he then was) of the Federal High Court, Lagos wherein he entered a default judgment in favour of the plaintiff/appellant against the respondent for non-appearance and failure to file a statement of defence.

H The background facts of this appeal are well captured in the leading judgment and I see no need to repeat them unless the occasion warrants a reference to any part of those facts.

I At the hearing on the 19th February, 2018, learned counsel for the appellant, Chief F.

- A** O. Offiah adopted its brief of argument filed on 28th May, 2010 and deemed filed on 28th May 2010 and in it were raised four issues for determination as follows:-
- B** 1. **Whether the Court of Appeal misdirected itself and came to a wrong conclusion in sustaining the respondent's preliminary objection to the appellants appeal on the ground that the appellant did not appeal against the Federal High Court Ruling of the 20th December, 2005.**
 - C** 2. **Whether the Court of Appeal erred in law in holding that proceedings which are nullity could not, unless appealed against, be set aside by the lower court and in failing to declare as a nullity the respondents' motion dated the 12th April, 2005 and filed before the writ of summons was served on the respondents, together with the ensuing proceedings before the Federal High Court.**
 - D** 3. **Whether the Court of Appeal erred in law in failing to enter judgment in favour of the appellant when it was patently clear that the respondent had no intention of entering an appearance to the suit or filing a defence thereto.**
 - E** 4. **Whether the Court of Appeal embarked on an irrelevant consideration of the law relating to service of a writ of summons in admiralty proceedings.**

F Clement Onwuenwunor Esq., learned counsel for the respondent adopted the brief of argument filed on 13th August 2014 and deemed on 19th February 2018. He equally adopted the issues as distilled by the appellant which I am going to utilise.

ISSUES ONE & TWO

- G** 1. **Whether the Court of Appeal misdirected itself and came to a wrong conclusion in sustaining the respondent's preliminary objection to the appellants appeal on the ground that the appellant did not appeal against the Federal High Court Ruling of the 20th December, 2005.**
- H** 2. **Whether the Court of Appeal erred in law in holding that proceedings which are nullity could not, unless appealed against, be set aside by the lower court and in failing to declare as a nullity the respondents' motion dated the 12th April, 2005 and filed before the writ of summons was served on the respondents, together with the ensuing proceedings before the Federal High Court.**

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A Learned counsel for the appellant contended that the court of Appeal failed to appreciate that the complaint of the appellant before it related to failure of the Federal High Court when invited to do so by the appellant in its submission leading to the Ruling of the 5th June 2006 to set aside its ruling which was a nullity, and not against the substance of the said ruling.

B That the court below failed to address either question in its judgment which are the issues now before this court. That in order to meet the end of justice, the respondents' application of 12th April 2005 and ensuring proceedings leading to the trial court's decision of 20th December 2005 which the trial court entertained without jurisdiction amounted to a nullity and accordingly should have been set aside by the trial court.

C Chief Offiah of counsel for the appellant further argued that service of a writ of summons is very fundamental and that no suit can be determined by a court unless and until the summons in relation to that suit has been served on the defendant. He cited **Okafor vs. Igbo (1991) 8 NWLR (Pt. 210) 476**.

D That where in this case the evidence shows that service was not affected on the appropriate party any judgment emanating from such proceedings is a nullity and the court should have terminated the proceedings upon discovery of that fundamental defect since at that point, the court is well aware that it lacks jurisdiction to proceed. He relied on **Abubakar vs. J.M.D.B (1997) 10 NWLR (Pt.524) 242 at 245; National Bank of Nigeria vs. Guthrie (1993) 3 NWLR (Pt.284) 643 at 659, Kennedy vs. INEC (2009) 1 NWLR (Pt.1123) 614 at 635**.

E For the appellant it was submitted that if the respondents were eager to pursue the action timeously they would have followed the regular procedure of entering conditional appearance after being served with the processes. That instead the respondents pursued an incomprehensible procedure by filing their application without waiting to be served with the writ of summons and then rejecting service when they were finally served. That if the Court of Appeal had considered this important issue, the appellant's ground 2 in the notice of appeal and issue 2 would not have been struck out by the court.

F Learned counsel for the respondents, Clement Onwuenwunor Esq submitted that the relief 4 of the appellant's notice of appeal stated clearly for an order of court allowing the appeal and entering judgment against the respondents.

G That the appellant is bound by the relief in its notice of appeal and cannot turn around at the Supreme Court to argue that its appeal at the court below was not against the substance of the ruling of 5th June 2006 dismissing its application for default judgment. He cited **Suberu vs. State (2010) 8 NWLR (Pt.1197) 586 at 612**.

H He stated that so long as the appellant did not appeal against the ruling of the trial court dated 20th December, 2005, the court below could not have assumed jurisdiction to entertain the appellant's unnecessary question on the said ruling which was not the subject matter of the appeal before it. He referred to **MC Investment Ltd vs. C.I. & C. M. Ltd (2012) 12 NWLR (Pt.1313) 17; S.P.D.C. (Nig) Ltd vs. M. Fed. (2006) 16 NWLR (Pt.1004) 189; Owie vs. Ighiwi (2005) 5 NWLR (Pt.917) 184; M.B.N. Plc vs. Nwobodo (2005) 14 NWLR (Pt.945) 379**.

I Learned counsel for the respondents submitted that the appellant's motion on notice

A dated and filed on 8th December, 2005 and its affidavit upon which the ruling appealed against was based, did not raise any issue relating to or concerning the ruling of the learned trial judge delivered on 20th December, 2005 now sought to be set aside. That the appellant is bound by the terms of the prayer of that motion and cannot change the tone of the said prayers at this stage.

B He cited **Okoya vs. Santilli (1990) 2 NWLR (Pt.131) 172; Ojoh vs. Kamalu (2005) 18 NWLR (Pt.958) 523 etc.**

C The crux of the appellants concern herein is that the Court of Appeal failed to appreciate that the complaint of the appellant before it related to the failure of the Federal High Court, which invited to do so by the appellant in its submissions leading to the ruling of the 5th June 2006 to set aside the ruling which was a nullity and not against the substance of the said ruling.

D The stance of the respondent is that the appellant being bound by the relief sought in its notice of appeal, cannot turn around at the Supreme Court to argue that its appeal at the court below was not against the substance of the ruling of 5th of June, 2006 dismissing its application for default judgment.

E Having regard to these contending divergent positions on either side, one is reminded that it is a rudimentary principle of procedure that parties have to be consistent in their case at the trial court on appeal to the Court of Appeal and up to the Apex court. No party is allowed to approbate and reprobate over the same issue. This consistency has to be from first instance to the very end as an appeal does not change the nature or structure of the dispute between parties. This is because an appeal does not lead to a discolouration of the matter at the beginning as the complaint remains what it is at every stage up to the conclusion of the appeal at the trial court or Court of Appeal or Supreme Court. See **Suberu vs. State (2010) 8 NWLR (Pt.1197) 586 at 618; Akpa vs. Itodo (1997) 5 NWLR (Pt.506) 589; Ngige vs. Obi (2006) 14 NWLR (Pt.999) 1, Oredoyin vs. Arowolo (1989) 4 NWLR (Pt.114) 172; Ajide vs. Kelani (1985) 3 NWLR (Pt.12) 248; Agidigbi vs. Agidigbi & 2 Ors (1996) 6 NWLR (Pt.454) 300.**

G It is with the guiding principle above stated to the effect that an appeal is not a licence to change the course of the dispute or nature or substance but is a continuum from inception of the case from trial to the very end at the last appeal. It is on that note that I shall refer to what the court below stated at page 302 of the record of appeal, thus:-

H **“On the 20th of December, 2005, the learned trial judge in a considered ruling granted the prayers contained in the respondents' application of 12th April, 2005 including orders for service of the writ of summons and the amended statement of claim. There is no appeal against this ruling. Thereafter the respondent filed a preliminary objection to the applicant's application for judgment in default of appearance. The preliminary objection is dated 16th of February, 2006 and filed on 20th**

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A February, 2006. The appellant's motion for judgment and preliminary objection were heard together and this resulted in the ruling of 5th June, 2006 against which this appeal lies.

B The decision of 20th December, 2005 which set aside all the processes that were ordered to be serviced on the respondents has not been set aside. It follows therefore that the processes are deemed to have been withdrawn. There was therefore no service. Any further service of these process which were delivered on the 20th December, 2005 is set aside.

C The appellant was aware of this ruling (of the 20th December, 2005) and as such it was bound to submit itself to the decision of the lower court, instead of playing hide and seek game. The only way out for the appellant was to seek for a reversal of the ruling of the 20th December, 2005 through appeal”.

D

The court below stated further, viz:-

E “Learned counsel for the appellant posed a few questions which I find interesting. The first question is whether a judge who has made an order for service of court's proceedings on the respondents by courier and at the same time ordering them to put up appearance within 35 days, can turn around to set aside the order pursuant to an application made by a party who has not been served with the writ, and the learned judge based his ruling on factual allegations contained in the affidavit filed in support of the said incompetent motion?

F

G The 2nd question is if the motion filed by the respondents on the 12th April, 2005 seeking to set aside the service of the writ was incompetent, since it was filed before service of the writ, can the learned judge entertain the said motion and rely on averments in the affidavit in support of same to annul retroactively the orders which he had previously made and which had been carried out”.

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What the Court of Appeal did and why are well captured as that court went along its summation as follows:-

I “The two questions which I said are interesting and I reproduced elsewhere in this judgment are questions which would have been

A subject to determination on appeal. Unfortunately, those questions are directed at the respondent's application filed on the 12th of April, 2003 which sought to set aside services of the writ of summons and the amended statement of claim.

B There is no appeal against the ruling of the lower court on that application. The appellant refers to that application as incompetent because it was not filed before the services of the writ of summons. Is the appellant competent to declare a process pending before the court incompetent? I do not think so. Only a court of competent jurisdiction

C can declare a process or a decision of a court incompetent”

This court almost in a similar circumstance in **MC Investment vs. C.I. & C. M. Ltd. (2012) 12 NWLR (Pt.1313) at 17 paragraph C** held decisively as follows:

D “Therefore, there being no appeal against the judgment of the trial court on the undefended suit on the merits in the absence of any defence to the suit, the judgment of 19th July, 1996 remains valid and cannot be disturbed on appeal” See also **Emeka vs. Okadigbo (2012) 18 NWLR (Pt.1331) 55.**

E What I see before this court as background is appellant's application of 8th December, 2005 which gave rise to the ruling of 5th June, 2006 and which simply was to “enter final judgment in default of appearance” and nothing else.

F A scenario akin to the present showed up in the case of **SPDC (Nig) Ltd. vs. X. M. Fed. (2006) 16 NWLR (Pt.1004) 189.** In that case a ruling delivered by the court of first instance against the appellants on 12th June, 1996. The same appellant filed an application which was dismissed by the same trial court in its ruling delivered on the 8th October, 1998 on the grounds that the application was similar to the one which gave rise to the ruling of June 12, 1996. The appellant therein being aggrieved with the ruling of 8th October, 1998 appealed against it to the Court of Appeal against the earlier ruling of the court delivered on 12 June, 1996. The Court of Appeal struck out the appellant's issue which was a challenge or question to the ruling of 12th June, 1996 on the ground that the appellant had not appealed against the ruling of 12th June, 1996 and went ahead to dismiss the appeal. A further appeal to the Supreme Court was also dismissed on the same point which I shall refer to hereunder, viz:-

H “I have earlier in this judgment gone through in some details what transpired in the “history” of the subject matter of this appeal. For the avoidance of doubt, the appeal to the court below was against the ruling of the trial court of 8th October, 1998 and not that of 12th June, 1996. I

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A have earlier in this judgment reproduced part of the pronouncement of this court below at page 160 in particular in support of this that rather than the appellants appealing against the ruling of 12th June, 1996 laboured in vain, so to speak, and proceeded to appeal against that of 8th October, 1998 which was a ruling that the trial court refused to revisit a subject matter of the latter application of the appellants which it had already decided and ruled upon. Period! In other words until decision of the trial court of 12th June, 1996 is appealed against and set aside by the court below, that decision subsists and is binding on the appellants in particular or the parties in general. Surely, the court below was justified and right in my respectful view, in its holding that the trial court's decision of 12th June, 1996 operated as an estoppel to bar the appellants from making the application of 2nd January, 1997 which gave rise to the ruling of 8th October, 1998. I so hold” per Ogbuagu JSC at page 199.

D The same route was followed by this court in the following cases among others, viz:- **Owie vs. Ighiwi (2005) 5 NWLR (Pt.917) 184; M.B.N. Plc. vs. Nwobodo (2005) 14 NWLR (Pt.945) 379.**

E For effect I shall quote the prayer or relief of the appellant on the said motion paper thus:-

F “An order granting leave to the plaintiff/applicant herein to enter final judgment as per the writ of summons and the amended statement of claim in this suit against the defendant/respondents herein in default of appearance”.

G It is now trite that a case of a party is considered and granted on the relief he has asked for as the other party or opponent is entitled to know the case being presented and which he has to meet. This is an elementary but rather a fundamental principle of the adversarial system of adjudication that impels an applicant to be bound by the prayers in his motion. Therefore a party who has come before the court seeking a certain known relief cannot change that case at will in each court as he goes along whether at the trial or on appeal. See **Okoya vs. Santilli (1990) 2 NWLR (Pt.131) 172; A.C.B. Ltd. vs. A.G. Northern Nigeria (1969) NMLR 231; Ojoh vs. Kamalu (2005) 18 NWLR (Pt.958) 523; Zabokey Int'l Ltd. vs. Omogbehin (2005) 17 NWLR (Pt.953) 200.**

H Indeed, the argument of the respondents captures what is on ground, which is, that the appellant's appeal is against one ruling and in the same breath persuading the appellate court to set aside another distinct and separate ruling not appealed against. A presentation such as stated above made a showing in the case of **Tomatech (Nig) Ltd. vs. FHA (2009) 18 NWLR**

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A (Pt.1173) 358 at 375 and this court deprecating that approach stated thus:-

B “This is obviously erroneous. A party who disagrees with the decision of a court, has the right to appeal against same either of right or with the leave of court, except the decision is that of this court, which is considered final; it is wrong to challenge the decision of a court of law under the guise of a Preliminary Objection, whether written or oral since the lower court, by striking out motion of 13th October, 2003, became functus officio and cannot entertain any further proceedings in respect of the appropriateness of the order made therein. The only court competent to do so is an appellate court which can only review the decision upon a proper appeal against same.

C Appellant could have appealed against the above decision of the lower court under either section 233(2) or 233(3) of the 1999 Constitution depending on whether his appeal falls within the category of appeals as of right or with leave of the courts but he did not utilize that opportunity. It is settled law that where a party fails, or decides not to appeal against any decision of a court of law, he is deemed to have accepted that decision and is consequently bound by it”.

D It is in appreciation of the law and practice that the court below in this instant case held as follows:-

E “The respondent promptly filed an application on the 12th of April, 2005 praying the court to set aside its order of service of processes which was made on the 8th April, 2005 because the 1st respondent had left Nigerian territorial waters before the said order. Argument on this application was concluded on the 15th of November, 2005 and ruling was reserved. Despite the fact that a ruling on the application to set aside the order of service was pending, learned senior counsel for the appellant filed a Motion on Notice dated 8th December, 2005 praying for a final judgment in default of appearance.

F On the 20th of December, 2005, the learned trial judge in a considered ruling granted the prayers contained in the respondents' application of 12th April, 2005 and set aside all the orders he made on the 8th of April, 2005 including orders for service of the writ of summons and the amended statement of claim. There is no appeal against this ruling. Thereafter the respondent filed a Preliminary Objection to the appellant's application for judgment in default of appearance. The preliminary objection is dated 16th of February, 2006 and filed on the

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A 20th of February, 2006. The appellant's motion for judgment and the preliminary objection were heard together and this resulted in the ruling of 5th June, 2006 against which this appeal lies”.

B Clearly the Court of Appeal was on solid ground when it struck out ground 2 of the Notice of Appeal and the issue 2 which arose from that ground. What the court below did cannot be faulted and so issues 1 and 2 are resolved against the appellant.

ISSUE NO.3

C Whether the Court of Appeal was right in failing to enter trial judgment in favour of the appellant.

D Learned counsel for the appellant submitted that the sequence of events in the case leads to inescapable conclusion that judgment ought to have been entered in favour of the appellants. That the writ had been issued on the 17th December, 2002, it was not until after the order of the trial court on the 8th April 2005, that the writ of summons and other processes were duly served on the respondents on 5th May, 2005 through DHL, Courier Service outside the jurisdiction of the court. The respondents were ordered to enter appearance within 35 days of date of dispatch of the process and they failed to do so rather they returned the same to the Chief Registrar of the Federal High Court, Lagos through a courier service (TNT). That the respondent thereby lost the right of being heard having been given the opportunity. He referred to the case of **Dickson vs. Okoi (2003) 16 NWLR (Pt.846) 397 at 411-412.**

E In response, learned counsel for the respondent contended that the appellant made no reference to the fact that the ruling on the respondents application to set aside the order of service made against them pending before it proceeded to file its application for default judgment against the respondents. That the decision of the learned trial judge delivered on 20th December, 2005 which had not been appealed against and set aside is binding on the appellant, the respondents and even the trial judge and the said decision constituted and operated as issue estoppel in this appeal. He cited **Akinyemi vs. Soyawo (2006) 13 NWLR (Pt.998) 496.**

G A look at the proceedings before the Court of Appeal leading to the ruling of 5th June, 2006 the subject matter of this appeal would show the following as bullet points, viz:-

- H**
- i.** That the writ of summons filed by the appellant on 17th December, 2002 was issued when the respondents were outside the jurisdiction of the Federal High Court.
 - ii.** That as at 8th April, 2005, when learned trial judge made the orders, which were subsequently discharged on 20th December, 2005, the writ of the summons has not been served on the respondents.
 - iii.** That when the learned trial judge made certain orders on 8th
- I**

- A** April, 2005 which included an order for service on respondents and an order amending the appellant's statement of claim, the respondent promptly filed an application on 12th April, 2005 to set aside all the orders of 8th April, 2005 which was granted.
- B** iv. That while the ruling of the learned trial judge on the respondent's application of 12th April, 2005 was being awaited after arguments had been concluded on the said application on 15th November, 2005 and a date fixed for ruling, the learned senior counsel for the appellant optimistically filed a motion on notice dated 8th November, 2005 for final judgment in default of appearance.
- C** v. That the ruling of the learned trial judge delivered on 20th December, 2005 however completely vitiated the basis of the appellant's motion of 8th December, 2005.
- vi. That the appellant did not and has not appealed against the ruling of the learned trial judge delivered on 20th December, 2005 till date.
- D** vii. That when the appellant's counsel insisted that he would argue the appellant's motion on notice of 8th December, 2005 and the respondent's notice of preliminary objection filed on 20th February, 2006 be argued together and they were so argued together.
- E** viii. That the learned trial judge ordered that both the appellant's motion on notice filed on 8th December, 2005 and the respondents' notice of preliminary objection filed on the 20th February, 2006 be argued together and they were so argued together.
- F** ix. That the learned trial judge in a considered ruling delivered on 5th June, 2006 sustained the respondents' preliminary objection but dismissed the appellants' motion for judgment on the ground that by its ruling of 20th December, 2005, the purported service on the respondents had been set aside and the amended statement of claim on which judgment is sought has also been set aside.
- G**

From the foregoing facts, it is clearly indisputable that the appellant's issue 3 for determination is thoroughly baseless and fundamentally defective.

