Picture of a supreme court judge

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ABIODUN ADEKOYA
AND
THE STATE

SC. 262/2011

IN THE SUPREME COURT OF NIGERIA
HOLDEN AT ABUJA
FRIDAY, 13TH JANUARY, 2017

BEFORE THEIR LORDSHIPS

MARY UKAEGO PETER-ODILI — **JUSTICE, SUPREME COURT**
OLUKAYODE ARIWOOLA — **JUSTICE, SUPREME COURT**
MUSA DATTIJO MUHAMMAD — **JUSTICE, SUPREME COURT**
CLARA BATA OGUNBIYI — **JUSTICE, SUPREME COURT**
KUMAI BAYANG AKA'AHS — **JUSTICE, SUPREME COURT**

APPEAL: Concurrent findings of two lower courts – How displaced.

COURT: Attitude of an appellate court to the findings of the trial court.

CRIMINAL LAW AND PROCEDURE: Failure to conduct forensic test of weapon used in armed robbery – Effect.

CRIMINAL LAW AND PROCEDURE: Proof of identity of the accused – Factors to be taken into account.

CRIMINAL LAW AND PROCEDURE: Standard of proof in

criminal matters – How discharged.

CRIMINAL LAW AND PROCEDURE: Proof – Proof of mens rea in armed robbery – Whether an indispensable requirement in all cases.

CRIMINAL LAW: Conspiracy – Considerations thereof.

CRIMINAL LAW: Essential elements of offence of armed robbery.

EVIDENCE: Tainted witness – Whether a blood relation simpliciter can be regarded as a tainted witness.

EVIDENCE: Evidence of a child ***Sections 155 (i) and 183 (i) of Evidence Act*** *– Need for court to comply with requirements therein.*

Issue for Determination

Whether the learned Justices of the Court of Appeal were right in upholding the decision of the learned trial Judge that the prosecution proved a case of conspiracy and armed robbery against the appellant beyond reasonable doubt.

Facts of The Matter

The appellant had been charged, arraigned, tried and convicted by the trial court per N.I. Agbelu J. on a two count charge of conspiracy to commit armed robbery and armed robbery contrary to **sections 6(b) and 1(2) of the Robbery and Firearms (Special Provisions) Act (Cap R. 11) Laws of the Federation of Nigeria, 2004.** The Court of Appeal upheld the

decision of the trial court.

The case of the prosecution at the trial court was that on the 11th day of February, 2005 at about 2pm, two armed robbers had attacked Mrs. Cecillia Olufunke Onanuga (PW4) and her two daughters at their residence at 176 Luba Eruwon Road, Ijebu-Ode. In the course of the robbery incident, the sum of N39,000, three Nokia Handsets, a Sagem X5 Handset and a Still Photograph Camera had been stolen from them. Three days later the appellant was caught at Oke-Aje market by PW4, one of the victims of the robbery and the appellant was then arrested.

The prosecution had called six witnesses. The appellant testified in his own defence and denied the charge stating that though he was at the scene, that he was there accompanying his friend Sakiru to collect his debt and a fight ensued and as things were getting out of hand, the appellant left the scene. He did not call any witness. At the end the trial court convicted the appellant of the two count charge of conspiracy and armed robbery respectively and sentenced him to death by hanging.

Dissatisfied with the verdict, appellant approached the Court of Appeal which affirmed what the trial court did. Further aggrieved the appellant has come before the Supreme Court on a sole ground of appeal.

Held *(Unanimously dismissing the appeal)*

1. *The standard of proof in criminal matters*
   It is to be reiterated that in criminal matters such as the one we are faced with, the standard of proof is beyond reasonable doubt. This is a principle that is fundamental and sacrosanct and in establishing that required standard of proof, all the essential elements

or ingredients must be proved on that standard. This is because the ingredients are cumulative and none should be found lacking before the proof beyond reasonable doubt is said to have been met. Therefore once all those vital ingredients are established altogether beyond reasonable doubt the court is enabled to convict the accused. I place reliance on Fatai Olayinka vs. State (2007) 9 NWLR (Pt. 1040) 561; Alabi vs. State (1993) 7 NWLR (Pt. 307)511; Bello vs. State (2007) 10 NWLR (Pt. 1043) 546; Oseni vs. State (2012) 2 SC (Pt. 11) 51.

Per Peter-Odili (JSC):

"What is expected of the prosecution is proof beyond reasonable doubt and not beyond a shadow or an iota of doubt. I call in aid the case of; Nwaturuocha vs. State (2011) 2-3 SC (Pt. 1) 1115, the Supreme Court held as follows:

"I shall again state it that proof beyond reasonable doubt as evolved by Lord Sankey, L.C. in Woolmington vs. DPP (1935) AC 485 is not proof to the hilt' as stated by Denning, J. as he then was, in Miller vs. Minister of Pensions (1947) 3 ALL ER 373. It is not proof beyond all iota of doubt as stated by Uwais, CJN in Nasiru vs. The State (1999) 2 NWLR (Pt. 589) 87 at 98. One thing that is certain is that where all the essential ingredients of the offence

charged have been proved or established by the prosecution, as done in this matter, the charge is proved beyond reasonable doubt. See Alabi vs. The State (1993) 7 NWLR (Pt. 307) 511 at 523.

Proof beyond reasonable doubt should not be stretched beyond reasonable limit. Otherwise, it will cleave." *(Pp 18; 27-28 paras E-H; C-A)*

2. *The essential elements of the offence of armed robbery*

a. That there was a robbery or series of robberies.
b. That the robbery was with arms.
c. That the accused person was the armed robber or one of the armed robbers.

(Bello vs. State supra: Alabi v State (supra).
(P 19 paras A-B)

3. *The failure to prove mens rea in the offence of armed robbery*

The appellant had attacked the prosecution for not establishing the mens rea or criminal intent in the offence charged, which failure learned counsel posited was fatal in the expected proof of the offence as the actus reus cannot go alone in the absence of the mens rea.

That stand of the appellant is not a watertight position in all criminal offences. This is so in that while the presumption of mens rea or evil intention or knowledge of the wrongfulness of an act, is an essential ingredient in every offence, the presumption

is subject to be displaced either by the words of the statute creating the offence, or by the subject matter with which it deals, and both must be considered.

In context armed robbery and conspiracy to commit armed robbery are not such offences for which mens rea or evil intention has to be established as the specific ingredients of armed robbery have been prescribed in Sections 401 and 402 of the Criminal Code Act. See Sherras vs. de Rutzen (1895) I.Q.B 918; Amofa vs. R (1952) 14 WACA 238.
(P 19 paras C-E)

4. *The proof of the identity of the accused*
In the guide as reiterated in Ndidi vs. State (2007) 5 SCNJ 274 at 286-287 the Supreme Court had stated that in proving identity of an accused, the following must be taken into consideration:
a. **Circumstances in which the eye-witness saw the accused;**
b. **The length of time the witness saw the accused;**
c. **The light conditions;**
d. **The opportunity of close observation;**
The previous contact between the parties
(P 23 paras C-E)

5. *Whether the mere fact that a witness is a blood relation of the victim makes him a tainted witness*
Learned counsel for the appellant had sought to discredit the testimony on the ground that PW4 was a tainted witness. In that regard I would have to say that the mere fact that a witness is a blood relation of

the victim does not translate without more to being a tainted witness. [Musa vs. State (2012) 3 NWLR (Pt. 1286) 59; Ben vs. State (2006)) 12 SCM (Pt. 2) 71 at 88]. *(P 24 paras A-C)*

6. *The procedure to be followed where a minor is a witness*
Per Peter-Odili (JSC):
> **"I am at one with learned counsel for the respondent on the matter raised by counsel for the appellant that PW4 being a minor of 13 years of age was subject to supervision and control of PW1. The position of the appellant is not borne out of the record on what transpired during her testimony as she was subjected to rigorous cross-examination by the defence and remained unshaken and did not deviate from her testimony. That apart from the court of trial complying with Section 155 (i) and 183 (i) of the Evidence Act relating to the evidence of a child as she had been thoroughly examined by the trial court before testifying".** *(P 25 paras A-D)*

7. *The failure to conduct forensic analysis on weapon used in armed robbery*
On the matter of Exhibit D i.e. the cutlass or matchet used by the appellant on PW1, the appellant sought to have the Exhibit discountenanced as there was no forensic analysis on the weapon and that its utilization by the trial court has occasioned a miscarriage of justice. That posture cannot fly in the

light of other connecting pieces of evidence which made that Exhibit authentic, cogent and reliable. I rely on Gbadamosi vs. State (1991) 6 NWLR (Pt. 196) 182 at 192. *(P 25 paras F-H).*

8. *Proof of conspiracy in criminal matters*

For a fact conspiracy is an offence that is often deduced or inferred from the acts of the parties and not usually by direct evidence of the meeting of the minds. The reason being simply, that discussions and agreements to do an illegal act or carry out a legal act by illegal means are transactions in secret and normally shrouded from those not part of the deal. The dictum of this court per Adekeye (JSC) in Onyenye vs. State (2012) 15 NWLR (Pt. 1324) 586, Pg. 36-37 is useful:

> **"In effect conspiracy can be inferred from the acts of doing things towards a common end where there is no direct evidence in support of an agreement between the accused persons. The conspirators need not know themselves and need not have agreed to commit the offence at the same time. The courts tackle the offence of conspiracy as a matter of inference to be deduced from certain criminal acts or inactions of the parties concerned. [Oduneye vs. The State (2001) 2 NWLR (Pt 697) 311; Obiakor vs. The State (2002) 10 NWLR (Pt. 776), Pg. 612 Daboh vs. The**

> **State (1977) 5 SC 197; Ubierho vs. The State (2005) 1 NWLR (Pt. 919, Pg. 644; Muonwem vs. Queen (1963) 2 SC, NLR Pg. 172 Gbadamosi vs. The State (1981) 2 NWLR Pt. 196 Pg. 182].**

Section 6 of the Robbery and Firearms Act classifies an absent accused like the appellant as a principal offender and shall be liable to be proceeded against and punished accordingly under the Act."

Taking that matter on how conspiracy is established in the realm of what transpired in this case from the evidence of the prosecution witnesses and the confessional statements of the accused/appellant, Exhibits H, A, B, and C, placing them alongside the wooly defence put up by the appellant, the trial court and as affirmed by the Court of Appeal had no difficulty in reaching the concurrent findings that the standard of proof beyond reasonable doubt had been met".
(P 26-27 paras A-C)

9. *How to displace the concurrent findings of the two lower courts*

The concurrent findings of the two courts below are that there was a robbery, it was an armed robbery and the appellant was one of the two robbers. Also the two courts accepted the extra-judicial statements of the appellant, Exhibits H, A, B, and C as confessional statements, the later retraction by the appellant not withstanding in the light of the facts before the trial

court. Also found by the two lower courts was that the offence of conspiracy had been firmly established from the circumstances discerned from evidence before court. The question at this point would be to what shall I place reliance on to disturb, alter, reverse or set aside these findings? I see no such anchor in sight as I rely on what the appellant courts including the Supreme Court had enjoined over the years to go along those findings concurrently made. See Nwaturuocha vs. State (supra), this court, per Rhodes-Vivour JSC, held as follows:

> **"Proof beyond reasonable doubt does not mean proof beyond all doubt, or all shadow of doubt. It simply means establishing the guilt of the accused person with compelling and conclusive evidence. A degree of compulsion which is consistent with a high degree of probability. This court will not interfere with concurrent findings of the trial court and the Court of Appeal on issues of fact except where the findings are perverse, or there is established a miscarriage of justice or a violation of principles of law or procedure…**
> *(Pp 28-29 paras B-A)*

10. Attitude of the Supreme Court to the findings of the trial court

In Abokokuyaro vs. State (2012) 2 NWLR (Pt. 1285)

530, the Supreme Court held as follows:

> **"An appellate court will not interfere with the findings of the trial court unless the findings are perverse, not supported by evidence and has led to miscarriage of justice or any principle of law or procedure have not been followed or compiled with."**
> *(P 29 paras E-G)*

Nigerian Cases Cited in This Judgment

Abokokuyaro vs. State (2012) 2 NWLR (Pt. 1285) 530;
Abu Ankwa vs. The State (1969) ALL NLR 129;
Adefarasin vs. Dayekh (2007) 11 NWLR (Pt. 1044) 89;
Alabi vs. The State (1993) 7 NWLR (Pt. 307) 511;
Amofa vs. R (1952) 14 WACA 238;
Anyanwu vs. The State (1986) 5 NWLR (part 43) at 612;
Babalola vs. The State (1989) 4 NWLR (Pt. 115) 264;
Bello vs. State (2007) 10 NWLR (Pt. 1043) 546;
Bello vs. State (2012) 8 NWLR (Pt. 1302) 207;
Ben vs. State (2006)) 12 SCM (Pt. 2) 71;
Daboh vs. The State (1977) 5 SC 197;
Daniels vs. State (1991) 8 NWLR (Pt. 212) 715;
Enong vs. Adu (1981) 11-12 SC 25;
Fatai Olayinka vs. State (2007) 9 NWLR (Pt. 1040) 561;
Gbadamosi vs. State (1991) 6 NWLR (Pt. 196) 182;
Gbadamosi vs. The State (1981) 2 NWLR (Pt. 196) Pg. 182;
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Ikemson vs. The State (1989) 3 NWLR (Pt. 110) at 414;
Mathew Orimoloye vs. The State (1984) 10 SC page 138;
Muonwem vs. Queen (1963) 2 SC, NLR Pg. 172;
Musa vs. State (2012) 3 NWLR (Pt. 1286) 59;
Nasiru vs. The State (1999) 2 NWLR (Pt. 589) 87;
Ndidi vs. State (2007) 5 SCNJ 274;
Ndidi vs. The State (2007) 13 NWLR page 633;
Nwaturuocha vs. State (2011) 2-3 SC (Pt. 1);
Nwosu vs. State (1998) 8 NWLR (Pt. 562) 433-444;
Obiakor vs. The State (2002) 10 NWLR (Pt. 776), Pg. 612;
Oduneye vs. The State (2001) 2 NWLR (Pt 697) 311;
Oforlete vs. State (2000) FWLR (Pt. 12) 2081;
Okonji vs. The State (1987) NSCC 291;
Okori vs. The State (1989) 1 NWLR (Pt. 100);
Onyenye vs. State (2012) 15 NWLR (Pt. 1324) 586, Pg. 36-37;
Oseni vs. State (2012) 2 SC (Pt. 11) 51;
State vs. Ogbubunjo (2001) 1 SCNJ 102;
The State vs. Solisu & Anor (1974) 4 NWLR page 400 and
Ubierho vs. The State (2005) 1 NWLR (Pt. 919, Pg. 644.

Foreign Cases Cited in This Judgment
Sherras vs. de Rutzen (1895) I.Q.B 918;
Miller vs. Minister of Pensions (1947)3 ALL ER 373; and
Woolmington vs. DPP (1935) AC 485.

Nigerian Statutes Cited in This Judgment
The Constitution of the Federal Republic of Nigeria, 1999 – S. 36(5)
The Criminal Code Act – Ss. 401 & 402
The Evidence Act – S. 138(2) & (3); Ss. 155(i) & 183(i)
The Robbery and Firearms (Special Provisions) Act, Cap R11

A 2004 – Ss. 6(b) & 1(2).

Representations
Olakunle Agbebi *for Appellant*
L. Fubara Anga *for Respondent and with him* **Miss**
B **Rebecca Ebokpo**

Peter-Odili, (JSC) (Delivering the Lead Judgment): This is an appeal against the judgment of the Court of
C Appeal Ibadan Division Coram: K.M.O. Kekere-Ekun JCA (as she then was), M. Fasanmi and I.S. Ikyegh JJCA with Modupre Fasanmi JCA delivering the lead judgment on 23rd November, 2011. The appellant had been charged,
D arraigned, tried and convicted by the trial court per N.I. Agbelu J. on a two count charge of conspiracy to commit armed robbery and armed robbery contrary to **Sections 6(b) and 1(2) of the Robbery and Firearms (Special**
E **Provisions) Act (Cap R. 11) Laws of the Federation of Nigeria, 2004**. The Court of Appeal or court below or lower court upheld the decision of the trial court.

F **Facts Briefly Stated**
The case of the prosecution at the trial court was that on the 11th day of February, 2005 at about 2pm, two armed robbers had attacked Mrs. Cecilia Olufunke Onanuga (PW1) and
G her two daughters at their residence at 176 Luba Eruwon Road, Ijebu-Ode. In the course of the robbery incident, the sum of N39,000, three Nokia Handsets, a Sagem X5 handset and a still photograph camera had been stolen from
H them. Three days later the appellant was caught at Oke-Aje market by PW4, one of the victims of the robbery, and the

appellant was then arrested.

The prosecution had called six witnesses. The appellant testified in his own defence and denied the charge stating that though he was at the scene, that he was there accompanying his friend Sakiru to collect his debt and a fight ensued and as things were getting out of hand, the appellant left the scene. He did not call any witness. At the end the trial court convicted the appellant of the two counts charge of conspiracy and armed robbery respectively and sentenced him to death by hanging.

Dissatisfied with the verdict, appellant approached the court below which affirmed what the trial court did. Further aggrieved, the appellant has come before the Supreme Court on a sole ground of appeal.

Olakunle Agbebi Esq., learned counsel for the appellant on the 20th day of October, 2016 date of hearing adopted the appellant's brief filed on 28/9/2011 and deemed filed on the 22/5/2013. In it were crafted two issues which are thus:

1. **Whether the learned Justices of the Court of Appeal were right in holding that the trial court rightly held that prosecution established all the ingredients of the offence of armed robbery in this case?**

2. **Whether the learned Justices of the Court of Appeal were right in upholding the decision of the learned trial Judge that the prosecution proved a case of conspiracy and armed robbery against the appellant beyond reasonable doubt.**

Lawrence Fubara Anga of counsel for the respondent adopted the brief of respondent filed on 8/5/15 and deemed filed on the 14/10/15 in which was formulated a single issue being:

Whether learned Justices of the Court of Appeal were right in upholding the decision of the trail court to the effect that the prosecution had proved the charges against the appellant beyond reasonable doubt.

The issues as crafted by the appellant on a one ground appeal cannot be utilized and it is even worse that each is seeking an answer to the same question which in effect is the same as the sole issue raised by the respondent. The Issue No 1 of the appellant is hereby struck out as two issues cannot emanate from a single ground of appeal.

I shall make use of Issue 2 of the appellant as a sole issue in the determination of this appeal.

Sole Issue

Whether the learned Justices of the Court of Appeal were right in upholding the decision of the learned trial Judge that the prosecution proved a case of conspiracy and armed robbery against the appellant beyond reasonable doubt.

Learned counsel for the appellant contended that, to prove criminal charges such as those in the case in hand, the prosecution must establish the intention of the appellant to commit the wrongful act and wrongful act itself together. He cited **Babalola vs. The State (1989) 4 NWLR (Pt. 115)**

264 at 292.

That the prosecution was expected to prove that the incident was a robbery, an armed robbery and the appellant the robber. That the defence that what transpired was a fight over a debt was not debunked by the prosecution.

For the appellant it was submitted that the trial judge ought to have evaluated the evidence of PW1 and PW4 and to have treated same as the evidence of tainted witnesses with a purpose to serve other than the ends of justice. That the testimony about matchete cuts to the head and the neck was not pointed out by the prosecution.

It was further contended that there was need to prove that the presence of the appellant at the scene of crime is obviated by the admission of the appellant that he was in the premises when the fight incident occurred and even if appellant is taken as a liar, it is not evidence of culpability of the offence of robbery. He cited **Daniels vs. State (1991) 8 NWLR (Pt. 212) 715 at 732; State vs. Ogbubunjo (2001) 1 SCNJ 102. Section 36(5) of the Constitution; Section 138(2) and (3) of the Evidence Act, Nwosu vs. State (1998) 8 NWLR (Pt. 562) 433-444.**

That reasonable doubt exist as to the guilt of the appellant which must be resolved in favour of the appellant. He cited **Abu Ankwa vs. The State (1969) ALL NLR 129; Okonji vs. The State (1987) NSCC 291 at 302.**

Learned counsel for the respondent submitted that the ingredients of armed robbery are clearly stipulated in **Sections 401 and 502 of the Criminal Code Act** and so the respondent had no responsibility to prove the mens rea of the appellant in order to discharge its burden of proof and to discountenance the arguments of the appellant in this

regard. That the respondent succeeded in proving all the ingredients of the offences at the trial court. That barely 48 hours after the incident PW4 positively identified the accused person and pointed him out for arrest.

On the issue of whether a witness is tainted or not is not a function of counsel's address but rather a matter to be gleaned from the available facts and evidence before the court. He cited **Musa vs. State (2012) 3 NWLR (Pt. 1286) 59; Bello vs. State (2012) 8 NWLR (Pt. 1302) 207.**

Learned counsel for the respondent said learned counsel for the appellant had put up a defence of justification of appellant's presence at the scene of crime but interestingly the defence was not put up before the court. That even at the trial the appellant failed to cross-examine PW1 and PW4 on the issue of the debt and non-involvement of the appellant in the armed robbery incident. He referred to **Oforlete vs. State (2000) FWLR (Pt. 12) 2081 at 2099.**

He contended that proof beyond reasonable doubt is not proof beyond all reasonable doubt and the prosecution had carried out the burden effectively. He cited **Nwaturuocha vs. State (2011) 2-3 SC (Pt. 1) 1115**. That the trial court had the sole responsibility to observe the demeanour of the witnesses and the accused during the trial and to reach a determination as to the weight to attach to the said testimonies and that the trial court did so in the instant case and there is no basis for the court below to interfere since the trial court did not err or misdirect itself in law. He relied on **Igwego vs. Ezengo (1992) 6 NWLR (Pt. 249) 561; Enong vs. Adu (1981) 11-12 SC 25; Adefarasin vs.**

Dayekh (2007) 11 NWLR (Pt. 1044) 89 etc**.**

In brief, the case put forward by the appellant is that the Supreme Court is urged to discharge and acquit the appellant because the judgment of the trial court was perverse and occasioned a grave miscarriage of justice and the court below erred in upholding the trial court's decision as the ingredients of the offences of conspiracy and armed robbery were not established. That the prosecution failed to prove the key element of violence on PW1 or that the assault on PW1 was done by the appellant.

On the other hand being the stance of the respondent is that the role of the appellant court is not to reopen the dispute and to try the case as if it were de novo but to rather it is to oversee, superintend and to review the way the dispute and the issues arising thereon were tried to see whether the trial court used the correct procedure and or arrived at the right and proper decision.

It is to be reiterated that in criminal matters such as the one we are faced with the standard of proof is beyond reasonable doubt. This is a principle that is fundamental and sacrosanct and in establishing that required standard of proof all the essential elements or ingredients must be proved on that standard. This is because the ingredients are cumulative and none should be found lacking before the proof beyond reasonable doubt is said to have been met. Therefore once all those vital ingredients are established altogether beyond reasonable doubt the court is enabled to convict the accused. I place reliance on **Fatai Olayinka vs. State (2007) 9 NWLR (Pt. 1040) 56; Alabi vs. State (1993) 7 NWLR (Pt. 307); Bello vs. State (2007) 10 NWLR (Pt. 1043) 546; Oseni vs. State (2012) 2 SC (Pt.**

11) 51.

Getting specifically into the offence of armed robbery on which the appellant was charged, the essential elements thereof are:

a. That there was a robbery or series of robberies.
b. That the robbery was with arms.
c. That the accused person was the armed robber or one of the armed robbers.

See: **Bello vs. State** supra: **Alabi vs. State** (supra).

The appellant had attacked the prosecution for not establishing the mens rea or criminal intent in the offence charged, which failure learned counsel posited was fatal in the expected proof of the offence as the actus reus cannot go alone in the absence of the mens rea.

That stand of the appellant is not a watertight position in all criminal offences. This is so in that while the presumption of mens rea or evil intention or knowledge of the wrongfulness of an act, is an essential ingredient in every offence, the presumption is subject to be displaced either by the words of the statute creating the offence, or by the subject matter with which it deal, and both must be considered. In context armed robbery and conspiracy to commit armed robbery are not such offences for which mens rea or evil intention has to be established as the specific ingredients of armed robbery have been prescribed in **sections 401** and **402** of the **Criminal Code Act**. See **Sherras vs. de Rutzen (1895) I.Q.B 918; Amofa vs. R (1952) 14 WACA 238.**

In the quest to establishing the essential elements of the offences of armed robbery and conspiracy to commit

armed robbery respectively the respondent provided the evidence of PW1 and PW4 who stated thus:

At page 13 lines 25-28, PW1 had this to say:

"While still in the sitting room, I saw the accused and one other. The accused was holding a cutlass while the other one was with a gun. I shouted on seeing them. However the accused matcheted me on my head".

PW4 at page 30 lines 10-18 had this to say:

"Myself and my sister were in the dining room and we heard the shout of our mother. Immediately, both of us went to the sitting room and we saw two boys. These two boys were armed robbers. One of them was short while the other was tall person. The short boy was holding a gun while the tall boy was holding a cutlass. The tall boy cut my mother with the cutlass he was holding on her hand. The accused was the tall boy holding the cutlass."

On the evidence of the witnesses I shall go back to the Record at page 28-33:

Under cross examination PW1 stated thus:

"Although, I fell down after the matchet cut on my head, I was still conscious. The accused partner was the one who ransacked

my bedroom while the accused went to my husband's bedroom. However, the accused partner did not attack me during the incident.

At page 68 lines 28, the learned trial Judge held as follows:

"I believe her evidence more importantly as to the actual person between the accused and his partner who wounded her and who went to her husband's bedroom (PW2) and removed the sum of ₦39,000.00 therein. Her evidence is credible and cogent. I find and hold that the accused was one of the two hoodlums that participated in the robbery attack at PW1's residence on 11/2/2005,"

PW4 on the matter of identification stated as follows:

"Myself and my sister were in the dining room and we heard the shout of our mother. Immediately, both of us went to the sitting room and we saw two boys… One of them was short while the other was a tall person. The short boy was holding a gun while the tall boy was holding a cutlass. The tall boy cut my mother with the cutlass he was holding on her head. The accused was the tall boy holding the cutlass and told us to go into our mother's room. By this time, the accused was in the sitting room and we heard our mother

shouting hence both of us went back to the sitting room. On getting there, we saw the accused holding the neck of our mother, she removed the scarf which the accused used as a mask. It was at this stage that I was able to see his face and the shape of his head. We pleaded with him but he dragged my mother into her room and both of us followed. The following Sunday which was 13/2/2005 while were coming back from the church, I saw the accused at Iwade in Oke-Aje Market, Ijebu-Ode. He was eating and I told my father that one of the boys that robbed us was the one eating. The accused was wearing the same clothes he put on when they came to our house on Friday. It was a short knicker with a T-shirt with red and black colour… My father stopped Mr. Ayankoya and told him my story regarding the identification of the accused at Oke-Aje. Mr. Ayankoya followed us back to the Oke-Aje Market in his own car. At Oke-Aje Market, the accused was seen in front of a pool house and I pointed him to Mr. Ayankoya".

Under cross-examination she had this to say:

"I saw the accused when he cut my mother's head with a cutlass he was holding. The incident took about one and a half hours, the incident was not hurriedly done… I

identified the accused by his face and the shape of his head. I made a statement to the Police when the robbery took place".

The Court of Appeal had this to say at that, in view of the circumstances of the case, that there was no need for an identification parade as the evidence of PW1 and PW4 in particular was overwhelming and cogent enough to show that the appellant was one of armed robbers that robbed PW1 at her residence on 11/2/2005. In the guide as reiterated in **Ndidi vs. State (2007) 5 SCNJ 274 at 286-287** the Supreme Court had stated that in proving identity of an accused, the following must be taken into consideration:

a. Circumstances in which the eye-witness saw the accused;
b. The length of time the witness saw the accused;
c. The light conditions;
d. The opportunity of close observation;
e. The previous contact between the parties

Having that roadmap in mind and taken along what occurred in the matter in hand, it was barely 48 hours after the incident of the accused/appellant that PW4 positively identified him for arrest and had stated that the assailants took their time during the robbery and had spent over one and half hours. Also in the matter of the light conditions, it was daytime and around 2pm in the afternoon. Again PW4 had stated thus: **"At the sitting room I saw the accused holding the neck of my mother. She removed the scarf the accused used to cover his face. This gave me the**

opportunity of seeing his face."

The evidence of PW4 was not contradicted during cross-examination.

Learned counsel for the appellant had sought to discredit the testimony on the ground that PW4 was a tainted witness. In that regard I would have to say that the mere fact that a witness is a blood relation of the victim does not translate without more to being a tainted witness. See **Musa vs. State (2012) 3 NWLR (Pt. 1286) 59; Ben vs. State (2006)) 12 SCM (Pt. 2) 71 at 88**.

The finding of the court below despatching the contention of PW4 being a tainted witness is quoted below:

> **"On the submission of the appellant counsel that PW4 should be treated as a tainted witness and that the court should have been more circumspect. There is no doubt that PW4 is a 13 year old school girl of tender age. Before her testimony, the court put some questions to her as to the implication of giving false evidence on oath, her educational background, why she was in court and the nature of the offence with which the appellant was charged. She gave answers to them before she testified on oath. See page 29 of the record. It was after this that the court remarked thus: "She is an intelligent school girl. I am therefore satisfied that her evidence is credible and cogent which can be relied upon by the court." What is more, the identification evidence of the appellant was**

> **neither controverted nor shaken under cross examination." See page 154 of the Record".**

"I am at one with learned counsel for the respondent on the matter raised by counsel for the appellant that PW4 being a minor of 13 years of age was subject to supervision and control of PW1. The position of the appellant is not borne out of the record on what transpired during her testimony as she was subjected to rigorous cross-examination by the defence and remained unshaken and did not deviate from her testimony. That, apart from the court of trial complying with **Sections 155 (i) and 183 (i)** of the **Evidence Act** relating to the evidence of a child as she had been thoroughly examined by the trial court before testifying.

In respect to the defence put up by the appellant of a debt recovery gone bad. I am inclined to accept the submission of the respondent that the police investigated the allegation and found it untrue. This is all the more acceptable since the defence did not see any need to cross-examine the prosecution witnesses along the line of the debt recovery.

On the matter of Exhibit D i.e. the cutlass or matchet used by the appellant on PW1, the appellant sought to have the exhibit discountenanced as there was no forensic analysis on the weapon and that its utilization by the trial court has occasioned a miscarriage of justice. That posture cannot fly in the light of other connecting pieces of evidence which made that exhibit authentic, cogent and reliable. I rely on **Gbadamosi vs. State (1991) 6 NWLR (Pt. 196) 182 at 192.**

In respect to the offence of conspiracy, while the

appellant is of the view that it was not proved, the respondent disagrees. For a fact, conspiracy is an offence that is often deduced or inferred from the acts of the parties and not usually by direct evidence of the meeting of the minds. The reason being simply, that discussions and agreements to do an illegal act or carry out a legal act by illegal means are transactions in secret and normally shrouded from those not part of the deal. The dictum of this court per **Adekeye JSC** in **Onyenye vs. State (2012) 15 NWLR (Pt. 1324) 586, Pg. 36-37** is useful:

> **"In effect conspiracy can be inferred from the acts of doing things towards a common end where there is no direct evidence in support of an agreement between the accused persons. The conspirators need not know themselves and need not have agreed to commit the offence at the same time. The courts tackle the offence of conspiracy as a matter of inference to be deduced from certain criminal acts or inactions of the parties concerned. Oduneye vs. The State (2001) 2 NWLR (Pt 697) 311; Obiakor vs. The State (2002) 10 NWLR (Pt. 776), Pg. 612; Daboh vs. The State (1977) 5 SC 197; Ubierho vs. The State (2005) 1 NWLR (Pt. 919), Pg. 644; Muonwem vs. Queen (1963) 2 SC, NLR Pg. 172; Gbadamosi vs. The State (1981) 2 NWLR (Pt. 196) Pg. 182; Section 6 of the Robbery and Firearms Act classifies an absent accused like the appellant as a**

> **principal offender and shall be liable to be proceeded against and punished accordingly under the Act."**

Taking that matter on how conspiracy is established in the realm of what transpired in this case from the evidence of the prosecution witnesses and the confessional statements of the accused/appellant, Exhibits H, A, B, and C, placing them alongside the wooly defence put up by the appellant, the trial court and as affirmed by the Court of Appeal had no difficulty in reaching the concurrent findings that the standard of proof beyond reasonable doubt had been met. "What is expected of the prosecution is proof beyond reasonable doubt and not beyond a shadow or an iota of doubt. I call in aid the case of; **Nwaturuocha vs. State (2011) 2-3 SC (Pt. 1) 111524**, the Supreme Court held as follows:

> **"I shall again state it that proof beyond reasonable doubt as evolved by Lord Sankey, L.C. in Woolmington Vs. DPP (1935) AC 485 is not proof to the hilt' as stated by Denning, J. as he then was, in Miller vs. Minister of Pensions (1947) 3 ALL ER 373. It is not proof beyond all iota of doubt as stated by Uwais, CJN in Nasiru vs. The State (1999) 2 NWLR (Pt. 589) 87 at 98. One thing that is certain is that where all the essential ingredients of the offence charged have been proved or established by the prosecution, as done in this matter, the charge is proved beyond reasonable doubt.**

See **Alabi vs. The State (1993) 7 NWLR (Pt. 307) 511 at 523. Proof beyond reasonable doubt should not be stretched beyond reasonable limit. Otherwise, it will cleave."**

The concurrent findings of the two courts below are that there was a robbery, it was an armed robbery and the appellant was one of the two robbers. Also the two courts accepted the extra-judicial statements of the appellant, Exhibits H, A, B, and C as confessional statements, the later retraction by the appellant not withstanding in the light of the facts before the trial court. Also found by the two lower courts was that the offence of conspiracy had been firmly established from the circumstances discerned from evidence before court. The question at this point would be to what shall I place reliance on to disturb, alter, reverse or set aside these findings? I see no such anchor in sight as I rely on what the appellant courts including the Supreme Court had enjoined over the years to go along those findings concurrently made. See **Nwaturuocha vs. State** (supra), the court, per **Rhodes-Vivour JSC,** held as follows:

> **"Proof beyond reasonable doubt does not mean proof beyond all doubt, or all shadow of doubt. It simply means establishing the guilt of the accused person with compelling and conclusive evidence. A degree of compulsion which is consistent with a high degree of probability. This court will not interfere with concurrent findings of the trial court and the Court of Appeal on issues of fact except where**

> **the findings are perverse, or there is established a miscarriage of justice or a violation of principles of law or procedure…**
>
> **In my view the trial court carefully considered and evaluated the evidence in the case and have come to the correct decision, confirmed by the Court of Appeal that the case against the appellant has been proved beyond reasonable doubt. The defence of alibi fades into insignificance in the light of clear evidence to the contrary. This is a clear case of robbery with nothing worth urging in favour of the appellant. For this and the much fuller reasoning in the leading judgment, I dismiss the appeal. The judgment of the Court of Appeal dismissing the appeal is hereby affirmed."**

In Abokokuyanro vs. The State (2012) 2 NWLR (Pt. 1285) 530, the Supreme Court held as follows:

> **"An appellate court will not interfere with the findings of the trial court unless the findings are perverse, not supported by evidence and has led to miscarriage of justice or any principle of law or procedure have not been followed or compiled with."**

In the light of the foregoing, I am satisfied that the prosecution has carried out the burden laid upon it by law to

prove the essential ingredients of the offences of conspiracy to commit armed robbery and armed robbery beyond reasonable doubt and so this appeal lacking in merit is hereby dismissed.

I affirm the decision of the Court of Appeal, Ibadan Division in its affirmation of the conviction and sentence to death by hanging on the appellant.

Mary Ukaego Peter-Odili
Justice, Supreme Court

OLU ARIWOOLA, (JSC): I had the privilege of reading in draft the lead judgment of my learned brother, Peter-Odili, (JSC) just delivered. I agree with the reasoning therein and the conclusion arrived thereat. The appeal is devoid of any merit and lacking in substance. Accordingly, I too will dismiss the appeal.

Appeal is dismissed and I affirm the judgment of the court below which had earlier affirmed that of the trial court.

Olu Ariwoola
Justice, Supreme Court

DATTIJO MUHAMMAD, (JSC): I read in draft the lead judgment of my learned brother Ukaego Peter-Odili, (JSC) just delivered. I agree with his lordship's conclusion therein that the appeal lacks merit. I dismiss same and abide by the consequential orders made therein.

Musa Dattijo Muhammad
Justice, Supreme Court

BATA OGUNBIYI, (JSC): The conviction and sentence

of the appellant was concurrent by the two lower courts. The law is trite and well settled on the appellant who must show cause why the concurrent findings should be disturbed. The evidence adduced by the prosecution's six witnesses confirmed that there was an armed robbery on the 11th of February, 2005 at 176 Luba-Eruwon Road, Ijebu Ode as alleged. The evidence of PW1, PW2 and PW4 specifically revealed that the robbers who invaded their home were armed with gun and cutlass. It is also overwhelming on their evidence that the appellant was one of the armed robbers that robbed PW1 and the children on the 11th day of February, 2005. The specific role played by the appellant in the armed robbery incident was stated by PW1 and PW4 (as the victims) in their evidence at pages 23 and 30 of the record respectively. PW4 was unshaken in her evidence under cross-examination. The reason justifying appellant's presence at the scene of the crime could not be believed because he had failed to call those he mentioned to testify to his defence.

It is also pertinent to restate that PW1 and PW4 were very clear in their testimony on the identification of the appellant. PW1 for instance was certain that the appellant matcheted her on the head and ordered her two daughters to go into the dining room while he collected some money and handsets from her oldest daughter. PW1 had enough opportunity to identify the appellant as she interacted with him. PW4 was also very vivid in her identification of the appellant while testifying in chief and under cross examination this was what she said:

"I saw the accused when he cut my mother's

head with a cutlass he was holding. The incident took about one and half hours, the incident was not hurriedly done … I identified the accused by his face and the shape of his head… I made statement to the Police when the robbery took place."

In the case of **Ndidi vs. The State (2007) 13 NWLR page 633 at 651** the courts are instructed on what to take into account for purpose of identification of a criminal. *See also* the cases of **The State vs. Solisu & Anor (1974) 4 NWLR page 400 at 404 405, Anyanwu vs. The State (1986) 5 NWLR (part 43) at 612, Igbi vs. The State (2000) 3 NWLR (Pt. 648) 169.**

PW4 was smart and spontaneous in her identification of the appellant three days after the robbery incident, A formal identification parade is therefore not necessary. ***See*** **Mathew Orimoloye vs. The State (1984) 10 SC page 138 at 143.** ***See also*** **Okori vs. The State (1989) 1 NWLR (Pt. 100) at 642, Ikemson vs. The State (1989) 3 NWLR (Pt. 110) at 414** and **Ibrahim vs. The State (1991) 4 NWLR (Pt. 186) P. 399 at 414.**

With the few words of mine and more particularly on the fuller reasons and conclusion arrived at by my learned brother Peter-Odili JSC, I adopt his judgment as mine and dismiss the appeal also as it lacks merit. The Concurrent Judgments of the two lower courts are hereby affirmed by me.

Clara Bata Ogunbiyi
Justice, Supreme Court

BAYANG AKA'AHS (JSC): I had a preview of the judgment of my learned brother, Peter-Odili JSC dismissing the appeal. There was overwhelming evidence by PW1, PW2 and PW4 implicating the appellant in the robbery which was carried out at No. 176 Eruwon Road, Ile-Oluko, Ijebu-Ode. PW1, a Primary School Teacher who was a victim of the robbery gave a vivid account of the robbery which occurred in broad day light at about 2pm on 11/2/2005. She recounted the ordeal she suffered in the hands of the appellant who matcheted her on the head. She recounted how the appellant removed her head scarf and used it to mask his face but she succeeded in taking off the scarf from him and thereby was able to see him clearly. Two days later while they were returning from church, PW4 who is one of her daughters sighted the appellant at Oke-Aje market in front of Iwade Community Bank and this led to the arrest of the appellant. PW4 who recognized the appellant shortly after the robbery incident gave her account of the robbery as follows:

"I remember 11/2/2005, it was a Friday at 2.00pm. My mother came to pick us at School, myself and my sister with her car. She drove the car to our house and parked the car inside the house. We packed the food stuffs my mother bought inside the house. Myself and my sister were inside the dining room and we heard the shout of our mother. Immediately, both of us went to the sitting room and we saw two boys. These two boys were armed robbers. One of them was short while the other was tall person. The short boy was holding a gun while the tall boy was holding a cutlass. The tall boy

cut my mother with the cutlass he was holding, on her head. The accused was the tall boy holding the cutlass and told us to go into our mother's room. He led us to her room. However, while we been (sic) led to our mother's room, I picked up my sister's GSM phone and while we were in our mother's room my sister told me to call my father. I called him and my sister said Ole, thief. By this time the accused was in the sitting room and we heard our mother shouting hence both of us went back to the sitting room. On getting there, we saw the accused holding the neck of our mother. While the accused was holding the neck of our mother, she removed the scarf which the accused used as a mask. It was at this stage that I was able to see his face and the shape of his head…

On the following Sunday which was 13/2/2005 while we were coming back from the Church, I saw the accused at Iwade in Oke-Aje market in Ijebu-Ode. He was eating and I told my father that one of the two boys that robbed us was the one eating. The accused was wearing the same clothes he was wearing when they came to our house on Friday. It was a short nicker with a T-shirt with red and black colour."

When PW4 was cross-examined she maintained that she saw the accused when he cut her mother's head with the cutlass he was holding and that the incident took about one and half hours. She also maintained that she identified the accused by his face and the shape of his head.

The appellant testified in person and stated that he accompanied his friend Sakiru to Luba Area where he went to collect money from a customer. While Sakiru entered

the house, he was waiting outside on the motorcycle they drove to the customer's house. After waiting for five minutes he went into the house and found Sakiru fighting with a woman and when he asked Sakiru why he had to fight with the woman before collecting his money, the woman alleged that Sakiru had wounded her on the neck and maltreated her. He advised Sakiru that he should not fight with the woman to collect his money but Sakiru did not heed the advice. He thereafter left the compound while Sakiru was still fighting with the woman.

The trial court found the appellant guilty based on the evidence of PW1 and PW4. The Court of Appeal made a concurrent finding of fact on the evidence of these two witnesses. In the Lead judgment of Fasanmi JCA she stated at page 151 of the records:

"From the evidence given, PW1 had enough opportunity to identify the appellant from the interaction she had with him. At page 68 lines 28-33 of the record, the learned trial Judge rightly held as follows:

> **"I believed her evidence more importantly as the actual person between the accused and his partner who wounded her and who went to her husband's bedroom (PW2) and remove (sic) a sum of N39,000.00 therein. Her evidence is credible and cogent. I find and hold that the accused was one of the two hoodlums that participated in the robbery attacks at PW1's residence on 11/2/2005."**

PW4 gave a more damnable evidence of identification

against the accused in her testimony before the court."

On the evidence adduced by the prosecution and the defence put up by the appellant, the lower court had this to say at page 153-154 of the record:

> **"The defence by the appellant that he followed one Sakiru to PW1's residence to collect a debt owed to him and that altercation took place between PW1 and one Sakiru who remains at large is of no moment. The offence was committed in broad daylight. PW4 said she saw his face and the shape of his head when her mother removed his mask. The time lag which the accused and the partner spent with both PW1 and PW4 was over one and half hours. She described the mode of dressing of the accused on the day of the incident and that he put on the same clothes when she identified him at Oke-Aje market. PW4 gave a vivid account of how the appellant robbed on the day in question. I find and hold that there can be no mistaken identity of the appellant by PW4."**

The two lower courts' findings of facts cannot be disturbed and the appellant has not adduced any reason for these findings to be interfered with by this court. There is clear evidence that PW1 was robbed in her residence on 11/2/2005 in broad daylight; and the appellant was identified by PW1 and PW4 as the person who matcheted PW1 on the head during the course of the robbery. There is

therefore nothing in this appeal that goes in favour of the appellant.

The appeal therefore lacks merit and it is hereby dismissed. It is on account of what I have said and the more detailed reasons contained in the judgment of my learned brother, Peter-Odili, JSC that I found no merit in the appeal. Appeal is accordingly dismissed.

AKAHALL & SONS LIMITED
AND
NIGERIA DEPOSIT INSURANCE CORPORATION
(RECEIVER/LIQUIDATOR OF ALLIED BANK OF NIGERIA PLC

SC. 302/2006

IN THE SUPREME COURT OF NIGERIA
HOLDEN AT ABUJA
FRIDAY, 20TH JANUARY, 2017

BEFORE THEIR LORDSHIPS

IBRAHIM TANKO MUHAMMAD	**JUSTICE, SUPREME COURT**
OLUKAYODE ARIWOOLA	**JUSTICE, SUPREME COURT**
KUMAI BAYANG AKAAHS	**JUSTICE, SUPREME COURT**
CHIMA CENTUS NWEZE	**JUSTICE, SUPREME COURT**
AMIRU SANUSI	**JUSTICE, SUPREME COURT**

ACTION: Undefended List Action – Rationale

ACTION: Undefended List Action – Scope and purpose

ACTION: Undefended List Action – Failure of defendant to file and deliver – Notice of intention to defend – Implication

COMPANY LAW: Procedure for proving a debt against a wound up company – Companies Winding Up Rules, 1983 – Consideration thereof

COURT: Action Undefended List Action – Non compliance with statutory provisions – Whether court can set aside its judgment

COURT: Jurisdiction – Distinction between irregularity in the exercise of jurisdiction and total lack of jurisdiction

COURT: Jurisdiction – Non-compliance with statutory provisions that stipulate pre-action notices to be given before commencement of action – Whether a jurisdictional matter

COURT: Undefended List Action – Court reopening case after Judgment – Court sitting on appeal over its decision – Impropriety of

COURT: Undefended List Action – Judgment entered thereon – Whether court can set aside its own judgment – Considerations thereof.

JUDGMENT AND ORDERS: Undefended List – Judgment – Pre-action statutory requirements violated – Whether court can set aside judgment on ground of lack of jurisdiction

JUDGMENT AND ORDERS: Undefended list – Judgment entered thereon – Nature of Judgment

PRACTICE AND PROCEDURE: Action – Undefended list – Statutory provisions not complied with in undefended action proceeding – Proper procedure to be adopted in challenging same

PRACTICE AND PROCEDURE: Undefended List Action – Rules regulating actions – Object

PRACTICE AND PROCEDURE: Undefended List Actions – Need to avoid delay tactics

PRACTICE AND PROCEDURE: Judgment in undefended list – Judgment on merit – When may be set aside – Factors to be considered.

STATUTE: Construction of statute – Bankruptcy Act – Section 32(2) and 8(b) and (c)

STATUTE: Construction of Companies and Allied Matters Act – Section 493

STATUTE: Construction – Companies winding up Rules 1983 – Imperatives

STATUTE: Construction of Nigerian Deposit Insurance Act – Section 27(1)

Issues for Determination

1. Whether the Court of Appeal was right in affirming the decision of the trial court in setting aside its judgment entered on the merits on the Undefended List (Grounds 1 and 2).
2. Whether the Court of Appeal was competent to suo motu raise and decide that service on the respondent's counsel at the High Court was improper service when the trial court had held the service was proper and the point was

not appealed on or canvassed on appeal by the parties (Ground 3).
3. Whether the Court of Appeal was right when it affirmed the decision of the trial court setting aside its judgment for want of jurisdiction to entertain the appellant's claim under the Undefended List Procedure.

Facts of The Matter

The appellant instituted an action under the Undefended List Procedure against the respondent as receiver and liquidator of Allied Bank of Nigeria Plc for monies owed it by Allied Bank of Nigeria Plc. Judgment was entered in favour of the appellant following the dismissal of the respondent's preliminary objection challenging the jurisdiction of the court to hear the matter. An appeal to the Court of Appeal, Calabar was allowed for breach of the respondent's right to fair hearing. The Court made an order for the matter to be heard de novo before a different Judge of the Federal High Court.

At the time the order for retrial was made, Akwa Ibom State had been created from Cross River State, resulting in the matter being transferred to the Uyo Division of the Federal High Court. Following the failure of the respondent to put in an appearance or file Notice of Intention to Defend, judgment was again entered against the respondent under the Undefended List. Following the judgment, the respondent brought an application for the judgment to be set aside on the ground that certain conditions precedent to instituting the action had not been complied with, as the appellant had failed to comply with Section 493 of the Companies and Allied Matters Act 1990, that subjects all claims against a wound-up company to prior proof under the Bankruptcy Act Cap. 30 Laws of the Federation of

Nigeria 1990; Section 32(3) (8)(b) and (c) of the Bankruptcy Act; the Nigerian Deposit Insurance Corporation Act, 1990 that gives the Nigerian Deposit Insurance Corporation the power to prove claims made against a failed bank and Rules 70-101 of the Companies Winding Up Rules 1983, that stipulate the procedure for proving debts against a wound-up company. After hearing the application, the learned trial Judge set aside the judgment and transferred the matter to the General Cause List. Dissatisfied with the decision the appellant appealed to the Court of Appeal, Calabar Division, which dismissed the appeal. The appellant decided to further appeal to the Supreme Court.

Held: (Unanimously allowing the appeal)

1. *The purport of companies winding-up Rules of 1983*
Under the Companies Winding Up Rules 1983, a debt is proved against a wound-up Company by delivering or sending through post to the liquidator an affidavit verifying the debt, which must contain or refer to the statement of account showing the particulars of the debt and whether the creditor is or is not a secured creditor. The liquidator has the power to examine and admit or reject every proof lodged with it. It is only when a creditor is dissatisfied with the decision by the liquidator that he can apply to the court to reverse or vary the decision. *(P 58 paras E-H)*

2. *The distinction between irregularity in the exercise of jurisdiction and total lack of jurisdiction*

Per AKAAHS (JSC):

"The non-compliance with statutory provisions that stipulate for pre-action notices to be given before the commencement of proceedings in courts are usually touted as jurisdictional matters. However, this Court in Mobil Producing (Nig.) Unlimited vs. LASEPA (2002) 18 NWLR (Pt. 798) explained the difference between alleged irregularity in the exercise of jurisdiction and total lack of jurisdiction and the incidents that attach to each. In the lead judgment by Ayoola (JSC) he explained the correct position of the law pages 31-32 as follows:

"Much stress has been placed on the argument that non- compliance with provisions such as Section 29(2) of the Act leads to a question of jurisdiction which can be raised at any time and, which, if resolved against the respondent renders the entire proceedings a nullity. This rather mechanical approach to the issue which tends to ignore the distinction between jurisdictional incompetence which is evident on the face of the proceedings and one which is dependent

on ascertainment of facts, leads to error. When the competence of the court is alleged to be affected by procedural defect in the commencement of the proceedings and the defect is not evident but is dependent on ascertainment of facts the incompetence cannot be said to arise on the face of the proceedings. The issue of facts, if properly raised by the party challenging the competence of the court, should be tried first before the court makes a pronouncement on its own competence. Where competence is presumed because there is nothing on the face of the proceedings which reveals jurisdictional incompetence of the court, it is for the party who alleges the court's incompetence to raise the issue either in his statement of defence in proceedings commenced by writ or by affidavit in cases commenced by originating summons. A judgment given in proceedings which appear ex facie regular is valid". *(Pp 59-60 paras B-E)*

3. *A Statutory defence should be raised promptly as a preliminary objection*

It is inconceivable that the respondent would rather wait until judgment is entered for the Plaintiff on the Undefended List before invoking the Companies and Allied Matters Act, the Bankruptcy Act, the Nigerian Deposit Insurance Corporation Act and the

Companies Winding Up Rules to have the judgment set aside instead of raising the issue immediately after being served with the writ of summons.
(P 62 paras D-F)

4. *The nature of undefended list Judgements*

I am in total agreement with the submission of Learned Senior Counsel for the appellant that these statutes which I mentioned a while ago do not confer jurisdiction on the trial court to sit on appeal over its judgment entered on the merits since a judgment entered in favour of the Plaintiff on the undefended list is a judgment on the merit and can be overturned only on appeal. (First Bank (Nig.) Ltd vs. Khaladu (1993) 9 NWLR (Pt. 315) 44 at 56. *(P 62 paras D-H)*

5. *The implication of the defendant's failure to file and deliver his Notice of Intention to Defend*

It was explained in First Bank (Nig.) Ltd vs. Khaladu supra at page 55 that the failure to deliver a notice of intention to defend means only one thing that is, that the defendant has no defence to the plaintiff's claim. Therefore failure to file or deliver a notice of intention to defend as provided by the rules is tantamount to an admission by the defendant of the plaintiff's claim and it is settled law that facts admitted need no proof. In the instant case since the respondent failed to file the Notice of Intention to Defend the affidavit, the appellant needs not lead evidence to prove the debt.
(Pp 62-63 paras H-B)

6. *The need for court to discourage delay tactics in undefended list actions*

As cautioned in Macaulay vs. NAL Merchant Bank Ltd (1986) 5 NWLR (Pt. 40) 216 at 223:

> **"A defendant who has no real defence to the action should not be allowed to dribble and frustrate the plaintiff and cheat him out of the judgment he is legitimately entitled to by delay tactics aimed not at offering any real defence to the action but at giving time within which he may continue to postpone meeting his obligation and indebtedness to the plaintiff. It is most inexpedient to allow a defendant who has no real defence to its action to defend for mere purpose of delay".**
> *(P 63 paras C-F)*

7. *When a court may set aside its judgment in an undefended action*

K.B. AKAAHS (JSC):

> **"Where a court makes a mistake of law in its decision, that mistake can be corrected only through appeal except where the judgment is given without jurisdiction. Mark vs. Eke (2004) 5 NWLR (Pt. 865) 54 at 77.**

In this instant appeal, it was wrong for the learned trial Judge to set aside her judgment under the Undefended List and for the Court of Appeal to

affirm that decision. The trial court had become functus officio and should have declined setting aside the judgment entered on the undefended list.

I, entirely, agree with His Lordship that a judgment entered in favour of a plaintiff on the Undefended List is a judgment on the merits and not a judgment entered in default, [Mark and Anor. vs. Eke (2004) LPELR 1841 (SC) 23, D F].

As such, the trial court cannot set it aside; U.A.C. (Technical) Ltd. vs. Anglo Canadian Cement Ltd. (1966) NMLR 349; Bank of the North Ltd. vs. Intra Bank S.A. (1969) 1 ANLR 91"].
(Pp 63-64; 65 paras G-A, H; A-B)

8. *It is not proper for a court to re-open undefended list action after judgment*

A contrary approach (that is, to permit the trial court to re-open such a case) would amount to a usurpation of the exclusive prerogative of the appellate court which is the only court empowered to set it aside on appeal. The only alternative method of tampering with such a judgment on the merits would be by yet another action in the case of allegation of fraud, [U.T.C. Nig. Ltd. vs. Pamotei (1989) 3 SCNJ 79, 124; (1989) 2 NWLR (Pt. 103) 244; (1989) LPELR 3276 (SC)]. *(P 65 paras B-D)*

[The nature and purpose of undefended list actions

This court in Wema Securities and Finance Plc vs. NAIC (2015) 24833 (SC) 67 – 70, E-C, explained, per Nweze, (JSC), that:

…The Undefended List procedure is a truncated form of the civil litigation process peculiar to the adversarial judicial system. Under the said procedure, ordinary hearing is rendered unnecessary due, in the main, to the absence of an issue to be tried, [UBA and Anor vs. Jargaba (2007) LPELR - 3399 (SC) 27; Agwuneme vs. Eze (1990) 3 NWLR (Pt. 137) 242].

Essentially, therefore, it is designed to secure quick justice and to avoid the injustice likely to occur when there is no genuine defence on the merits to the plaintiff's case, (International Bank for West Africa Limited vs. Unakalamba (1998) 9 NWLR (Pt. 565) 245.

It is, usually, meant to shorten the hearing of a suit where the claim is for a liquidated sum, (Co-operative and Commerce Bank (Nigeria) Plc vs. Samed Investment Company Limited (2000) 4 NWLR (Pt. 651) 19). *(Pp 65-66 paras D-B)*

9. The object of the rules relating to undefended list actions

Put differently, the object of the rules relating to actions on the undefended list is to ensure quick dispatch of certain types of cases, such as those involving debts or liquidated money claims, [Bank of the North vs. Intra Bank SA (1969) 1 All NLR 91; Bendel Construction Co. Ltd. vs. Anglo Development Co. (Nigeria) Ltd (1972) All NLR (Pt. 1) 153 Olubusola vs. Standard Bank (1975) 1 ALL NLR (Pt. 1) 125; N. M. C. B. (Nig.) Ltd vs. Obi (2010) LPELR

2051 (26) 26],

Which are, virtually, uncontested, Ataguba and Co. vs. Gura Nig. Ltd (2005) LPELR 584 (SC) 16 17; Macaulay vs. NAL Merchant Bank Ltd. (1990) 4 NWLR (Pt. 144) 283 at 324-325; Nwankwo and Anor. vs. EDCS UA (2007) LPELR 2108 (SC) 46; Bank of the North vs. Intra Bank S.A. (1969) 1 All NLR 91; Ataguba & Co. vs. Gura (Nig.) Ltd. (2005) 8 NWLR (Pt. 927) 429; (2005) 2 SCNJ, 139, 157; (2005) 2 S.C (Pt. 1) 101;].

Such rules are, thus, designed to relieve the courts of the rigours of pleadings and burden of hearing tedious evidence on sham defences mounted by defendants who are just determined to dribble and cheat plaintiffs out of reliefs they are normally entitled to, because the case is, patently, clear and unassailable, [Cow vs. Casey (1949) 1 K.B. 482; Sodipo vs. Leminkainen and Ors. (1986) NWLR (Pt. 15) 220; UBA and Anor. vs. Jargaba (2007) LPELR 3399 (SC) 24; Obaro vs. Hassan (2013) LPELR 20089 (SC); Planwel Watershed Ltd. vs. Ogala (2003) 18 NWLR (Pt. 852) 478; (2003) 12 SCNJ 58, 68].
(Pp 66-67 paras B-A)

Nigerian Cases Referred to in The Judgment

Adebisi Macgregor Ass. Ltd vs. N.M.B. Ltd (1996) 2 NWLR (Pt. 43) 378; (1996) 2 SCNJ 72,
Agwuneme vs. Eze (1990) 3 NWLR (Pt. 137) 242;
Ataguba & Co. vs. Gura (Nig.) Ltd. (2005) 8 NWLR (Pt. 927) 429 (2005) 2 SCNJ, 139, 157; (2005) 2 S.C (Pt. 1) 101;
Ataguba and Co. vs. Gura Nig. Ltd (2005) LPELR 584 (SC) 16 17;

Bank of the North Ltd. vs. Intra Bank S.A. (1969) 1 ANLR 91;
Ben Thomas Hotel vs. Sebi Furniture Co. Ltd (1989) 5 NWLR (Pt. 123) 523;
Bendel Construction Co. Ltd. vs. Anglo Development Co. (Nigeria) Ltd (1972) All NLR (Pt. 1) 153;
Co-operative and Commerce Bank (Nigeria) Plc vs. Samed Investment Company Limited (2000) 4 NWLR (Pt. 651) 19;
First Bank (Nig.) Ltd vs. Khaladu (1993) 9 NWLR (Pt. 315) 44;
Intercontinental Bank Ltd vs. Brifina Ltd (2012) 13 NWLR (Pt. 1316) 1;
International Bank for West Africa Limited vs. Unakalamba (1998) 9 NWLR (Pt. 565) 245;
Macaulay vs. NAL Merchant Bank Ltd (1986) 5 NWLR (Pt. 40) 216;
Macaulay vs. NAL Merchant Bank Ltd. (1990) 4 NWLR (Pt. 144) 283;
Mark and Anor. vs. Eke (2004) LPELR 1841 (SC) 23, ;
Mark vs. Eke (2004) 5 NWLR (Pt. 865) 54;
Mobil Producing (Nig.) Unlimited vs. LASEPA (2002) 18 NWLR (Pt. 798);
N. M. C. B. (Nig.) Ltd vs. Obi (2010) LPELR 2051 (26) 26;
Nwankwo and Anor. vs. EDCS UA (2007) LPELR 2108 (SC) 46;
Obaro vs. Hassan (2013) LPELR 20089 (SC);
Obioha vs. Ibero (1994) 1 NWLR (Pt. 322) 503;
Olubusola vs. Standard Bank (1975) 1 ALL NLR (Pt. 1) 125;
Planwel Ltd vs. Ogala (2003) 18 NWLR (Pt. 852) 478; (2003) 12 SCNJ 58,;
Sodipo vs. Leminkainen (1986) 1 NWLR (Pt. 15) 220;
U.A.C. (Technical) Ltd. vs. Anglo Canadian Cement Ltd. (1966) NMLR 349;

U.T.C. Nig. Ltd. vs. Pamotel (1989) 3 SCNJ 79, 124; (1989) 2 NWLR (Pt. 103) 244; (1989) LPELR 3276 (SC);
UBA and Anor vs. Jargaba (2007) LPELR - 3399 (SC) 27;
Umunna vs. Okwuraiwe (1978) 6-7 SC 1 at 11;
Wema Securities and Finance Plc vs. NAIC (2015) 24833 (SC) 67 70, .

Foreign Cases Referred to in The Judgment
Cow vs. Casey (1949) 1 K.B. 482

Nigerian Statutes in This Judgment
Bankruptcy Act Cap 30 LFN 1990 – S. 32(3) 8 (b) and (c)
Companies and Allied Matter Act 1990 – S.493.
Companies Winding Up Rules 1983 Rules 70 101
Federal High Court (Civil Procedure) Rules, 2000 Or. 24 Rule 4
High Court (Civil Procedure Rules) 1988 of Anambra State Or. 24 Rule 9(5).
Nigerian Deposit Insurance Corporation Acjt 1990 S.27(1)

Representations
Chief Chris Uche (SAN) *appearing with* **Dr. Effiong Esu, James Odiba, Emmanuel Okorie, Uzoma Nwosu-Iheme, Isaac Nwachukwu, Adobi Eziokwu (Mrs.), Emike Imuekheme (Miss), Angel Uche (Miss), Moses Udoh, James Ebbi, Francis Nsiegbunam and Chiamaka Agu *(Miss) for the Appellant.***
Ikani Agabi appearing *with* Nzube Ezidi *for Respondent.*

BAYANG AKAAHS (JSC) (Delivering the Lead Judgment):

The appellant instituted an action under the Undefended List Procedure against the respondent as receiver and liquidator of Allied Bank of Nigeria Plc for monies owed it by Allied Bank of Nigeria Plc. Judgment was entered in favour of the appellant following the dismissal of the respondent's preliminary objection challenging the jurisdiction of the court to hear the matter. An appeal to the Court of Appeal, Calabar was allowed for breach of the respondent's right to fair hearing. The Court made an order for the matter to be heard de novo before a different Judge of the Federal High Court.

At the time the order for retrial was made, Akwa Ibom State had been created from Cross River State, resulting in the matter being transferred to the Uyo Division of the Federal High Court. Following the failure of the respondent to put in an appearance or file Notice of Intention to Defend, judgment was again entered against the respondent under the Undefended List. Following the judgment, the respondent brought an application for the judgment to be set aside on the ground that certain conditions precedent to instituting the action had not been complied with, as the appellant had failed to comply with Section 493 of the Companies and Allied Matters Act 1990, that subjects all claims against a wound-up company to prior proof under the Bankruptcy Act Cap. 30 Laws of the Federation of Nigeria 1990; Section 32(3) (8)(b) and (c) of the Bankruptcy Act; the Nigerian Deposit Insurance Corporation Act, 1990 that gives the Nigerian Deposit Insurance Corporation the power to prove claims made

against a failed bank and Rules 70-101 of the Companies Winding Up Rules 1983, that stipulate the procedure for proving debts against a wound-up company. After hearing the application, the learned trial Judge set aside the judgment and transferred the matter to the general cause list. Dissatisfied with the decision, the appellant appealed to the Court of Appeal, Calabar Division which dismissed the appeal. The appellant decided to further appeal to the Supreme Court. The Notice of Appeal filed on 25/9/2006 contained three grounds from which the following two issues were formulated:

4. Whether the Court of Appeal was right in affirming the decision of the trial court in setting aside its judgment entered on the merits on the Undefended List (Grounds 1 and 2).
5. Whether the Court of Appeal was competent to *suo motu* raise and decide that service on the respondent's counsel at the High Court was improper service when the trial court had held the service was proper and the point was not appealed on or canvassed on appeal by the parties (Ground 3).

The respondent submitted a sole issue for determination which is:

Whether the Court of Appeal was right when it affirmed the decision of the trial court setting aside its judgment for want of jurisdiction to entertain the appellant's claim under the Undefended List Procedure.

The crux of this appeal is centred on issue 1. In the lower court's judgment at page 449 Ngwuta (JCA) (as he then was) held that the non-compliance with the provisions of the legislations cited prior to the institution of the suit rendered the suit incompetent and robbed the trial court of jurisdiction to hear it.