What obtains when there is a subsisting order of a court of competent jurisdiction is well stated in the case of *Akinyemi vs. Soyawo* (2006) 13 NWLR (Pt.998) 496 per *Tabai JSC* at page 514.

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“It is a settled principle of law that every party to a suit, and indeed every citizen, has an obligation to obey the subsisting court decision or order in the suit unless and until it is set aside. And the party's

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- A** obligation to obey the decision is without regard to his perception about the irregularity or illegality of the decision as long as it subsists. See *Odogeu vs. Odogwu* (1992) 2 NWLR (Pt.225) 539; *Nigerian Army vs. Gloria Mowarin* (1992) 4 NWLR (Pt.235) 345. The appellant as a party in the case cannot claim ignorance of this decision of the Court of Appeal on the 15th July, 1999. He became aware or deemed to have become aware on the 15th July, 1999 that the court decided to keep the running of the 45 days in abeyance during the pendency of the motion for variation from the 17th March, 1999 to 15th July, 1999”.
- B**
- C** The reality that cannot be wished away in the light of the facts available and the grinding principles is that the learned trial judge in his decision declining jurisdiction and affirmed by the Court of Appeal on the 1st respondent, M. T. Tabora, a vessel on the ground that the time the appellant commenced its action on the 17th November, 2002, the 1st respondent was not within the territorial waters of Nigeria and therefore out of the jurisdiction of the court and so
- D** the trial court could not competently enter judgment against it.
The situation makes baseless the invitation by the appellant that this court exercise its powers under section 22 of the Supreme Court Act to enter judgment against the respondents since the appellant had not appealed against the set aside orders for service made against the respondents, which brought to an end the issue which remains subsisting and valid for all time since it is believed to have been accepted by the appellant. The issue is resolved against the appellant.
- E**

ISSUE NO.4

- F** **Whether the Court of Appeal was right in embarking on a consideration of the law relating to service of a writ of summons in admiralty proceedings.**
Learned counsel for the appellant submitted that the Court of Appeal misunderstood the issue relating to service as what appellant was seeking was to re-activate the dormant suit. That the order of the trial court made on the 8th April, 2005 was merely to serve the writ of summons and amended statement of claim outside the jurisdiction and was a matter in personam and did not require the presence of the vessel within the jurisdiction to invoke the Admiralty jurisdiction of the court. He cited *GMBH vs. Rivways Lines Ltd.* NSC Vol.vii 354; (1998) 5 NWLR (PT.549) 265 at 281.
- G**
- H** Learned counsel for the respondents submitted that the application of 12th April, 2005 praying to set aside the Order of 8th April, 2005 was substantially based on the fact that the respondents are not within the jurisdiction of the Federal High Court, Lagos and that the trial court's order of 8th April, 2005 was set aside on the 20th December, 2005 and appellant did not appeal against the said order.
That the ruling of trial court delivered on 5th June, 2006 and the Court of Appeal affirmation dated 19th March, 2009 qualify as concurrent findings of fact which were not
- I**

A perverse cannot be interfered with by the Supreme Court. He cited **Military Governor, Lagos State vs. Adeyiga (2012) 5 NWLR (Pt.1293) 291 at 334; Ucha vs. Elechi (2012) 13 NWLR (Pt.1317) 330 at 362.**

The Court of Appeal had ruled thus:-

B **“Indeed, I agree with the learned counsel for the respondents that in admiralty action, the presence of the vessel within the jurisdiction of the court is the foundation of the court's admiralty jurisdiction over it. At the time the lower court ordered for service on the 1st respondent, the 1st respondent was no within the jurisdiction. That order was therefore**

C **a nullity. The lower court therefore, has power to set aside its order which was made without jurisdiction”.**

I agree with learned counsel for the respondents that the issue of service of a writ of summons in admiralty proceedings is crucial to this appeal as no court can enter default judgment against anyone without proof of service of the originating processes. That is the crux of the matter in this appeal.

D For clarity I shall refer to pages 306-307 of the record for what the Court of Appeal, said, viz:-

E **“I also agree that apart from the appellant's failure to appeal against the ruling of learned trial judge delivered on 20th December, 2005 which set aside the earlier orders of the court granting leave to the appellant to serve the writ and statement of claim on the respondent and for the latter to enter appearance within 35 days; the said appellant also took risk or acted deliberately in bringing his present application for default judgment knowing fully that there was a pending challenge against the competence of the court to enter its previous ruling of 8th April 2005 (ex-**

F **parte). Instead of appealing against the said ruling or applying to set it aside, the appellant surprisingly brought another application on 8th December 2005 for the trial court to enter a default (or summary)**

G **judgment in its favour, the refusal of which is the subject matter of this present appeal. Thus the appellant should have waited for the ruling on the application to set aside the earlier orders of the court (ex-parte)**

H **before making an application in the interim for the entry of summary or default judgment. His present action or appeal in disregard of earlier ruling of the court setting aside the writ and other processes for lack of jurisdiction was not in good faith as it looks as if he is enticing or dragging the court to give a judgment in the case in which he knows that it had no jurisdiction to do so”.**

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A For a fact what is before the Supreme Court is an appeal based on concurrent findings of facts of two courts below and I shall refer to the attitude of this court to such presentations.

In *Military Governor, Lagos State vs. Adeyiga* (2012) 5 NWLR (Pt.1293) 291 at page 32 of *Mary Ukaego Odili Judgment* 334 paras F-H, the Supreme Court held as follows:

B “This is a case of concurrent findings of fact. The Supreme Court will not interfere with the concurrent findings of fact by the trial court and the Court of Appeal where there is sufficient evidence in support of such findings and where no substantial error is apparent on the record such as miscarriage of justice and violation of some principle of law or procedure. See *Ogunbiyi vs. Adewunmi* (1988) 5 NWLR (Pt.93) pg.215; *Shipcare Nig. Ltd. vs. The owners of the M/V Fortunato & Anor* (2011) 2-3 SC (Pt.11) p.1; (2011) 7 NWLR (Pt.1246) 205; *Ezeonwu vs. Onyechi* (1996) 3 NWLR (Pt.438) p.499”.

D Being well advised in the Policy Statements emanating from this court as adumbrated in the cases above cited and quoted extensively, there is no basis for any interference with what the two courts below did in their findings and conclusions which came from sound application of the law within the context of the facts available to them.

E Therefore treading the same path as the reasoning in the lead judgment this appeal lacks merits and I dismiss it.

I abide by the consequential orders made.

Mary Ukaego Peter-odili
Justice, Supreme Court

F DATTIJO MUHAMMAD, (JSC): Having read in draft the lead judgment of my learned brother **Ejembi Eko JSC** just delivered and being in complete agreement with the reasoning and conclusion therein, I adopt same as mine in dismissing the unmeritorious appeal. I abide by the consequential orders made in the said lead judgment.

Musa Dattijo Muhammad,
Justice, Supreme Court

G **KEKERE-EKUN, (JSC)**

I have had the benefit of reading before now, a copy of the well considered judgment of my learned brother, **Ejembi Eko, JSC** just delivered. I agree with the sound reasoning and conclusion that this appeal is devoid of merit.

H The background facts giving rise to this appeal have been well summarised in the lead judgment. I shall not repeat the exercise here. Suffice it to say that the crux of the issue in contention between the parties was well captured by the lower court when it held thus at pages 301-303 of the record:

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- A** “The appellant's application for default judgment filed on the 8th of December 2005 was essentially based on the order of the lower court made on 8th of April 2005, wherein the writs of summons and the appellant's amended statement of claim were directed to be served on the respondents.
- B** The respondents promptly filed an application on the 12th of April 2005 praying the court to set aside its order of service of processes which was made on the 8th of April 2005 because the 1st respondent had left Nigerian territorial waters before the said order. Argument on this application was concluded on the 15th of November 2005 and ruling was so reserved. Despite the fact that a ruling on the application to set aside the order of service was pending, learned senior counsel for the appellant filed a motion on notice dated 8th December, 2005 praying for a final judgment in default of appearance. On the 20th of December 2005, the learned trial judge in a considered ruling granted the prayers in the respondents' application of 12th April 2005 and set aside all the orders he made on the 8th of April 2005 including orders for service of the writ of summons and the amended statement of claim. There is no appeal against this ruling. Thereafter the respondents filed a preliminary objection to the appellant's application for judgment in default of appearance. The preliminary objection is dated 16th of February 2006 and filed on the 20th of February 2006. The appellant's motion for judgment and the preliminary objection were heard together and this resulted in the ruling of 5th June 2006 against which this appeal lies.
- C**
- D**
- E**
- F** The decision of 20th December 2005 which set aside all the processes that were ordered to be served on the respondents has not been set aside. It follows therefore that the processes are deemed to have been withdrawn. There was therefore no service. Any further service of these processes can only be possible if the decision of the lower court which was delivered on the 20th of December 2005 is set aside.
- G** The appellant was aware of this ruling as such it was bound to submit itself to the decision of the lower court, instead of playing hide and seek game. The only way out for the appellant was to seek for a reversal of the ruling of 20th December 2005 through appeal. Since that ruling subsists, condition for judgment in the appellant's claims does not exist”.
- H**

I On 8/5/2005, the learned trial judge granted the prayers sought by the plaintiff/appellant vide its motion ex-parte filed on 23/3/2005. The court ordered as follows:

A “1 That leave is granted to the plaintiff/applicant to serve the court processes on the 1st, 2nd, 3rd and 4th defendants in this action out of this court by DHL to wit NORTHERN FOX SHIPPING P.O. BOX 3657, WILLEMSTAD CURACAO WEST INDIES and HANSA HUIS ERNEST VAN DIJCKAA I 10, BUS B 2000 ANTWERP, BELGIUM-10.

B

2. That the 1st, 2nd, 3rd and 4th defendants enter appearance within 35 days of the date of the dispatch of the processes herein by DHL Courier.

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3. That leave is granted to the plaintiff to amend its statement of claim in the terms of the proposed amended statement of claim attached to this application as Exhibit MUN-1.

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4. That the names of the 5th and 6th defendants are hereby struck out from the suit.

5. That the return dated id 23rd May 2005”.

E The said orders were discharged by the same court in a ruling delivered on 20/12/2006. The service of the amended statement of claim on the defendants/respondents through DHL to their address at Belgium was also set aside.

F The net effect of the ruling therefore is that there was no service of any of the originating processes on the respondents. Curiously and without waiting for the ruling to be delivered, the appellant on 8/12/2005 filed a motion for default judgment against the respondents. The respondents reacted by filing a notice of preliminary objection to the motion on the following grounds:

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1. “This honourable court has no jurisdiction to entertain the plaintiff/respondents' application filed on 8th December 2005.

2. On 20th December 2005 this honourable court held that it has no jurisdiction over the 1st defendant.

H

3. The order of this honourable court made on 8th April 2005 wherein the plaintiff/ respondent was allowed to amend its writ of summons and statement of claim and to serve the defendants/applicants by substituted means were discharged/set aside.

I

4. There is no service of any writ of summons or statement of claim

A in this suit on the defendants/applicants.

5. There is no amended statement of claim subsisting before this court”.

B The appellant's motion and respondents' preliminary objection were heard together. The court upheld the preliminary objection and dismissed the application for judgment in the following terms at pages 129-130 of the record:

C “This court having in its ruling of 20th December 2005 held that its jurisdiction cannot be invoked IN REM against MT TABORA i.e. 1st defendant and having set aside the leave granted to the plaintiff to amend its statement of claim upon which the plaintiff's motion is grounded and having set aside the purported service by DHL of the amended statement of claim on the defendants out of jurisdiction of this court, I am unable to enter final judgment against the defendants on a writ of summons which has not been served and an amended statement of claim which has been set aside. The defendants' notice of preliminary objection is upheld. The plaintiff's motion on notice dated 8th December 2005 is hereby dismissed”.

E I agree entirely with the court below that in the absence of an appeal against the ruling of the trial court delivered on 20/12/2005, the orders made therein are valid and subsisting. The foundation of the appellant's motion for default judgment was the existence of a competent suit with parties properly before the court. The service of originating processes on parties who ought to be served is indispensable in any adjudication. Failure to serve a process where service is required is so fundamental that the party not served and against whom any order is made in his absence is entitled to have the order set aside on the ground that a condition precedent to the exercise of jurisdiction by the court has not been fulfilled. See: **Obimonure vs. Erinosh** (1966) 1 ALL NLR 250; **Kida vs. Ogunmola** (2006) 6 SCNJ 165 @ 174; **National Bank of Nigeria Ltd. vs. Guthrie Nig. Ltd. & Anor.** (1993) 3 NWLR (Pt.284) 643; **Ihedioha & Anor. vs. Okorocho & Ors.** (2015) LPELR-40837 (SC) @ 69-70 B-A.

H The premise of an application for a default judgment is that the person against whom the order is sought has been duly served with the writ of summons and statement of claim and has failed to respond or file a defence. As service of those processes on the respondents and the order granting an amended statement of claim had been set aside, the application for default judgment had no leg to stand on.

The appellant's failure to appeal against the ruling of 20/12/2005 was fatal. I am of the considered view that the lower court was right when it upheld the respondents' preliminary objection to the appellant's motion for default judgment.

I For the foregoing and the more detailed reasons advanced in the lead judgment, I find

GARKUWA PINA

VS

JAGABA MAI-ANGWA

SC. 122/2006

**IN THE SUPREME COURT OF NIGERIA
HOLDEN AT ABUJA**

FRIDAY, 18TH MAY, 2018

BEFORE THEIR LORDSHIPS

OLUKAYODE ARIWOOLA

JUSTICE, SUPREME COURT

KUMAI BAYANG AKAHHS

JUSTICE, SUPREME COURT

KUDIRAT MOTONMORI OLATUKUNBO KEKERE-EKUN

JUSTICE, SUPREME COURT

AMINA ADAMU AUGIE

JUSTICE, SUPREME COURT

PAUL ADAMU GALINJE

JUSTICE, SUPREME COURT

COURT: Area Courts – Principles of natural justice – Whether Area Courts being courts of law are bound to apply principles of natural justice.

COURT: Jurisdiction – Where a lower court has no jurisdiction to apply the provisions of the Evidence Act – Whether a higher appellate court does not also have jurisdiction to apply the provisions of the Evidence Act.

*EQUITY: Estoppel – Rule thereof – Whether does not allow a party to affirm at one time and deny at another time – The principle in **Ude vs. Nwara & Anor (1993) LPELR – 2389 (SC)**.*

EQUITY: Estoppel – Where respondent admitted appellant's title to the land in a previous proceedings – Whether respondent is estopped from denying appellant's title in an action instituted by appellant for declaration of title.

EQUITY: Estoppel by conduct – Where there is intentional representation which have been acted upon by the other party – Whether the first party will be estopped from denying the state of affairs.

*LAND LAW: Identification of Land – Where both parties know the quality and quantity of the land in dispute – Whether a survey plan is not a sine qua non – The principle in **Olujinle vs. Adeagbo (1988) 19 NSCC (Pt. 1) 625.***

PRACTICE AND PROCEDURE: Proof – When a fact is admitted – Whether what is admitted needs no further proof.

STATUTE: Evidence Act Cap 112, LFN 1990 – SS 151 and 152 thereof – Purport and import.

WORDS AND PHRASES: Estoppel – Meaning.

Issues for determination

- (1) **Whether, in the circumstances of this case, the respondent's earlier statement in Exhibit 1 that the land in dispute belongs to the appellant and that the appellant placed him in possession is not relevant in the instant suit.**
- (2) **Whether on a balance of probabilities, the respondent, and not the appellant, proved better title.**

Facts of the matter

The plaintiff/appellant intuited an action at the upper area court Minna claiming some Declaratory & Injunctive reliefs in respect of a piece or parcel of land in dispute.

Both sides called witnesses. At the end of trial the learned trial court. He was however barred from sub-letting the farm to anybody, except he obtained th consent of the appellant herein the respondent successfully lodged an appeal to the High Court, consequently, the appellant appealed to the Court of Appeal, which dismiss the appeal, hence this further appeal to the Supreme Court.

Held: *(Unanimously allowing the appeal)*

1. *The application of doctrine of estoppel*
There was no appeal against the decision of the High Court that the Evidence Act, which is within the exclusive legislative list in the 1999 Constitution of the Federal republic of Nigeria, is not applicable to the Area Courts. It is also not in evidence that Exhibit 1 was tendered for the purpose of operating as res judicata. The question of whether Exhibit 1 is a decision of the Area Court, Kuta or not, and whether it is a final decision or not, is irrelevant here. The High Court agreed that the admission by the respondent herein in Exhibit 1 was made in a proceeding before the Area Court Kuta in a case in which the present appellant was not a party, but was called to confirm as a witness, the admission by the respondent and he did confirm the respondent's admission. Having so admitted

the appellant's ownership of the disputed piece of land, the respondent in my view is estopped from denying the appellant's ownership of the disputed piece of land by the application of doctrine of estoppel. (Pp 359 - 360 Paras H - C).

2. *Meaning of Estoppel*

Estoppel is defined by Black's Law Dictionary 8th Edition at page 589 as a bar that prevents one from asserting a claim or right that contradicts what one has said or done before or what has been legally established as true. (P 360 Paras C - D).

Per Galinje (JSC)

“The respondent who was in possession of the disputed piece of land upon which his title was been challenged told the area court kuta, that the land was not his, but that it belonged to the appellant. He ran to the appellant and told him that the land which you loaned to me is subject of litigation with a third party. He invited the owner to tell the court that the land was his. The appellant who was invited by the respondent told the court that he put the respondent on the disputed piece of land as a tenant. It will therefore be contrary to common sense and the doctrine of equity to conclude that such admission is irrelevant in the present case.