Learned senior counsel for the appellant conceded in paragraph 4.05 that where any kind of decision of any court was reached without jurisdiction or is a nullity, that court has inherent jurisdiction to set it aside. He however, submitted that no such case was made out to warrant the Court of Appeal affirming the setting aside of the judgment of the trial court as it was given on the merit since it was a judgment on the Undefended List. He argued that the non application of purportedly applicable laws by a court in the determination of a case is not a matter of jurisdiction. He also contended that the non advertence to purportedly applicable laws does not confer jurisdiction on a trial court to sit on appeal over its judgment entered on the merits and that what the two lower courts did in this case is an affront to the system of appellate justice in Nigeria. It is the learned senior counsel's further contention that the fact that a court may have made a mistake of law in its decision does not give it the power to sit on appeal over its decision so as to correct the error. He relied on the pronouncements of **Obaseki (JSC) and Othman Mohammed (JSC) in Umunna vs. Okwuraiwe (1978) 6-7 SC 1 at 11** and **Obioha vs. Ibero (1994) 1 NWLR (Pt. 322) 503 at 532** respectively. He referred to the cases of **Mark vs. Eke (2004) 5 NWLR (Pt. 865) 54 at 77** and **Ben Thomas Hotel vs. Sebi Furniture Co. Ltd (1989) 5 NWLR (Pt. 123) 523**

and submitted that what would justify a trial court setting aside its own judgment is if there is absence of service or if the Rules of that court provide for it.

In its consideration of the arguments by Counsel for the appellant and respondent on the validity or nullity of the judgment delivered by the trial court on 29/7/ 2004 the lower court stated at pages 447-448 of the records:

> **"Appellant's contention is hinged on the fact that a judgment on the undefended list is a judgment on the merit and that the judgment on merit cannot be said to be null and void since Court of Appeal had determined that the suit is competent. On the other hand the crux of the respondent's case is that compliance with the provisions of Section 493 of the Companies and Allied Matters Act 1990 which subject claims against a wound-up company to prior proof under section 32(3), Section 32(8)(b) and (c) of the Bankruptcy Act Cap. 30 Laws of the Federation of Nigeria 1990 and Section 27(1) of the Nigeria Deposit Insurance Act 1990 as well as Rules 70-101 of the Company Winding-Up Rules 1983 stipulating procedure for proving debts against a wound up company were not complied with".**

The lower court in considering the arguments reproduced above went on to hold that non-compliance with the provisions of the Acts referred to above would deprive the

trial court of jurisdiction to determine the appellant's claim and placed reliance on the case of In re: **Mbamalu (2002) FWLR (Pt. 85) 946; (2001) 18 NWLR (Pt. 744) 143.**

Section 493 of the Companies and Allied Matter Act provides as follows:

"493 in the winding up of an insolvent company registered in Nigeria the same rules shall prevail and be observed with regard to the respective rights of secured and unsecured creditors and to debts provable and to the valuation of annuities and future and contingent liabilities as are in force for the time being under the law of bankruptcy in Nigeria with respect to the estates of persons adjudged bankrupt, and all persons who in any such case would be entitled to prove for and receive dividends out of the assets of the company may come in under the winding up and make such claims against the company as they respectively are entitled to by virtue of this section".

Section 32(2) and (8)(b) and (c) of the Bankruptcy Act stipulates:

"32(2) A person having notice of any act of bankruptcy against the debtor shall not prove in bankruptcy for any debt or liability contracted by the debtor subsequently to the date of his

so having the notice.

(8) For the purposes of this Act, "liability" includes:

(b) any obligation or possibility of an obligation to pay money or money's worth, on the breach of any express or implied covenant, contract, agreement or undertaking, whether the breach does or does not occur, or is not likely to occur or capable of occurring, before the discharge of the debtor;

(c) generally, any express or implied engagement, agreement or undertaking to pay or capable of resulting in the payment of money or money's worth, whether the payment is, as respects amounts, fixed or unliquidated, as respects time, present or future, certain or dependent on any one contingency or on two or more contingencies, or as, to mode of valuation, capable of being ascertained by fixed rules or as matter of opinion".

And Section 27(1) of the Nigerian Deposit Insurance Corporation reads as follows:

"27(1) Where an insured bank fails on account of inability to meet the demands of its depositors, payment of the insured deposit in such bank shall be made by the Corporation

as soon as possible either:

(a) By cash; or

(b) By making available to each deposit or a transferred deposit in a new bank in the same area, or in another insured bank in an amount equal to the insured deposit of such depositors:

Provided that:

(i) Where the corporation is liable to make payment in pursuance of this section it shall at its discretion require proof of claim from all depositors with the insured bank; and

(ii) Where the corporation is not satisfied as to the validity of a claim for an insured deposit, it may require the final determination by a court of competent jurisdiction before paying such claim".

Under the Companies Winding Up Rules 1983, a debt is proved against a wound-up Company by delivering or sending through post to the liquidator an affidavit verifying the debt, which must contain or refer to the statement of account showing the particulars of the debt and whether the creditor is or is not a secured creditor. The liquidator has the power to examine and admit or reject every proof lodged with it. It is only when a creditor is dissatisfied with the decision by the liquidator that he can apply to the court to reverse or vary the decision.

As argued by learned senior counsel for the appellant, the provisions stated above have to do with the procedure and manner of proof of debt and they are defences that could have been proffered by the respondent on the undefended list in order to have the matter transferred to the general cause list. The non-compliance with statutory provisions that stipulate for pre-action notices to be given before the commencement of proceedings in courts are usually touted as jurisdictional matters. However, this Court in **Mobil Producing (Nig.) Unlimited vs. LASEPA (2002) 18 NWLR (Pt. 798)** explained the difference between alleged irregularity in the exercise of jurisdiction and total lack of jurisdiction and the incidents that attach to each. In the lead judgment by Ayoola JSC he explained the correct position of the law at pages 31-32 as follows:

"Much stress has been placed on the argument that non- compliance with provisions such as Section 29(2) of the Act (Federal Environmental Protection Agency Act) leads to a question of jurisdiction which can be raised at any time and which if resolved against the respondent renders the entire proceedings a nullity. This rather mechanical approach to the issue which tends to ignore the distinction between jurisdictional incompetence which is evident on the face of the proceedings and one which is dependent on ascertainment of facts, leads to error ..... when the competence of the court is alleged to be affected by procedural defect

in the commencement of the proceedings and the defect is not evident but is dependent on ascertainment of facts the incompetence cannot be said to arise on the face of the proceedings. The issue of facts if properly raised by the party challenging the competence of the court should be tried first before the court makes a pronouncement on its own competence. Where competence is presumed because there is nothing on the face of the proceedings which reveals jurisdictional incompetence of the court, it is for the party who alleges the court's incompetence to raise the issue either in his statement of defence in proceedings commenced by writ or by affidavit in cases commenced by Originating Summons. A judgment given in proceedings which appear ex facie regular is valid".

It is rather surprising that the respondent whose appeal to the Court of Appeal was allowed and the suit sent back to the Federal High Court for retrial did not seize the opportunity to defend the action. And so on 29/7/2004, the learned trial Judge, Olotu J. in her judgment traced the history of the case and made her findings before entering judgment in the Undefended List at page 337 of the records as follows:

"The case first came up in this court after its sojourn to the Court of Appeal on 26/1/2004

and I ordered hearing notice to be served on the defendant following the plaintiff's application that the court should enter judgment in its favour. From the records of the court, the defendant was duly served with the hearing notice vide its Solicitors, Kanu G. Agabi & Associates on 28/1/2004. When the case was called again on 27/7/2004, the Plaintiff's (sic) repeated his application that judgment should be entered in its favour as per its claim under Order 24 Rule 4 Federal High Court (Civil Procedure) Rules 2000 since the defendants have not filed any notice of intention to defend.

I confirm from the records of the court that the defendant has not filed any notice of defence as prescribed by Order 24 Rule 3(1) therefore this suit will be heard as undefended suit in as prescribed under Order 24 Rule 4 and I hereby enter judgment for the plaintiff as per its claim in paragraphs 1 and 2 and then in paragraph 3 subject to the following:

1. **21% interest on the total sum from 7th August 1998 until the date of this judgment.**
2. **10% post judgment interest on the judgment debt from the date of this judgment until same is fully liquidated".**

It is to be noted that the Nigerian Deposit Insurance Corporation was already the Receiver/Liquidator of Allied Bank of Nigeria Plc when the action was filed and before the Court of Appeal made the order for retrial. This Court

per Mukhtar JSC (as she then was) expressed the view in **Intercontinental Bank Ltd vs. Brifina Ltd (2012) 13 NWLR (Pt. 1316) 1 at 21** that:

> **"…. when one considers the issue of receivership raised in the conditional memorandum of appearance, one will really see that a triable issue is manifested therein, and in the circumstances, the suit should have been transferred to the general cause list by virtue of Order 24 Rule 9(5) of the High Court of Anambra State (Civil Procedure) Rules, 1988".**

It is inconceivable that the respondent would rather wait until judgment is entered for the plaintiff on the Undefended List before invoking the Companies and Allied Matters Act, the Bankruptcy Act, the Nigerian Deposit Insurance Corporation Act and the Companies Winding Up Rules to have the judgment set aside instead of raising the issue immediately after being served with the writ of summons.

I am in total agreement with the submission of learned senior counsel for the appellant that these statutes which I mentioned a while ago do not confer jurisdiction on the trial court to sit on appeal over its judgment entered on the merits since a judgment entered in favour of the plaintiff on the undefended list is a judgment on the merit and can be overturned only on appeal. See: **First Bank (Nig.) Ltd vs. Khaladu (1993) 9 NWLR (Pt. 315) 44 at 56**. It was explained in First Bank (Nig.) Ltd vs. Khaladu supra at page 55 that the failure to deliver a notice of intention to defend

means only one thing that is, that the defendant has no defence to the plaintiff's claim. Therefore failure to file or deliver a notice of intention to defend as provided by the rules is tantamount to an admission by the defendant of the plaintiff's claim and it is settled law that facts admitted need no proof. In the instant case since the respondent failed to file the notice of intention to defend the affidavit, the appellant need not lead evidence to prove the debt.

As cautioned in **Macaulay vs. NAL Merchant Bank Ltd (1986) 5 NWLR (Pt. 40) 216 at 223**:

> **"A defendant who has no real defence to the action should not be allowed to dribble and frustrate the plaintiff and cheat him out of the judgment he is legitimately entitled to by delay tactics aimed not at offering any real defence to the action but at giving time within which he may continue to postpone meeting his obligation and indebtedness to the plaintiff. It is most in-expedient to allow a defendant who has no real defence to its action to defend for mere purpose of delay".**

Where a court makes a mistake of law in its decision, that mistake can be corrected only through appeal except where the judgment is given without jurisdiction. See: **Mark vs. Eke (2004) 5 NWLR (Pt. 865) 54 at 77**. In this instant appeal, it was wrong for the learned trial Judge to set aside her judgment under the Undefended List and for the Court of Appeal to affirm that decision. The trial court had become functus officio and should have declined setting

aside the judgment entered on the undefended list.

I find that the appeal has merit and it is accordingly allowed. The order by the Court of Appeal affirming the setting aside of the judgment entered on the undefended list is set aside while the judgment of the trial court entered in favour of the plaintiff on the undefended list is restored. Appeal is allowed.

K. B. AKA'AHS
Justice, Supreme Court

OLU ARIWOOLA, (JSC): I read before now, the judgment just delivered by my learned brother, Aka'ahs, JSC. I agree with him that the appeal should be allowed. I allow the appeal and abide by consequential orders made in the lead judgment.

I. T. MUHAMMAD, (JSC): I have had the preview of the draft of the lead judgment just delivered by my learned brother, **Aka'ahs, (JSC)**. I am in agreement with the reasoning that led to the conclusion that the appeal has merit and should be allowed. It is hereby allowed by me.

I abide by the consequential orders in the said lead judgment including the order on costs.

Olu Ariwoola
Justice, Supreme Court

CENTUS NWEZE (JSC): My Lord, Aka'ahs, (JSC), obliged me with the draft of the lead judgment just delivered now. I, entirely, agree with His Lordship that a judgment entered in favour of a plaintiff on the Undefended List is a judgment on the merits and not a judgment entered

in default, **Mark and Anor. vs. Eke (2004) LPELR 1841 (SC) 23, D F. As such, the trial court cannot set it aside; U.A.C. (Technical) Ltd. vs. Anglo Canadian Cement Ltd. (1966) NMLR 349; Bank of the North Ltd. vs. Intra Bank S.A. (1969) 1 ANLR 91.**

A contrary approach (that is, to permit the trial court to re-open such a case) would amount to a usurpation of the exclusive prerogative of the appellate court which is the only court empowered to set it aside on appeal. The only alternative method of tampering with such a judgment on the merits would be by yet another action in the case of allegation of fraud, **U.T.C. Nig. Ltd. vs. Pamotei (1989) 3 SCNJ 79, 124; (1989) 2 NWLR (Pt. 103) 244; (1989) LPELR 3276 (SC).**

Enunciating the rationale for this prescription, this court in **Wema Securities and Finance Plc vs. NAIC (2015) 24833 (SC) 67 – 70, E-C**, explained (per Nweze, JSC) that:

> **…the Undefended List procedure is a truncated form of the civil litigation process peculiar to the adversarial judicial system. Under the said procedure, ordinary hearing is rendered unnecessary due, in the main, to the absence of an issue to be tried, UBA and Anor vs. Jargaba (2007) LPELR - 3399 (SC) 27; Agwuneme vs. Eze (1990) 3 NWLR (Pt. 137) 242. Essentially, therefore, it is designed to secure quick justice and to avoid the injustice likely to occur when there is no genuine defence on the merits to the plaintiff's case, International Bank for West**

Africa Limited vs. Unakalamba (1998) 9 NWLR (Pt. 565) 245.

It is, usually, meant to shorten the hearing of a suit where the claim is for a liquidated sum, **Co-operative and Commerce Bank (Nigeria) Plc vs. Samed Investment Company Limited (2000) 4 NWLR (Pt. 651) 19**.

Put differently, the object of the rules relating to actions on the undefended list is to ensure quick dispatch of certain types of cases, such as those involving debts or liquidated money claims, **Bank of the North vs. Intra Bank SA (1969) 1 All NLR 91; Bendel Construction Co. Ltd. vs. Anglo Development Co. (Nigeria) Ltd (1972) All NLR (Pt. 1) 153 Olubusola vs. Standard Bank (1975) 1 ALL NLR (Pt. 1) 125; N. M. C. B. (Nig.) Ltd vs. Obi (2010) LPELR 2051 (26) 26, which are, virtually, uncontested, Ataguba and Co. vs. Gura Nig. Ltd (2005) LPELR 584 (SC) 16 17; Macaulay vs. NAL Merchant Bank Ltd. (1990) 4 NWLR (Pt. 144) 283 at 324-325; Nwankwo and Anor. vs. EDCS UA (2007) LPELR 2108 (SC) 46; Bank of the North vs. Intra Bank S.A. (1969) 1 All NLR 91; Ataguba & Co. vs. Gura (Nig.) Ltd. (2005) 8 NWLR (Pt. 927) 429; (2005) 2 SCNJ, 139, 157; (2005) 2 S.C (Pt. 1) 101**;

Such rules are, thus, designed to relieve the courts of the rigour of pleadings and burden of hearing tedious evidence on sham defences mounted by defendants who are just determined to dribble and cheat plaintiffs out of reliefs they are normally entitled to because the case is, patently, clear and unassailable, **Cow vs. Casey (1949) 1 K.B. 482; Sodipo vs. Leminkainen and Ors. (1986) NWLR (Pt. 15)**

220; UBA and Anor. vs. Jargaba (2007) LPELR 3399 (SC) 24; Obaro vs. Hassan (2013) LPELR 20089 (SC); Planwel Ltd vs. Ogala (2003) 18 NWLR (Pt. 852) 478; (2003) 12 SCNJ 58, 68. In such a case, it would be inexpedient to allow a defendant to defend for the mere purpose of delay**, Sodipo vs. Leminkainen (1986) 1 NWLR (Pt. 15) 220; Adebisi Macgregor Ass. Ltd vs. N.M.B. Ltd (1996) 2 NWLR (Pt. 43) 378; (1996) 2 SCNJ 72, 81**.

See also, C. C. Nweze, *Law and Procedure in Suits on the Undefended List* (Enugu: Hamson Publishers, 1998) 45.

It is for these, and the more detailed, reasons in the leading judgment that I, too, shall enter an order allowing this appeal. Appeal allowed. I abide by the consequential orders in the leading judgment.

Chima Centus Nweze
Justice, Supreme Court

AMIRU SANUSI, (JSC): I had the advantage of reading the draft copy of the judgment prepared by my learned brother Akaahs JSC just delivered. His lordship took pains to thoroughly consider the issues canvassed by learned counsel to the parties in this appeal before he advanced his reasons and arriving at the conclusion that this appeal has merit which I entirely agree with the appeal is accordingly allowed by me.

I make no order on costs.

Amiru Sanusi
Justice, Supreme Court

BBS CONSTRUCTION & ENGINEERING CO. LTD
AND
FEDERAL CAPITAL DEVELOPMENT AUTHORITY

SC. 293/2011

IN THE SUPREME COURT OF NIGERIA
HOLDEN AT ABUJA
FRIDAY, 27TH JANUARY 2017

BEFORE THEIR LORDSHIPS

WALTER S. NKANU ONNOGHEN	**ACTING CHIEF JUSTICE OF NIGERIA**
MARY UKAEGO PETER-ODILI	**JUSTICE, SUPREME COURT**
KUMAI BAYANG AKAAHS	**JUSTICE, SUPREME COURT**
KUDIRAT M. O. KEKERE-EKUN	**JUSTICE, SUPREME COURT**
AMIRU SANUSI	**JUSTICE, SUPREME COURT**

CONTRACT: Bindingness of contract on parties

CONTRACT: Bindingness of Memorandum of Understanding – Whether it is enforceable

CONTRACT: Formation of contract – How to establish that parties formed a contract

CONTRACT: Implication of signing of Memorandum of Understanding – Whether parties are precluded from entering into negotiations with a third party on the same subject matter

CONTRACT: Legal status of a contract which is subject to the fulfilment of certain terms and conditions - Considerations thereof.

CONTRACT: Legal status of Memorandum of Understanding – Consideration thereof

CONTRACT: Nature and meaning of invitation to treat

CONTRACT: Nature of a valid and enforceable contract

CONTRACT: Purpose of Memorandum of Understanding

CONTRACT: Terms of a Memorandum of Understanding – Whether binding on parties thereto

CONTRACT: What constitute basic elements of a contract?

CONTRACT: Where Memorandum of Understanding is made subject to the signing of a formal agreement – Implications

EQUITY: Principles of estoppel by conduct – Considerations thereof.

EQUITY: The purpose of principle of promissory estoppel

EVIDENCE: Estoppel by conduct – Section 169 of Evidence Act – Scope and Import

EVIDENCE: Promissory estoppels – What are the essential

requirements for its operation – Consideration thereof.

WORDS AND PHRASES: "Memorandum of Understanding" – Meaning

WORDS AND PHRASES: "Shall" – How interpreted

Issues for Determination

1. Whether the Court of Appeal's definition and application of the import and meaning of "memorandum" simpliciter in determining the contractual relationship between the parties instead of the definition and the application of the import of Memorandum of understanding which is the case presented by the appellant is not a misapprehension or misconception of the appellant's case which has occasioned a miscarriage of justice against the appellant (Ground 1)

2. Whether the court below was right in holding that there was no valid and enforceable contract between the appellant and the respondent pursuant to Exhibit P5, thus reversing the decision of the learned trial Chief Judge which held that there was binding contract between the appellant and the respondent having regard to the mandatory provisions contained in Exhibit P5 the use of the words "subject to contract notwithstanding.

3. Whether the court below was right in failing to consider the promissory estoppel and estoppel by conduct arising from the promises, assurance and representations made by the respondent to the appellant which the appellant

believed and acted upon to its detriment before the court below relied solely on Exhibit P5 to come to the conclusion that there was no binding contract between the appellant and the respondent and whether the non consideration thereof has occasioned a miscarriage of justice. (Ground 4).

4. Whether the Court of Appeal was right when in reversing the decision of the learned trial Judge which held that there was a binding contract between the appellant and the respondent on the ground that the trial Chief Judge did not verify whether there is in existence a valid contract, (Ground 3)

5. Whether the court below was right when it held that the failure of the respondent to lead evidence at the trial is irrelevant and immaterial since the appellant can only succeed on the strength of its own case and not on the weakness of the respondent's case.

6. Whether the court below was right in failing to consider the appellant's issues No. 1 and 2 which border on the relief of specific performance which is the crux of the appellant's appeal and issues Nos. 3, 4 and 5 of the appellant's issues for determination before them, describing them as academic exercise and whether the non consideration of those issues by the court has not occasioned a miscarriage of justice and a denial of the appellant's right to fair hearing (Ground 6)

7. Whether the Court of Appeal was right in holding that the appellant was not entitled to damages in respect of the

expenses it incurred pursuant to the MOU and to the promises, assurances and representations made by the respondent to the appellant on the ground that the expenses incurred were based on a frolic of its own. (Ground 5)

8. Whether the appellant's right of fair hearing was not breached when the court below failed to consider issues raised by the appellant/cross respondent in answer to the respondent/cross appellant's cross appeal before it came to the conclusion that there was no contract between the parties. (Ground 9)

9. Whether the Court of Appeal was right in holding that there was no basis for the award of specific performance in favour of the appellant.

Facts of The Matter

The plaintiff/appellant, a company registered in Nigeria, carries on the business of civil, mechanical and electrical engineering and construction work. The defendant/ respondent is the statutory body responsible for the orderly development and administration of the FCT. The plaintiff approached the defendant with a proposal for the provision of infrastructural facilities at Mabushi and Katampe Districts of the FCT. At a meeting held on 6th July 2004 between the parties, the plaintiff's proposal was approved. A memorandum of understanding (MOU) was drawn up and signed by the parties on 13th July 2004 (Exhibit P5). The MOU was subject to the signing of a formal agreement by the parties. By the agreement, the plaintiff, as infrastructural developer, would raise funds for the project. It would recoup its costs from the collection of development levies

payable by allotees of plots and from the sale of vacant plots in the two districts. By the terms of the MOU, the defendant was to provide the plaintiff with the engineering design drawings and bill of quantities (BOQ) and any other documents that would enable the plaintiff complete its cost analysis of the project. The MOU also provided that within 14 days of its execution, the parties shall enter into a formal agreement on terms to be mutually agreed between the parties. It was also agreed that all documents, materials, discussions, etc would be treated with the utmost confidentiality and neither party to the MOU shall disclose any information to a third party.

In compliance with the MOU, the defendant submitted the required documents to the plaintiff. The plaintiff in return, submitted its infrastructural Development Agreement to the defendant for execution, as well as evidence of its financial capacity to execute the contract. However, notwithstanding repeated reminders, the respondent refused to sign the agreement. Meanwhile, the plaintiff had proceeded to incur costs in terms of manpower and resources in the execution of the project. As a result of the defendant's failure to sign the formal agreement, the plaintiff instituted an action before the trial High Court vide a writ of summons and statement of claim seeking the following reliefs:

a. A DECLARATION that in compliance with the terms of the said MOU of 13th July 2005 executed by the parties, the defendant is duty bound to enter into a formal agreement with the plaintiff for the provision of infrastructural facilities in Mabushi and Katampe Districts of the Federal Capital Territory, Abuja.

b. AN ORDER for the defendant to execute forthwith or within such a time as may be stipulated by this

Honourable Court, a formal agreement with the plaintiff in respect of the said project.

c. AN ORDER for the defendant to deliver and finally assign all the parcels of land lying within Mabushi and Katampe Districts of the Federal Capital Territory, Abuja to the plaintiff for the purpose of providing the said infrastructural facilities.

d. AN ORDER for the defendant to pay the sum of N3, 875, 284, 858.29 being the cumulative monetary value of the efforts, services and work-input which the plaintiff has already committed to the said project pursuant to the MOU, subsequent assurance and representations of the defendant from 2004-2008

At the conclusion of the trial, the learned trial Chief Judge gave judgment to the plaintiff (part of its claims)

The plaintiff was dissatisfied with the judgment and filed an appeal against it at the court below. The defendant was also dissatisfied with an aspect of the judgment and accordingly filed a Notice of Cross Appeal.

In a considered judgment, the lower court dismissed the main appeal and allowed the cross appeal. In consequence, the plaintiff/appellant has appealed to the Supreme Court.

Held: *(Unanimously dismissing the appeal)*

1. What constitutes a valid contract?

This Court in a recent decision in: Bilante International Ltd. vs. N.D.I.C. (2011) 15 NWLR (Pt.1270). 407 at 423 C - F, restated the position of the law regarding what constitutes a valid and

enforceable contract thus:

> **"Contract is defined as an agreement between two or more persons which creates an obligation to do or not to do a particular thing. Its essentials are competent parties/subject matter, a legal consideration/mutuality of agreement and mutuality of obligation. [Lemoureu vs. Burrillville Racing Ass'n 91 R. 194, 161 A. 2d 213, 215].** *(Pp 97-98 paras G-B)*

2. When parties are said to have made a binding contract

To constitute a binding contract between parties/ there must be a meeting of the minds often referred to as consensus ad idem. The mutual consent relates to offer and acceptance. An offer is the expression by a party of readiness to contract on the terms specified by him/ which/ if accepted by the offeree gives rise to a binding contract. The offer matures to a contract where the offeree signifies a clear and unequivocal intention to accept the offer. (Okulule & Anor. vs. Oyagbola & Ors (1990) **4** ***NWLR (Pt.147) 723).*** *(P 98 paras C-F)*

3. How to establish that parties have formed a contract

It should be reiterated that in order to establish that parties have formed a contract, there must be evidence of consensus ad idem between them. Then if there is a stipulated mode for acceptance of the offer, the offeree has a duty to comply with same. (Afolabi vs. Polymera Industries Ltd. **(1967) 1** ***All NLR*** **144/ (1967)** ***SCNLR*** **256.)** *(P 98 paras F-H)*

4. *The basic elements of a contract*
The basic elements of a binding contract are therefore offer, acceptance, consideration, capacity to contract and intention to create a legal relationship. (Dangote Gen. Textile Products Ltd. & Ors. vs. Hascon Associates Nig. Ltd. & Anor. (2013)12_SCNJ_456: Akinyemi vs_ Odu'a Investment Co. Ltd. (2012) 1 SCNJ 127. *See also:* **Alfotrin Ltd. vs. A.G. Federation & Ors. (1996) 9 NWLR (Pt.475) 634 at 656 Hi; (1996) LPELR 414 (SC) at 29 B - D** per Iguh, JSC, to wit:

> **"To constitute a binding contract; there must be an agreement in that the parties must be in consensus ad idem with regard to the essential terms and conditions thereof; the parties must intend to create legal relations and the promise of each party; in a simple contract, not under seal, must be supported by consideration. There must be a concluded bargain which has settled all essential conditions that are necessary to be settled and leaves no vital term or condition unsettled."** (P 99 paras A-F)

5. *The nature of 'invitation to treat'*
An invitation to treat, on the other hand, is the first step in negotiations between the parties to a contract, which may or may not lead to a definite offer being made by one of the parties to the negotiation. An invitation to treat is not an offer that can be accepted to lead to an agreement or contract. (BFI Group Corporation vs.

B.P.E (2012) 18 NWLR (Pt. 1332) 209 at 246 G- H; Neka B.B.B Manufacturing Co. Ltd. vs. A.C.B. Ltd (2004) 2 NWLR (Pt. 858) 521). *(P 99 paras F-H)*

6. *The definition of "Memorandum of Understanding"*
For the definition of "Memorandum of understanding," in *Black's Law Dictionary*, 8th edition at 1006, the reader is directed to the definition of "Letter of intent." Which is found at page 924 thereof and states thus:

> **"Letter of intent: a written statement detailing the preliminary understanding of parties who plan to enter into a contract or some other agreement.**
>
> > **A letter of intent is not meant to be binding and does not hinder the parties from bargaining with a third party. Business people typically mean not to be bound by a letter of intent and courts ordinarily do not enforce one; but courts occasionally find that a commitment has been made." (underlining mine for emphasis)**
> > *(Pp 102-103 paras E-C)*

7. *The purpose of a "Memorandum of Understanding"*
From the above definition, it is clear that a memorandum of understanding or letter of intent, merely sets down in writing what the parties intend

will eventually form the basis of a formal contract between them. It speaks to the future happening of a more formal relationship between the parties and the steps each party needs to take to bring that intention to reality. *(P 103 paras D-E)*

8. *The parties are not precluded from entering into negotiations with third party after signing Memorandum of Understanding*

From the definition given above, notwithstanding the signing of a Memorandum of Understanding, the parties thereto are not precluded from entering into negotiations with a third party on the same subject matter. This probably explains why clause 4 was inserted in Exhibit P5, so that the understanding between the parties thereto remains confidential and does not prejudice possible negotiations with a third party. *(P 103 paras E-G)*

9. *The legal status of a Memorandum of Understanding signed by the parties hereto*

In the instant case, Exhibit, P5, the MOU does not qualify as an offer or an acceptance, but an invitation to treat or negotiate. *(P 105 para A)*

Per Kekere-Ekun (JSC)

"I am of the view that taking into consideration the elements that constitute a valid and enforceable contract and the legal implications of a Memorandum of Understanding, the lower court, by its finding

above has demonstrated a clear understanding of the import of Exhibit P5. Whichever definition is relied upon, the end result is the same. Exhibit P5 is a representation of the intention of the parties, subject to the execution of a formal agreement. The finding of the lower court in this regard cannot be faulted. The court below did not misapprehend the appellant's case and no miscarriage of justice has been shown to have been occasioned by its finding in this regard." *(P 105 paras A-D)*

10. *The elements of an enforceable contract*

It is necessary to reiterate here the elements of a binding and enforceable contract, which are: offer, acceptance, intention to create a legal relationship, consideration and capacity to contract. (Bilante International Ltd. vs. N.D.I.C (supra) and Alfotrin Ltd. vs A.G. Federation & Ors (supra)). For ease of reference I deem it appropriate to restate the dictum of Iguh, JSC in: Alfotrin Ltd. vs. A.G. Federation & Ors. (supra) to the effect that for there to be an enforceable contract *"there must be a concluded bargain which has settled all essential conditions that are necessary to be settled and leaves no vital term* or condition unsettled".

Learned senior counsel for the appellant contends that the exchange of documents between the parties i.e the engineering drawings and bill of quantities by the respondent and the cost analysis

prepared by the appellant amount to consideration for the contract. With due respect to learned senior counsel, this cannot be correct. The MOU clearly states that the formal agreement would be entered into after compliance with paragraph 3 (1) on terms to be mutually agreed. This suggests that compliance with paragraph 3 (1) does not conclude the agreement between the parties. For instance, the fact that the appellant has submitted a cost analysis of the project does not mean that the respondent is bound to accept it without further ado.

The terms of the formal contract are to be mutually agreed, thus implying that some terms and conditions are yet to be settled. The MOU also refers to the project proposal'. In other words it remains a proposal until a formal agreement is entered into and executed by the parties.
(Pp 111; 112 paras A-D; B-F)

11. The interpretation of the word "Shall" does not connote "mandatory" obligation in all situations
It is true that generally the word "shall" is interpreted in its mandatory sense. However, whether the word is used in its mandatory or directory sense depends on the context in which it is used. The word "shall can also mean "may" where the context so admits. [Fidelity Bank Plc. vs Mony & Ors. (2012) LPELR-7819 (SC) at 21-22 B D; Amadi vs. N.N.P.C. (2000) 10 NWLR (Pt. 674) 76 at 97 -98 H A]. *(P 113 paras F-G)*

12. The legal implication where the Memorandum of Understanding is subject to a formal agreement
In the instant case, since the MOU is subject to the signing of a formal agreement on terms to be mutually agreed by the parties, it would not be correct to say that the terms thereof are to be construed in the mandatory sense. I am of the considered view that contrary to the contention of learned senior counsel for the appellant, the terms stating that the MOU is subject to the signing of a formal agreement by the parties are fundamental and clearly express the intention of the parties. It follows also that the exchange of preliminary documents between the parties as per paragraph 3 (1) thereof cannot amount to the acceptance of an offer such as to constitute the MOU as a binding and enforceable contract between them. *(Pp 113-114 paras H-C)*

13. The implication where a contract is made subject to the fulfillment of certain terms and conditions
The general principle of law is that where a contract is made subject to the fulfillment of certain terms and conditions, the contract is inchoate and not binding until those terms and conditions are fulfilled. [Tsokwa Marketing Co vs. B.O.N Ltd. (2002) 11 NWLR (Pt. 777) 163 at 196 -197 H A & 156 200 G A; U.B.A. Ltd. vs. Tejumola & Sons Ltd. (1998) 2 NWLR (Pt.79 662 at 686 C – D; Okechukwu vs. Onuorah (2000) 15 NWLR (Pt.691) 597 at 614 -615 - H – A; Best (Nig.) Ltd. vs. Blackwood Hodge (Nig.) Ltd (2011) 5 NWLR (Pt. 1239) 95 at 126 C-D]. *(Pp 117-118 paras F-A)*

14. The import of promissory estoppel

This court expounded the doctrine of promissory estoppel in: Trans Bridge Co. Ltd. vs. Survey International Ltd. (1986) 4 NWLR (Pt.37) 576 at 617 F-G and held the following to be essential requirements for its operation;

1. **There must be in existence, two contracting parties, who are contractually bound, or who but for the representation could have been contractually bound.**
2. **There must be a representation, relied upon resulting in something different from what was agreed between the parties. It is not necessary that there should be detriment in the sense of loss or damage.**
3. **The representation is not necessarily supported by valuable consideration. It is sufficient merely if it is a promise which has been relied upon. If these conditions are present, the doctrine of promissory estoppel operates.** *(P 118 paras A-E)*

4. The scope and interpretation of S.169 of the Evidence Act on Estoppel by conduct

Section 151 of the Evidence Act 1990, now Section 169 of the Evidence Act 2011 provides:

> **"When one person has either by virtue of an existing court judgment, deed or agreement, or by his declaration, act, or omission, intentionally caused or permitted another**

> **person to believe a thing to be true and to act upon such belief, neither he nor his representatives in interest shall be allowed, in any proceeding between himself and such person or such person's representative in interest, to deny the truth of that thing."**

This is what is meant by estoppel by conduct. [**Olalekan vs. Wema Bank Plc. (2006) 13 NWLR (Pt.998) 617 at 622 626 H G; Lawal vs. Union Bank Ltd. (1995) 2 SCNJ 132 at 145.** *(Pp 118-119 paras G-D)*

Per Kekere-Ekun(JSC)

> **"The issue to be determined is whether there was evidence of any modification of the agreement between the parties as contained in the MOU. The answer must be in the negative. The MOU clearly states that it is subject to the signing of a formal agreement between the parties. Therefore even if the appellant had fulfilled its obligations under the MOU by, *inter alia*, preparing a bill of quantities and providing evidence of its financial ability to execute the contract, such acts cannot amount to a license to proceed to mobilize to the site and commit financial and manpower resources to the project without the formal agreement being signed. At best the assurance were to the effect that a formal agreement would be signed. Prudence dictates that for a project of this magnitude**

the appellant would have been patient enough to ensure that all i's were dotted and the t's crossed before mobilizing to site and incurring expenses in respect thereof. I agree with the lower court that in the absence of any agreement authorizing the appellant to mobilize to the site, it was on a frolic of its own and must bear the consequences".
(Pp 121-122 paras H-E)

5. *The lower court failed to consider the issue of estoppels but it did not occasion a miscarriage of justice*
Although the lower court did not consider the issue of estoppel raised by the appellant, I am of the view that there has been no miscarriage of justice in this case, as it rightly concluded that there was no enforceable contract between the parties. This issue is accordingly resolved against the appellant. *(P 122 paras E-F)*

Nigerian Cases cited in This Judgment
A.G. Rivers State vs. A.G. Akwa-Ibom State (2011) 8 NWLR (Pt. 1248) 31
Afolabi vs. Polymera Industries Ltd. (1967) 1 *All NLR* 144/ (1967) *SCNLR* 256.
Akinyemi vs. Odu'a Investment ***Co. Ltd.*** **(2012) 1 SCNJ 127.**
Akpene vs Barclays Bank of Nig. Ltd & Anor. (1977) 1 Sc (Reprint) 30.
Alfotrin Ltd. vs. A.G. Federation & Ors. **(1996) 9 NWLR (Pt.475) 634 Hi; (1996) LPELR 414 (SC) at 29 B - D**
Amadi vs N.N.P.C. (2000) 10 NWLR (Pt. 674) 76
Amokeodo vs. I.G.P. (1999) 6 NWLR (Pt. 607 467

Best (Nig.) Ltd. vs. Blackwood Hodge (Nig.) Ltd (2011) 5 NWLR (Pt. 1239) 95
BFI Group Corporation vs. B.P.E (2012) 18 NWLR (Pt. 1332) 209
Bilante International Ltd. vs. N.D.I.C. **(2011) 15 NWLR (Pt.1270).**
Dangote Gen. Textile Products Ltd. & Ors. vs. Hascon Associates Nig. Ltd. & Anor. (2013)12-SCNJ-456
Echaka Cattle Ranch Ltd vs. N. A.C.V.B Ltd (1998) 4 NWLR (Pt.547) 526
Edet vs. Chagoon (2008) 2 NWLR (Pt. 1070)8
Ezenwa vs. Oko (2008) 3 NWLR (Pt. 1075) 610
Fasheun vs. Oyerinde (1997) 11 NWLR (Pt. 530) 561
Fidelity Bank Plc. vs. Mony & Ors. (2012) LPELR-7819 (SC) 21-22 B D
Frances vs. Osunkwo(2000) 7 NWLR (Pt. 665) 564.
Iwokv vs. University of Uyo (2011) 6 WNLR (Pt .1243) 211 241
Lawal vs. Union Bank Ltd. (1995) 2 SCNJ 132
Lawal vs. Union Bank Ltd. (1995) 2 SCNJ 132
Neka B.B.B Manufacturing Co. Ltd. vs. A.C.B. Ltd (2004) 2 NWLR (Pt. 858) 521
Nwagwu vs. FBN (2009) 2 NWLR (Pt. 1125) 203,
Okechukwu vs. Onuorah (2000) 15 NWLR (Pt.691) 597
Okugule & Anor. vs. Oyagbola & Ors (1990) 4 *NWLR (Pt.147) 723.*
Olalekan vs Wema Bank Plc. (2006) 13 NWLR (Pt.998) 617
Omega Bank Plc vs. O.B.C Ltd (2005) 8 NWLR (Pt. 928) 541
Savannah Bank of Nigeria Plc vs. Oladipo Opanubi (2004) 15 NWLR (Pt. 896) 437
Sosan vs. HFP Eng. Ltd, (2004) 3 NWLR (Pt. 961) 346,
Suleiman & Bros. vs. Mehr (1957) NSCC 49.

Temco Engineering & Co Ltd. vs. Savannah Bank Ltd. (1995) 5 NWLR (Pt. 397) 607
Trans *Bridge Co. Ltd vs. Survey International Ltd.* (1986) 4 NWLR (Pt.37) 576.
Trans Bridge Co. Ltd. vs. Survey International Ltd. (1986) 4 NWLR (Pt.37) 576
Tsokwa Marketing Co vs. B.O.N Ltd. (2002) 11 NWLR (Pt. 777) 163
U.B.A vs. Tejumola (1986) 4 NWLR (Pt. 38) 816.
U.B.A. Ltd. vs. Tejumola & Sons Ltd. (1998) 2 NWLR (Pt.79 662
Udengwu vs. Uzuegbu (2003) 13 NWLR (Pt. 836) 136.
Ugwu vs. Nnaji (1991) 15 NWLR (Pt. 189 18
Ugwu vs. Ararume (2007) NWLR (Pt. 1040) 367.
Ukaegbu vs. Ugoji (1991) 6 NWLR (Pt. 196) 127.

Foreign Cases cited in This Judgment
Branca vs. Cobarro (1947) KB 854
Combe vs. Combe (1951) 2 K.B. 215
Lemoureu vs. Burrillville Racing Ass'n 91 *R.* 194.
Metibaiye vs. Narelli International Ltd. (2009) 16 NWLR (Pt. 1167 326.
Michael Richards Properties Ltd. vs. St. Saviour's (1975) 3 ALL ER 416
Rosslier vs. Miller (1947) KB 854

Nigerian Statutes cited in This Judgment
The Evidence Act 2011 – S. 169(d) and S. 151

Representations
Chief Tochukwu Onwugbufor (SAN) for the Appellant, with: H. Okhiria **(Miss) and O. Onwugbufor (Miss)**.

M.A. Nunghe (Esq.) *for the Respondent, with:* **Sylvester Ogbelu (Esq.), M.J Numa (Esq.), E.O. Agi (Esq**.) and **M.T. Husseini (Esq.)**

KEKERE-EKUN, (JSC), (Delivering the Lead Judgment):
This is an appeal against the judgment of the Court of Appeal, Abuja Division delivered on 3rd June 2011 dismissing the appellant's appeal and allowing the respondent's cross-appeal against the judgment of the High Court of the Federal Capital Territory (hereafter referred to as the FCT) delivered on 29th June 2010.

The facts that gave rise to this appeal are as follows:- The appellant, a company registered in Nigeria, carries on the business of civil, mechanical and electrical engineering and construction work. The respondent is the statutory body responsible for the orderly development and administration of the FCT. The appellant approached the respondent with a proposal for the provision of infrastructural facilities at Mabushi and Katampe Districts of the FCT. At a meeting held on 6th July 2004 between the parties, the appellant's proposal was approved. A memorandum of understanding (MOU) was drawn up and signed by the parties on 13th July 2004 (Exhibit P5). The MOU was subject to the signing of a formal agreement by the parties. By the agreement, the appellant, as infrastructural developer, would raise funds for the project. It would recoup its costs from the collection of development levies payable by allottees of plots and from the sale of vacant plots in the two districts. By the terms of the MOU, the respondent was to provide the appellant with the engineering design drawings and bill of quantities

(BOQ) and any other documents that would enable the appellant complete its cost analysis of the project. The MOU also provided that within 14 days of its execution, the parties shall enter into a formal agreement on terms to be mutually agreed between the parties. It was also agreed that all documents, materials, discussions, etc would be treated with the utmost confidentiality and neither party to the MOU shall disclose any information to a third party.

In compliance with the MOU, the respondent submitted the required documents to the appellant. The appellant in return, submitted its infrastructural Development Agreement to the respondent for execution, as well as evidence of its financial capacity to execute the contract. However, notwithstanding repeated reminders, the respondent refused to sign the agreement. Meanwhile, the appellant had proceeded to incur costs in terms of manpower and resources in the execution of the project based on *"reliance on the promises, assurance and representations of the respondent that a formal agreement will be executed in line with the MOU."* As a result of the respondent's failure to sign the formal agreement, the appellant instituted an action before the trial High Court vide a writ of summons and statement of claim dated 20/1/2009 and filed on 21/1/2009 seeking the following reliefs:

(a) A DECLARATION that in compliance with the terms of the said MOU of 13th July 2005 executed by the parties, the defendant is duty bound to enter into a formal agreement with the plaintiff for the provision of infrastructural facilities in Mabushi and Katampse Districts of the Federal Capital Territory, Abuja.

(b) AN ORDER for the defendant to execute forthwith or within such a time as may be stipulated by this Honourable Court, a formal agreement with the plaintiff in respect of the said project.

(c) An ORDER for the defendant to deliver and finally assign all the parcel of land lying within Mabushi and Katampe Districts of the Federal Capital Territory, Abuja to the plaintiff for the purpose of providing the said infrastructural facilities.

(d) AN ORDER for the defendant to pay the sum of N3, 875, 284, 858.29 being the cumulative monetary value of the efforts, services and work-input which the plaintiff has already committed to the said project pursuant to the Mou, subsequent assurance and representations of the defendant from 2004-2008

IN THE ALTERNATIVE to relief (a), (b) and (c)

(e) AN ORDER for the defendant to pay the plaintiff the sum of N10,000,000,000.00 being loss of anticipated profit by the plaintiff in respect of the said project.

The appellant also claimed the sum of N105,000,000.00 as legal fees and cost of prosecuting the case.

The respondent, as defendant, filed a statement of defence dated 17th May, 2009 wherein it denied the appellant's claims. The appellant called only one witness. The respondent filed the witness statement of one Umar Gambojibrin but he did not attend court to adopt it nor was he available for cross-examination. At the conclusion of the trial, the learned trial Chief Judge held at page 1208 of Vol. 3

of the record as follows;

"On the whole I find that the defendant is in breach of the MOU to enter into a formal agreement with the plaintiff for the provision of infrastructural facilities in Mabushi and Katampe Districts of the FCT. It is hereby ordered against the defendant as follows:

(1) The sum of N10,000,000 is hereby awarded against the defendant in favour of the plaintiff as damages for a breach of contract.

(2) An additional sum of N2,000,000 is awarded against the defendant as cost and legal expenses in this action."

The appellant was dissatisfied with the judgment and filed an appeal against it at the court below. The respondent was also dissatisfied with an aspect of the judgment and accordingly filed a Notice of Cross Appeal.

In a considered judgment delivered on 3rd June, 2011, the lower court dismissed the main appeal and allowed the Cross appeal in the following terms:

"The issues raised in the cross appeal have been laid to rest in my consideration of the appeal. I have held that Exhibit p5 (the MOU) does not amount to a contract the question of whether the use of the word "shall" in the

document amount (Sic) to a command or directive is irrelevant at this stage. Whichever way the definition of "shall" is given here will not revive Exhibit P5. The submission in respect of the commanding nature of shall and the award of damages cost and legal expenses are dependent on the validity of Exhibit P5. Since I have held that Exhibit p5 is not a contract capable of being enforced between the parties, all argument on issues connected with the said exhibit goes to nothing.

These two issues are resolved in favour of the respondent/cross appellant. The cross appeal is therefore allowed.

On the whole, the main appeal is dismissed, while the cross appeal is allowed. The decision of the lower court in which Exhibit P5 was held to amount to a contract capable of being reached is hereby set aside. I also set aside the award of N10,000,000 and ₦2,000,000 respectively. I make no order as to cost' (see page 1312 of Vol. 4 of the record.)

The appellant is still dissatisfied and has further appealed to this court vide a Notice of Appeal dated 1/8/2011 and filed on 2/8/11 containing 9 grounds of appeal

The parties duly filed and exchanged briefs of argument in compliance with the rules of this court. At the hearing of the appeal on 7/11/2016, CHIEF TOCHUKWU ONWUGBUFOR, (SAN) leading several learned counsel

adopted and relied on the appellant's brief filed on 10/10/2011 and its reply briefs filed, on 23/1/2012. By way of adumbration of the arguments contained in his briefs, learned senior counsel relied on the additional authority of **B.F.I. Group Corporation vs B.P.E (2012 18 NWLR (Pt. 1332) 209 at 240-242 D-F**, in support of his submissions under issues 1, 2 and 3 to the effect that the court is bound to consider all the documents, assurances and promises connected with the contract. He contended that the court below was wrong in considering only Exhibit P5 in reaching the conclusion that there was no enforceable contract between the parties. He urged the court to allow the appeal.

M.A. NUNGHE ESQ., also leading a team of learned counsels, adopted and relied on the respondent's brief on 28/11/2011. He referred to paragraphs 4.2.19 and 4.2.20 of his brief and submitted that the court below did consider all the relevant facts before reaching its decision. He submitted that the gravemen of the agreement between the parties was Exhibit P5. He urged the court to dismiss the appeal

The appellant identified nine issues for the determination of the appeal thus:

1. Whether the Court of Appeal's definition and application of the import and meaning of "Memorandum" simpliciter in determining the contractual relationship between the parties instead of the definition and the application of the import of Memorandum of Understanding which is the case presented by the appellant is not a misapprehension or misconception of the appellant's case which has occasioned a miscarriage of justice against the

appellant (Ground 1)

2. Whether the court below was right in holding that there was no valid and enforceable contract between the appellant and the respondent pursuant to Exhibit P5, thus reversing the decision of the learned trial Chief judge which held that there was binding contract between the appellant and the respondent having regard to the mandatory provisions contained in Exhibit P5 the use of the words "subject to contract notwithstanding.

3. Whether the court below was right in failing to consider the promissory estoppel and estoppel by conduct arising from the promises, assurances and representations made by the respondent to the appellant which the appellant believed and acted upon to its detriment before the court below relied solely on Exhibit P5 to come to the conclusion that there was no binding contract between the appellant and the respondent and whether the non consideration thereof has occasioned a miscarriage of justice. (Ground 4).

4. Whether the Court of Appeal was right when in reversing the decision of the learned trial Judge which held that there was a binding contract between the appellant and the respondent on the ground that the trial Chief Judge did not verify whether there is in existence a valid contract, (Ground 3)

5. Whether the court below was right when it held that the failure of the respondent to lead evidence at the trial is irrelevant and immaterial since the appellant can only succeed on the strength of its own case and not on the weakness of the respondent's case.

6. Whether the court below was right in failing to consider the appellant's issue No. 1 and 2 which border on the relief of specific performance which is the crux of the appellant's appeal and issues Nos. 3, 4 and 5 of the appellant's issues for determination before them, describing them as academic exercise and whether the non consideration of those issues by the court has not occasioned a miscarriage of justice and a denial of the appellant's right to fair hearing (Ground 6)

7. Whether the Court of Appeal was right in holding that the appellant was not entitled to damages in respect of the expenses it incurred pursuant to the MOU and to the promises, assurances and representations made by the respondent to the appellant on the ground that the expenses incurred were based on a frolic of its own. (Ground 5)

8. Whether the appellant's right of fair hearing was not breached when the court below failed to consider issues raised by the appellant/cross respondent in answer to the respondent/cross appellant's cross appeal before it came to the conclusion that there was no contract between the parties. (Ground 9)

9. Whether the Court of Appeal was right in holding that there was no basis for the award of specific performance in favour of the appellant.

The respondent, without specifically saying so, appears to have adopted the issues identified by the appellant. Although the appellant's issues are prolix and rather unwieldy, I shall adopt them in the determination of this appeal.

ISSUE 1

Under this issue, it is contended on behalf of the appellant that the lower court misunderstood its case as to the meaning and import of a Memorandum of Understanding and thereby occasioned a miscarriage of justice. The learned senior counsel, Tochukwu Onwugbufor, (SAN) argued that the court at pages 1289 -1315 of Vol. 4 of the record applied the definition of the word. "Memorandum" simpliciter in construing Exhibit P5 entered into between the parties, as opposed to applying the definition of the entire expression "Memorandum of Understanding." Relying on the definition of MOU as found in *Black's Law Dictionary*, 8th edition at page 924, he submitted that in certain circumstances an MOU could be held to contain a commitment, which is binding and enforceable between the parties thereto, as opposed to a memorandum simpliciter, which has no element of commitment and cannot therefore effectuate a binding and enforceable contract between the parties. He submitted that the lower court misapprehended and misconceived the issue before it and thereby evolved a case different from the case presented by the appellant. He

submitted that in the circumstances the decision based on such a flawed process is perverse and liable to be set aside. He referred to:

Undengwu vs Uzuegbu (2003) 13 NWLR (Pt. 836) 136 @ 151 -152 G-b & 157 A-C. He contended that had the court adopted the proper definition of Memorandum of Understanding, it would have reached a result more favorable to the appellant and would have found that Exhibit P5 contained the required commitment having regard to the fact that there was an unequivocal offer, acceptance and consideration vide paragraphs 2 and 3 of the recital thereto. He argued further that the court would have discovered that the subject matter of the contract was settled vide paragraph 2 of the said recital and that the details and terms of the contract were fully set out in the said paragraphs 2 and 3. On what constitutes a miscarriage of justice in the circumstances of this case, he referred to: **Iwok vs. University of Uyo (2011) 6 NWLR (Pt .1243) 211 @ 241 D - E & 241 - 242 H - B** Per Ngwuta, JCA (as then was).

In reply, Chief Karina Tunyan, (SAN), who settled the respondent's brief, submitted that the lower court rightly construed the meaning of Memorandum of Understanding and that its application to the facts of this case did not occasion a miscarriage of justice. He submitted that an MOU can be called either a Memorandum or a Memorandum of Understanding and that in either case it connotes an informal record. He referred to the definition of Memorandum of Understanding as contained in Black's Law Dictionary, 8th Edition (Supra) and noted that the definition includes a letter of Intent, where it is stated that "business people typically mean not to be bound by letter of

intent and court do not ordinarily enforce one, but occasionally find that commitment has been made." He noted that learned senior counsel for the appellant in his brief emphasized the phrase"… but occasionally find that commitment has been made" and submitted that a finding that commitment has been made is the exception and not the norm. He submitted that the issue before this court does not involve one of those exceptional cases. He submitted that the lower court was correct when it held at page 1306 lines 18 -19 and page 1308. Lines 24' 25 of Vol. 4 of the record that the MOU, Exhibit P5 is clear and unambiguous and that there was no contract in existence between the parties. He submitted that the lower court was correct when it held that at best, what was between the parties was an invitation to treat. He submitted that the case of **Udengwu vs "Uzoegbu (supra)** relied upon by learned senior counsel for the appellant does not support its case and that it rather supports, the respondent's position on the meaning of an MOU. Learned senior counsel in his reply brief, merely reiterated the submissions already made in his main brief. The submissions are of no additional assistance to the court in resolving this issue. It is clear from the submissions of learned senior counsel for the appellant that it is the appellant's contention that Exhibit P5, the MOU, represented a binding and enforceable contract between the parties.This court in a recent decision in: **Bilante International Ltd. vs N.D.I.C. (2011) 15 NWLR (Pt.1270). 407 @ 423 C - F,** restated the position of the taw regarding what constitutes a valid and enforceable contract thus:

"Contract is defined as an agreement between two or more persons which creates an obligation to do or not to do a particular thing. Its essentials are competent parties/ subject matter, a legal consideration/ mutuality of agreement and mutuality of obligation. Lemoureu vs. Burrillville Racing Ass'n 91 R. 194, 161 A. 2d 213, 215.

To constitute a binding contract between parties/ there must be a meeting of the mind often referred to as consensus ad idem. The mutual consent relates to offer and acceptance. An offer is the expression by a party of readiness to contract on the terms specified by him/ which/ if accepted by the offeree gives rise to a binding contract. The offer matures to a contract where the offeree signifies a clear and unequivocal intention to accept the offer. See: Okubule & Anor. vs. Oyagbola & Ors (1990) 4 NWLR (Pt.147) 723.

It should be reiterated that in order to establish that parties have formed a contract, there must be evidence of consensus ad Idem between them. Then if there is a stipulated mode for acceptance of the offer, the offeree has a duty to comply with same. See: Afolabi Vs Polymera Industries Ltd. (1967) 1 All NLR 144/ (1967) SCNLR 256."

The basic elements of a binding contract are therefore offer, acceptance, consideration, capacity to contract and intention to create a legal relationship. *See also*: **Dangote Gen. Textile Products Ltd. & Ors. vs Hascon Associates Nig. Ltd. & Anor. (2013)12_SCNJ_456: Akinyemi vs. Odu'a Investment Co. Ltd. (2012) 1 SCNJ 127.** *See also*: **Alfotrin Ltd. vs. A.G. Federation & Ors. (1996) 9 NWLR (Pt.475) 634 at 656 Hi; (1996) LPELR 414 (SC) at 29 B - D** per Iguh, JSC, to wit:

> **"To constitute a- binding contract; there must be an agreement in that the parties must be in consensus ad idem with regard to the essential terms and conditions thereof; the parties must intend to create legal relations and the promise of each party; in a simple contract, not under seal, must be supported by consideration. There must be a concluded bargain which has settled all essential conditions that are necessary to be settled and leaves no vital term or condition unsettled."**

An invitation to treat, on the other hand, is the first step in negotiations between the parties to a contract, which may or may not lead to a definite offer being made by one of the parties to the negotiation. An invitation to treat is not an offer that can be accepted to lead to an agreement or contract. See ***BFI Group Corporation vs B.P.E (2012) 18 NWLR (Pt. 1332) 209 at 246 G – H; Neka B.B.B Manufacturing Co. Ltd. vs A.C.B. Ltd (2004) 2 NWLR (Pt. 858) 521.***

Exhibit P5 can be found at pages 904 908 of Vol. 3 of the record. It providers as follows:

"MEMORANDUM OF UNDERSTANDING"

This **MEMORANDUM OF UNDERSTANDING** is entered into this 13th day of July 2004 BETWEEN FEDERAL CAPITAL DEVELOPMENT AUTHORITY Area II Gariki Abuja hereafter referred to as **THE AUTHORITY,"** (which expression shall where the context so admits include the representatives and assigns) of the first part,

AND

BPS ENGINEERING AND CONSTRUCTION COMPANY LIMITED RC.343541, a company incorporated in Nigeria with limited liability whose registered office is Situated at Plot 1687 Oyin Jolayemi Street, Victoria Island, lagos, hereinafter referred to as "THE COMPANY," (which expression shall where the context so admits include the representatives and assigns) of the other part.

Whereas

1. **THE COMPANY** is a limited liability company registered in Nigeria and engaged in engineering and construction works.
2. **THE COMPANY** at a meeting held on the 6th day of July 2004 at the instance of the presidency, presented a proposal for the provision of infrastructural facilities to Mabushi and katampe Districts of the

Federal Capital Territory (hereinafter referred to as "THE PROJECT") Through Public Private Sector Partnership (PPP) and funding and to recover the cost of the project by the receipts of development levies and sale of plots.

3. **THE AUTHORITY** has expressed interest in THE COMPANY'S proposal for the development of infrastructural facilities in Mabushi and Katampe Districts of the Federal Capital Territory.
4. **THE AUTHORITY** recognizes that THE COMPANY shall raise fund for THE PROJECT through financial institutions wherefore the parties have entered into these presents.

Now This Memorandum of Understanding Witnesses as follows:

1. That THE AUTHORITY shall provide to THE COMPANY Mabushi and Katampe Districts of the Federal Capital Territory for the development of infrastructural facilities.
2. That the details of the type, method of development and specification material used for the provision of the said infrastructure shall be in accordance with specific standards of the Federal Capital Development Authority (FCDA) applicable in the Federal Capital City.
3. That the parties shall:
   i. Upon the execution of this memorandum of understanding THE AUTHORITY shall immediately provide THE COMPANY engineering drawings and bill of quantities

and any other documents which will enable the company complete its cost analysis on the project.

ii. Within 14 days of the execution of this memorandum of understanding the parties hereto shall enter into a formal agreement with respect to THE PROJECT/proposal on terms to be mutually agreed.

4. That all documents, materials, discussion etc shall be treated with the utmost confidentiality and neither party to this Memorandum of Understanding shall disclose any information to a third party.

5. That this Memorandum of Understanding is subject to the signing of a formal agreement by the parties.

WITNESS WHEREOF THE PARTIES HAVE SET THEIR HANDS AND SEALS THE DAY AND YEAR FIRST ABOVE WRITTEN

Signed."

(Emphasis supplied)

For the definition of "Memorandum of Understanding," in *Black's Law Dictionary*, 8th edition at 1006, the reader is directed to the definition of "Letter of intent." Which is found at page 924 thereof and states thus:

> "Letter of intent: a written statement detailing the preliminary understanding of parties **who plan to enter into a contract or some other**

agreement.

> **A letter of intent is not meant to be binding and does not hinder the parties from bargaining with a third party. Business people typically mean not to be bound by a letter of intent and courts ordinarily do not enforce one; but courts occasionally find that a commitment has been made." (underlining mine for emphasis)**

From the above definition, it is clear that a Memorandum of Understanding or letter of intent, merely sets down in writing what the parties intend will eventually form the basis of a formal contract between them. It speaks to the future happening of a more formal relationship between the parties and the steps each party needs to take to bring that intention to reality. From the definition given above, notwithstanding the signing of a Memorandum of Understanding, the parties thereto are not precluded from entering into negotiations with a third party on the same subject matter. This probably explains why clause 4 was inserted in Exhibit P5, so that the understanding between the parties thereto remains confidential and does not prejudice possible negotiations with a third party. The court below at page 1308 of Vol. 4 of the record, relied on the definition of "memorandum" as found at page 984 of *Black's Law Dictionary* (Supra), which defines it as:

"An information, record, note or instrument embodying something that the parties desire to fix in memory by the aid of written evidence, or that is to serve as the basis of a future formal contract or deed." (Emphasis mine)

Thereafter the court held as follows:

"By this definition therefore, a Memorandum of Understanding is an informal document that serves as a reminder that the parties to such a document have a date in future to enter into a contract. Since the MOU is not definite, but subject to the signing of contract, it is not an offer. For an offer to be capable of becoming binding …….. must be definitely clear and final. A document which merely provides for signing of agreement in future does not amount to an offer. It is merely a preliminary move in negotiation which may lead or may not lead to a definite offer being made by one of the parties to the negotiation. At this stage when the terms and conditions of the agreement are not known and are not contained in the document so signed, it will be foolhardy for any party to claim that there is an offer and acceptance.

In the instant case, Exhibit, P5, the MOU does not qualify as an offer or an acceptance, but an invitation to treat or negotiate.

I am of the view that taking into consideration the elements that constitute a valid and enforceable contract and the legal implications of a memorandum of understanding, the lower court, by its finding above has demonstrated a clear understanding of the import of Exhibit P5. Whichever definition is relied upon, the end result is the same. Exhibit P5 is a representation of the intention of the parties, subject to the execution of a formal agreement. The finding of the lower court in this regard cannot be faulted. The court below did not misapprehend the appellant's case and no miscarriage of justice has been shown to have been occasioned by its finding in this regard. This issue is accordingly resolved against the appellant.

ISSUE 2

This issue is based on the premise that the lower court was wrong in its interpretation of the meaning and connotation of Exhibit P5. learned senior counsel is particularly dissatisfied with the following findings of the court below at page 1306 of the record:

"The MOU is subject to the signing of a formal agreement by the parties. The term mutually agreed by the parties with respect to the infrastructural provision at Mabushi and Katampe are not set out in the Memorandum of Understanding. So also are the financial implications and what sanctions will follow in

case of breach. There is also no evidence on the MOU that certain consideration has passed and that the parties intended to create a legal relationship through the MOU, as the MOU was made subject to signing a formal agreement between the parties."

Learned senior counsel submitted that the terms of the agreement between the parties are fully set out in Exhibit P5 and that the sanctions for any breach of the contract need not be spelt out in the MOU, as the implications of any breach is settled in law. He contended that pursuant to paragraph 3 (1) of Exhibit P5, the respondent provided the appellant with Engineering Design Drawing (EDD) and other documents that would enable it compete the bill of quantities and cost analysis in respect of the project and that the appellant on its part accepted them and prepared its bill of quantities and cost analysis and forwarded same to the respondent. He submitted that these actions represent evidence of some of the consideration that passed between the parties pursuant to the MOU. He maintained that the parties intended to create a legal relationship through the MOU, as all the elements of binding and enforceable contract are contained therein. He referred to:

Metibaiye vs Narelli International Ltd. (2009) 16 NWLR (Pt. 1167 326 @ 346. He argued that the parties having carried out their obligations as stated in paragraph 3 (1) of Exhibit P5 by exchanging documents and cost analysis relating to the project, they could be said to be in agreement and that the agreement constituted an enforceable and binding contract, notwithstanding the

expression "subject to the signing of a formal agreement" contained in the MOU, which he contended was mere surplusage. He relied on: **Michael Richards Properties Ltd. vs. St. Saviour's (1975) 3 ALL ER 416; Rosslier vs. Miller (1947) KB 854 Branca vs Cobarro (1947) KB 854; U.B.A vs. Tejumola (1986) 4 NWLR (Pt. 38) 815.** He submitted that the agreement need not be in any particular form, as the main consideration is that there must be evidence of consensus between the parties. He referred to: **A.G. Rivers State vs. Akwa Ibom (2011) 8 NWLR (Pt. 1248) 31 @ 108 F – G.** He submitted that the trial court was right when it held that the use of the word "shall" throughout the MOU was indicative of the parties intention to create a binding obligation. He submitted that the court below erred in disregarding this finding

Learned senior counsel for the respondent however contends that the court below rightly interpreted the meaning of memorandum of understanding and considered Exhibit P5 in its entirety. He submitted that the MOU did not contain any mandatory provisions and that the lower court was right when it held that there was no enforceable contract between the parties. He submitted that since the MOU was understood by the parties to be subject to the signing of a formal contract, it could not be a binding contract mutually and voluntarily executed by the parties. He reiterated his argument under issue I that a document that provides for the signing of an agreement in the future is merely a preliminary move in negotiations, which may or may not lead to a definite offer being made. He referred to the finding of the lower court at pages 1306 -1308 of the record and submitted that the court carefully considered all relevant issues before

concluding that there was no enforceable contract between the parties. He agreed with the court that Exhibit P5 was merely an invitation to treat.

Learned counsel submitted that the appellant, as observed by the lower court, failed to prove at the trial court that there was a definite offer and acceptance, which constituted a valid contract between the parties to entitle it to the reliefs sought. He submitted that having failed to, so prove at the trial court, it was improper for learned senior counsel to attempt to do so before this court without seeking leave. He relied on: **Akpene vs. Barclays Bank of Nig. Ltd & Anor. (1977) 1 Sc (Reprint) 30.** He submitted that in the absence of a binding contract between the parties, the issue of consideration does not arise. He submitted that the appellant took an unnecessary risk and went on a frolic of its own by incurring expenses in respect of the project in anticipation of profit in the region of N10 Billion without first ensuring that a formal contract was executed between the parties. He submitted that the appellant must bear the consequences of its action. He referred to: **Fasheun vs. Oyerinde (1997) 11 NWLR (Pt. 530) 561**

He submitted that contrary to the contention of learned counsel for the appellant, none of the meetings held between the parties, could be inferred to constitute an offer, acceptance, consideration or intention to create a legally binding relationship. He submitted that the word "shall" in Exhibit P5 was not used in its mandatory sense. On the guiding principle in the interpretation of "shall", he referred to: **Amokeodo vs I.G.P. (1999) 6 NWLR (Pt. 607 467 @ 481 A - b & 485 - 486; Ugwu vs Ararume (2007) NWLR (Pt. 1048) 365 @ 412 F-G.** He observed that in construing

the word "shall" in Exhibit P5, the learned trial Chief Judge failed to consider the effect of paragraph 5 thereof, which states that the MOU is subject to the signing of a formal agreement by the parties. He argued that his Lordship had currectly construed paragraph 5 he would have arrived at a different conclusion.

On the legal implication of the words "subject to," he referred to: **Okechukwu vs; Onuorah (2000) 15 NWLR (Pt. 691) 579 at 614 -615; U.B.A. Ltd. vs. Tejumola & Sons Ltd. (1988) 2 NWLR (Pt.79) 662 at 688; Tsokwa Marketing Co. Ltd. vs. B.O.N Ltd (2002) 11 NWLR (Pt. 777) 163 at 200 Suleiman & Bros. vs. Mehr (1957) NSCC 49 at 51 Paragraphs 15-40.** He urged the court to construe all the paragraphs of Exhibit P5 together and to interpret the word "shall" wherever it appears as being directory and not mandatory and to further hold that since the parties expressly agreed that Exhibit P5 was subject to the signing of a formal agreement within 14 days, the contract had not come into effect and was not binding on the parties.

In reaction to the contention of learned counsel for the respondent that the appellant failed to prove at the trial court that there was a contractual relationship between the parties and that the issue was being raised as a new issue before this court, learned senior counsel in his reply brief maintained that the appellant pleaded and proved the existence of a valid contract between the parties vide Exhibit P5, which evidence was accepted and believed by the trial court, particularly as regards the legal effect of the word "shall" contained therein. He submitted that the case of **Akpene vs. Barclays Bank Nig Ltd. (Supra)** is inapplicable to the circumstances of this case.

On the contention that the appellant failed to prove that it provided consideration for the contract, he submitted that the appellant copiously pleaded and led evidence in this regard such as mobilization to the site, providing guarantees from banks as to its ability to execute the contract and preparing and submitting, at the request of the respondent, the design and engineering drawings. He observed that the evidence was unchallenged. He submitted that the submission of counsel, no matter how eloquent, cannot be a substitute for evidence. He submitted that there is no appeal against the finding of the trial court on the meaning of the word "shall" as contained in Exhibit P5, and that the pronouncement of the court as to its being mandatory stands. Relying on several cases including **Sosan vs. HFP Eng. Ltd, (2004) 3 NWLR (Pt. 861) 546,** he submitted that even if the expression in paragraph 5 of the MOU were to render the contract unenforceable, a party is not allowed, in equity, to take undue advantage of the other party by his wrongful act and proceed to contend that the transaction was unenforceable or illegal or to use the court to perpetrate his wrongful act. He submitted that notwithstanding its agreement to execute a formal agreement within 14 days of signing the MOU, the respondent deliberately refused to execute the draft agreement (Exhibit p6) forwarded to it by the appellant within the stipulated time, and turned around to contend that the contract is unenforceable. He argued that a court of equity would not condone such conduct.

From the submissions of learned senior counsel for the appellant, it would appear that what is being contended under this issue is that Exhibit P5 falls within the exceptional circumstance where a court finds that a

commitment has been made between the parties notwithstanding the general nature of a Memorandum of Understanding. My Lords, it is necessary to reiterate here the elements of a binding and enforceable contract, which are: offer, acceptance, intention to create a legal relationship, consideration and capacity to contract. **See: Bilante International Ltd. vs. N.D.I.C (supra)** and **Alfotrin Ltd. vs. A.G. Federation & Ors (supra).** For ease of reference I deem it appropriate to restate the dictum of Iguh, JSC in: **Alfotrin Ltd. vs. A.G. Federation & Ors. (supra)** to the effect that for there to be an enforceable contract *"there must be a concluded bargain which has settled all essential conditions that are necessary to be settled and leaves no vital term* or condition unsettled. "as noted earlier in this judgment, it was the appellant that approached the respondent with proposals for the provision of infrastructure in the Mabushi and Katampe Districts of the Federal Capital Territory through Public Private Partnership. Exhibit P5 was drawn up and executed by the parties after a series of meetings. A careful peruse of paragraphs 1, 2, 3 and 5 in particular of the second part of Exhibit P5 (reproduced earlier), discloses the following intentions: that the respondent shall make the said districts available to the appellant for the development of the infrastructural facilities; that details of the type, method of development and specification of materials used shall be in accordance with the specific standards of the FCDA; upon execution of the MOU the respondent shall provide the appellant with the engineering design drawings and bill of quantities and other documents that would enable it complete its **Cost analysis of the project;** and that **a formal**

agreement would be entered into within 14 days of the signing of the MOU with respect to the **project proposal** on **terms to be mutually agreed.** For the avoidance of doubt, paragraph 5 states: "That this memorandum of understanding is subject to the signing of a formal agreement by the parties."

Learned senior counsel for the appellant contends that the exchange of documents between the parties i.e the engineering drawings and bill of quantities by the respondent and the cost analysis prepared by the appellant amounts to consideration for the contract. With due respect to learned senior counsel, this cannot be correct. The MOU clearly states that the formal agreement would be entered into after compliance with paragraph 3 (1) on terms to be mutually agreed. This suggests that compliance with paragraph 3 (1) does not conclude the agreement between the parties. For instance, the fact that the appellant has submitted a cost analysis of the project does not mean that the respondent is bound to accept it without further ado. The terms of the formal contract are to be mutually agreed, thus implying that some terms and conditions are yet to be settled. The MOU also refers to the project proposal'. In other words it remains a proposal until a formal agreement is entered into and executed by the parties. The lower court, at pages 1306 -1307 of the record, after reproducing Exhibit P5 and examining its provisions carefully, held thus:

> ***"The Memorandum of Understanding is so clear. The parties to the MOU shall enter into a formal agreement with respect to the project/proposal on terms mutually agreed***

> ***within 14 days of the execution of the MOU and that all documents, materials discussions etc shall be treated with confidentiality and neither party to the MOU shall disclose any information to a third party. This is not all. The MOU is subject to the signing of a formal agreement by the parties. The term mutually agreed by the parties with respect to the infrastructural provision at Mabushi and Katampe are not set out in the Memorandum of Understanding. So also are the financial implications and what sanctions will follow in case of breach. There is also no evidence on the MOU that certain consideration has passed and that the parties intended to create a legal relationship through the MOU, as the MOU was made subject to signing a formal agreement between the parties." (Underlining mine for emphasis)***

In my view, this analysis by the court below of the legal implications of the MOU cannot be faulted. It is true that generally the word "shall" is interpreted in its mandatory sense. However, whether the word is used in its mandatory or directory sense depends on the context in which it is used. The word "shall can also mean "may" where the context so admit. **See: Fidelity Bank Plc. vs Mony & Ors. (2012) LPELR-7819 (SC) at 21-22 B D; Amadi vs N.N.P.C. (2000) 10 NWLR (Pt. 674) 76 at 97 -98 H A** Although these authorities are in respect of the applicable principles in the interpretation of statutes, the principles are just as relevant to the interpretation of documents. In the instant case, since

the MOU is subject to the signing of a formal agreement or terms to be mutually agreed by the parties, it would not be correct to say that the terms thereof are to be construed in the mandatory sense. I am of the considered view that contrary to the contention of learned senior counsel for the appellant, the terms stating that the MOU is subject to the signing of a formal agreement by the parties are fundamental and clearly express the intention of the parties. It follows also that the exchange of preliminary documents between the parties as per paragraph 3 (1) thereof cannot amount to the acceptance of an offer such as to constitute the MOU as a binding and enforceable contract between them. The court below was indeed correct when it held that there was not valid and enforceable contract between the parties pursuant to Exhibit P5. The agreement between them was inchoate until the signing of a formal contract embodying all the agreed terms and conditions.

This issue must therefore be answered in the affirmative and it is accordingly resolved against the appellant.

ISSUE 3

Under this issue, it is contended that the lower court was wrong to rely solely on Exhibit p5 in reaching the conclusion that there was no binding agreement between the parties. It is contended that the court ought to have considered the principles of promissory estoppel and estoppel by conduct arising from the promises, assurances and representation made by the respondent to the appellant upon which it acted to its detriment.

Learned senior counsel submitted that pursuant to

decisions reached with the respondent in several meetings before and after the execution of the MOU and based on further assurances by the respondent and the then Minister of the FCT, Mallam El-Rufai, that a formal agreement embodying the terms and conditions of the project would be signed once the appellant fulfilled its obligations under the MOU, the plaintiff committed its staff to the project with the aid of other professionals, its bankers and financial institutions partnering with it on the project and prepared and submitted the Bill of Quantities for the project. He submitted that, at the request of the Minister, it provided evidence of its ability to source and raise funds for the execution of the project through meetings and correspondence with various international financial institutions. He submitted that pursuant to the MOU and the assurances received, the appellant incurred cost in respect of the following:

i. Preparation of bill of quantities
ii. Cost analysis
iii. Survey of the two districts
iv. Mobilization of personnel to the site
v. Design and mapping of re-location scheme for the 'natives.'
vi. Preparation of formal contract by legal firm
vii. Mobilization of equipment to the site.

He submitted that documents evidencing the above steps taken and the expenses thereby incurred were submitted to the respondent. That the appellant having altered its position based on those assurances, the respondent could not be permitted to revert the previous legal position as if there

were no intervening factors. He submitted that the learned trial Judge correctly evaluated the evidence in this regard and came to the right conclusion that the respondent could not resile from assurances given by the Minister, which modified the legal relations between the parties. He submitted that the lower court erred in failing to consider this issue, which has led to a miscarriage of justice. He referred to Section 151 of the Evidence Act and submitted that the respondent is caught by the doctrines of estoppel by conduct and promissory estoppel. He relied on: **Olalekan vs Wema Bank Plc. (2009) 13 NWLR (Pt.998) 617 at 622 626 H – G; Lawal vs Union Bank Ltd. (1995) 2 SCNJ 132 at 145; Trans Bridge Co. Ltd vs Survey International Ltd. (1986) 4 NWLR (Pt.37) 576.**

In reaction to the above submissions, learned senior counsel for the respondent disagrees with the contention that the principles of promissory estoppel and estoppel by conduct are applicable in the circumstances of this case. He also disagreed with the argument that it was representations, assurances and promises allegedly made to it by the respondent that caused the appellant to commit financial and manpower resources to the project without waiting for the execution of a formal agreement. He submitted that the lower court was right in holding that the appellant was on a frolic of its own. Learned counsel submitted that the meetings held between the parties referred to by the appellant were held at the negotiation stage. He referred to the various expenses allegedly incurred by the appellant and submitted that it took a risk by investing in the project before the signing of a formal agreement and should be bound by the consequences. He submitted that it would be wrong to

say that the lower court did not consider the doctrine of estoppel, as the court had held emphatically that the various meetings and discussions held prior to the signing of the MOU were part of the negotiations and amounted to an invitation to treat. He submitted that section 151 of the Evidence Act and the authorities cited by learned senior counsel on estoppel are not applicable to the facts of this case and argued that there was no miscarriage of justice in this case.

In reply, learned senior counsel submitted that the doctrine of promissory estoppel or estoppel by conduct can arise not only in contract but also in any relationship between parties, including preliminary negotiations, provided that the elements of a contract, particularly consideration, are complete. He referred to: **Temco Engineering & Co Ltd. vs Savannah Bank Ltd. (1995) 5 NWLR (Pt. 397) 607.** He submitted that the respondent did not give any evidence before the trial court to show that the promises, assurance and representation were made in the course of negotiations and urged the court to discountenance the submissions in that regard. Other submissions in the reply brief are merely a re-argument of the submissions in the main brief.

The general principle of law is that where a contract is made subject to the fulfillment of certain terms and conditions, the contract is inchoate and not binding until those terms and conditions are fulfilled. **See: Tsokwa Marketing Co vs. B.O.N Ltd. (2002) 11 NWLR (Pt. 777) 163 at 196 -197 H – A & 156 – 200 G – A; U.B.A. Ltd. vs. Tejumola & Sons Ltd. (1998) 2 NWLR (Pt.79 662 at 686 C – D; Okechukwu vs Onuorah (2000) 15 NWLR (Pt.691)**

597 at 614 -615 - H – A; Best (Nig.) Ltd. vs. Blackwood Hodge (Nig.) Ltd (2011) 5 NWLR (Pt. 1239) 95 at 126 C-D This court expounded the doctrine of promissory estoppel in: **Trans Bridge Co. Ltd. vs Survey International Ltd. (1986) 4 NWLR (Pt.37) 576 @ 617 F-G** and held the following to be essential requirements for its operation;

1. There must be in existence, two contracting parties, who are contractually bound, or who but for the representation could have been contractually bound.
2. There must be a representation, relied upon resulting in something different from what was agreed between the parties. It is not necessary that there should be detriment in the sense of loss or damage.
3. The representation is not necessarily supported by valuable consideration. It is sufficient merely if it is a promise which has been relied upon. If these conditions are present, the doctrine of promissory estoppel operates.

At page 618 A B (supra), the dictum of Deninng, L3 in **Combe vs. Combe (1951) 2 K.B. 215 at 220** was cited with approval to the effect that the doctrine of promissory estoppel does not create a new cause of action but only prevents a party from insisting on his strict legal rights when it would be unjust to allow him to enforce them, having regard to the dealings which have taken place between the parties

Section 151 of the Evidence Act 1990, now Section 169 of the Evidence Act 2011 provides:

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

This is what is meant by estoppel by conduct. *See also:* **Olalekan vs Wema Bank Plc. (2006) 13 NWLR (Pt.998) 617 at 622 626 H – G; Lawal vs Union Bank Ltd. (1995) 2 SCNJ 132 at 145.**

The issue in contention here is whether there were promises, assurances and representations made by the respondent subsequent to Exhibit P5 that caused the appellant to alter its position to its detriment as found by the learned trial Chief Judge. Now, in the process of reviewing the evidence adduced by the appellant, the learned trial Chief Judge at page 1194 of Vol. 3 of the record noted that Exhibit P5, the MOU, was entered into on 13th July 2004 after meetings had been held with the appellant, its Bankers and financiers on the one hand and the respondent on the other hand, with the Minister of Works in attendance. That the meeting was also attended by the Minister of the Federal Capital Territory. That the appellant's proposals were discussed and approved before the parties signed the MOU. In paragraph 1,2 and 3 of the judgment at page 1194 of the record, the following observation were made:

"According to PWI in paragraph 16 of his witness statement on oath, the total cost for the provision of the said infrastructural facilities for Mabushi is N26.14 Billion while that of Katampe was put at N23, 936 Billion and the anticipated profit from the project was put at about N10.5 Billion.

It is further PWI's testimony that in keeping with the terms of the MOU and based on assurances from the then minister that a formal agreement will be signed once the plaintiff fulfilled its obligations under the MOU and provided evidence of financial capacity to execute the project, the plaintiff committed its staff and resources to all project and in fact prepared and presented a Bill of Quantity (B.O.Q) for the project to the defendant. The plaintiff further provided evidence of its financial capacity. This evidence is captured in the annexure to Exhibit p6.

However, PWI continues that after several meetings with the defendant the infrastructural Development Agreement capturing the terms and conditions of the said project was agreed on and a final copy prepared by the law firm of Ajumogobia & Okeke but the defendant failed and/or refused to sign the said agreement in compliance with the terms of the MOU and no reasons were given for the refusal.

The relevant portion of Exhibit p6, a letter dated 4th August 2004 from the appellant to the Minister of the FCT, reproduced in the judgment of the trial court reads:

"Hon. Minister, sir, in keeping with the said time line and in furtherance of the decisions reached at the said meeting of the 6th July 2004, we forward herewith, the 3rd and final draft

> **"Infrastructural Development Agreement" ready for signing which is the result of several meetings and discussions between us and your relevant departments." (Underlining mine for emphasis)**

It is appropriate to reiterate here that it was the result of the decisions reached at the meeting of 6th July 2004 that culminated in Exhibit P5. The trial court at page 1202 at the record concluded from Exhibit p6 that the parties agreed on the terms of the Infrastructural Development Agreement and that the respondent had no justification in refusing to sign the document in accordance with the terms of the MOU. It was in this context that the learned trial Chief Judge held that the respondent had, by its promises, assurances and representations, caused the appellant to alter its position to its detriment. His Lordship held that the respondent *"Must accept their legal relations as modified by himself, even though it is not supported in point of law by any consideration but only his words."*

The issue to be determined is whether there was evidence of any modification of the agreement between the parties as contained in the MOU. The answer must be in the

negative. The MOU clearly states that it is subject to the signing of a formal agreement between the parties. Therefore even if the appellant had fulfilled its obligations under the MOU by, *inter alia*, preparing a bill of quantities and providing evidence of its financial ability to execute the contract, such acts cannot amount to a license to proceed to mobilize to the site and commit financial and manpower resources to the project without the formal agreement being signed. At best the assurances were to the effect that a formal agreement would be signed. Prudence dictates that for a project of this magnitude the appellant would have been patient enough to ensure that all i's were dotted and the t's crossed before mobilizing to site and incurring expenses in respect thereof. I agree with the lower court that in the absence of any agreement authorizing the appellant to mobilize to the site, it was on a frolic of its own and must bear the consequences.

Although the lower court did not consider the issue of estoppel raised by the appellant, I am of the view that there has been no miscarriage of justice in this case, as it rightly concluded that there was no enforceable contract between the parties. This issue is accordingly resolved against the appellant.

ISSUE 4

This issue questions whether the court of Appeal was right in reversing the decision of the learned trial Chief Judge to the effect that there was a binding contract between the parties, having regard to the resolution of Issues 1,2 and 3 infra against the appellant, this issue must be answered in the affirmative. It is accordingly resolved against the

appellant.

Issues 5, 6, 7, 8 and 9 become otiose in view of the resolution of issues 1, 2, 3 and 4 against the appellant.

In conclusion, I find no merit in this appeal. It is accordingly dismissed. The parties shall bear their respective costs.

Kudirat Motonmori Olatokunbo Kekere-Ekun
Justice, Supreme Court

CHIEF TOCHUKWU ONWUGBUFOR (SAN) for the Appellant with H. Okhiria (Miss) and O. Onwugbufor (Miss). **M.A. NUNGHE ESQ.** for the Respondent with Sylvester Ogbelu Esq., M.J Numa Esq., E.O. Agi Esq. and M.T. Husseini Esq.

NKANU ONNOGHEN, (AG. CJN): I have had the benefit of reading in draft the lead judgment of my learned brother, KEKERE EKUN (JSC) just delivered.

My learned brother has exhaustively dealt with the issues calling for determination in the appeal thereby leaving me with nothing much to do other than to agree with his reasoning and conclusion that the appeal is devoid of merit and should be dismissed.

I therefore order accordingly and abide by the consequential orders made in the said lead judgment including the order as to costs

Appeal dismissed.

Walter Samuel Nkanu Onnoghen
Acting Chief Justice of Nigeria.

Peter Odili, (JSC): I am in agreement with the judgment just delivered by my learned brother, Kudirat Kekere-Ekun (JSC) and in support of the reasoning I shall make some remarks.

On the 3rd day of June, 2011 the Court of Appeal, Abuja Division delivered a judgment allowing the respondent's cross appeal while it dismissed the appeal of the appellant against the judgment of the High court of FCT, Abuja delivered by Gummi J. (as he then was) which had awarded Ten Million naira in favour of the plaintiff as damages and Two Million naira as cost against the defendant at the trial court.

FACTS

The plaintiff/appellant is a construction and engineering company while the defendant respondent is the statutory body charged with the responsibility for the development and administration of the Federal Capital Territory, Abuja. The appellant herein made a suggestion to the respondent and the then President of Nigeria, Chief Olusegun Obasanjo by letters of intention to provide infrastructural facilities at Mabushi and Katampe Districts of the Federal Capital Territory, Abuja. Consequent upon these correspondence a Memorandum of Understanding was written and signed by the parties, subject to the signing of a formal agreement between the parties.

In spite of clause 5 of the MOU which expressly stated, "subject to the signing of a formal agreement" the appellant drew up Exhibit p6 which respondent refused to sign and the plaintiff/appellant instituted the suit asking for specific performance and damages. The High Court, FCT

per Gummi CJ (as he then was) refused to grant the order of specific performance but awarded damages of Ten Million (N10,000,000.00) and N2,000,000 (two million) for cost against the defendant/ respondent.

The appellant appealed to the Court of Appeal or court below while the respondent cross-appealed. The court below found in favour of the defendant/cross-appellant/respondent granting the cross appeal while that court dismissed the appeal hence a recourse to the Supreme Court vide Notice of Appeal filed on 2nd day of August, 2011.

On the 7th day of November, 2016 date of hearing, learned Chief Tochukwu Onwugbufor (SAN) adopted appellant's brief of argument filed on 10th October 2011 and a reply brief of 23/1/2012. In the brief of argument, learned counsel raised nine issues for determination which are thus:

1. **Whether the Court of Appeal's definition and application of the import and meaning of "Memorandum" simpliciter in determining the contractual relationship between the parties instead of the definition and the application of the import of Memorandum of Understanding which is the case presented by the appellant is not a misapprehension or misconception of the appellants case which has occasioned a miscarriage of justice against the appellant (ground 1 of the grounds of appeal).**

2. **Whether the court below was right in holding that there was no valid and enforceable contract between the appellant and the respondent**

pursuant to EXH p5, thus reversing the decision of the learned trial Chief Judge which held that there was a binding contract between the appellant and the respondent having regard to the mandatory provisions contained in EXH P5 the use of the words "subject tot contract" notwithstanding

3. Whether the court below was right in failing to consider the promissory estoppel and estoppel by conduct arising from the promises, assurances and representations made by the respondent to the appellant which the appellant believe and acted upon to its detriment before the court below relied solely on Exhibit P5 to come to the conclusion that there was no binding contract between the appellant and the respondent and whether the non consideration thereof has occasioned a miscarriage of justice (Ground 4 of the grounds of appeal).

4. Whether the court of Appeal was right in reversing the decision of the learned trial Chief Judge which held that there was a binding contract between the appellant and the respondent on the ground that the trial Chief Judge did not verify whether there is in existence a valid contract. (Ground 3 of the ground of appeal).

5. Whether the court below was right when it held that the failure of the respondent to lead evidence at the trial is irrelevant and immaterial since the appellant can only succeed on the strength of its own case and not on the weakness of the estoppel it's case (Ground 8 of the ground of appeal).

6. Whether the court below was right in failing to consider the appellant's issues No.1 and 2 which border on the relief of specific performance which is the crux of the appellant's appeal and issues Nos 3, 4 and 5 of the appellants issues for determination before them, describing them as academic exercise and whether the non consideration of those issues by the court has not occasioned a miscarriage of justice and a denial of the appellant's right to fair hearing. (Ground 6 of the grounds of appeal).

7. Whether the Court of Appeal was right in holding that the appellant was not entitled to damages in respect of the expenses it incurred pursuant to the MOU and to the promises, assurance and representations made by the respondent to the appellant on the ground that the expenses were incurred or based on a frolic of its won. (Distilled from Ground 5 in the Notice of Appeal)

8. Whether the appellant's right of fair hearing was not breached when the court below failed to consider issues raised by the appellant/cross

respondent in answer to the respondent/cross appellant's cross appeal before it came to the conclusion that there was no contract between the parties (Ground 9 of the ground of appeal).

9. Whether the Court of Appeal was right in holding that there was no basis for the award of specific performance in favour of the appellant.

M.A Nunghe of counsel for the respondent adopted the brief of the respondent settled by Karina Tunyan (SAN) and filed on 28/11/11. He argued along the lines of the issues as raised by the appellant.

I shall utilize Issues, 2, 8 and 9 of the distilled issues which I see sufficient to answer the questions in the determination of this appeal.

ISSUES 2, 8 &9

1. Whether the court below was right in holding that there was no valid and enforceable contract between the appellant and the respondent pursuant to EXH P5, thus reversing the decision of the learned trial Chief Judge which held that there was a binding contract between the appellant and the respondent having regard to the mandatory provisions contained in EXH P5 the use of the word "subject to contract" notwithstanding.
2. Whether the appellant's right of fair hearing was not breached when the court below failed to consider issues raised by the appellant/cross respondent in answer to the respondent/cross appellant's cross

appeal before it came to the conclusion that there was no contract between the parties.

3. Whether the Court of Appeal was right in holding that there was no basis for the award of specific performance in favour of the appellant.

Canvassing the position of the appellant counsel contended that the court below misapprehended, misconceived and misdirected itself on the issue before them which was the meaning, effect and import of the MOU, Exhibit P5 entered into by the parties. That the effect of that was the court below evolving a case for a party different from the case presented by the party which led to a flawed process and necessitating a reversal by this court. He cited (**Udengbwu vs. Uzuegbu (2003) 13 NWLR (Pt. 836) 136.**

That the MOU, Exhibit P5 shows clearly that the parties intended to create a legal relationship through the MOU as all the elements of a binding and enforceable contract had crystallized. The case of **Metibaiye vs. Narelli Int'l Ltd (2009) 16 NWLR (Pt. 1167) 326 at 346; Branca vs. Cobarro (1947 ICB 854; A.G. Rivers State vs. A.G. Akwa-Ibom State (2011) 8 NWLR (Pt. 1248) 31 at 108.**

Chief Onwugbufor (SAN) for the appellant submitted that there is in existence a contractual relationship and that all the expenses incurred by the appellant pursuant to the MOU were based on the promises, assurance and representation made to the appellant by the respondent and this failure constitutes a breach of the appellant's right to fair hearing occasioning in its wake a miscarriage of justice against the appellant. He referred to S.

151 of the Evidence Act, **Olalekan vs. Wema Bank Plc (2006) 13 NWLR (Pt. 998) 617 626** etc.

That the trial High Court having found that there was a valid and subsisting contract which contract had been breached the natural follow up should have been an order for specific performance as sought by the appellant. That the trial court failing to properly exercise that discretion and the Court of Appeal also failing to rectify that perversity, it is the duty of this court to rectify the anomaly. He relied on **Echaka Cattle Ranch Ltd vs. N. A.C.V.B Ltd (1998) 4 NWLR (Pt.547) 526 at 544, Frances vs. Osunkwo(2000) 7 NWLR (Pt. 666) 564 at 580.**

M.A Nunghe Esq. for the respondent submitted in reaction that Court of Appeal was right in its judgment that the Memorandum of Understanding was not a binding contract but rather an invitation to treat. That the meetings the appellant wants the court to infer as constituting a contract did not constitute a valid contract as they could not be taken as offer and acceptance to approve the ingredients of a subsisting contract. He cited **Omega Bank Plc vs. O.B.C. Ltd (2005) 8 NWLR (Pt. 928) 547 at 575; Edet vs. Chagoon (2008) 2 NWLR (Pt. 1070)85 at 101.**

That since the MOU had provided a condition precedent to the coming into force of a contract without that condition being fulfilled the contract cannot come into force. He cited **UBA Ltd vs. Tejumola & sons Ltd (1988) 2 NWLR (Pt. 79 662 at 688; Tsokwa Marketing Co. Ltd vs. B.O.N. Ltd (2002) 11 NWLR (Pt. 777) 163 at 200; Suleiman & Bros vs. Mehv (1957) NSCC 49 at 51.**

For the appellant it was further submitted that specific performance is an equitable remedy that could be

used where the law imposes hardship on the plaintiff and it is not the case herein. The case of **Ezenwa vs. Oko (2008) 3 NWLR (Pt. 1075) 610 at 628; Savdannah Bank of Nigeria Plc Oladipo Opanubi (2004) 15 NWLR (Pt. 896) at 453-454** etc were relied on.

That the respondent did not make any promise to the appellant that made it alter its position that would give rise to promissory estoppel. The case of **Ukaegbu vs. Ugoji (1991) 6 NWLR (Pt. 196) 127 at 146.**

Learned counsel contended that since there was no contract between the parties, the issue of specific performance did not arise. He cited **Ugwu vs. Nnaji (1991) 15 NWLR (Pt. 189 18 at 34.**

The summary of what is placed before this court is, on the part of the appellant a request that the Supreme Court allows the appeal, sets aside the judgment of the Court of Appeal and in its place enter judgment in favour of the appellant granting the relief of specific performance, N10.5 billion as damages for breach of contract and the sum of N3,875, 284, 858.29 being the quantum meruit which the appellants is entitled to even if there exists no enforceable contract between it and the respondent because the Court of Appeal ought to have relied on the Memorandum of Understanding with which it would have come to the conclusion that a contract existed between the parties.

On the other part, the respondent contends that the appeal should be dismissed as the Court of Appeal gave a correct definition of the Memorandum of Understanding in holding that Exhibit, P5, the Memorandum of Understanding (MOU) was not a binding contract and could not form a basis for an enforceable obligation between the

parties.

The respondent put across that the MOU is an informal record and cannot be equated to a binding contract between the parties to the Memorandum of Understanding and is just like a letter of Intent. The definition of Letter of Intent as seen at page 924 of the *Black Law Dictionary* 8th Edition defines Letter of Intent to be as follows:

> **"A written statement detailing a preliminary understanding of parties who plan to enter into a contract or some other agreements, a non committed writing which is not meant to be binding and does not hinder the parties from bargaining with a third party. Business people typically mean not to be bound by letter of intent and court ordinarily do not enforce one, but occasionally find that commitment has been made."**

The above definition was acceptable to the Court of Appeal which held thus:

> **"The Memorandum of Understanding is so clear. The parties to the MOU shall enter into a formal agreement with respect to the project/Proposal… The MOU is subject to the signing of a formal agreement by the parties. See lines 19-21, lines 24 -25 page 1306 vol. 4 of the Record of Appeal.**

That court continued as follows:

> **"At this stage when the terms and conditions of the agreement are not specified and not contained in the document so signed it will be fool hardy for any party to claim that there is an offer and acceptance…"**
>
> **In the instant case Exhibit P5 the MOU does not qualify as an offer or acceptance but an invitation to treat or negotiate." See lines 17 -21 page 1308 vol 4 of the Record of Appeal.**
>
> **Having found that there was no contract in existence…" see lines 23 -24 page 1308 vol. 4 of the Record of Appeal.**

Relating what was before him to the document, MOU, the Court of Appeal stated at page 1308 of the Record as follow:

> **"In the instant case Exhibit P5 the MOU does not qualify as offer or an acceptance but an invitation to treat or negotiate.**
>
> **An invitation to treat is a communication by which a party is invited to make an offer. It is distinguished from an offer primarily on the ground that it is not made with the intention that it shall become binding as soon as the person to whom it is addressed simply communicates his assent to its terms."**

The Court of Appeal concluded by stating thus:

> "**The law is settled that it is the duty of the plaintiff to prove the existence of a valid contract on which he relies for the reliefs sought in an action for breach of contract. In the instant case the appellant who was the plaintiff at the lower court failed to prove the existence of a valid contract as a basis for the reliefs sought."**

This court has stated time without number that in order to decide whether parties have reached agreement, it is usual to inquire whether there has been a definite offer by one party and unqualified acceptance of that offer by another. An offer is a definite undertaking made with the intention that it shall become binding on the person making it as soon as it is accepted by the person to whom it is addressed. It therefore follows as a matter of course to the happening of a contingency that contract only become enforceable provided the event has occurred or the contingency has happened. In other words where the contract is made subject to the fulfillment of certain specific terms and conditions, the contract is not formed or becomes binding unless and until those terms and conditions are complied with or fulfilled.

I have relied heavily on the following judicial authorities of this court, viz: **Omega Bank Plc vs. O.B.C Ltd (2005) 8 NWLR (Pt. 928) 547 at 575' Nwangwu vs. FBN (2009) 2 NWLR (Pt. 1125) 203, UBA Ltd. vs. Tejumola & Sons Ltd (1988) 2 NWLR (Pt. 79) 662 at 688;**

Tsokwa Marketing Co. Ltde vs. B.O.N. Ltd (2002) 11 NWLR (Pt. 777) 163 at 200.

It is necessary to weigh in the contents of the MOU within the ambit of the principles governing binding contracts with particular reference to what occurred in this case and the intendment of the parties.

I shall for a clearer view recast the Memorandum of Understanding (MOU) of Exhibit P5 to show which interpretation should be accorded the document and if it really qualified for the binding contract which the learned trial Judge accorded it and which the Court of Appeal jettisoned on the ground that it fall short of a contract agreement as known to law. Hereunder is the MOU thus:

MEMORANDUM OF UNDERSTANDING

This MEMORANDUM OF UNDERSTANDING is entered into this 13th day of July 2004

BETWEEN

Federal Capital Development Authority, Area II Garki Abuja, hereinafter referred to as "THE AUTHORITY" (which expression shall where the context so admit include the representatives and assigns of the first part.

AND

BBS Engineering Construction Company Limited RC. 343541, a company incorporated in Nigeria with Limited Liability whose registered office is situated at Plot1687 Jolayemi Street, Victoria Island, Lagos, hereinafter referred

to as "THE COMPANY", (which expression shall where the context so admits include the representative and assigns) of the first part.

WHEREAS

1. The Company is a limited liability company registered in Nigeria and engaged in Engineering and construction works

2. The Company at a meeting held on the 6th day of July 2004 at the instance of the Presidency, presented a proposal for the provision of infrastructural facilities to Mabushi and Katampe Districts of the Federal Capital Territory (hereinafter referred to as THE PROJECT) through Public Private Sector Partnership (PPP) and funding and to recover the cost of the project by the receipts of development levies and sale of plots

3. The authority has express interest in the company's proposal for the development of infrastructural facilities in Mabushi and Katampe District of Federal Capital Territory, Abuja.

4. The authority recognize that the company shall raise funds for the project through financial institutions wherefore the parties have entered into these present.

Now this memorandum of understanding witnessed as follows:

1. That the Authority shall provide to the Company Mabushi and Katampe Districts of the Federal Capital

Territory for the development of infrastructural facilities.

2. That the details of the, method of development and specification materials used for the provision of the said infrastructure in accordance with specific standards of the Federal Capital Territory Development Authority (FCDA) applicable in the Federal Capital City.

3. That the parties shall:

(i) Upon the execution of this memorandum of understanding the Authority shall immediately provide the Company engineering design drawings and bill of quantities and any other documents, which will enable the Company complete its cost analysis in the project.

(ii) Within 14 days of the execution of this memorandum of understanding the parties hereto shall enter into a formal agreement with respect to the project/proposal on terms to be mutually agreed.

4. That all documents, materials, discussions, etc shall be treated with the utmost confidentiality and neither party to this memorandum of understanding shall disclose any information to a third party.

5. That this memorandum of understanding is subject to the signing of a formal agreement by the parties. The

gravamen of Exhibit 5 is seen at paragraph 5 thereof thus:

"That this memorandum of understanding is subject to the signing of the formal agreement by the parties."

The understanding to be alluded to that phrase above is that the MOU, Exhibit P5 is subject to the occurrence of the future event which is the signing of a formal agreement. That means in my humble view that Exhibit P5 is not that final event or agreement but rather a preamble to the happening of the event coming after. Therefore the interpretation of the trial court of the MOU being a binding contract was faulty, for as an agreement the MOU was inchoate or incomplete. Its completeness can only be when the "formal agreement" was signed and that was yet to happen. See **Okechukwu vs. Onuorah** (2000) 15 NWLR (Pt. 691) 597 at 614 -615; **UBA Ltd vs. Tejumola & Sons Ltd** (1988) 2 NWLR (Pt. 79) 662 at 688).

This stand is well captured in the case of Best (Nig) Ltd vs. B. H (Nig) Ltd (2011) 5 NWLR (Pt. 1239) 95 at 126 where this court held as follows:

"Where a contract is made subject to the fulfillment of certain specific terms and conditions, the contract is not formed and not binding unless and until those terms and conditions are complied with or fulfilled. Tsokwa Marketing Co. Ltd vs. B.O.N. Ltd (2002) 11 NWLR (Pt. 777) 163."

The situation presenting as it is, that of an inchoate agreement which can be properly described as an Intent for a future reaching of an agreement, there is no basis on which specific performance can be ordered. For emphasis the MOU was just a process in the journey to a contract and so the contract has not happened and so no specific performance can be ordered and the issue of a quantum merit of damages cannot be ordered for a non-existent contract not to talk of a breach thereof. *See* **Ezenwa vs. Oko (2008) 3 NWLR (Pt. 1075) 610 at 628; Savannah Bank of Nigeria Plc vs. Oladipo Opanubi (2004) 1 NWLR Pt. 896) 437 at 453 -454.**

From the foregoing in the light of the fuller reasoning in the lead judgment of my learned brother, Kekere-Ekun JSC I see no basis for upsetting the well considered judgment of the court of Appeal. This appeal lacks merit and it hereby dismissed. I abide by the consequential orders made.

Mary Ukaego PeterOdili
Justice, Supreme Court

BAYANG AKAAHS (JSC): My learned brother, Kekere-Ekun (JSC), made available to me in advance the judgments just delivered dismissing the appeal with which I am entirely in agreement.

The linchpin of this case is Exhibit 5 which is merely a declaration of intent and does not crystallize into a binding contract until a formal agreement has been duly signed by the parties provided in paragraph 5 of the Memorandum of Understanding which states that:

A "That this memorandum of understanding is subject to the signing of a formal agreement by the parties."

B For this and the more detailed reasons contained in the lead judgment of my learned brother, Kekere-Ekun (JSC), the appeal lack merit and it is accordingly dismissed. Parties to bear their respective costs.

C **K.B. AKAAHS**
Justice Supreme Court

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CANNITEC INTERNATIONAL COMPANY LTD
AND
SOLEL BONEH NIG. LTD.

SC.88/2007

IN THE SUPREME COURT OF NIGERIA
HOLDEN AT ABUJA
FRIDAY, 27TH JANUARY, 2017

BEFORE THEIR LORDSHIPS

OLABODE RHODES-VIVOUR	**JUSTICE, SUPREME COURT**
OLUKAYODE ARIWOOLA	**JUSTICE, SUPREME COURT**
CLARA BATA OGUNBIYI	**JUSTICE, SUPREME COURT**
CHIMA CENTUS NWEZE	**JUSTICE, SUPREME COURT**
AMIRU SANUSI	**JUSTICE, SUPREME COURT**

APPEAL: Formulation of issues for determination – Formulation of issues by court – When permissible

CONTRACT: Construction of contractual terms – Guiding principles

CONTRACT: Contractual terms – Bindingness on parties

CONTRACT: Elements of a valid contract – Consideration thereof.

COURT: Construction of contract – Duty on the court thereto

Issue for Determination

Whether there is a contract between the parties for the appellant to execute the laying of terrazzo and skirting works in the Mortuary Block and Block H at the University of Port Harcourt.

Facts of the Matter

The respondent, Solel Boneh Nigeria Ltd is the main contractor to the University of Port Harcourt Teaching Hospital, while the appellant, Cannitec International Company Ltd is a subcontractor to the respondent. Between 1999 and 2001 the respondent awarded the appellant a subcontract for terrazzo and skirting works in Block J at the University of Port Harcourt. The parties agreed that the price for the job would be N1,400.00 (one thousand four hundred naira) per square meter and N300.00 (three hundred naira) per linear meter respectively.

The job was completed by the appellant. The respondent was satisfied with work done and duly paid the appellant. Both sides were happy. Thereafter, the respondent offered the appellant another sub-contract. In this sub-contract the respondent wanted the appellant to extend work done in Block J to the Mortuary Block and Block H at the same price. The appellant refused, there were offers and counter offers. The appellant's case is that the parties verbally agreed to the upward review of the rates to N2,600.00 (two thousand, six hundred naira) per square meter for terrazzo and N500.00 (five hundred naira) per linear for skirting for the Mortuary Block and Block H. On the other hand the respondent's case is that the works he offered the appellant were an extension of the sub-contract for Block J, and the agreed price was N1,400.00 (one thousand, four hundred naira) and N300.00 (three hundred naira) for terrazzo

and skirting works respectively. The trial court agreed with the case made out by the appellant and entered judgment against the respondent in the sum of N6,923,750.00 (six million, nine hundred and twenty-three thousand, seven hundred and fifty naira). The Court of Appeal upset the judgment of the High Court on the ground that there is no enforceable contract between the parties. Being dissatisfied, the appellant now appeals to the Supreme Court.

Held: *(Unanimously dismissing the appeal)*

1. *When a Court can formulate issues for determination*
In situations such as this where counsel fail to formulate issues that easily determine the appeal as opposed to presenting peripheral issues for determination this court can formulate issues that would determine the real grievance in the appeal. [Okpala vs. Ibeme (1982) 2 NWLR (Pt.102) p.220, Ogunbiyi vs. Ishola (1996) 6 NWLR (Pt.452) p.15]
(P 151 paras A-B)

2. *When does a valid contract exist between parties*
A valid contract exists between the parties when a valid offer and valid acceptance is identified. Also, when the parties are in agreement on all material points, a valid contract exists and there would be no need to identify if there was offer and acceptance.
(P 153 paras A-B)

3. *What amounts to a counter-offer*
Exhibit 'C' is a counter-offer. It amounts to a

rejection of the offer by the appellant. (Okubule vs. Oyagbola (1990) 4 NWLR (Pt.147) p.723.
(Pp 155-156 paras H-A)

4. *The conduct of parties as a guide in deducing contractual intention*
The conduct of parties to a contract is a guide towards deducing what their actual intention is. Exhibit E and F (not produced) are clear evidence that the appellant wanted the price for the extension work to the Mortuary and Block H reviewed upwards. All documents are indicative of the fact that there was an outright rejection by the respondent.
(P 159 paras C-D)

5. *What are the elements of a valid contact?*
The law is trite and elementary that, for a valid contract to exist between the parties there must have been offer and acceptance which ought to be sealed by a consideration. *(P 161 para B-C)*

6. *The bindingness of contractual terms on the parties*
Learned counsel for the appellant would appear to have glossed over the fact that the said exhibits contained the contractual terms between the parties. Their terms were, therefore, binding on them, [Northern Assurance Co Ltd vs. Wurola (1969) NSCC 22; UBA vs. Europhina Nigeria Ltd (1991) 12 NWLR (Pt.176) 677] *(P 164 paras D-E)*

7. *The construction of contractual terms*
I am informed by my reading and understanding of the extant jurisprudence on this point that the meaning to be imposed on a contract is that which is plain, clear and the obvious results of the terms used, [Aouad vs. Kesserawani (1956) NSCC 33..]

Accordingly, the inflexible prescription that has crystallized from case law is that when construing documents in dispute between two parties, the proper course is to discover the intention or contemplation of the parties and not to import into the contract "ideas not potent on the face of the document," per Tobi (JSC) in Nika Fishing Co Ltd vs. Lavina Corporation (2008) LPELR-SC.162/2002; (2008) 16 NWLR (Pt.1114) 509, citing Amadi vs. Thomas Aplin and Co Ltd (1972) 7 NSCC 262. *(Pp 164-165 paras E-A)*

8. *The duty of the court in the construction of contract between parties*
It is this rule that dictated the position that where there is a contract regulating any arrangement between the parties, the main duty of the court is to interpret that contract and to give effect to their wishes as expressed in the contract document, [Oduye vs. Nigerian Airways Ltd (1987) 2 NWLR (Pt.55) 126].

In discharging its duty in the construction of such documents, therefore, the question is not what the parties to the document may have intended to do by entering into that document, but what the meaning of the words used is, [Amizu vs. Dr. Nzeribe (1989) 4

NWLR (Pt.118) 755].

Indeed, there is authority for the proposition that while a contract must be strictly construed in accordance with the well-known rules of construction, such strict construction cannot be a ground for departing from the terms which had been agreed by both parties to the contract, Niger Dams Authority vs. Chief Lajide (1973) 5 SC 207. This must be so for the law takes the view that parties to an agreement retain the commercial freedom to determine their own terms. Hence, no other person, not even the court, can determine the terms of contract between parties thereto. *(P 165 paras A-F)*

9. *Duty of the court in the interpretation of a contract*
The duty of the court is to strictly interpret the terms of the agreement on its wordings, [Nimanteks Associates vs. Marco Construction Company Ltd (1991) 2 NWLR (Pt.1740) 411]. As such, it is not the function of a court of law either to make agreements for the parties or to change their agreements as made, [African Reinsurance Corporation vs. Fantaye (1986) 1 NWLR (Pt.14) 113; Nika Fishing Co Ltd vs. Lavina Corporation (supra)] *(P 165 paras F-H)*

Nigerian Cases cited in this Judgment
A.G. Rivers State vs. A.G. AkwaIbom State & Anor (2011) 3 SC P.1;
African Reinsurance Corporation vs. Fantaye (1986) 1 NWLR (Pt.14) 113;

Alhaji K. A. Igbaro vs. Rasamin Industry Ltd. (1986) 3 NWLR (Pt.30) P.588;
Amadi vs. Thomas Aplin and Co Ltd (1972) 7 NSCC 262;
Amizu vs. Dr.Nzeribe (1989) 4 NWLR (Pt.118) 755;
Aouad vs. Kesserawani (1956) NSCC 33;
Idundun vs. Okumagba (1976) 9-10 SC 227;
Niger Dams Authority vs. Chief Lajide (1973) 5 SC 207;
Nika Fishing Co Ltd vs. Lavina Corporation (2008) LPELR-SC.162/2002; (2008) 16 NWLR (Pt.1114) 509;
Nimanteks Associates vs. Marco Construction Company Ltd (1991) 2 NWLR (Pt.1740) 411;
Northern Assurance Co Ltd vs. Wurola (1969) NSCC 22;
Oduye vs. Nigerian Airways Ltd (1987) 2 NWLR (Pt.55) 126;
Ogunbiyi vs. Ishola (1996) 6 NWLR (Pt.452) p.15;
Okpala vs. Ibeme (1982) 2 NWLR (Pt.102) p.220;
Okubule vs. Oyagbola (1990) 4 NWLR (Pt.147) p.723;
Refer Data Processing Maintenance and Services (D.P.M) Limited vs. Emmanuel OlamideLarmie (2000) 5 NWLR (Pt.655);
UBA vs. Europhina Nigeria Ltd (1991) 12 NWLR (Pt.176) 677; and
Uwah & Anor vs. Akpabio &Anor (2014) 2-3 SC P.1.

Nigerian Statutes cited in this Judgment
Constitution of the Federal Republic of Nigeria, 1999 (as amended)

Representations
S. Brisibe and **E. I. Erebi-***for the Appellant*
Mrs. R. Chris Garuba with her **R.Odo and A. Omah** -*for the Respondent*.

RHODES-VIVOUR, (JSC) (Delivering the Lead Judgment): The appellant as plaintiff sued the respondent on a writ of summons and Statement of Claim for:

(1) The sum of N8,866,670.00 (eight million, eight hundred and sixty-six thousand, six hundred and seventy naira) being and representing the balance of the contractual sum for the subcontract works awarded by the defendant to the plaintiff between 1999-2001 to Terrazzo and Skirt Blocks "A" "H" and Mortuary Building, respectively at the permanent site of the University of Port Harcourt Teaching Hospital, Port Harcourt.

(2) Interest of 10% of the said sum of money from the date of judgment until the same is liquidated.

The defendant filed a Statement of Defence. At the trial which commenced on 3rd October, 2002 the plaintiff called a sole witness to prove its case and closed its case on 6th November, 2002. The defendant opened its defence on 12th December, 2002 and also called a sole witness to defend the suit. Documents to wit: Exhibits A, B, C, D, E, F, G, H, J, K, L, M and N were admitted in evidence.

In a judgment delivered on 24th March, 2004 the learned trial Judge entered judgment in favour of the plaintiff. His lordship said:

> **"In the circumstance, plaintiff is entitled to the sum of N7,223,000.00 (seven million, two hundred and twenty-three thousand naira) less N299,250 part payment as in item H of Exhibit 'K' that is to remain N6,923,750.00 (six million, nine hundred and twenty-three thousand, seven hundred and fifty naira) being retention fee for Block 'A' and representing the balance of the contractual sum for the subcontract works awarded by the defendant to the plaintiff..... There shall be 10% interest per annum on the judgment sum with effect from March, 2004 until judgment debt is liquidated. No order as to cost."**

Dissatisfied, the defendant Solel Boneh Nigeria Ltd filed an appeal. In a judgment delivered on 30th November, 2006 the Court of Appeal upset the judgment of the trial court. The court said:

> **"Accordingly, this appeal succeeds except on the issue of 10% retention fee which was assessed at 75% execution rate and should accordingly be paid over to the respondent.**
>
> **Parties shall each bear their cost."**

This appeal is against that judgment. In accordance with Rules of this Court, the appellant and the respondent filed and exchanged briefs of argument. The appellant's brief

was filed on 4 November 2008. Four issues were formulated from Grounds of Appeal. They are:

(1) Whether the lower court in the determination of the Appeal infringed on the appellant's right to fair hearing guaranteed in **Section 36 of the Constitution**.

(2) Whether the lower court had jurisdiction to interfere with and set aside the finding of the trial court that the agreed rates for the terrazzo and Skirting works were N2,600.00 and N500.00 respectively.

(3) Whether the lower court had jurisdiction to interfere with and set aside the portion of the judgment of the trial court awarding the sum of N6,923,750.00 in favour of the appellant.

(4) Whether the lower court was right when it interfered with and substantially set aside the judgment of the trial High Court.

On the other side of the fence, the respondent was of the view that there is only one issue for determination in this appeal, and it is:

> **"Whether or not the lower court was right to have interfered with and set aside the judgment of the trial court having regard to the evidence contained in the record of appeal before it?"**

The court of Appeal quite rightly in my view observed that the bone of contention between the parties is the amount at which the extension to the Mortuary Block and Block H

were executed. In situations such as this where counsel fail to formulate issues that easily determine the appeal as opposed to presenting peripheral issues for determination this court can formulate issues that would determine the real grievance in the appeal. See **Okpala vs.v Ibeme (1982) 2 NWLR (Pt.102) p.220, Ogunbiyi vs. Ishola (1996) 6 NWLR (Pt.452) p.15.**

I am satisfied that the issues formulated by both sides would not serve the interest of justice. The issue for determination shall be.

1. Whether there is a contract between the parties for the appellant to execute the laying of terrazzo and skirting works in the Mortuary Block and Block H at the University of Port Harcourt.

At the hearing of the appeal on 1st November, 2016 learned counsel for the appellant Mr. S. Brisibe adopted the appellant's brief filed on 4th November, 2008 and urged this court to allow the appeal.

On the other side Mrs. R. Chris Garuba, learned counsel for the respondent adopted the respondent's brief filed on 18th January, 2010 but deemed properly filed and served on 10th March, 2010 and urged this court to dismiss the appeal.

The facts are these:

The respondent, Solel Boneh Nigeria Ltd is the main contractor to the University of Port Harcourt Teaching

Hospital, while the appellant, Cannitec International Company Ltd is a subcontractor to the respondent. Between 1999 and 2001 the respondent awarded the appellant a subcontract for terrazzo and skirting works in Block J at the University of Port Harcourt. The parties agreed that the price for the job would be N1,400.00 (one thousand four hundred naira) per square meter and N300.00 (three hundred naira) per linear meter respectively. See exhibit 'A'.

The job was completed by the appellant. The respondent was satisfied with work done and duly paid the appellant. Both sides were happy. Thereafter, the respondent offered the appellant another sub-contract. In this sub-contract the respondent wanted the appellant to extend work done in Block J to the Mortuary Block and Block H at the same price. The appellant refused, there were offers and counter offers. The appellant's case is that the parties verbally agreed to the upward review of the rates to N2,600.00 (two thousand, six hundred naira) per square meter for terrazzo and N500.00 (five hundred naira) per linear for skirting for the Mortuary Block and Block H. On the other hand the respondent's case is that the works he offered the appellant were an extension of the sub-contract for Block J, and the agreed price was N1,400.00 (one thousand, four hundred naira) and N300.00 (three hundred naira) for terrazzo and skirting works respectively. The trial court agreed with the case made out by the appellant and entered judgment against the respondent in the sum of N6,923,750.00 (six million, nine hundred and twenty-three thousand, seven hundred and fifty naira). The Court of Appeal upset the judgment of the High Court on the ground

that there is no enforceable contract between the parties.

A valid contract exists between the parties when a valid offer and valid acceptance is identified. Also, when the parties are in agreement on all material points, a valid contract exists and there would be no need to identify if there was offer and acceptance. For example, multi-partite contracts and executed contracts in a commercial setting.

After the appellant completed terrazzo and skirting works in Block J in the University of Port Harcourt the respondent made another offer to the appellant, that is to say an extension of the existing subcontract to cover the Mortuary Block and Block H at the same rate Block J was executed.

The issue is at what amount was the extension to the Mortuary Block and Block H executed by the appellant? Did the parties agree?

The learned trial judge agreed with the appellant and entered judgment in his favour in the sum of N6,923,750.00 (six million, nine hundred and twenty-three thousand, seven hundred and fifty naira).

After examining Exhibits to wit: Exhibit 'A N' the Court of Appeal came to the conclusion that there is no document emanating from the respondent to the appellant evidencing any form of variation or acceptance of the counter offer of the appellant on the Mortuary and Block H works.

The Court of Appeal concluded, saying that there is no enforceable contract between the parties. Learned counsel for the appellant submitted that there was an oral agreement between the appellant and the respondent that the agreed rate for the works is N2,600.00 (two thousand, six

hundred naira) for terrazzo works and N500.00 (five hundred naira) for skirting works.

Reference was made to Exhibits L and K.

Learned counsel for the respondent observed that the respondent is not a party in exhibit L and so cannot be sued on it. He submitted that the Court of Appeal was right to re-evaluate evidence and was correct in its findings that there was no written or oral agreement between the parties for the appellant to execute terrazzo and skirting work in the Mortuary and Block H in the University of Port Harcourt. It is the duty of this court to examine documentary evidence to see if the Court of Appeal was correct.

Several documents passed between the parties for terrazzo and skirting works in the Mortuary and Block H of the University of Port Harcourt. In such a situation the judge should examine carefully all the documents passing between the parties and glean from them or from the conduct of the parties if they reached agreement on all material points.

Exhibit 'B' is addressed to the appellant. It was written by the respondent. Therein the respondent is offering the appellant a subcontract for the extension of terrazzo work in the Mortuary Block. It reads:

This is to inform you that your work has been extended to above-named building in our site at the University of Port Harcourt Teaching Hospital.

You are hereby instructed to go ahead with Terrazzo works with the former rate of N1,400.00 per meter square and N300.00 per

meter for skirting.

We hope you will find this in order.

Thanks

Yours faithfully,

For: Solel Boneh (Nigeria) Limited
Sergin Mesesan
Projects Manager

How did the appellant react to this offer?

See Exhibit 'C'. Relevant extracts from the appellant's letter, Exhibit 'C' reads:

"We wish to inform you that in view of the obvious fact that the cost of terrazzo materials and labour have skyrocketed, we cannot undertake the project at the old rate of N1,400.00 per square meter and N300.00 per meter for skirting.

Consequently, we are eager and willing to commence work at the rate of N3,500.00 per square meter and 600.00 per meter for skirting respectively, if this is acceptable by you and funds made available to us.

We sincerely count on your understanding and immediate, action to enable us move to site.

Exhibit 'C' is a counter-offer. It amounts to a rejection of the offer by the appellant.

See **Okubule v Oyagbola (1990) 4 NWLR (Pt.147) p.723.**

What transpired thereafter. The respondent replied Exhibit 'C'. It is Exhibit 'D'. It reads:

TERRAZZO WORKS IN MORTUARY BLOCK

> **"Since you were instructed to commence works on Terrazzo Works in the above described area, we noticed that nothing has been done or brought to site to show a sign of commitment.**
>
> **You are hereby instructed once again to start work immediately in this area and make finishing touches in all other buildings that you have worked....."**

In response to Exhibit 'D' the appellant wrote Exhibit 'E'. Extracts from it runs as follows:

> **"We categorically made it clear in our above referenced letter that the old price of N1,400.00 and N300.00 per square meter is not acceptable to us. We also stated a new price in the quoted letter for which we expected your reply confirming your acceptance or rejection of the offer. We could not have moved to site for commencement of work when we have not heard from you on the new rate, for the job.**
>
> **Consequently, we wish to state unequivocally that our movement to site is**

> **dependent on your confirmation of the acceptance of our offer in writing and subsequent commitment by way of releasing some funds to us....."**

All the letters reproduced so far show that the parties at no time agreed, on a price for the works to be done to the Mortuary and Block H, but Exhibit 'N' is decisive. It was written by the appellant to the respondent. It reads:

> **"..... Sequel to our discussions with Messrs F. Boaz Chief Engineer, and Moshe Ben-Baruk, Project Manager of your company and in view of our present and future business relationship which we want to sustain, we hereby withdraw the reference letter.**
>
> **We look forward to widening the scope of our business relationship to include other service provided by our company."**

What did the Court of Appeal have to say on Exhibit 'N'. The court said:

> **"The import of this letter is that respondent (appellant in Supreme Court) accepts the extension of Mortuary and Block H at the old rate, that respondent thereby waived his rights on the matter of review of rates....."**

Where the terms of a written contract are clear effect must be given to it and it is not the function of the court to rewrite contracts for the parties. In the absence of fraud or misrepresentation, the parties are bound by its terms. See **A.G. Rivers State vs. A.G. Akwa Ibom State & Anor (2011) 3 SC P.1; Uwah & Anor vs. Akpabio & Anor (2014) 2-3 SC P.1**

To my mind, Exhibit 'N' withdraws the appellant's counter-offer made in Exhibit 'C'. This means that the appellant accepts the offer made by the respondent in Exhibit B. It was the rates agreed in Exhibit B that covered works for the Mortuary and Block H. No new rates or upward review of rates were agreed by the parties and the appellant has been paid for work done. Exhibit N is conclusive evidence that at no time was there a verbal or oral contract. This also applies to Exhibit K which only shows interim payment for work done by the appellant in Block A, H, J and the Mortuary.

Dismissing Exhibit L as it is not a documentation of the extension of the subcontract to the Mortuary Block and Block H the Court of Appeal said:

> **"..... Further, by the contents of the said Exhibit L the parties are different and so all the terms....."**

I have examined Exhibit L. It is a subcontract agreement between Reynolds Construction Company (Nig) Ltd and the appellant, and the contract was for the appellant to execute work on cement and sand screeding, and Terrazzo

works both in Block A. The parties are different and the terms of the contract are different in that they do not cover work in the Mortuary and Block H. Nowhere in Exhibit L is the respondent mentioned. This document does not emanate from the respondent, so it is irrelevant in considering whether there was a subcontract between the respondent and appellant for the appellant to execute terrazzo and skirting works in the Mortuary and Block H.

The conduct of parties to a contract is a guide towards deducing what their actual intention is. Exhibit E and F are clear evidence that the appellant wanted the price for the extension work to the Mortuary and Block H reviewed upward. All documents are indicative of the fact that there was an outright rejection by the respondent.

The Court of Appeal came to the conclusion that some work was done when it said:

> **"Both parties however, by conduct engaged in some contractual activities under which some work was done and payments were made....."**

The Court of Appeal further observed that:

> **"..... The respondent however radically changed his legal position by its Exhibit N which withdraws its counter offer". The implication is thus a return to Exhibit B, the initial offer made by the appellants....."**

After an examination of the Exhibits, it becomes clear that there is no written contract by the parties. Indeed, Exhibit N is conclusive that the parties never entered into any written contract, rather the appellant accepted to execute the laying of terrazzo and skirting in the Mortuary and Block H at the University of Port Harcourt at the old rate. There is thus no contract on which the appellant could sue.

Appeal dismissed. Judgment of the Court of Appeal is affirmed.

Olabode Rhodes-Vivour
Justice Supreme Court

OLU ARIWOOLA, (JSC): I had the preview of the draft of the lead judgment just delivered by my learned brother, **Rhodes-Vivour, (JSC)**. I am in agreement with the reasoning that led to the conclusion that the appeal lacks merit and should be dismissed. It is accordingly dismissed by me.

Appeal dismissed.

I abide by the consequential orders in the said lead judgment including the order on costs.

Olu Ariwoola
Justice, Supreme Court

BATA OGUNBIYI, (JSC): I read in draft the lead judgment just delivered by my brother, **Rhodes-Vivour, (JSC).** I agree that there is no merit in this appeal and the judgment of the lower court which set aside the decision of the trial High Court is also affirmed by me.

The facts of this case are well spelt out in the lead judgment of my learned brother.

The issue that calls for determination in this appeal is simple and narrow. In other words, whether or not there is an existing contract agreement between the parties and demanding the appellant to execute the laying of terrazzo and skirting works in the Mortuary Block and Block H at the University of Port Harcourt.

The law is trite and elementary that, for a valid contract to exist between the parties there must have been offer and acceptance which ought to be sealed by a consideration.

The services of the appellant were employed by the respondent to execute the laying of terrazzo and skirting works in Block J at the University of Port Harcourt. The appellant is the sub-contractor to the respondent. The said sub-contract was settled at the rate of N1,400.00 (one thousand four hundred naira) per square meter and N300.00 (three hundred naira) per linear metre respectively. The said term of contract was fully executed and paid for in terms of Exhibit 'A'.

The bone of contention between the parties arose from the subsequent and separate offer made by the appellant to the respondent in terms of "an extension of the existing sub-contract to cover the Mortuary Block and Block H", at the same rate with the earlier one which had been executed and concluded. The respondent made a counter offer in respect of the new contract, wherein he demanded for N3,500.00 (three thousand, five hundred naira) and N600.00 (six hundred naira) respectively for the terrazzo and skirting works. The letter of extension of the sub-contract to cover the "Mortuary Block and Block H" is "Exhibit B". Exhibit C embodies the counter-offer made by

the respondent.

Without responding to Exhibit C the appellant sent "Exhibit D" to the respondent which contains complaints of the failure of the respondent to commence work as offered in Exhibit B. Exhibit C is where the respondent requested a confirmation/acceptance of its counter-offer at the reviewed rates for the extension, but received no response.

Respondent nonetheless mobilized the site.

At page 194 of the record, this was what the lower court had to say:

> **"Both parties however, by conduct engaged in some contractual activities under which some work was done and payment were made. Without "Exhibit N", made by the respondent, the situation of the parties would have been governed by the principles of *quantum meruit,* {Refer Data Processing Maintenance and Services (D.P.M) Limited vs. Emmanuel Olamide Larmie (2000) 5 NWLR (Pt.655)} as propounded by the learned counsel for the respondent. The respondent however radically changed this legal position by its Exhibit N which withdraws its counter offer. The implication is thus a return to Exhibit B the initial offer made by the appellant. By the terms of "Exhibit B" the initial contract, though fully executed and paid for, was extended to the "Mortuary Block and Block H". The rates of work for the said two blocks are therefore as**

> **agreed to for that of "Block J".**

I agree and endorse in totality the findings by the lower court per above. In addition further, the lower court cannot also be faulted when it held that:

> **"The findings of the learned trial judge that an outstanding balance be paid to the respondent upon the upward review of the Mortuary Block and Block H" is perverse because it is not supported by the facts and evidence before the trial court and is hereby set aside as occasioning a miscarriage of justice. See Alhaji K. A. Igbaro vs. Rasamin Industry Ltd. (1986) 3 NWLR (Pt.30) P.588 @ 595, and Idundun vs. Okumagba (1976) 9-10 SC 227".**

My brother **Rhodes-Vivour, (JSC)** has dealt adequately with the appeal. With the few words of mine and particularly on the comprehensive reasoning and conclusion arrived at by my brother, which I adopt as mine, I also dismiss this appeal as lacking in merit and abide by all orders made in the lead judgment.

Clara Bata Ogunbiyi
Justice, Supreme Court

CENTUS NWEZE, (JSC): My Lord, **Rhodes-Vivour, (JSC),** obliged me with the draft of the lead judgment just delivered now. I, entirely, agree with His Lordship that, being unmeritorious, this appeal should be dismissed.

As shown in the leading judgment, upon its perusal and evaluation of Exhibits A N, the lower court was unable to locate any document evidencing any form of variation or acceptance of the appellant's counter offer on the Mortuary works etc.

Intriguingly, learned counsel for the appellant would seem to suggest that the lower court ought to have sought for, and located, the intention of the parties *aliunde* (that is, from where). Happily, that court was not persuaded by that argument.

Like the leading judgment, I adopt the approach of the lower court. No doubt, a contrary approach would have rankled exegetes of Contract Law Principles. True, indeed, learned counsel for the appellant would appear to have glossed over the fact that the said exhibits contained the contractual terms between the parties. Their terms were, therefore, binding on them, **Northern Assurance Co Ltd. vs. Wurola (1969) NSCC 22; UBA vs Europhina Nigeria Ltd (1991) 12 NWLR (Pt.176) 677.**

I am informed by my reading and understanding of the extant jurisprudence on this point that the meaning to be imposed on a contract is that which is plain, clear and the obvious results of the terms used, **Aouad vs. Kesserawani (1956) NSCC 33.**. Accordingly, the inflexible prescription that has crystallized from case law is that when construing documents in dispute between two parties, the proper course is to discover the intention or contemplation of the parties and not to import into the contract "ideas not potent on the face of the document," per **Tobi JSC in Nika Fishing Co Ltd vs. Lavina Corporation (2008) LPELR-SC.162/2002; (2008) 16 NWLR (Pt.1114) 509,** citing

Amadi vs. Thomas Aplin and Co Ltd (1972) 7 NSCC 262.