The lower court resolved the admission of the respondent on the disputed land by relying on Section 35(1) of the Evidence Act which provides for when a statement may be used in Evidence. Their lordships of lower court did not take into account the provisions of Section 26 of the Evidence Act cap 112, Laws of the Federation of Nigeria 1990 which provides as follows:-

“Admissions are not conclusive proof of the matters admitted, but they may operate as estoppels under the provisions of Part VIII of this Act.” (P 360 Paras D - H).

3. *The nature and purport of Ss 151 and 152 of the Evidence Act 1990*

Section 151 of the said Evidence Act provides as follows:-

“When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such believe, neither he nor his representative in interest shall be allowed, in any proceedings between himself and such person or such persons representative in interest, to deny the truth of that thing.”

Section 152 of the same Act provides as follows:-

“No tenant of immovable property or person claiming through such

tenant, shall during the continuance of the tenancy, be permitted to deny that the landlord of such tenant had at the beginning of the tenancy, a title to such immovable property....” (Pp 360 - 361 Paras H - B).

4. *Where there is intentional representation*

In Iga & Ors vs. Amakiri & Ors (1976) 11 SC 1 at 12 – 13, this court held that when, there is an intentional representation that had been acted upon by the other party, the first party will be estopped from denying the existence of the state of affairs. See Lawal vs. Union Bank (1995) 2 SCNJ 132 at 145; Onamade vs. ACB (1997) 1 SCNJ 65 at 83.

The respondent's declaration that the disputed piece of land belonged to the appellant was acted upon by the appellant when he testified before the Kuta Area Court that he owned the land and that the respondent was his tenant. Indeed the statement of the respondent at Kuta Area Court was not evidence before that court. It was an admission against interest, as such it was wrongly construed under Section 35(1) of the Evidence Act which deals with evidence in a previous court proceedings. (P 361 Paras C - E).

5. *No jurisdiction to apply the Evidence Act.*

Be that as it may, if the Upper Area Court is not bound to apply the provision of the Evidence Act, the High Court which heard the appeal from the Upper Area Court and the lower court had no jurisdiction to apply the provisions of the Evidence Act to the decision that emanated from the Upper Area Court.

As I have stated elsewhere in this judgment, there was no appeal against the decision of the High Court where it held that the Evidence Act is not applicable to the Area Court. The lower court was therefore wrong to have applied the provision of the Evidence Act to determine whether Exhibit 1 is relevant or not. (P 361 Paras F - H).

6. *Area courts are bound by principles of natural justice*

The High Court at page 59 of the printed record of this appeal stated that the Area Courts being courts of law are required to observe the rules of natural justice and fairness. Be it under the rules of natural justice and fairness or under the Evidence Act, the justice of this matter is so clear, and that is that a man who is a gentleman should be bound by the words uttered by him. It is against natural justice and fairness for a person to approbate and reprobate when confronted with similar issue at two or more Fora. (Pp 361 - 362 Paras H - A).

7. *What is admitted needs no further proof*

In my consideration of the first issue for determination of this appeal, I concluded that the respondent having admitted in a previous proceeding between him and one Masinja Tanko Sabo Gida at Area Court Kuta that the disputed farmland belonged to the appellant, is estopped from denying that fact. The law is settled that what is admitted needs no further proof. See *Phoenix Motors Ltd vs. Ojewunmi* (1992) 6 NWLR (Pt. 248) 501; *Ajuwon vs. Akanni* (1993) 9 NWLR (pt. 316) 182. (P 362 Paras G - H).

8. *Where a survey plan is not necessary*

The appellant did not need to call additional evidence to prove his title to the disputed land. However, the appellant gave evidence at the Upper Area Court where he described the boundaries and the type of trees on the land. From the admission of the respondent in Exhibit 1, it is very clear that both parties in this case know the quality and the quantity of the disputed piece of land. In *Olujinle vs. Adeagbo* (1988) 19 NSCC (Pt.1) 625, this court held:-

“That it is now perfectly settled that a survey plan is not a sine qua non in every land case. This is especially so when both parties know the quantity and quality of the land in dispute between them. In this appeal both parties do know the quantity and quality of the land in dispute and as such plan ceases to be of absolute necessity.”

See *Chief Daniel Allison Ibuluya & Ors vs. Tom Benebo Dikibo & Ors* (1976) 10 SC 272 at 107; *Chief Sokpui vs. Chief Agbozo* (1951) 13 WACA 241; *Atolagbe vs. Shorun* (1985) 1 NWLR (Pt. 2) 360. Since parties knew the land in dispute, the issue raised by learned counsel for the respondent with respect to the inability of the appellant to describe the land is unnecessary. The appellant in his evidence at the trial court traced the root of his title to his great grandfather Ya'a from whom his father Wambai inherited the disputed land from. It is therefore my considered view that the appellant successfully proved his title on balance of probability, since long and adverse possession cannot defeat the title of a true owner of land. (Pp 362 - 363 Paras H - E).

Per K.B. Aka'ahs (JSC)

“When the respondent was sued by Masinja Tanko at the Area Court Kuta over the disputed land, he told the court that he got the land on loan from the appellant and called the appellant as a witness who confirmed to the court that he was the owner of the land and had given it out on loan to the respondent and other tenants. It was based on this evidence that the Area Court struck out the

matter and advised Masinja Tanko to sue the appellant. The proceedings between the respondent and Masinja Tanko were admitted as Exhibit 1.

Since the respondent had earlier held out appellant as the owner of the land, he is estopped from denying the appellant's ownership of the land. See: Section 151 Evidence Act which provides:-

“151 When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative in interest shall be allowed, in any proceedings between himself and such person or such person's representative in interest to deny the truth of that thing” See: A-G Nasarawa State vs. A-G. Plateau State (2012) 10 NWLR (pt.1309) 419; Ajayi vs. Total (Nig.) Plc (2013) 15 NWLR (Pt.1378) 423; C.P.C vs. Ombugadu (2013) 18 NWLR (Pt.1385) 66; Mabamije vs. Otto (2016) 13 NWLR (Pt.1529) 171.

This is a principle of law and of equity which can be applied even in the Area Courts. (Pp 364 - 365 Paras D - A).

9. *The rule of estoppel by conduct*

I agree entirely with my learned brother that the respondent having admitted in a previous suit that the land in dispute belongs to the appellant, is bound by that admission and estopped from contending otherwise. This is known as the rule of estoppel by conduct. The equitable doctrine has been explained by this court in plethora of decisions. In Bank of the North Ltd. vs. Yau (2001) 10 NWLR (Pt.721) 408; (2001) LPELR – 746 (SC) @ 37 B – E this court held:

“It is well accepted in our jurisprudence that where a person by words or conduct made to another a clear and unequivocal representation of a fact of facts either with knowledge of its falsehood, with intention that it should be acted upon, or has so conducted himself that another would, as a reasonable man in his full faculties, understand that a certain representation of fact was intended to be acted upon, and that other person in fact acted upon that representation whereby his position was thereby altered to his detriment, estoppel arises against the person who makes the representation and he will not be allowed to aver the contrary of what he presented it to be. See: Oyerogba vs. Olaopa (1998) 13 NWLR (Pt.583) 509.” (Pp 365 - 366 Paras E - A).

10. *By rule of estoppel a man is not allowed to affirm at one time and deny at another time.*

In Ude vs. Nwara & Anor (1993) LPELR – 3289 (SC) @ 27 A– B it was held.

“By operation of the rule of estoppel a man is not allowed to blow hot and cold, to affirm at one time and deny at the other, or, as it is said, to approbate and reprobate. He cannot be allowed to mislead another person into believing a state of affairs and then turning round to say to that person's disadvantage that the state of affairs which he had presented does not exist at all or as represented by him.” (P 366 Paras A - C).

Per Kekere-Ekun (JSC)

This principle has been embodied in Section 169 of the Evidence Act, 2011.

There was evidence before the Upper Area Court that in a previous suit (Exhibit 1) between the respondent herein and one Masinja Tanko (who sued as plaintiff) at the Kuta Area Court, seeking a declaration of title in respect of the land in dispute, the respondent herein had testified on behalf of the appellant stating that the land belonged to the appellant. On the basis of his testimony, judgment was entered in the appellant's favour. The appellant consequently “borrowed” the respondent the land in dispute in appreciation of his testimony. The respondent could not therefore turn around and challenge the appellant's title. He is estopped by his earlier conduct from doing so. The Upper Area Court was right to have relied on the respondent's earlier admission in resolving the dispute before it. (P 366 Paras D - F).

A Representation:

MR. PHILIPA OLUSOLA (ESQ) with M. M Sakaba (Esq.); and B. T Ehinmowo (Esq.) for the respondent.

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

- B** Sometimes in 1993, one **Masinja Tanko** claimed against the respondent herein a declaration of title to a piece of land at the Area Court, Kuta, in Niger State. During the trial the respondent who was then the defendant to that action was asked whether he had brought his witnesses to the court. This is what he told the court:-

- C** “The person I have brought is only one. He is Garkuwa Maikama and he is the one who gave me this piece of land and I continued borrowing it to other persons about six of them in number. And Garkuwa Ibrahim Makama is present in court now and I want him to

D

A testify before this court.

In his evidence before the area court Kuta, the appellant herein who was called by the respondent testified as follows:-

B “I have heard Masinja Tanko the plaintiff and Maianguwan Jaba the defendant, but what I want to say to this court is that there is no doubt that I borrowed Maianguwan Jaba the disputed farmland. But it is not a gift and the disputed farmland is mine I inherited it from my grandfather. So I was the one who borrowed the land to Maianguwan Jaba and there is no doubt that I know that I borrowed out the same land to other persons. And the reason why I borrowed the land to Maianguwan Jaba is because his father married my Aunt. So the land is mine and not for Masinja Tanko because Masinja Tanko has no piece of land on the disputed farmland.”

D In resolving the issue at stake, the area court judge kuta proffered the following solution:-

E “Since it was Garkuwan Ibrahim Makama who borrowed the land to Maianguwan Jaba, this court advises you, Masinja Tanko, the plaintiff to sue Garkuwan Ibrahim so that you can call your own witnesses, the court adjourn this case from 5/7/1993 to enable Masinja Tanko the plaintiff to go home and discuss with his father whether to sue Garkuwan Ibrahim or to leave the matter.”

F After the case at Kuta, the appellant sought to take back his farmland, but the respondent refused to hand over the farm to him. As a result, the appellant instituted an action against the respondent at the Upper Area Court II holden at Minna in Niger State in which he claimed declaration of title over the disputed piece of land. At the hearing of the case, the appellant gave evidence and tendered the record of proceeding at Kuta Area Court which was admitted and marked **Exhibit 1**. The respondent testified for himself and called six witnesses. At the end of the trial and addresses by parties' respective counsel, the trial court in a reserved and considered judgment delivered on the 28th of December, 1998 allowed the respondent to farm the portion of the farm he occupied to enable him to get food. He was however barred from sub-letting the farm to anybody, except where he obtained the consent of the appellant herein. The respondent before this court was dissatisfied with the decision of the Upper Area Court.

H Being aggrieved he lodged an appeal at the High Court of Niger State. After hearing the parties, the High Court allowed the appeal, set aside the decision of the Upper Area Court, Minna and ordered a retrial of the suit before another area court in Kuta.

I The appellant herein was dissatisfied with the decision of the High Court. He

A appealed to the Court of Appeal, Abuja Division. The Court of Appeal heard the appeal and in a reserved and considered judgment delivered on the 8th December, 2005 dismissed the appeal and varied the decision of the High Court by declaring title to the respondent with cost of N5,000 in favour of the respondent and against the appellant.

It is against the decision of the lower court that the appellant has brought this appeal.

B The appellant's notice of appeal at pages 146 – 147 of the printed record of this appeal contains two grounds of appeal which I reproduce hereunder without their particulars as follows:-

1. The learned Justices of the lower court erred in law when they held that the admission by the respondent (in favour of the appellant) in a previous case between him and a third party on the same subject matter as the instant suit is not binding on him.
2. The learned Justices of the lower court misdirected themselves on the facts when in disregard of material contradictions they held that –

C

D **“With such preponderance of evidence in favour of the respondent the proper order to be made by the appellate High Court should have been to award judgment in favour of the respondent here Mai-Angwa who was the appellant in the appellate High Court. I do so now”.**

E Parties filed and exchanged briefs of argument. Mr. Ibrahim Isiyaku, learned senior counsel for the appellant formulated two issues for determination of this appeal. Those issues are reproduced hereunder as follows:-

- F**
- (1) **Whether, in the circumstances of this case, the respondent's earlier statement in Exhibit 1 that the land in dispute belongs to the appellant and that the appellant placed him in possession is not relevant in the instant suit.**
 - (2) **Whether on a balance of probabilities, the respondent, and not the appellant, proved better title.**

G **Mr. Philips Olusola**, learned counsel for the respondent adopted the two issues formulated by the appellant.

H In arguing the appeal, learned senior counsel for the appellant called on this court to hold that the respondent's statement in **Exhibit 1** in which he admitted that the appellant is the owner of the disputed piece of land is relevant and applies to stop the respondent from denying the appellant's ownership of the land in question. In aid, learned senior counsel cited **Alli vs. Alesinloye (2000) 6 NWLR (Pt.660) 177 at paras D – F; IGA & Ors vs. Amakiri & Ors (1976) 10 NSCC 610 at 616 lines 35 – 51.**

I In reply, learned counsel for the respondent submitted that the proceedings in

- A** **Exhibit 1** was between Masinja Sabon Gida and Maiangwan Jaba, quite distinct from the parties to the present suit, as such there was no room to have the present parties cross examine each other, since they did not testify as witnesses under oath. Learned counsel made reference to Section 26 of the Evidence Act and submitted that an admission is not a conclusive proof of the issues at stake. In a further argument, learned counsel submitted that
- B** the Area Court Kuta did not make any precise order in **Exhibit 1** as to be able to create estoppel, as such the admission contained in **Exhibit 1** cannot be said to be relevant as to determine the fate of the present suit. It is learned counsel's view that the lower court rightly held that the conditions precedent to the admissibility of **Exhibit 1** under Section 35 of the Evidence Act were not satisfied. In aid, learned counsel cites **Odutola vs. Paper Sack (Nig) Ltd (2007) 7 W.R.N.I at 24.**
- C**

In consideration of whether the provisions of the Evidence Act are applicable to the Area Court, the High Court of Niger State held at page 58 of the printed record of this appeal as follows:-

- D** **“To this submission, the respondent's counsel submitted, to which we are in agreement, that the lower court was not bound by the provisions of the Evidence Act as far as the procedure before the lower court was concerned, and further, that the lower court was not bound by the provisions of the Evidence Act as the Act does not apply to the proceedings before that court. We are also in agreement with the**
- E** **respondent's counsel that there is nothing in the Evidence Act which makes it applicable to proceedings before the lower court and that in proceedings before that court all that is important is that substantial justice be done to both parties rather than form. Consequently, none**
- F** **observance of rules of the Evidence Act by an Area court in so far as such non observance does not occasion or lead to miscarriage of justice, prejudicial to fair hearing or against rules of natural justice.... Shall not be interfered with by the Appeal Court. There is no doubt that the**
- G** **sections referred to by the appellant as haven (sic having) been breached by the lower court are of the Evidence Act which do not strictly apply to the court.”**

- H** There was no appeal against the decision of the High Court that the Evidence Act, which is within the exclusive legislative list in the 1999 Constitution of the Federal republic of Nigeria, is not applicable to the Area Courts. It is also not in evidence that **Exhibit 1** was tendered for the purpose of operating as res judicata. The question of whether **Exhibit 1** is a decision of the Area Court, Kuta or not, and whether it is a final decision or not, is irrelevant here. The High Court agreed that the admission by the respondent herein in **Exhibit 1** was made in a proceeding before the Area Court Kuta in a case in which the present appellant was not a party, but was called to confirm as a witness, the admission by the respondent and he did
- I**

A confirm the respondent's admission. Having so admitted the appellant's ownership of the disputed piece of land, the respondent in my view is estopped from denying the appellant's ownership of the disputed piece of land by the application of doctrine of estoppel. Estoppel is defined by Black's Law Dictionary 8th Edition at page 589 as a bar that prevents one from asserting a claim or right that contradicts what one has said or done before or what has been

B legally established as true.

The respondent who was in possession of the disputed piece of land upon which his title was been challenged told the area court kuta, that the land was not his, but that it belonged to the appellant. He ran to the appellant and told him that the land which you loaned to me is subject of litigation with a third party. He invited the owner to tell the court that the

C land was his. The appellant who was invited by the respondent told the court that he put the respondent on the disputed piece of land as a tenant. It will therefore be contrary to common sense and the doctrine of equity to conclude that such admission is irrelevant in the present case.

D The lower court resolved the admission of the respondent on the disputed land by relying on Section 35(1) of the Evidence Act which provides for when a statement may be used in Evidence. Their lordships of lower court did not take into account the provisions of Section 26 of the Evidence Act cap 112, Laws of the Federation of Nigeria 1990 which provides as follows:-

E **“Admissions are not conclusive proof of the matters admitted, but they may operate as estoppels under the provisions of Part VIII of this Act.”**

Section 151 of the said Evidence Act provides as follows:-

F **“When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such believe, neither he nor his representative in interest shall be allowed, in any proceedings between himself and such person or such persons representative in interest, to deny the truth of that thing.”**

Section 152 of the same Act provides as follows:-

G **“No tenant of immovable property or person claiming through such tenant, shall during the continuance of the tenancy, be permitted to deny that the landlord of such tenant had at the beginning of the tenancy, a title to such immovable property....”**

H In *Iga & Ors vs. Amakiri & Ors* (1976) 11 SC 1 at 12 – 13, this court held that when, there is an intentional representation that had been acted upon by the other party, the first party will be estopped from denying the existence of the state of affairs. See *Lawal vs. Union Bank* (195) 2 SCNJ 132 at 145; *Onamade vs. ACB* (1997) 1 SCNJ 65 at 83.

I The respondent's declaration that the disputed piece of land belonged to the appellant

A was acted upon by the appellant when he testified before the Kuta Area Court that he owned the land and that the respondent was his tenant. Indeed the statement of the respondent at Kuta Area Court was not evidence before that court. It was an admission against interest, as such it was wrongly construed under Section 35(1) of the Evidence Act which deals with evidence in a previous court proceedings.

B Be that as it may, if the Upper Area Court is not bound to apply the provision of the Evidence Act, the High Court which heard the appeal from the Upper Area Court and the lower court had no jurisdiction to apply the provisions of the Evidence Act to the decision that emanated from the Upper Area Court.