It is this rule that dictated the position that where there is a contract regulating any arrangement between the parties, the main duty of the court is to interpret that contract and to give effect to their wishes as expressed in the contract document, **Oduye vs. Nigerian Airways Ltd (1987) 2 NWLR (Pt.55) 126.** In discharging its duty in the construction of such documents, therefore, the question is not what the parties to the document may have intended to do by entering into that document, but what the meaning of the words used is, **Amizu vs. Dr. Nzeribe (1989) 4 NWLR (Pt.118) 755.**

Indeed, there is authority for the proposition that while a contract must be strictly construed in accordance with the well-known rules of construction, such strict construction cannot be a ground for departing from the terms which had been agreed by both parties to the contract, **Niger Dams Authority vs. Chief Lajide (1973) 5 SC 207.** This must be so for the law takes the view that parties to an agreement retain the commercial freedom to determine their own terms. Hence, no other person, not even the court, can determine the terms of contract between parties thereto.

The duty of the court is to strictly interpret the terms of the agreement on its wordings, **Nimanteks Associates vs. Marco Construction Company Ltd (1991) 2 NWLR (Pt.1740) 411.** As such, it is not the function of a court of law either to make agreements for the parties or to change their agreements as made, **African Reinsurance Corporation vs. Fantaye (1986) 1 NWLR (Pt.14) 113; Nika Fishing Co Ltd vs. Lavina Corporation (supra).**

A It is for these, and the more detailed, reasons in the leading judgment that, I too, shall dismiss this appeal for being unmeritorious. Appeal dismissed.

Chima Centus Nweze
B ***Justice, Supreme Court***

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H

COMMISSIONER OF POLICE
AND
EPHRAIM ALOZIE

SC.60/2013

IN THE SUPREME COURT OF NIGERIA
HOLDEN AT ABUJA
FRIDAY, 20TH JANUARY, 2017

BEFORE THEIR LORDSHIPS

IBRAHIM TANKO MUHAMMAD	**JUSTICE, SUPREME COURT**
MUSA DATTIJO MUHAMMAD	**JUSTICE SUPREME COURT**
KUMAI BAYANG AKA AHS	**JUSTICE, SUPREME COURT**
CHIMA CENTUS NWEZE	**JUSTICE, SUPREME COURT**
AMIRU SANUSI	**JUSTICE, SUPREME COURT**

COURT: Confessional statement – Objection to its admissibility – Accused retracts his statement – Court to determine weight to be attached to statement – Factors to be considered.

COURT: Confessional statement of accused – Objection to its admissibility on ground of involuntariness – Court failed to conduct trial within trial – Effect on tendered confessional statement.

COURT: Confessional statement tendered – Objection on ground of involuntariness – Obligation on the trial court

COURT: Confessional statement tendered – Objection to its admissibility – Where court is bound to reject

CRIMINAL LAW AND PROCEDURE: Confessional statement – Objection to admissibility – The concept of retraction – Meaning

CRIMINAL LAW AND PROCEDURE: Confessional statement – When challenged on ground of involuntariness by an accused, trial within trial is the only process of testing its admissibility

CRIMINAL LAW AND PROCEDURE: Confessional statement – Where an accused person retracts his confessional statement – Procedure to be adopted

CRIMINAL LAW AND PROCEDURE: Confessional statement – When does the question of its involuntariness arise during proceedings

CRIMINAL LAW AND PROCEDURE: Distinction between involuntariness of confessional statement and retraction of confessional statement – Procedure applicable in each case.

CRIMINAL LAW AND PROCEDURE: Statement made by accused – Admissibility – Onus on prosecution

CRIMINAL LAW AND PROCEDURE: Where accused objects to his confessional statement on ground of involuntariness trial within trial is imperative – How conducted.

EVIDENCE: Confessional statement – Objection to its admissibility – Distinction between objection on ground of involuntariness and retraction.

Issue for Determination

Whether the court below was right in rejecting and expunging the confessional statement, Exhibit B, from the evidence on the ground of failure to conduct trial within trial resulting in the discharge and acquittal of the respondent of the offences of criminal conspiracy and armed robbery?

Facts of the Matter

The accused/respondent, Ephraim Alozie, was arraigned before the High Court of the Federal Capital Territory, Abuja for the offences of conspiracy and armed robbery.

In proof of their case, the prosecution called five witnesses, PW1 PW5. The PW1 received the report of the robbery incident and recovered certain items from the *locus criminis*. The Investigating Police Officer, PW5, in his evidence, identified and tendered a confessional statement which the accused, allegedly, made. The said statement was recorded by Emmanuel Okoye who was a member of the investigation team.

The said statement was admitted in the proceedings as Exhibit B.

The evidence of the PW2 was that both himself and the respondent were members of an armed robbery gang. He, it was, who spied on the victim, the deceased person, prior to the robbery incident. On his part, the accused/respondent, not only denied making the said Exhibit B, he, equally denied committing the offence he was charged with. The trial court,

upon finding him guilty as charged, convicted and sentenced him.

His appeal to the Court of Appeal, Abuja Division was successful. The Court of Appeal quashed his conviction and sentence, hence, this further appeal by the prosecution.

Held: *(Unanimously dismissing the appeal)*

1. *The onus placed on the prosecution to prove that a statement to be admitted against an accused was made voluntarily*
It is as clear as day, that the appellant's objection was to the voluntariness of the statement sought to be tendered, and the Judge ought to have known so. Apart from the clear words used in objecting, other evidence led before the court, clearly raised the issue of the voluntariness of the statement, which the trial Judge should have considered.
This principle is as old as the law received from England. In England, the principle is as old as Hale, [Gbadamosi and Anor vs. State (1992) LPELR - SC.290/1991, citing Ibrahim vs. R (1914) AC, 559, 609; Ikpasa vs. The State (1981) 9 SC 7, 29; John Dawaand Anor vs. State (supra) at 258; Auta vs. State [1975] 1 All NLR 163, 169].
(Pp 190-191; 193 paras H-B; C-D)

2. *When does involuntariness arise in a confessional statement made by an accused person*
The question of involuntariness, often, arises where

an accused person alleges that he was subjected to torture in making of a confessional statement. In other words, though, he made the statement, it was not a product of his free will since he was forced to make it, Mbang vs. State [2013] 7 NWLR (Pt. 1352) 48; Ibeme vs. State [2013] 10 NWLR (Pt. 1362) 333; Olatunbosun vs. State [2013] 17 NWLR (Pt. 1382) 167]. *(P 193 paras D-F)*

3. *The duty of the trial court where the question of involuntariness of a confessional statement arises in a criminal trial*
Per C.C Nweze (JSC)

> **"In this sort of situation, the trial court is under obligation to conduct a trial-within-trial (also known as *voire dire* or mini trial) to determine the veracity or otherwise of the claim. As this court (per Nweze, JSC) explained in FRN vs. Dairo (2015) LPELR 24303 (SC) 44 - 45:**
>
> > **….the raison d'etre of the evolution of the mini trial or voire dire procedure is to arm the trial court with procedural mechanism for shifting the chaff of involuntary, and, hence, inadmissible evidence from the wheat of admissible evidence whose cogency and probative value are indisputable. The cases on this point are legion: they are countless.**

Only one or two of them will be cited here, Ogudo vs. The State [2011] 12 SC (Pt. 1) 71; Ibeme vs. The State (2013) LPELR - 20138 (SC); Auta vs. State [1975] 4 SC 125; Effiong vs. State [1978] 8 NWLR (Pt. 562) 362; Lasis vs. State (2013) LPELR 20183 (SC) 29; The State vs. Rabiu (2013) LPELR 20183 (SC) 29; Ogudu vs. The State (2011) LPELR – 860 (SC); Nwangbonu vs. State [1987] 4 NWLR (Pt 67) 748; Ogunye vs. State [1999] 5 NWLR (Pt 664) 548, 570.

Scholars are, also, unanimous on this issue, I.H. Dennis, *The law of Evidence* **[Second Edition] (London: Sweet and Maxwell, 2002) 184; L.O. Aremu, "The Voluntariness of Confessions in Nigeria in 1977-1980"** *Nigerian Law Journal***, 32; J. Amadi,** *Contemporary Law of Evidence in Nigeria* **[Vol. 1] (Port Harcourt: Pearl Publishers, 2011) 324, M.A. Owoade, "Voluntariness of Confessions in Nigerian Law - Need for Reform," in** *1987 Nigeria Current Law Review* **179.** (Pp 193-194 paras F-H)

4. *The procedure to be followed by court where an accused person retracts his confessional statement*

On the other hand, a retraction or denial of a confessional statement does not affect its admissibility, [Mbang vs. State (supra)]. In other words, where an accused person denies his

confessional statement, the trial court has no obligation to conduct a trial within trial, [Mbang vs. State (supra); Abdullahi vs. State [2013] 11 NWLR (pt 1366) 435].

This has long been settled in the very old cases of R. vs. Sapele and Anor (1952) 2 FSC 74; R vs. Itule (1961) Al NLR 462; the relatively old decisions of Ikpasa vs. The State (1981) 9SC 7; Akpan vs. State (1992) LPELR - 381 (SC) 36 Osakwe vs. State [1994] 2 SCNJ 57; Nwangbonu vs. The State [1994] 2 NWLR (Pt. 327) 380; Bature vs. State [1994] 1 NWLR (pt 320) 267; Eragna and Ors vs. The AG, Bendel (1994) LPELR (SC) 30; Idowu vs. State [1996] 11 NWLR (pt 574) 354; as well as the more recent decisions of Silas Sule vs. State (2009) LPELR 3125 (SC) 28-20, G-B; FRN vs. Iweka (2011) LPELR - 9350 (SC) 53; Oseni vs. The State (2012) LPELR - 7833 (SC) 22 -23.
(P 195 paras A-E)

5. *The procedure to be adopted by court where an accused retracts his statement*

Where it is the case of retraction of the confessional statement, that is to say, where the accused simply denies making the statement, such statement can still be admitted when tendered by the prosecution notwithstanding the objection by the defence. The matter of retraction could still be taken up by the defence/accused in his defence. In such situation, it is not of any necessity to conduct a trialwithintrial, as I stated above, once no minutest element of allegation or evidence of involuntariness or any vitiating factor

of confessional statement was applied and raised in the course of the trial. It is within the precinct of a trial court to consider, if in deciding the credibility of the retracted confession, what weight to ascribe to it. [Adisa Wale vs. The State (2013) 14 NWLR (pt.1375) 562] *(Pp 210-211 paras G-C)*

6. *Where a confessional statement is found to be voluntary*

As has been well-settled, a confession, if voluntary, is deemed to constitute a relevant fact as against the person who made it, hence, it is admissible against that person, only, [Nsofor vs. State [2004] 18 NWLR (Pt 905) 292; Lasisi vs. State [2013] 9 NWLR (pt 1358) 74; Saidu vs. State [1982] 4 SC 41; Adebayo vs. AG, Ogun State [2008] 2 SCNJ 352.

As a corollary, the courts are bound to reject an accused person's confession which eventuated from torture, duress, threat or inducement, [Ehot vs. State [1993] 4 NWLR (Pt. 290) 644; Nwosu vs. State [1986] 4 NWLR (Pt 35) 348; Odeh vs. FRN [2008] 13 NWLR (Pt 1103) 1] *(P 195 paras E-H)*

7. *The rationale for trial within trial*

The only process of determining the voluntariness of a confession is through a trial-within-trial, [Mbang vs. State [2013] 7 NWLR (Pt 1352) 48, 72].

This is, also the only process of testing the admissibility of a confession where it is challenged on the grounds of threat, undue influence, duress etc, [Nsofor vs. State [2004] 18 NWLR (Pt 905) 292; Auta vs.. State [1975] 4 SC 125; Gbadamosi vs. State [1991]

6 NWLR (Pt 196) 182]. *(P 195-196 paras H-B)*

In the latter situation, that is, where an accused person retracts or resiles from his confessional statement, the trial court would be, perfectly, right to admit it and determine the weight to be attached to it in its judgment. *(P 199 paras G-H)*

8. *The factors relevant in considering the weight the court attaches to a retracted confessional statement of the accused*

For this purpose, it [the trial court] would, consider issues, such as the ones indicated hereafter.

They are: whether there is anything outside the confession which may vindicate its veracity; whether it is corroborated in any way; whether its contents, if tested, could be true; whether the defendant had the opportunity of committing the alleged offence; whether the confession is possible and the consistency of the said confession with other facts that have been established, Osetola and Anor vs. The State (2012) LPELR- 9348 (SC) 32-33, G-D; Kareeem vs. FRN [2002] 7 SCM 73; Akpan vs. The State [2001] 11 SCM 66.

> **"These principles which were enunciated in R. vs. Sykes (1913) 8 C. A. R. 233, 236 have been, consistently, endorsed by our Superior Courts, [Kanu vs. The King (1952) 14 WACA 30; The Queen vs. Obiasa (1962) 1 ALL NLR 651; [1962] 1 SCNLR 137; Obosi vs. The State (1965) NMLR**

129; Onochie and Ors vs. The Republic (1966) NMLR 307; Jakfiya Kopa vs. The State (1971) 1 ALL NLR 150; Dawa vs. The State [1980] 8-11 SC 236; Ejinima vs. The State [1991] 5 LRCN 1640, 1671; Arthur Onyejekwe vs. The State [1992] 4 SCNJ 1, 9; [1992] 3 NWLR (Pt. 230) 444; Aiguoreghian and Anor. vs. The State [2004] 3 NWLR (Pt 860) 367; [2004] 1 SCNJ 65; [2004] 1 SC (Pt.1) 65".
(Pp 199-200 paras H-F)

9. *The implication of admitting a confessional statement objected by the accused without determining voluntariness*

Regrettably, the trial court failed to ascertain the voluntariness of Exhibit B which it admitted and acted upon in convicting the appellant. The lower court was, therefore, right in expunging the said exhibit from the record. *(P 201 paras F-G)*

Per Amiru Sanusi (JSC):

"My lords, I think it is not out of place to restate the law on procedure of determining the voluntariness of a confessional statement. Where in the course of criminal proceedings a confessional statement of an accused person is tendered in evidence by the prosecution and question is raised by defence with regard to whether it was

made or obtained voluntarily, the trial court has a duty, and in fact MUST suspend the main trial and conduct a trial within trial to determine its voluntariness or otherwise. At the end of the mini trial, the trial court must make up its mind in the light of the evidence adduced before it by both the prosecution and the defence, on whether such statement was voluntarily made by the accused or not. If in its opinion, the statement in question was voluntarily made, it will admit it. But if the trial court finds that it was not voluntarily obtained, for instance if there was slightest evidence of duress, force, promise, inducement or that trick was applied to the accused person, it will reject such statement and mark it so in its ruling and will proceed with the main trial, except that it will not act on it in its determination of the case.

But if on the other hand, the trial court after conducting the trial within trial finds that the statement was voluntarily made by accused, it will deliver its ruling admitting it and mark it so accordingly and then proceed with the main trial and it could later use or act on it in the determination of the case". *(P 210 paras A-F)*

Nigerian Cases cited in the Judgment

*Abdullahi vs. State [*2013] 11 NWLR (pt 1366) 435;
Adebayo vs. AG, Ogun State [2008] 2 SCNJ 352;
Adisa Wale vs. The State (2013) 14 NWLR (pt.1375) 562;
Aiguoreghian and Anor. vs. The State [2004] 3 NWLR (Pt 860) 367 [2004] 1 SCNJ 65[2004] 1 SC (Pt.1) 65;
Akpan vs. The State [2001] 11 SCM 66;
Akpan vs. The State (1992) 6 NWLR (Pt 248) 439;
Amachree vs. Nigeria Army [2003] 3 NWLR (Pt. 807) 256;
Arthur Onyejekwe vs. The State [1992] 4 SCNJ 1, 9; [1992] 3 NWLR (Pt. 230) 444;
Auta vs. State [1975] 1 All NLR 163, 169;
Bature vs. State [1994] 1 NWLR (pt 320) 267;
Bozin vs. State (1985) LPELR 799 (SC);
Citing Igago vs. The State (1999) 10 - 12 SC 84; (1999) 14 NWLR (Pt. 637) 1;
Dawa vs. The State [1980] 8-11 SC 236;
Effiong vs. State [1978] 8 NWLR (Pt. 562) 362;
Ehot vs. State [1993] 4 NWLR (Pt. 290) 644;
Ejinima vs. The State [1991] 5 LRCN 1640,;
Eragna and Ors vs. The AG, Bendel (1994) LPELR (SC) 30;
FRN vs Iweka (2011) LPELR - 9350 (SC) 53;
FRN vs. Dairo (2015) LPELR 24303 (SC) 44 45;
Gbadamosi and Anor vs. State (1992) LPELR - SC.290/1991;
Gbadamosi vs. State [1991] 6 NWLR (Pt 196) 182;
Gira vs. The State (1996) 4 NWLR (Pt. 443) 375, 388;
Ibeme vs. State [2013] 10 NWLR (Pt. 1362) 333;
Idowu vs. State [1996] 11 NWLR (pt 574) 354;
Ikemson and Ors vs. The State (1989) 3 NWLR (Pt. 110) 455, 476;
Ikpasa vs. The State (1981) 9 SC 7, 29;

Jakfiya Kopa vs. The State (1971) 1 ALL NLR 150;
Kanu vs. The King (1952) 14 WACA 30;
Kareeem vs. FRN [2002] 7 SCM 73;
Lasis vs. State (2013) LPELR 20183 (SC) 29;
Lasisi vs State [2013] 9 NWLR (pt 1358) 74;
Madjemu vs. The State (2001) 9 NWLR (Pt.718) 349;
Mbang vs. State [2013] 7 NWLR (Pt 1352) 48,;
Nkwuda Edamine vs. The State (1996) 3 NWLR (Pt.438) 530;
Nsofor and Anor vs. State (2005) All FWLR (Pt. 242) 397;
Nsofor vs. State [2004] 18 NWLR (Pt 905) 292;
Nwangbonu vs. The State [1994] 2 NWLR (Pt. 327) 380;
Nwangbonu vs. State [1987] 4 NWLR (Pt 67) 748;
Nwosu vs. State [1986] 4 NWLR (Pt 35) 348;
Obiakor vs. State [2002] 6 SC (Pt. II 33) 39 40;
Obidiozo vs. State (1987) 4 NWLR (Pt. 67) 748;
Obosi vs. The State (1965) NMLR 129;
Odeh vs. FRN [2008] 13 NWLR (Pt 1103) 1;
Odu vs. F.R.N (2002) 5 NWLR (Pt. 761) 615;
Ogudo vs. The State [2011] 12 SC (Pt. 1) 71;
Ogudu vs. The State (2011) LPELR 860 (SC);
Ogunye vs. State [1999] 5 NWLR (Pt 664) 548, 570;
Ohuka and Ors vs. The State (1988) 7 SC (Pt. II) 24, 37;
Ojegele vs. The State (1988) 1 NWLR (Pt. 71) 414;
Olatunbosun vs. State [2013] 17 NWLR (Pt. 1382) 167;
*Onochie and Ors vs. The Republi*c (1966) NMLR 307;
Osakwe vs. State [1994] 2 SCNJ 57;
Oseni vs. The State (2012) LPELR - 7833 (SC) 22 -23;
Osetola and Anor vs. The State (2012) LPELR- 9348 (SC) 32-33, G-D;
R vs. Itule (1961) ALNLR 462;
R.vs. Sapele and Anor (1952) 2 FSC 74;

Saidu vs. The State (1982) 41 SC (reprint);
*Silas Sule vs State (*2009) LPELR 3125 (SC) 28-20,;
The Queen vs Obiasa (1962) 1 ALL NLR 651; [1962] 1 SCNLR 137;
The State vs. Rabiu (2013) LPELR 20183 (SC) 29; and
Ubierho vs. The State [2002] 5 NWLR (Pt. 819) 644.

Foreign Cases cited in Judgment

R.v. Sykes (1913) 8 C. A. R. 233, 236
Ibrahim v R (1914) AC, 559, 609;

Nigerian Statutes Cited in this Judgment

Evidence Act 2011
Penal Code – Ss 97, 298, 221 and 283

Representations

F.F. Egele, *for the appellant*

Aliyu Saiki with I.T. Hassan and A. Abdulwahab (Miss) *for the respondent;*

CENTUS NWEZE, (JSC) (Delivering the Lead Judgment): My lords, this appeal turns on a very narrow compass. I shall return to it *anon*. Before then, however, it would only be proper to trace its forensic trajectory from the court of first instance to this final court. The respondent herein, Ephraim Alozie, was arraigned before the High Court of the Federal Capital Territory, Abuja for the offences of conspiracy and armed robbery.

In proof of their case, the prosecution called five witnesses, PW1 PW5. While PW3 was the victim, PW2, a

co-accused person, testified in favour of the prosecution. PW1 and PW5 were the Police Officers involved in the investigation of the case. While the PW1 received the report of the robbery incident and recovered certain items from the *locus criminis*, the Investigating Police Officer, PW5, in his evidence, identified and tendered a confessional statement which the respondent, allegedly, made. The said statement was recorded by Emmanuel Okoye who was a member of the investigation team.

The said statement was admitted in the proceedings as exhibit B.

The evidence of the PW2 was that both himself and the respondent were members of an armed robbery gang. He, it was, who spied on the victim, the deceased person, prior to the robbery incident. On his part, the respondent, not only denied making the said exhibit B, he, equally denied committing the offence he was charged with. The said court (hereinafter, simply, referred to as "the trial court"), upon finding him guilty as charged, convicted and sentenced him. His appeal to the Court of Appeal, Abuja Division was successful. The said court (hereinafter, simply, referred to as "the lower court") quashed his conviction and sentence, hence, this further appeal by the prosecution,

Wherein this court was entreated to determine the sole question:

Whether the court below was right in rejecting and expunging the confessional statement, exhibit B, from the evidence on the ground of failure to conduct trial within trial resulting in the discharge and acquittal of the

respondent of the offences of criminal conspiracy and armed robbery?

The respondent, also, formulated a sole issue for the determination of the appeal. It was framed thus:

Whether the court below was right and justified in discharging and acquitting the respondent of the offences of criminal conspiracy and armed robbery?

My lord, I take the view that the appellant's sole issue better captures the main agitation in his grounds of appeal. It would, therefore, be adopted as the sole issue for the determination of this appeal.

Thus, for the avoidance of any doubt, the sole issue for the resolution of the divergent submissions hereunder is:

Whether the court below was right in rejecting and expunging the confessional statement, Exhibit B, from the evidence on the ground of failure to conduct trial within trial resulting in the discharge and acquittal of the respondent of the offences of criminal conspiracy and armed robbery?

ARGUMENTS OF COUNSEL ON THE SOLE ISSUE
APPELLANTS CONTENTION

When this appeal was heard on October 27, 2016, Chief F.F. Egele, for the appellant, adopted the Amended brief of argument filed on September 19, 2016, although deemed,

properly filed on October 27, 2016. In the said brief, **Sections 28 and 29 of the Evidence Act 2011** were cited on the relevance and admissibility of a confessional statement of an accused person. The following cases were, cited, **Nsofor and Anor vs. State (2005) All FWLR (Pt. 242) 397, 409 - 410; Ikemson and Ors vs. The State (1989) 3 NWLR (Pt. 110) 455, 476.**

It was contended that where an accused person objects to the voluntariness of a statement, that issue must, first, be determined through a trial within trial before its admissibility or otherwise, **Ojegele vs. The State (1988) 1 NWLR (Pt. 71) 414; Madjemu vs. The State (2001) 9 NWLR (Pt.718) 349.**

Counsel submitted that the mere denial of a confessional statement is not a sufficient ground for rendering it inadmissible, citing **Igago vs. The State (1999) 10 - 12 SC 84; (1999) 14 NWLR (Pt. 637) 1; Madjemu vs. The State (supra).**

He pointed out that, at the trial court, the respondent denied making the confessional statement at the point it was being tendered by PW5, the Investigating Police Officer.

He referred to page 203 of the record.

He explained that the trial court admitted the statement as Exhibit B, holding that the weight to be attached to it would be determined later. He observed that, by the above objection, the respondent not only disputed the correctness of its contents, but also denied making the statement. In his view, since that objection amounted to a retraction of the confessional statement, its admission in evidence as exhibit B, was proper, **Obidiozo vs. State (1987) 4 NWLR (Pt. 67) 748; Ehot vs. State (1993) 4**

NWLR (Pt 290).

He, further, submitted that, since respondent denied making that said confessional statement, there was no basis for a trial within trial, citing the objection to the effect "he did not make any statement".

He pointed out that the ground of the objection was neither hinged on the complaint that he was tortured to make the statement nor that he made the statement under duress, citing the respondent's evidence-in-chief at pages 209 - 210 of the record where he insisted that he made no statement to the police.

He noted that there was a marked distinction between the admissibility of a confessional statement and the weight attachable to it through the ascription of evidential value. He cited **Ubierho vs. The State [2002] 5 NWLR (Pt. 819) 644; Madjemu vs. The State (supra)** as authorities which laid down the guide for determining the truth or veracity and what weight to attach to a confessional statement.

He submitted that for a confessional statement to be acted upon in convicting an accused person, it must be direct, positive unequivocal and point to the fact that the accused person committed the crime, **Odua vs. F.R.N (2002) 5 NWLR (Pt. 761) 615; Amachree vs. Nigeria Army [2003] 3 NWLR (Pt. 807) 256.**

He maintained that, by the guidelines for assessing a confessional statement, there was abundant evidence, outside the confessional statement exhibit B - pointing to the fact that the respondent committed, or partook in the said offences of robbery, citing the testimonies of PW2, page 187 (lines 19 - 26) of the record which, in his view, clearly supported and corroborated Exhibit B and the fact that the

respondent committed the said offences. He drew attention to the confessional statement of the co-accused person, Peter Ogu, Exhibit A, pages 25 26 of the record.

He explained that Peter Ogu was also convicted by the trial court: a conviction that was affirmed by the court below. He observed that exhibit B, at pages 33 - 34 of the record, mentioned Peter Ogu as one of the robbers.

He, however, conceded that the statement of an accused person to the Police is only evidence against him and not evidence against a co-accused person.

According to him, the evidence of a co-accused person, implicating an accused person directly or inferentially in the commission of the crime, must be examined before coming to the conclusion that he had a case to answer or committed the crime. He cited **Ohuka and Ors vs. The State (1988) 7 SC (Pt. II) 24, 37**, for this view.

Counsel canvassed the view that a court can act on a retracted confessional statement to convict an accused person**, Nkwuda Edamine vs. The State (1996) 3 NWLR (Pt.438) 530; Gira vs. The State (1996) 4 NWLR (Pt. 443) 375, 388.** He maintained that the admissibility of the respondents confessional statement, exhibit B, and the high evidential value which the trial court accorded it, were well-founded.

In his submissions, Exhibit B, and other pieces of evidence no matter how slight they were, met the standard of proof, that is, proof beyond reasonable doubt. In effect, the prosecution, successfully, established the ingredients of the offences of criminal conspiracy and armed robbery, **Ikemson vs. The State (supra).**

He invited the court to hold that the lower court erred in rejecting and expunging exhibit B on the ground that the trial court ought to have conducted a trial within trial to determine its admissibility. He, finally, urged the court to hold that lower court was in error in acquitting and discharging the respondent.

RESPONDENT'S ARGUMENT

On his part, Aliyu Saiki, for the respondent; with I.T Hassan and A. Abdulwahab (Miss), adopted the respondent's brief of argument. In the main, his contention was that a person standing trial for an offence could be convicted based on his admission of guilt, that is, his confession or by the surrounding circumstances, that is, circumstantial evidence; or by an eye witness account**.**

He made the point that the basis of admissibility of a confessional statement is voluntariness, citing **Section 29 (2) of the Evidence Act, 2011**. He maintained that, once an accused person makes a statement under caution admitting the charge or creating the impression that he committed the offence charged, the statement becomes confessional, citing **Ikemson and ors vs. The State (supra).** He pointed out that, in consequence any confession made or extracted through violence, threats, promise or any extraneous circumstances suggesting lack of free will would be irrelevant and cannot be acted, or relied, upon at the trial of the accused person, **Section 29 of the Evidence Act.**

He canvassed the view that a conviction could be based solely on the confessional statement of the accused person, **Ubierho vs. The State (supra).** He contended that a court can act on a retracted confessional statement to

convict an accused person, **Nkwuda Edamine vs. The State (supra); Gira vs. The State (supra).**

He explained that, at the trial, the respondent objected to the admissibility of the purported confessional statement at the point it was being tendered by PW5, the Investigating Police Officer, (IPO). He pointed out that the respondent's objection was on the ground that he signed the purported confessional statement under duress and therefore the statement was not voluntary, citing page 203 of the record. He noted that the trial court, instead of conducting a trial within trial admitted the statement in evidence and marked it exhibit B, stating that the weight to be attached to it would be determined later.

He submitted that the trial court was in grave error in admitting the alleged confessional statement in the face of the respondent objection without first determining the voluntariness or otherwise of the statement by conducting a trial within trial. He maintained that the conduct of the trial within trial was imperative and imminent considering the fact that the appellant's witness, the PW2, had earlier testified thus "They took Peter and Ephraim (appellant) to the theatre and flog (sic) them to confess who killed the man who died at Dape," [page 188 of the record].

In his view, the fact that the respondent objected to the admissibility of the statement on the ground that he did not make the statement but signed it under duress raised the question of voluntariness which the trial court ought to have determined first, **Nsofor vs. State [2005] All FWLR (Pt. 242) 397.** He observed that the respondent, in his defence, explained the surrounding circumstances leading to his signing the statement exhibit B under duress, citing **Nsofor**

vs. State (supra). He, further, submitted that where a confessional statement was the mode adopted to establish the guilt of the accused person in criminal proceedings, voluntariness comes before the truth of the statement, that is to say, admissibility must be determined first before any consideration of the content as to its truthfulness.

Consequently, before the statement could be relied, and acted, upon it must have been properly and rightly admitted in evidence, **Nsofor vs. State (supra) 415**.

He maintained that the alleged confessional statement of the respondent, exhibit B, was wrongly, admitted in the face of the objection and the trial court's failure to conduct a trial within trial to ascertain and determine its voluntariness. He, therefore, took the view that the trial court's reliance on Exhibit B to convict the respondent was misplaced and in error. He invited the court to hold that the lower court was right to have rejected and expunged exhibit B for having been wrongfully admitted in evidence by the trial court.

He submitted that, in criminal trials, the establishment of the commission of a crime does not transcend the establishment of the guilt of the accused person except there is a link or nexus between the accused person and the commission of the crime, citing **Obiakor vs. State [2002] 6 SC (Pt. II 33) 39 - 40; Bozin vs. Sate (1985) LPELR 799 (SC).**

He insisted that, in this appeal, there was no evidence linking the respondent with the commission of the offences charged. He pointed out that the appellant's witnesses did not link the respondent with the crime except PW5 who, merely, tendered the alleged confessional statement,

purportedly, recorded by his colleague without more. PW3, the victim and an eye witness to the robbery, did not identify the respondent as one of the robbers. He urged the court to resolve the sole issue in favour of the respondent.

RESOLUTION OF THE SOLE ISSUE

Now, as pointed out earlier, when the prosecution applied that the statement of the appellant (as second accused person) be admitted in evidence through PW5, the Investigating Police Officer, counsel for the respondent objected thus:

> **We are objecting to the admissibility of the statement in evidence. The accused said *he was put under duress to sign the statement,* he never made any statement".**

[Page 203 of the record; italics supplied for emphasis]

The trial court admitted the statement in evidence and marked it as Exhibit B, holding that it **"would determine the weight to attach to the statement at the end of the day,"** [page 203 of the record]. At page 236 of the record, the said trial court, observed that in "**the same vein, a critical look at Exhibit B shows that DW2, Ephraim Alozie, signed the document and not (sic) thump print. What it means is that the accused persons are denying [the Exhibits] in totality**."

Further, at page 237 of the record, the trial court maintained that:

"….it is very unlikely that the Investigating Police Officers who recorded the statements….separately would concoct such a story only to implicate the accused persons in a matter of life and death. Again, it is very unlikely that the Superior Police Officer, I.G. Audu, Superintendent of Police, would endorse the two statements to confirm that they were made by the two accused persons…"

The court took the view that the "retraction of the said Exhibits…. is only an afterthought. The denial of the statements cannot avail the accused….," [page 238 of the record].

On appeal, the lower court found thus:

"There is no doubt that the trial judge only considered that last part of the objection to the admissibility of the statement, to the effect that the appellant did not make a statement. He therefore admitted it in evidence and said he would consider its weight later on. I think the trial judge completely missed the point when he failed to consider the first ground of objection to the admissibility of the statement, and the most crucial part for that matter. The appellant said he was 'put under duress to sign the statement.' It is as clear as day, that the appellant's objection was to the voluntariness

of the statement sought to be tendered, and the judge ought to have known so. Apart from the clear words used in objecting, other evidence led before the court, clearly raised the issue of the voluntariness of the statement, which the trial judge should have considered. For before the prosecution applied to tender the appellant's statement, PW2, David Udoh, had given evidence before the court and stated at page 188 of the record, that:

> **They took Peter and Ephraim (appellant) to the theatre and flog (sic) them to confess who killed the man who died at Dape. Peter said he was the one who shot the man. Ephraim said he was the one who was holding the gun……**

This piece of evidence was already before the court when the statement, exhibit B, was sought to be tendered. It should not have been ignored in *toto* by the trial judge when the appellant raised the voluntariness of his alleged confessional statement. Since PW2 was a living witness to the flogging of the appellant, he was a competent witness who might have been called by the appellant to testify, if a trial-within-trial had been conducted, as it ought to have been, to ascertain the voluntariness of the statement.

In my considered view, the trial court here, ought to have known and ought to have considered the

objection to the admissibility of the statement was clearly and crucially based on its non-voluntariness and not that it was simply a denial of making it. In such a situation, the trial judge had a duty to subject that statement to the test of voluntariness before he could admit it into (sic) evidence. The only way known to law is to conduct a trial within trial….

Since the trial court in this appeal had failed to conduct a trial within trial, and the objection was on the voluntariness of the statement, the statement, i.e. exhibit B, was wrongly admitted in evidence. It ought not therefore to be considered at all by the trial court or this court. It is therefore hereby expunged from the record, and for the avoidance of doubt, all references and reliance on it, to convict the appellant are also expunged from the record….” [Page 300 - 304 of the record]

As indicated earlier, when the prosecution applied that the said statement be admitted in evidence through PW5, the Investigating Police Officer, counsel for the respondent objected thus:

> **“We are objecting to the admissibility of the statement in evidence. The accused *said he was put under duress to sign the statement*, he never made any statement”.** [Page 203 of the record; italics supplied for emphasis].

The appellant's counsel contended that, by the above objection, the respondent not only disputed the correctness of its contents, but also denied making the statement. In his view, since that objection amounted to a retraction of the

confessional statement, its admission in evidence as Exhibit B, was proper.

With profound respect, counsel would seem, by this submission, to be conflicting two dissimilar situations. Surely, it is a positive rule of our accusatorial jurisprudence that no statement of an accused person is admissible against him unless it is shown by the prosecution to have been made voluntarily.

This principle is as old as the law received from England. In England, the principle is as old as Hale, **Gbadamosi and Anor vs. State (1992) LPELR - SC.290/1991, citing Ibrahim vs. R (1914) AC, 559, 609; Ikpasa vs. The State (1981) 9 SC 7, 29; John Dawa and Anor vs. State (supra) at 258; Auta vs. State [1975] 1 All NLR 163, 169.**

The question of involuntariness, often, arises where an accused person alleges that he was subjected to torture in making of a confessional statement. In other words, though, he made the statement, it was not a product of his free will since he was forced to make it, **Mbang vs. State [2013] 7 NWLR (Pt. 1352) 48; Ibeme vs. State [2013] 10 NWLR (Pt. 1362) 333; Olatunbosun vs. State [2013] 17 NWLR (Pt. 1382) 167.**

In this sort of situation, the trial court is under obligation to conduct a trial-within-trial (also known as *voire dire* or mini trial) to determine the veracity or otherwise of the claim. As this court (per Nweze, JSC) explained in **FRN vs. Dairo (2015) LPELR 24303 (SC) 44 - 45:**

"**….the *raison d'etre* of the evolution of the mini trial or *voire dire* procedure is to arm the trial court with procedural mechanism for shifting the chaff of involuntary, and, hence, inadmissible evidence from the wheat of inadmissible evidence whose cogency and probative value are indubitable. The cases on this point are legion: they are countless. Only one or two of them will be cited here, Ogudo vs. The State [2011] 12 SC (Pt. 1) 71; Ibeme vs. The State (2013) LPELR - 20138 (SC); Auta vs. State [1975] 4 SC 125; Effiong vs. State [1978] 8 NWLR (Pt. 562) 362; Lasis vs. State (2013) LPELR 20183 (SC) 29; The State vs. Rabiu (2013) LPELR 20183 (SC) 29; Ogudu vs. The State (2011) LPELR 860 (SC); Nwangbonu vs. State [1987] 4 NWLR (Pt 67) 748; Ogunye vs. State [1999] 5 NWLR (Pt 664) 548, 570.**

Scholars are, also, unanimous on this issue, I.H. Dennis, *The law of Evidence* **[Second Edition] (London: Sweet and Maxwell, 2002) 184; L.O. Aremu, "The Voluntariness of Confessions in Nigeria in 1977-1980"** *Nigerian Law Journal***, 32; J. Amadi,** *Contemporary Law of Evidence in Nigeria* **[Vol. 1] (Port Harcourt: Pearl Publishers, 2011) 324, M.A. Owoade, "Voluntariness of Confessions in Nigerian Law - Need for Reform," in** *1987 Nigeria Current Law Review* **179".**

On the other hand, a retraction or denial of a confessional statement does not affect its admissibility, **Mbang vs. State (supra).** In other words, where an accused person denies his confessional statement, the trial court has no obligation to conduct a trial within trial, **Mbang vs. State (supra); Abdullahi vs. State [2013] 11 NWLR (pt 1366) 435.**

This has long been settled in the very old cases of **R. vs. Sapele and Anor (1952) 2 FSC 74; R vs. Itule (1961) ALL NLR 462**; the relatively old decisions of **Ikpasa vs. The State (1981) 9SC 7; Akpan vs. State (1992) LPELR - 381 (SC) 36; Osakwe vs. State [1994] 2 SCNJ 57; Nwangbonu vs. The State [1994] 2 NWLR (Pt. 327) 380; Bature vs. State [1994] 1 NWLR (pt 320) 267; Eragna and Ors vs. The AG, Bendel (1994) LPELR (SC) 30; Idowu vs. State [1996] 11 NWLR (pt 574) 354**; as well as the more recent decisions of **Silas Sule vs. State (2009) LPELR 3125 (SC) 28-20, G-B; FRN vs. Iweka (2011) LPELR - 9350 (SC) 53; Oseni vs. The State (2012) LPELR - 7833 (SC) 22 -23.**

As has been well-settled, a confession, if voluntary, is deemed to constitute a relevant fact as against the person who made it, hence, it is admissible against that person, only, **Nsofor vs. State [2004] 18 NWLR (Pt 905) 292; Lasisi vs. State [2013] 9 NWLR (pt 1358) 74; Saidu vs. State [1982] 4 SC 41; Adebayo vs. AG, Ogun State [2008] 2 SCNJ 352.** As a corollary, the courts are bound to reject an accused person's confession which eventuated from torture, duress, threat or inducement, **Ehot vs. State [1993] 4 NWLR (Pt. 290) 644; Nwosu vs. State [1986] 4 NWLR (Pt 35) 326; Odeh vs. FRN [2008] 12 NWLR (Pt 1103) 1**. The only process of determining the voluntariness of a

confession is through a trial-within-trial, **Mbang vs. State [2013] 7 NWLR (Pt 1352) 48, 72.** This is, also the only process of testing the admissibility of a confession where it is challenged on the grounds of threat, undue influence, duress etc, **Nsofor vs. State [2004] 18 NWLR (Pt 905) 292; Auta vs. State [1975] 4 SC 125; Gbadamosi vs. State [1991] 6 NWLR (Pt 196) 182.**

As the lower court, insightfully, found:

> **"…I think the trial judge completely missed the point when he failed to consider the first ground of objection to the admissibility of the statement, and the most crucial part for that matter. The appellant said he was" put under duress to sign the statement, it is as clear as day, that the appellant's objection was to the voluntariness of the statement sought to be tendered, and the judge ought to have known so. Apart from the clear words used in objecting, other evidence led before the court, clearly raised the issue of the voluntariness of the statement, which the trial judge should have considered. For before the prosecution applied to tender the appellant's statement, PW2, David Udoh, had given evidence before the court and stated at page 188 of the record, that:**
>
> > **"They took Peter and Ephraim (appellant) to the theatre and flog (sic) them to confess who killed the man**

> > **who died at Dape. Peter said he was the one who shot the man. Ephraim said he was the one who was holding the gun…**

This piece of evidence was already before the court when the statement, Exhibit B, was sought to be tendered. It should not have been ignored in toto by the trial Judge when the appellant raised the voluntariness of his alleged confessional statement. Since PW2 was a living witness to the flogging of the appellant, he was a competent witness who might have been called by the appellant to testify, if a trial-within-trial had been conducted, as it ought to have been, to ascertain the voluntariness of the statement.

In my considered view, the trial court here ought to have known and ought to have considered the objection to the admissibility of the statement was clearly and crucially based on its non-voluntariness and not that it was simply a denial of making it. In such a situation, the trial Judge had a duty to subject that statement to the test of voluntariness before he could admit it into (sic) evidence. The only known to law is to conduct a trial within trial…

> **"Since the trial court in this appeal had failed to conduct a trial within trial, and the objection was on the voluntariness of the statement, the statement, i.e. exhibit B, was wrongly admitted in evidence. It ought not therefore to be considered at all by the trial court or this court. It is therefore hereby**

expunged from the record, and for the avoidance of doubt, all references and reliance on it, to convict the appellant are also expunged from the record…" [Pages 300-304 of the record]

My lords, I am, entirely, in agreement with the above findings and reasoning of the lower court.

Since even the Prosecution's witness, PW2, was honest enough to concede to the torture which prompted the so-called confession of the accused person, the lower court was right in holding that:

"In my considered view, the trial court here, ought to have known and ought to have considered the objection to the admissibility of the statement was clearly and crucially based on its non-voluntariness and not that it was simply a denial of making it. In such a situation, the trial Judge had a duty to subject that statement to the test of voluntariness before he could admit it into (sic) evidence. The only way known to law is to conduct a trial within trial…

Since the trial court in this appeal had failed to conduct a trial within trial, and the objection was on the voluntariness of the statement, the statement, i.e. exhibit B, was wrongly admitted in evidence. It ought not therefore to be considered at all by the trial court or this court. It is therefore hereby

expunged from the record, and for the avoidance of doubt, all references and reliance on it, to convict the appellant are also expunged from the record…" [Pages 300-304 of the record]

In the circumstance, I find no merits in the appellant's complaint against the above findings and conclusion. Contrariwise, the submissions of the learned counsel for the appellant would have been well-taken if what was in issue was the question of the retraction of the appellant's confession.

As indicated earlier, a retraction or denial of a confessional statement does not affect its admissibility, **Mbang vs. State (supra).** In other words, where an accused person denies his confessional statement, the trial court has no obligation to conduct a trial within trial, **Mbang vs. State (supra); Abdullahi vs. State [2013] 11 NWLR (pt 1366) 435; R. vs. Sapele and Anor (supra); R vs. Itule (supra); Ikpasa vs. The State (supra); Akpan vs. State (supra); Osakwe vs. State (supra); Nwangbonu vs. The State (supra); Bature vs. State (supra); Eragna and Ors vs. The AG, Bendel (supra); Idowu vs. State (supra); Silas Sule vs. State (supra); FRN vs. Iweka (supra); Oseni vs. The State (supra).**

In the latter situation, that is, where an accused person retracts or resiles from his confessional statement, the trial court would be, perfectly, right to admit it and determine the weight to be attached to it in its judgment. For this purpose, it [the trial court] would, consider issues, such as the ones indicated hereafter.

They are: whether there is anything outside the confession which may vindicate its veracity; whether it is corroborated in any way; whether its contents, if tested, could be true; whether the defendant had the opportunity of committing the alleged offence; whether the confession is possible and the consistency of the said confession with other facts that have been established, **Osetola and Anor vs. The State (2012) LPELR- 9348 (SC) 32-33, G-D; Kareeem vs. FRN [2002] 7 SCM 73; Akpan vs. The State [2001] 11 SCM 66.**

These principles which were enunciated in **R. vs. Sykes (1913) 8 C. A. R. 233, 236** have been, consistently, endorsed by our Superior Courts, **Kanu vs. The King (1952) 14 WACA 30; The Queen vs. Obiasa (1962) 1 ALL NLR 651; [1962] 1 SCNLR 137; Obosi vs. The State (1965) NMLR 129; Onochie and Ors vs. The Republic (1966) NMLR 307; Jakfiya Kopa vs. The State (1971) 1 ALL NLR 150 Dawa Vs. The State [1980] 8-11 SC 236; Ejinima vs. The State [1991] 5 LRCN 1640, 1671; Arthur Onyejekwe vs. The State [1992] 4 SCNJ 1, 9; [1992]] 3 NWLR (Pt. 230) 444; Aiguoreghian and Anor. vs. The State [2004] 3 NWLR (Pt 860) 367; [2004] 1 SCNJ 65; [2004] 1 SC (Pt.1) 65.**

However, the situation in the instant case was different. As the lower court found:

> **"….before the Prosecution applied to tender the appellants statement, PW2, David Udoh, had given evidence before the court and stated at page 188 of the record, that:**

> **"They took Peter and Ephraim (appellant) to the theatre and flog (sic) them to confess who killed the man who died at Dape. Peter said he was the one who shot the man. Ephraim said he was the one who was holding the gun…."**
>
> **"This piece of evidence was already before the court when the statement, exhibit B, was sought to be tendered. It should not have been ignored in toto by the trial judge when the appellant raised the voluntariness of his alleged confessional statement. Since PW2 was a living witness to the flogging of the appellant, he was a competent witness who might have been called by the appellant to testify, if a trial-within-trial had been conducted, as it ought to have been, to ascertain the voluntariness of the statement." [Pages 300-304 of the record]**

Regrettably, the trial court failed to ascertain the voluntariness of Exhibit B which it admitted and acted upon in convicting the appellant. The lower court was, therefore, right in expunging the said exhibit from the record. In all, this appeal is devoid of any scintilla of merit.

Accordingly, I hereby enter an order dismissing it. Appeal dismissed.

Chima Centus Nweze
Justice, Supreme Court

DATTIJO MUHAMMAD, (JSC): I read in draft the lead judgment of my learned brother Nweze (JSC) just delivered. I entirely agree with his lordship's reasoning and conclusion that the appeal lacks merit and dismiss the appeal too. It is unnecessary for me to restate the facts of the case that brought about the appeal same having been thoroughly captured in the lead judgment. I rely on the summary of these facts made in the lead judgment in emphasizing the resolve to dismiss the appeal.

My lords, it is evident from the record of this appeal that of the five witnesses the appellant relied upon to secure the conviction of the respondent, none was an eye witness. What occurred at, led to the admission of and the reliance on Exhibit B, the respondent's purported confessional statement, by the trial court is fully captured at page 202-203 of the record. Please read same as herein under reproduced:

> "**PW5: …. On 21-2-2006 Ephraim Alozie made a confessional statement …… I can - recognize the statement.**
>
> **Ct: witness identified the statement(s)**
>
> **Pros Counsel: We seek to tender the statement(s) in evidence**
>
> **Def Counsel: We are objecting to the admissibility of the statement in evidence. The accused said he was put under duress to sign the statement. He never made the**

> **statement.**
>
> **Court: The statement is admitted in evidence and marked as Exhibit B. The court would determine the weight to attach to the statement at the end of the day"** (Underlining mine for emphasis)

In its judgment, the trial court at page 235 of the record held in relation to the respondent thus:

> **"Through PW5 Hyginus Uba, the prosecution tendered Exhibits A and B. Exhibits A is the confessional statement of Peter Ogu (1st accused). While exhibit B is the confessional statement of Ephraim Alozie (2nd accused). At the point when the prosecution applied to tender Exhibit A in evidence, the learned defence counsel raised an objection on the grounds that the statement was obtained involuntarily. The court ordered for a trial within trial……**
>
> **The next issue at this state is how to determine the veracity of Exhibits A and B. The test for determining the truth or otherwise of a confessional statement is to seek for any other evidence be it slight or circumstances which makes it probable that the confessions is true. See the case of Akpan vs. The State (1992) 6 NWLR (Pt 248) 439 at 460 and Ikpasa vs. AG. Bendel State (1981)**

supra…….. a critical look at Exhibit B shows that DW2 Ephraim Alozie signed the documents and not thump print. What it means is that the accused person(s) are denying Exhibits A and B in totality."

It is glaring from the record particularly reproduced above that whereas the trial court has conducted a trial-within-trial before admitting Exhibit A, the extra judicial statement of the 1st accused it finds confessional, no such trial has been conducted in relation to Exhibit B, the respondent's statement in spite of his objection that he was tortured. Yet, the trial court in the course of its judgment found Exhibit B confessional and relied on it to convict the respondent. Learned respondent's counsel is right in defending the lower court's judgment to the effect that the trial court's reliance on Exhibit B which voluntariness has not been ascertained is perverse.

Our jurisprudence is replete with decisions which the lower court dutifully invoked to set-aside the trial court's wrong judgment. Having failed to ascertain the voluntariness of Exhibit B, even if same is shown to be ex-facie voluntary, and it is not, the trial court is indeed wrong to have arrived at its decision on the basis of the inadmissible and unavailing Exhibit.

See **Nsofor vs. State (2005) FWLR (Pt 242) 397; Ogudo vs. The State (2011) 12 SC (Pt. 1) 71; Lasisi vs. State (2013) LPELR 20183 (SC) 29.** The lower court having rightfully expunged the wrongly admitted statement arrived at the correct and lawful decision in the case.

It is for the foregoing and more so the fuller reasons adumbrated in the lead judgment I adjudge this appeal as lacking in merit and dismiss same. I abide by the consequential orders made in the lead judgment as well.

Musa Dattijo Muhammad,
Justice, Supreme Court

BAYANG AKA'AHS, (JSC): I had the preview of the judgment of my learned brother, Nweze JSC dismissing the appeal as lacking in merit. I agree with the reasoning and conclusion arrived at in the lead judgment.

The respondent along with 2 others stood trial before the High Court of the Federal Capital Territory, Abuja for the offences of conspiracy, armed robbery, culpable homicide and rape contrary to Sections 97, 298, 221 and 283 respectively of the Penal Code. At the end of the trial, Peter Ogu (1st accused) and himself (2nd accused) were found guilty of conspiracy to commit armed robbery as well as armed robbery contrary to **Sections 97 and 298 Penal Code** and sentenced to 5 years for criminal conspiracy and 10 years for armed robbery and a fine of N10,000.00. The sentences were to run consecutively. The conviction was based principally on their alleged confessional statements which were admitted as Exhibits "A" and "B". They were however acquitted and discharged of the offence of rape.

The respondent was dissatisfied with his conviction and appealed to the Court of Appeal, Abuja and the appeal was allowed thereby upturning his conviction and sentence in appeal No. CA/A/215C/2012 on 16/1/2013. The appeal turned on the alleged confessional statement Exhibit "B".

The prosecution felt aggrieved and appealed to this court and the issue agitated in the Amended Appellant's brief is:

Whether the court below was right in rejecting and expunging the confessional statement, Exhibit "A" from the evidence on the ground of failure to conduct trial within trial resulting in the discharge and acquittal of the Respondent of the offences of criminal conspiracy and armed robbery (Grounds 1 and 2).

It should be noted that the statement admitted in evidence as the confessional statement of the respondent is Exhibit "B" and not Exhibit "A" which was the statement of Peter Ogu who was the 1st accused.

PW5, Hyginus Uba, a Police Constable No. 37205 testified as follows:

"I recorded the statement of Ephraim Alozie on 10/2/2006. On 21/2/2006 Ephraim Alozie made a confessional statement which was recorded by my team member Emmanuel Okoye. I told Emmanuel Okoye to record the confessional statement. After he recorded the statement he brought it to me and I attached it to the one he made on 10/2/2006. I took Ephraim Alozie to a Superior officer I.G. Audu (S.P). He read the statement to the suspect and he accepted making the statement. Then Ephraim Alozie signed and Emmanuel Okoye signed as the recorder. I can recognize the 1st statement through my handwriting, name and signature. I can also recognize the 2nd statement through the

handwriting of Emmanuel Okoye whom I had worked together with since 2004".

After identifying the statements the prosecution applied to tender them in evidence but the defence counsel objected on the ground that the accused was put under duress to sign the statement. This is what took place 2/11/2009.

"Court: Witness identified the statements.

Pros. Counsel: We seek to tender the statements in evidence.

Def. Counsel: We are objecting to the admissibility of the statement in evidence. The accused said he was put under duress to sign the statement he never made a statement.

Court: The statement is admitted in evidence and marked as exhibit "B". The court would determine the weight to attach to the statement at the end of the day" (See pages 202-203 of the records).

From what took place in court as reproduced above it is clear that the voluntariness of the making of Exhibits "B" by the respondent was directly in issue and a trial within trial ought to have been conducted before it could be admitted in evidence.

See: **Nsofor vs. State (2004) 18 NWLR (Pt. 905) 292.**

The learned trial judge jumped the gun when he decided to admit the statement without conducting a trial within trial to

determine its voluntariness and hence admissibility. He must have thought that the respondent was merely denying making of the statement. This error by the learned trial judge was fatal to the prosecution's case. As it turned out the trial judge relied heavily on Exhibits "B" in finding the respondent guilty. The court below did the right thing to expunge the said Exhibits "B" from the record and having done so there was no evidence to establish without doubt the culpability of the respondent in the offences charged. In the result the respondent was acquitted and discharged of the offences for which he was found guilty and convicted.

It is for this reason and the fuller reasons contained in the lead judgment of my learned brother, Nweze (JSC) that made me to find that the appeal lacks merit and consequently dismissed same and to affirm the judgment delivered by the Court of Appeal, Abuja on 23/10/2012 in CA/A/215C/2012.

Appeal is dismissed.

K. B. AKA'AHS
Justice, Supreme Court

SANUSI, (JSC): I had a preview of the judgment prepared and just read by my learned brother C.C. Nweze (JSC).

I am in entire agreement with the reasons and conclusion arrived at by His Lordship. While adopting those reasons and conclusion as mine, I also wish to chip in few comments in their support. The learned trial judge during the trial had perhaps declined to conduct trial within trial before admitting the purported confessional statement of the accused person now respondent, simply because he was carried away by the tone or mode of the objection raised by

the learned respondent's counsel that they were objection to the admissibility of the said statement because the respondent said he did not make the statement. However, previously and as borne out by the record, evidence abound that the respondent was put under duress to sign the statement. To my mind, that presupposes that the respondent herein, did not voluntarily sign it. The trial court then without conducting a trial within trial proceeded to admit the statement in evidence and marked it Exhibit B with a rider that it would later determine the weight to attach to it. Still on the issue of the objection by the learned defence counsel, the learned defence counsel in his own words raised categorical objection to the effect that "the accused was put under duress to sign the statement which he never made. My understanding of such wording of objection, is that the contents of the statement were concocted and were ascribed to be one he made and was therefore forced to sign same. It is therefore wrong, in my view, for the appellant to take the stance that the accused person, now respondent, simply denied making the statement simpliciter, as would make the statement to be admissible in evidence on the established principle of law, that mere denial of making a confessional statement does not render or make it inadmissible. See **Mbang vs State (supra).**

Admittedly, where an accused person merely denies making a statement simpliciter, the trial court is not bound to conduct any trial within trial. Conversely, where an accused person, as in this instant appeal, alleged that his signature was obtained by force or by trick, that necessarily brings to fore an issue as to the voluntariness of that statement itself, which could only be determined by trial

court by conducting a trial within trial. See **Saidu vs. The State (1982) 4. SC (reprint)**

My lords, I think it is not out of place to restate the law on procedure of determining the voluntariness of confessional statement. Where in the course of criminal proceedings a confessional statement of an accused person is tendered in evidence by the prosecution and question is raised by defence with regard to whether it was made or obtained voluntarily, the trial court has a duty, and in fact MUST suspend the main trial and conduct a trial within trial to determine its voluntariness or otherwise. At the end of the mini trial, the trial court must make up its mind in the light of the evidence adduced before it by both the prosecution and the defence, on whether such statement was voluntarily made by the accused or not. If in its opinion, the statement in question was voluntarily made, it will admit it. But if the trial court finds that it was not voluntarily obtained, for instance if there was slightest evidence of duress, force, promise, inducement or that trick was applied to the accused person, it will reject such statement and mark it so in its ruling and will proceed with the main trial, except that it will not act on it in its determination of the case.

But if on the other hand, the trial court after conducting the trial within trial finds that the statement was voluntarily made by accused, it will deliver its ruling admitting it and mark it so accordingly and then proceed with the main trial and it could later use or act on it in the determination of the case. However, where it is the case of retraction of the confessional statement, that is to say, where the accused simply denies making the statement, such statement can still be admitted when tendered by the

prosecution notwithstanding the objection by the defence. The matter of retraction could still be taken up by the defence/accused in his defence. In such situation, it is not of any necessity to conduct a trial within trial, as I stated above, once no minutest element of allegation or evidence of involuntariness or any vitiating factor of confessional statement was applied and raised in the course of the trial. It is within the precinct of a trial court to consider, if in deciding the credibility of the retracted confession, what weight to ascribe to it. See **Adisa Wale vs. The State (2013) 14 NWLR (pt.1375) 562**.

Now, in this instant case it is clear as crystal that the prosecution applied duress on the accused before obtaining the statement [Exhibit B] as admitted by the defence. For instance, while testifying in court, as shown on page 188 of the record, PW2 testified inter alias, thus:

> "**They took Peter and Ephraim (appellant) to the theatre and flog (sic) them to confess who killed the man who died at Dape. Peter said he was the one who shot the man. Ephraim said he was the one who was holding the gun……..**"

It is noteworthy, that the above piece of evidence was given at the trial court even before the purported confessional statement of the accused/respondent (Exhibit B) was tendered in evidence, other pieces of evidence also abound from the testimony of PW2 which brought out or had confirmed that some elements of duress were applied on the accused/ respondent in obtaining the statement i.e. Exhibit B.

It is my considered view therefore that if the learned trial judge had cast his mind to those pieces of evidence which were raised by the witness in question, they would have convinced him to at least, see the need or necessity to conduct a trial within trial in the circumstance, to enable him determine whether the statement in question was voluntarily made by the accused. However, he unfortunately failed to do so. In this situation I find myself in tanderm with the finding of the court below, that the trial court was wrong in refusing or failing to conduct trial within trial in the circumstance.

Thus, in view of these few comments and for the more detailed and elaborate reasons and the conclusion arrived at in the leading judgment of my learned brother, I also see no merit in this appeal. It is hereby dismissed by me. Appeal is dismissed.

Amiru Sanusi
Justice, Supreme Court

DR. ALEX OTTI
ALL PROGRESSIVE GRAND ALLIANCE (APGA)
AND
DR. SAMPSON UCHECHUKWU OGAH
PEOPLES DEMOCRATIC PARTY (PDP)
DR. OKEZIE VICTOR IKPEAZU
INDEPENDENT NATIONAL ELECTORAL COMMISSION (INEC)
SIR FRIDAY NWANOZIE NWOSU

SC. 718/2016

IN THE SUPREME COURT OF NIGERIA
HOLDEN AT ABUJA
FRIDAY, 27TH JANUARY, 2017

BEFORE THEIR LORDSHIPS

IBRAHIM TANKO MUHAMMAD	**JUSTICE, SUPREME COURT**
OLUKAYODE ARIWOOLA	**JUSTICE, SUPREME COURT**
CLARA BATA OGUNBIYI	**JUSTICE, SUPREME COURT**
KUMAI BAYANG AKAAHS	**JUSTICE, SUPREME COURT**
KUDIRAT M. O. KEKERE-EKUN	**JUSTICE, SUPREME COURT**
CHIMA CENTUS NWEZE	**JUSTICE, SUPREME COURT**
AMIRU SANUSI	**JUSTICE, SUPREME COURT**

APPEAL: What applicant must show in an application for leave to appeal on grounds of mixed law and facts.

APPEAL: Principles relevant in the consideration of an application for leave to appeal on grounds other than law.

APPEAL: Application for leave to appeal on grounds other than law – Distinct from an application for leave to appeal on absolute terms.

APPEAL: Nature of an application for leave to appeal – How exercised – Discretionary – Nature thereof.

APPEAL: Party applying to be joined as a person interested – Application refused – Judgment delivered in the case where party wants to appeal as an interested party – Whether right of appeal against judgment still exists.

APPEAL: Application for leave to appeal – Onus on applicant – When discharged.

APPEAL: Application for leave to argue grounds of mixed law and facts – Refusal by the Supreme Court to grant – Effect on right of appeal of the applicant.

APPEAL: Competence of appeal – Grounds of mixed law and facts – No leave to appeal sought – Whether appeal is competent.

APPEAL: Court determining interlocutory appeal – Need to avoid determining the substantive appeal.

APPEAL: Whether one competent ground of appeal can sustain a Notice of Appeal – Considerations thereof.

APPEAL: Right of Appeal – Section 233 (2)(e)(i) of the Constitution of Federal Republic of Nigeria 1999 (as amended) Right of Appeal from the Court of Appeal to the Supreme Court – When it accrues.

APPEAL: The lower court refusing leave to appeal – Party affected has a right of further appeal to a higher court

CONSTITUTIONAL LAW: Right of Appeal – Every citizen has a right to approach a higher court against a final decision of a lower court

CONSTITUTIONAL LAW: Appeals from Court of Appeal to the Supreme Court – Circumstances where appeal is of right – Section 233(2) of the Constitution of Federal Republic of Nigeria 1999 (as amended) considered

CONSTITUTIONAL LAW: Right of fair hearing – Section 36 of the Constitution of the Federal Republic of Nigeria 1999 – Nature of – Whether can be defeated by technicalities

CONSTITUTIONAL LAW: Whether the right of fair hearing of a person who has been refused leave to appeal is breached

COURT: Interlocutory proceedings – Court not to delve into substantive issues during interlocutory proceedings

COURT: Jurisdiction – Applicant did not seek leave to appeal on grounds of mixed law and facts – Implication on jurisdiction of court.

PRACTICE AND PROCEDURE: Application for leave to appeal on grounds of mixed law and facts – Guiding Principles.

PRACTICE AND PROCEDURE: Application for leave to apply – Necessity of where some grounds of appeal in the Notice of appeal are of mixed law and facts.

PRACTICE AND PROCEDURE: Application for leave where some grounds are of mixed law and facts – The degree of opposition expected of a respondent.

PRACTICE AND PROCEDURE: Application – Party not sure of the nature of a ground of appeal – Proper steps to follow.

Issue for Determination

Whether considering the materials placed before this Honourable court coupled with the peculiar facts and circumstances of this case, this is a case to exercise the court's discretion in favour of a grant of this application.

Facts of the Matter

The 1st and 3rd respondents are members of the Peoples Democratic Party, (the 2nd respondent herein), while the 1st applicant is a member of the All Progressive Grand Alliance, (the 2nd applicant herein).

The 1st and 3rd respondents as members of the 2nd respondent, therefore, participated in the 2nd respondent's Gubernatorial Primary Election for Abia State on 8th December, 2014, wherein the 2nd respondent returned the 3rd respondent as the winner of the said Abia State Gubernatorial Primary

Election, while the 1st respondent came second in the said primary election.

Dissatisfied with the declaration of the 3rd respondent as the winner of the 2nd respondent's Gubernatorial Primary Election, and upon the 1st respondent becoming aware that the 3rd respondent breached the 2nd respondent's Electoral Guidelines for 2014 and section 31 (2), (5) and (6) of the Electoral Act 2010 (as amended), the 1st Respondent commenced an action by Originating Summons at the Federal High Court in Suit No. FHC/UM/CS/94/2015, which later culminated into Suit No. FHC/ABJ/CS/71/ 2016 upon transfer of the said suit to the Federal High Court Abuja Division.

In the 1st respondent's Amended Originating Summons in the said suit filed by him, several Reliefs were claimed.

In its judgment delivered on 27th June, 2016, the trial court granted the aforesaid reliefs claimed by the 1st respondent and further ordered that INEC should, forthwith, issue certificate of Return to the 1st respondent as Governor elect and restore all entitlements to him as the elected Governor of Abia State. Following the delivery of the aforesaid judgment, the applicants brought an application at the Court of Appeal seeking for the following Reliefs among others:

1. An order granting the appellants/applicants leave to appeal as interested persons against the final judgment of the Federal High Court Abuja Division, delivered on 27th June, 2016 in Suit No: FHC/ABJ/CS/71/2016. [FHC/UM/CS/94/2015 DR. SAMPSON UCHECHUKWU OGAH vs. PEOPLES DEMOCRATIC PARTY (PDP) & 3 ORS].
2. An order deeming the Notice of Appeal already filed on the 15th Day of July, 2016 against the said judgment as

properly filed and served, the appropriate filing fees thereto having been paid."