C As I have stated elsewhere in this judgment, there was no appeal against the decision of the High Court where it held that the Evidence Act is not applicable to the Area Court. The lower court was therefore wrong to have applied the provision of the Evidence Act to determine whether **Exhibit 1** is relevant or not. The High Court at page 59 of the printed record of this appeal stated that the Area Courts being courts of law are required to observe the rules of natural justice and fairness. Be it under the rules of natural justice and fairness or

D under the Evidence Act, the justice of this matter is so clear, and that is that a man who is a gentleman should be bound by the words uttered by him. It is against natural justice and fairness for a person to approbate and reprobate when confronted with similar issue at two or more Fora. The First issue for determination of this appeal is resolved in favour of the appellant and the 1st ground of appeal upon which it is formulated is allowed. On the second

E issue for determination of this appeal, learned senior counsel for the appellant submitted that the appellant did not rely solely on **Exhibit 1** to establish his title, but that he gave evidence in proof of his title. Learned senior counsel contended that the six witnesses called by the respondent gave contradictory evidence coated with lies and lack of knowledge of the identity of land in dispute.

F Finally, learned senior counsel urged this court to set aside the order of the lower court and award title to the appellant, as long possession of land cannot displace the title of the true owner.

G In his argument in support of this issue, learned counsel for the respondent submitted that the appellant could not confirm the exact location or identity of the disputed land which is SINE QUA NON in an action for declaration of title to land. In aid, learned counsel cited **Ilona vs. Idako (2003) 32 WRN 121 at 135; Otanma vs. Youdubagha (2006) 10 WRN 1 at 22**. In a further argument, learned counsel submitted that the respondent led evidence of long possession of the disputed land which he inherited from his late father and went on to specify the boundaries. According to learned counsel, the respondent exercised acts of ownership by

H renting out portions of the disputed land to tenants on different occasions, whereas the appellant could neither produce documents of title nor prove possession or acts of ownership. Learned counsel addressed the testimonies of the witnesses called by the respondent and concluded by urging the court to dismiss the appeal.

I In my consideration of the first issue for determination of this appeal, I concluded that

A the respondent having admitted in a previous proceeding between him and one Masinja Tanko Sabo Gida at Area Court Kuta that the disputed farmland belonged to the appellant, is estopped from denying that fact. The law is settled that what is admitted needs no further proof. See **Phoenix Motors Ltd vs. Ojewunmi (1992) 6 NWLR (Pt. 248) 501; Ajuwon vs. Akanni (1993) 9 NWLR (pt. 316) 182**. The appellant did not need to call additional evidence to prove his title to the disputed land. However, the appellant gave evidence at the Upper Area Court where he described the boundaries and the type of trees on the land. From the admission of the respondent in **Exhibit 1**, it is very clear that both parties in this case know the quality and the quantity of the disputed piece of land. In **Olunjile vs. Adeagbo (1988) 19 NSCC (Pt.1) 625**, this court held:-

C

“That it is now perfectly settled that a survey plan is not a sine qua non in every land case. This is especially so when both parties know the quantity and quality of the land in dispute between them. In this appeal both parties do know the quantity and quality of the land in dispute and as such plan ceases to be of absolute necessity.”

D

See **Chief Daniel Allison Ibuluja & Ors vs. Tom Benebo Dikibo & Ors (1976) 6 SC 97 at 107; Chief Sokpui vs. Chief Agbozo (1951) 13 WACA 241; Atolagbe vs. Shorun (1985) 1 NWLR (Pt. 2) 360**. Since parties knew the land in dispute, the issue raised by learned counsel for the respondent with respect to the inability of the appellant to describe the land is unnecessary. The appellant in his evidence at the trial court traced the root of his title to his great grandfather Ya'a from whom his father Wambai inherited the disputed land from. It is therefore my considered view that the appellant successfully proved his title on balance of probability, since long and adverse possession cannot defeat the title of a true owner of land.

F This issue is also resolved in favour of the appellant and the Ground 2 upon which it is formulated is allowed.

Having resolved the two issues in favour of the appellant, this appeal shall be and it is hereby allowed. The decision of the lower court is accordingly set aside. In its place the decision of the Upper Area Court, Minna is hereby restored.

G The respondent shall pay to the appellant the sum of N200,000 as costs of prosecuting this appeal.

H

Paul Adamu Galinje
Justice, Supreme Court

OLU ARIWOOLA, (JSC): I read before now in draft the lead judgment of my learned brother **Galinje, JSC** just delivered. I am in agreement with the reasoning therein and conclusion arrived thereat, that the appeal is meritorious and should be allowed. I too will

I

A allow the appeal.

Appeal allowed.

I abide by the consequential orders in the said lead judgment including the order on costs.

Olu Ariwoola

Justice, Supreme Court

B

KUMAI BAYANG AKA' AHS, (JSC): I was privileged to read in draft the judgment of my learned brother, Galinje JSC in which he found merit in the appeal and therefore allowed it. I agree entirely with his reasoning and the conclusion arrived at.

C

When the respondent was sued by Masinja Tanko at the Area Court Kuta over the disputed land, he told the court that he got the land on loan from the appellant and called the appellant as a witness who confirmed to the court that he was the owner of the land and had given it out on loan to the respondent and other tenants. It was based on this evidence that the Area Court struck out the matter and advised Masinja Tanko to sue the appellant. The

D

proceedings between the respondent and Masinja Tanko were admitted as Exhibit 1.

Since the respondent had earlier held out appellant as the owner of the land, he is estopped from denying the appellant's ownership of the land. See: Section 151 Evidence Act which provides:-

E

“151 When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative in interest shall be allowed, in any proceedings between himself and such person or such person's representative in interest to deny the truth of that thing” See: A-G Nasarawa State vs. A-G. Plateau State (2012) 10 NWLR (pt.1309) 419; Ajayi vs. Total (Nig.) Plc (2013) 15 NWLR (Pt.1378) 423; C.P.C vs. Umubugadu (2013) 18 NWLR (Pt.1385) 66; Mabamije vs. Otto (2016) 13 NWLR (Pt.1529) 171.

F

G

This is a principle of law and of equity which can be applied even in the Area Courts.

It is for this reason and the more elaborate reasons contained in the leading judgment of my learned brother, Galinje JSC that I found the appeal to be meritorious and accordingly allowed it. The appeal is therefore allowed with costs assessed at N200,000.00 in favour of the appellant against the respondent.

H

K. B. Aka'ahs

Justice, Supreme Court

I

A KEKERE-EKUN, (JSC): I have read before now a copy of the judgment of my learned brother, Paul Adamu Galinje, JSC just delivered. His Lordship has painstakingly considered and ably resolved the issues in contention in this appeal. I agree with the reasoning and conclusion that the appeal is meritorious and should be allowed.

B I agree entirely with my learned brother that the respondent having admitted in a previous suit that the land in dispute belongs to the appellant, is bound by that admission and estopped from contending otherwise. This is known as the rule of estoppel by conduct. The equitable doctrine has been explained by this court in plethora of decisions. In **Bank of the North Ltd. vs. Yau (2001) 10 NWLR (Pt.721) 408; (2001) LPELR – 746 (SC) @ 37 B – E** this court held:

C **“It is well accepted in our jurisprudence that where a person by words or conduct made to another a clear and unequivocal representation of a fact of facts either with knowledge of its falsehood, with intention that it should be acted upon, or has so conducted himself that another would, as a reasonable man in his full faculties, understand that a certain representation of fact was intended to be acted upon, and that other person in fact acted upon that representation whereby his position was thereby altered to his detriment, estoppel arises against the person who makes the representation and he will not be allowed to aver the contrary of what he presented it to be. See: Oyerogba vs. Olaopa (1998) 13 NWLR (Pt.583) 509.”**

F In **Ude vs. Nwora & Anor (1993) LPELR – 3289 (SC) @ 27 A – B** it was held. **“By operation of the rule of estoppel a man is not allowed to blow hot and cold, to affirm at one time and deny at the other, or, as it is said, to approbate and reprobate. He cannot be allowed to mislead another person into believing a state of affairs and then turning round to say that person's disadvantage that the state of affairs which he had presented does not exist at all or as represented by him.”**

G This principle has been embodied in Section 169 of the Evidence Act, 2011.

H There was evidence before the Upper Area Court that in a previous suit (Exhibit 1) between the respondent herein and one Masinja Tanko (who sued as plaintiff) at the Kuta Area Court, seeking a declaration of title in respect of the land in dispute, the respondent herein had testified on behalf of the appellant stating that the land belonged to the appellant. On the basis of his testimony, judgment was entered in the appellant's favour. The appellant consequently “borrowed” the respondent the land in dispute in appreciation of his testimony.

I The respondent could not therefore turn around and challenge the appellant's title. He is

A estopped by his earlier conduct from doing so. The Upper Area Court was right to have relied on the respondent's earlier admission in resolving the dispute before it.

For these and the more detailed reasons advanced in the lead judgment, I hold that this appeal has merit. It is hereby allowed. The judgments of the Court of Appeal and the High Court of Niger State sitting at Minna in its appellate jurisdiction are hereby set aside.

B The judgment of the Civil Upper Area Court 2 Minna delivered on 28/12/1998 is hereby affirmed.

I abide by order on costs as contained in the lead judgment.

C

Kudirat Motonmori Olatokunbo Kekere-ekun

Justice, Supreme Court

D **ADAMU AUGIE, (JSC):** I had a preview of the lead judgment delivered by my learned brother, **Galinje, JSC**, and I agree entirely with his reasoning and conclusion that this appeal shall be and it is hereby allowed. In its place the decision of the Upper Area Court, Minna is hereby restored. I abide by the consequential orders made in the lead judgment.

E

Amina Adamu Augie

Justice, Supreme Court

F

G

H

I

FRANCIS OLANIYI OGUNTADE
*(for himself and on behalf of other Members of Alaelu Group of Aina
Okobi Ruling House)*

Vs.

- (1) JOSEPH OYEWALE OYELAKIN**
*(For himself and on behalf of other Members of Abioye Group of Aina
Okobi Ruling House)*
- (2) SECRETARY, ONDO-OTIN LOCAL GOVERNMENT**
- (3) CHIEF YESUFU AKINOLA**
(The Eesa of Okua for himself and other / Kingmakers of Okua)
- (4) GOVERNMENT OF OSUN STATE**
- (5) ATTORNEY GENERAL OF OSUN STATE**

SC. 17/2006

**IN THE SUPREME COURT OF NIGERIA
HOLDEN AT ABUJA**

FRIDAY, 29TH NOVEMBER, 2019

BEFORE THEIR LORDSHIP

**MUSA DATTIJO MUHAMMAD
KUDIRAT M. O. KEKERE-EKUN
CHIMA CENTUS NWEZE
AMIRU SANUSI
EJEMBI EKO**

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

*ACTION:- Civil cases – Bases for decision – Whether decided on balance of probabilities
and the party in favour of whom the weight of evidence preponderates succeeds.*

*ACTION:- Civil cases – Basis for decision – Whether civil cases are decided upon issues put
up by the parties.*

*ACTION:- Declaratory relief – Where a party seeks a declaratory relief – Whether he will
succeed on the strength of his case and not on the weakness of the defence.*

*ACTION:- Res judicata – Where a party relitigates on issue that has been decided by court
of competent jurisdiction – Whether it constitutes res judicata – The principle in
Arubo Vs. Atiyeleru*

ACTION:- Res judicata – Where appellant is relitigating on matters decided by public inquiry tribunal – Whether the decisions of the public inquiry tribunal are still valid and subsisting.

APPEAL:- Brief writing – Repetitive argument – Whether repetition does not improve an otherwise weak argument.

CHIEFTAINCY:- Failure to adduce traditional evidence – Where a party claims entitlement to a chieftaincy title based on custom – Whether party has not discharged onus of proof where he failed to adduce evidence of the said custom.

COURT:- Appellate court – Findings of fact – Whether an appellate court should not interfere with findings of fact made by the trial court – Rationale.

*COURT:- Supreme Court – Review of findings of fact – Condition thereto – Whether Supreme Court will not review findings of fact except under special circumstances – The principle in **Assachere Vs. Dadiase (945) 11 WACA 1**.*

EQUITY:- Estoppel by conduct – Where a cause of action has been previously decided – Whether a party is estopped by conduct as a matter of public policy from bringing a subsequent suit on the same court.

EVIDENCE:- Presumption of fact – There is a presumption that the trial court knows the fact and is a master of fact – Implication – Whether appellate courts will not ordinarily interfere with findings of fact.

EVIDENCE:- Proof – Where appellant alleges blood relationship with the respondent no prove to that effect – Whether he has not discharge onus of proof.

*EVIDENCE:- Traditional history – Where there is conflict in the traditional history given by one party one side and that given by another side – Whether the conflict can be resolved by the application – The principle in **Kojo Vs. Bonsie***

JUDGMENT AND ORDERS:- Decision of court – Perversity thereof – What constitutes

PRACTICE AND PROCEDURE:- Appeal – Concurrent findings – Whether Supreme Court will not allow concurrent findings where shown to be perverse.

PRACTICE AND PROCEDURE:- Appeal – Where a party contends an appeal that the trial court failed to evaluate evidence of his witness – Whether must prove how material the evidence was to his case.

Facts of the matter

Held: *(Unanimously dismissing the appeal)*

1. *Appellant is unnecessarily being repetitive*

I am of the firm and considered view that it is unnecessary to reproduce arguments in respect of appellants' 2nd, 3rd and 4th issues. It is clearly evident that whereas the arguments under his 2nd and 3rd issues are amplifications of the injustice caused by the non consideration of his oral evidence of traditional history in proof of his claim, under his 4th issue the appellant dwells more on the non consideration of his documentary evidence by the two courts in their concurrent decisions. In either situation the appellant is unnecessarily being repetitive. (P.....para.....)

2. *Repetition does not improve a weak argument*

It has long been settled that repetition does not improve the efficacy of a weak or unacceptable argument. See FSB International Bank Limited Vs. Imano Nigeria Limited & Anor (2000) LPELR - 1219 (SC) and John Ogbu & Anor Vs. The State (2007) LPELR - 2289 (SC). The reproduction of appellants' argument on his 2nd, 3rd and 4th Issues being unhelpful is accordingly hereby abandoned.

Arguing the appeal under its lone issue, learned 2nd respondent's counsel submits that to the trial court before which had the rare opportunity of assessing the demeanor of the witnesses in the course of taking both oral and documentary evidence, belongs the primary responsibility of evaluating the evidence and ascribing probative value to them. (P.....para.....)

3. *Supreme Court will not allow concurrent findings where shown to be perverse*

It is indeed trite that as hesitant as this Court is in interfering with concurrent findings of facts it will all the same succumb to allow an appeal where such findings are shown to be perverse. See AKPAJI Vs. UDEMBA (2009) LPELA-

371 (SC) and AJIBOYE Vs. FRN (2018) LPELR - 44468 (SC). A perverse finding or decision of a court, learned counsel to the 2nd respondent is particularly right, is one in which the court's finding or inference being appealed against is completely unsupported by evidence or that it is so manifestly unreasonable that no reasonable tribunal could have arrived at such a finding or conclusion on the evidence. A court's finding contrary to a principle of law and/or procedure that equally occasions miscarriage of justice falls within the category of perverse decisions the appellate court interferes with. See NAFIU RABIU Vs. KANO STATE (1980) LPELR - 2936 (SC) and ATOLAGBE Vs. SHORUN (1985) LPELR - 592 (SC). (*P.....para.....*)

4. *Appellant did not prove blood relationship with the respondent*
Significantly, although the appellant had pleaded joint or common settlement with 1st respondent's family at Idiomo, Idi-Ape and Ile - Tutun and that the two families together constitute the Aina Okobi Ruling House, the plaintiff failed to provide evidence of any blood link between the two families.

The 1st respondent's oral historical account shows, Oyelehin, his ancestor who had migrated Ilota in Kwara State, to be the founder of Okua. His story depicts joint settlement between Alaelu, the appellant's ancestor, and Aina Okobi in the latter's palace. 1st respondent's oral account however traces Alaelu to Onayemi rather than Aina Okobi. Onayemi had migrated from Idofin to Okua. All the festivals the appellant claim his family to have jointly partook with 1st respondent, the latter, by clear evidence in refutation, show that the festivals and activities are peculiar to Aina Okobi and other ruling families.

It is in relation to this state of pleadings and evidence as pronounced upon by the trial court, which findings the lower court affirmed, that the appellant has further come to this court urging the court to intervene. (*P.....para.....*)

5. *On what basis are civil cases decided*
The instant claim is clearly a civil one. On what basis, it may be asked, are civil cases decided? Civil cases are decided upon what is put as an issue by the parties. See Adeneji Vs. Adeneji (1972) 4. SC 10 and Madam Helen Obulor & Anor Vs. Linus Weso Oboro (2001) LPELR - 2196 (SC). A civil claim as well as the defendant's defence succeed or fail on the basis of the pleadings thereto and evidence proffered in support thereof. See Oyekanmi Vs. NEPA (2000) LPELR - 2873 (SC) and Ramonu Rufai Apena & Anor Vs. Oba Fatal Aileru & Anor (2014) LPELR - 23305 (SC). (*P.....para.....*)

6. *Civil cases are decided on the balance of probabilities*
In addition to evidence of traditional history, parties in the case at hand have relied on documentary evidence to establish their respective cases. Civil cases,

it must be restated, are decided on the balance of probabilities and the party in favour of whom the weight of evidence preponderates succeeds. (P.....para.....)

7. *A party who seeks declaratory reliefs succeeds on the strength of his own case*
In this particular case where the appellant seeks declaratory reliefs, it must be further stressed, he succeeds on the strength of his own case and not on the weakness of the respondents case. See Woluchem Vs. Gudi (1981) 5 SC 291, Jiaza Vs. Bamgbose (1999) 7 NWLR (Pt. 610) 182, Eva & Ors Vs. Olopade & Anor (2011) LPELR- 1184. (P.....para.....)

8. *Decisions of a public inquiry are valid and subsisting*
The appellant has further appealed to this court inspite of the foregoing profound concurrent findings of the two courts ignoring many trite principles that militate against his bid.
Firstly, as the lower court puts it, in commencing the instant suit the appellant is relitigating matters which the inquiry set up by the 4th respondent duly considered, determined and issued Exhibit D, the report of its findings in respect of the very facts he wants the trial court to again enquire into and determine.
Both courts below have further rightly held that Exhibit D, the findings of the public inquiry into the Olokua of Okua chieftaincy dispute is valid and subsisting as same is yet to be set aside by a competent reviewing authority. See Willams Vs. Sanusi (1961) 2 SCNLR, Nweke Nwokedi & Ors Vs. Ekwenagu Okugo & Ors (2002) LPELR - 2123 (SC) and Robert C. Okafor & Ors Vs. Attorney General and Commissioner For Justice & ORS (1991) LPELR 2414 (SC). (P.....para.....)