After hearing the respective parties in the aforesaid application the Court of Appeal, in its considered ruling delivered on the 5th August, 2016 dismissed same and, hence, a Notice of Appeal was filed to the Supreme Court by the appellants/applicants herein against the said ruling on the 17th August, 2016.

The application which is the subject matter of contention was filed on the 15th September, 2016, and pursuant to section 233 (3) of the constitution of the Federal Republic of Nigeria, 1999 (as amended) order 3 Rule 15, Order 6 (2) (1) of the Supreme Court Rules 1985 (as amended) and under the inherent jurisdiction of the Supreme Court filed 15th September, 2016 and seeking for the following Relief:

"1. AN ORDER of this Honourable court granting leave to the appellants/applicants to appeal against the decision of the Court of Appeal, Abuja Division, delivered on 5th day of August, 2016 in Appeal No: CA/A/390/2016: Dr. Alex Otti & Anor Vs. Dr. Samson Uchechukwu Ogah & 4 Ors, on grounds of mixed law and facts as set out in the Notice of Appeal already filed at the Court of Appeal, Abuja Registry, on the 17th day of August, 2016.

2. AN ORDER of this Honourable Court deeming as properly filed and served the

Notice of Appeal filed at the Court of Appeal, Abuja Registry, on the 17th day of August, 2016 the correct filing fee having been paid.

3. AND FOR SUCH FURTHER ORDER (S) as this Honourable Court may deem fit to make in the circumstance of this case."

In support of the motion is an affidavit of 15 paragraphs sworn to by one Abdulrasheed Usman Esq. One of the counsel representing the appellants/applicants. There is a further affidavit and a further and better affidavit sworn to by the same deponent. Also predicating the application are ten grounds enumerated as (*1*-X)

Held: *(Unanimously allowing the application)*

1. The burden placed on an applicant for leave to argue grounds of mixed law and facts

It is trite law that in an application of this nature, an applicant for leave to appeal must show by good and substantial reason why the appeal ought to be heard and this must be exhibited by a Notice of Appeal showing arguable grounds of appeal if leave is granted. *(P 252 paras A-B)*

2. The consideration of application for leave to argue grounds of mixed law and facts

The grant of leave is not a matter of course as rightly submitted by the respondents' counsel. It is also not necessary that the appeal should have merit, but the question is whether there is a right and reason to appeal. *(P 252 paras B-C)*

3. *The court has discretion to grant an application for leave to appeal on grounds of mixed law and facts*
The law is well settled also that the grant or refusal to grant leave to appeal to an appellant/applicant is a matter of discretion of the Court. However, such discretion is to be exercised judicially and judiciously. [Ukachukwu vs. PDP (2014) All FWLR (Pt. 728) 889 at 911] wherein it was held that:

> **"In an application which calls for the exercise of the court's discretion, the discretion must be exercised judicially and judiciously taking all the facts and circumstances of the case into consideration.** *(P 252 paras C-F)*

4. *The nature of an application to appeal on grounds of mixed law and facts*
The application of this nature is seeking leave in respect of grounds that are not on pure law and the situation is not the same as one seeking leave to appeal in absolute terms.

On Pages 422-430 of the Record of Appeal the decision of the court of Appeal delivered on the 5th day

of August, 2016 is a final decision which prevented the appellants from appealing against the orders made by the learned trial judge. Being a final decision the appellants/applicants have a right of appeal. By Sections 241 9(1), 244 (2) and 245 (1) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) every citizen of Nigeria has the right to approach a higher court to exercise his right of appeal as provided. *(P 253 paras A-C)*

5. *One competent ground of appeal can sustain a Notice of Appeal*
As rightly submitted by the learned senior counsel for the appellants/applicants, the law is well settled that one competent ground of law alone is enough to sustain an appeal to this court. (Nwaolisah vs. Nwabufoh (2011) 14 NWLR (Pt. 1268) 600 625, Abubakar vs. Dankwambo (2015) 18 NWLR (Pt. 1491) 213 on 244) *(P 253 paras D-E)*

6. *The constitutional right of appeal from the Court of Appeal to the Supreme Court.*
Section 233 (2) (e) (iv) of the constitution is also clear that an appeal shall be from decisions of the court of Appeal to this court as of right. The appellants/applicants have the constitutional right to appeal against the decision of the lower court made against them. (PDP vs. Okorocha (2012) 15 NWLR (Pt.1323) 205 at 273, 240). *(P 253 paras E-G)*
Per Ogunbiyi (JSC):
"This court while putting succinctly the issue

of right of appeal had this to say in the case of Ugba vs. Suswan (2014) 14 NWLR (Pt.1427) 264 at 340-341.

"It is the glory, happiness and pride of Nigeria's various constitutions that to prevent any injustice no man is to be concluded by the first judgment, but that if he apprehends himself to be aggrieved, he had another court to which he can resort to for relief. For this purpose, the law furnishes him with the right of appeal as of right. If there is no appeal at all possible the system would be intolerable. The doors of the appellate courts have to be kept open if right and freedom are to be preserved/" (Emphasis provided)

See also cases of Anachebe vs. Ijeoma (2014 14 NWLR (Pt.1426) 168 at 183-184 and Ngere vs. Okuruket XIV (2014) 11 NWLR (Pt. 1417) at 178.

Where it was held by this court that a party should never be denied the right of appeal if he satisfied the conditions for appeal. See again [**Kotol Inv. Ltd vs. UACN P.D Co. Plc (2011) 16 NWLR (Pt. 1273) 211 at 223].** *(Pp 253-254 paras G-E)*

7. *The requirement of leave where a ground is of mixed law and facts*

It is also the requirement of the law that an appellant should seek the leave of the court in instances where the notice of appeal contains grounds of mixed law

and fact; the leave of the court serves as pre-condition upon which concerned grounds are properly filed before the appellate court, failure of which the defective grounds may be struck out. See this court in the case of Abubakar vs. Dankwambo (supra) at 234-235, wherein it was held that:

> **"Where leave, which means permission is a pre-condition before an appellant can file a notice of appeal, containing grounds of mixed law and fact, an appellant who files a notice of appeal without satisfying or obtaining that pre-condition would have his process thrown out. In the instant case, the appellant having not obtained leave of the court of appeal was caught by the provision of section 242 of the constitution and grounds, 1, 2, 4, 5 and 6 in the notice of appeal were correctly struck out by the court of Appeal."** *(Pp 254-255 paras E-D)*

8. *The nature of opposition expected in an application for leave to appeal on* grounds of mixed law and facts

When the law lays down a condition that leave is to be sought and obtained before filing grounds of appeal on mixed law and facts, this does not give a reason for exploitation by the opposite party in making it difficult for the applicant to access the discretion of court. In other words, when the law expects the applicant to lay before a court all materials necessary for the exercise of discretion in his favour, the respondent is not to be subjective in his opposition but

rather allow the principle of law and objectivity to apply. This is more so especially when regard is had to the submission made on behalf of the appellants/applicants that they cannot appeal against the lower court's decisions in appeals Nos. CA/A/390/2016 and CA/A/390A/2010 because they were not parties therein. *(P 255 Paras D-G).*

9. *A person's right to fair hearing under S.36 of the Constitution should not be determined on grounds of technicalities*

The applicants' application boarders squarely on their right to be heard on a case that affects their interest. I seek to restate at this point also that the applicants' right to fair hearing as provided under Section 36 of 1999 constitution of the Federal Republic of Nigeria (as amended) is inviolable and as such cannot be denied on the ground of technicalities. See Abubaka vs. Ya'adua (2008) 4 `NWLR (1078) P 465, where this court re-iterated in strong terms that courts are to do substantial justice without due regard to technicalities. *(Pp 255-256 paras G-B)*

10. *The need for a court not to prejudge in an interlocutory appeal, matters arising from the* substantive appeal

The appellate court is also enjoined not to prejudge in an interlocutory appeal, issues arising in a pending substantive appeal. See the case of Magnusson vs. koiki (1993) 9 NWLR (Pt. 317 page 287 at 298

Per Ogunbiyi (JSC):

"At paragraph 3.18 of his written address, the 1st respondent contends that the grant of this application will "confer legal stamp of validity on their notice of appeal filed on 17th August 2016." It is warned in the earlier case of Magnusson vs. Koiki (supra) that an appeal court should refrain from delving into the merit of the substantive question before it, at an interlocutory stage. Page 298 for instance, this court said:

> **"In an appeal arising from an interlocutory decision, care should be taken by an appellate court to avoid making an observation which may appear to pre-judge the issues yet to be determined in the pending substantive appeal."**
> *(P 256 paras B-G)*

11. *The activation of the power of the Supreme Court Under S.22 of the Supreme Court's Act will make this application an academic exercise*

By the very nature of this application and the justice it seeks to serve, it will not, make it an academic exercise, contrary to the submission by the 1st respondent's counsel that the activation of the provisions of section 22 of the Supreme Court Act will be nothing other than an academic exercise.
(P 256 paras G-H)

12. *Failure of an appellant to seek leave to argue a ground of mixed law and facts*

The failure of an appellant to seek the leave of court to argue grounds of mixed law and facts which are subscribed on the Notice of Appeal touches or robs the appellate court of its jurisdiction to consider and pronounce on such grounds as they are deemed incompetent before the court. For instance in the case of Akiwiwu Motors Ltd vs. Sangonuga (1984) ANLR (Reprint) 309, this court had this to say at page 311:

> **"This court has, in a series of cases, decided that where grounds of appeal involve questions of facts alone or questions of mixed law and facts, leave of the court of Appeal or the Supreme Court must be obtained to make the appeal competent and invest the Supreme Court with jurisdiction to hear the appeal. See Section 213 (3) of the (sic) Constitution of the Federal Republic of Nigeria 1979, Ojeme vs. Momidu III (1983) 3 SC 173; Oke vs. Eke (1982) 12 SC 228; and Akpasubi vs. Uweni (1982) II SC 132."**

From the foregoing deduction, it is obvious that the refusal of this court to grant the appellant s/applicants leave to argue the grounds of mixed law and fact as subscribed on the Notice of Appeal i.e. ground 4 will rob the appellants/applicants of the right to be heard on the said ground of their Notice of Appeal. [Anachebe vs. Ijeoma (2015) All FMLR (Pt.784) 183 at 201]. *(P 257 paras A-G)*

13. Where a party is not sure of the nature of a ground of appeal

The application at hand presupposes that the Notice of Appeal filed on the 17th day of August, 2016 and exhibited as Exhibit AU3 to the affidavit in support of the motion on Notice, contains a ground of mixed law and facts as such, the leave of this court is inevitable before the affected ground of appeal is to be proper before the court. It is trite law and also reasonable in my view that, where it is not apparent on record or when a party is not sure whether a ground of appeal can be classified as a ground of law or a ground of mixed law and fact, leave of court to appeal on such ground could be obtained as a safe or precautionary measure. [F.B.N. Plc vs. T.S.A Ind. Ltd (2010) 15 NWLR (Pt. 1216) 247 at 292]. *(Pp 257-258 paras G-C)*

14. The principles guiding application for leave to appeal on ground of mixed law and facts

As rightly submitted by the learned counsel for the appellants/applicants, with his clients having appealed within time and having subscribed other valid grounds of appeal on the notice of appeal duly filed earlier within the time allowed by law, there is nothing before this court to prevent the exercise of discretion in favour of their application. It will defeat the cause of justice to fetter the right of access to the court by way of declining to grant an application of this nature. The principle had long been laid down that the path to tread should be that of justice as

against technicality. Such application should not be opposed for the sake of either doing so or because the opponent feels threatened. The overriding consideration must always be justice and fairness. The principle has been well entrenched affirmatively by this court in the following cases of:- Obikoya vs. Wema Bank Plc (1989) 1 NWLR (Pt 96) 157 at 179 and Holman Brothers (Nig) Ltd vs. Kigo (Nig) Ltd (1980) 8-11 SC 43 at 62 and 63 where it was held that:

> **"an applicant is not required to show that the appeal would succeed if leave is granted. It is sufficient to show that there is an arguable appeal……**
>
> **…Having regard to the grounds of appeal exhibited and the facts disclosed in the affidavit evidence, ….the Court of Appeal was in error to refuse the application and prevent a hearing of the appeal."** *(Pp 258-259 paras C-B)*

15. *The fact that judgment had been delivered in an appeal where a party* was *refused to be joined as an interested party will not hinder his right of appeal*

As rightly submitted by the appellants/ applicants' counsel, the fact that judgment had already been delivered by the lower court in the case in which his clients are seeking leave to be joined as interested parties at the Court of Appeal, cannot hinder the exercise of their constitutional right to Appeal; this is especially when their appeal to this court was

properly, and timorously filed. *(P 259 paras B-D)*

Per Ogunbiyi (JSC):

> **"It is of no moment that the lower court had determined the substantive appeal before it. It is sacrosanct that the appellants'/applicants' constitutional right of appeal against the decision of the lower court refusing them leave to appeal as interested party, remains extant and cannot be waived or taken away from them. The following authorities are supportive on the principle of fair hearing:- [MFA vs. Inongha (2014) 4 NWLR (Pt.1397) 343 at 375 376; 7-up Bottling co. vs. Abiola & Sons (Nig) Ltd (1995) 3 SC NJ 37 (1995) 3 WLR (Pt. 383) 257; Deduwa vs. Okorodudu (1976) 1 NMLR 236 at 246; Tsokwa Motors (Nig) Ltd vs. U.B.A Plc (2008) All FWLR (Pt. 403 124 at 1255, (2008) 2 NWLR (Pt. 1071) 347. Also in the recent case of Abubakar Udu vs. FRN (2014) 53 NSCQR 456 AT 469 (2013) 5 NWLR (Pt.1348) 397 at 401-411],**

"This court reiterated, thus, amongst others:

> **"……..the obligation to hear the other side of a dispute or the right of a party in dispute to**

be heard, is so basic and fundamental a principle of our adjudicatory system in the determination of disputes that it cannot be compromised on any ground. [Nwokoro vs. Onuma (1990) 3 NWLR (Pt. 136 22"]
(Pp 260-261 paras D-B)

16. *A person denied leave to appeal as a party interested can appeal against such a decision*
It is pertinent to recapitulate that the appellants/ applicants were denied leave to appeal as a party interested by the lower court: the poser question is, whether such persons can rightly exercise their constitutional right of appeal against the decision of the Court of Appeal refusing them leave to appeal? It is elementary to say that the ruling of the lower court refusing the appellants/applicants leave to appeal is a decision of the court within the meaning of section 318(1) of the Constitution of the Federal Republic of Nigeria 1999, which is therefore appealable. In Re: Shyllon (1994) 6 NWLR (Pt. 353) 735 at 751 -752; Rabiu vs. State (1980) 8-11SC (Reprint) 85; and Tomtech (Nig) Ltd. vs. F.H.A (2009) 18 NLWR (Pt. 1173) 358 at 375 -376). *(P 259 paras D-G)*

17. *It is not proper to decide the substantive appeal at an interlocutory stage*
As rightly submitted by the learned counsel for the applicants all the issues being raised by the respondents against this application can be determined appropriately in the substantive appeal

and should not be looked into at the interlocutory stage at hand, which as stated earlier is prohibited, as it will amount to determining the merit of the substantive appeal that is yet to be heard. See again the case of Kotoye vs. C.B.N (1989) NWLR (Pt. 98) 419 and Obeya M.S. Hospital vs. A.G. Federation (1987) 3 NWLR (Pt. 60) 325 at 340].

In other words, the objection by the 3rd respondent is clearly an invitation to the court to determine the substantive appeal at an interlocutory stage, which this court will surely not do.
(P 261 paras D-G)

18. *The applicants for leave to argue a ground of mixed law and facts have discharged onus on them*
The appellants/applicants in my view, have placed before this court all relevant materials necessary for the grant of this application. The application is seeking to render as competent ground 4 of the notice of appeal which appears to be a ground of mixed law and facts. The justice of the application would be achieved if the discretion of this court is exercised in favour of the application thereof in the absence of any reason put before this court that the granting of same will either prejudice the respondents or overreach them. *(Pp 261-262 paras G-B)*

19. *The scope of S.233(2) of the Constitution of Federal Republic of Nigeria 1999 (as amended)*

Section 233(2) of the 1999 Constitution provides for the circumstances in which appeals to this Court from decisions of the Court of Appeal are as of right. Section 233 (2) (a) provides for appeals as of right where the ground of appeal in any civil or criminal proceeding involves questions of law alone. Thus where questions of facts or of mixed law and facts are in issue, leave must be sought and obtained. (Abubakar vs. Dankwambo (2015) 18 NWLR (Pt.1491) 213 @ 234-235; Okwuagbala vs. Ikwueme (2010) 19 NWLR (Pt. 1226) 54 Opuiyo vs. Omoniwari (2007) 16 NWLR (Pt.1060) 415). *(P 268 paras E-H)*

20. *A ground of appeal filed without leave where leave is required*

A ground of appeal filed without leave where leave is required is incompetent and liable to be struck out. (C.B.N & Anor. vs Okojie (2002) 8 NWLR (Pt.768) 48; Kano Textile Printers Ltd. vs. Gloede and Hoff (Nig.) Ltd. (2005 13 NWLR (Pt. 943) 680)
(Pp 268-269 paras H-A)

21. *Where a party is not certain of the nature of a ground of appeal*

It has been held severally by this court that the line between a ground of appeal on issues of law alone and a ground of appeal on issues of mixed law and fact is very thin. Where counsel are not certain into which category their ground or grounds of appeal fall, they are advised to seek leave out of abundance of caution. (F.B.N. Plc vs. T.S.A. Ind. Ltd. (2010) 15 NWLR

(Pt.1216) 247 at 292 G.) *(P 269 paras A-C)*

Nigerian Cases cited in this Judgment

7-up Bottling Co. vs. Abiola & Sons (Nig) Ltd (1995) 3 SC NJ 37 (1995) 3 WLR (Pt. 383);
Abidoye vs. Alawode (2001) 3 KLR (Pt. 118) 917;
Abubaka vs. Ya'adua (2008) 4 `NWLR (1078) P 465;
Abubakar Audu vs. FRN (2014) 53 NSCQR 456 (2013) 5 NWLR (Pt.1348) 397;
Abubakar vs. Dankwambo (2015) 18 NWLR (Pt. 1491) 213;
Akiwiwu Motors Ltd vs. Songonuga (1984) ANLR (Reprint) 309;
Akpasubi vs. Uweni (1982) II SC 132;
Alor & Anor vs. Ngene & Ors. (2007) 17 NWLR (Pt.1062) 163;
Amaechi vs. INEC (2008) All FWLR (Pt. 407) 1;
Anachebe vs. Ijeoma (2014 14 NWLR (Pt.1426) 168;
Ngere vs. Okuruket XIV (2014) 11 NWLR (Pt. 1417);
B.A.S.F (Nig) Ltd. vs. Faith Ent. Ltd (2010) 4 NWLR (Pt. 1183) 104;
C.B.N & Anor. vs. Okojie (2002) 8 NWLR (Pt.768) 48;
C.C.B. (Nig.) Plc vs. A-G Anambra State (1992) 8 NWLR (Pt. 261) 528;
Comm. Education, Imo State vs. Amadi (2013) 13NWLR (Pt. 1370) 133;
Deduwa vs. Okorodudu (1976)1 NMLR 236;
Deduwa v. Okorodudu (1976) 1 NMLR 236;
Eligwe vs. Okpokiri & 2 Ors. LE. (2014) SC/475/2011;
Ezeobi vs. Abang (2000) 9 NWLR (Pt. 672) 230;
F.B.N. Plc vs. T.S.A Ind. Ltd (2010) 15 NWLR (Pt. 1216) 247;
Hoff (Nig.) Ltd. (2005) 13 NWLR (Pt. 943) 680;.
Holman Brothers (Nig) Ltd vs. *Kigo (Nig) Ltd (1980) 8-11 SC 43;*

Kano Textile Printers Ltd vs. Gloede and Hoff (Nig) Ltd (2005) 13 NWLR (Pt.943) 680;
Kotol Inv. Ltd vs. UACN P.D Co. Plc (2011) 16 NWLR (Pt. 1273) 211;
Kotoye vs. C.B.N (1989) NWLR (Pt. 98) 419;
Magnusson vs. koiki (1993) 9 NWLR (Pt. 317;
MDPDT vs. Okonkwo (2001) 3 KLR (Pt. 117) 739;
MFA vs. Inongha (2014) 4 NWLR (Pt.1397) 343;
NEPA vs. Eze (2001) 3 NWLR (Pt. 709) 606;
Nwadike and Ors vs. Ibekwe and Ors (1987) LPELR 2087 (SC) 42 -43;
Nwaolisah vs. Nwabufoh (2011) 14 NWLR (Pt. 1268) 600
Abubakar vs. Dankwambo (2015) 18 NWLR (Pt. 1491) 231;
Obatoyinbo vs. Oshatoba (1996) 5 NWLR (Pt.450) 531,;
Obeya M.S. Hospital vs. A.G. Federation (1987) 3 NWLR (Pt. 60) 325;
Obikoya vs. Wema Bank Plc (1989) 1 NWLR (Pt 96) 157;
Ogbechie vs. Onochie (1986) 1 NWLR (Pt.70) 370;
Oieme vs. Momidu III (1983) 3 SC 173;
Ojukwu vs. Kain (2000) 15 NWLR (Pt. 691) 516;
Oke vs. Eke (1982) 12 SC 228;
Okwuagbala vs. Ikwueme (2010) 19 NWLR (Pt. 1226) 54;
Olori Motors Co. Ltd vs. B. N. Plc (2006) 10 NWLR (Pt. 989) 586;
Opuiyo vs. Omoniwari (2007) 16 NWLR (Pt. 1060) 415;
PDP vs. Okorocha (2012) 15 NWLR (Pt.1323) 205;
Rabiu vs. State (1980) 12 NSCC 291;
Shyllon (1994) 6 NWLR (Pt. 353) 735;
Tomtech (Nig) Ltd. vs. F.H.A (2009) 18 NLWR (Pt. 1173) 358;
Tsokwa Motors (Nig) Ltd vs. J.B.A Plc (2008) All FWLR (Pt. 403 124 (2008) 2 NWLR (Pt. 1071) 347;

UBA Ltd vs. Stahlbau Gambh & Co (1989) 3 NWLR (Pt. 110) 374,;
Ugba vs. Suswam (2014) 14 NWLR (Pt.1427) 264 at 340-341;
Ukachukwu vs. PDP (2014) All FWLR (Pt. 728) 889.

Foreign Cases cited in this Judgment
Benmax vs. Austin Motors Co Ltd (1945) All ER 326;
Clarke vs. Edinburgh etc Tramways (1919) SC (H.L) 35;
Cooper vs. Stubbs (1925) 2 KB 277;
Currie vs. Inland Revenue Commission (1921) 2 KB 536; and
Edwaards (Inspector of Taxes) v Bairstows and Anor (1955) 3 ALL ER 48.

Nigerian Statutes cited in this Judgment
Constitution of 1999 (as amended) – S. 233(3)
Electoral Act 2010 – S.87 (4) (1) and (2), S. 31 (2) (5) and (6)
Supreme Court Act – S. 22
Supreme Court Rules Or. 3 Rule 15, Or 6 2(1), or2 Rules 2(3) and (1).

Representations
YUSUF ALI SAN ***for the Appellants/Applicants:*** *appearing with: P.A.N. Ikwueto, (SAN) Yakub Dauda,(Esq); C.I. Ndukwe, (Esq); Luther K. Onyemkpa, (Esq); Alex Akoja, (Esq); O.D. Soyebo, (Esq); C.D. Ezeh, (Esq); Patricia Ikpegbu (Mrs); K.O.Lawal, Precious Kalu,(Esq); and Safinat Lamidi (Miss).*

DR. ALEX A. IZINYON, (SAN) ***for the 1st Respondent*** *appearing with: O.J Nnadi, (SAN): Max Ozoaka, (Esq); B.K.*

Abu, (Esq); K.O. Omoruan, (Esq); H. Abdurrahman (Mrs); E. Oghojafor, (Esq); Chijioke Udeogu, (Esq); L.O. Fagbemi, (Esq); and C.U. Adah (Miss).

DR. ONYECHI IKPEAZU OON. (SAN) ***for the 2nd respondent*** *appearing with: Dr. Paul Ananaba, (SAN); Prof. Ernest Ojukwu, (SAN); Henry Balogun; S.N. Mbanezue, (Esq); Emeka Eze, (Esq); Nwachukwu Ibegun (Esq); Godswill D. Nwani, (Esq); Obinna Onya, (Esq); Julius Mba, (Esq); Nwamaka Ofoegbu (Miss); Oluchi Elendu (Miss); S.T.Moses Ogbonna, (Esq); D.D. Nkume; and Uche Ihemanma.*

CHIEF WOLE OLANIPEKUN, (SAN) ***for the 3rd respondent;*** *appearing with: Chief Kanu Agabi, (SAN). S.F. Hon, (SAN) and J U.K Igwe, (SAN); and hosts of other counsel.*

MRS WENDY KUKU ***for the 4th respondent;*** *appearing with: Rahimatu Aminu (Mrs) and Ahmed Goni Ismaila.*

MR. J.C.IDOKO for the 5th respondent; appearing with Ben N.Ukandu, John Adah and Ijeoma Okoye (Miss).

BATA OGUNBIYI, (JSC) (Delivering the Lead Judgment):

The 1st and 3rd respondents are members of the Peoples Democratic Party, (the 2nd respondent herein), while the 1st applicant is a member of the All Progressive Grand Alliance, the 2nd applicant herein.

The 1st and 3rd respondents as members of the 2nd

respondent, therefore, participated in the 2nd respondent's Governorship Primary Election for Abia State on 8th December, 2014 wherein the 2nd respondent returned the 3rd respondent as the winner of the said Abia State Governorship Primary Election, while the 1st respondent came second in the said primary election.

Dissatisfied with the declaration of the 3rd respondent as the winner of the 2nd respondent's Governorship Primary Election and upon the 1st respondent becoming aware that the 3rd respondent breached the 2nd respondent's Electoral Guidelines for 2014 and Section 31 (2), (5) and (6) of the Electoral Act 2010 (as amended), the 1st respondent commenced an action by originating summons at the Federal High Court in Suit No. FHC/UM/CS/94/2015 which later culminated Suit No. FHC/ABJ/CS/71/2016 upon the transfer of the said suit to the Federal High Court, Abuja Division.

In the 1st respondent's Amended Originating Summons in the said suit filed by him, several reliefs were claimed.

In its judgment delivered on 27th June, 2016, the trial court granted the aforesaid reliefs claimed by the 1st respondent and further ordered that INEC should forthwith issue certificate of Return to the 1st respondent as Governor elect and restore all entitlements to him as the elected Governor of Abia State. Following the delivery of the aforesaid judgment, the applicants brought an application at the court below on the 15th July, 2016 seeking the following reliefs among others:

3. An order granting the appellants/applicants leave to

appeal as interested persons against the final judgment of the Federal High Court, Abuja Division, delivered on 27th June, 2016 in Suit No. FHC/ABJ/CS/71/2016. (FHC/UM/CS/94/2015 DR. SAMPSON UCHECHUKWU OGAH V. PEOPLES DEMOCRATIC PARTY (PDP) & 3 ORS.

4. An order deeming the Notice of Appeal already filed on the 15th Day of July, 2016 against the said judgment as properly filed and served, the appropriate filing fees thereto having been paid."

After hearing the respective parties in the aforesaid application, the court below in its considered ruling delivered on the 5th August, 2016 dismissed same and hence a notice of appeal was filed to this court by the appellants/applicants herein against the said ruling on the 17th August, 2016.

The application which is the subject matter of contention now before us was filed on the 15th September, 2016, and pursuant to Section 233 (3) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) Order 3 Rule 15, Order 6 (2) (1) of the Supreme Court Rules 1985 (as amended) and under the inherent jurisdiction of this court filed 15th September, 2016 and seeking the following relief:

"1. AN ORDER of this Honourable court granting leave to the appellants/applicants to appeal against the decision of the Court of Appeal, Abuja Division, delivered on 5th day of August, 2016 in Appeal No.

CA/A/390/2016: Dr. Alex Otti & Anor vs. Dr. Samson Uchechukwu Ogah & 4 Ors, on grounds of mixed law and facts as set out in the Notice of Appeal already filed at the Court of Appeal, Abuja Registry, on the 17th day of August, 2016.

2. AN ORDER of this Honourable Court deeming as properly filed and served the Notice of Appeal filed at the Court of Appeal, Abuja Registry, on the 17th day of August, 2016 the correct filing fee having been paid.

3. AND FOR SUCH FURTHER ORDER (S) as this Honourable Court may deem fit to make in the circumstance of this case."

In support of the motion is an affidavit of 15 paragraphs sworn to by one Abdulrasheed Usman (Esq.), one of the counsels representing the appellants/applicants. There is a further affidavit and a further and better affidavit sworn to by the same deponent. Also predicating the application are ten grounds enumerated as (*1*-X) and reproduced hereunder as follows:

"GROUNDS OF THE APPLICATION

i. The Federal High Court, Abuja delivered its judgment in Suit No. FHC/ABJ/CS/71/2016 on the 27th day of June, 2016

ii. The appellants/applicants being affected with the judgment filed an application to the Court of Appeal to be allowed to appeal against the said decision of the Federal High Court, Abuja, delivered on the 27th

day of June, 2016, as interested parties.

iii. The Court of Appeal delivered its ruling on the application in Appeal No. CA/A/390/2016 and dismissed the application.

iv. The appellants/applicants being dissatisfied with the said ruling is desirous of appealing against the said decision.

v. The appellants/applicants had filed a Notice of Appeal at the Court of Appeal Registry and which has formed part of the record before this court.

vi. Some of the grounds of appeal are not exclusively on grounds of law.

vii. The appellants/applicants are constitutionally required to seek and obtain the leave of this Honourable Court to appeal on grounds of mixed law and facts.

viii. The leave of this Honourable Court is sine qua non to the validity of the concerned grounds of appeal.

ix. The appellants/applicants have arguable Grounds of Appeal.

x. This application is made in the interest of justice."

For purpose of substantiating the application, their counsel Mr. Yusuf Ali, (SAN) filed a written address on the 30th September, 2016.

On behalf of the 1st respondent, a counter affidavit was filed on the 7th October, 2016 and was supported by a written address in opposition to the application. There is also a counter affidavit filed on the 6th October, 2016 on behalf of the 2nd respondent which was supported by a written address. Furthermore, and on behalf of the 3rd

respondent, two affidavits i.e to say a counter and a further counter affidavits were filed on the 21st September and 6th October, 2016 respectively as well as a written address in opposing the motion filed. The 3rd respondent also deemed it pertinent to attach the final judgment of the lower court delivered on the 18/8/16. Replies were also filed on the 10th October, 2016 in response to the 1st, 2nd & 3rd respondents and on the 11th October, 2016 also to that by the 5th respondent respectively. The 4th respondent did not file any process in respect of the application. On the part of the 5th respondent a counter affidavit was filed on the 11th October, 2016 as well as a written address.

On the 8th November, 2016 when the application was heard, the senior counsel, Mr. Yusuf Ali, (SAN) with his brothers silk, Mr. P.I. N. Ikwueto, (SAN) also in company of other counsels, represented the appellants/applicants. Dr. Alex Izinyon, (SAN) with D. Okpeseyi, (SAN) and leading a host of counsel in chambers represented the 1st respondent. The learned senior counsel Dr. Onyechi Ikpeazu, (SAN) also in company of his bothers silk Dr. Paul Ananaba, (SAN) and Prof. Ernest Ojukwu, (SAN) led a number of counsel and represented the 2nd respondent. Chief Wole Olanipekun, (SAN) with Chief Kanu Agabi (SAN), S.F. Hon. (SAN) and J.U.K. Igwe, SAN and a teeming number of other counsels represented the 3rd respondent. The 4th respondent was represented by Mrs. Wendy Kuku, leading R. Aminu (Mrs) and Ahmed Goni Ismaila. Finally, the 5th respondent was represented by Mr. J.C.Idoko appearing with Ben N.Ukandu, John Adah and Ijeoma Okoye (Miss).

At the hearing of the application, all counsel with exception of the 4th respondent adopted and relied on their

respective processes filed. While the appellants/applicants counsel urged for a discretion to be exercised in favour of their clients by granting the reliefs sought, the respondents were vehement and prayed that the application should be dismissed, because the subject matter is non-existent. There was nothing to urge on behalf of the 4th respondent.

In submission to substantiate their application, the senior counsel for the appellants/applicants related copiously to Exhibit AUI, being the judgment of the Federal High Court, from whence the following statements of facts are evident:

1. That the court found that the 3rd respondent herein, who submitted false information in his form CF001, was not qualified to contest the 2015 Abia State Gubernatorial Election.
2. Trial court also found that 1st respondent who contested primaries with 3rd respondent should be recognized as the candidate of the PDP at the April, 2015 State Gubernatorial Election
3. That the court made a consequential order that 1st respondent be issued with a certificate of Return. Learned counsel related closely to Section 31 (5) and (6) of the Electoral Act 2010. It is the submission of counsel further that his clients became aware of the judgment only through the media and filed an application to the lower court to be allowed to appeal as interested party. This is in view of the applicants having participated at the election and having scored the second highest number of lawful votes;
4. That the lower court, in its ruling delivered on the 5th day of August, 2016, dismissed the application and

hence the appeal filed before this court on the 17th August, 2016. It is the counsel's contention that the Notice of Appeal filed at the Registry of the Court of Appeal is of mixed law and facts. The counsel submits the necessity of this application to seek the leave of this court, therefore, before the appellants can argue the ground of mixed law and fact in their Notice of Appeal.

In urging for an exercise of discretion in favour of the application, the learned counsel for the appellants/applicants re-iterates strongly that with the ruling of the lower court delivered on the 5th August, 2016 being a final decision, the relief sought is within their constitutional right. This counsel submits, because their application is not seeking leave to appeal out rightly in view of an already existing notice and grounds of appeal filed 17th August 2016 as shown on the Record of Appeal at pages 422-430 and which is sufficient to sustain the entire appeal as competent. To buttress his submission further, the learned counsel cites copiously the provisions of section 233 (2) (e) (iv) of the Constitution of Federal Republic of Nigeria, 1999 (as amended) as well as decided numerous case laws in support. It is counsel's further submission that the law enjoins an appellant to seek the leave of court in instances where the notice of appeal contains grounds of mixed law and facts; that the leave of court serves as pre-condition upon which concerned grounds are properly filed before the appellate court. In the absence of the leave, the grounds will be rendered as incompetent and liable to be struck out as it was held by this court in the case of **Abubakar vs. Dankwambo**

(2015) 18 NWLR (Pt. 1491) 213 at 234 235; that the consequential effect of the failure to seek the leave of court to regularize such grounds robs the appellate court of jurisdiction to consider and pronounce thereon, the grounds. Again, the counsel cites in support the decision of this court in **Akiwiwu Motor Ltd vs. Songonuga (1984) ANLR (Reprint) 309 at 311.**

The application, counsel contends, relates to ground 4 of the grounds of appeal only and does not affect the other grounds which are valid and subsisting before the court; that this application is brought out of abundance of caution in order to save ground 4 in the Notice of Appeal; that the appellants/applicants have placed before this court sufficient facts in the depositions of their affidavits in support for the determination of this application.

In further submission, the applicants' counsel related copiously to the facts deposed to in their further and better affidavit where they acknowledged the two separate appeals filed by the 1st respondent against the decisions of the lower Court in Appeal No. CA/A/390/2016 and CA/A/390A/2016 and the appeal are entered in this court as SC.717/2016 and SC. 719/2016, and are pending before this court. For the foregoing, following reasons, therefore, the applicants' counsels re-iterates strongly that their constitutional right of appeal should not be tampered-with, simply on the ground that judgment had since been delivered by the lower court; that the court of Appeal having refused the appellants/applicants leave to appeal, proceeded to determine the appeal before it without and in the absence of the appellants/applicants. This counsel submits, is sufficient to raise a threshold issue of denial of right to fair hearing;

that since an appeal is a continuation of the case, the learned counsel has urged this court to see the reliefs which the present appellants/applicants are seeking from this court vide their Notice of Appeal filed 17th August, 2016; that the appellants' constitutional right of appeal against the decision of the Court of Appeal refusing them leave to appeal as interested party, remains extant and ought to be respected; that the issues raised in the instant appeal relate to the right of fair hearing and the constitutional right to such is synonymous with the common law principles of natural justice. Counsel cites, in support, the cases of **7-Up bottling co. vs. Abiola & Sons (Nig) Ltd. (1995) 3 SCNJ 37 (1995) 3 NWLR (Pt. 383) 257 and Deduwa vs. Okorodudu (1976)1 NMLR 236 at 246;** that the judgment of the lower court in the substantive appeal has not affected appellants/applicants' pending appeal before this court in any way. This, counsel argues because in the substantive appeal, the prayer is asking the court to invoke section 22 of the Supreme Court Act; that all the issues raised by the respondent against this application can be canvassed appropriately in the substantive appeal and not at this stage.

The learned counsel submits finally that the application should be granted in the interest of justice.

In opposing the Application, a 12 paragraph counter affidavit was filed on behalf of the 1st respondent on the 7th October, 2016. In the said counter affidavit, the learned senior counsel Dr. Alex A. Izinyon, (SAN), who represented the 1st respondent, gave a detailed background history of this case and relied copiously on all the paragraphs deposed to in their counter affidavit and also the Exhibits "A" and "B" which are the judgments of the court below setting aside the

judgment of the Federal High Court Abuja.

Counsel submits vehemently that a careful perusal of the appellants' relief 1, will reveal clearly that it is the entire grounds of appeal that are on mixed law and facts which leave is required to file same. Counsel further re-asserts the trite law that, for a ground of mixed law and fact to be competent, leave of court where such notice is to be filed, must be obtained first as a condition precedent to the filing of the ground. Counsel cites in support the provision of Order 2 Rule 28 (3) and (4) of the Rules of this court and a host of case laws in **B.A.S.F (Nig) Ltd. vs. Faith Ent. Ltd (2010) 4 NWLR (Pt. 1183) 104 at 128 paras. D H; also the cases of Opuiyo vs. Omoniwari (2007) 16 NWLR (Pt. 1060) 415 at 440; C.C.B. (Nig.) Plc vs. A-G Anambra State (1992) 8 NWLR (Pt. 261) 528 at 545 and Comm. Education, Imo State vs. Amadi (2013) 13 NWLR (Pt. 1370) 133 at 148.**

It is the argument of counsel, further, that the applicants herein have not shown any exceptional circumstance to warrant bringing this application directly to this court; that with the applicants' application at the court below having been dismissed on 5th August, 2016, they had every opportunity between the said date and the 17th August, 2016 when they filed their said notice of appeal to have filed an application at the court below for leave to appeal on grounds of mixed law and fact; that this, they had failed to do and have not shown any exceptional circumstance why discretion should be exercised in favour of their application. The learned senior counsel restates the trite principle of law that where a law prescribes a procedure for doing an act, it must be rigidly followed. The senior counsel cites in support

the case of **Amaechi vs. INEC (2008) All FWLR (Pt. 407) 1 at 98** a decision of this court, also the case of C.C.B. Nig. Plc vs. A.G. Anambra State (supra) that in the case at hand, the applicant failed to comply with the procedure prescribed by the aforesaid Rule of Court and as a result their application should be dismissed. Counsel urges the court to discountenance the assertion by the applicants' counsel that their said application relates to ground 4 of their notice of appeal only; that the submission, counsel argues is highly misconceived.

On a further contention, the learned counsel submits the application as being academic and is therefore spent; that the reliefs which the applicants want this court to consider and grant by invoking section 22 of this court's Act are the ones in the Notice of Appeal before the court below, and with the court below having set aside the judgment of the Federal High Court based on 2nd and 3rd respondents' appeal, the invocation of section 22 of the Supreme Act will be nothing other than an academic exercise. Counsel cites a number of decided case laws in support of his argument and argues finally that the application be dismissed for lack of merit.

In the address filed on behalf of the 2nd respondent, the two issues raised to oppose the motion on notice filed on 15/9/2016 are as follows:

1. Whether having conceded that the Grounds of Appeal in the Notice of Appeal filed on 17th August 2016 require leave, this application is competent before the Supreme Court.
2. Whether the applicants are entitled to the reliefs sought by them in the motion paper.

Submitting on behalf of the 2nd respondent, the learned senior counsel, Dr. Onyechi Ikpeazu, (SAN), drew the court's attention to paragraphs 8, 9, 10 and 11 of the affidavit in support of the applicants' application and re-iterates that they did not specify the ground on which the leave was required by reason of which none can be excluded. As a consequence, that it is not for this court to decipher which ones were or were not validly filed without the leave of the Court of Appeal, which being a pre-condition to the validity of the appeal renders the entire process nugatory if the prescribed leave was not obtained. Copious reference was made to section 233 (1) of the Constitution of the Federal Republic of Nigeria, 1999, and Order 2 Rule 28 (4) of the Rules of Court to the effect that the application for leave, not having been made in the first instance at the court below, it cannot now be made at the level of this court; that whereas in this case, the applicants did not specify any ground of appeal which is excluded from the application so as to sustain a valid appeal as of right, the appeal could not have been accepted at all without the leave of the Court of Appeal in the first instance; that without a valid appeal, there can be no valid compilation of record of appeal, which is instrumental to a valid entry of appeal; that the operative relief 4 (ii) in this purported appeal which prays this court to invoke the provisions of section 22 of the Act to "consider and grant the reliefs subscribed on the Notice of Appeal that was before the Court of Appeal" may only be viable if the decision of the Federal High Court was extant; that the position is now different since the decision against which the leave to appeal is founded no longer exists; that in the absence of any

judgment a person cannot conceivably be an aggrieved party or a party interested in the outcome of an adverse judgment; also that in the absence of any existing judgment, there cannot be any right of appeal as sought in this application.

The 3rd respondent as a party to this application also raised an issue in tandem with the counterpart respondents and the applicants, that is to say, whether or not the application is grantable in the circumstance. The learned counsel, Mr. Olabode Olanipekun, counsel for the 3rd respondent concurred with the earlier arguments on the academic nature of the application which is not worth considering. Counsel submits further that an academic appeal is not arguable; that an interlocutory appeal has no reason to exist after the substantive appeal had been heard and determined. Counsel submits that the decision, applicants are seeking the leave of this court to appeal against, was given as ruling on August 5th 2016 in substantive Appeal No. CA/A/390/2016 (and not in Appeal No. CA/A 390C/2016, as applicants have misleadingly stated in paragraph I of their written address) before the determination of the substance of that appeal on August 18, 2016. For purpose of drawing the line between interlocutory and final decisions counsel cites the decision of this court in **Alor & Anor vs. Ngene & Ors. (2007) 17 NWLR (Pt.1062) 163 at 175**; that the decision in respect of which leave is sought to appeal against is an interlocutory decision of the lower court which cannot ensure when a lower court has already delivered its final judgment. Counsel cites in support

the case of this court in **Olori Motors Co. Ltd vs. B. N. Plc (2006) 10 NWLR (Pt. 989) 586 at 606.**

It is the submission of counsel also that the right of a party is to appeal not without its limitations. Hence in the case at hand, the court should consider whether such appeal is arguable; that the court has the inherent powers to refuse to entertain an appeal which is patently incompetent; see **Rabiu vs. State (1980) 12 NSCC 291**.

The counsel submits further that by the Judgment of the lower court delivered on August 18, 2016 in appeal No. CA/A/390/2016 and Appeal No. CA/A/390A/2016, the judgment of the Federal High court no longer exists. In other words, that the issue of leave to appeal against the decision of the Federal High Court is spent and lifeless, since the Court of Appeal has already finally and conclusively entertained and determined appeals against the same decision; that contrary to the submission by the counsel for the applicants, there is nowhere in the applicants' motion paper stating that **"ground 4"** is that in respect of which leave is sought. The sole reference made to ground 4, counsel argues is not only untrue, but also an afterthought. Counsel cites several authorities in support and urges further that by parity of reasoning the claims in the instant motion paper do not make any reference remotely or proximately, to ground 4 of the notice of appeal as wrongly conceived by the applicants' counsel; that by the use of a general phrase, "some of the grounds of appeal", it makes the application speculative and the reason why the court should also refuse same on this ground; that parties should be encouraged to pursue appeal against final decisions rather than appealing interlocutory decisions as pronounced

by this court in **Eligwe vs. Okpokiri & 2 Ors. L.E. (2014) SC/475/2011**. Counsel urges for the dismissal of this application without much ado and with substantial cost.

In summary the reply by the applicants in response to the 1st, 2nd and 3rd respondents are very succinct and to the point. For instance the learned counsel for the appellants/ applicants re-iterate that the court should discountenance the arguments by the respondents that the application is either academic or that the activation of section 22 of the Supreme Court Act will render it academic. This, counsel submits, is in view of the existing competent and valid Notice of appeal having been entered in this court predicated on a valid record of appeal, duly compiled. Also, that contrary to the submission on behalf of the 3rd respondent, the applicants cannot appeal against the lower court's decision in Appeals Nos. CA/A/390/2016 and CA/A/390A/2016 because they are not parties in those appeals. Finally, that by the use of the phrase "some of the grounds of appeal" in the application, it presupposes that not all the grounds of appeal are affected by the application. In other words, while the application applies to the incompetent grounds of appeal, it does not apply to the existing grounds that are competent. Counsel finally solicits for the applicants' right to be heard.

The lone issue for determination is:

Whether considering the materials placed before this Honourable court coupled with the peculiar facts and circumstances of this case, this is a case to exercise the court's discretion in favour of a grant of this application.

It is trite law that in an application of this nature, an applicant for leave to appeal must show by good and

substantial reason why the appeal ought to be heard and this must be exhibited by a Notice of Appeal showing arguable grounds of appeal if leave is granted. The grant of leave is not a matter of course as rightly submitted by the respondents' counsel. It is also not necessary that the appeal should have merit, but the question is whether there is a right and reason to appeal.

The law is well settled also that the grant or refusal to grant leave to appeal to an appellant/applicant is a matter of discretion of the court. However, such discretion is to be exercised judicially and judiciously. See the case of **Ukachukwu vs. PDP (2014) All FWLR (Pt. 728) 889 at 911,** wherein it was held that:

"In an application which calls for the exercise of the court's discretion, the discretion must be exercised judicially and judiciously taking all the facts and circumstance of the case into consideration.

The application of this nature is seeking leave in respect of grounds that are not on pure law and the situation is not the same as one seeking leave to appeal in absolute terms.

It is on record affirmatively that the appellant/ applicants filed a valid, competent and subsisting notice of appeal Exhibit Au3. The said substantive appeal is challenging the refusal of the court below to grant the appellants/applicants leave to appeal as interested parties against the consequential orders contained in the judgment of the trial court. On pages 422-430 of the Record of Appeal, the decision of the Court of Appeal delivered on the 5th day of August, 2016, is a final decision which prevented the appellants from appealing against the orders made by the

learned trial judge. Being a final decision the appellants/applicants have a right of appeal. By sections 241 9(1), 244 (2) and 245 (1) of the constitution of the Federal Republic of Nigeria, 1999 (as amended), every citizen of Nigeria has the right to approach a higher court to exercise his right of appeal as provided.

In the matter at hand and under consideration, it is only in respect of ground 4, therefore, that leave to appeal on ground of mixed law and fact is sought.

As rightly submitted by the learned senior counsel for the appellants/applicants, the law is well settled that one competent ground of law alone is enough to sustain an appeal to this court. *See* **Nwaolisa vs. Nwabufoh (2011) 14 NWLR (Pt. 1268) 600 at 625; also Abubakar vs. Dankwambo (2015) 18 NWLR (Pt. 1491) 231 at 244.** Section 233 (2) (e) (iv) of the constitution is also clear that an appeal shall be from decisions of the court of Appeal to this court as of right. The appellants/applicants have the constitutional right to appeal against the decision of the lower court made against them. See **PDP vs. Okorocha (2012) 15 NWLR (Pt.1323) 205 at 273, 240**. This court while putting succinctly the issue of right of appeal had this to say in the case of **Ugba vs. Suswam (2014) 14 NWLR (Pt.1427) 264 at 340-341.**

> **"It is the glory, happiness and pride of Nigeria's various constitutions that to prevent any injustice no man is to be concluded by the first judgment, but that if he apprehends himself to be aggrieved, he had another court to which he can resort to for**

relief. For this purpose, the law furnishes him with the right of appeal as of right. If there is no appeal at all possible the system would be intolerable. The doors of the appellate courts have to be kept open if right and freedom are to be preserved/" (Emphasis provided)

See also cases of **Anachebe vs. Ijeoma (2014 14 NWLR (Pt.1426) 168 at 183-184 and Ngere vs. Okuruket XIV (2014) 11 NWLR (Pt. 1417) at 147** where it was held by this court that a party should never be denied the right of appeal if he satisfied the conditions for appeal. See again **Katol Inv. Ltd vs. UACN P.D Co. Plc (2011) 16 NWLR (Pt. 1273) 211 at 223.**

It is also the requirement of the law that an appellant should seek the leave of the court in instances where the Notice of Appeal contains grounds of mixed law and fact; the leave of the court serves as pre-condition upon which concerned grounds are properly filed before the appellate court, failure of which the defective grounds may be struck out. See this court in the case of **Abubakar vs. Dankwambo (supra) at 234-235** wherein it was held that:

> **"Where leave, which means permission is a pre-condition before an appellant can file a Notice of Appeal, containing grounds of mixed law and fact, an appellant who files a Notice of Appeal without satisfying or obtaining**

> **that pre-condition would have his process thrown out. In the instant case, the appellant having not obtained leave of the court of appeal was caught by the provision of section 242 of the constitution and grounds, 1, 2, 4, 5 and 6 in the notice of appeal were correctly struck out by the Court of Appeal."**

When the law lays down a condition that leave is to be sought and obtained before filing grounds of appeal on mixed law and facts, this does not give a reason for exploitation by the opposite party in making it difficult for the applicant to access the discretion of court. In other words, when the law expects the applicant to lay before a court all materials necessary for the exercise of discretion in his favour, the respondent is not to be subjective in his opposition but rather allow the principle of law and objectivity to apply. This is more so especially when regard is had to the submission made on behalf of the appellants/applicants that they cannot appeal against the lower court's decisions in appeals Nos. CA/A/390/2016 and CA/A/390A/2010, because they were not parties therein. The applicants' application boarders squarely on their right to be heard on a case that affects their interest. I feel to restate at this point also that the applicants' right to fair hearing as provided under section 36 of 1999 Constitution of the Federal Republic of Nigeria (as amended) is inviolable and as such cannot be denied on the ground of technicalities. **See Abubaka vs. Ya'adua (2008) 4 NWLR (1078) P 465,** where this court re-iterated in strong terms

that courts are to do substantial justice just without due regard to technicalities.

The appellate court is also enjoined not to prejudge in an interlocutory appeal issues arising in a pending substantive appeal. See the case of **Magnusson vs. Koiki (1993) 9 NWLR (Pt. 317 page 387 at 298**

At paragraph 3.18 of his written address, the 1st respondent contends that the grant of this application will "confer legal stamp of validity on their Notice of Appeal filed on 17th August 2016." It is warned in the earlier case of **Magnusson vs. Koiki (supra)** that an appeal court should refrain from delving into the merit of the substantive question before it, at an interlocutory stage. On **page 298** for instance, this court said:

> **"In an appeal arising from an interlocutory decision, care should be taken by an appellate court to avoid making an observation which may appear to pre-judge the issues yet to be determined in the pending substantive appeal."**

By the very nature of this application and the justice it seeks to serve, it will not make it an academic exercise, contrary to the submission by the 1st respondent's counsel that the activation of the provisions of section 22 of the Supreme Court Act will be nothing other than an academic exercise.

The failure of an appellant to seek the leave of court to argue grounds of mixed law and facts which are subscribed on the Notice of Appeal touches or robs the appellate court of its jurisdiction to consider and pronounce on such grounds as they are deemed incompetent before the

court. For instance, in the case of Akiwiwu Motors Ltd vs. Sangonuga (1984) ANLR (Reprint) 309, this court had this to say at page 311:

> **"This court has, in a series of cases, decided that where grounds of appeal involve questions of facts alone or questions of mixed law and facts, leave of the court of Appeal or the Supreme Court must be obtained to make the appeal competent and invest the Supreme court with jurisdiction to hear the appeal. See section 213 (3) (sic) Constitution 1979, Oieme vs. Momidu III (1983) 3 SC 173, Oke vs. Eke (1982) 12 SC 228 and Akpasubi vs. Uweni (1982) II SC 132."**

From the foregoing deduction, it is obvious that the refusal of this court to grant the appellant s/applicants leave to argue the grounds of mixed law and fact as subscribed on the Notice of Appeal i.e. ground 4 will rob the appellants/applicants of the right to be heard on the said ground of their **Notice of Appeal. See also Anachebe** vs. Ijeoma (2015) All FMLR (Pt.784) 183 at 201

The application at hand presupposes that the Notice of Appeal filed on the 17th day of August, 2016 and exhibited as Exhibit AU3 to the affidavit in support of the Motion on Notice, contains a ground of mixed law and facts; as such, the leave of this court is inevitable before the affected ground of appeal is to be proper before the court. It is trite law and also reasonable in my view that, where it is not apparent on record or when a party is not sure whether a ground of appeal can be classified as a ground of law or a

ground of mixed law and fact, leave of court to appeal on such ground could be obtained as a safe or precautionary measure. See **F.B.N. Plc vs. T.S.A Ind. Ltd (2010) 15 NWLR (Pt. 1216) 247** at 292.

As rightly submitted by the learned counsel for the appellants/applicants, with his clients having appealed within time and having subscribed other valid grounds of appeal on the notice of appeal duly filed earlier within the time allowed by law, there is nothing before this court to prevent the exercise of discretion in favour of their application. It will defeat the cause of justice to fetter the right of access to the court by way of declining to grant an application of this nature. The principle had long been laid down that the path to tread should be that of justice as against technicality. Such application should not be opposed for the sake of either doing so or because the opponent feels threatened. The overriding consideration must always be justice and fairness. The principle has been well entrenched affirmatively by this court in the following cases of: **Obikoya vs. Wema Bank Plc (1989) 1 NWLR (Pt 96) 157 at 179 and Holman Brothers (Nig) Ltd vs. Kigo (Nig) Ltd (1980) 8-11 SC 43 at 62 and 63** where it was held that:

> "an applicant is not required to show that the appeal would succeed if leave is granted. It is sufficient to show that there is an arguable appeal……
>
> ……Having regard to the grounds of appeal exhibited and the facts disclosed in the affidavit evidence, ……the court of Appeal was in error to refuse the application and

prevent a hearing of the appeal."

As rightly submitted by the appellants/applicants' counsel, the fact that judgment had already been delivered by the lower court in the case in which his clients are seeking leave to be joined as interested parties at the Court of Appeal, cannot hinder the exercise of their constitutional right to appeal. This is especially when their appeal to this court was properly, and timorously filed.

It is pertinent to recapitulate that the appellants/applicants were denied leave to appeal as a party interested by the lower court. The poser question is, whether such persons can rightly exercise their constitutional right of appeal against the decision of the Court of Appeal refusing them leave to appeal? It is elementary to say that the ruling of the lower court refusing the appellants/applicants leave to appeal is a decision of the court within the meaning of section 318(1) of the Constitution of the Federal Republic of Nigeria 1999 (as amended) which is therefore appeasable see in **Re: Shyllon (1994) 6 NWLR (Pt. 353) 735 at 751 - 752; Rabiu vs. State (1980) 8-11SC (Reprint) 85; and Tomtech (Nig) Ltd. vs. F.H.A (2009) 18 NWLR (Pt. 1173) 358 at 375 -376.** The refusal of leave to appeal is, without more, a denial of right to fair hearing.

The present application is praying the court to exercise its powers under section 22 of the Act to grant the reliefs which the appellants/applicants sought before the court below. The grounds predicating the application as well as the facts deposed to on the affidavit in support are very evident. The Exhibits AUI, AU2 and AU3 are also relevant being the final judgment of the Federal High Court, Abuja, Ruling of the Court of Appeal, Abuja, dismissing the

appellants/applicants application praying to be joined as interested parties and the Notice of Appeal filed at the Court of Appeal registry on 17th August 2016 and challenging the ruling of the lower court delivered 5th August, 2016 all attached herein respectively.

The issue before the lower court which is centred on the principle of fair hearing cannot be waived off as sought by the respondents. As rightly submitted on behalf of the appellants/applicants, it is of no moment that the lower court had determined the substantive appeal before it. It is sacrosanct that the appellants'/applicants right of appeal against the decision of the lower court refusing them leave to appeal as interested party, remains extant and cannot be waived or taken away from them. The following authorities are supportive on the principle of fair hearing:, **MFA vs. Inongha (2014) 4 NWLR (Pt.1397) 343 at 375 376; 7-up Bottling co. vs. Abiola & Sons (Nig) Ltd (1995) 3 SC NJ 37 (1995) 3 WLR (Pt. 383) 257; Deduwa vs. Okorodudu (1976) 1 NMLR 236 at 246; Tsokwa Motors (Nig) Ltd vs. U.B.A Plc (2008) All FWLR (Pt. 403 124 at 1255, (2008) 2 NWLR (Pt. 1071) 347.** Also in the recent case of **Abubakar Audu vs. FRN (2014) 53 NSCQR 456 AT 469 (2013) 5 NWLR (Pt.1348) 397 at 401-411,** this court reiterated thus amongst others:

> "……..the obligation to hear the other side of a dispute or the right of a party in dispute to be heard, is so basic and fundamental a principle of our adjudicatory system in the determination of disputes that it cannot be compromised on any

> ground. See Nwokoro vs. Onuma (1990) 3 NWLR (Pt. 136 22……..'

In the substantive appeal per relief (ii), the appellants/applicants are praying this court to invoke section 22 of the Supreme Court Act. Therefore, the judgment of the lower court in the substantive appeal has not affected appellants/applicants pending appeal before this court. Again and as rightly submitted by the learned counsel for the applicants all the issues being raised by the respondents against this application can be determined appropriately in the substantive appeal and should not be looked into at the interlocutory stage at hand, which as stated earlier is prohibited, as it will amount to determining the merit of the substantive appeal that is yet to be heard. See again the case of **Kotoye vs. C.B.N (1989) NWLR (Pt. 98) 419 and Obeya M.S. Hospital vs. A.G. Federation (1987) 3 NWLR (Pt. 60) 325 at 340.** In other words, the objection by the 3rd respondent is clearly an invitation to the court to determine the substantive appeal at an interlocutory stage, which this court will surely not do.

The appellants/applicants in my view, have placed before this court all relevant materials necessary for the grant of this application. The application is seeking to render as competent ground 4 of the Notice of Appeal which appears to be a ground of mixed law and facts. The justice of the application would be achieved if the discretion of this court is exercise in favour of the application thereof in the absence of any reason put before this court that the granting of same will either prejudice the respondents or overreach them.

The appellants/applications already have in place a valid and subsisting appeal which was properly and timeously filed at the Registry of the lower court. In the result, I hereby grant the application as per the orders prayed:

1. Leave is granted the appellants/applicants to appeal against the decision of the Court of Appeal, Abuja Division, delivered on the 5th day of August 2016 in Appeal No. CA/A/390/3016, **Dr. Alex Otti & Anor** vs. Dr. Sampson Uchechukwu Ogah & 4 Ors.; on grounds of mixed law and facts as set out in the Notice of Appeal already filed at the Court of Appeal, Abuja Registry, on the 17th day of August 2016.
2. A further order is also made and deeming as properly filed and served the Notice of Appeal filed at the court of Appeal, Abuja Registry, on the 17th day of August, 2016 the correct filing fees having been paid.
3. There shall be no order as to costs:

Clara Bata Ogunbiyi
Justice, Supreme Court

I.T. MUHAMMAD, (JSC): My learned brother, Ogunbiyi, JSC, graciously, permitted me to read in draft form, the Ruling just delivered. I am in complete agreement with my learned brother in his reasoning and conclusion. 1, too, grant the reliefs prayed by the applicants in their motion on Notice. I abide by consequential orders made in the leading Ruling including one on costs.

Ibrahim Tanko Muhammad,
Justice, Supreme Court

OLU ARIWOOLA, (JSC): I have been obliged before now with a copy of the lead ruling of my learned brother, Clara Ogunbiyi, JSC just delivered. I am in complete agreement with the reasoning and conclusion that this application has merit and should be granted. Application is therefore granted by me.

I abide by the consequential orders in the said lead ruling including the order on costs.

Olu Ariwoola
Justice, Supreme Court

BAYANG AKAAHS (JSC): My learned brother, Clara Bata Ogunbiyi JSC made available to me in advance the Ruling which has just been delivered. I am in total agreement that the application has merit and should be granted.

That 1st and 3rd respondents as members of the Peoples Democratic Party (PDP) participated in the primary election for the governorship of Abia State on 18th December, 2014 and Dr. Okezie Victor (3rd respondent) was the person nominated as the gubernatorial candidate for Abia State while Dr. Sampson Uche Chukwu Ogah (1st respondent) came second in the exercise. Dissatisfied with the outcome of the nomination exercise, the 1st respondent commenced an action by Originating Summons in the Federal High Court, Umuahia in suit No. FHC/UM/CS/94/2015 which was later transferred to Abuja and became Suit No. FHC/ABJ/CS/71/2016. In the Amended Originating Summons, the 1st respondent sought for several reliefs against the 3rd respondent, without joining the 3rd respondent as a party.

The reliefs that affected the respondent are:

1. A declaration that Dr. Okezie Ikpeazu the 2nd defendant herein was not eligible nor qualified to be nominated or to participate or take part in the gubernatorial primary election for Abia State conducted by People's Democratic Party and her officers on 8th December, 2014 which the plaintiff, Dr. Okezie Ikpeazu the 2nd defendant and others participated as aspirants.
2. A declaration that Dr. Okezie Ikpeazu not being qualified to be nominated or to participate or take part in the People's Democratic Party Gubernatorial primary election on 8th December, 2014 is not the aspirant scored in law and in fact the highest number of votes cast in the People's Democratic Party primary election Pursuant to Section 87 (4)(1) and (2) of the Electoral Act 2010 as amended and part IV, article 14 (a) of the People's Democratic Party Electoral Guideline 2014.
3. A declaration that the votes allegedly scored by Dr. Okezie Ikpeazu in the People's Democratic Party's primary election for Abia State on 8th December, 2014 are wasted votes, null and void and none of the defendants is entitled to act on the scores credited to Dr. Okezie Ikpeazu (the 2nd defendant) based on the said People's Democratic party's primary election which Dr. Okezie Ikpeazu the 2nd defendant abinitio is not qualified to be nominated or participate in the said primary election."

On 27/6/2016, the trial court granted the reliefs claimed by

the 1st respondent and proceeded to order INEC to issue forthwith a Certificate of return to the 1st respondent as the governor elect and restore all entitlements to him as elected governor of Abia State. My Lord, Ogunbiyi (JSC) has set out the steps which the applicants took to appeal against the judgment as parties interested but the application was dismissed on 5/8/2016. This prompted the appeal filed on 17/8/2016 and the present application filed on 15/9/2016 which according to the applicants contain grounds of mixed law and facts. Without granting this application, there will be no competent appeal as contained in the Notice of Appeal filed on 17/8/2016 since the applicants can only appeal with leave of the lower court or this court as interested parties and on grounds of mixed law and facts. See: section 233(3) Constitution of the Federal Republic of Nigeria 1999 (as amended).

The applicants have disclosed their interest in the appeal and justice demands that they should be given the opportunity to ventilate their grievances against the judgment where orders were made directly affecting their interest without their being afforded a hearing.

I share the views expressed by my Lord Ogunbiyi JSC in the lead ruling which I adopt as mine. I endorse the orders contained in the lead ruling.

K.B. AKAAHS
Justice, Supreme Court

KEKERE-EKUN, (JSC): I have had the benefit of reading in draft the ruling of my learned brother, CLARA BATA OGUNBIYI (JSC) just delivered. I agree with the reasoning and conclusion that the application has merit and should be allowed.

By their motion on notice filed on 15/9/2016 brought pursuant to Section 233(3) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended), Order 3 Rule 15 and Order 6 Rule 2 (1) of the Supreme Court Rules 1985 (as amended) and under the inherent jurisdiction of the court, the appellants/applicants seek the following reliefs:

1. "1 AN ORDER of this Honourable Court granting leave to the appellants/applicants to appeal against the decision of the Court of Appeal Abuja Division delivered on the 5th day of August 2016 in **Appeal No: CA/A/390/2016: Dr/ Alex Otti & Anor vs. Dr. Sampson Uchechukwu Ogah & 4 Ors.**, on grounds of mixed law and facts as set out in the Notice of Appeal already filed at the Court of Appeal, Abuja Registry on the 17th day of August 2016.

3. AN ORDER of this Honourable Court deeming as properly filed and served the Notice of Appeal filed at the Court of Appeal Abuja Registry on the 17th day of August, 2016 the correct filling fee having been paid.

4. AND FOR SUCH FURTHER ORDER (S) as this Honourable Court may deem fit to make in the circumstance of this case."

The grounds for the reliefs, in a nutshell, are that the applicants were dissatisfied with a judgment delivered by the Federal High Court, Abuja on 27th June 2016 in Suit No. FHC/ABJ/CS/71/2016, to which they were not parties. They sought leave of the Court of Appeal, Abuja Division (the

lower court) to appeal against the judgment, which in their opinion, affected their interest, as interested parties. Their applications was refused on 5th August, 2016. Being dissatisfied with the refusal of their application, they filed a Notice of Appeal to this court on 17/8/2016 within the time prescribed by the Rules of this court to do so. However, the applicants contend that some of the grounds of appeal are not exclusively of law alone but of mixed law and facts. They have therefore brought this application to obtain the leave of this court to argue those grounds of appeal that are not exclusively on law alone, out of an abundance of caution.

The application, not surprisingly, has been strenuously apposed by all the respondents except the 4th respondent (INEC). Some of the reason advance against the grant of the application are that all the grounds of appeal are of mixed law and fact and that the application for leave to argue them ought to have been filed first at the lower court and that no special circumstance has been shown to warrant it being filed directly before this court; that the judgment of the Federal High Court against which they seek leave to appeal as interested persons no longer subsists, having been set aside by the court below based on the appeals filed against it by the 2nd and 3rd respondents; that if the applicants are granted the leave they seek, there is no longer a judgment to appeal against; that even if they are granted leave to appeal and the appeal eventually succeeds, it would amount to an academic exercise, as it would be impossible to invoke the provisions of Section 22 of the Supreme Court Act, as sought by the applicants, to enable them attack a judgment which no longer subsists.

I am in agreement with my learned brother, Ogunbiyi, JSC that in opposing this application, learned counsel for the 1st, 2nd, 3rd and 5th respondents have delved into the merits or otherwise of the substantive appeal and it chances of success. What is in issue in this application is whether or not the applicants should be granted leave to argue the ground or grounds of appeal, which are of mixed law and fact. This is not an application for leave to appeal or for extension of time to seek leave to appeal. The Notice of Appeal was filed within the time prescribed by the rules of this court. All that the applicants are seeking to do by this application is to fulfill the requirement of the law in respect of grounds of appeal which are not exclusively of law alone.

Section 233(2) of the 1999 Constitution provides for the circumstances in which appeals to this Court from decisions of the Court of Appeal are as of right. Section 233 (2) (a) provides for appeals as of right where the ground of appeal in any civil or criminal proceeding involves questions of law alone. Thus where questions of facts or of mixed law and facts are in issue, leave must be sought and obtained. **See: Abubakar vs. Dankwambo (2015) 18 NWLR (Pt.1491) 213 @ 234-235; Okwuagbala vs. Ikwueme (2010) 19 NWLR (Pt. 1226) 54 Opuiyo vs. Omoniwari (2007) 16 NWLR (Pt. 1060) 415.**

A ground of appeal filed without leave where leave is required **is** incompetent and liable to be struck out. **See: C.B.N & Anor. vs Okojie (2002) 8 NWLR (Pt.768) 48; Kano Textile Printers Ltd. vs Gloede and Hoff (Nig.) Ltd. (2005) 13 NWLR (Pt. 943) 680**. As rightly submitted by learned senior counsel for the applicants, it has been held severally by this court that the line between a ground of

appeal on issues of law alone and a ground of appeal on issues of mixed law and fact is very thin. Where counsel are not certain into which category their ground or grounds of appeal fall, they are advised to seek leave out of abundance of caution. **See: F.B.N. Plc vs. T.S.A. Ind. Ltd. (2010) 15 NWLR (Pt.1216) 247 @ 292 G.**

The instant application is made in respect of Ground 4 only, as contended by learned senior counsel for the applicants. The only issue, which requires the exercise of the court's discretion at this stage, is whether to grant the leave sought.

It is my considered view that it is in the interest of justice to grant this application which seeks to regularize the Notice of Appeal already before this court. I am satisfied that the respondents will not be prejudiced by the grant of same. Any issues regarding the merit of the appeal itself should be addressed at the hearing of the appeal.

For this and the fuller reasoning contained in the lead ruling, the motion on notice filed on 15/9/2016 is granted as prayed.

I make no order as to costs

Kudirat Motonmori Olatokunbo Kekere-Ekun
Justice, Supreme Court JSC

CENTUS NWEZE, (JSC): MY LORD, OGUNBIYI, (JSC), Obliged me with the draft of the leading Ruling just delivered now. I am enamored of His Lordship's adroit resolution of the jockeying submissions on the application under consideration.

Indeed, it is not surprising that the said application provoked divergent responses from very senior counsel for

the parties (except counsel for the fourth respondent). Let me explain.

The difficulty in typologising grounds of appeal into grounds of law simpliciter and grounds of mixed law and facts has long been acknowledged in Anglo-Nigerian Civil jurisprudence. In England, this difficulty was acknowledged as early as 1919, if not earlier, Clarke v Edinburgh etc Tramways (1919) SC (H.L) 35; also Currie vs. Inland Revenue Commission (1921) 2 KB 536; Cooper vs. Stubbs (1925) 2 KB 277; Benmax vs. Austin Motors Co Ltd (1945) All ER 326; Edwaards (Inspector of Taxes) vs. Bairstows and Anor (1955) 3 ALL ER 48. This state of affairs prompted the very scintillating expose on the subject by C.T. Emery and Professor B. Smythe in their article titled, "Error of Law in Administrative Law," In *LAW QUARTERLY Review* Vol. 100 October 1984.

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

Other examples include: UBA Ltd vs. Stahlbau GAMBH & Co (1989) 3 NWLR (Pt. 110) 374, 391-392; Obatoyinbo vs. Oshatoba (1996) 5 NWLR (Pt.450) 531, 548; MDPDT vs. Okonkwo (2001) 3 KLR (Pt. 117) 739 etc.

Happily, however, this difficulty, notwithstanding, this court has, ingeniously, fashioned out formulae for

navigating through the nuances of the characterization of grounds of appeal. The first formula aims at facilitating the ascertainment of what constitutes a ground of appeal. It comes to this: a court has a duty to do a thorough examination of such ground which the appellant filed.

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

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

Simply put, these formulae simply mean that it is the essence of the ground; the main grouse: that is, the reality of the complaint embedded in that name, that determines what any particular ground involves, Abidoye vs. Alawode (2001) 3 KLR)Pt. 118) (917, 919; NEPA vs. Eze (2001) 3 NWLR (Pt. 709) 606; Ezeobi vs. Abang (2000) 9 NWLR (Pt. 672) 230; Ojukwu vs. Kaine (2000) 15 NWLR (Pt. 691) 516.

In effect, it is neither its cognomen nor its designation as "Error of Law" that determines the essence of a ground of appeal. Abidoye vs. Alawode (supra) 927; UBA Ltd vs. Stahlbau Gmbh and Co (1989) (supra) 374, 377; Ojemen vs. Momodu (1983) 3 SC 173.

All said and done, where counsel is un-surefooted, or finds himself in a dilemma in this characterization, he could apply for leave to do so for abundant *cautela non nocet*

A abundant or sufficient caution does no harm, FBN PLC vs T.S. A. Ind Ltd (2010) 15 NWLR (Pt. 1216) 247, 292. Such a precautionary approach would obviate all finicky objections on the incompetence of such grounds, Kano
B Textile Printers Ltd vs. Gloede and Hoff (Nig) Ltd (2005) 13 NWLR (Pt.943) 680; CBN and Anor vs. Okojie (2002) 8 NWLR (P.t. 768) 48.

It is for these, and the more detailed, reasons in His
C Lordship's lead Ruling that I, too, shall order as prayed. Application is, therefore, granted. I abide by the consequential orders in the Lead Ruling.

Chima Centus Nweze
D ***Justice Supreme Court***

AMIRU SANUSI, (JSC): The Ruling just delivered by my learned brother Clara Ogunbiyi (JSC), was made available
E to me before now. Having read it, I find myself at one with her reasons and the conclusion arrived at therein. I also see merit in the application and hereby grant it as prayed. I abide by all the orders granted in the lead ruling. I decline to make
F any order as to cost.

Amiru Sanusi
Justice, Supreme Court

G

H

FOLARIN ROTIMI ABIOLA WILLIAMS TOKUNBO ENIOLA WILLIAMS, SAN AND ADOLD/STAMM INTERNATIONAL (NIG) LTD CHIEF ROTIMI WILLIAMS CHAMBERS

SC. 404/2013

IN THE SUPREME COURT OF NIGERIA
HOLDEN AT ABUJA
FRIDAY, 13TH JANUARY, 2017

BEFORE THEIR LORDSHIPS

WALTER S. NKANU ONNOGHEN	**ACTING CHIEF JUSTICE OF NIGERIA**
MARY UKAEGO PETER-ODILI	**JUSTICE, SUPREME COURT**
OLUKAYODE ARIWOOLA	**JUSTICE, SUPREME COURT**
KUMAI BAYANG AKAAHS	**JUSTICE, SUPREME COURT**
KUDIRAT M. O. KEKERE-EKUN	**JUSTICE, SUPREME COURT**

APPEAL: Application for fresh evidence on appeal – Where there is a substing decision on the evidence sought to be tendered – Implication.

APPEAL: Application for fresh evidence on appeal – How to determine whether application is an attempt to overreach the respondent – Relevant considerations.

APPEAL: Application for fresh evidence on appeal – Where the validity of evidence sought to be adduced is subject of litigation in another pending action – Implication.

APPEAL: Application for fresh evidence on appeal – Whether the evidence sought to be adduced was in existence when the suit was filed at the trial court – Relevant considerations.

APPEAL: Fresh evidence on appeal – Conditions for the receipt of fresh evidence on appeal – ***Order 2 Rule 12 of Supreme Court Rules*** *– Consideration thereof.*

COURT: Appeal – Fresh evidence on appeal – Duty on court when considering application thereof.

LEGAL PRACTITIONERS: Signing of process – Consideration of – ***Sections 2 and 24 of Legal Practitioners Act Cap L. 11 2004***

LEGAL PRACTITIONERS: Filing of process – Process must contain signature of legal practitioner who filed it – What amounts to sufficient signature.

PRACTICE AND PROCEDURE: Application for fresh or further evidence on appeal – Guiding principles.

PRACTICE AND PROCEDURE: Filing of process – Failure of legal practitioner to sign process – Effect.

PRACTICE AND PROCEDURE: Appeal – Application for fresh evidence – Duty on court thereof.

RULES: Or. 2 Rule 12, Supreme Court Rules 1985 (as amended) – Extent and scope.

RULES: ***Sections 2 and 24 of Legal Practitioners' Act Cap L11, 2004*** *– Extent and scope.*

Issues for Determination

Whether this Honourable Court has the discretionary power to allow Exhibits AB/15 and AB/16 to be admitted as further evidence for the determination of this appeal.

Facts of the Matter

This is a Motion on Notice Pursuant to **Section 36(1) of the Constitution of the Federal Republic of Nigeria, 1999** (as amended), **Sections 22 and 29 (b) of the Supreme Court Act, Cap S15, Laws of the Federation of Nigeria, 2004, Order 2 Rules 12 (1) and (2) of the Supreme Court Rules (as amended in 1999)** and under the Inherent Jurisdiction of the Honourable Court. It is filed on behalf of the 1st respondent/applicant and seeks the following reliefs:

1. AN ORDER of this Honourable Court granting LEAVE to the 1st respondent/applicant to produce and tender documentary evidence as fresh evidence for the fair and just determination of this appeal.

2. AN ORDER of this Honourable Court admitting in evidence the bundle of documents captioned "ADDITIONAL EVIDENCE" as further and/or fresh evidence in this appeal, and also to allow the said further and/or fresh evidence form part of the Record of Appeal for the hearing and determination of this appeal.

3. AN ORDER of this Honourable Court deeming the aforesaid further and/or fresh evidence as evidence

properly before this Honourable Court for the fair and just determination of this appeal.

The grounds for the application as stated on the face of the motion paper can be summarized as follows: That the documentary evidence sought to be introduced was not available to the applicant during the proceedings at the lower courts; that the documents are material and relevant and go to the root of the issue before this court and that their admission would assist this court in arriving at a just and fair resolution of the appeal.

Held: *(Unanimously dismissing the application)*

1. *Where a legal practitioner who prepares a process fails to sign it before filing*
There is no doubt that it has been held in a plethora of decisions of this court and it is now firmly settled that a court process that is not signed by a legal practitioner whose name appears on the roll of legal practitioners and who is entitled to practice as a barrister and solicitor as provided for in Section 2 and 24 (2) (1) of the LPA Cap. L11 LFN 2004 is incompetent and liable to be struck out. (Oketade vs Adewunmi (supra); Okafor vs. Nweke (supra); F.B.N. Plc. vs Maiwada (2013) 5 NWLR (Pt. 1348) 444. In S.L.B. Consortium Ltd. vs N.N.P.C. (2011) 9 NWLR (Pt. 1252) 317 @ 331 B 332A). *(P 298 paras A-C)*

2. *The requirement of signature of legal practitioner on a process prepared and filed by him*
This court affirmed its earlier decision in Registered Trustees of Apostolic Church Lagos Area vs. Rahman Akinde (1967) NMLR 263 and held that a process prepared and filed in court by a legal practitioner must be signed by the legal practitioner, and it is sufficient signature if the legal practitioner simply writes his own name over and above the name of his/or firm in which he carries out his practice.

Per Kekere-Ekun (JSC)
"In the instant case, the name LADI WILLIAMS, though handwritten, is very clear and legible. The respondents are not contending that Chief Ladi Rotimi Williams, SAN is not the same person as LAD WILLIAMS who signed the process or that the person who signed the process is not a legal practitioner whose name is on the roll of legal practitioners entitled to practice law in Nigeria. I am satisfied that there is no doubt as to who signed the process and that he is a legal practitioner whose name is on the roll. The omission to place a tick beside the name Chief Ladi Rotimi Williams, SAN has not misled the respondents nor this court as to who signed the process and such omission cannot invalidate it. I therefore hold that the applicant's written address filed on 16/11/2015 is competent". *(Pp 298-299 paras C-E, G-B.)*

3. The duty of Court to apply the relevant principles when considering application to adduce fresh or further evidence on appeal

It is evident that an application brought pursuant to Order 2 Rule 12 of the Rules of this Court is not one that is granted as a matter of course. It calls for the exercise of the court's discretion, which must be exercised judicially and judiciously. As rightly submitted by learned counsel for both parties, there are settled principles, which guide the court in determining whether to grant leave to adduce fresh or further evidence.

(a) The evidence sought to be adduced must be such as could not have been, with reasonable diligence, obtained for use at the trial, or are matters which have occurred after judgment in the trial court.

(b) In respect of other evidence other than in (a) above, as for instance, in respect of an appeal from a judgment after a hearing on the merits, the court will admit such fresh evidence only on special grounds.

(c) The evidence should be such as if admitted, it would have an important, not necessarily crucial effect on the whole case; and

(d) The evidence must be such as apparently credible in the sense that it is capable of being believed and it need not be incontrovertible.

(Asabaro vs. Aruwaji (1974) 4 SC (Reprint) 87 @ 90-91; Akanbi vs. Alao (1989) 3 NWLR (Pt. 108) 118 @ 137 138 H-B; Esangbedo vs. The State (1989) 4 NWLR (Pt. 113) 57 @ 67 A-C. *)*

In the instant case, the documents were clearly not in existence at the time the suit was filed at the trial court. It would therefore not have been possible for the applicant to plead them at that stage.
(Pp 304-305; 308 paras D-C; H-A)

4. The discretionary power of court to grant an application to adduce fresh evidence

The power to admit new, fresh or additional evidence must always be exercised sparingly and with caution. The court must consider whether there are special circumstances to warrant the grant of the application and whether it would be in furtherance of the justice of the case. (Uzodinma vs. Izunaso (No. 2) (2011) 17 NWLR (Pt. 1275) 30 @ 55 B-C). *(P 309 paras B-C)*

5. It is not proper to grant leave to adduce further evidence which is subject of courts decisions and pending courts' cases

It goes without saying that the proposed introduction of the fresh/additional evidence vide Exhibits AB/15 and AB/16 is not as straightforward as it might seem at first glance. What is clear from the averments in the affidavits before the court and the exhibits attached thereto is that there are several matters pending in different courts involving the respondents and their two brothers regarding the distribution of

the Estate of their late father in which the documents play a pivotal role. Two lower courts have made pronouncements on the documents, which are the subject of pending appeals. They cannot serve their intended purpose in this appeal until there is a final pronouncement as to their validity and/or authenticity. It is obvious from Exhibit KA2, that the will sought to be relied upon has not been admitted to probate, as one of the reliefs in the suit filed by Chief Ladi Williams, SAN and Chief Kayode Williams, as claimants, at the trial court, that led to the appeal, was for an order vacating the caveat entered on 22/12/2009 by the present appellants (as defendants) and for an order for the grant of Letters of Administration (with will annexed) of the deceased's estate in their favour, being the only beneficiaries under the will. The deed of revocation is also in dispute. The applicant is also not a party to any of these documents.

Taking all these factors into consideration, it is my view that this application is an attempt to overreach the respondents by bringing in through the back door, documents that are presently in dispute in other proceedings.

Per Kekere-Ekun (JSC)

> **"I am not satisfied that the introduction of these documents is crucial to the proper determination of this appeal or that their admission would be in furtherance of the justice of this matter. Rather I am of the**

> **view that the respondents would be prejudiced by the grant of this application. This court being an appellate court, they would be denied the opportunity of cross-examining on them unless this court assumes the role of the trial court which it would not ordinarily do. See: Adeyefa vs. Bamgboye (2013) 10 NWLR (Pt. 1363) 532 @ 544 545 F-E per Fabiyi, JSC.**
>
> **On the whole, I find no merit in this application. It is hereby refused and accordingly dismissed".**
>
> *(Pp 311-312 paras A-C)*

Per Peter Odili (JSC)

> **"Taking the affidavit evidence from both sides in view clearly the conditions on which fresh evidence can be brought in at this level of the adjudication are far from available.**

Firstly the documents were not pleaded and in another related suit the Court of Appeal declared the same documents inadmissible and so letting the documents in this matter would clearly create some confusion or complication, a situation such as was decried by this court in Adeyefa's case (supra) per Fabiyi JSC as follows:

> **"This significantly cast aspersion on the posture of the appellants/applicants. I do**

not want to say it that they embarked upon falsehood; all in a bid to get in those unpleaded documents through the back door; as it were. I was not taken in by the ploy or gimmick embarked upon by the appellants/applicants. No court of record should tolerate such a rather mundane practice."

That there is the danger that granting this application would seriously and gravely overreach the appellants as the documents sought to be tendered would produce, the safe harbor would be to refuse this application in the interest of balancing the scale of justice as it should be without jeopardizing the interest of one side to the advantage of the other". *(Pp 319-320 paras G-F)*

6. *The import of Order 2 Rule 12(1) of the Supreme Court Rules 1985 (as amended)*

Per Peter- Odili (JSC):

"What Order 2 Rule 12 (1), (2) and (3) of the Rules of Supreme Court translate to have been explained in the case of: Adeyefa & Ors vs. Bamgboye (2014) LPELR- 22884 (SC) on the issue of admission of fresh evidence held thus:

"It is basic that admission of further evidence in this court is not granted as a matter of course. This court in the case of Esangbedo vs. The State (1989) 4 NWLR

(Pt. 113) 57 at page 67, per Nnemeka-Agu, JSC stated the guiding settled principles as follows:

1. **It must be shown that the evidence could not have been obtained and, with reasonable diligence, used at the court of trial.**
2. **The court must be satisfied that the evidence is such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive.**
3. **The evidence must be apparently credible, though it need not be incontrovertible".**

(Uzodinma vs. Izunaso (2011) 17 NWLR (Pt. 1275) 30. *(P 319 paras A-G)*

Nigerian Cases cited in the Ruling

Registered Trustees of Apostolic Church Lagos Area vs Rahman Akinde (1967) NMLR 263;
Adeyefa & Ors vs. Bamgboye (2014) LPELR- 22884;
Akanbi vs. Alao (1989) 3 NWLR (Pt. 108) 118;
Anike vs. SPDC Ltd (2011) 7 NWLR (Pt. 1246) 227;
Asabaro vs. Aruwaji (1974) 4 SC (Reprint) 87;
Bala vs. Dikko (2013) 4 NWLR (Pt. 1343) 52;
Esangbedo vs. The State (1989) 4 NWLR (Pt. 113) 57;
F.B.N. Plc. vs. Maiwada (2013) 5 NWLR (Pt. 1348) 444;
Mobil Oil (Nig.) Ltd. vs. F.B.I.R. (1977) 3 SC 1;
Ngige vs. Obi (2006) 14 NWLR (Pt. 999) 1;

Nwaogu vs. Atuma (2013) ALL FWLR (Pt. 675) 260;
Obasi vs. Onwuka (1987) 3 NWLR (Pt. 61) 364;
Okafor vs. Nweke (2007) 10 NWLR (Pt. 1043) 521;
Oketade vs. Adewunmi (2010) 8 NWLR (Pt. 1195) 63;
P.M.B. Ltd. vs. N.D.I.C. (2011) 12 NWLR (Pt. 1261) 253;
S.L.B. Consortium Ltd. vs. N.N.P.C. (2011) 9 NWLR (Pt. 1252) 317;
Union Registrars Ltd. vs. United Investments Limited Suit No. FHC/L/CS/773/10;
Uzodinma vs. Izunaso (2011) 17 NWLR (Pt. 1275) 30.

Nigerian Statutes Cited
Supreme Court Rules, 1985 (as amended in 1999) – Or. 2 Rules 12(1), (2) and (3)
The Constitution of the Federal Republic of Nigeria, 1999 – S. 36(1).
The Legal Practitioners Act (LPA) Cap. 207 Laws of the Federation of Nigeria, 1990; and
The LPA Cap. L11 LFN 2004 – Ss. 2 and 24(1) (2).
The Supreme Court Act, Cap S15, Laws of the Federation of Nigeria, 2004 – Ss 22 and 29(b).

Representations
Chima Okereke (Esq.) *for the Appellants/Respondents with* **Frances Monago (Miss**).

Christ Eneje (Esq.) *for 1st Respondent/Appellant with* **Daniella Ikokwu (Miss)**.

Mohammed Sallau (Esq.) *for 2nd Respondent.*

KEKERE-EKUN, (JSC) (Delivering the Lead Judgment):
This is a Motion on Notice dated 7/11/2013 but filed on 8/11/2013 pursuant to **Section 36(1) of the Constitution of the Federal Republic of Nigeria, 1999** (as amended), **Section 22 and 29 (b) of the Supreme Court Act, Cap S15, Laws of the Federation of Nigeria, 2004, Order 2 Rule 12 (1) and (2) of the Supreme Court Rules (as amended in 1999)** and under the Inherent Jurisdiction of this Honourable Court. It is filed on behalf of the 1st respondent/applicant and seeks the following reliefs:

1. AN ORDER of this Honourable Court granting LEAVE to the 1st respondent/applicant to produce and tender documentary evidence as fresh evidence for the fair and just determination of this appeal.

2. AN ORDER of this Honourable Court admitting in evidence the bundle of documents captioned "**ADDITIONAL EVIDENCE**" as further and/or fresh evidence in this appeal, and also to allow the said further and/or fresh evidence form part of the Record of Appeal for the hearing and determination of this appeal.

3. AN ORDER of this Honourable Court deeming the aforesaid further and/or fresh evidence as evidence properly before this Honourable Court for the fair and just determination of this appeal.

The grounds for the application as stated on the face of the motion paper can be summarized as follows: That the

documentary evidence sought to be introduced was not available to the applicant during the proceedings at the lower courts; that the documents are material and relevant and go to the root of the issue before this court and that their admission would assist this court in arriving at a just and fair resolution of the appeal.

The application is supported by an affidavit of 6 paragraphs deposed to by one AZEEZ BIODUN, a litigation officer in Chief Ladi William's Chambers, counsel to the 1st respondent. Attached to the affidavit are two exhibits marked AB/15 and AB/16 respectively. Exhibit AB/15 is a certified true copy of a document titled Notice to Rescind Family Agreement dated and signed on 13th July, 2009, while Exhibit AB//16 is a certified true copy of an affidavit deposed to on 22nd November 2011 by one Mr. Agboola Isaiah Olusegun, Head, Probate Division, High Court of Lagos State forwarding the purported will of late Chief Rotimi Williams, SAN, CFR to the Probate Division of the High Court. Exhibits AB/15 and AB/16 are the documents sought to be introduced as fresh evidence in this appeal.

Also filed in support of the application are the following processes:

(a) 1st respondent/applicant's written address in support of the motion filed on 13/11/2015.

(b) Further affidavit of 25 paragraphs deposed to on 24/4/2015 by Chief Oladipupo Akanni Olumuyiwa Williams, SAN, one of the directors of the 1st respondent/applicant with exhibits attached thereto and marked A/1 to A/7a respectively.

(c) Two additional affidavits filed on 5/10/2015 also

described as "further affidavits" deposed to by AZEEZ ABIODUN:

(i) The first, henceforth referred to as the 2nd further affidavit, consists of 6 paragraphs. Attached thereto are Exhibits AB/1 AB/14, which were inadvertently omitted from the affidavit in support of the application.

(ii) The second, henceforth referred to as the 3rd further affidavit, contains 5 paragraphs.

The appellants/respondents, in opposition to the application relied on their counter affidavit filed on 6/2/2015 consisting of 7 paragraphs, deposed to by OLUWAFEMI ADEMOLA, a legal practitioner in the firm of KOLA AWODEIN & CO., solicitors to the appellants/respondents. Attached to the counter affidavit are exhibits marked KA1, KA2 and KA3 respectively. Also filed in opposition is a 9-paragraph further counter affidavit deposed to on 30/4/2015. Additional exhibits are annexed thereto and marked Exhibits KA4 and KA5 respectively.

The appellants/respondents also filed a written address in opposition to the 1st respondent/applicant's address in support of the application. It was deemed filed by an order of this court at the hearing of the application on 18/10/2016.

On the said 18/10/2016, CHRIS ENEJE ESQ. of counsel leading DANIELLA IKOKWU (Miss) for the 1st respondent/applicant adopted all the processes filed on behalf of the applicant and urged the court to grant the application.

CHIMA OKEREKE ESQ. leading FRANCES MONAGO (Miss) for the appellants/respondents (henceforth referred to as the respondents) adopted and relied on all the processes filed in opposition and urged the court to dismiss the application with substantial costs.

As no processes were filed on behalf of the 2nd respondent, MOHAMMED SALLAU ESQ. of counsel had nothing to urge on the court on its behalf. Reference to the respondents in this application therefore shall be in relation to the appellants/respondents.

The genesis of this application is a suit commenced before the High Court of Lagos State by way of writ of summons dated 2/02/2007 by the 1st respondent, ADOLD/STAMM INTERNATIONAL Ltd., as plaintiff, against FOLARIN ROTIMI ABIOLA WILLIAMS, TOKUNBO ENIOLA WILLIAMS and CHIEF ROTIMI WILLIAMS CHAMBERS, the appellants and 2nd respondent respectively, as defendants, wherein the 1st respondent sought to recover from the appellants and 2nd respondent a judgment sum awarded in its favour, being client's money, had and received on its behalf but which the appellants and 2nd respondent had refused/failed and/or neglected to hand over to it despite repeated demands. The 1st respondent (hereinafter referred to as the applicant) sought the following reliefs vide paragraph 24 of its statement of claim at page 4 of the record:

"(i) A declaration that the defendants owe a fiduciary duty to the claimant which duty they have breached jointly and severally;

(ii) A declaration that the fund is held in *cestui qui* trust

for the benefit of the claimant and since the defendants have failed to refund the money to the claimant for two years, they are liable for damages for breach of trust;

(iii) An order that the defendants should jointly and severally render a full and detailed account of the funds held by them in trust.

(iv) An order of this Honourable Court compelling the defendants to pay over the outstanding balance of the said judgment sum which is N21,818,198.26 (twenty-one million, eight hundred and eighteen Naira (sic), one hundred and ninety-eight Naira, twenty-six kobo) to the claimant in accordance with the order of the Supreme Court.

(v) An order that interest rate of 11% per annum be paid on the said outstanding balance from 3rd of February, 2005, till judgment and thereafter 7½% until the judgment debt is fully liquidated.

(vi) Damages of N10 million for breach of fiduciary relationship or breach of trust.

(vii) An order that the defendants shall pay the cost of this action."

Upon receipt of the writ of summons, the respondents filed an application before the trial court seeking a stay of proceedings and an order referring the dispute to arbitration as stipulated in an agreement executed by all the four sons of the late Chief F.R.A. Williams, SAN i.e. the respondents and their two brothers, Chief Oladipupo Akanni Olumuyiwa Williams, SAN (henceforth referred to as Chief Ladi Williams, SAN) and Mr. Kayode Adekunle Olusegun

Williams (henceforth referred to as Mr. Kayode Williams).

The trial court by its ruling delivered on 26/7/2007 dismissed the application on the ground that the applicant herein was not a party to the agreement nor was it a beneficiary thereof and that in the circumstances, the said agreement could not be the basis of an order for stay of proceedings pending a reference to arbitration. The respondents were dissatisfied with the ruling and appealed to the Court of Appeal, Lagos Division, which court, on 1st March 2013, dismissed the appeal and affirmed the ruling of the trial court. The respondents are still dissatisfied and have further appealed to this court vide the present appeal No. SC.404/2013.

In order to support its opposition to the appeal, the applicant seeks to rely on two documents as fresh evidence. It is contended by the applicant that the agreement containing the arbitration clause (Exhibit AB14) was rescinded by a "Rescission Agreement" dated 13th July 2009 (Exhibit AB15) signed by Chief Ladi Williams, SAN and Mr. Kayode Williams on grounds of mistaken belief in the intestacy of their late father.

It is averred as follows in paragraphs 4 (v) to (xiii) and 5 of the affidavit in support of the application:

"4(v) That whilst the said dismissed appeal was pending at the court below, the 1st respondent/applicant became in possession of additional evidence that are relevant and germane to the fair and just determination of this appeal.

Hence, this application.

(vi) That after the execution of Exhibit AB//14 the Probate Division of the High Court of Lagos State discovered the Will of Late Chief F.R.A. Williams, SAN, CFR dated the 22nd day of June, 1954, which said discovering (sic) was communicated to all the four surviving sons of Late Chief F.R.A. Williams, SAN, CFR by the Probate Division of High Court of Lagos State.

(vii) That the said Will dated 22nd day of June 1954 is now sought to be admitted as fresh evidence via this application. Attached herewith and marked as Exhibit AB/16 is the certified true copy of the affidavit of Mr. Agboola Isaiah Olusegun, Head Probate Division, Lagos State High Court, dated 22nd day of November, 2011 forwarding the said Will to Probate Court.

(vii) That the existence and surfacing of the said Exhibit AB/16 would impact seriously on the said Exhibit 14.

(viii) That the aforementioned Exhibits AB/15 and AB/16 being vital and relevant documents be allowed as fresh and or further evidence in this appeal, to enable this Honourable Court arrive at a fair and just determination of the appeal.

(ix) That at the time this suit was initiated, the said Exhibits AB/15 and AB/16 were not available to the 1st respondent/applicant. Hence this application.

(x) That by the provisions of the Act and Rules of this Honourable Court, a party who became in possession of fresh evidence not available at the commencement of the suit, can with the leave of this Honourable Court be allowed to bring in such fresh evidence that are relevant to the just determination of the application.

(xi) That the facts and documents sought to be admitted as fresh evidence are not strange to the respondents, as such the respondents are not being taken by surprise.

(xii) That the 1st respondent/applicant's right to fair hearing guaranteed under the Constitution would be breached if this application is refused, as the 1st respondent/applicant would have been denied right to fair trial and fair hearing by not allowing these vital and relevant evidence.

(5) That it is in the interest of justice that this application be granted."

The respondents, in opposition to the above averments, deposed to the following facts in paragraphs 5 (a) (k), 6 and 7 (wrongly numbered 5 & 6) of their counter affidavit filed on 6/2/2015:

"5(a) The documents exhibited by the 1st respondent/applicant as Exhibit AB/15 and Exhibit AB/16 which the 1st respondent/ applicant seeks leave of this Honourable Court to produce and tender as fresh evidence in this appeal by its application are documents that have been pronounced upon and rejected by both the High Court and the Court of Appeal and/or still pending before the High Court and the Court of Appeal.

(b) The Federal High Court, Coram Abang J. in Suit No. FHC/L/CS/773/10 Union Registrars Ltd. vs United Investments Limited held that the Family Agreement could not be rescinded unilaterally by two of the four signatories.

(c) The Federal High Court further held that the Family Agreement ((purportedly rescinded by Exhibit AB/15 which the 1st respondent/ applicant seeks leave of this Honourable Court to produce and tender as fresh evidence in this appeal)

was to be preferred as a document governing the relationship between the brothers as it was signed before they went to court.

(d) The Federal High Court also held that Exhibit AB/16 (the purported Will) is in dispute between the parties and cannot be held valid until same is proved and admitted to probate. Annexed herewith and marked Exhibit KA1 is a copy of the decision of Honourable Justice Abang in Suit No. FHC/L/CS/773/10 Union Registrars Ltd. vs United Investments Limited.

(e) The Court of Appeal sitting in Lagos coram: Justice R.M. Pemu, S.C. Oseji and T. Abubakar also held that the notice of rescission was invalid. I refer to Appeal No. CA/L/247/2012 F.R.A. Williams vs. Chief Ladi Williams & Ors wherein the Court of Appeal stayed the PROBATE action in the High Court and ordered the parties to go to Arbitration. Now shown to me attached herewith and marked Exhibit KA2 is a copy of the decision of the Court of Appeal.

(f) These decisions have a bearing on this present application of the 1st respondent/applicant to produce and tender as fresh evidence in this appeal.

(g) The Court of Appeal in Appeal No. CA/L/247/2012 F.RA. Williams vs. Chief Ladi Williams & Ors has already held that any issues about the said Exhibit AB/16 are issues that can be resolved through Arbitration in view of the Family Agreement signed by the four brothers.

(h) An appeal against the decision of the Court of Appeal sending the four brothers to arbitration is already pending before this Honourable Court as Appeal No. SC. 807/2014.

(i) Their late father, the Late Chief F.R.A. Williams made a DEED revoking all earlier testamentary dispositions. Now shown to me and marked Exhibit KA3 is a copy of the aforesaid DEED.

(j) The hearing of this suit before the trial court is yet to commence.

(k) The 1st respondent/applicant still has the opportunity to bring the documents before the trial court in this suit, if of any relevance.

6. I believe it will not be in the interest of justice for this Honourable Court to grant the 1st respondent/applicant's application.

7. The 1st and 2nd appellants will be prejudiced if this application is granted.

In the applicant's further affidavit deposed to on 24/4/2015 in response to the averments reproduced above, it is averred that the rescission agreement and the holograph will of the late Chief F.R.A. Williams, SAN, have not been set aside or declared invalid by any court of competent jurisdiction; that the trial court per K.O. Alogba, J. in his ruling of 17/11/2014 held that having regard to the discovery of the will, the Family Agreement, Exhibit AB/15, had become spent and of no further efficacy, noting that it was executed by the four brothers at a time when they were unaware of the fact that their late father died testate; that in the judgment of the Court of Appeal in Appeal No. CA/L/151/2010, which is the subject of the substantive appeal pending before this court, the court held that the 1st respondent is not a party of Exhibit AB/15; that the late Chief Williams did not revoke any testamentary dispositions made by him and that Exhibit KA3 dated 25/5/1998 purported to be such a revocation is unregistered and a photocopy and that the signature thereon is not that of the late Chief Williams.

In their further counter affidavit filed on 30/4/2015, it is averred on behalf of the respondents that the issue before Alogba, J. was whether or not to grant a stay of proceedings and therefore the learned trial judge had no jurisdiction to pronounce on the validity or otherwise of Exhibit AB/15; that the issue of whether a will had been found was a non-issue at that stage of the proceedings and that the arbitration agreement has yet to be challenged and/or nullified in any suit. They also maintained that the signature on Exhibit KA3 is the true signature of the late Chief Williams.

In the written address in support of the application, which was filed on 16/11/2015, a single issue was distilled

for determination as follows:

Whether this Honourable Court has the discretionary power to allow Exhibits AB/15 and AB/16 to be admitted as further evidence for the determination of this appeal.

The respondents on the other hand identified two issues thus:

1. Whether the 1st respondents/applicant's written address filed on 16th November 2015 should not be discountenanced same having not been signed by a legal practitioner known to law.
2. Whether in the circumstances of this matter the 1st respondent's Exhibits AB/15 and AB/16 should be admitted as fresh evidence in this appeal.

I am of the considered view that the sole issue formulated by the applicant is adequate for the disposal of this application. The first issue formulated by the respondents is in the nature of a preliminary objection. I shall consider it first before going into the merits of the application,

It is contended on behalf of the respondents that the written address in support of the application is incompetent for failure to disclose the identity of learned counsel who signed it by marking and/or making a tick beside his name. Reliance was placed on Section 24 (2) (1) of the Legal Practitioners Act (LPA) Cap. 207 Laws of the Federation of Nigeria, 1990, **Bala vs. Dikko (2013) 4 NWLR (Pt. 1343) 52; Oketade vs. Adewunmi (2010) 8 NWLR (Pt. 1195) 63; P.M.B. Ltd. vs. N.D.I.C. (2011) 12 NWLR (Pt. 1261) 253 @ 262 F-G (CA); Okafor vs. Nweke (2007) 10 NWLR (Pt. 1043) 521 @ 532-533 B-C.** Learned counsel urge the court to strike out the written address. There is no

response to this submission on behalf of the applicant.

There is no doubt that it has been held in a plethora of decisions of this court and it is now firmly settled that a court process that is not signed by a legal practitioner whose name appears on the roll of legal practitioners and who is entitled to practice as a barrister and solicitor as provided for in **Section 2 and 24 (2) (1) of the LPA Cap. L11 LFN 2004** is incompetent and liable to be struck out. **See: Oketade vs. Adewunmi (supra); Okafor vs. Nweke (supra); F.B.N. Plc. vs. Maiwada (2013) 5 NWLR (Pt. 1348) 444.** In **S.L.B. Consortium Ltd. vs. N.N.P.C. (2011) 9 NWLR (Pt. 1252) 317 @ 331 B – 332A,** this court affirmed its earlier decision in **Registered Trustees of Apostolic Church Lagos Area vs. Rahman Akinde (1967) NMLR 263** and held that a process prepared and filed in court by a legal practitioner must be signed by the legal practitioner, and it is sufficient signature if the legal practitioner simply writes his own name over and above the name of his/or firm in which he carries out his practice.

On page 14 of the applicant's written address, at the bottom of the page, the handwritten name, LADI WILLIAMS, appears above two names, Chief Ladi Rotimi Williams, SAN and Chris I. Eneje. The grouse of the respondents appears to be that there is no mark beside either of the two names to identify which of them signed the process. In the instant case, the name LADI WILLIAMS, though handwritten, is very clear and legible. The respondents are not contending that Chief Ladi Rotimi Williams, SAN is not the same person as LAD WILLIAMS who signed the process or that the person who signed the process is not a legal practitioner whose name is on the roll

of legal practitioners entitled to practice law in Nigeria. I am satisfied that there is no doubt as to who signed the process and that he is a legal practitioner whose name is on the roll. The omission to place a tick beside the name Chief Ladi Rotimi Williams, SAN has not misled the respondents nor this court as to who signed the process and such omission cannot invalidate it. I therefore hold that the applicant's written address filed on 16/11/2015 is competent.

I shall now proceed to the merit of the application, relying on the provisions of **Order 2 Rule 12 (1), (2) and (3),** and the case of **Nwaogu vs. Atuma (2013) ALL FWLR (Pt. 675) 260 @ 274-275 G-C; 274 A,** learned senior counsel for the applicant referred to the principles that guide the court in the exercise of its discretion in an application of this nature. He also relied on the case of **Uzodinma vs. Izunaso (2011) 17 NWLR (Pt. 1275) 30** and submitted that the main consideration of the court should be the weight of the new evidence and its impact. It is contended that Exhibits AB/15 and AB/16 are vital and relevant documents, which would enable the court arrive at a fair and just determination of the appeal. It was also argued that the documents were not available to the applicant while the matter was before the two lower courts. He referred to the averments in paragraphs 3 (a) and 4 (i) (xiii) of the affidavit in support of the application filed on 8/11/2013 (reproduced earlier in this ruling) as constituting special circumstances to warrant the grant of the application. He argued that the applicant could not, despite diligence, have obtained the evidence for use by the trial court, as the respondents herein, did not file a statement of defence but immediately upon being served with the writ of summons, filed an application

for stay of proceedings seeking a referral of the matter to arbitration pursuant to a clause in a Family Agreement to which it was not a party. Learned senior counsel submitted that if admitted in evidence, the proposed fresh evidence would have an important effect on the appeal, as it would counter the reliance by the respondents on the Family Agreement as their basis for seeking a stay of proceedings. Relying on the cases of: **Asaboro vs. Aruwaju (1974) 4 SC 119, Akanbi vs. Alao (1989) 3 NWLR (Pt. 108) 118 @ 140 A-B** and **Mobil Oil (Nig.) Ltd. vs. F.B.I.R. (1977) 3 SC 1 @ 15,** he submitted further that the applicant need not give evidence at the trial before taking advantage of the rules to adduce new evidence. Reliance was also placed on the concurrent findings of fact by the two lower courts evidenced by Exhibits A/7 (ruling of Alogba, J. delivered on 26/7/2007) attached to the further affidavit of the applicant filed on 24/4/2015 and the ruling of the lower court of 1/3/2013 at pages 245 286 of the record to the effect that the applicant is not a party to the Family Agreement.

Learned senior counsel submitted that the evidence sought to be admitted is credible, material and weighty. He referred to the ruling of the trial court delivered on 17/11/2014 wherein the learned trial judge held that the discovery of the will of the late Chief Williams had knocked the bottom off the arbitration agreement relating to the distribution of the estate, the implication being that with the discovery of the will it would be the document that would govern the distribution of the estate. He urged the court to grant the application having regard to the fact that the proceedings before the High Court have been stalled more than 9 years now on account of the application for stay of

proceedings and that the appellants/respondents and the 2nd respondent have meddled with and dissipated its money in their possession.

In reaction to the above submissions, learned counsel for the respondents submitted that the applicant has not fulfilled any of the conditions precedent to the grant of this application. On the conditions to be satisfied before an application to adduce fresh evidence may be granted, he relied on: **Adeyefa & Ors. vs. Bamgboye (2014) LPELR 22884 (SC); (2013) 2 SCNJ 198.** While conceding that **Order 2 Rule 12 (1) and (2) of the Supreme Court Rules** (as amended) provides for the introduction of fresh evidence on appeal, he submitted that the applicant is undeserving of the exercise of the court's discretion in its favour for the following reasons:

a. The additional evidence sought to be tendered are unnecessary, immaterial and have not placed before the Honourable Court any question or questions in controversy between the parties.
b. The 1st respondent/applicant have (sic) not shown special circumstances why the new evidence sought to be admitted ought to be received.
c. The application is sought to overreach the applicants/respondents and is made in bad faith.

Learned counsel argued that the decision in **Akanbi vs. Alao ((supra)** cited in support of the applicant's case is in fact against it. He submitted that the substance of the decision in that case is that a party that fails to plead the document at the trial court cannot seek leave to introduce such evidence through the back door as further evidence

before this court. In other words, that the relevant facts must be (or must have been) pleaded at the trial court before an application to bring them in as fresh evidence on appeal could be made. It is contended that the documents in issue were in existence during the proceedings at the lower court before the appeal before this court was filed. Learned counsel submitted that attempts had been made at the Federal High Court and at the Court of Appeal to introduce the documents but they did not succeed, as both courts held them to be inadmissible. That in the circumstances, the first condition has not been met. He submitted that the cases of **Uzodinma vs. Izunaso (supra)** and **Obasi vs. Onwuka (supra)** cited and relied upon by learned senior counsel for the applicant are inapplicable in this case, as the documents sought to be introduced as fresh evidence have no weight, having been held to be inadmissible by the two lower courts.

With regard to the submission in paragraph 4.8 of the applicant's written address that the documents were not available to the 1st respondent/applicant, learned counsel argued that the requirement for their admissibility is evidence that they could not have been obtained with reasonable diligence and not whether they were available or not. That the applicant has not shown the court what efforts, if any, it made to obtain the evidence before now. That in any event the documents are not relevant to the fair and just determination of the appeal. It is contended on behalf of the respondents that the grant of this application would seriously overreach them, as they were neither pleaded nor referred to in the applicant's pleadings at the trial court and therefore they were denied the opportunity of scrutinizing them. Learned counsel noted that the authenticity of Exhibit

AB/16 is likely to be contested by the parties to this appeal, as it had earlier been held to be inadmissible by the Court of Appeal in another matter. He submitted that allowing the applicant to use the documents would seriously jeopardize the respondents. He submitted that the documents, as shown in paragraph 4.16 of the applicant's written address, are contentious and it would not be proper for them to be allowed in by this court. He referred to **Adeyefa's case (supra)** wherein it was held that *"the tendering of documents in this court is subject to valid objection. This is because they cannot now be cross-examined upon them unless this court assumes the whole role of the trial court."* He urged the court to dismiss the application.

Order 2 Rule 12 (1), (2) and (3) of the Supreme Court Rules (as amended) provides as follows:

> **12. (1) A party who wishes the court to receive the evidence of witnesses (whether they were or were not called at the trial) or to order the production of any document, exhibit or other thing connected with the proceedings in accordance with the provisions of section 33 of the Act, shall apply for leave on notice of motion prior to the date set down for the hearing of the appeal.**
>
> **(2) The application shall be supported by affidavit of the**

facts on which the party relies for making it and of the nature of the evidence or the document concerned.

(3) It shall not be necessary for the other party to answer the additional evidence intended to be called but if leave is granted the other party shall be entitled to a reasonable opportunity to give his own evidence in reply if he so wishes."

It is evident that an application brought pursuant to **Order 2 Rule 12** of the Rules of this court is not one that is granted as a matter of course. It calls for the exercise of the court's discretion, which must be exercised judicially and judiciously. As rightly submitted by learned counsel for both parties, there are settled principles, which guide the court in determining whether to grant leave to adduce fresh or further evidence.

(a) The evidence sought to be adduced must be such as could not have been, with reasonable diligence, obtained for use at the trial, or are matters which have occurred after judgment in the trial court.

(b) In respect of other evidence other than in (a) above, as for instance, in respect of an appeal from a judgment after a hearing on the merits, the court will admit such fresh evidence only on special grounds.

(c) The evidence should be such as if admitted, it would have an important, not necessarily crucial effect on

the whole case; and

(d) The evidence must be such as apparently credible in the sense that it is capable of being believed and it need not be incontrovertible.

See: **Asabaro vs. Aruwaji (1974) 4 SC (Reprint) 87 @ 90-91; Akanbi vs. Alao (1989) 3 NWLR (Pt. 108) 118 @ 137 138 H-B; Esangbedo vs. The State (1989) 4 NWLR (Pt. 113) 57 @ 67 A-C.**

Before delving into the merits of this application, I deem it necessary at this early stage to reiterate the fact that hearing in the substantive suit is yet to commence at the trial court. The applicant herein is yet to file any pleadings. I have carefully examined the six grounds of appeal filed by the respondents contained in their Notice of Appeal dated 14/3/2014 at pages 287-292 of the record. Of particular relevance to this application are grounds 3, 4 and 6 reproduced below without their particulars:

Ground 3

The learned Justices of the Court of Appeal erred in law in affirming the decision of the trial Judge that Chief Ladi Williams SAN was not the alter ego and directing mind of the 1st respondent and was therefore the actual Claimant/1st respondent.

Ground 4

The learned Justices of the Court of Appeal erred in law when they upheld the finding of the trial court to the effect that "the 1st respondent was not mentioned in the exhibit and

could not be liable for the terms and conditions inherent in exhibit TEW1."

Ground 6

The learned Justices of the Court of Appeal erred in law in refusing to stay proceedings in this matter and referred the parties to arbitration as they have contracted in Exhibit TEW1.

Essentially, in the substantive appeal before this court, the appellant will seek to convince the court, among other things, that Chief Ladi Williams, SAN is the alter ego of the applicant and that the applicant is therefore bound by the Family Agreement, Exhibit AB/14 and that a stay of proceedings ought to have been granted in compliance with a clause in the said Family Agreement to refer disputes to arbitration. The applicant, on the other hand seeks to debunk the appellants' claims by relying on fresh evidence to show not only that the said Family Agreement has been rescinded but also that the foundation of that agreement has collapsed, as it was entered into in the belief that the late Chief F.R.A. Williams, SAN died intestate, whereas a will (Exhibit AB/16) had been discovered by the Probate Section of the Lagos State High Court.

The first issue for the court to consider is whether the evidence now sought to be relied upon could have, with diligence, been obtained for use at the trial court or whether they are matters that occurred after judgment. Exhibit AB/15, the notice of rescission of the Family Agreement is dated 13/7/2009 while Exhibit AB/16, the sworn affidavit of the Probate Registrar regarding the last will of the deceased was deposed to on 22/11/2011. The ruling of the trial court

that gave rise to this appeal was delivered on 26/7/2007. It is therefore evident that they could not have been obtained for use at the trial court when the application for stay of proceedings was filed. However, judgment was delivered by the Court of Appeal on 1st March 2013. The first opportunity to seek to bring the evidence to the court's attention would have been while proceedings were pending at the lower court. In paragraph 4 (v) and (vi) of the affidavit in support of the application, it was averred as follows:

> (v) That whilst the said dismissed appeal was pending at the court below, the 1st respondent/applicant became in possession of additional evidence that are relevant and germane to the fair and just determination of this appeal. Hence, this application.
>
> (vi) That after the execution of Exhibit AB/14 the Probate Division of the High Court of Lagos State discovered the Will of Late Chief F.R.A. Williams, SAN, CFR dated the 22nd day of June, 1954, which said discovering (sic) was communicated to all the four surviving sons of Late Chief F.R.A. Williams, SAN, CFR by the Probate Division of High Court of Lagos State. (Underlining mine)

There is nothing in the above paragraphs, or indeed any of the paragraphs of the affidavit, which explains why the application was not brought before the lower court. With regard to sub-paragraph (vi), it is not in dispute that Chief Ladi Williams, SAN, is not only one of the four sons of the deceased to whom the discovery of the purported last will and testament was said to have been communicated, but he

is also a director of the applicant, a fact personally deposed to by him in the applicant's further affidavit filed on 24/4/2015.

It was argued on behalf of the respondents that since the applicant failed to plead the documents at the trial court, it is not entitled to seek to bring them in as fresh evidence on appeal. While the guiding principles in an application to adduce additional evidence were correctly stated in **Akanbi vs. Alao (supra),** the facts are distinguished from the facts of this case on this particular issue. This is because in that case the suit at the High Court was heard on its merits. The plaintiffs called evidence and closed their case. The defendants filed pleadings but elected not to call any evidence and rested their case on that of the plaintiffs. Judgment was entered against them. At the Court of Appeal they applied to adduce further evidence to rely on judgments pleaded and relied on in their statement of defence, arguing that the failure to call evidence at the trial was against their instructions to their counsel, as they were available and willing to testify. The Court of Appeal allowed the application. On appeal to the Supreme Court, this court allowed the appeal on the ground that the decision not to call evidence was a strategy employed by their counsel, which, had it succeeded would have enhanced their case. The strategy having failed, they were held not be entitled to be granted leave to adduce further evidence to repair the damage. They were bound by their counsel's decision not to call evidence. It was held in that case that the decision whether or not to grant leave to adduce fresh evidence on appeal would depend on the peculiar facts of each case. In the instant case, the documents were clearly

not in existence at the time the suit was filed at the trial court. It would therefore not have been possible for the applicant to plead them at that stage.

This is however not the end of the matter, as the application would not be granted as a matter of course. The power to admit new, fresh or additional evidence must always be exercised sparingly and with caution. The court must consider whether there are special circumstances to warrant the grant of the application and whether it would be in furtherance of the justice of the case. See**: Uzodinma vs. Izunaso (No. 2) (2011) 17 NWLR (Pt. 1275) 30 @ 55 B-C.**

From a careful reading of the various affidavits filed on behalf of the applicant, it seeks to rely on the documents in question in proof of the fact that the family agreement between the four brothers, upon which the prayer for stay of proceedings at the trial court is predicated, has been rescinded and that there is in existence the last will and testament of the late Chief F.R.A. Williams, SAN, which also knocks the bottom off the said family agreement. The attention of this court has been drawn to the fact that the documents the applicant seeks to introduce as fresh evidence are contentious and have been considered and pronounced upon by different courts. I have earlier reproduced some paragraphs of the counter affidavit filed on 6/2/2015 on behalf of the respondents. Paragraphs 5 (b), (c) and (d) are to be the effect that in Suit No.**FHC/L/CS/773/10: Union Registrars Ltd. vs. United Investments Ltd.** before the Federal High Court Coram Abang, J., His Lordship held, regarding Exhibit AB/15 (the notice of rescission of family agreement), that the Family Agreement executed by the four brothers could not be

rescinded unilaterally by two of them; that the Family Agreement was to be preferred in determining the relationship between the parties thereto, having been executed before the matter was instituted in court; that Exhibit AB/16 (the purported will) is in dispute between the parties and can therefore not be held to be valid until it has been proved and admitted to probate. I refer to pages 21-22 of the ruling, which is Exhibited as Exhibit KA1. In paragraph 5 (e) of the said counter affidavit it is averred that the Court of Appeal has also weighed in on an aspect of this matter in Appeal No. **CA/L/247/2012: F.R.A. Williams vs. Chief Ladi Williams, SAN & Ors.** In its ruling delivered on 31/3/2014 (attached as Exhibit KA2), the court held that the notice of rescission of the family agreement is invalid. The court also stayed the probate action pending at the High Court and ordered the parties to go to arbitration. There is a pending appeal before this court in SC. 807/2014 against the said decision. Moreover, it is averred in paragraph 4 (i) of the aforementioned counter affidavit that the late Chief F.R.A. Williams, SAN made a deed revoking all earlier testamentary dispositions made by him. The said deed of revocation is attached as Exhibit KA3.

In response to the said averments it is contended on behalf of the applicant in its further affidavit filed on 24/4/2015 that neither of the documents intended to be relied upon as fresh evidence has been set aside or declared invalid by a court of competent jurisdiction. The applicant maintains its reliance on the ruling of Alogba, J. to the effect that it is not a party to the Family Agreement and that with the discovery of the will, the Family Agreement is no longer of any efficacy. It is contended that the matters before the

Federal High Court and the Court of Appeal have no relevance to the appeal before this court. The authenticity of the alleged deed of revocation is also challenged.

It goes without saying that the proposed introduction of the fresh/additional evidence vide Exhibits AB/15 and AB/16 is not as straightforward as it might seem at first glance. What is clear from the averments in the affidavits before the court and the exhibits attached thereto is that there are several matters pending in different courts involving the respondents and their two brothers regarding the distribution of the Estate of their late father in which the documents play a pivotal role. Two lower courts have made pronouncements on the documents, which are the subject of pending appeals. They cannot serve their intended purpose in this appeal until there is a final pronouncement as to their validity and/or authenticity. It is obvious from Exhibit KA2, that the will sought to be relied upon has not been admitted to probate, as one of the reliefs in the suit filed by Chief Ladi Williams, SAN and Chief Kayode Williams, as claimants, at the trial court, that led to the appeal, was for an order vacating the caveat entered on 22/12/2009 by the present appellants (as defendants) and for an order for the grant of Letters of Administration (with will annexed) of the deceased's estate in their favour, being the only beneficiaries under the will. The deed of revocation is also in dispute. The applicant is also not a party to any of these documents. Taking all these factors into consideration, it is my view that this application is an attempt to overreach the respondents by bringing in through the back door, documents that are presently in dispute in other proceedings. I am not satisfied that the introduction of these

documents is crucial to the proper determination of this appeal or that their admission would be in furtherance of the justice of this matter. Rather I am of the view that the respondents would be prejudiced by the grant of this application. This court being an appellate court, they would be denied the opportunity of cross-examining on them unless this court assumes the role of the trial court which it would not ordinarily do. See**: Adeyefa vs. Bamgboye (2013) 10 NWLR (Pt. 1363) 532 @ 544 – 545 F-E** per Fabiyi, JSC.

On the whole, I find no merit in this application. It is hereby refused and accordingly dismissed. The parties shall bear their respective costs.

Kudirat Motonmori Olatokunbo Kekere-Ekun
Justice, Supreme Court

CHIMA OKEREKE ESQ. for the Appellants/ Respondents with Frances Monago (Miss).

CHRIS ENEJE ESQ. for 1st Respondent/Appellant with Daniella Ikokwu (Miss).

MOHAMMED SALLAU ESQ. for 2nd Respondent.

NKANU ONNOGHEN, (Ag. CJN): I have had the benefit of reading in draft the lead ruling of my learned brother, KEKERE-EKUN (JSC) just delivered.

My learned brother has dealt exhaustively with the issues raised for determination thereby leaving me with nothing more to add except to agree with his reasoning and conclusion that the application is grossly without merit and

should be dismissed.

I therefore order accordingly.

I abide by the consequential orders made in the said lead ruling.

Application dismissed.

Walter Samuel Nkanu Onnoghen
Acting Chief Justice of Nigeria

PETER-ODILI, (JSC): I agree with the ruling just delivered by my learned brother, Kudirat Kekere-Ekun JSC and in support of the reasoning I shall make some comments.

The 1st respondent by motion on notice filed on 8/11/13 prays for the following reliefs.

1. An Order of this Honourable Court granting leave to the 1st respondent/applicant to produce and tender documentary evidence as fresh evidence for the fair and just determination of this appeal.
2. An Order of this Honourable Court admitting in evidence the bundle of documents captioned "ADDITIONAL EVIDENCE" as further and/or fresh evidence in this appeal and also to allow the said further and/or fresh evidence form part of the record of appeal for the hearing and determination of this appeal.
3. An Order of this Honourable Court deeming the aforesaid further and/or fresh evidence as evidence properly before this Honourable Court for the fair and just determination of this appeal.

The motion is supported by a 6 paragraph affidavit deposed to by Azeez Biodun, Litigation Officer in the law firm of Chief Ladi Rotimi Williams. Also a written address was filed by learned counsel for the 1st respondent/applicant on the 16/11/15.

Learned counsel for the appellants/respondents adopted their written address filed 19/1/16 and deemed filed on 18/10/16.

Copious processes as Further Affidavit and Counter Affidavit and Further Counter Affidavit were filed on either side.

BACKGROUND FACTS

The appellants/respondents without filing a defence to this suit at the trial court, filed an application seeking to refer this action to an arbitration pursuant to an arbitral clause contained in Rescission/Family Agreement, it is now being contended that the said Family Agreement has been rescinded hence the application to reply on the purported rescission in this court as fresh and further evidence through this application.

The learned trial judge on the 26/7/2007 dismissed the said application for lacking in merit and on appeal, the Court of Appeal, Lagos Division dismissed the appeal on the 1st day of March, 2013 and of note is that whilst the appeal at the Court of Appeal was pending, the 1st respondent/applicant said it became in possession of the WILL of late Chief F.R.A. Williams SAN, CFR dated the 2nd day of June, 1954 which is now sought to be admitted as fresh evidence in this application as Exhibit AB/16.

The applicant crafted a single issue, viz:

Whether this Honourable Court has the discretionary power to allow Exhibits AB/15 and AB/16 to be admitted as further evidence for the determination of this appeal.

The appellants/respondents learned counsel adopted their written address filed on the 19/1/2016 in which he formulated two issues for determination which are as follows:

1. **Whether the 1st respondent/applicant's written address filed on 16th November, 2015 should not be discountenanced same having not been signed by a legal practitioner known to law.**
2. **Whether in the circumstances of this matter the 1st respondent's Exhibits AB/15 and AB/16 should be admitted as Fresh Evidence in this appeal.**

The sole issue of the applicant is adequate in the determination of this application and I shall use it.

Whether this Honourable Court has the discretionary power to allow Exhibits AB/15 and AB/16 to be admitted as further evidence for the determination of this appeal.

Canvassing the position of applicant, learned counsel stated that the Supreme Court has the discretion to allow the admission of further evidence for the determination of the appeal. He cited **Order 2 Rule 12(1), (2) and 3 of the Supreme Court Rules (as amended in 1999)**; **Nwaogu vs. Atuma (2013) ALL FWLR (Pt. 675)**

260 at 274,275; Uzodinma vs. Izunaso (2011) 17 NWLR (Pt. 1275) 30.

That the applicant need not give evidence at the trial before taking advantage of the Rules to adduce new or further evidence. That the discretion of the court to grant leave to adduce new evidence or fresh evidence is properly exercised if it is for the furtherance of justice. He cited **Asaboro vs. Aruwaju (1974) 4 SC 119; Akanbi vs. Alao (1989) 3 NWLR (Pt. 108) 118 at 140; Mobil Oil (Ng) vs. FBRI (1977) 3 SC 1 at 15; Obasi vs. Onwuka (1987) 3 NWLR (Pt. 61) 364.**

Learned counsel for the applicant referred to paragraphs of the affidavit which are paragraphs 3(a), 4(i), 4(ii), 4(iii), 4(iv), 4(v), 4(vi), 4(vii), 4 (viii), 4(x) 4(xi) and 4(xii), 4 (xiii) and 5 as giving special circumstance upon which the new evidence is sought to be admitted.

It was submitted that the evidence sought to be adduced being the Rescission Agreement dated 13th day of July, 2009 (Exhibit AB/15) and the said Will of Late Chief F.R.A. Williams SAN being Exhibit AB/16 if admitted would have an important effect on the appeal where the appellant/respondents are parading the Family Agreement as their basis for seeking stay of proceedings in the case but a separate entity having regard to its certificate of incorporation being Exhibit A/B attached to the 1st respondent/applicant's Further Affidavit filed on the 24th April 2015. That the evidence sought to be admitted are apparently credible in the sense that they are capable of being believed and are material, weighty and have an important effect on the whole case. He referred to the Appeal Court dicta in his matter.

Learned counsel stated for the applicant, that a party must be consistent in his litigation and that appellant's counsel shifted on appeal from the position he canvassed at the trial court which can be seen in the appellants/respondents Further Counter-Affidavit of 30th April, 2015. He cited **Anike vs. SPDCN Ltd (2011) 7 NWLR (Pt. 1246) 227 at 242; Ngige vs. Obi (2006) 14 NWLR (Pt. 999) 1.**

Responding, learned counsel for the appellants/respondents contending that it is trite that a party to an appeal who intends to adduce fresh evidence on appeal must first satisfy some laid down criteria before such evidence is considered for admission and the 1st respondent/applicant has not fulfilled any of the conditions necessary for the grant of the leave sought. He cited **Adeyefa & Ors vs. Bamgboye (2014) LPELR- 22884**.

That the documents were in existence long before this appeal was brought and even during proceedings at the lower court and the respondents/applicants had made attempts to use the documents in other suits but the attempts were rightly refused by both the Federal High Court and the Court of Appeal as the two courts declared the said documents inadmissible. That the documents are contentious and so cannot be brought into this process. He cited Adeyefa's case (supra).

The point on which this application is hinged in a nutshell is that the evidence Exhibit AB15 and Exhibit AB16 are sought to be admitted because they are credible in the sense that they are capable of being believed. Also that they are material and weighty and would have an important effect on the whole case.

The appellant/respondent disagrees with that stance of the applicant stating that the evidence sought to be brought in as fresh evidence will in no way help this court to do justice in this appeal hence should be discountenanced.

There is no disputing the effect of the provisions of **Order 2 Rule 12(1), (2) of the Supreme Court Rules**, (as amended) to allow fresh evidence on an appeal before it.

The said provisions of the relevant Rule of court are thus:

> "(1) **A party who wishes the court to receive the evidence of witnesses (whether they were or were not called at the trial) or to order the production of any document, exhibit or other thing connected with proceedings in accordance with the provisions of section 33 of the Act, shall apply for leave on notice of motion prior to the date set down for the hearing of the appeal.**
>
> (2) **The application shall be supported by affidavit of the facts on which the party relies for making it and of the nature of the evidence or the document concerned.**
>
> (3) **It shall not be necessary for the other party to answer the additional evidence intended to be called but if leave is granted the other party shall be entitled to a reasonable opportunity to give his own evidence in reply if he so wishes".**

What **Order 2 Rule 12 (1), (2) and (3) of the Rules of Supreme Court translate** to have been explained in the case of: **Adeyefa & Ors vs. Bamgboye (2014) LPELR-22884 (SC)** on the issue of admission of fresh evidence held thus:

> **"It is basic that admission of further evidence in this court is not granted as a matter of course. This court in the case of Esangbedo vs. The State (1989) 4 NWLR (Pt. 113) 57 at page 67, per Nnemeka-Agu, JSC stated the guiding settled principles as follows:**
>
> **4. It must be shown that the evidence could not have been obtained and, with reasonable diligence, used at the court of trial.**
>
> **5. The court must be satisfied that the evidence is such that, if given, it would probably gave an important influence on the result of the case, though it need not be decisive.**
>
> **6. The evidence must be apparently credible, though it need not be incontrovertible".**

See also **Uzodinma vs. Izunaso (2011) 17 NWLR (Pt. 1275) 30.**

Taking the affidavit evidence from both sides in view clearly the conditions on which fresh evidence can be brought in at this level of the adjudication are far from available.