9. *Where a judgment or order has been pronounced upon, it prohibits further litigation on the same issue*
The appellant has not demonstrated why this Court should hold otherwise. Indeed by Exhibit D the appellant is estopped from further relitigating the very claims he sets out to do by the instant suit. Spencer-Bower and Turner on Res Judicata (2nd Edition) in paragraph 43 at pages 9 - 10 cited with approval by this court in Arubo Vs. Atiyeleru (supra) puts the situation as thus:-

“Where a judgment or order which fulfills all the requisites of a good res judicata has once been pronounced upon, a subsequent order merely embodying a compromise by the parties on appeal of their rights and liabilities so adjudged or merely purporting to rescind or set-aside by consent the former judgment or order without the court being called upon to exercise its functions of

review or having any judicial cognizance of the unofficial reversal is not a decision at all and has no effect whatever on the first judgment which remains the 'only res judicata binding on the parties.'"

It is for the foregoing that I further affirm the concurrent findings of the two courts below that Exhibit D having satisfied all the attributes of a just and fair decision of a tribunal arrived at after all parties to the inquiry have been heard remains extant. (P.....para.....)

10. *There must be an end to litigation*

Where a cause of action has been determined in the manner it is determined in Exhibit D, between the parties herein, the appellant as a matter of policy and in the interest of the common good is estopped from bringing a subsequent suit in any court in the same cause that had already been pronounced upon by a competent tribunal duly constituted to decide the matter. There must be end to litigation. See *Memudu Ajiboye Vs. Alhaji Oloyede Ishola (2006) LPELR - 301 (SC)* and *Adeyefa & Ors Vs. Bangboye (2014) LPELR - 22884 (SC)*. Ordinarily, this would have determined the appeal. (P.....para.....)

11. *Appellant failed to discharge onus*

The refusal of the appellant to also appreciate that his effort to secure declaratory reliefs from the trial court requires of him to succeed purely on the strength of his case. It is the further concurrent findings of the two courts below that appellant has failed to proffer evidence of the native law and custom on which basis the declaration of their candidate's entitlement to the Olokua chieftaincy is to be made and that of the 1st respondent negated. Appellant contends that the two courts have ignored his evidence in their concurrent findings dismissing his claim'. He argues that the two courts' findings also ensue in total disobedience to the principle enunciated in *KOJO V. BONISIE (supra)*. (P.....para.....)

12. *The principle in Kojo Vs. Bonsie (supra)*

I totally disagree with learned appellant's counsel in this regard. Learned appellant's counsel appears uninformed about what principle *Kojo Vs. Bonsie (supra)* enunciates. It is only where conflict arises between the traditional history given by one side and the traditional history given by the other side in a case that the test in *Kojo Vs. Bonsie (supra)* is resorted to. See *Mogaji & Ors Vs. Cadbury Nig Ltd (1985) LPELR - 1889 (SC)* and *Taiwo & Ors Vs. Ogunole & ORS (2012) LPELR- 7803 (SC)*. In the case at hand, appellant's claim is for a declaration that 1st respondent's nomination for the chieftaincy of Olokua of Okua, being contrary to the native law and custom of Okua is null and void.

Having based his claim on the native law and custom of Okua people, it is his burden to strictly prove the existence of the native law and custom by credible evidence. In such a situation the rule in *Kojo Vs. Bonsie* (supra) is inapplicable and does not avail the appellant. See *Giwa Vs. Erinmi Lokun* (1961) 1 SCNLR 377, *Ozogaba II Vs. Ekpenga* (1962) 1 SCNLR 423 at 426; *Onyejukwe Vs. Onyejukwe* (1999) 3 NWLR (Pt. 596) 483 and *Chief Joseph Taiwo & Ors Vs. Mr. Nicholas Ogundele & ORS* (2012) LPELR - 7803 (SC).

The two courts below are right that having failed to establish the existence of the native law and custom he bases his claim upon by credible evidence, his claim has failed. (*P.....para.....*)

Per Ekun (JSC)

The effect of the above finding is that the findings of fact by the Panel of Inquiry on the correct composition of the Aina Okobi Ruling House, has been affirmed by two courts. In other words, there are three concurrent findings" on the issue. Furthermore, the court below considered the evidence relied upon by the appellant of the participation of his family" in traditional ceremonies of the Aina Okobi Ruling House, in support of his contention that his Alaelu family shares blood ties with the Aina Okobi Ruling House. The court saw no reason to interfere with the finding of the learned trial Judge that the appellant's assertions had been successfully debunked by the respondents. The court also found unassailable the -fact that the findings in Exhibit remained extant, having regard to the inability of the appellant to tender any evidence showing what the actual native law and custom of the Okua people said to have been violated, was.

All the parties in Exhibit D were given a fair hearing and the two lower courts found no justification to interfere with the findings, which emanated from proceedings not found to be deficient in form or substance. (*P.....para.....*)

13. *No justification for interference with the three concurrent findings*

The appellant has failed to establish his case on a preponderance of evidence and has equally failed, in - this court, to show any special circumstances to warrant, interference with the three concurrent findings. The totality of the evidence resonated in favour of the respondents for the reasons copiously stated in the judgment of the lower court, as held by my learned brother in the lead judgment. It is time to let the matter rest. (*P.....para.....*)

14. *Why appellate court should not interfere with findings made by a trial court*

It has long been established that an appellate court, generally speaking, should not interfere with findings of fact of trial courts. The reason is simple. The latter courts, that is, trial courts, had - the unique opportunity of seeing and hearing the witnesses give evidence. They not only see the witnesses, they

equally observe all their habits and mannerisms. These include their demeanour and idiosyncrasies.

As a corollary to these peculiar advantages, the Law anticipates that they should utilize all their judicial competence or skill rooted or anchored on law and commonsense to evaluate the evidence by eliminating the chaff from the grain of probative evidence. Proper conclusions which a reasonable court ought to arrive at expectedly or ideally, should eventuate from that rigorous exercise.

That is why the law takes the view that a failure in this regard would warrant the interference of the appellate court, *Adeye and Ors Vs. Adesanya and Ors* [2001] 6 NWLR (Pt. 708) 1; *Olatunde Vs. Abidogun* [2001] 18 NWLR (Pt. 746) 712; *Adeleke Vs. Iyanda* [2001] 12 NWLR (Pt. 729) 1; *Udo Vs. CRSNC* [2001] 14 NWLR (Pt.732) 116; *Enilolobo Vs. Adegbesan* [2001] 2NWLR (Pt.698) 611. (*P.....para.....*)

Per Nweze (JSC)

This, then, is the foundation for the number of exceptions to this general rule against non-interference. For example, one major exception to the said general rule is that, where such findings are in fact inferences from findings properly made, the appellate court is in as good a position as the trial court to come to a decision *Ebba Vs. Ogodo* [1984] 1 SCNLR 372; [1984] 4 SC 84, 98-100; *Fabunmi Vs. Agbe* [1985] 1 NWLR (Pt. 2) 299, 314; *Fatoyinbo Vs. Williams* [1956] SCNLR 274; (1955) 1 FSC 87; *Ukatta Vs. Ndinaeze* [1997] 4 NWLR (Pt. 499)251/263.

This explains the prescription that an appellate court will also interfere with findings of fact where such findings are perverse that is, persistent in error, different from what is reasonable or required, against weight of evidence; put, differently, where the trial Judge took into account, matters which he ought not to have taken into account or where he shut his eyes to the obvious, *Atolagbe Vs. shorun* (1985) LPELR- 592 (SC) 31; C-D. Such a perverse finding is a finding of facts which is, merely, speculative and is not on any evidence, before the court. It is an unreasonable and unacceptable finding because it is wrong and completely outside the evidence before the trial judge, *Iwuoha and Anor Vs. NIPOST and Anor* (2003) LPELR-1569 (SC) 39-40; *Overseas Construction Company Nig Ltd Vs. Creek Enterprises (Nig.) Ltd.* [1985] 3 NWLR (Pt.13) 407. (*P.....para.....*)

15. *When a decision is said to be perverse*

In all then a decision is said to be perverse: (a) When it runs counter to the evidence or (b) Where it has been shown that the trial court took into account matters which it ought not to have taken into account or shut its eyes to the obvious or (c) When it has occasioned a miscarriage of justice, *Missr.Vs.*

Ibrahim [1975] 5 SC, 55; Incar Ltd. Vs. Adegboye [1985] 2 NWLR (Pt.8) 453; Atolagbe. Vs. Shorun [1985] 4 SC. (Pt. 1) 250, 282.

Learned counsel for the appellant failed to show how the concurrent findings of the lower courts could be pitch - forked into the above categories! Put differently, he has, woefully, failed to satisfy the court that the findings are perverse to necessitate this court's interference with them, Adeye and Ors Vs. Adesanya and Ors (supra); Olatunde Vs. Abidogun (supra); Adeleke Vs. Iyanda (supra); Udo Vs. CRSNC (supra); Enitolobo Vs. Adegbesan (supra). (P.....para.....)

Per Eko (JSC)

The Committee that produced Exhibit D, which the Government of Oyo State (succeeded by Osun State) accepted, was a quasi judicial body. It was set up pursuant to Section 25(1) of Oyo State Chiefs Law CAP. 21. 1978. It took evidence from all the contending parties before it came up with the findings of fact in Exhibit D. Thus the decision of the trial court constituted a concurrent finding of fact as it regards Exhibit D and on the fact that formed the appellant's cause of" action. The Appellant, still not satisfied, appealed the decision of the trial court to the lower court which affirmed the concurrent findings of fact.

Two major public policy Issues are of some crucial importance or significance in this appeal. That is: the first is there should be end to litigation. The second, which follows the first is: the parties and the issues of fact being the same, this court - the Apex Court, will not (unless under special circumstances) hear arguments seeking to disturb concurrent judgments of the courts below on pure questions of fact. (P.....para.....)

16. *Supreme Court will not review findings of fact except in special circumstance*
Assachere Vs. Dadiase (1945) 11 WACA 1 is a case from Ghana that went up to the Privy Council, then the Apex Court. The case; before the Privy Council, had gone before other three Courts previously. Upon the appellant seeking the Privy Council to review the findings of fact the fourth time; the Privy Council held that, in the absence of special reasons, it would not, as an Apex Court, review such findings of fact previously done by the three courts below. We have found ourselves now in the same situation. The appellant herein is seeking this court, the fourth time to review the same facts on which the Committee on the Public Inquiry into the OLUKUA of OKUA Chieftaincy Dispute made their findings in Exhibits D. The said findings were affirmed by the trial High Court and further affirmed by the lower court. (P.....para.....)
17. *There is a presumption that the trial court knows the fact and is a master of those fact*
There is a presumption that the court of trial knows the facts of the case and is a

master of those facts. It is for this reason that in appellate court practice a rule has been formulated to the effect that the concurrent findings fact prima facie entitle the respondent to the dismissal of appeal. And for this reason, the Apex Court will not in the absence of special circumstances interfere with concurrent findings of fact: DAWODU Vs. Danmole (1962) 1 All NLR 702. And it will decline to review the evidence for a third time, in this case the fourth time, unless there are some special circumstance which justify a departure from that practice. This seems to be the rationale for the provision of Section 233(3) of the Constitution stating in clear terms that an appeal, either on facts alone or mixed law and facts, shall not lie to this court as of right, but only upon leave previously sought and obtained.

I have not seen the special circumstance that would justify this court interfering with the findings of fact made by the quasi judicial body, affirmed by the trial High Court and further affirmed by the lower court. Exhibit D was part of the documentary evidence before the trial court, it formed part of the totality of the evidence considered by the trial court and the consideration of which formed the crux of the appellant's complaint at the lower court. (P.....para.....)

18. *Appellant must show that concurrent findings are perverse or have occasioned a miscarriage of justice.*

The learned counsel has thus misconceived the process of appeal, which is by way of re-hearing. He had complained to the lower court that the trial court ignored the evidence of the PW.5. The lower court, upon its consideration of the evidence of the PW.5 viz-a-viz other pieces of evidence found that even if the evidence of PW.5 were considered by the trial court it would not improve the appellant's fortune in view of other very compelling evidence particularly Exhibit D.

I agree with the 2nd and 3rd respondents that it is not enough for the appellant to complain that the two courts below failed to properly evaluate the evidence at the trial; and that he must further demonstrate that their concurrent findings of fact are either perverse or that they occasion, against him, a miscarriage of justice. (P.....para.....)

19. *Failure to prove relevance of evidence*

The appellant must further demonstrate how material the evidence of the PW.5, allegedly not considered, was to his case and that it established his case that Alaelu Family is, by blood, linked to AinaOkobi Ruling House. He failed in this regard woefully. (P.....para.....)

Representations:

O.O. Ogungbade, for the appellant.

**Adetunji Oso with Umar Abdulhameed, for 2nd respondent.
Uzona H. AZIKIWE with Ijeoma Uwale, for 3rd respondent.
MUSA DATTIJO MUHAMMAD, JSC (Delivering the lead judgment):**

FRIDAY NWANKWO
Vs.
THE STATE

SC.421/2017

IN THE SUPREME COURT OF NIGERIA
HOLDEN AT ABUJA

FRIDAY, 29TH NOVEMBER, 2019

BEFORE THEIR LORDSHIP

MUSA DATTIJO MUHAMMAD
KUDIRAT M. O. KEKERE-EKUN
CHIMA CENTUS NWEZE
AMIRU SANUSI
EJEMBI EKO

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

APPEAL:- Success thereof – Whether an appeal succeed when the appellate court considers the decision of the lower court to be perverse and to have caused miscarriage of justice.

CRIMINAL LAW AND PROCEDURE:- Conviction – Criteria thereto – Whether what is material is the credibility of evidence of witnesses and not the number of witnesses called.

CRIMINAL LAW AND PROCEDURE:- Evidence of identification – Approach of trial court thereto – Whether must be satisfied that the evidence of identification establishes the guilt of the accused beyond reasonable doubt.

*CRIMINAL LAW AND PROCEDURE:- Identification parade – Whether necessary when to put to test a witness power of recognition – The principle in **Segun Balogun Vs. A-G of Ogun State (2002) LPELR – 726 (SC)***

CRIMINAL LAW AND PROCEDURE:- Identification parade – Whether not necessary in all cases where an accused is suspected of committing an offence.

CRIMINAL LAW AND PROCEDURE:- Murder – Conviction thereof – What prosecution must prove – Section 135 of Evidence Act considered.

CRIMINAL LAW AND PROCEDURE:- Murder – Elements thereof – How proved – Whether must be jointly proved beyond reasonable doubt.

CRIMINAL LAW:- Defences – Alibi – Nature and purport.

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

Facts of the matter

Held: (Unanimously dismissing the appeal)

1. *When does an appeal succeed*

An appeal against the decision of a lower court succeeds not only on the basis of the lapse the appellant establishes in the decision he appeals against but on account of the further proof of the miscarriage of justice the lapse occasions against the appellant. The appellate court allows the appeal because the aspect of the lower court's decision the appellant complains about is perverse. Where the appellant's grouse is that an inference drawn by the court below is absolutely unsupported by the evidence, or that the, decision is so manifestly unreasonable that no reasonable tribunal could have come to that conclusion on the evidence then the appeal, having successfully raised an issue of law, warrants the conclusion by the appellate court that the decision appealed against is perverse. It succeeds and is allowed. See NAFIU RABIU Vs. KANO STATE LPELR - 2936 (SC) DOOM & ORS Vs. P.D.P. & ORS (2015) LPELR-24351 (SC) and EMMANUEL UGBOJI Vs. STATE (2017) LPELR – 43427(SC). (P.....para.....)

2. *When conviction for murder can be sustained*
Both sides to the instant appeal rightly agree that the law in Section 135 of the Evidence Act 2011 requires that an accused's conviction is sustained only where the prosecution, beyond reasonable doubt, proves
 - (i) That the deceased has died
 - (ii) That the death of the deceased resulted from the act of the accused/appellant and
 - (iii) That the act of the accused/ appellant was intentional, done with the knowledge that death or grievous bodily harm was its probable consequence. (*P.....para.....*)

3. *Elements of murder must be jointly proved*
It is also trite that the foregoing three requirements must be jointly met by the prosecution to sustain a conviction for the offence. See IHEONUNEKWU NDUKWE Vs. THE STATE (2009) LPELR - 1979 (SC), ADEBIYI FAMAKINWA Vs. THE STATE (2016) LPELR - 40104 (SC) and BAMIDELE SIMEON Vs. THE STATE, (2018) LPELR - 44388. (*P.....para.....*)

4. *Identification parade is not necessary at all times*
I entirely agree with learned respondent's counsel that in the case at hand, the combined evidence of PWI and PWII proffered by the prosecution, has rendered the conduct of an identification parade for the purpose of establishing the fact of the appellant's involvement in the act of the mob which killed the deceased unnecessary. It must be stressed that it is not in every instance when an accused person is suspected of having committed an offence that he is paraded for identification. The law is sufficiently settled that where, as in the case at hand, appellant was the positively identified and fixed at the scene of crime, there was no need for an identification parade. A formal identification parade would have been necessary only when the identity of the appellant in relation to the offence charged was in dispute. See UKPABI Vs. THE STATE (2004) 7 SCM 189" IKESON Vs. STATE (1989) 3 NWLR (PT 110) 455, KENNETH OGOALA Vs. THE STATE (1991) LPELR - 2307 (SC). (*P.....para.....*)

5. *Identification parade is necessary to determined the witness's power of recognition*
In restating the principle this court, see SEGUN BALOGUN Vs. ATTORNEY GENERAL OF OGUN STATE (2002) LPELR - 726 (SC), per Uwaifo JSC held thus:-

“An identification parade will be useful when a witness claims to have seen an unfamiliar person who' escaped from a crime scene in circumstances which require putting to test the witness's power of recognition based upon the physical

peculiarities of the person he claims to have seen. There must be real doubt as to who was seen in connection with the offence to require identification parade." (Underlining mine for emphasis).
(P.....para.....)

6. *What is relevant is the credibility of witnesses and not the number of witnesses called*
My lords, the lower court's foregoing findings and statement of the law "are unassailable.