Firstly the documents were not pleaded and in another related suit the Court of Appeal declared the same documents inadmissible and so letting the documents in this matter would clearly create some confusion or complication, a situation such as was decried by this court in Adeyefa's case (supra) per Fabiyi JSC as follows:

> **"This significantly cast aspersion on the posture of the appellants/applicants. I do not want to say it that they embarked upon falsehood; all in a bid to get in those unpleaded documents through the back door; as it were. I was not taken in by the ploy or gimmick embarked upon by the appellants/applicants. No court of record should tolerate such a rather mundane practice."**

That there is the danger that granting this application would seriously and gravely overreach the appellants as the documents sought to be tendered would produce, the safe harbor would be to refuse this application in the interest of balancing the scale of justice as it should be without jeopardizing the interest of one side to the advantage of the other.

From the foregoing and as fuller presented in the lead ruling. I too refuse this application and I dismiss it as lacking in merit.

Mary Ukaego Peter-Odili
Justice, Supreme Court

OLU ARIWOOLA, (JSC): I have had the preview of the draft of the lead Ruling just delivered by my learned brother, **Kekere-Ekun, JSC.** I am in agreement with the reasoning that led to the conclusion that the application lacks merit and should be dismissed. It is hereby refused and accordingly dismissed by me.

I abide by the consequential orders in the said lead ruling including the order on costs.

Olu Ariwoola
Justice, Supreme Court

BAYANG AKAAHS (JSC): The application filed on behalf of the 1st respondent/applicant is seeking the leave of this court to admit the bundle of documents captioned "ADDITIONAL EVIDENCE" as further and/or fresh evidence and also to allow the said further and/or fresh evidence to form part of the Record of Appeal for the just and fair determination of the appeal.

The facts leading to this application are well set out in the Lead Ruling of my Lord, Kekere-Ekun (JSC). The motions has been stoutly opposed and this has led the parties to file several affidavits in support of and against the motions. These affidavits have been copiously reproduced in the lead ruling. It is therefore unnecessary for me to reproduce same. Suffice it to state that I fully agree with the resolution of the issue in the application as has been properly dissected by my Lord, Kekere-Ekun JSC and the issue is:

> Whether this Honourable Court has the discretionary power to allow Exhibits AB/15 and AB/16 to be

admitted as further evidence for the determination of this appeal.

Order 2 Rule 12(1)(2) and (3) of the Supreme Court Rules (as amended) under which this application is predicated provides:

> **"Ord. 2 Rule 12(1) A party who wishes the court to receive evidence of witnesses (whether they were or were not called at the trial or to order the production of any document, exhibit or other thing connected with the proceeding in accordance with the provisions of section 33 of the Act, shall apply for leave on notice of motion prior to the date set down for the hearing of the appeal.**
>
> **2. The application shall be supported by affidavit of the facts on which the party relies for making it and of the nature of the evidence or the document concerned.**
>
> **3. It shall not be necessary for the other party to answer the additional evidence intended to be called but if leave is granted the other party shall be entitled to a reasonable opportunity to give his own evidence in reply if he so wishes".**

The principles guiding appellate courts when considering whether to grant leave to adduce fresh evidence on appeal are:

1. An appellant court can only receive fresh evidence, new evidence or additional evidence on appeal in circumstances where the matter arose *ex improviso* which no human ingenuity could foresee and it is in the interest of justice that evidence of that fact be led.
2. The court will permit fresh evidence in furtherance of justice in civil cases under the following circumstances:
   (i) Where the evidence sought to be adduced in such as could not have been obtained with reasonable care and diligence for use at the trial.
   (ii) Where the fresh evidence is such that if admitted would have an important, but not necessarily crucial, effect on the whole case.
   (iii) Where the evidence sought to be tendered on appeal is such as is apparently credible in the sense that it is capable of being believed. It need not necessarily be incontrovertible. See: **Asaboro vs. Aruwaji (1974) 4 SC 119; Obasi vs. Onwuka (1987) 3 NWLR (Pt. 61) 364** and **Akanbi vs. Alao (1989) 3 NWLR (Pt. 108) 118.**

I am one with my Lord that this application is unnecessary since the controversy surrounding the documents sought to be tendered as fresh evidence has not yet been resolved and the substantive action is yet to take off the ground as pleadings are yet to be filed and exchanged between the parties. It is a matter of grave concern and heart rendering to watch uterine brothers go at each other's throats with such venom on mundane things. I entirely agree that the

A application is unmeritorious and it is accordingly refused. It is hereby dismissed.

Parties should bear their respective costs.

K.B. AKA'AHS
B ***Justice, Supreme Court***

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GLOBAL WEST VESSEL SPECIALIST NIG. LTD.

AND

1. NIGERIA NLG LTD
2. ATTORNEY GENERAL OF THE FEDERATION

SC.544/2014

IN THE SUPREME COURT OF NIGERIA
HOLDEN AT ABUJA
FRIDAY, 20TH JANUARY, 2017

BEFORE THEIR LORDSHIPS

IBRAHIM TANKO MUHAMMAD	**JUSTICE, SUPREME COURT**
OLUKAYODE ARIWOOLA	**JUSTICE, SUPREME COURT**
KUMAI BAYANG AKAAHS	**JUSTICE, SUPREME COURT**
CHIMA CENTUS NWEZE	**JUSTICE, SUPREME COURT**
AMIRU SANUSI	**JUSTICE, SUPREME COURT**

ACTION: Parties Necessary parties – How determined.

ACTION: Parties – Proper parties – How determined

APPEAL: Application for leave to appeal where necessary to be made before Notice of Appeal could be properly filed – Failure to seek such leave – Effect.

APPEAL: Argument of appeal – Appellant's counsel who filed brief absent on the date of hearing of appeal – Consequence thereof.

APPEAL: Court of Appeal – Appellate jurisdiction – Consideration thereof

APPEAL: Court of Appeal – Where appeal is of right to the court of Appeal – Section 242(1) of the Constitution of Federal Republic of Nigeria, 1999 (as amended) – Extent and Scope.

APPEAL: Ground of Appeal – Description of a ground as ground of law – Whether such description actually makes it a ground of law.

APPEAL: Grounds of Appeal – A ground which complains about failure to give preaction notice to a party – Need to determine whether such a party is a proper party – Nature of Ground of appeal.

APPEAL: Grounds of Appeal – Classification – Relevant Principles

APPEAL: Grounds of Appeal – Ground of appeal dealing with issues of Principal and Agent – Classification

APPEAL: Grounds of Appeal – Grounds of Appeal on mixed law and facts – Necessity for leave before filing the Notice of Appeal.

APPEAL: Grounds of Appeal – Grounds of mixed law and facts – How determined.

APPEAL: Grounds of Appeal – Grounds of mixed law and facts – Import

APPEAL: Grounds of Appeal – Nature of Ground of Appeal – Which involves resolution of evidence.

APPEAL: Grounds of law – How determined

APPEAL: Interlocutory Appeals to the Court of Appeal – Need to obtain leave on grounds of mixed law and facts – Section 14 of the Court of Appeal Act, 2004 – Consideration thereof.

APPEAL: Nature of ground – Whether ground of law, mixed law and fact or fact alone – How determined.

Issues for Determination

1. Whether the Court of Appeal, Lagos Division was right in holding that the appellant's Notice of Appeal before it, filed without the leave of court, was incompetent thereby proceeding to strike out same on account that the grounds of appeal contained therein are not grounds of law alone but of mixed law and facts (Distilled from grounds 4,5,6,7 and 8 of the Notice of Appeal.
2. Whether the Court of Appeal, Lagos Division, was right in dismissing the appellant's appeal and affirming the ruling of the trial court without proferring any reason for its decision, after upholding the 1st respondent's preliminary objection and consequently striking out the Notice of Appeal. (Distilled from grounds 1, 2 and 3 of the Notice of Appeal).

Facts of the Matter

The 1st respondent was the plaintiff at the trial court. It had commenced an action by an originating Summons before the Federal High Court in Suit No.FHC/C/L/847/2013. The said Summons was filed along with an affidavit dated 17th June, 2013 against the 2nd respondent and the appellant (hereinafter referred to as AGF) and Global West respectively, as the 1st and 2nd defendants. The Plaintiff had then sought the interpretation of the following:

1. Nigeria LNG Act;
2. The Nigerian Maritime Administration and Safety Agency (NIMASA) Act;
3. The Coastal and Inland Shipping (Cabotage) Act, Cap. C51 LFN, 2004;
4. The Marine Environmental (Sea Protection Levy) Regulations, 2012; and
5. The Merchant Shipping (Ship Generated Marine Waste Reception Facilities) Regulations, 2012.

The plaintiff also challenged the blockade of its vessels and the prevention of same from accessing the Bonny Channel by a Vessel with men in Military uniform on board, identified as representatives of Global West etc.

The plaintiff further filed a Motion exparte along with a Notice of Motion dated 17th June, 2013 seeking various interim and interlocutory injunctive reliefs respectively against the Federal Government of Nigeria and its agents and Global West. The trial court on 18th June, 2013 granted all the interim reliefs sought.

The 2nd defendant Global West filed a Notice of Preliminary Objection dated 24th June, 2013, challenging the

Jurisdiction of the trial court to entertain the suit on grounds of misjoinder and non-joinder of a necessary party and consequently sought an order of the trial court to strike out the suit for lack of jurisdiction and or strike out its name from the suit for misjoinder. Global West also filed an application praying the trial court to discharge the order of interim injunction earlier made against it. The trial court on Friday 12th July, 2013 dismissed the 2nd defendant's Preliminary Objection together with the application seeking to discharge the Order of interim injunction granted against it.

2nd defendant was dissatisfied with the ruling of the trial Federal High Court, hence it appealed by the Notice of Appeal dated 23rd July, 2013 to the Court of Appeal.

By a Notice of Preliminary Objection, dated 28th March, 2014, the plaintiff now 1st respondent objected to the competence of the aforementioned Notice of Appeal on the grounds, *inter alia*, that leave of the trial court or of the Court of Appeal was not sought and obtained before the said Notice of Appeal was filed in accordance with the provisions of the Constitution of the Federal Republic of Nigeria, 1999 as amended.

On 18th June, 2014, the Court of Appeal heard the substantive appeal along with arguments on the Preliminary Objection and in its considered judgment delivered on 11th August, 2014 upheld the said objection to the effect that the Notice of Appeal filed by the appellant was incompetent having been filed without leave of either the trial court or of the Court of Appeal. The court consequently struck out the Notice of Appeal and thereby affirmed the ruling of the trial court.

Further dissatisfied with the judgment of the Court of

Appeal it appealed in the instant appeal to the Supreme Court on eight grounds vide the Notice of Appeal filed on 22nd August, 2014.

Held: *(Unanimously dismissing the appeal)*

1. *Where appellant counsel who filed brief is absent in court*
When this appeal came up for hearing on 24th October, 2016, both the 1st and 2nd respondents were represented by counsel but there was no legal representation for the appellant. Upon enquiry, the court was duly informed that there was proof of service of hearing notice to the counsel for the appellant. Appellant having duly filed and served its brief of argument, same was deemed argued.
(P 343 paras C-D)

2. *The appellate jurisdiction of the Court of Appeal*
There is no doubt that appellate jurisdiction of both the court below and this court are provided for in the Constitution.

Subject to the provisions of the constitution, the Court of Appeal shall have jurisdiction to the exclusion of any other court of law in Nigeria, to hear and determine appeals from the Federal High Court, the National Industrial Court, the High Court of the Federal Capital Territory, Abuja, High Court of a State, Sharia Court of Appeal of the Federal Capital Territory, Abuja, Sharia Court of Appeal of a State, Customary Court of Appeal of a State and from decision of a Court Martial or other Tribunals as may

be prescribed by an Act of the National Assembly. Section 240 of the Constitution of Federal Republic of Nigeria, 1999 (as amended). *(Pp 355-356 paras E-A)*

3. *What are the situations where appeal is of right to the Court of Appeal*
An appeal shall lie from decision of the Federal High Court or a High Court to the Court of Appeal as of right in the following cases:
a) Final decisions in any civil or criminal proceedings before the Federal High Court or a High Court sitting at first instance;
b) Where the ground of appeal involves questions of law alone,
decisions in any civil or criminal proceedings;
c) Decisions in any civil or criminal proceedings on questions as to the interpretation or application of this constitution;
(P 356 paras B-F)

4. *Appeal with leave to the Court of Appeal*
Subject to the provisions of Section 241 of the constitution above, an appeal shall lie from decision of the Federal High Court or a State High Court to the Court of Appeal with the leave of the Federal High Court or that of the States High Court or the Court of Appeal. Section 242(1) of the 1999 Constitution of Federal Republic of Nigeria (as amended).

By law, appeals against interlocutory decisions of a High Court require the leave of the High Court or of the Court of Appeal to be first sought and obtained

before the filling of the notice of appeal, in particular, where the grounds of appeal are not based on grounds of law alone. (Section 14 of the Court of Appeal Act). *(Pp 356-357 paras F-A)*

5. *How to determine grounds of law, mixed law and facts or facts alone*

It is trite law, that it is difficult to distinguish a ground of law from a ground of fact. However, the grounds of appeal in any case concerned must be thoroughly examined to see whether the grounds reveal a misunderstanding by the lower court or tribunal of the law or a misapplication of the law to the facts already proved or admitted, in that case. It would be simply question of law or one that would require questioning the evaluation of facts by the lower Court or tribunal before the application of law in which it would amount to question of mixed law and fact.

But where the appeal is against the findings made by the court below, then the question is on facts and then leave of court will be required before filing the Notice of Appeal. (J. B. Ogbechie & Ors vs. Gabriel Onochie & Ors (1986) 1 SC 54; (1986) NWLR (Pt. 23) 484). *(Pp 361-362 paras F-B)*

6. *Appeal on facts or mixed law and facts require leave*

It is equally trite law and constitutionally required that while appeal to the court below from the trial court on the issue of law is as of right, an appeal purely on the facts or mixed law and facts requires leave of the court from where appeal lies to the court to which

the appeals lies. *(P 362 paras B-C)*

7. *How to determine a ground of appeal*

It had been held that in determining the nature of a ground of appeal, the ground and its particulars must be read together. It is only by reading the ground as a whole that the complaint of the appellant about the judgment on appeal will be apparent. Nnanyelugo L. A. Orakosim & Ors vs. Grancis Ifeanyichukwu Menkiti (2001) 9 NWLR (Pt. 719) 529; (2001) 5 SC (Pt. 1) 72).

There is no doubt, and it is trite law that a ground of appeal does not become a ground of law merely or simply because it is so described in the Notice of Appeal. Indeed, the ground of appeal itself with its particulars must clearly show that it is a ground of law for it to require no leave of court before being filed. *(P 362 paras C-F)*

8. *The principles which determine the classification of grounds of appeal as grounds of law alone*

This court in its several decisions had long laid down the general principles to guide the court and parties in determining whether a particular ground of appeal is one of law, fact or mixed law and facts.

The following are three ways to determine a question of law:

(a) A question the court is bound to answer in accordance with a rule of law. That is, the question is already determined and answered by the law.

(b) That which explains what the law is. An appeal on a question of law in this sense means an appeal in which the question for argument and determination is what the true law is, on a certain matter, for instance, a question relating to the construction of a Statutory provision.

(c) All questions within the judicial powers of a judge to determine and not that for a jury, for instance, the interpretation of documents. In other words, any ground of appeal which alleges misunderstanding of the lower court of the law or misapplication of the law to the facts already proved, admitted, undisputed, or a misdirection, is purely a ground of law.

(Ogbechie & Ors vs. Onochie & Ors (supra); Nwadike vs. Ibekwe (1987) 4 NWLR (Pt.67) 718; Metal Construction (West Africa) Ltd. vs. Migliore (1990) 1 NWR (Pt.126) 299; ACB vs. Obimiami Brick & Stone (1993) 5 NWLR (Pt.294) 399 General Electric Co. vs. Akande & Ors (2010) 18 NWLR (Pt. 1225) 596. *(Pp 362-363 paras G-F)*

9. How to determine a ground of mixed law and fact

Where the facts are in dispute and the issue of evaluation of the facts by the lower or trial court arises before the application of the law, this will constitute a matter of mixed law and fact. UBA Ltd. vs. Stahlbau GMBH & Co. KG (1989); Briggs vs. Okoye (2005) 4 SC 89 at 94).

There is no doubt that grounds 1, 2 and 3 of the Notice of Appeal are talking about issue of proper and necessary parties in the action before the trial Federal High Court.

The issue of who is a proper or necessary party to be joined in an action depends on the evidence to be adduced before the court or rather the facts of the case. *(Pp 363-364 paras F-H; B-D)*

10. What a ground of mixed law and fact entails

It is admitted that there were allegations of wrong doing in a couple of paragraphs of the affidavit in support of the originating summons. Therefore, whether or not proper parties were before the trial court and whether there was proper evaluation of the affidavit evidence to warrant the decision taken by the trial judge will be a question of mixed law and facts. *(P 365 paras A-B)*

11. Who is a proper party to an action

It has long been held that proper parties are those who though not interested in the plaintiff's claim, are made parties for some good reasons, for example, in action instituted to rescind a contract, any person who was active or concurring in the matters which gave the plaintiff the right to rescind, is a proper party to the action. *(P 364 paras D-E)*

12. How to determine a necessary party

Necessary parties are those who are not only interested in the subject matter of the proceedings but

also who in their absence, the proceeding could not be fairly dealt with. In other words, the question to be settled in the action between the existing parties must be a question which cannot be properly settled unless they are parties to the action instituted by the plaintiff. Chief Abusi David Green vs. Chief (Dr) E.T. Dublin Green (1987) NWLR (Pt. 61) 480 (1987) LPELR SC 206/1986; Amon vs. Raphael Tuck & Cons (1956) 1 WB 357; Re Vandervills Trust (1971) A.C. 812; Re Vandervelle (1969) 3 All ER 497).
(P364 paras E-H)

13. *The nature of a ground of appeal which requires the giving of Pre-action Notice*
This ground when read with the particulars as it should be read, shows that the issue of pre-action notice to NIMASA under Section 53 (2) of the NIMASA Act cannot be considered unless and until the question of proper parties is resolved. In other words, the issue of non-compliance with the requirement of pre-action notice does not arise without the resolution of the necessity of its being a party who was required to be before the court.
(P 365 paras B-D)

14. *The nature of a ground of appeal dealing with issues of agency*
In the same vein, whether or not the substantive suit of the 1st respondent before the trial court which was brought against the appellant as an agent of NIMASA, is a suit that raised claims in tort which

could be proceeded with against principal and agent is a question of mixed law and fact. *(P 365 paras D-F)*

15. *The implication where grounds of appeal which require leave were filed without the requisite leave*
In the result, it is clear that none of the four grounds of appeal raised in the vexed Notice of Appeal filed by the appellant is a pure ground of law. Indeed, they are all grounds of mixed law and facts which the law says cannot be filed without the leave of either the trial court or the court below. In the final analysis, the appellant not having shown that leave of either the trial Federal High Court, Lagos or the Court of Appeal, Lagos Division was duly obtained before the Notice of Appeal dated 23rd July, 2013 against the interlocutory decision of the trial court was filed, the said Notice of Appeal was incompetent and deserves to be struck out. Accordingly, the court below was right to have held that the said Notice of Appeal was incompetent and properly struck out.
(Pp 365-366 paras F-A)

Nigerian Cases cited in this Judgment:
Abidoye vs. Alawode (2001) 3 NWLR (Pt. 118) 917,;
Abubakar vs. Nasamu (NO.1) (2012) 17 NWLR (Pt.1330) 523;
Abubakar vs. Waziri & Ors (2008) NWLR (Pt.1108) 507;
ACB vs. Obimiami Brick & Stone (1993) 5 NWLR (Pt.294) 399;
Amon vs. Raphael Tuck & Cons (1956) 1 FB 357;
Bayol vs. Ahemba (1994) 10 NWLR (pt.623) 381;
Bello vs. INEC (2010) 3 NWLR (Pt. 1196) 341;
Briggs vs. Okoye (2005) 4 SC 89 ;

Chief Abusi David Green vs. Chief (Dr) E.T. Dublin Green (1987) NWLR (Pt. 61) 481 (1987) LPELRSC 206/1986;
Coker vs. UBA Plc (1977) 2 NWLR (Pt.490) 641;
Elelu-Habeeb vs. A. G. of the Federation (2012) 13 NWLR (Pt. 1318) 423;
Ezeobi vs. Abang (2000) 9 NWLR (Pt. 672) 230;
Ezeugo vs. Ohanyere (1978) 6 7 SC 171;
Garuba & Ors vs. Omokhodion & Ors (2011) 6 NMLR 143 ;
General Electric Co. vs. Hancy A. Akande & Ors (2010) 18 NWLR (Pt. 1225) 596;
Iwueke vs. I.B.C (2005) 17 NWLR (Pt.955) 447;
J. B. Ogbechie & Ors vs. Gabriel Onochie & Ors (1986) 1 SC 54 (1986) NWLR (Pt. 23) 484;
K.T.P Ltd vs. GAH (Nig) Ltd (2005) 13 NWLR (Pt.943) 680;
Kisdhadadi vs. Sarkin Noma (2007) 13 NWLR (Pt.1052) 510;
Ladoja vs. INEC (2007) 12 NWLR (Pt.1047)119;
MDPDT vs. Okonkwo (2001) 3 KLR (pt. 117) 739;
Metal Construction (West Africa) Ltd. vs. Migliore (1990) 1 NWR (Pt.126) 299;
NEPA vs. Eze (2001) 3 NWLR (Pt. 709) 606;
Nigeria Navy vs. Labayo (2012) 17 NWLR (Pt.1328) 56;
Njemanze vs. Njemanze (2013) 8 NWLR (Pt.1356)376;
Nnanyelugo L. A. Orakosim & Ors vs. Grancis Ifeanyichukwu Menkiti (2001) 9 NWLR (Pt. 719) 529;(2001) 5 SC (Pt. 1) 72;
Nwadike vs. Ibekwe (1987) 4 NWLR (Pt.67) 718;
Obatoyinbo vs. Oshatoba (1996) 5 NWLR (Pt 450) 531,;
Obi vs. INEC (2007) 11 NWLR (Pt.1046) 564;
Obisi vs. Chief Naval staff (2004) 11 NWLR (Pt. 885) 482;
Odedo vs. INEC (2008) 17 NWLR (Pt.1117) 554;
Ogbechie & Ors vs. Onochie & Ors (1986) 2 NWLR (Pt.23) 484;
Ogboru vs. Uduaghan (2012) 11 NWLR (Pt.1311) 357;

Ojemen vs. Momodu (1983) 3 SC 173;
Ojukwu vs. Kaine (2000) 15 NWLR (Pt. 691) 516;
Okotie-Eboh vs. Manager (2004) 18 NWLR Pt. 905) 242;
Omole and Sons Ltd vs. Adeyemo (1994) 4 NWLR (Pt. 336) 48;
Oniah vs. Onyia (1989) 1 NWLR (Pt. 99) 514;
Onyeyemi vs. Irewole L.G. (1993) 1 NWLR (Pt.270) 462;
Pan Atlantic Shipping & Trans vs. Rhein Mass GMBH (1997) 3 NWLR (Pt. 493) 248;
Panabina World Transport vs. Olandeen International & 4 ors (2010) 12 SC (Pt. 111) 30;
PDP vs. Okorocha (2012) 15 NWLR (Pt. 1323) 205;
PMB Ltd vs. NDIC (2011) 12 NWLR (Pt.1261) 253;
Road Transport Employers Association of Nigeria vs. National Union of Road Transport Workers (1992) NWLR (Pt. 224) 381;
Suleiman vs. C. O. P. Plateau State (2008) 21 WRN 1,;
Tanko vs. UBA Plc (2010) 17 NWLR (Pt. 1221) 80;
UBA Ltd vs. Stanhlbau GMBH & Co (1989) 3 NWLR (Pt 110) 374,;
Udesen vs. State (2007) 4 NWLR (Pt. 1023) 125, 137; and
Yusuf vs. Obasanjo (2003) 16 NWLR (Pt.847) 554.

Foreign Cases cited in this judgment
Re Vandervelle (1969) 3 All ER 497;
Re Vandervills Trust (1971) A.C. 812;

Nigerian Statutes cited in this Judgment
Court of Appeal Act;
The Nigeria LNG Act;
The Coastal and Inland Shipping (Cabotage) Act, Cap. C51 LFN, 2004;
The Constitution of Federal Republic of Nigeria, 1999 (as

amended);
The Constitution of the Federal Republic of Nigeria, 1999; and
The Marine Environmental (Sea Protection Levy) Regulations, 2012; and
The Merchant Shipping (Ship Generated Marine Waste Reception Facilities) Regulations, 2012.
The Nigerian Maritime Administration and Safety Agency (NIMASA) Act;
The Supreme Court Act, Caps.15, Laws of the Federation of Nigeria, 2004;

Representations
No legal representation for the appellant.

Olawale Akoni SAN, with B. B. Lawal, Esq., A. O. Itake, Esq and A. Achiniun (Miss) *for the 1st Respondent.*

Dr. Oscar Nhiam with Adeola Adeniyi, Esq. Nnanna Oketa Esq., and Akintola Makinde, Esq. *for 2nd Respondent.*

OLUKAYODE ARIWOOLA, (JSC) (Delivering the Lead Judgment)

This is an appeal against the judgment of the Court of Appeal, Lagos Division, delivered on 11th August, 2014 in Appeal No.CA/L/849B/2013 wherein the appeal was, *inter alia*, struck out. The facts of this case are as follows:

The 1st respondent was the plaintiff at the trial court. It had commenced an action by an Originating Summons before the Federal High Court in Suit

No.FHC/C/L/847/2013. The said Summons was filed along with an affidavit dated 17th June, 2013 against the 2nd respondent and the appellant (hereinafter referred to as AGF) and Global West respectively, as the 1st and 2nd defendants. The plaintiff had then sought the interpretation of the following:

1. Nigerian LNG Act;
2. The Nigerian Maritime Administration and Safety Agency (NIMASA) Act;
3. The Coastal and Inland Shipping (Cabotage) Act, Cap. C51 LFN, 2004;
4. The Marine Environmental (Sea Protection Levy) Regulations, 2012; and
5. The Merchant Shipping (Ship Generated Marine Waste Reception Facilities) Regulations, 2012.

The plaintiff also challenged the blockade of its vessels and the prevention of same from accessing the Bonny Channel by a Vessel with men in Military uniform on board, identified as representatives of Global West etc. The plaintiff further filed a Motion *Ex-parte* along with a Notice of Motion dated 17th June, 2013 seeking various interim and interlocutory injunctive reliefs respectively against the Federal Government of Nigeria and its agents and Global West. The trial court on 18th June, 2013 granted all the interim reliefs sought.

The 2nd defendant Global West filed a Notice of Preliminary Objection dated 24th June, 2013, challenging the Jurisdiction of the trial court to entertain the suit on grounds of misjoinder and non-joinder of a necessary party and consequently sought an order of the trial court to strike

out the suit for lack of jurisdiction and or strike out its name from the suit for misjoinder. Global West also filed an application praying the trial court to discharge the order of interim injunction earlier made against it.

The trial court on Friday 12th July, 2013 dismissed the 2nd defendant's Preliminary Objection together with the application seeking to discharge the Order of interim injunction granted against it. The 2nd defendant was dissatisfied with the ruling of the trial Federal High Court, hence it appealed by the Notice of Appeal dated 23rd July, 2013 to the court below.

By a Notice of Preliminary Objection, dated 28th March, 2014, the plaintiff now 1st respondent objected to the competence of the aforementioned Notice of Appeal on the grounds, *inter alia*, that: leave of the trial court or of the court below was not sought and obtained before the said Notice of Appeal was filed in accordance with the provisions of the Constitution of the Federal Republic of Nigeria, 1999 (as amended).

On 18th June, 2014, the court below heard the substantive appeal along with arguments on the Preliminary Objection and in its considered judgment delivered on 11th August, 2014 upheld the said objection to the effect that the Notice of Appeal filed by the appellant was incompetent having been filed without leave of either the trial court or of the court below. The court below consequently struck out the Notice of Appeal and thereby affirmed the ruling of the trial court.

Further dissatisfaction with the judgment of the court below led to the instant appeal on eight grounds vide the Notice of Appeal filed on 22nd August, 2014.

The appellant and 1st respondent filed and exchanged briefs of argument. Appellant's brief of argument filed on 8th April, 2015 was deemed properly filed and served on 15th March, 2016. The 1st respondent filed its brief of argument within time on 19th April, 2016. It is note worthy that the 2nd respondent (the Attorney General of the Federation) did not file any brief of argument or any other process in this appeal.

When this appeal came up for hearing on 24th October, 2016, both the 1st and 2nd respondents were represented by counsel but there was no legal representation for the appellant. Upon enquiry, the court was duly informed that there was proof of service of hearing notice to the counsel for the appellant. Appellant having duly filed and served its brief of argument, same was deemed argued.

Mr. Akoni, learned senior counsel for the 1st respondent identified his brief of argument. He adopted and relied on same to urge the court to dismiss the appeal for want of merit.

Mr. Nhiam, learned counsel for the 2nd respondent once again announced to the court that he did not and does not intend to file any brief of argument for the 2nd respondent. Accordingly, the appellant's brief of argument settled by Selekeowei, Larry, (SAN) was duly considered.

The following two issues were distilled by the appellant for the determination of the appeal in its brief of argument:

Issues for Determination

1. Whether the Court of Appeal, Lagos Division, was right in holding that the appellant's Notice of Appeal before it, filed without leave of court was incompetent thereby proceeding to strike out same on account that the grounds of appeal contained therein are not grounds of law alone but of mixed law and fact (Distilled from grounds 4,5,6,7 and 8 of the Notice of Appeal).

2. Whether the Court of Appeal, Lagos Division, was right in dismissing the appellant's appeal and affirming the ruling of the trial court without proferring any reason for its decision, after upholding the 1st respondent's preliminary objection and consequently striking out the Notice of Appeal. (Distilled from grounds 1, 2 and 3 of the Notice of Appeal).

The issues were argued *seriatim* in the appellant's brief of argument.

On the first issue, it was contended that the court below was in error when it struck out the appellant's Notice of Appeal before it as incompetent, as no leave of court was first sought and obtained before same was filed, for the reason that the grounds contained therein are not of pure law but of mixed law and fact.

Learned senior counsel for the appellant referred to Section 241 (1) (b) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) and contended that an appeal from a decision of the Federal High Court to the

Court of Appeal is as of right where the grounds of appeal raise questions of law alone. In other words, he submitted that in such a case, a specific right of appeal is conferred by the Constitution devoid of any requirement of leave to appeal, notwithstanding, that the appeal is against an interlocutory decision. He referred to the four (4) grounds of appeal contained in the Notice of Appeal in question, filed on 23rd July, 2013 before the court below. He submitted that no leave was required to file the said Notice of Appeal contrary to the findings of the court below.

Based on the decisions of this court in couple of cases, learned counsel submitted that the way out on this line of distinction between a ground of appeal simpliciter on law and mixed law and fact, is to carefully examine the grounds of appeal along with the particulars attending to them, to determine whether they reveal a misunderstanding by the lower court of the law or a misapplication of the law to facts already proved or undisputed or admitted. He cited, **Nwadike vs. Ibekwe (1987) 4 NWLR (Pt.67) 718, K.T.P Ltd vs. G & H (Nig) Ltd (2005) 13 NWLR (Pt.943) 680; Iwueke vs. I.B.C (2005) 17 NWLR (Pt.955) 447.**

Learned senior counsel contended that a careful examination of the four grounds of appeal in the vexed Notice of Appeal before the lower court would reveal that the grounds centre on the misunderstanding or misapplication of the law of agency to the proved, established, accepted, undisputed or admitted fact that the appellant was sued as an agent to a disclosed principal NIMASA which was never joined as a party. He contended further that the 1st respondent, by its own admission in its pleadings vide paragraph 5 of the supporting affidavit to its

Originating Summons sued the appellant as an agent of NIMASA for acts, levies, taxes etc. done or demanded by NIMASA from the 1st respondent in the exercise of the statutory powers of NIMASA under several extant legislations without making NIMASA a party to the suit.

The appellant referred to the 1st respondent's Preliminary Objection of 25th June, 2013, wherein it moved the trial court to strike out the suit for want of jurisdiction and or strike out the appellant's name from the suit for misjoinder and set aside the Form 48 issued against it. The appellant did not file any Counter Affidavit and so did not join issues with the 1st respondent on facts. He submitted that it was the decision of the trial court, which overruled and dismissed the objection that form the basis for the four grounds of appeal in the vexed Notice of Appeal before the court below.

Learned senior counsel submitted that the said grounds of appeal in the vexed Notice of Appeal being such that alleged misunderstanding and/or misapplication of the law cannot be highly struck down as the lower court did as being of mixed law and fact, and therefore requiring leave to be competent.

He contended that even on a more global view, the objection culminating in the ruling appealed against therein is one that raises the question of jurisdiction against the trial court, and therefore indicative of raising grounds of pure law. He urged the court to resolve the issue against the 1st respondent and hold that the Notice of Appeal is competent as it requires no leave to be competent.

On the second issue, the appellant contended that the court below erred when it dismissed the appellant's appeal

without giving reasons for its decision, and that the court below in so doing violated its right to fair hearing guaranteed under section 36 of the Constitution of the Federal Republic of Nigeria 1999 (as amended) and abdicated its judicial responsibility under section 294 (1) of the same constitution. The appellant's learned senior counsel submitted that the appellant's grouse is that the court below heard the substantive appeal on the merits alongside the respondent's preliminary objection which it upheld, and proceeded to affirm the ruling of the trial court without proffering any reason.

Learned senior counsel contended that a court has a duty to decide the merit of a case upon the issues canvassed before it. The reason is that, being an intermediate appellate court, its decision on jurisdiction could be reversed on appeal to this court, in which case if all other issues had been decided, at least, in the alternative, it would prevent the necessity of the Supreme Court having to remit the appeal to the court below for it to resolve other issues originally arising in the appeal. He relied on several cases, including **Elelu-Habeeb vs. Attorney-General of the Federation** (2012) 13 NWLR (Pt. 1318) 423; **Tanko vs. UBA Plc** (2010) 17 NWLR (Pt. 1221) 80; **Obisi vs. Chief of Naval staff** (2004) 11 NWLR (Pt. 885) 482; **Okotie-Eboh vs. Manager** (2004) 18 NWLR Pt. 905) 242.

Learned senior counsel referred to the conclusion of the judgment of the court below whereby, it dismissed the appellant's appeal and affirmed the ruling of the trial court. He contended that the court below did not give any reason for its decision to dismiss the appeal before it which it had already struck out in the preceding paragraph of the

judgment. He submitted that a decision of a court, without the reason for the same is in law, no decision at all. He submitted further that the substance of a court's judgment is the *ratio decidendi* but not in the mere passing remarks. He contended that every court whose decision is subject to appeal is required to state the reason(s) for its decision to enable the parties know how the court arrived at its decision. He relied on **Abubakar vs. Nasamu (NO.1) (2012) 17 NWLR (Pt.1330) 523; Ogboru vs. Uduaghan (2012) 11 NWLR (Pt.1311) 357; PDP vs. Okorocha (2012) 15 NWLR (Pt. 1323) 205; Onyeyemi vs. Irewole L.G. (1993) 1 NWLR (Pt.270) 462.**

Learned senior counsel contended that the court below abdicated its duty to consider the substantive issues placed before it in the appeal despite having heard the appeal contemporaneously with the preliminary objection. He further contended that despite declining to consider the appeal on the merit, the court below proceeded to affirm the ruling of the trial court, without proferring reason for the decision. He submitted that the decision of the court below dismissing the appeal and affirming the trial court's decision is a nullity and he urged the court to so hold.

The appellant referred to section 22 of the Supreme Court Act, Cap.15, Laws of the Federation of Nigeria, 2004. He contended that the Supreme Court is empowered to exercise full jurisdiction over a case and deal with it in the same way a trial court or the court below would have done. He however contended further that before this court would invoke its said omnibus powers, it must ensure that the following are considered:

(a) The availability before it of all necessary materials on which to consider the request of the party;

(b) The length of time, between the disposal of the action in the court below and the hearing of the appeal at the Supreme Court and

(c) The interest of justice to eliminate further delay in the hearing of the matter and minimize the hardship of the party.

He relied on **Odedo vs. INEC (2008) 17 NWLR (Pt.1117) 554; Obi vs. INEC (2007) 11 NWLR (Pt.1046) 560; Ladoja vs. INEC (2007) 12 NWLR (Pt.1047) 115; Yusufu vs.Obasanjo (2003) 16 NWLR (Pt.847) 532**.

Learned senior counsel referred to the two issues the appellant considered to be in controversy in the appeal before the court below and urges the court to determine same and make appropriate orders. He referred to the documents in the record already transmitted and contended that since the substantive matter is still pending before the Federal High Court, Lagos, it is in the interest of justice that this court steps into the shoes of the court below and deal with the real issues earlier identified rather than remitting same to the court below. He urged the court to invoke section 22 of the Supreme Court Act and resolve the real issues put before the court below which it failed to consider.

From the eight grounds of appeal filed by the appellant, the 1st respondent distilled the following two issues as it considered germane to the just determination of this appeal, to wit:

"1. Whether from the facts and circumstances of this case, the court below, was right in upholding the 1st respondent's Preliminary Objection and consequently striking out the appellant's Notice of Appeal which was filed without the statutorily required leave of court? (Distilled from grounds 4,5,6,7 and 8 of the Notice of Appeal).

2. Whether the court below was right in affirming the ruling of the trial court dismissing the appellant's preliminary objection after finding that the appellant's Notice of Appeal against the ruling was incompetent? (Distilled from grounds 1,2 and 3 of the Notice of Appeal)".

Learned senior counsel for the 1st respondent took the issues seriatim. On issue No.1 he contended that it is now settled beyond equivocation that by a combined reading of Sections 241 and 242 (1) of the 1999 Constitution of the Federal Republic of Nigeria, and Section 14 of the Court of Appeal Act, appeals against interlocutory decisions of a High court mandatorily require the leave of the High Court or of the Court below to be first sought and obtained before filing the Notice of Appeal, in so far as the grounds of appeal are not based on grounds of law alone. In other words, obtaining leave of court is a desideration to the successful exercise of a right of appeal whenever the decision complained against is an interlocutory decision and grounds of appeal are of mixed law and facts.

He contended further that there is no dispute that the appellant did not first seek and obtain leave of either the

High Court or the court below before it filed its Notice of Appeal to the court below and that parties agreed on the point that the vexed decision of the trial court delivered on 12th July, 2013 is an interlocutory rather than a final decision, as same did not determine the rights of the parties in the 1st respondent's suit. The point of divergence between the parties is the question whether the grounds of appeal before the court below were grounds of mixed law and facts, thus requiring leave of the trial court or of the court below or grounds of law alone.

Learned senior counsel contended that a Notice of Appeal is an originating process which activates the jurisdiction of an appellate court. He relied on **PMB Ltd vs. NDIC (2011) 12 NWLR (Pt.1261) 253 at 262; Nigeria Navy vs. Labinjo (2012) 17 NWLR (Pt.1328) 56 at 81.**

He submitted that the principles that should guide a court in its quest for the proper determination of whether a ground of appeal is ground of law, a ground of mixed law and facts or simply a ground of fact has been laid down by this court in **Ogbechie & Ors vs. Onochie & Ors (1986) 2 NWLR (Pt.23) 484 at 491.**

Learned senior counsel contended that in arguing that the grounds of appeal before the court below were grounds of law alone, the appellant set out the grounds of appeal and contended that they were grounds of law alone. He submitted that the approach by the appellant is misleading and contravenes the directives of this court. He relied on **Kashadadi vs. Sarkin Noma (2007) 13 NWLR (Pt.1052) 510 at 522.**

He referred to the Notice of Appeal filed by the appellant at the court below at pages 1551-1555 of the

Record of Appeal and considered each of the four grounds of appeal raised in the said Notice of Appeal. He submitted that all the questions necessarily involved evaluation of facts and hence the grounds of appeal are grounds of fact or at best of mixed law and facts and he urged the court to so hold. He submitted that where an appellant ought to have sought leave before filing his Notice of Appeal and no such leave was sought, the appeal is incompetent and liable to be struck out. He relied on **Abubakar vs. Waziri & Ors (2008) NWLR (Pt.1108) 507; Coker vs. UBA Plc (1977) 2 NWLR (Pt.490) 641; Njemanze vs. Njemanze (2013) 8 NWLR (Pt.1356)376; Garuba & Ors vs. Omokhodion & Ors (2011) 5 NMLR 145 at 165.**

Learned senior counsel submitted that by a combined reading of the extant provisions of section 241(2) and 242 Constitution of the Federal Republic of Nigeria, 1999 and section 14 of the Court of Appeal Act, and on the strength of the judicial authorities cited, the court is urged to resolve the issue against the appellant; uphold the finding of the court below that the appellant's Notice of Appeal having been filed without the requisite leave of court, is consequentially incompetent and was correctly struck out.

On issue No. 2 formulated by the 1st respondent, the learned senior counsel contended that the effect of a combined consideration of grounds 1, 2 and 3 of the appellant's Notice of Appeal against the judgment of the court below will reveal that the appellant's grouse with the judgment revolves around the question of whether the court below was right in affirming the ruling of the trial court dismissing the appellants preliminary objection to the competence of the substantive suit. Learned senior counsel

contented that in arguing this issue, the appellant has made heavy weather of the fact that the court below dismissed the appellant appeal after striking out notice of Appeal. He submitted that this is a non issue.

He referred to the judgment of the court below and to the extent that the court had already struck out the Notice of Appeal for incompetence, he submitted that there was nothing left to dismiss and the order of striking out remains the only extant order of the court below. He submitted further that, indeed, the law is that where a dismissal order is made in circumstances where the action cannot be said to have been determined on the merits, such dismissal would be legally construed as a mere striking out and not a dismissal on the merits. He relied on **Panabina World Transport vs. Olandeen International & 4 ors** (2010) 12 SC (Pt. 111) 30 at 49.

The respondent contended that assuming without conceding that the court below was wrong to dismiss the appellants appeal and affirm the trial court ruling rather than merely striking out the appeal for incompetence, the 1st respondent submitted that this is a mere error or slip which is not substantial enough to warrant the court reversing the entire judgment of the court below. He submitted further that it is not every error of a court that has the effect of leading to a reversal of the judgment by an appellate court. For the court to set aside or reverse the decision of the court below, such wrong complained about must have occasioned a serious miscarriage of justice against the aggrieved party. He relied on **Bayol vs. Ahemba (1994) 10 NWLR (pt.623) 381; Pan Atlantic Shipping & Trans vs. Rhein Mass GMBH (1997) 3 NWLR (Pt. 493) 248.**

Learned senior counsel submitted that even if this court find that the court below ought not to have made the order dismissing the appeal, having come to the right conclusion that the appellants Notice of Appeal was incompetent, the proper order for this court to make is not to allow this appeal, but to substitute the order of dismissal with an order striking out. He relied on **Road Transport Employers Association Of Nigeria vs. National Union Of Road Transport Workers (1992) NWLR (Pt. 224) 381.**

On the contention of the appellant that this court ought to invoke the provision of section 22 of the supreme court act and deal with the issues in the appeal that was filled at the court below rather than remitting same to the court below for determination, learned senior counsel referred to the issues distilled by the appellant and 1st respondent respectively and went to town with his copious submissions on the appeal before the court below and finally urged the court to dismiss the appeal in its entirety and uphold the ruling of the court below dismissing the appellants appeal and upholding the trial court's dismissal of the appellant's preliminary objection.

As I stated, the 2nd respondent did not file any brief of argument in this appeal. Even on the date this appeal was heard, learned counsel for the 2nd respondent announced to the court that he did not file any process and did not intend to file any process in the appeal. As a result, this appeal shall be resolved or determined based on the processes filed by the appellants and 1st respondent only.

I have carefully examined the two issues formulated by both the appellant's and 1st respondent respectively and I have come to the conclusion that their respective issues

having been duly formulated from the same grounds of appeal filed by the appellant and saying the same thing though slightly differently couched, I shall utilize the two issues of the appellant to determine this appeal.

Issue No.1

The first issue is whether the court below was right in holding that the appellants Notice of Appeal before it, filed without leave of court was incompetent thereby proceeding to strike out same on account that the grounds of appeal contained therein are not grounds of law alone but of mixed law and fact.

As I earlier stated, the appellants herein was also the appellant at the court below and a defendant before the trial federal high court, Lagos Division. It had filed an appeal before the court below against the decision of the trial court, but the said appeal was decided by the court below upon the preliminary objection raised by the 1st respondent. That had led to the instant appeal.

There is no doubt that appellate jurisdiction of both the court below and this court are provided for in the constitution. Subject to the provisions of the constitution, the Court of Appeal shall have jurisdiction to the exclusion of any other court of law in Nigeria, to hear and determine appeals from the Federal High Court, the National Industrial Court, the High Court of the Federal Capital Territory, Abuja, High Court of a State, Sharia Court of Appeal of the Federal Capital Territory, Abuja, Sharia Court of Appeal of a State, Customary Court of Appeal of a State and from decision of a Court Martial or other Tribunals as may be prescribed by an Act of the National Assembly. See;

Section 240 of the Constitution of Federal Republic of Nigeria, 1999 (as amended).

However, with regards to appeals as of right from the Federal or State High Courts, Section 241 provides *inter alia*, as follows:

"Section 241 (1),

> An appeal shall lie from decision of the Federal High Court or a High Court to the Court of Appeal as of right in the following cases:
>
> a. Final decisions in any civil or criminal proceedings before the Federal High Court or a High Court sitting at first instance;
> b. Where the ground of appeal involves questions of law alone, decisions in any civil or criminal proceedings; and
> c. Decisions in any civil or criminal proceedings on questions as to the interpretation or application of this constitution."

But subject to the provisions of section 241 of the constitution above, an appeal shall lie from decision of the Federal High Court or a State High Court to the Court of Appeal with the leave of the Federal High Court or that of the State High Court or the Court of Appeal. See; section 242(1) of the 1999 Constitution of Federal Republic of Nigeria (as amended).

Yet by law, appeals against interlocutory decisions of a High Court require the leave of the High Court or of the

Court of Appeal to be first sought and obtained before the filling of the Notice of Appeal, in particular, where the grounds of appeal are not based on grounds of law alone. See; section 14 of the Court of Appeal Act. In the instant matter, certain facts are not in dispute and are very clear from doubt, on the records. They are:

- The facts that the appeal in question to the court below was an interlocutory decision of the Federal High Court.
- The appellant neither sought nor obtained any leave of either the Federal High Court or the court below before the Notice of Appeal was filed.

What is therefore being contested is whether or not there was need to or rather whether the grounds of appeal are not of law alone that will not require that leave of court be first sought and obtained before the filling of the Notice of Appeal. In other words, the point of divergence between the parties is the question whether the grounds of appeal filed by the appellant before the court below were grounds of mixed law and facts which require leave of either the trial Federal High Court or that of the court below or ground of law alone.

The appellant had contended strongly that there was no need to have sought leave of court before the appellant filed the Notice of Appeal in the case that was put before the court below. But the 1st respondent thought differently, that with the grounds of appeal contained in the Notice of Appeal, the appellant required and ought to have obtained leave of either the trial Federal High Court or the Court below. And not having so obtained the said required leave, it

considered the said Notice of Appeal incompetent and liable to be struck out.

However, it is trite law that in order to see whether or not the alleged grounds of Appeal filed with the Notice of Appeal before the court below are grounds of mixed law and facts thus requiring leave of court before being filed, there is need to state the said grounds and their respective particulars. They are as follows:

Grounds of Appeal

1. The learned trial judge erred in law when His Lordship held that the appellant (a purported agent of NIMASA) itself was not joined as a party.

Particulars

i. By its originating Summons, the 1st respondent sought the determination of question relating to the interpretation of certain provisions of some status relating to NIMASA's supervisory function over it (1st respondent).

ii. In the affidavits in support of the Originating Summons, the 1st respondent described the appellant as an agent of NIMASA.

iii. All actions complained of in the said affidavit were said to have been carried out by NIMASA but that certain equipment of appellant were used by NIMASA in carrying out the actions.

iv. NIMASA was not joined as a party to the action but an ex-parte order of injunction was

obtained against the appellant in a bid to bind NIMASA.

2. The learned trial judge erred in law when his lordship held that, the appellant was properly joined as a party since there were allegations of wrong doing in some paragraphs of the affidavit in support of the Originating Summons.

Particulars

i. It is the substantive claim/reliefs sought, rather than mere mention or narration of a person's action in an affidavit that is required to establish a cause of action against the person.

ii. The crux of the 1st respondent's action before the Honorable Court was the interpretation of some provisions of certain law relating to its obligations and the supervisory functions of NIMASA - the purported principal of the appellant who was not joined as a party.

iii. There was no specific relief sought against the appellant in the questions proffered for resolutions or the reliefs sought.

iv. It is clear that the appellant, being a private body, is in no position to ensure the compliance with or execution of any provision of law relating to statutory bodies such as NIMASA.

3. The learned trial judge erred in law when His Lordship refused to decline jurisdiction to entertain the suit when the proper parties necessary for proper

resolution of the questions were not before it.

Particulars

i. One of the prerequisites for a court to assume jurisdiction is the presence of necessary parties before it. **Bello vs. INEC (2010) 3 NWLR (Pt. 1196) 341 at 410.**

ii. The 1st respondent's Originating Summons primarily sought the interpretation of laws relating to the exercise of NIMASA's supervisory functions over it which enable it to demand for taxes and levies and other payments.

iii. NIMASA was not joined as a party to the action.

iv. The Attorney General was made the 1st defendant to the action and its joinder was predicated upon a conception that it was NIMASA's principal.

v. The appellant herein was joined as 2nd defendant to the action and described as an agent of NIMASA.

4. The learned trial judge erred in law when His Lordship held that non compliance with the pre-action notice to NIMASA under Section 53(2) of the NIMASA Act, did not rob the court of jurisdiction to entertain the substantive suit which was brought against appellant, as an agent of NIMASA, because the suit raised claims in tort which could be proceeded with against principal and agent whether jointly or severally.

Particulars

i. The distinction between action and other suits is not a valid exemption to compliance with the provisions of S.53(2) of the NIMASA Act.

ii. The substantive action was not for redress in tort, but one for interpretation of statutory provision.

iii. The jurisdiction of court over ancillary relies (if any) is lost where there is no jurisdiction to entertain the principal claim.

iv. Pre-action notice in section 53 (2) of NIMASA Act, prohibits the institution of a suit against NIMASA, its Directors Board members, and employees without first giving 30 days notice to the Agency with indication of the cause of action and reliefs sought.

v. Failure to give pre-action notice, where affected party objects, robs the court of jurisdiction.

vi. The appellant having been sued as agent of NIMASA is entitled to raise the point of objection.

It is trite law, that it is difficult to distinguish a ground of law from a ground of fact. However, the grounds of appeal in any case concerned must be thoroughly examined to see whether the grounds reveal a misunderstanding by the lower court or tribunal of the law or a misapplication of the law to the facts already proved or admitted, in that case, it would be simply question of law or one that would require questioning the evaluation of facts by the lower court or tribunal before the application of the law, in which case it

would amount to question of mixed law and fact. But where the appeal is against the findings made by the court below, then the question is on facts and then leave of court will be required before filing the Notice of Appeal. See: **J. B. Ogbechie & Ors vs. Gabriel Onochie & Ors (1986) 1 SC 54; (1986) NWLR (Pt. 23) 484.**

It is equally trite law and constitutionally required that while appeal to the court below from the trial court on the issue of law is as of right, an appeal purely on the facts or mixed law and facts requires leave of the court from where appeal lies or the court to which the appeals lies.

It had been held that in determining the nature of a ground of appeal, the ground and its particulars must be read together. It is only by reading the ground as a whole that the complaint of the appellant about the judgment on appeal will be apparent. See: **Nnanyelugo L. A. Orakosim & Ors vs. Grancis Ifeanyichukwu Menkiti (2001) 9 NWLR (Pt. 719) 529; (2001) 5 SC (Pt. 1) 72.**

There is no doubt, and it is trite law that a ground of appeal does not become a ground of law merely or simply because it is so described in the Notice of Appeal. Indeed, the ground of appeal itself with its particulars must clearly show that is a ground of law for it to require no leave of court before being filed.

This court in its several decisions had long laid down the general principles to guide the court and parties in determining whether a particular ground of appeal is one of law, or fact or mixed law and facts.

The following are three ways to determine a question of law:

(a) A question the court is bound to answer in

accordance with a rule of law. That is, the question is already determined and answered by the law.

(b) That which explains what the law is. An appeal on a question of law in this sense means an appeal in which the question for argument and determination is what the true law is, on a certain matter, for instance, a question relating to the construction of a Statutory provision; and

(c) All questions within the judicial powers of a judge to determine and not that of a jury, for instance, the interpretation of documents. In other words, any ground of appeal which alleges misunderstanding of the lower court of the law or misapplication of the law to the facts already proved, admitted or undisputed, or a misdirection, is purely a ground of law.

See: **Ogbechie & Ors vs. Onochie & Ors (supra); Nwadike vs. Ibekwe (1987) 4 NWLR (Pt.67) 718; Metal Construction (West Africa) Ltd. vs. Migliore (1990) 1 NWR (Pt.126) 299; ACB vs. Obimiami Brick & Stone (1993) 5 NWLR (Pt.294) 399 General Electric Co. vs. Hancy A. Akande & Ors (2010) 18 NWLR (Pt. 1225) 596.**

However, where the facts are in dispute and the issue of evaluation of the facts by the lower or trial court arises before the application of the law, this will constitute a matter of mixed law and fact. See: **UBA Ltd. vs. Stahlbau GMBH & Co. KG (1989); Briggs Vs. Okoye (2005) 4 SC 89 at 94.**

As I had earlier stated in this judgment, the decision of the trial court being appealed was not a final

decision but interlocutory. Furthermore, it is not being disputed that the appellant neither sought nor obtained leave of either the trial Federal High Court or that of the court below. But to the latter, the appellant had argued that no leave was required to file the Notice of Appeal being challenged, the four grounds being grounds of law alone.

I have carefully perused the vexed grounds of appeal with their particulars. There is no doubt that grounds 1, 2 and 3 of the Notice of Appeal are talking about issue of proper and necessary parties in the action before the trial Federal High Court.

The issue of who is a proper or necessary party to be joined in an action depends on the evidence to be adduced before the court or rather the facts of the case. It has long been held that proper parties are those who though not interested in the plaintiff's claim, are made parties for some good reasons, for example, in action instituted to rescind a contract, any person who was active or concurring in the matters which gave the plaintiff the right to rescind, is a proper party to the action. Necessary parties are those who are not only interested in the subject matter of the proceedings but also who in their absence, the proceeding could not be fairly dealt with. In other words, the question to be settled in the action between the existing parties must be a question which cannot be properly settled unless they are parties to the action instituted by the plaintiff. See: **Chief Abusi David Green vs. Chief (Dr) E.T. Dublin Green (1987) NWLR (Pt. 61) 481 (1987) LPELR SC 206/1986; Amon vs. Raphael Tuck & Cons (1956) 1 WB 357; Re Vandervills Trust (1971) A.C. 812; Re Vandervelle (1969) 3 All ER 497.**

It is admitted that there were allegations of wrong doing in couple of paragraphs of the affidavit in support of the Originating Summons. Therefore, whether or not proper parties were before the trial court and whether there was proper evaluation of the affidavit evidence to warrant the decision taken by the trial judge will be a question of mixed law and facts.

Now to ground 4 of the Notice of Appeal. This ground when read with the particulars as it should be read, shows that the issue of pre-action notice to NIMASA under Section 53 (2) of the NIMASA Act cannot be considered unless and until the question of proper parties is resolved. In other words, the issue of non-compliance with the requirement of pre-action notice does not arise without the resolution of the necessity of its being a party who was required to be before the court. In the same vein, whether or not the substantive suit of the 1st respondent before the trial court which was brought against the appellant as an agent of NIMASA, is a suit that raised claims in tort which could be proceeded with against principal and agent is a question of mixed law and fact. In the result, it is clear that none of the four grounds of appeal raised in the vexed Notice of Appeal filed by the appellant is a pure ground of law. Indeed, they are all grounds of mixed law and facts which the law says cannot be filed without the leave of either the trial court or the court below.

In the final analysis, the appellant not having shown that leave of either the trial Federal High Court, Lagos or the Court of Appeal, Lagos Division, was duly obtained before the Notice of Appeal dated 23rd July, 2013 against the interlocutory decision of the trial court was filed,

the said Notice of Appeal was incompetent and deserve to be struck out. Accordingly, the court below was right to have held that the said Notice of Appeal was incompetent and properly struck out.

Having found that the vexed Notice of Appeal filed by the appellant which was challenged by the 1st respondent was incompetent, leave not having been obtained to file same and was appropriately struck out, I do not consider it necessary to further consider the second issue raised by the appellant. In any event, once a Notice of Appeal is adjudged incompetent and struck out, there was nothing left with the appeal.

In the circumstance, and without any further ado, this appeal is lacking in merit and should be dismissed. Appeal is accordingly dismissed.

The decision of the court below delivered on 11th August, 2014 by which the appellant's Notice of Appeal filed before the court below was struck out is affirmed.

Parties are to bear their respective costs.

Olu Ariwoola,
Justice, Supreme Court

I. T. MUHAMMAD, (JSC): My learned brother, Ariwoola, (JSC) graciously, made available to me a copy of his lead judgment just delivered. I agree with him in his reasoning and conclusion. I, too, dismiss the appeal and abide by consequential orders made in the lead judgment.

Ibrahim Tanko Muhammad,
Justice, Supreme Court

BAYANG AKAAHS (JSC): My learned brother,

Ariwoola, (JSC), made available to me before now his judgment in this appeal which turns on the notice and grounds of Appeal filed by the appellant after the Federal High Court sitting in Lagos had dismissed its preliminary objection together with the application seeking to discharge the order of interim injunction granted against it on 12/7/2013 in Suit No. FHC/C/L/CS/847/2013. The appellant was dissatisfied with the ruling of the trial Federal High Court and appealed against it in Appeal No. CA/L/849B/2013.

On 11/8/2014 the Court of Appeal struck out the appeal on account of incompetent notice and grounds of appeal since leave to appeal was not granted either by the Federal High court or the Court of Appeal. It is against this judgment delivered on 11/8/2014 that the appellant further appealed to this Court and filed its Notice of Appeal containing eight grounds on 22/8/2014 from which two issues were distilled for determination.

We should not lose sight of the appeal which was struck out by the lower court. The notice was accompanied by four grounds of appeal. The said grounds shorn of their particulars are as follows:

"Ground One

The learned trial judge erred in law when His Lordship held that the appellant a purported agent of NIMASA was a proper party to the action for acts purportedly done by NIMASA, when NIMASA itself was not joined as a party.

"**Ground Two**

The learned trial judge erred in law when His Lordship held that the appellant was properly joined as a party since there were allegation of wrong in some paragraphs of the Originating Summons.

"Ground Three

The learned trial judge erred in law when His Lordship refused to decline jurisdiction to entertain the suit when the proper parties necessary for proper resolution of the questions were not before it.

"Ground Four

The learned trial judge erred in law when His Lordship held that non-compliance with the pre-action notice to NIMASA under section 53(2) of the NIMASA Act, did not rob the court of jurisdiction to entertain the substantive suit which was brought against appellant, as agent of NIMASA, because the suit raised claims in tort which could be proceeded with against principal and agent either jointly or severally".

Both the grounds of appeal contained in the Notice of Appeal in the court below as well as the notice and grounds of appeal to this court must be scrutinized to see if they are grounds of law as claimed by the appellant or grounds of mixed law and fact as contended by the respondents in the court below and in this court. The use of the phrase "error in law" is not a magic wand that will automatically transform a ground of appeal into ground of law. Guidelines have been given on how a ground of law is to be distinguished from one that is of mixed law and fact. See **Ogbechie vs. Onochie (1986) 1 NWLR (Pt. 23) 484;**

Nwadike vs. Ibekwe (1987) 4 NWLR (Pt. 67) 718. In order to determine the nature of a ground of appeal, both the grounds and the particulars must be read together. See: **Nnanyelugo L. A. Orakasim & Ors vs. Francis Ifeanyichukwu Menkiti (2001) 9 NWLR (Pt. 719) 529**.

My Lord, Ariwoola (JSC), has admirably dissected the grounds of appeal in the court below and in this court and arrived at the conclusion that the court below was right to strike out the appeal since the grounds in the Notice of Appeal were grounds of mixed law and fact and leave was required before the appeal could become competent. Since leave was not sought either in the trial court or the court below, the appeal was incompetent and liable to be struck out which the court below did. I entirely agree.

The appeal lacks merit and it is accordingly dismissed. I also endorse the order that parties should bear their respective costs.

K. B. AKAAHS
Justice, Supreme Court

CENTUS NWEZE, (JSC): My Lord, Ariwoola, (JSC), obliged me with the draft of the leading judgment just delivered now. I agree with His Lordship's reasoning and conclusion.

In consequence, this short contribution would be circumscribed to a juridical phenomenon which has become an albatross to many appeals. As shown in the leading judgment, the respondent's preliminary objection, at the lower court, was predicated on the irrefutable contention that, whereas the appellant's Grounds of Appeal broached questions of mixed law and fact, no prior leave of the either

the Federal High Court or of the lower court was sought and obtained; hence the appeal was incompetent *ab initio*.

The submission found favour with the lower court. In this further appeal, the appellants still maintained that they needed no such leave either from the trial Federal High Court or the lower court. In effect, they impugned the conclusion of the lower court on this question.

Like the leading judgment, I find no merit in this compliant against the position which the lower court took; that is, its decision striking out the Notice of Appeal before it as being incompetent.

My Lords, this conclusion notwithstanding, it ought to be restated here that even this court had confessed its difficulty in distinguishing a ground of law from a ground of mixed law and fact, **Ogbechie vs. Onochie (1986) 1 NWLR (pt. 70) 370**. There, Eso (JSC), approvingly, adopted the scintillating expose on the subject by C. T. Emery and Professor B. Smythe in their article titled, "Error of Law in Administrative Law", in Law Quarterly Review Vol. 100 (October 1984).

Other examples include: **UBA Ltd vs. Stanhlbau GMBH & Co (1989) 3 NWLR (Pt 110) 374, 391-392; Obatoyinbo vs. Oshatoba (1996) 5 NWLR (Pt 450) 531, 548; MDPDT vs. Okonkwo (2001) 3 KLR (pt. 117) 739 etc**.

Instructively, however, this difficulty, notwithstanding, this court has, ingeniously, fashioned out formulae for navigating through the nuances of the characterization of grounds of appeal.

The first formula aims at facilitating the

ascertainment of what constitutes a ground of appeal. It comes to this: a court has a duty to do a thorough examination of such grounds which the appellant filed.

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

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

Simply put, these formulae simply mean that it is the essence of the ground; the main grouse: that is, the reality of the complaint embedded in that name, that determines what any particular ground involves, **Abidoye vs. Alawode (2001) 3 KLR (Pt. 118) 917,919; NEPA vs. Eze (2001) 3 NWLR (Pt. 709) 606; Ezeobi vs. Abang (2000) 9 NWLR (Pt. 672) 230; Ojukwu vs. Kaine (2000) 15 NWLR (Pt. 691) 516.**

In effect, it is neither its cognomen nor its designation as "Error of Law" that determines the essence of a ground of appeal, **Abidoye vs. Alawode (supra) 927; UBA Ltd Vs. Stahlbau GMBH and Co. (1989) (supra) 374, 377; Ojemen vs. Momodu (1983) 3 SC 173.**

Against this background, I sympathize with the appellant's counsel, and indeed, all counsel who have been enmeshed in this nightmare. But wait a minute! My Lords, permit me to add here that my sympathy for counsel is of no moment as the law books have neither sentiment nor

empathy, **Suleiman vs. C. O. P. Plateau State (2008) 21 WRN 1, 13; Udesen vs. State (2007) 4 NWLR (Pt. 1023) 125, 137; Ezeugo vs. Ohanyere (1978) 6 7 SC 171; Oniah vs. Onyia (1989) 1 NWLR (Pt. 99) 514; Omole and Sons Ltd vs. Adeyemo (1994) 4 NWLR (Pt. 336) 48.**

Accordingly, I agree with the lead judgment that this appeal is unmeritorious and must fail. As a result, I also enter an order dismissing it. I abide by the consequential orders in the lead judgment.

Chima Centus Nweze
Justice, Supreme Court

AMIRU SANUSI, (JSC): The judgment prepared by my learned brother, Ariwoola (JSC), was made available to me before now. Having perused same, I find myself in entire agreement with his reason and conclusion that this appeal is bereft of any merit and deserves to be struck out.

His Lordship had thoroughly and painstakingly dealt with all the salient issues canvassed by the learned counsel to the parties before he arrived at such conclusion which I entirely agree with and adopt as mine. I also adjudge the appeal to be meritless. In affirming the judgment of the court below, I hereby also strike out the appeal and decline to award costs. Appeal struck out.

Amiru Sanusi
Justice, Supreme Court

JAMES SIMON
AND
THE STATE

SC.144/2013

IN THE SUPREME COURT OF NIGERIA
HOLDEN AT ABUJA
FRIDAY, 27 JANUARY, 2017

BEFORE THEIR LORDSHIPS

OLABODE RHODES-VIVOUR	**JUSTICE, SUPREME COURT**
MUSA DATTIJO MUHAMMAD	**JUSTICE, SUPREME COURT**
CLARA BATA OGUNBIYI	**JUSTICE, SUPREME COURT**
CHIMA CENTUS NWEZE	**JUSTICE, SUPREME COURT**
AMIRU SANUSI	**JUSTICE, SUPREME COURT**

APPEAL: Concurrent findings of two lower courts – Attitude of the Supreme Court thereto.