The appraisal of both oral and documentary evidence and the ascription of probative value to the evidence resulting in the finding of facts is primarily the function of the trial court. The exercise, known as evaluation of evidence, is never based on the number of witnesses but on their credibility and the acceptability of the evidence they proffer. In the instant case PW1 and PWII clearly had firsthand knowledge of that which they testified to and the two courts below are right to have accredited their evidence with the probative value it necessarily commands. It would have been unreasonable if the two courts had done otherwise. See OMISORE & ANOR Vs. AREGBESOLA & ORS (2015) LPELR - 24803 (SC) and EZEANI Vs. FRN (2019) LPELR - 46800 (SC). (P.....para.....)

7. *The nature and purport of defence of alibi*

When an accused 'person raises the defence of *alibi*, it simply means that he is contending that he was, in another place other than the scene of crime when the offence was committed. See: Ochemaje Vs The State (2008) 15 NWLR (Pt. 1109) 57; Ozaki Vs The State (1990) J. NWLR (Pt. 124) 92; Ude Vs The State (2016) LPELR 40441 (SC) @ 49 B. The defence must be raised at the earliest opportunity, to afford the Police the opportunity of investigating the claim and ascertaining its veracity or otherwise.

However, where the accused person is fixed at the scene by credible witnesses, the defence of *alibi* collapses like a pack of cards. See: Adeyemi Vs The State (2018) 5 NWLR (Pt. 1613) 482; Dawai Vs The State (2018) 5 NWLR (Pt. 1613) 499; Chukwunyere Vs The State (2018) 9 NWLR (Pt. 1624) 249;; (2017) LPELR - 43725 (SC) @ 36 B - E.

In the instant case, the defence of *alibi* was not raised at the earliest opportunity. Furthermore, the appellant was positively identified by PW1 and PW2. PW1 testified that although he did not know the appellant prior to the incident, the fact that he witnessed him cutting the deceased with a machet on the head, made him stick in his memory. In other words the graphic or gruesome nature of what he observed made the appellant indelible in his memory. (P.....para.....)

8. *Identification parade is not necessary*

PW2 testified that he knew the appellant prior to the incident as a palmwine tapper. He also testified that he saw the appellant deliver the fatal blow on the deceased. Both witnesses remained unshaken in their testimonies under cross examination. The learned trial Judge believed them.

I am in complete agreement with my learned brother in the lead judgment and the concurrent findings of the two courts below that the circumstances of this case did not require an identification parade to prove beyond reasonable doubt that the appellant caused the death of the deceased. (P.....para.....)

Per Kekere-Ekun JSC

The facts of this case are so unfortunate. A young man lost his promising life as a result of jungle justice meted out to him on what turned out be an unfounded allegation of kidnapping. The person allegedly kidnapped re-appeared after the deceased had been burnt to ashes! In order to maintain an orderly society where the rule of law prevails, resort to self-help must be condemned in all its ramifications. The wheels of justice may grind slowly but they do grind surely. If the deceased had been afforded his day in court his life would not have been snuffed out for no just cause. He would still be alive to be of use to himself, his family and the society at large.

I agree with my learned brother that there is no basis for interfering with the concurrent findings of the two lower courts. (P.....para.....)

9. Approach where prosecution gives evidence of identification.

Let me state that, as a general proposition, where a trial court is confronted with the question of identification, of an accused person, it should be satisfied that the evidence of identification, which the Prosecution marshalled, establishes his guilt beyond reasonable doubt, *Ukpabi Vs. The State* [2004] 34 WRN 133; [2004] 7 SC 189, 199 - 200. (P.....para.....)

10. *Identification parade is not a sine qua non to conviction*

My Lords, I must take the liberty of this contribution to emphasise, once again, that an identification parade is not, always, a *sine qua non* to conviction as in this case. As the respondent's counsel pointed out, the appellant was positively, identified and fixed at the scene of the crime. The trial court, accordingly, found that the evidence of identification was unnecessary. The lower court affirmed that finding.

I have, painstakingly, perused the records. I entertain no doubt that there is no justification for interfering with these concurrent findings on the issue of identification parade having regard to these concurrent findings. I, thus, affirm the said concurrent findings on this issue, *Ikemson Vs. The State* [1989] 3 NWLR

(Pt 110) 455; [1989] 6 SCNJ 54; Ibrahim Vs. The State [1991] 5 SCNJ 129; [1991] 4 NWLR (Pt. 186) 399; Ibe Vs. The State [1992] 5 NWLR (Pt. 244) 642; [1992] 5 SCNJ (Pt 11) 172; The State Vs. Aibangee [1988] 3 NWLR (Pt. 84) 549; [1988] 7 SCNJ 128; [1988] 2 NSCC 192; Attah Vs. The State [2010] 10 NWLR (Pt.1201) 190, 225 - 22, G -B; Balogun Vs. A.G Ogun State [2002] 6 NWLR (Pt. 763) 512, 534; Eyisi Vs. The State [2001] 1 WRN 1; [2002] 15 NWLR (Pt. 691) 555; Williams Vs. The State [1992] 10 SCNJ 74; [1992] 1 NWLR (Pt. 261) 515; Ugwumba Vs. The State [1993] 6 SCNJ (Pt.11) 217; [1993] 5 NWLR (Pt. 296) 660. (P.....para.....)

11. *Evidence of prosecution witnesses are credible*

The trial court was right in so doing. The evidence was credible.

The PW2 knew the appellant previously as a palm wine tapper (though he did not know his actual name). When he saw people attacking the deceased, the PW2 stopped and walked towards the scene. He saw the appellant bring out his knife and" deal cuts on the deceased. The PW.2 was not in any doubt about the identity of the appellant. He was not discredited by the cross-examination.

The evidence of the PW.5, confirming the multiple fracture at the back of the deceased's skull corroborate the evidence of the PW1 and PW2, who had mutually corroborated one another as to the identity of the appellant. The totality of the evidence of the PW1 and PW2, and their evidence were credible, actively fixed the appellant to the *locus criminis*. The defence of *alibi* collapses and no longer avails the accused person once he is fixed to the scene of crime and his participation in the alleged crime by credible evidence: NJOVENS Vs. THE STATE (1973) 5 SC.12 at 68; EBENEHI Vs. THE STATE (2009) (Pt. 1138) 431 at 448; NDUKWE Vs. THE SATE (2009) 7 NWLR (pt. 1139) 43; STATE v. EKANEM (2016) LPELR - 4130 9SC) 10 - 11. (P.....para.....)

12. *Appellant admitted that he was at the scene of crime.*

The appellant (as DW.2) seemingly attesting to the veracity of the PW1 and PW.2 as to his presence at the scene of crime, admitted that he was infact at the *locus criminis*. The appellant having been fixed to the scene of crime, and further fixed to his active participation and role in the alleged murder, has thus lost any claims to the defence of *alibi*. I have thus no cause to disturb the concurrent findings of fact on which the appellant was convicted for the murder of Christopher Nwankwegu (the deceased) who was brutally killed on 3rd April, 2009 at Umuogbara in Ezza L.G.A of Ebonyi State.

My learned brother found in the lead judgment, and I agree, that there is no substance in this appeal. The appeal therefore deserves to be, and it is hereby dismissed. The conviction of the appellant for the murder of Christopher Nwankwegu on 3rd April, 2009 affirmed by the lower Court is hereby further affirmed. Appeal dismissed. (P.....para.....)

Representations:

B.C. UZUEGBU, for the Appellant.

1.1. ALOBU DPP, Ebonyi State, for the Respondent

MUSA DATTIJO MUHAMMAD, JSC (Delivering the lead judgment):

HON. NED MUNIR NWOKO
Vs.
SEN. PETER N. WAOBOSHI & 3 ORS

SC.671/2019

IN THE SUPREME COURT OF NIGERIA
HOLDEN AT ABUJA

TUESDAY, 16TH JULY 2019

BEFORE THEIR LORDSHIPS

JOHN INYANG OKORO
AMIRU SANUSI
AMINA ADAMU AUGIE
EJEMBI EKO
UWANI MUSA ABBA AJI

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

APPEAL:- Appellate jurisdiction – Where judgment delivered by the trial court is incompetent – Whether appellate court lacks jurisdiction to entertain any appeal thereon.

ELECTION PETITION:- Filing of suit thereto – Where suit was filed outside 14 days as required by the 4th Alteration Act – Whether suit is incompetent.

ELECTION PETITION:- Limitation thereof – Whether election and election relating matter are sui – generis and do not permit the doctrine of continuous injury.

Facts of the matter

Held: *(Unanimously dismissing the appeal)*

1. *Election and election related matters are sui-generis*

The above summation by the appellant shows that the appellant was aggrieved on 2nd October, 2018 when the decision to declare the 1st respondent winner of the election was announced. Clearly, his cause of action arose on that date. The argument by the learned senior counsel for the appellant that the injury was continuous until general election was held does not fly at all. (P.....para.....)

2. *The filing of suit was outside 14 days allowed by the 4th Alteration Act*

The 4th Alteration Act does not permit the doctrine of continuous injury as election and election related matters are sui generis. The learned senior counsel for the 1st respondent and other respondents' counsel's argument that cause of action arose on 2nd October, 2018 is unassailable. Based on this, I agree that the filing of this suit at the trial court on 11th December, 2018 was clearly outside the 14 days allowed by the 4th Alteration Act. (P.....para.....)

3. *Where lower court lacks jurisdiction, appellate court also will not have jurisdiction*

The originating summons at the trial court was incompetent. The judgment of the trial court was without jurisdiction. It is my view that both the court below and this court have no jurisdiction to entertain any appeal arising from the incompetent judgment of the learned trial Judge. Accordingly, this appeal is hereby struck out for want of jurisdiction. There shall be no order as to costs. (P.....para.....)

4. *Cause of action arose on the day the primary election was held*

As could be gleaned from the record of appeal, the originating summons filed by the plaintiff at the trial Federal High Court clearly shows that the primary election was held on 2nd October 2018 in which the 1st respondent was declared winner of the primary election by INEC, (the 3rd respondent). To my mind, that was the day when the cause of action arose. (P.....para.....)

5. *Action was filed outside the 14 days*

Also as clearly shown by the record, the action that culminated into this appeal was filed on 11th December 2018.

By the provisions of Section 285 (9) of the 1999 Constitution as amended, such action is supposed to be filed on or before 14 days from the date of the happening of the cause of action i.e. 2nd October 2018. The action filed vire the originating summons was therefore filed outside the 14 days stipulated by the said provisions. That being the case, the trial court was bereft of jurisdiction to entertain and determine the suit, same having been filed out of time. Therefore, the originating summons was right from the out set, incompetent.

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

6. *Judgment of trial court was given without jurisdiction*
It goes without saying therefore that since the originating summons is incompetent the Judgment of the trial court was given without jurisdiction as it is a nullity as it was given by the trial court which is bereft of jurisdiction.

Similarly, the judgment of the lower court is also a nullity since same was given on an incompetent suit or action.

Apropos, of the above, I adjudge this appeal to be lacking in merit and out accordingly strike it out. (*P.....para.....*)

Per Eko (JSC) Upon the occurrence of any of the three circumstances; that is -"the occurrence of the event, decision or action complained of," the cause of action for purposes of S.285(9) of the Constitution, as amended, ripens or matures for the plaintiff to commence his suit.

The indubitable facts of this case point to the cause of action being the disputed primary election that took place on 2nd October, 2018. It prompted the appellant, to commence his action at the High Court of the Federal Capital Territory on 19th October, 2018 - more than 14 days after the disputed election complained of. He withdrew the suit and recommenced a similar suit at the Federal High Court on 11th December, 2018 to challenge the purported or alleged sham election.

Clearly the cause of action arose on 2nd October, 2018. The suit is statute barred by operation of S.285(9) of the Constitution as amended. The jurisdiction of the trial court was ousted thereby. (*P.....para.....*)

Representations:

Ahmed Raji (SAN) with Onyeka Nwokolo, Adeola Adedipe, Dolapo Kehinde and Mubarak Imam for the appellant.

A. I. Idigbe (SAN) with Chief Roberk Clarke, (SAN), Ola Olanipekun, (SAN), George Ogbemie (Esq.), and Dr. Frank Nwugo for the 1st respondent.

Wendy Kuku for 2nd respondent with him S. M. Danbaba, (Esq).

Emmanuel Enodim (Esq.), with A. Fanokun and N. N. Asobinuakwu for the 3rd respondent.

Orji Nwafor Orizu with S. N. Anicheve for party interested.

JOHN INYANG OKORO, JSC (Delivering the lead judgment):

**HON. YAHAYA MUSA
AND**

- 1. BALAUMAR**
- 2. AIR COMMODORE EMMANUEL JEKADA (RTD)
THE CHAIRMAN A.P.C KADUNA STATE**
- 3. ALL PROGRESSIVE CONGRESS (A.P.C)**
- 4. INDEPENDENT NATIONAL ELECTORAL COMMISSION (INEC)**

SC.1193/2019

**IN THE SUPREME COURT OF NIGERIA
HOLDEN AT ABUJA**

TUESDAY, 29TH OCTOBER, 2019

BEFORE THEIR LORDSHIPS

**OLUKAYODE ARIWOOLA
KUDIRAT M. O. KEKERE-EKUN
JOHN INYANG OKORO
AMINA ADAMU AUGIE
PAUL ADAMU GALUMJE**

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

ELECTION PETITION:- Limitation of time thereto – Whether shall be disposed within sixty days – S. 285(12) thereof.

ELECTION PETITION:- Pre and post-election matters – Distinction thereof – Where a political party embarked upon a process – Whether it is a pre-election matter – The principle in APC Vs. Umar & 4 Ors (2019) LPELR 47296 (SC).

STATUTE:- Electoral Act, 2010 – S. 31(5) and (6) thereof – Nature and purport.

Facts of the matter

Held: *(Unanimously dismissing the appeal)*

1. *The nature and purport of S. 31(5) & (6) of Electoral Act, 2010*
Section 31(5) and (6) of the Electoral Act, 2010 as amended provides as follows:

"(5) Any person who has reasonable grounds to believe that any information given by a candidate in the affidavit or document submitted by that candidate is false may file a suit at the Federal High Court, High Court of a State or FCT against such person seeking a declaration that the information contained in the affidavit is false.

(6) If the Court determines that any of the information contained in the affidavit or any document submitted by that candidate is false, the court shall issue an order disqualifying the candidate from contesting the election.
(Underlining mine) (P.....para.....)

2. *Reliefs sought by the appellant are pre-election matter*

A careful perusal of the provisions, particularly Subsection (6) thereof indicates clearly that a successful claim brought under the Section would result in the disqualification of the affected candidate. The relief sought in the appellant's originating summons also clearly shows that the intention of the appellant was to prevent the 1st respondent from contesting the February/March 2019 general election to select the candidate of the All Progressives Congress (APC) for the Kaduna State House of Assembly representing Kakangi Constituency.
(P.....para.....)

3. *Distinction between post and pre-election matter*

In a recent decision of this court in APC Vs. UMAR & Ors. (2019) LPELR - 47296 (SC) @ 14-17 F-D per Sanusi, JSC it was held thus:

"Any preparation or process embarked upon by a political party in preparation for an election can ... be regarded as "pre-election" or prior to the election or before the election as opposed to post-election." *(Underlining mine)*

The submission of the 1st respondent's Form CF001 to INEC is part of the process embarked upon by the political party in preparation for the election. I have no doubt whatsoever that the lower court was right in holding that the appeal before it is a pre-election matter caught by Section 285(12) of the 1999 Constitution as amended and striking it out. *(P.....para.....)*

4. *Time for disposing of election petition cases*
By virtue of Section 285 (12) of the 1999 Constitution of the Federal Republic of Nigeria (as amended) an appeal to the Court of Appeal from the decision of Election Petition Tribunal shall be heard and disposed of within sixty days. The appeal in this matter at the lower court was not heard before the prescribed 60 days' period came to an end, as such it had lapsed and became statute barred. The lower court was therefore right when it struck out the appeal in line with the prayers in the respondents' motion dated 4/9/2019 and filed on the 5th September, 2019. (P.....para.....)

Representations:

Bello Ibrahim (Esq.) for the appellant with E.Y. Alhassan (Esq.) and M.A. Danmama and also in SC.1194/2019, 1195/2019 and 1196/2019.

Sule Shuaibu (Esq.) for the 1st respondent in all the 4 appeals.

N.K. Mohammed (Esq.) with Abiola Olawole (Esq.) for 2nd respondent in SC. 1193/2019 and SC.1194/2019.

Inuwa Abdulkadir (Esq.) for the 3rd respondent in all the appeals with A.N. Agu (Esq.)

Mubarak Imam (Esq.) for the 4th respondent in SC.1193/2019 and SC.1196/2019

Abdulazeez Sani (Esq.) for the 4th respondent in SC.1194/2019 and SC.1195/2019.

KUDIRAT MOTONMORI OLATOKUNBO KEKERE-EKUN, JSC (Delivering the lead judgment):

JOSEPH AKENKULE SALE

Vs.

THE STATE

SC.635/2016

**IN THE SUPREME COURT OF NIGERIA
HOLDEN AT ABUJA**

FRIDAY, 5TH JULY 2019

BEFORE THEIR LORDSHIPS

**OLABODE RHODES-VIVOUR
MARYUKAEGO PETER-ODILI
COURT
OLUKAYODE ARIWOOLA
CHIMA CENTUS NWEZE
COURT
AMINA ADAMU AUGIE**

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

APPEAL:- Grounds of appeal – Whether must arise from ratio decidendi.

APPEAL:- Issues for determination – Nature and Significance.

CRIMINAL LAW AND PROCEDURE:- Confessional statement – Involuntariness and retraction thereof – Distinction thereto.

CRIMINAL LAW AND PROCEDURE:- Confessional statement – Objection thereto – Where accused who objected to the involuntariness of a confessional statement during trial within trial denies making the statement – Whether the essence of trial within trial is to determine the voluntariness of confessional statement and not weight attached to it.

CRIMINAL LAW AND PROCEDURE:- Confessional statement – Retraction thereof – Where accused retracts his confessional statement – Whether the issue of voluntariness does not arise but only weight to be attached thereto.

CRIMINAL LAW AND PROCEDURE:- Confessional statement – Retraction thereof – Whether there is need for corroboration before court can convict thereon – The

principle in Ejinima Vs. State (1991) LPELR – 1067.

CRIMINAL LAW AND PROCEDURE:- Confessional statement – Voluntariness of – When challenged – Whether accused can no longer challenge the voluntariness of confessional statement after trial within trial.

*CRIMINAL LAW AND PROCEDURE:- Conspiracy – Proof thereof – Where there are enough evidence upon which a trial court could inferred that the offence of conspiracy was committed as required by law – Effect – The principle in **Bouwor Vs. State (2016) LPELR – 26054.***

CRIMINAL LAW AND PROCEDURE:- Defences – Alibi – Meaning and purport.

CRIMINAL LAW AND PROCEDURE:- Defences – Alibi – Nature thereof – Whether must be precise and specific.

CRIMINAL LAW AND PROCEDURE:- Defences – Alibi – Where not properly raised – Whether must be raised at the earliest opportunity to enable the police investigate same.

CRIMINAL LAW AND PROCEDURE:- Othorpsy – Identification of the body of the deceased – Where there is overwhelming evidence that the body on whom othorpsy was performed is that of the deceased – Whether there is no necessity for a separate witness though desirable for this purpose.

CRIMINAL LAW AND PROCEDURE:- Othorpsy – Identification of the deceased – Where the identity of the deceased can be inferred from circumstantial evidence – Whether direct evidence is not a necessity.

CRIMINAL LAW AND PROCEDURE:- Trial within trial – Meaning and purpose.

CRIMINAL LAW AND PROCEDURE:- Trial within trial – Purpose thereof – Whether to determine the voluntariness of confessional statement and not the weight detached to it.

CRIMINAL LAW AND PROCEDURE:- Confessional statement – Conviction thereon – Whether a confessional statement even without corroboration is sufficient to grant conviction.

EVIDENCE:- Corroboration – How done – Whether evidence which corroborates must be independent of evidence to be corroborated.

EVIDENCE:- Weight of evidence – Meaning and purport.

*PRACTICE AND PROCEDURE:- Appeal – Concurrent findings – Whether Supreme Court is usually loathe to interfere with concurrent findings – The principle in **Chukwuemeka Agugua Vs. The State (2017) LPELR – 42021.***

*PRACTICE AND PROCEDURE:- Appeal – Concurrent findings – Whether Supreme Court does not usually interfere with concurrent findings – The principle in **Olude Vs. The State (2018) LPELR- 44070 (SC).***

PRACTICE AND PROCEDURE:- Appeal – Right of appeal – Where grounds of appeal are formulated outside decision appealed against – Impropriety thereof – Whether appellant's right of appeal is circumscribed within the parameter of the judgment appealed against.

PRACTICE AND PROCEDURE:- Appeal – Where a point was not decided at the Court of appeal – Whether Supreme Court has no power to decide same because it has no jurisdiction to decide point directly from the trial court.

WORDS AND PHRASES:- Corroborative evidence – Meaning

WORDS AND PHRASES:- Vital witness – Meaning

Issues for Determination

- 1. Whether the learned justices of the Court of Appeal, Makurdi Division were right to have affirmed the decision of the learned trial judge admitting the appellants extra judicial statement. Exhibit 2 as evidence and treated same as confessional statements in spite of the fact that same were retracted by the appellant.**
- 2. Whether the learned justices of the Court of Appeal Makurdi Division were right to have affirmed the decision of the learned trial judge, that the prosecution proved its case beyond reasonable doubt against the appellant as to warrant (his) conviction for the offences charged having regard to the totality of evidence before the court.**

Facts of the Matter

In March 2002, one Angulu Akitse, who hails from Benue State, was apprehended at Abuja, with a human head in his possession. He told the police that the head belonged to one "Sunday Usue" [the deceased], whom four of them, including the appellant, killed for money-

making rituals, at the behest of their friend's master.

The body of the deceased, without a head, heart and genitals, was later discovered at the River Benue Bank near Abinsi in Guma Local Government Area, Benue State. Apart from Bomboi Bawa whose master asked for the human head, the said Angulu Akitse, one Luka Ali and the appellant as third accused, were arraigned before the Benue State High Court and charged with the offences of conspiracy and culpable homicide punishable with death.

To establish its case, the prosecution called four witnesses, who were all police officers. PW3, one Sgt. Emmanuel Uhambe recorded the statement made by the appellant to the police, and when the prosecution counsel sought to tender the statement in evidence through him, learned defence counsel for the appellant objected on the ground that "*the statement was not voluntary*", and he asked for a trial-within-trial, which the trial court ordered.

At the trial-within-trial. PW3, and one ASP Zakari Ali Agono, testified as TWT.1 and TWT.2 respectively, In his own testimony, the appellant admitted that **TWT.1/PW3** took him to TW1.2. after two months of his making the said statement: that TWT.2 read the statement to him; and that he thumb-printed the said statement.

In his ruling delivered on 25/4/2007, the learned trial judge, Ejembi Eko. J.. (as he then was, now JSC), admitted the confessional statements.

Thereafter, the three accused persons, including the appellant, were sentenced to death by hanging for "*conspiracy to kill Sunday Usue and intentionally and unlawfully killing Sunday Usue*", and the appellant appealed to the Court of Appeal. The Court of Appeal dismissed his appeal and affirmed the decision of the trial court.

Aggrieved, the appellant filed a notice of appeal to the Supreme Court.

Held: *(Unanimously dismissing the appeal)*

1. *The nature of issues for determination*

Obviously, what the appellant formulated as Issues (2) and (3) are legal arguments and conclusions: not issues for determination, which are raised from grounds of appeal, and they are questions, usually a proposition of law or fact in dispute between the parties.

The key word is *question*; it is trite that an issue for determination is a substantial question of law or of fact or both arising from the grounds of appeal, and Issues 2 and 3 formulated by the appellant are categorical statements, which raise no questions of any kind. (P.....para.....)

2. *The meaning of trial within trial*

There are two angles to this issue: Exhibit 2 was admitted in evidence after a trial-within-trial, which is a separate proceeding from the main trial: and after the trial court overruled the said objection to its admissibility, Exhibit 2 became evidence that the trial court could act on and rely upon in convicting the

appellant and different considerations and principles of law apply to both.

Trial-within-trial is exactly what it implies; a mini trial within the main trial, wherein the confessional statement of an accused is subjected to a closer scrutiny to determine whether or not the statement was freely and voluntarily made by him to the police. (P.....para.....)

3. *Distinction between involuntariness and retraction of confessional statement*

But an objection to a confessional statement on the ground of involuntariness is not the same thing as a retraction of same on the ground that the statement was never made in the first place.

It is settled that where an accused says that he did not make the confession, a trial court is entitled to admit it in evidence, and decide at the conclusion of the trial whether or not he had made it. But where he agrees that he made the confession but says that he was forced or tortured to make it, he is attacking its admissibility, so, trial-within-trial must be held to determine its voluntariness.

In this case, the appellant challenged the admissibility of the said statement on the ground of involuntariness. The trial court rightly conducted a trial-within-trial and overruled his objection. (P.....para.....)

4. *Appellant retracted his statement at defence stage*

The bottom line is that he objected to the admissibility of the said Exhibit 2 in evidence on the ground that it was not voluntary. The trial court took the right step and conducted a trial within trial. It heard both sides, and concluded that the appellant's allegation that he was tortured to make the said statement could not be true.

Thus, when the appellant went into the witness box as DW5 and denied making Exhibit 2, he was going down a different road. He retracted his Statement at defence stage, therefore, the issue had nothing to do with the admissibility or otherwise of Exhibit 2. At that stage, it changed from admissibility to weight of evidence. (P.....para.....)

5. *The meaning of weight of evidence*

Weight of evidence is the persuasiveness of some evidence in comparison with other evidence - Black's Law Dictionary 9th Ed. In this case, there were no eye-witnesses, and apart from PW3, who also testified as TWT. 1 the evidence of PW1, PW2 and PW4 centered on the other accused persons. (P.....para.....)

6. *The essence of trial within trial*

The respondent submitted that the said evidence of PW3 as TWT.1 at the trial-within-trial, corroborates the confession in Exhibit 2. But its argument does not hold water because a trial-within-trial is only used to test the voluntariness of a

confessional statement and not what value or weight to attach to it as evidence at the trial.

The issue of voluntariness cannot be equated with the issue of guilt, which is determined at the main trial. In a trial within trial;

The accused person can go into the witness-box on the issue of voluntariness without being exposed to general cross-examination on the issue of his guilt -Ifaramoye Vs. State (2017) LPELR-42037(SC). (P.....para.....)

7. *Exhibits 2 was a confessional statement*

In effect, evidence from a trial within trial, wherein voluntariness of a confession is determined cannot be transplanted, injected or imported into the main trial, wherein issue of guilt is decided. So, PW3's evidence at the trial within trial is immaterial in this appeal.

Be that as it may, the appellant also argued in his brief that "In Exhibit 2, the appellant denies the commission of the offences alleged against him". I do not think that he is referring to Exhibit 2, which is set out at pages 18-19 of the record (reproduced earlier), wherein he stated how, motivated by the "plenty money" that they would get from Bomboy's master, he and his friends agreed to kill and remove the deceased's head and how they actually killed him. (P.....para.....)

8. *A confessional statement even without corroboration is sufficient to grant conviction*

Whatever clouds the appellant may be hiding under, it is as clear as daylight that Exhibit 2 is purely a confessional statement and a confession, even without corroboration, is sufficient to support a conviction, so long as the court is satisfied of the truth - see Oseni Vs. State (2012) 5 NWLR (Pt. 1293) 351 where this court held:

In Nigeria, a free and voluntary confession of guilt by [an accused], If it is direct and positive and is duly made and satisfactorily proved, it is sufficient to warrant conviction without corroborative evidence, as long as the court is satisfied as to the truth of the confession.

Nonetheless, the general and more abiding principle of law is that it is better to find some evidence outside the confession, however, slight, of circumstances that make it probable that the confession is true - Queen Vs. Itule (1961) 2 SCNLR 183 Edhigere Vs. State (1996) 8 NWLR (Pt. 464) 1. R. Vs. Kanu (supra) and Dawa Vs. State (supra).

To this end, the court is enjoined to evaluate the confession, the

testimony of the accused and other evidence adduced at trial. It must also satisfy itself that the statement passed the six tests laid out by Ridley, J., in *R. Vs. Sykes (supra)*, which as the appellant submitted, was adopted and applied by this court in many cases. As suggested, the court must ask itself the following questions:

- Is there is anything outside the confession, which shows that it may be true?
- Is it corroborated in anyway?
- Are the relevant statements of fact made in it most likely true as far as they can be tested?
- Did the accused have an opportunity to commit the offence?
- Is the confession possible?
- Is the confession consistent with other facts, which have been ascertained and established? (*P.....para.....*)

9. *Meaning of corroborative evidence*

In this case, the appellant's grouse is that none of the evidence led by the prosecution's witnesses, qualifies as corroboration of his alleged confession, and which is sufficient to secure a conviction. The meaning of “*corroborative evidence*”; stated by Lord Reading CJ. in *Rex Vs. Baskerville* [1916] 2 KB 658, which was adopted by this court in *Okabichi Vs. State* (1975) 3 SC 96. is captured as follows -

It must be evidence, which implicates him corroborative evidence is evidence, which shows or tends to show that the story of the accomplice that the accused committed the crime is true, not merely that the crime has been committed, but that it was committed by him. (*P.....para.....*)

10. *Evidence to be corroborated must be independent of evidence which corroborates it.*
In the said *Okabichi Vs. State (supra)*, Coker, JSC, further said that:

It is the duty of the court to ascertain that whatever evidence is - used or regarded as corroboration is independent of the evidence to be corroborated and is such as supports the story of the main evidence to the effect that it renders the story mere probable and that it implicates the accused - - No stereotyped category of evidence is envisaged and a great deal depends upon the circumstances of each case for what may in a given set of circumstances amount to corroboration may not be so in another set of circumstances. (*P.....para.....*)

11. *Grounds of appeal must arise from ratio decidendi*
He may be referring to another judgment but in the judgment he appealed against the Court of Appeal did not consider conspiracy because the appellant did not proffer any arguments thereon, therefore, it deemed the issue abandoned, and held that since the trial court's decision remained unchallenged, it stands securely.
 As I see it, the decision appealed against grounds of appeal and the issues formulated for the determination of an appeal by an appellate court, are intertwined and come to a complete circle - the grounds of appeal must arise from the *ratio decidendi* of the decision appealed against and the issues for determination must arise from grounds of appeal, which emanated from the decision appealed against - see *Ibigbami & Anor Vs. Mil. Gov ., Ekiti State (2004) 4 NWLR (Pt. 863) 243 SC*. In this case, it is obvious that the appellant's complaint in Ground 1 of the grounds of appeal did not arise from the decision of the Court of Appeal appealed against. (*P.....para.....*)
12. *Appellant's right of appeal is circumscribed within the parameter of judgment appealed against.*
There is nowhere in its judgment where the Court of Appeal held or implied that "the offence of conspiracy had been proved". So, this court is not in a position to consider that offence because, as this court observed in *Uor Vs. Loko (1988) 2 NWLR (Pt. 77) 430* :
- It is the opinion appealed against which is affirmed or reversed. Hence, without the benefit of such opinion, an appellate court will be extremely reluctant to interfere. Any judgment - - founded on grounds not canvassed in the court below and not adverted to and pronounced upon in the judgment appealed against ideally is not an appeal against such a judgment. Since an appellant 's right of appeal is circumscribed within the parameters of the judgment appealed against this court will not lightly permit impugning the judgment on grounds of error other than are contained therein. (*P.....para.....*)**
13. *Supreme Court cannot decide a point not taken at the Court of Appeal*
What is more, the said offence cannot be considered by this court, because doing so, would amount to dealing with a matter directly from the trial court, which the 1999 Constitution did not provide for - see *Akibu & Ors Vs. Oduntan (2000) LPELR-336(SC)* and *A-G ., Oyo State & Anor Vs. Fairlakes Hotel (1988) LPELR-24926(SC)*. (*P.....para.....*)

14. *The meaning and purport of alibi*

At this point, it must be clear to anyone reading this that the appellant is grasping at straws with his arguments on this issue. To start with, he merely asserted in his brief that the lower courts "*should have considered all the defences*" that he raised but I take it that he means *alibi* which the trial court found did not avail him.

The defence of *alibi* which is latin for "*elsewhere*", is based on the physical impossibility of an accused person being guilty by placing him in another location at the relevant time. It also means – "*the fact or state of having been elsewhere when an offence was committed* - see Black's Law Dictionary. 8th Ed.. Shehu Vs. State (2010) 8 NWLR (Pt. 1195) 112SC; Dagayya Vs. State (2006) 7 NWLR (Pt. 980) 637 and Ochemaje Vs. State (2008) 75 NWLR (Pt. 1109) 57. (P.....para.....)

15. *Alibi must be precise and specific*

It is settled that once the defence of *alibi* is properly raised by an accused during investigations, it is the duty of the Police to investigate the defence and for the prosecution to disprove same. But to be worthy of investigation, it must be precise and specific in terms of the place that the accused was and the person(s) he was with and possibly what he was doing there at the material time - see Ochemaje Vs. State (supra) wherein Tobi, JSC explained that-

It is not the law that the Police should be involved in a wild goose chase for the whereabouts of the accused - - That is not the function or role of the Police. The accused must give specific particulars of where he was at the material time to enable the Police move straight to that place to carry out the investigation required by law - - Investigation is not a necessity if the evidence unequivocally points to the guilt of the accused person either in the evidence of the witnesses or under cross-examination by the evidence of the accused person or his witness. (P.....para.....)

16. *Defences of alibi was not properly raised*

What can I say? Obviously, the Court of Appeal is absolutely right. Not only did the trial court not believe the appellant and DW6 that he was at Lodo in Cameroun at the time the deceased was killed; he did not inform the police at the earliest opportunity that he was "*elsewhere*" when the deceased was killed, to enable the Police investigate whether the said defence of "*alibi*" checked out or not.

The Court of Appeal was, therefore, right to conclude that the "*defence of alibi can definitely not avail the appellant not having been properly raised*". Clearly, the trial court and Court of Appeal considered his defence of *alibi* and

found that it did not avail him. Thus, the suggestion made by the appellant that the lower courts "*did not consider all the defences*" that he raised, is without merit. He raised a defence of *alibi* and I agree with the lower courts that in the circumstances of this case, the defence does not avail him. (P.....para.....)

17. *The meaning of a vital witness*

Now, a vital witness is a witness, whose evidence may determine the case one way or the other, and failure to call him is fatal to the prosecution's case - *Onah Vs. State (1985) 3 NWLR (Pt. 12) 236 SC*. Is the failure to call the person, who identified the deceased, and the Medical Doctor, a fatal error on the part of the prosecution? The trial court did not think so, and it held as follows on this issue: (P.....para.....)

18. *A separate witness is not a necessity where there is overwhelming evidence that the body in whom the doctor perform othorpsy is that of the deceased.*

Obviously, there was overwhelming evidence indicating that the headless body recovered from the said River bank, who was identified by" *Terkaa Osue* , before it was taken for post-mortem examination, was that of Sunday Osue, the deceased in this case. The law says that where the totality of the prosecution's evidence showed unmistakably that the body on whom a doctor performed a post-mortem examination, was that of the deceased, a separate witness, though desirable, is not a necessity - see *Enewoh Vs. The State (1990) 4 NWLR (Pt. 145) 469* wherein Akpata. JSC, observed:

If there are facts from which it can be inferred that the corpse examined by the Doctor was that of the deceased, the evidence of the person said to have identified the corpse is not indispensable. Indeed, a conviction for murder can be made without the recovery of the dead body if there is positive evidence that the deceased has been killed. In effect the need for anyone to identify the body of a deceased to a Doctor is not a sine qua non in all murder cases. It is also trite law that medical evidence, though desirable in establishing the cause of death in a case of murder, is not essential provided that there are facts, which sufficiently show cause of death to the satisfaction of the court. The position, therefore, it seems to me is that the principle that failure to call the person, who allegedly identified the corpse of the deceased is fatal to the case of the prosecution, though good law is narrow in its application. It is restricted to situations where the identity of the body examined by the Doctor is shrouded in doubt and there is no other evidence to clear the doubt.

In his own judgment in that case, Obaseki, JSC stated as follows:

The absence of identification of the corpse examined, circumstantial or direct is fatal where medical evidence of the cause of death is vital. But where there is circumstantial evidence of identification of the corpse, which point irresistibly to the body of the deceased the conviction must stand despite the non-availability of direct oral evidence of the person, who identified the corpse, to the Doctor. (P.....para.....)

19. *Where identity of deceased can be inferred from circumstantial evidence, direct evidence is not a necessity.*

See also Idemudia Vs. State (1999) 7 NWLR (Pt. 610) 202 SC, wherein this court adopted the principles laid in Enewoh Vs. State (supra).

Where the identity of the deceased can be inferred from the circumstances of the case, then direct evidence is not essential, and where the deceased died in circumstances in which there is abundant evidence of the manner of death, medical evidence can be dispensed with; that is the position of the law as stated by this court in Enewoh Vs. State (supra) and Idemudia Vs. State (supra).

In this case, the two principles apply as if made for this case. In the circumstances of this case, the identity of the deceased was not in doubt, and whether or not, the body had decomposed when it was handed over to the Doctor for a post-mortem examination, there is no question that the cause of death, as stated in Exhibit 3, is consistent with the appellant's confession as to how he died. (P.....para.....)

20. *Concurrent findings are unassailable*

I have said more than enough already. Suffice it to say that the concurrent findings of the two lower courts are unassailable. The appellant's confession in Exhibit 2 is not only rich with details, it is consistent with established facts; from the human head found with the first accused to the headless body of the deceased found exactly where the appellant said they killed him and hid his body. (P.....para.....)

21. *Procedure where accused resides on his confessional statement and challenges its voluntariness*

With respect to the confessional statement which upon admission became Exhibit 2, the appellant made a retraction of it or denied making it, albeit voluntarily and thereby brought into play two scenarios. One that has to do with when an accused resides on an extra-judicial statement alluded to him in which case the issue of admissibility does not arise rather what plays out is the

weight to be ascribed to it by the trial court in a given circumstance. Also in the fray of this case is the challenge to the voluntariness of the said extra-judicial statement and as happened with that objection the option open to the trial court before anything else is to embark on an inquiry into the voluntariness or otherwise of that statement in what is called a mini trial or trial-within-trial, which the court of first instance conducted. (P.....para.....)

22. *There is need for corroborative evidence before court can convict on a retracted confessional statement*

The Supreme Court and other courts have made pronouncements over the two presentations concerning a disputed extra-judicial statement of an accused such as the appellant herein and citing some of those authorities would be clarifying. See *Ejinima Vs. State* (1991) LPELR - 1067 per Nnaemeka-Agu JSC held:

"I believe the law is that though the court can still admit and convict on such a retracted confession, if satisfied that the accused person made the statement and as to the circumstances which give credibility to the contents of the confession, yet it is desirable that, before conviction can be properly based on such a retracted confession, that there be some corroborative evidence outside the confession which would make it probable that the confession was true. See *Olusegun Otufale & Ors, Vs. The State* (1968) NMLRR 261 at pp.265 - 266. Brett, Ag. CJ. F. summed up the principle in the case of *R. Vs. John Agagariga Itule* (1961) 2 SCNLR 183; (1961) 1 All NLR 462 where he held at P.465. "A confession does not become inadmissible merely because an accused person denies having made it and in this respect a confession contained in a statement made to the police by a person under arrest is not to be treated differently from any other confession."

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

23. *After trial within trial, accused can no longer effectively challenge the voluntariness of a confessional statement*

Also see the case of: *BOUWOR Vs. STATE* (2016) LPELR-26054 (SC), this Apex Court per NGWUTA JSC held that:

"It is at the trial-within-trial that the appellant can effectively challenge the prosecutor as to the voluntariness vel non of the confessional statement. If the confessional statement is admitted after the trial within trial the appellant cannot argue simply that he did not make the confession voluntarily without first

impugning the trial within trial. Appellant's voluntary confession which is direct positive and satisfactorily proved is sufficient to warrant conviction even without any corroborative evidence so long as the court is satisfied of the truth of the confession. See Sunday Effiong Vs. The State (1998) 59 LRCN 13961 at 3975; Kalu & Anor. Vs. King 14 WACA 30."
(P.....para.....)

24. *Evidence of PW 3 corroborates confessional statement*
I would say as it has become trite in law anyway that the cogent, uncontroverted and unchallenged evidence of PW3 alone can ground the conviction even if Exhibit 2, the confessional statement is expunged and that expurgation would not happen as the Statement was properly admitted after passing through the crucible. In fact the evidence of PW3 corroborates the confessional statement, Exhibit 2 and so the trial court was right to place reliance on it in convicting the appellant. See Obineche & Ors. Vs. Akusobi (2010) LPELR-2178 per Adekeye JSC; Lanre Vs. State (2018) LPELR-45156 per Ejembi Eko JSC; Esseyin Vs. State (2018) LPELR-44476 per Kekere-Ekun JSC. *(P.....para.....)*
25. *There was enough to hold that the offence of conspiracy was committed as required by law*
Of note is that the details of the gory nature of the enterprise appellant and cohorts embarked on are corroborated by the medical report in evidence and of such weight, clarity and cogency leading to the irresistible conclusion of the commission of the offence by the appellant and others. In the matter of the culpable homicide charged and in that of conspiracy, there is a surfeit of material from which the inference is deducible that the appellant had conspired with others to carry out the unlawful act of. The situation is similar to that in the case of Bouwor Vs. State (2016) LPELR-26054 wherein it was stated thus:-

"From the pieces of evidence referred to including the extra judicial statements of the accused person, the trial court as affirmed by the court below found enough upon which to hold that the offence of conspiracy was established as required by law. This is so, bearing in mind that the elements of the offence are embedded in the agreement or plot among the parties, a position that is rarely capable of direct proof and so is deduced from the acts of the parties channeled or focused towards the realization of a common goal or mutual criminal purpose. The various parts played by the co-accused supporting the confession in the extra judicial statement of the appellant, Exhibit D have given a solid establishment of the offence of conspiracy to murder as alleged. I

rely on *Njovens & Ors. Vs. The State* (1973) 5 SC 17; *Haruna & Ors, Vs. The State* (1972) All LR 738 at 754.” Per Peter-Odili, JSC (p.13-14, paras. F-C). (*P.....para.....*)

Per Odili (JSC)

The appellant had raised the matter of the alibi put up by the appellant which the learned counsel said the trial judge ignored. This position brought up late in the day serves no useful purpose to the appellant and the rule guiding the raising of alibi is that it must be raised timeously to give the prosecution, the opportunity of investigating it and come up with a result either way that is either that the alibi stood firm in that appellant was not at the scene of crime at the material time or that the alibi failed as the posture of being elsewhere than the scene of crime was unsubstantiated. Therefore raising alibi when the matter is already in court goes to no moment and even in this instance nowhere in the record either at the main trial or trial-within-trial was the alibi seen and so this alibi that is coming from the address of counsel is a labour in vain. This is because the main purpose of address of counsel is to aid the court and cases are not decided based on an address or attractive closing speeches but on solid and credible evidence. It follows that no matter how brilliant an address may be, it cannot make up for lack of evidence in the resolution of any issue before the court. See *Ofortishe Vs. Nigerian Gas Co. Ltd.* (2017) LPRLR - 42766 per *Rhodes-Vivour JSC*, *Agugua Vs. State* (2017) LPELR- 42021 per *Ejembi Eko JSC*. (*P.....para.....*)

26. *Supreme Court is usually loathe to interfere with concurrent findings*

The appeal being one over concurrent findings of fact of two Lower courts, the question that arises at this point is if there is ground on which the policy stance of the Apex Court in not interfering with such findings can be reversed. The answer to that question would come up after reference to earlier decided cases of this court which have been called up in aid.

In the case of *Chukwuemeka Agugua Vs. The State* (supra), the Supreme Court reiterated its attitude to concurrent findings of fact(s) by lower courts when it was stated thus:

"This court is usually loathe to interfere with the concurrent findings of facts by the trial court and the intermediate court, unless the appellant is able to establish that the findings are perverse and/or that substantial miscarriage of justice had been done to him." Per *Eko JSC* (p.55, paras. E-F). (*P.....para.....*)

27. *Supreme Court does not interfere with concurrent findings unless shown to be perverse*

In the case of Olude Vs. State (2018) LPELR-44070 (SC) the Apex Court puts its concisely thus:-

"Above all, this court does not lightly interfere with the concurrent findings of lower courts unless such findings are shown to be perverse or not the result of a proper exercise of discretion. Counsel for the appellant, thus, had a duty to demonstrate the perversity of those concurrent findings. Having failed to do so, there is no basis for this court's interference with them, Sokwo Vs. Kpongbo (2008) All FWLR (Pt.420) 680, 695 - 696; H-Ai Braimah Vs. Abasi (1998) LPELR - 801 (SC) 34; C-E; Okonkwo Vs. Okagbue (1994) 9 NWLR (Pt.368) 301. Simply put, if learned counsel wanted this court to upset those concurrent findings of lower courts he should have shown that there were exceptional circumstances for doing that. Thus, he had a duty to show that the findings are perverse; there was a miscarriage of justice or that a principle of law or procedure was not followed, Ogbu Vs. State (1992) 8 NWLR (Pt.259) 255; Igago Vs. State (1999) 14 NWLR (Pt.537) 1; Adeyemi Vs. The State (1991) 1 NWLR (Pt.170) 679; Adeyeye Vs. The State (2013) LPELR - 19913 (SC) 46; Akpabio Vs. State (1994) 7 NWLR (Pt.359) 635; Ejikeme Vs. Okonkwo (1994) 8 NWLR (Pt.362) 266." Per Nweze, JSC (p.16-17, paras. E-D).

Taking those guiding elucidations of my learned brothers in mind and co-relating them to the facts in the case under review, I do not hesitate in saying that there is no basis for interference or an upsetting of the findings and conclusions reached in the two courts below.

The conclusion along with the well reasoned lead judgment is that this appeal lacks merit and I too dismiss it. (P.....para.....)

Per Nweze (JSC)

My Lords, it has become fashionable for accused persons who have no defence whatsoever to the cases which the Prosecution made against them to conjure the bonus defence of *alibi*. It would appear that they resort to this disingenuous ploy in the vain hope that, like the magical incantation of *open sesame* by the fictional Ali Baba and his forty thieves, such a sham defence could open the doors to their freedom.

However, this is not the juridical rationale for the said defence. For the umpteenth time, it ought to be emphasised that, to be entitled to the beneficent

effect of the defence of *alibi*, an accused person must raise it at the earliest opportunity, Hassan Vs. The State [2001] 6 NWLR (Pt. 709) 286, 305, which would, preferably, be in his extra-judicial statement. This is to offer the Police an opportunity either to confirm or confute its availability to the accused person, Ibrahim Vs. The State [1991] 4 NWLR (Pt. 186) 399; Nwabueze Vs. The State [1988] 3 NWLR (Pt. 86); Ikemson Vs. The State [1989] 3 NWLR (Pt. 110) 455.

What is more, the said defence must be unequivocal as to the particulars of his whereabouts and those present with him, Onyegbu Vs. The State [1995] 4 SCNJ 275, 285-286; Ibrahim Vs. State (supra); Balogun Vs. AG, Ogun State [2002] 6 NWLR (Pt. 763) 512, 535-536; Eke Vs. The State (2011) LPELR - 1133 (SC) 16.

It is only where an accused person, such as the appellant, raised the said defence at the earliest opportunity without any ambiguity that a burden is cast on the prosecution to investigate it, Eyisi Vs. State [2000] 4 NSCQR 60 and to disprove same, Eke Vs. The State (supra). Failure to investigate the defence of *alibi* raised in such circumstance will lead to an acquittal, Yanor Vs. The State (1965) ANLR (Reprint) 199; Bello Vs. Police [1956] SCNLR 113; Odu and Anor Vs. The State [2001] 5 SCNJ 115, 120; [2001] 10 NWLR (Pt.772) 668.

In the instant case, the lower court found that the defence was unavailing to the appellant. I agree with the said court. (*P.....para.....*)

Lead Judgement: AMINAADAMU AUGIE (JSC)

Representations:

**Dr. Agada Elachi, (Esq.), with Johnson Ochai, (Esq.), for the appellant
Eko Ejembi Eko, (Esq.), for the respondent.**

J V C PROFESSIONAL PRODUCT (UK) LIMITED

Vs.

- 1. MR. MICHEAL FAMIYIDE**
- 2. FADALER ENTERPRISES NIGERIA LIMITED**

SC.434/2010

IN THE SUPREME COURT OF NIGERIA

HOLDEN AT ABUJA

FRIDAY, 28TH JUNE, 2019

BEFORE THEIR LORDSHIPS

**IBRAHIM TANKO MUHAMMAD
AMIRU SANUSI
EJEMBI EKO
PAUL ADAMU GALUMJE
UWANI MUSA ABBA AJI**

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

*ACTION:- Originating process – Incompetency thereof – Where an originating process is issued by a chambers – Whether it is incompetent. The principle in **Uwazurike & Ors Vs. AG, Federation (2007) LPELR – 3448 (SC)***

ACTION:- Originating process – Where an originating process is issued by Falana and Falana & Co – Whether was issued by an artificial person and therefore incompetent.

JUDGMENT AND ORDERS:- Judgment – Where based on an incompetent originating process – Whether the judgment is nonexistent and cannot be sustained.

STATUTE:- Legal Practitioners Act, Cap LII, LFN 2004 – Section 2(1) thereof – Competence to practice as a barrister and solicitor – Who is competent as a barrister and solicitor – Whether it is a person whose name appears on the roll.

STATUTE:- Legal Practitioners Act, Cap LII, LFN, 2004 – Section 24 – Legal practitioner – Definition therein.

Issue for Determination

Whether the two lower courts were right in holding that the writ of summons and the statement of claim settled and signed by 'FALANA & FALANA CHAMBERS' qualifies as 'other evidence' for the purpose of the provisions of Order 8 Rule 4 of the High Court of Lagos state (Civil Procedure) Rules 1994.

Facts of the Matter

The plaintiff respondent commenced an action by writ of summons at the High Court of Lagos State whereby he claimed against the defendant/appellant certain sums of money for the sale of equipment.

The plaintiff respondent filed a statement of claim and brought an application to serve same outside the jurisdiction in the UK. The trial court granted the application. The defendant appellant filed an application to set aside the order of service outside jurisdiction.

The trial court also refused the application. Consequently, the defendant unsuccessfully appealed to the Court of Appeal, hence this further appeal to the Supreme Court.

HELD: *(Unanimously allowing the appeal)*

1. *Who is competent to practise as barrister and solicitor*

By the provisions of Section 2(1) of the Legal Practitioners Act Cap LII, Laws of the Federation of Nigeria 2004, a person who is competent to practice as a barrister and solicitor only if such person's name appears on the roll. The same Act went further to define a "legal practitioner" in its Section 24 as a person who is entitled to practice as a barrister or solicitor, generally or for the purpose of any particular office or proceedings. Thus, from the wording of the provisions of Legal Practitioners Act referred to above, it goes without saying, that only 'natural person' is entitled or qualifies to practice law or to qualify as a legal practitioner since only a natural person can have his name registered in the roll of registered legal practitioners. *(P.....para.....)*

2. *Effect of originating process issued by an artificial person*

In this instant case, the statement of claim and indeed the writ of summons, were issued, filed and settled by "FALANA & FALANA CHAMBERS" Surely, that chambers cannot be regarded as legal practitioner who could issue processes meant for proceedings in court since it was not a person

registered in the ROLL where only natural persons and not corporate bodies or legal firms are registered. (P.....para.....)

3. *A defect in a notice of appeal will render the whole appeal incompetent*
In the case of UWAZURIKE & Ors Vs. Attorney General of the Federation (2007) LPELR - 3448 (sc), this court had yet another occasion to expatiate on the incompetence of originating process issued by artificial or non-natural person or by a chambers or legal firms as in this instant case. This court stated thus:-

"It must be borne in mind always and this is also settled that a notice of appeal is the foundation and substratum of every appeal. Any defect thereto or therein will render the whole appeal incompetent and the appellate court will lack the required jurisdiction to entertain it or any interlocutory application based on the said appeal. See the case of Aviagents Ltd. Vs. Balstravest Investment Ltd. (1966) 1 All ER 450; Olowokere Vs. African Newspapers (1993) 5 NWLR (pt. 295) 583 and Olanrewaju Vs. B. O. N. Ltd. (1994) 8 NWLR (pt. 364) 622 just to mention but a few. On the above principle of law and the said provisions of Oder 4 Rule 4(1) of the said Rules, I rest this judgment. But before I am done, I will deal with issue 2 of the appellant. I agree with the submission of the respondent in their brief that once the notice of appeal even as amended was held by the court below to be defective and therefore incompetent, there was nothing left for it to consider in the appeal other than to strike out the appeal in its entirety. I hold that the court below was not entitled and could not consider or deal with any other issue in respect of an incompetent appeal. This is because there was no competent appeal before it. Since the appeal was initiated by an incompetent and defective notice of appeal (even as amended) or due process, that is/was the end of the appeal.

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

4. *Effect of a decision of court based on an incompetent originating process*
I must emphasise here that since the decision of the lower court is based on an incompetent statement of claim filed by the respondents/plaintiffs which is also on original process, it can be said that the foundation or substratum of the lower court's decision now being appealed against, had collapsed same being based on a process, which is null and void ab initio, had collapsed. The judgment of the lower court is therefore ipso facto in-existent and can no longer be sustained. (P.....para.....)

Per Ejembi Eko (JSC)

“The only germane and fundamental issue in this appeal is: whether, from the onset the originating process, that is the writ of summons specially endorsed with the statement of claim, was competent? Both the writ of summons and the statement of claim were purportedly signed by a firm of solicitors; FALANA & FALANA CHAMBERS, which is not a legal Practitioner. A valid originating judicial process must be signed or settled by a known legal practitioner acting for and on behalf of the litigant, or by the litigant himself. That is the only way to invoke the jurisdiction of the court.

A firm of legal practitioners, describing itself as FALANA & FALANA CHAMBERS, not being a legal practitioner within the definition of the "legal practitioner" under Sections 2(1) and 24 of the Legal Practitioners Act cap 207, 1990 LFN cannot sign or settle a legal process for filing in the law court. A Legal Practitioner, by virtue of Section 2 (1) of the Legal Practitioners Act is a person registered in the Supreme Court and whose name is on the roll of persons registered to practise law in Nigeria as barristers and solicitors. And that is the person that Section 24 of the said Act further defines as a legal practitioner entitled to practise law as barrister or solicitor, either generally or for the purpose of any particular judicial proceeding. It is on the basis of Sections 2 (1) and 24 of the Legal Practitioners Act, cap 207 1990 LFN that this court had stated in OKAFOR & ORS Vs. NWEKE & ORS (2007) 10 NWLR (pt. 1043) 521, viz:

**The combined effect of the above provisions is that for a person to be qualified to practice as a legal practitioner, he must have his name in the roll otherwise he cannot engage in any form of legal practice in Nigeria.
(P.....para.....)**

Representations

Mark Mordi with D.D Killi, Kehinde Olona for the appellant.

Temitope Adebayo for the respondents

AMIRU SANUSI, JSC (Delivered the Lead Judgment)