COURT: Confessional statement by an accused – When an accused retracts his confessional statement – Attitude of Court thereto.

COURT: Whether court can convict solely on the Confessional statement of accused – Consideration thereof.

CRIMINAL LAW AND PROCEDURE: Whether failure to tender exhibits recovered in the process of armed robbery is fatal to the case of the prosecution.

CRIMINAL LAW AND PROCEDURE: Whether prosecution is obliged to call all witnesses listed in the Proof of Evidence.

CRIMINAL LAW AND PROCEDURE: Whether the prosecution is obliged to call a minimum number of witnesses in order to prove the charge.

CRIMINAL LAW AND PROCEDURE: Improper description of scene of incident in a charge of armed robbery – Whether has any implication.

CRIMINAL LAW AND PROCEDURE: Confessional statement – Objection by accused – Accused objects that he did not make the confessional statement – Procedure thereto.

CRIMINAL LAW AND PROCEDURE: Prosecution tenders confessional statement – No objection by the accused – Implication.

CRIMINAL LAW AND PROCEDURE: Confessional statement – Retraction by the accused – Procedure thereto.

CRIMINAL LAW AND PROCEDURE: Elements of offence of armed robbery – Burden on prosecution.

CRIMINAL LAW AND PROCEDURE: Whether the prosecution must tender weapons used in armed robbery as exhibits.

CRIMINAL LAW: Conspiracy – Nature of.

CRIMINAL LAW: When is the offence of Conspiracy committed.

EVIDENCE: Admission by accused person – Section 28 of Evidence Act – Scope.

EVIDENCE: How to determine the quality and reliability of confessional statement – Guiding principles.

EVIDENCE: When a confessional statement can sustain conviction of the accused?

EVIDENCE: The purpose of cross examination.

EVIDENCE: The relevance of cross examination

EVIDENCE: The application of the Inconsistency Rule to the statement of an accused person.

EVIDENCE: Inconsistency Rule – Import

EVIDENCE: Withholding of evidence – Section 167(d) of the Evidence Act – When applicable.

Issues for Determination

1. Whether the failure of the respondent to call as witnesses the victims of the robbery and tender the items allegedly recovered from the appellant was not fatal to its case.
2. Whether the learned justices of the Court of Appeal were right in affirming the conviction of the appellant having regard to the evidence before the court.

Facts of the Matter

The appellant, and two others namely Joel Adamu, and Ibrahim Musa were arraigned before **Talba J,** of an Abuja High Court charged with conspiracy to commit Armed Robbery and Armed Robbery contrary to section 5 and 1(2) (a) of the Robbery and Firearms Special Provisions Act Cap 398 Laws of the Federation of Nigeria 1990.

At about 3.40 a.m. on 8 September 2005 about ten men armed with clubs, sticks and cutlasses etc. broke into the Anglican Church Guest House at Wuse Zone 5, Abuja. They proceeded to steal handsets, money, wrist watches, and trinkets from those residing in the Guest House. The security man, PW3 was tied down by the appellant and it was he who was left to guard PW3 while the armed robbery was in progress. The Federal Capital Territory Police Command control room was alerted. Inspector Akeem Lamboye and his team raced to the Guest House, but the hoodlums had escaped before their arrival. Inspector Akeem Lambuyo, PW1 and the other policemen were able to block all exits out of the canal behind the Guest House and in the course of combing the bush by the canal the 1st accused/appellant was arrested and the following items were recovered from him Samsung handset, N4,930 cash, necklace chain, two wrist watches and a belt. He was taken to the Police Station where most of the victims of the robbery were already waiting. At the station he made a statement. During trial his counsel raised objection when the prosecuting counsel applied to tender it. His objection being that the statement was not obtained voluntarily. The court ordered a trial within trial, but midway through proceedings of the mini trial on 28 January 2008 learned counsel for the appellant applied to withdraw his objection to the admissibility of the statement on the grounds

that the statement was obtained under violence. His position being that the appellant never made a statement. The statement was then admitted in evidence as Exhibit A. The appellant led the police to Jabi Park, Abuja where the two other accused persons were arrested. The second statement made by the appellant was admitted without objection as Exhibit B1.

The appellant and the other two accused persons denied both counts. This is an appeal by the 1st accused person. At the trial the prosecution fielded three witnesses and tendered two statements while the appellant testified in his defence. He did not call any witness. After hearing and evaluation of evidence the learned trial judge convicted the appellant and the other two accused persons on both counts and sentenced them to death.

Dissatisfied with both his conviction and sentence, the appellant appealed to the Court of Appeal. That court affirmed the decision of the High Court and dismissed the appeal.

This appeal is against that judgment.

Held: (*Unanimously dismissing the appeal)*

1. The elements of offence of armed robbery

To succeed, the prosecution must prove beyond reasonable doubt that:

(a) There was a robbery or series of robberies;

(b) The robbery or each robbery was an armed robbery and

(c) The accused was one of those who took part in the armed robbery.

[Bozin vs. State (1985) 5 SC P.106; Okosi vs. Attorney General Bendel State (1989) 2 SC (Pt.1) P.126;

Martins vs. State (1997) 1 NWLR (Pt.481) P.355; Osuagwu vs. State (2013) 1-2 Sc (Pt.1) P.37; Emeka vs. State (2014) 6-7 SC (Pt.1) P.64)] *(P 399 paras D-F)*

2. *The prosecution is not obliged to call all witnesses listed in the proof of Evidence*

In proof of the charge of armed robbery against the appellant the prosecution called one of the victims of the robbery, Julius T. Nonsham. He being an eye witness gave uncontroverted evidence of the role of the appellant in the armed robbery. The prosecution was in the circumstances able to establish beyond reasonable doubt that the appellant was one of the robbers that robbed Julius T. Nonsham of his valuables in the night of 8 September, 2008. There was no need to call all the eight witnesses listed in the proof of evidence to establish the fact that Julius T. Nonsham was robbed when this fact was easily established by Julius T. Nonsham himself when he gave credible and compelling evidence on the said armed robbery.

Calling three witnesses out of the eight witnesses listed in the proof of evidence is not fatal to the case of the prosecution. *(Pp 399-400 paras G-B, D)*

3. *The prosecution is not obliged to call a certain number of witnesses to secure conviction*

Generally, the law does not impose any obligation on the part of the prosecution as to the number of witnesses to call to prove its case. However, the quality of the evidence it leads sustains its case. [Babuga vs. The State (1996) 7 NWLR (Pt. 460) 279

and Alli vs. State (1988) 1 NWLR (Pt.68) 1 at 70)]. *(Pp 411-412 paras H-A)*

4. *The principle of withholding of evidence does not apply in the instant case*

Section 167 (d) of the Evidence Act states that:

> **"Evidence which could be and is not produced would, if produced be un-favourable to the person who withholds it".**

In the light of the fact that the victim of the robbery in Count 2(1) who is also an eye witness to the armed robbery gave uncontroverted evidence, nothing was withheld in proof of armed robbery in Count 2(1). *(P 400 paras E-G)*

5. *The failure to tender recovered items in a case of armed robbery is not always fatal*

In a case of armed robbery all that is required of the prosecution is to prove that there was an armed robbery and the appellant was one of the armed robbers.

Tendering recovered items from an armed robbery is desirable but not mandatory, especially when there is damaging eye witness evidence that the appellant was one of the armed robbers. PW3 an eye witness gave evidence that was direct, very credible and compelling that the appellant was actually the armed robber who tied him up and stood guard over him while the armed robbery in the Guest House was

in progress. Tendering recovered stolen items on these facts are unnecessary since there is overwhelming eye witness evidence that the appellant took part in the armed robbery. *(P 400 paras D-H)*

6. *The failure of the prosecution to tender the weapons recovered is not fatal to the case of armed robbery*
Nowhere in the law is it stated that the prosecution should tender weapons used in the robbery. Weapons used in armed robberies are usually easily disposable items as in this case, clubs, stick, cutlasses. The circumstances of most robberies do not require the tendering of weapons used by the robbers, all that is required is that the robber was armed when he robbed the victim. The prosecution does not need to tender the weapons used in an armed robbery.
(P 400 paras E-F)

7. *The effect of misdescription of the scene of robbery in the charge*
To my mind since the charge and the confessional statements state that the armed robbery occurred at Wuse Zone 5, the prosecution, not mentioning the correct name of the Guest House is irrelevant. The fact that the armed robbery occurred in a Christian Guest house/lodge in Wuse Zone 5 is clearly established to my satisfaction and I am in complete agreement with both courts below on the crime scene.
(P 403 paras C-D)

8. *The nature of the offence of conspiracy*
Per-Rhodes-Vivour (JSC):

"In **Oyediran vs. Republic (1966) 4 NSCC p.252, Coker, (JSC)** explained the modes of forming conspiracy when His lordship said that:

1. Conspiracy may be formed in one of the following ways:
(a) The conspirators may all directly communicate with each other at a particular place and time and enter into an agreement with a common design.
(b) There may be one person who is the hub around whom the others revolve like the centre of a circle and the circumference.
(c) A person may communicate with A and A with B, who in turn communicates with another, and so on. This is what is called 'chain' conspiracy.
2. In order to establish conspiracy therefore, it is not necessary that the conspirators should know each other. They do not have to know each other so long as they know of the existence and the intention or

purpose of the conspiracy.

3. **It becomes clear that there is said to be a conspiracy when A and B agree to commit a crime, and the agreement between A and B can be inferred after examining the facts of the case. [Njovens vs. State (1973) 5Sc p.17; Mumuni vs. State (1975) 6 SC p.79); Daboh vs. State (1977) 5 SC p.197); Osetola & Anor vs. State (2012) 6SC (Pt.iv) p.148)]**

(Pp 403-404 paras E-E)

9. *The offence of conspiracy was proved in the instant case*

The appellant and the other two armed robbers said that one Omo was the one who put the gang together. Omo is the hub around whom the appellant and the other armed robbers revolve. On arrival at the Guest House on 8/9/2005 they tied up the security man, PW3, while the appellant stood guard over him. They robbed PW3 and occupants of the guest house. It is obvious from these facts that the appellant and the other armed robbers agreed to rob occupants of the guest house. The agreement becomes very clear when the appellant was assigned the duty of keeping guard over PW3, a duty he performed creditably. The offence of conspiracy was committed when the appellant and the other armed robbers agreed to burgle the Guest House while armed on 8 September, 2008. Both courts below were correct that the count on conspiracy was proved beyond reasonable doubt.

(Pp 404-405 paras F-A)

10. *The meaning of the inconsistency rule*

In **R vs. Golder (1960) 1 WLR P.1169,** Lord Parker CJ of England explained the inconsistency Rule when His lordship said that:

> **"..... When a witness is shown to have made previous statements inconsistent with the evidence given by that witness at the trial, the jury should not merely be directed that the evidence given at the trial should be regarded as unreliable, they should also be directed that the previous statements, whether sworn or unsworn do not constitute evidence upon which they can act".**

This position of the law has long since been adopted and applied in Nigeria. **[Joshua vs. Queen (1964) ANLR P.1; State vs. Okoro (1974) 2 SC p.73 and Queen vs. Ukpong (1961) ALL NLR P.26)**

(Pp 405-406 paras F-B)

11. *The scope of the inconsistency rule as it applies to an accused person*

The law is long settled that the inconsistency Rule does not apply to an accused person. Cases where an accused persons confessional extra judicial statements run contrary to his testimony in court are not covered by the inconsistency Rule. The court is at liberty to convict on the retracted confessional statement of an accused person provided the testimony and confession of the accused person and

all other evidence are properly evaluated.

Once an accused person's confessional statement is voluntary and true but inconsistent with his evidence in court a court may convict. (Egboghonome vs. State (1993) 7 NWLR (Pt.306) p.383). *(P 406 paras C-F)*

12. *A confessional statement alone can sustain the conviction of the accused*

It has long been settled that confessional statement of the appellant alone, where cogent and unequivocal, may sustain his conviction on appeal notwithstanding the inconsistency of the statement with his subsequent oral statement at trial. The court is at liberty to discountenance the subsequent oral statement for being an afterthought. [State vs. Okoro (1974) 2 SC 73 and Egboghonome vs. State (1999) 7 NWLR (Pt.306) 383] *(P 412 paras B – D)*

13. *A court can convict solely on the confessional statement of the accused*

The law is well established also that a conviction of an accused person could be grounded solely on a confessional statement made by him.
(P 414 paras E-F)

14. *The circumstances in which a confessional statement can sustain a conviction*

Section 28 of the Evidence Act defines confession. It states that:

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

It is well settled law that a free and voluntary confession of guilt made by an accused person if it is direct and positive is sufficient for a conviction without corroborative evidence, so long as the court is satisfied that the confession is true. Haruna vs. A.G. Federation (2012) 3 SC (Pt. IV) P.40); Adekoya vs. State (2012) 3 SC (Pt.III) P.36); Galadima vs. State (2012) 12 Sc (Pt.II) P.213.)

It is desirable, though not mandatory to have some evidence outside the confession which makes it probable that the confession is true.
In Exhibits A and B1 the appellant admitted that he and his co-armed robbers agreed and planned to rob the Guest House. *(Pp 406-407 paras F-C)*

15. *The import of S.28 of the Evidence Act*

By the provision of section 28 of the Evidence Act, an admission made at any time by a person charged with a crime stating or suggesting the inference that he committed the crime amounts to a confession. (Patrick Ikemson & 2 ors vs. The State (1989) 3 NWLR (Pt.110) 455 at 476. *(P 414 paras D-E)*

16. *Where an accused objects to the tendering of a statement on the ground that he did not make it.*

At the trial the appellant said that exhibit A was obtained under duress. He then said his statement

was never obtained. Exhibit B1 was tendered in evidence without objection. It is long settled that where an accused person objects to the tendering of a confessional statement on the ground that he did not make it, the question as to whether he made it or not is to be decided at the end of trial by the learned trial judge. No matter the objection by counsel, such a statement should be admitted since the issue of voluntariness of the statement does not arise for consideration. [Queen vs. Igwe (1960) 5 FSC p.55; Ikpasa vs. Bendel State Vol.12 (1979 1981) NSCC p. 300). *(P 407 paras C-F)*

17. *The implication where a confessional statement is tendered without objection.*

When a confessional statement is tendered without objection the clear understanding is that it is a free and voluntary confession made by the accused person.

Exhibit A and B1 are without doubt a confession by the appellant to armed robbery and conspiracy to commit armed robbery is easily inferred from the facts. The confession was free and voluntary and in itself fully consistent and probable. *(Pp 407-408 paras G-A)*

18. *The relevance of cross-examination in trial proceedings*

When a witness (the adversary) testifies on a material fact in controversy in the case, the other party, if he does not accept the witness testimony as true, should cross-examine him on that fact or at least show that he does not accept the evidence as true. Where, as in this

case he fails to do either, the court can take his silence as an acceptance that the party does not dispute the fact. [Amadi vs. Nwosu (1992) 5 NWLR (Pt.241) p.275].

It must be made abundantly clear that one of the main purposes of cross-examination is to test the veracity of a witness and in this case it is established that PW3 was telling the truth. Evidence of PW3 is credible and compelling evidence outside the confession which makes it probable that the confession was true. In the light of all that I have been saying the trial court was right to convict on the appellant's confessional statements, subsequently retracted, and the Court of Appeal was correct to affirm the conviction.

The evidence given by PW3 established the fact that it was an armed robbery when he said:

> **".....many of them came with weapons such as cutlass, matchetes, sticks ..... they tied me down".**

This evidence was unchallenged under cross-examination. *(Pp 409-410 paras F-D)*

19. *The attitude of the Supreme Court to the concurrent findings of two lower courts*

The Supreme Court is always slow to upset concurrent findings of fact made by the High Court and the Court of Appeal, unless a substantial error is apparent on the face of the record of proceedings or when the findings are perverse. (Military Gov. of

Lagos State & ors vs. Adeyiga & 6 ors (2012) 2SC (Pt.1) p.68). *(P 410 paras D-E)*

Per Rhodes-Vivour (JSC):

> **"It is clear that the appellant was convicted on his confessional statement and the evidence of PW3, an eyewitness who saw him participating in the armed robbery on 8/9/2005. The appellant has not been able to show that his statement, particularly Exhibit B1 was not voluntarily made by him, or that he was not seen by PW3 participating in the armed robbery.**

It is my conclusion in the circumstances that since the appellant has not been able to show these findings to be perverse this court cannot interfere with the decisions of both courts below". *(Pp 410 paras E-H)*

20. *The guide to assessing the quality and reliability of a confessional statement*

This court in the case of Madjemu vs. The State (2001) 9 NWLR (Pt.718) 349 however, did provide a guide in assessing and considering the quality and reliability of a confessional statement and using the following yardstick:

- **"i). whether there is anything outside the confession which shows that it may be true;**
- **ii). whether the confessional statement is in fact corroborated;**
- **iii). whether the relevant statement of fact made in it are most likely true as far as they can be tested;**
- **iv). whether the accused had the opportunity of committing the offence;**
- **v). whether the confession is possible;**
- **vi). whether the alleged confession is consistent with other facts that have been ascertained and established.**

(Pp 414-415 paras H-E)

21. *The attitude of court to retracted confession*

It is the position of the law further that a court can rely and act on a retracted confessional statement to convict an accused person; [Nkwuda Edamine vs. The State (1996) 3 NWLR (Pt.438) 530 and Dapere Gira vs. The State (1996) 6 NWLR (Pt.44) 375 at 388].
(P 415 paras E-F)

Nigerian Cases cited in this Judgment

Adekoya vs. State (2012) 3 SC (Pt.III) P.36;
Alli vs. State (1988) 1 NWLR (Pt.68) 1;
Amadi vs. Nwosu (1992) 5 NWLR (Pt.241) p.275;
Babuga vs. The State (1996) 7 NWLR (Pt. 460) 279;
Bozin vs. State (1985) 5 SC P.106;
Daboh vs. State (1977) 5 SC p.197;
Dapere Gira vs. State (1996) 4 NWLR (Pt.443) P.375;
Dapere Gira vs. The State (1996) 6 NWLR (Pt.44) 375;
Egboghonome vs. State (1993) 7 NWLR (Pt.306) p.383;
Egboghonome vs. State (1999) 7 NWLR (Pt.306) 383;
Emeka vs. State (2014) 6-7 SC (Pt.1) 64;
Galadima vs. State (2012) 12 Sc (Pt.II) 213;

Gbadamosi vs. The State (1991) 6 NWLR (Pt.196) 182;
Haruna vs. A.G. Federation (2012) 3 SC (Pt. IV).40;
Ikpasa vs. Bendel State Vol.12 (1979 1981) NSCC 300;
Joshua vs. Queen (1964) 1 ANLR 1;
Madjemu vs. The State (2001) 9 NWLR (Pt.718) 349;
Martins vs. State (1997) 1 NWLR (Pt.481).355;
Military Gov. of Lagos State & ors vs. Adeyiga & 6 ors (2012) 2SC (Pt.1) 68;
Millar vs. State (2005) 8 NWLR (Pt.927) 236;
Mumuni vs. State (1975) 6 SC 79;
Njovens vs. State (1973) 5Sc 17;
Nkwuda Edamine vs. State (1996) 3 NWLR (Pt.438) 530;
Nwabuoku vs. Ottih (1961) 1 ALL NLR 487;
Nwomu Koro & Ors vs. State (1995) 1 NWLR (Pt.372) 432;
Okosi vs. Attorney General Bendel State (1989) 2 SC (Pt.1) 126;
Olayinka vs. State (2008) 6 ACLR p.194;
Olayinka vs. The State (2007) 9 NWLR (Pt.1040) 561;
Osetola & anor vs. State (2012) 6SC (Pt.iv)148;
Osuagwu vs. State (2013) 1-2 Sc (Pt.1) 37;
Oyediran vs. Republic (1966) 4 NSCC 252;
Patrick Ikemson & 2 ors vs. The State (1989) 3 NWLR (Pt.110) 455 at 476;
Queen vs. Igwe (1960) 5 FSC 55;
Queen vs. Ukpong (1961) ALL NLR 25;
Shurumo vs. State (2010) 19 NWLR (Pt.1226)73;
State vs. Ajayi (2016) LPELR 40663 (SC) 51 52,;
State vs. Okoro (1974) 2 SC 73;
Ubierho vs. The State (2002) 5 NWLR (Pt.819) 644.

Foreign Cases cited in this Judgment
R vs. Golder (1960) 1 WLR P.1169

Nigerian Statutes cited in this Judgment
A. The Robbery and Firearms Special Provisions Act Cap 398 Laws of Federation of Nigeria 1990;
B. The Evidence Act
C. The Evidence Act; and
D. The Robbery and Firearms Special Provisions Act Cap 398 Laws of the Federation of Nigeria 1990.

Representations
A. Saiki (Esq.) for the Appellant, with him
A. Omotosho (Esq.); I. T. Hassan (Esq.); D. Akinyemi (Esq.)
E. Egele (Miss) for the Respondent

RHODES-VIVOUR, (JSC), (Delivering the Lead Judgment)

The appellant, and two others namely Joel Adamu, and Ibrahim Musa were arraigned before **Talba J,** of an Abuja High Court, charged with conspiracy to commit Armed Robbery and Armed Robbery contrary to section 5 and 1(2) (a) of the Robbery and Firearms Special Provisions Act Cap 398 Laws of the Federation of Nigeria 1990.

The appellant and the other two accused persons denied both counts. This is an appeal by the 1st accused person. At the trial the prosecution fielded three witnesses and tendered two statements while the appellant testified in his defence. He did not call any witness. After hearing and evaluation of evidence the learned trial judge convicted the

appellant and the other two accused persons on both counts and sentenced them to death.

Dissatisfied with both his conviction and sentence, the appellant appealed to the Court of Appeal. That court affirmed the decision of the High Court and dismissed the appeal.

This appeal is against that judgment.

In accordance with the Rules of this court, the appellant and respondent filed and exchanged briefs of argument. The appellant identified two issues for determination, namely:

3. Whether the failure of the respondent to call as witnesses the victims of the robbery and tender the items allegedly recovered from the appellant was not fatal to its case.

4. Whether the learned justices of the Court of Appeal were right in affirming the conviction of the appellant having regard to the evidence before the court.

For the respondent, two issues were also postulated, to wit:

1. Whether there was a miscarriage of justice in convicting the appellant in spite of the respondent's failure to call all those listed in the proof of evidence as witnesses and tender the recovered stolen items in evidence.

2. Whether from the evidence adduced the learned Justices of the Court of Appeal were wrong in affirming the conviction and sentence of the appellant.

A close look at the two sets of issues shows clearly that learned counsel for the parties appear to be *ad idem* on the issues. They ask the same questions. I shall accordingly rely on the appellant's issues in considering this appeal.

At the hearing of the appeal on 3 November 2016, learned counsel for the appellant, Mr. A. Saiki adopted the appellant's brief and urged this court to allow the appeal, while learned counsel for the respondent, Miss A. Egele adopted the respondent's amended brief and urged this court to dismiss the appeal and affirm the concurrent decisions of both courts below.

The Facts are These

At about 3.40 a.m. on 8 September 2005 about ten men armed with clubs, sticks and cutlasses etc. broke into the Anglican Church Guest House at Wuse Zone 5, Abuja. They proceeded to steal handsets, money, wrist watches, and trinkets from those residing in the Guest House. The security man, PW3 was tied down by the appellant and it was he who was left to guard PW3 while the armed robbery was in progress. The Federal Capital Territory Police Command control room was alerted. Inspector Akeem Lamboye and his team raced to the Guest House, but the hoodlums had escaped before their arrival. Inspector Akeem Lamboye, PW1 and the other policemen were able to block all exits out of the canal behind the Guest House and in the course of combing the bush by the canal the 1st accused/appellant was arrested and the following items were recovered from him Samsung handset, N4,930 cash, necklace chain, two wrist watches and a belt. He was taken to the Police Station where most of the victims of the

robbery were already waiting. At the station he made a statement. During trial his counsel raised objection when the prosecuting counsel applied to tender it. His objection being that the statement was not obtained voluntarily. The court ordered a trial within trial, but midway through proceedings of the mini trial on 28 January 2008 learned counsel for the appellant applied to withdraw his objection to the admissibility of the statement on the grounds that the statement was obtained under violence. His position being that the appellant never made a statement. The statement was then admitted in evidence as Exhibit A. The appellant led the police to Jabi Park, Abuja where the two other accused persons were arrested. The second statement made by the appellant was admitted without objection as exhibit B1.

Issues One and Two

Learned counsel for the appellant, observed that eight witnesses were listed in the proof of evidence but only three of them gave evidence. He further observed that Mrs. Ikphopsa, R.O. Joel Ukpe, and Navy Capt, Wahid were victims of the robbery who all gave their statements to the Police but were not called to give evidence. He submitted that failure to call them to testify is fatal to the respondent's case. Reliance was placed on **Millar vs. State (2005) 8 NWLR (Pt.927) p.236 Section 167(d)** of the Evidence Act.

He submitted that failure by the respondent to tender in evidence the items allegedly recovered is fatal to the case, moreso in the absence of any explanation as to the whereabouts of the said items or why they were not brought to court. Reliance was placed on **Nwomu Koro & Ors vs.**

State (1995) 1 NWLR (Pt.372) P.432.

He submitted that failure to call vital and material witnesses listed in the proof of evidence and failure to tender the stolen items allegedly recovered from the appellant is fatal to the respondent's case.

Learned counsel for the appellant observed that the confessional statements of the appellant, Exhibits A and B1 are inconsistent with other facts on the crime scene. He observed that the charge and respondent's witnesses alleged that the offence of armed robbery was committed at No.23 Anglican Church Guest House, Dauda Street, Wuse Zone 5, Abuja while Exhibits A and B1, the confessional statements of the appellant states the scene of crime to be at Wuse Zone 5 at All Saints lodge. He submitted that since there was no clarification of where the armed robbery occurred the trial court and Court of Appeal's conclusions are speculative.

On the offence of conspiracy, he submitted that there was no direct or circumstantial evidence suggesting or inferring common intention on the part of the appellant with the other accused persons contending that the charge of conspiracy should fail since the appellant stated categorically that he never knew the other accused persons. Reliance was placed on **Shurumo vs. State (2010) 19 NWLR (Pt.1226) P.73.**

On whether the robbery was armed robbery, learned counsel observed that since PW1 admitted in evidence that clubs and cutlasses used in the robbery were not recovered from the appellant and PW2 also stated that no offensive weapons were recovered from the appellant shows that the robbery, if at all, was not armed robbery.

Concluding he submitted that in view of the inconsistency rule the confessional statements, Exhibits A and B1 were wrongfully relied and acted upon by the trial court and the Court of Appeal to convict the appellant, contending that the respondent failed to prove the case against the appellant beyond reasonable doubt, observing that the conviction and sentence of the appellant was manifestly in error, urging this court to allow the appeal.

Responding, learned counsel for the respondent observed that PW3 is an eye witness and victim of the robbery who gave a positive account of the robbery, contending that his evidence is sufficient to establish the offences charged against the appellant.

On the presumption of withholding evidence as provided in Section 167(d) of the Evidence Act, he submitted that witholding of evidence is not equated with not calling witnesses, contending that the presumption does not apply in the present case. He urged the court to resolve this issue in favour of the respondent.

Learned counsel for the respondent argued that there is no controversy on the crime scene, contending that All Saints lodge Wuse referred to in the confessional statement and No.23 Anglican Church Guest House Dauda Street, Wuse Zone 5, Abuja referred to in the charge are churches, relying on **Nkwuda Edamine vs. State (1996) 3 NWLR (Pt.438) P.530.**

Dapere Gira vs. State (1996) 4 NWLR (Pt.443) P.375.

Learned counsel submitted that the court can act and rely on a retracted confessional statement to convict an accused person after considering the weight to be attached to the

statement.

He further submitted that evidence of PW3, an eye witness and victim of the robbery is consistent with the confessional statements Exhibits A and B1 observing that it is evidence outside the confessional statements which is an attestation to the truthfulness of the statements.

Concluding, he submitted that apart from Exhibits A and B1 the evidence of PW3, an eye witness, was positive, direct and credible moreso as it was un-contradicted and un-controvertible under cross-examination and so sufficient to convict the appellant, further submitting that the charge of conspiracy and armed robbery were established.

The proof of evidence had eight witnesses listed as those the prosecution would call to establish its case beyond reasonable doubt against the accused person/appellant, but only three witnesses were called to give evidence.

Is this fatal to the case of the prosecution?

The appellant was charged on two Counts. They read:

Count 1:

"That you James Simon, Joel Adamu and Ibrahim Musa, all of Jabi Motor Park, Omo Awalu, Ojo, Magaji, David, Danlami and Mubo all now at large on or about 8 September, 2005 at about 3:40 hours at No.23 Anglican Church House Guest House Dauda Street, Wuse Zone 5, Abuja, within Abuja Judicial Division, did conspire together to

commit felony to wit: armed robbery and you thereby committed an offence contrary to Section 5 of the Robbery and Firearms Special Provisions Act Cap 398 Laws of Federation of Nigeria".

Count 2:

"That you James Simon, Joel Adamu and Ibrahim Musa, all of Jabi Motor Park; Omo, Awalu, Ojo, Magaji, David, Danlami and Mubo all now at large on or about 8 September, 2005 at about 3:40 hours at No.23 Anglican Church House Guest House Dauda Street, Wuse Zone 5, Abuja, within Abuja Judicial Division, while armed with cutlasses, sticks, woods and other offensive weapons robbed:

(1) Julius T. Nonsham of No.23 Church House, Guest House, Wuse Zone 5, Abuja, of the sum of N1,505.00 cash, one rechargeable touch light, one handset valued at N25,000.00.

(2) Navy Captain I. Wahid of same address of one Nokia handset, 22 gold necklace, N7,000.00 cash and white Navy shoes.

(3) Nwafor Kelvin C. of the same address of the sum of N25,000.00 cash, two handsets, a bag containing clothes and many other valuables.

(4) Comfort C. Okpe of the same address of N9,500.00, one handset, one wrist watch, some trinkets and other valuables.

AND

(5) Many other occupants of the church House, Guest House, you thereby committed an offence contrary to section 1(2) of the Robbery and Firearms Special Provisions Act Cap 398 Laws of Federation of Nigeria 1990.

To succeed the prosecution must prove beyond reasonable doubt that:

(d) There was a robbery or series of robberies;

(e) The robbery or each robbery was an armed robbery and

(f) The accused was one of those who took part in the armed robbery. See **Bozin vs. State (1985) 5 SC P.106; Okosi vs. Attorney General Bendel State (1989) 2 SC (Pt.1) P.126; Martins vs. State (1997) 1 NWLR (Pt.481) P.355; Osuagwu vs. State (2013) 1-2 Sc (Pt.1) P.37; and Emeka vs. State (2014) 6-7 SC (Pt.1) P.64**

In proof of the charge of armed robbery against the appellant, the prosecution called one of the victims of the robbery, Julius T. Nonsham. He, being an eye witness, gave uncontroverted evidence of the role of the appellant in the armed robbery. The prosecution was in the circumstances able to establish beyond reasonable doubt that the appellant

was one of the robbers that robbed Julius T. Nonsham of his valuables in the night of 8 September, 2008. There was no need to call all the eight witnesses listed in the proof of evidence to establish the fact that Julius T. Nonsham was robbed when this fact was easily established by Julius T. Nonsham himself when he gave credible and compelling evidence on the said armed robbery.

Furthermore, an examination of Count 2 reveals that the witnesses who were not called to give evidence were victims of the armed robbery and are vital and relevant witnesses to prove Count 2(2), (3), (4) and (5). Since they were not called these subheads of Count 2 were abandoned. The prosecution proved Count 2 (1) and the victim therein is an eye-witness. Calling three witnesses out of the eight witnesses listed in the proof of evidence is not fatal to the case of the prosecution.

Section 167 (d) of the Evidence Act states that:

> **"Evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it".**

In the light of the fact that the victim of the robbery in Count 2(1) who is also an eye witness to the armed robbery gave uncontroverted evidence, nothing was withheld in proof of armed robbery in Count 2(1).

On the failure of the prosecution to tender the recovered stolen property, this is what the Court of Appeal had to say:

> **"..... Once the prosecution has adduced credible evidence to establish there was**

> **removal of property belonging to the victim under threat of hurt that is sufficient. Where goods stolen are recovered, it should be tendered in evidence. However where there is overwhelming evidence that the victims are not ordinarily resident in the place of robbery or are on transit and recovered items have been released to them as personal effects, it will be an enormous task on the prosecution to tender such items recovered. In such circumstances once ownership of property is not in issue the failure to tender an exhibit should not be fatal to prosecution case....."**

In a case of armed robbery all that is required of the prosecution is to prove that there was an armed robbery and the appellant was one of the armed robbers.

Tendering recovered items from an armed robbery is desirable but not mandatory, especially when there is damaging eye witness evidence that the appellant was one of the armed robbers. PW3, an eye witness, gave evidence that was direct, very credible and compelling that the appellant was actually the armed robber who tied him up and stood guard over him, while the armed robbery in the Guest House was in progress. Tendering recovered stolen items on these facts are unnecessary since there is overwhelming eye witness evidence that the appellant took part in the armed robbery.

On the failure of the prosecution to tender the weapon used in the armed robbery, the Court of Appeal said:

"The prosecution need not tender the weapon of the offence of robbery".

Relying on the decision of this court in **Olayinka vs. State (2008) 6 ACLR p.194.**

This court said:

"With respect to the submission of the appellant about the failure of the prosecution to tender the weapons of the alleged robbery and its effect on the prosecution I do not think there is any principle of law requiring the tendering of the weapons of an alleged robbery to establish the guilt of an accused person....."

Nowhere in the law is it stated that the prosecution should tender weapons used in the robbery. Weapons used in armed robberies are usually easily disposable items as in this case, clubs, stick, cutlasses. The circumstances of most robberies do not require the tendering of weapons used by the robbers, all that is required is that the robber was armed when he robbed the victim. The prosecution does not need to tender the weapons used in an armed robbery.

On the crime scene the charge states that the armed robbery occurred at No.23 Anglican Church House, Guest House Dauda Street, Wuse Zone 5, Abuja, while Exhibits A and B1 the confessional statements of the appellant state that the crime scene was at Wuse Zone 5 at All Saints lodge.

In resolving the issue of the crime scene this was what the Court of Appeal had to say:

"..... In searching the area the appellant was arrested at a canal behind the Guest lodge. The Anglican Guest House lodge is a lodge. The fact that the appellant did not mention the correct name of the lodge is insufficient to create doubt on the evidence of the prosecution.....".

To my mind since the charge and the confessional statements state that the armed robbery occurred at Wuse Zone 5, the appellant, not mentioning the correct name of the Guest House is irrelevant. The fact that the armed robbery occurred in a Christian Guest house/lodge in Wuse Zone 5 is clearly established to my satisfaction and I am in complete agreement with both courts below on the crime scene.

In **Oyediran vs. Republic (1966) 4 NSCC p.252, Coker, (JSC)** explained the modes of forming conspiracy when His lordship said that:

4. Conspiracy may be formed in one of the following ways:

(d) The conspirators may all directly communicate with each other at a particular place and time and enter into an agreement with a common design.

(e) There may be one person who is the hub around whom the others revolve like the centre of a circle and the circumstance.

(f) A person may communicate with A and A with B, who in turn communicates with another, and so on. This is what is called 'chain' conspiracy.

5. In order to establish conspiracy, therefore, it is not necessary that the conspirators should know each other. They do not have to know each other so long as they know of the existence and the intention or purpose of the conspiracy.

6. It becomes clear that there is said to be a conspiracy when A and B agree to commit a crime, and the agreement between A and B can be inferred after examining the facts of the case. See Njovens vs. State (1973) 5Sc p.17; Mumuni vs. State (1975) 6 SC p.79; Daboh vs. State (1977) 5 SC p.197; Osetola & Anor vs. State (2012) 6SC (Pt.iv) p.148.

The appellant and the other two armed robbers said that one Omo was the one who put the gang together. Omo is the hub around whom the appellant and the other armed robbers revolve. On arrival at the Guest House on 8/9/2005 they tied up the security man, PW3, while the appellant stood guard over him. They robbed PW3 and occupants of the guest house. It is obvious from these facts that the appellant and the other armed robbers agreed to rob occupants of the guest house. The agreement becomes very clear when the appellant was assigned the duty of keeping guard over PW3, a duty he performed creditably. The offence of conspiracy was committed when the appellant and the other armed

robbers agreed to burgle the Guest House while armed on 8 September, 2008. Both courts below were correct that the count on conspiracy was proved beyond reasonable doubt.

Exhibit A is a confessional statement made by the appellant. When the prosecution applied to tender it as an exhibit, the appellant's counsel objected on the ground that the statement was obtained under duress. A mini trial was conducted to determine if the statement was made voluntarily by the appellant. During the mini trial learned counsel for the appellant changed his stance. He withdrew his objection and said that the statement of the accused was never obtained. The court proceeded to admit the statement as Exhibit A.

Exhibit B1, also a confessional statement made by the appellant, was admitted without objection from his defence counsel.

In cross-examination the appellant denied making any statement to the police. That is to say he made confessions, Exhibits A and B1, which he later retracted in cross-examination.

In **R vs. Golder (1960) 1 WLR P.1169,** Lord Parker (CJ of England) explained the inconsistency Rule when His lordship said that:

"..... When a witness is shown to have made previous statements inconsistent with the evidence given by that witness at the trial, the jury should not merely be directed that the evidence given at the trial should be regarded as unreliable, they should also be directed that the previous statements, whether sworn or unsworn do not constitute evidence upon

which they can act".

This position of the law has long since been adopted and applied in Nigeria. Se **Joshua vs. Queen (1964) 1 ANLR P.1; State vs. Okoro (1974) 2 SC p.73 and Queen vs. Ukpong (1961) ALL NLR 26.**

The issue is not the inconsistency Rule as it applies to a witness, rather it is the inconsistency Rule as it applies to an accused person.

The law is long settled that the inconsistency Rule does not apply to an accused person. Cases where an accused person's confessional extra judicial statements run contrary to his testimony in court are not covered by the inconsistency Rule. The court is at liberty to convict on the retracted confessional statement of an accused person provided the testimony and confession of the accused person and all other evidence are properly evaluated. Once an accused person's confessional statement is voluntary and true but inconsistent with his evidence in court a court may convict. See **Egboghonome vs. State (1993) 7 NWLR (Pt.306) p.383.**

Section 28 of the Evidence Act defines confession. It states that:

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

It is well settled law that a free and voluntary confession of guilt made by an accused person if it is direct and positive is sufficient for a conviction without corroborative evidence,

so long as the court is satisfied that the confession is true. See **Haruna vs. A.G. Federation (2012) 3 SC (Pt. IV) P.40; Adekoya vs. State (2012) 3 SC (Pt.III) P.36 and Galadima vs. State (2012) 12 Sc (Pt.II) P.213.**

It is desirable, though not mandatory to have some evidence outside the confession which makes it probable, that the confession is true.

In Exhibits A and B1 the appellant admitted that he and his co-armed robbers agreed and planned to rob the Guest House.

At the trial the appellant said that Exhibit A was obtained under duress. He then said his statement was never obtained. Exhibit B1 was tendered in evidence without objection. It is long settled that where an accused person objects to the tendering of a confessional statement on the ground that he did not make it, the question as to whether he made it or not is to be decided at the end of trial by the learned trial judge. No matter the objection by counsel such a statement should be admitted since the issue of voluntariness of the statement does not arise for consideration. [**Queen vs. Igwe (1960) 5 FSC p.55; Ikpasa vs. Bendel State Vol.12 (1979 1981) NSCC p.300].**

That is the position of Exhibit A. On the other hand Exhibit B1 is also a confessional statement tendered in evidence without objection by defence counsel. When a confessional statement is tendered without objection the clear understanding is that it is a free and voluntary confession made by the accused person.

Exhibits A and B1 are without doubt a confession by the appellant to armed robbery and conspiracy to commit armed robbery is easily inferred from the facts. The confession was free and voluntary and in itself fully

consistent and probable.

Is there evidence outside the confession which makes it probable that the confession is/was true? PW3, Julius Nomshem, was a victim of the robbery. An eye witness. It was he that was tied up by the armed robbers on the 8th of September 2005 and it was the appellant that stood guard over him while the other armed robbers ransacked the Guest House and stole from the occupants. He gave damaging evidence.

In evidence in Chief he said:

".....I am a security man. I know the three accused persons. On 8/9/2005 when I was patrolling round the premises of the Guest House. .....many of them and with weapons such as cutlass, machete, sticks..... they tied me down, they started their operation and they left one of them to guard me. When they came, there was light in the compound. They removed one handset from me (sergem), the sum of N1,505.00 and a security torch light. The first and the third accused were the ones that tied me. I saw their faces in the light..... they said if I shout they would finish me. After the incident the Police arrested them. I went to the Police Station I saw them. The sergem handset, the security torch light and money were recovered from the accused persons. It was the first accused who was left to guard me....."

Evidence of an eye-witness is one of the best evidence available in a criminal trial provided he is telling the truth, and all too often victims of armed robbery are always ready to identify almost anyone as the armed robber. The court can only find out the truth of a witness testimony by good cross-examination, and his demeanour. I shall reproduce the entire cross-examination, to highlight the shoddy handling of such an important aspect of the trial. It runs as follows:

"The accused persons confessed. At the station I saw the three of the accused. The accused persons were not brought to the Guest Inn in the morning. I may not know if they were brought to the guest Inn. I made a statement at the Police Station Wuse. The police asked me to write what happened at that time and I wrote. I am telling the court the truth. The accused persons were not arrested at the Guest house".

That was all, and quite rightly there was no re-examination. I must explain the importance of cross-examination.

When a witness (the adversary) testifies on a material fact in controversy in the case, the other party if he does not accept the witness testimony as true should cross-examine him on that fact or at least show that he does not accept the evidence as true. Where, as in this case he fails to do either, the court can take his silence as an acceptance that the party does not dispute the fact. See **Amadi vs. Nwosu (1992) 5 NWLR (Pt.241) p.273.**

It must be made abundantly clear that one of the main purposes of cross-examination is to test the veracity of a

witness and in this case it is established that PW3 was telling the truth. Evidence of PW3 is credible and compelling evidence outside the confession which make it probable that the confession was true. In the light of all that I have been saying the trial court was right to convict on the appellant's confessional statements, subsequently retracted, and the Court of Appeal was correct to affirm the conviction.

The evidence given by PW3 established the fact that it was an armed robbery when he said:

".....many of them came with weapons such as cutlass, matchetes, sticks ..... they tied me down".

This evidence was unchallenged under cross-examination. The Supreme Court is always slow to upset concurrent findings of fact made by the High Court and the Court of Appeal, unless a substantial error is apparent on the face of the record of proceedings or when the findings are perverse. See **Military Gov. of Lagos State & Ors vs. Adeyiga & 6 Ors (2012) 2SC (Pt.1) p.68.**

It is clear that the appellant was convicted on his confessional statement and the evidence of PW3, an eyewitness who saw him participating in the armed robbery on 8/9/2005. The appellant has not been able to show that his statement, particularly Exhibit B1 was not voluntarily made by him, or that he was not seen by PW3 participating in the armed robbery.

It is my conclusion in the circumstances that, since the appellant has not been able to show these findings to be perverse, this court cannot interfere with the decisions of both courts below.

Once again it is established that PW3 was telling the truth.

In the end, I am satisfied that the learned justices of the Court of Appeal were right in affirming the conviction of the appellant on the evidence as presented by the respondent.

Appeal dismissed.

Olabode Rhodes-Vivour
Justice, Supreme Court

DATTIJO MUHAMMAD, (JSC): Having read in draft the lead judgment of my learned brother Rhodes-Vivour (JSC), just delivered, I agree with his lordship's reasoning and conclusion that the unmeritorious appeal stand dismissed.

The appellant insists that the failure of the respondent to call all his victims and tender the property they were robbed in establishing the offences he has been convicted for is fatal to the affirmation of the conviction by the lower court. His extra judicial statement Exhibit A and B1 being inconsistent with his evidence at trial, it is further contended, are wrongly relied upon to convict him. I disagree. Learned counsel for the appellant is deemed to know very well that these belie the true position of the law.

The respondent in this case has led evidence before the court that has not been rebutted by the appellant. The judgment against the appellant cannot be said to have been wrongly given. The lower court's affirmation of such a judgment remains unassailable. See **Nwabuoku vs. Ottih (1961) 1 ALL NLR 487.**

Generally, the law does not impose any obligation on the part of the prosecution as to the number of witnesses to call to prove its case. However, the quality of the evidence it leads sustains its case. See **Babuga vs. The State (1996) 7**

NWLR (Pt. 460) 279 and **Alli vs. State (1988) 1 NWLR (Pt.68) 1 at 70.**

Again, the appellant is wrong that the lower court's affirmation of the trial court's reliance on Exhibit A and B1, appellant's confessional statement admitted without objection, is wrong. It cannot be.

It has long been settled that confessional statement of the appellant alone, where cogent and unequivocal, may sustain his conviction on appeal notwithstanding the inconsistency of the statement with his subsequent oral statement at trial. The court is at liberty to discountenance the subsequent oral statement for being an afterthought. See **State vs. Okoro (1974) 2 SC 73 and Egboghonome vs. State (1999) 7 NWLR (Pt.306) 383.** In the case at hand, that is what occurred.

In the case at hand, beyond Exhibits A and B1, the confessional statement of the appellant, the trial court, and by extension the lower court, resorted to the testimony of PW3, a victim of the appellant and an eye witness to the commission of the offences by the appellant. This corroborative evidence outside the confessional statement makes appellant's appeal all the more hopeless.

It is for the foregoing, and more so the fuller reasons marshalled in the lead judgment, that I also dismiss the appeal and abide by the consequential orders stated in the lead judgment.

Musa Dattijo Muhammad,
Justice, Supreme Court

BATA OGUNBIYI, (JSC): I had the privilege of reading in draft the lead judgment just delivered by my brother Rhodes-Vivour, (JSC). I agree that the appeal is devoid of

any merit and should be dismissed.

The appellant along with two others stood trial on a two count charge of conspiracy and armed robbery contrary to Sections 5 and 1 (2) of the Robbery and Firearms (Special Provisions) Act, Cap 398, Laws of the Federation of Nigeria, 1990.

At the end of the trial, the appellant was found guilty and convicted as charged. He was sentenced to death by hanging.

The court of Appeal also affirmed the conviction and sentence of the appellant and hence his appeal now before us. One of the issues raised for determination in this appeal reads:

Whether from the evidence adduced the learned justices of the Court of Appeal were right in affirming the conviction and sentence of the appellant?

Central to the conviction of the appellant were his extra judicial or confessional statements which were admitted as Exhibits A and B1. It is the submission by the appellant's counsel that the alleged confessional statements relied upon by the lower court and also trial court were not consistent with the other facts before the court. This, the learned counsel related to the charge and evidence of the respondent's witnesses which alleged that the offence of armed robbery was committed at **No.23 Anglican Church Guest House, Dauda Street, Wuse Zone 5, Abuja:**

In other words, the appellant contends that the scene of crime is different from the scene as given in the charge and the evidence in court; that no evidence was led to establish the fact that the place mentioned in the alleged **Exhibits A and B1** are the same as **No.23 Anglican Church Guest House, Wuse Zone 5, Abuja**. Counsel argued

vehemently that in the absence of such clarification, the conclusions arrived at by both the two lower courts are speculative.

Exhibits **A** and **B1** which were admitted by the trial court without objection, were confessional in nature. The evidence of PW3, an eye witness to the incident as the victim of the robbery, was consistent with the confessional statements in **Exhibits A and B1.**

PW3's evidence is outside the confessional statement which is an attestation to the truthfulness of same. There was also no contradiction to the witnesses' evidence under cross examination. His evidence was rather positive, direct and credible. By the provision of section 28 of the Evidence Act, an admission made at any time by a person charged with a crime stating or suggesting the inference that he committed the crime amounts to a confession. **See Patrick Ikemson & 2 Ors vs. The State (1989) 3 NWLR (Pt.110) 455 at 476.**

The law is well established also that a conviction of an accused person could be grounded solely on a confessional statement made by him. This court in **Ubierho vs. The State (2002) 5 NWLR (Pt.819) 644** has this to say at **page 655:**

> **"A man may be convicted solely on his confession. There is no law against it. If a man makes a free and voluntary confession which is direct and positive and is properly proved, the court may if it thinks fit, convict him of any crime upon it".**

This court in the case of **Madjemu vs. The State (2001) 9 NWLR (Pt.718) 349,** however, did provide a guide in

assessing and considering the quality and reliability of a confessional statement and using the following yardstick:

> **"i) whether there is anything outside the confession which shows that it may be true;**
> **ii) whether the confessional statement is in fact corroborated;**
> **iii) whether the relevant statement of fact made in it are most likely true as far as they can be tested;**
> **iv) whether the accused had the opportunity of committing the offence;**
> **v) whether the confession is possible;**
> **vi) whether the alleged confession is consistent with other facts that have been ascertained and established".**

It is the position of the law further that a court can rely and act on a retracted confessional statement to convict an accused person; **See the cases of Nkwuda Edamine vs. The State (1996) 3 NWLR (Pt.438) 530 and Dapere Gira vs. The State (1996) 6 NWLR (Pt.44) 375 at 388.**

Exhibits A and B1 which are confessional were admitted in evidence without objection. The appellant, however, retracted and denied making any of the statements while testifying in his defence at the trial, thus, putting the court on the guard so as to ensure proper assessment, quality and reliability of the statements.

I have said earlier in the course of this judgment that **Exhibits A and B1** are closely corroborated with the evidence of PW3 which being outside the confession is very

supportive. A reproduction of an excerpt from the confessional statement states as follows:

> **"I joined the gang a month ago and I had only participated in three operations, one in Area 1, Wuse II and this last one at Wuse Zone 5 at all Saint lodge".**

The conviction and sentence of the appellant is concurrent by the two lower courts. The appellant has not shown any reason why this court should interfere with the said judgments. With the few words of mine and relying particularly on the fuller reasoning and conclusion arrived at in the lead judgment, I also dismiss this appeal as lacking in merit. The concurrent judgments of the two lower courts are, hereby, also affirmed by me and I abide by the orders made in the lead judgment.

Clara Bata Ogunbiyi
Justice, Supreme Court

CENTUS NWEZE, (JSC): I had the advantage of reading the draft of the lead judgment which my Lord, Rhodes-Vivour, (JSC), just delivered now. I, entirely, agree with His Lordship that this appeal, being unmeritorious, should be dismissed.

It is for these, and the more detailed, reasons in the lead judgement that I shall affirm the judgment of the lower court and dismiss this appeal. Appeal dismissed.

Chima Centus Nweze
Justice, Supreme Court

JOB KOLAWOLE BUREMOH
AND
ALHAJI ISIAKA AKANDE

SC. 93/2015

IN THE SUPREME COURT OF NIGERIA
HOLDEN AT ABUJA
FRIDAY, 13TH JANUARY, 2017

BEFORE THEIR LORDSHIPS

MARY UKAEGO PETER-ODILI	**JUSTICE, SUPREME COURT**
OLUKAYODE ARIWOOLA	**JUSTICE, SUPREME COURT**
MUSA DATTIJO MUHAMMAD	**JUSTICE, SUPREME COURT**
KUMAI BAYANG AKAAHS	**JUSTICE, SUPREME COURT**
KUDIRAT M. O. KEKERE-EKUN	**JUSTICE, SUPREME COURT**

ACTION: Scope of Kwara State limitation law 1994

ACTION: Distinction between Public Officers Protection Law and Limitation Law of Kwara State

ACTION: Interlocutory applications – Necessity of

ACTION: Effect of Successful plea of Law of limitation

APPEAL: Application to adduce fresh issues on appeal – Principles relevant thereto

APPEAL: Application to raise fresh issues on appeal – Need for

fresh issues to be readily available

COURT: Competence –Attributes

COURT: Fundamental nature of Jurisdiction

COURT: Whether it can be too late to raise issue of jurisdiction of Court

PRACTICE AND PROCEDURE: Need to avoid determining substantive issues during interlocutory applications

Issue for Determination

Whether this application on the affidavit evidence and attached Exhibits has made out a favourable exercise of a judicial and judicious discretion.

Facts of the Matter

By his Motion on Notice pursuant to Order 2 rule 28(1), Order 7 rules 4 & 8 of the Supreme Court Rules and under the inherent powers of this court filed on 22nd April, 2015, the appellant/applicant seeks the following six reliefs:

1. An Order of this court extending time within which the appellant/applicant may compile and transmit the Record of Appeal in this case to thiscCourt.

2. An Order deeming the already compiled and transmitted Record of Appeal as properly transmitted and served.

3. An Order of this Honourable Court granting leave to the appellant/applicant to raise for the first time before the

Supreme Court fresh issue on the application of the Limitation Law of the case of the respondent pursuant to the provision of Kwara State Limitation Law Cap K30, Laws of Kwara State, 2006.

4. An Order of this Honourable Court granting leave to the appellant/applicant to amend his Notice of Appeal by including the fresh issue on the application of Limitation Law to the case of the respondent pursuant to the provisions of the Kwara State Limitation Law Cap K30, Laws of Kwara State, 2006 on the one hand and to harmonize and amend all existing grounds of appeal with the inclusion of particulars on the other hand as per the attached Schedule of Amendment and proposed Amended Notice of Appeal.

5. An Order of this Honourable Court granting leave to the appellant/applicant to appeal against the decision of the Court of Appeal, Ilorin Division in Appeal No: CA/IL/70/1999 on grounds other than law alone.

And for such further Order(s) as this Honourable Court may deem fit to make in the circumstances of this case".

Grounds:

1. **The appellant/applicant being dissatisfied with the judgment of the lower court delivered on 3rd July, 2000 filed a Notice of Appeal against the judgment on 10th July, 2000 and additional grounds of appeal filed on 21st September, 2000.**

2. **The time limited by the Rules of the court for the lower**

court Registrar to compile and transmit the Record of Appeal to this court has lapsed.

3. The appellant/applicant could not meet the demand of funds charged by the Registry of the lower court to compile and transmit the Record of Appeal; hence, it could not be so compiled within time.

4. The judgment of the lower court was executed after the dismissal of the appellant's application for stay of execution.

5. Following the execution of the judgment, the Appellant/Applicant's business office on the land in dispute was demolished and he was evicted. This greatly affected the appellant/applicant's finance, mental being and family life.

6. When the business of the appellant/applicant which was then worth Ten Million Naira (N10,000,000.00) suffered set back and collapsed, the appellant/ applicant was psychologically affected and could not even meet the immediate needs of his family which eventually affected his state of health. This lasted for about eight years.

7. It was well-wishers and family members who are sympathetic to the plight of the appellant/applicant that made funds available to ensure that the Registry of the lower court compile and transmit the Record of Appeal and prosecute the appeal. This was after the appellant started recovering from his ill health.

8. The funds to compile the Record of Appeal were to be made available to the appellant/applicant's former counsel, Prince (Dr.) J. O. Ijaodola, but he fell ill and eventually died in 2013. His ailment lasted for at least four years (2009-2013) before his death.

9. The appellant/applicant subsequently briefed another firm of solicitors Messrs. D. Akin Akintoye & Co who agreed to prosecute the case pro bono for the Appellant/Applicant after payment of all court, travelling and filing expenses.

10. That the Record is now ready and has been transmitted to and before this court.

11. The new counsel saw the need to raise a fresh issue of jurisdiction which does not require calling evidence and to harmonize all the existing grounds of appeal with the addition of particulars, hence, the need to amend the appellant/applicant's Notice of Appeal before the court.

12. Some of the existing grounds of appeal in the appellant/applicant's Notice of Appeal raise issues other than law alone for which leave of this court is required.

13. The grounds of appeal raise substantial and recondite issues of law capable of a positive determination of the appeal in favour of the appellant/applicant.

14. The delay in compiling and transmitting the Record of Appeal and in bringing this application is not deliberate.

15. **If this application is refused, the entire and lifelong investment and business enterprise of the appellant/applicant would be lost with no other means of resuscitating same and no opportunity to exercise his constitutional right of appeal.**

16. **This court is the only court with powers to possibly remedy the position and plight of the appellant/applicant if his appeal succeeds.**

17. **The grant of the application will serve the interest of justice.**

18. **The Record of Appeal transmitted to this court on 15th February, 2015 will be relied upon".** (Underlining supplied for emphasis).

The application is supported by a twenty-six paragraph affidavit sworn to by Comfort Stephen a clerk in the chambers of applicant's counsel, the annexures thereto and verified therein and a further affidavit sworn to by Olujide Samuel Rotimi (Esq) of counsel in the firm of the legal practitioners, retained by the applicant. The annexures to the affidavit in support of the application are: Exhibit A, the judgment of the Court of Appeal delivered on 3rd July 2000 being appealed against, Exhibit B appellant's original Notice of Appeal, Exhibit C, his proposed additional grounds of appeal, Exhibits D & D 1 his medical report, Exhibit E the Schedule of Amendment in respect of applicant's Notice of Appeal, Exhibit F, his proposed amended Notice of Appeal and finally, the written address in support of

appellant/applicant's motion.

The respondent relies on his thirty three paragraph counter affidavit deposed to by John Ayodeji Esq a Research Assistant in the law firm retained by the respondent as well as the written address in opposition to the applicant's motion.

Held: (Unanimously allowing the application)

1. *The fundamental nature of jurisdiction in the process of adjudication.*
The place of jurisdiction in the adjudication process cannot be over-emphasized. The fundamental nature of jurisdiction explains the various descriptions given to it by jurists and the courts themselves. Jurisdiction has thus variously been described as the life blood, the fiat, the stamp of authority which necessarily ensures to the court or tribunal and empowers either to adjudicate. *(P 452 paras A-B)*

2. *When to raise issue of jurisdiction.*
Learned applicant's counsel is right in his submission that the fundamental nature of the issue of jurisdiction underscores the liberty allowed in competently raising it even orally and for the first time by any of the parties or the court suo motu at whatever level in the adjudication process. [*Oloriode vs. Oyebi* **(1984) 5 SC 1;** *Katto vs. CBN* **(1991) 11-12 SC 176;** *Petrojessica Enterprises Ltd vs. Leventis Technical Co Ltd* **(1992) 6 SC (Pt II) 1 and** *Lado & 43 Ors vs. CPC* **& 53 others (2011) 12 SC (Pt III) 113].**
(P 452 paras B-D)

3. *The import of Kwara State limitation Law, Cap 89 of 1994*

The Kwara State limitation law CAP 89 of 1994 the applicant asserts entitles him to raise the jurisdictional issue in the appeal, on being granted leave to add and argue a new ground thereon, provides in Section 4 thereof as follows:

> **"4 No action shall be brought by any person to recover any land after the expiration of ten years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person."**

Being clear and unambiguous, the section does not brook of any subtle, clever or deviant interpretation. It is an undoubted fetter to the court's assumption and exercise of jurisdiction. [*Madukolu vs. Nkemdilim* **(1962) 1 ALL NLR 581],** *(P 452-453 paras E-A)*

4. *The competence of a court*

A court is only competent to assume jurisdiction in respect of any matter if:

(a) **It is properly constituted with respect to the number and qualification of its members,**

(b) **The subject matter of the action is within its jurisdiction**

(c) **The action is initiated by due process of the law and**

(d) **Any condition precedent to the exercise of its jurisdiction must have been fulfilled. [***Dangara & Anor vs. Usman & 4 Ors* **(2012) 2 SC (Pt III) 103].** *(P 453 paras A-C)*

5. *The principles relevant in the consideration of an application for fresh issue on appeal*

Per-Dattijo Muhammad (JSC):

"Learned respondent counsel must be reminded of certain principles that are very relevant in the determination of applicant's motion. Firstly, there are the criteria for determining the applicant's motion seeking leave to raise a fresh issue not raised at the two lower courts which this court dwelt on in too many of its decisions. In *Salati vs. Shehu* **(1986) 1 NWLR (Pt 15) 198 Nnamani (JSC) (of blessed memory) restated the criteria thus:**

> **"It was the additional prayer to raise a new matter not raised in the three lower courts that merited closer examination. The attitude of this court has been that it will not allow a party on appeal to raise a question not raised in the court of trial or grant leave to a party to argue new grounds not canvassed in the lower courts except where the new grounds involve substantial points of law substantive or procedural which need to be allowed to**

prevent an obvious miscarriage of justice. [*Akpene vs. Barclavs Bank of Nigeria Ltd***. (1977) 1 S.C. 47,** *Debesi Djukpan vs. Rhorhadjor Orovuyovbe* **& Anor. (1967) 1 All N.L.R. 144, 137; Re Cowburn ex parte Firth, (1881-85) All E.R. 987, 991;** *Agness Deborah Ejiofodomi vs. H.C. Okonkwo* **(1982) II S.C. 74 at 96-98, 109;** *United Marketing Co. Ltd. vs. Kura* **(1963) 1 W.L.R. 523].** *(Pp 453-454 paras G-F)*

6. The principles which determine application for fresh issues on appeal

Per Dattijo Muhammad (JSC):

"Idigbe, J.S.C., in Fadiora vs. Gbadebo **1 L.R.N. 97, 108 touched on the other points which this court takes into consideration. The learned and revered late Justice said:**

"However, the law is that where a point of law which has not been taken in the court below has been put forward by an appellant for the first time in a Court of Appeal that court ought not to decide in his favour unless it is satisfied beyond reasonable doubt:

(a) That it has before it all the facts bearing on the new contention as completely as if it has been raised in the lower court (i.e. court of first

instance) and

(b) That no satisfactory explanation could have been given in the court below if it had been so raised (See Tasmania (Owners) and Freight Owners vs. Smith, etc. City of Corinth (Owners) (1890) 15 App. Cas. 223" *(Pp 454-455 paras G-E)*

7. The need to avoid determining substantive issues during interlocutory applications.

A court must avoid the determination of a substantive issue at the interlocutory stage. It is never proper for a court to make pronouncements in the course of interlocutory proceedings on issues capable of prejudging the substantive issues before the court. *(P 455 paras E-F)*

8. The purpose of interlocutory applications

Interlocutory applications, which applicant's motion is, must remain the handmaid and aid that enable the courts reach the ultimate goal of doing substantial justice between the parties in the real issues in litigation between the parties. [*Consortium MC vs. NEPA (***1992) 6 NWLR (Pt 246) 132 and** ***Senator Amange Nimi Barigha vs. PDP* & 2 Ors (2012) 12 SC (Pt V) 1].** *(P 455 paras F-H)*

9. It can never be too late to raise issue of jurisdiction

A party's resolve to challenge the legality of the decision of a court given without jurisdiction cannot

be too late. It is either the court has jurisdiction or it does not. In the case at hand, therefore, learned respondent counsel's contention that the motion be refused because of the applicant's failure to explain the inordinate delay for the application is accordingly legally incorrect. *(P 456 paras A-B)*

10. *The need for materials to be used as fresh issues on appeal to be readily available*

I am satisfied that the materials the respective parties require to argue and contest the issue the applicant seeks to raise in his appeal are readily available. It is for all these reasons that I find merit in the application and grant same in terms. *(Pp 456 paras B-C)*

11. *The effect of a successful plea of Limitation Law to an action*

The effect of a limitation law on a cause of action is that it removes the right of action, the right of enforcement and the right to judicial relief. In other words an action filed outside the limitation period renders the action unenforceable. See *Yare vs National Salaries, Wages and Income Commission* (2013) 5 SCNJ 406; *Lafia local Government vs Gov. of Nasarawa State* & Ors (2012) 7 SCNJ 648].

In effect, where an action is statute barred, the court will lack jurisdiction to entertain it. *(P 469 paras E-G)*

12. *The distinction between the Public Officers' Protection Law and Limitation of Action Law of Kwara State*

In the instant case, the issue of the failure of the plaintiff (now respondent) to comply with the provision of the Public Officers' Protection Law, which led to the striking out of the name of the 2nd defendant at the trial court, is a completely different issue from the applicability of the limitation law of Kwara State, 2006 to the entire claim.
(P 470 paras C-D)

Nigerian Cases cited in this Judgment

Abake vs. Odunsi (2013) ALL FWLR (Pt.697) 659;
Adelaja vs. Alade (1994) 7 NWLR (Pt. 358) 537;
Adelekan vs. Elu Line NV (2006) 5 SCNJ 137;
A-G Oyo State vs. Fairlakes Hotel Ltd (1988) 5 NWLR (Pt.92) 1;
Agness Deborah Ejiofodomi vs. H.C. Okonkwo (1982) II S.C. 74;
Alhaji Raimi Oloriegbe vs. J.A. Omotosho (1993) 1 SCNJ 30 ;
Arubo vs. Aiyeleru (1993) 2 SCNJ 90 ;
Bank of Baroda & Anor vs. Merchantile Bank (Nig) Ltd (1987) 6 SCNJ 165;
Bolex Enterprises Nig Ltd vs. Incar Nig Plc (1997) 7 SCNJ 194;
Chief Karimu Ajayi Arubo vs. Fatai Ayinla Aiyeleru (1993) 2 SCNJ 90;
Consortium MC vs. NEPA (1992) 6 NWLR (Pt 246) 132;
Dangara & Anor vs. Usman & 4 Ors (2012) 2 SC (Pt III) 103;
Debesi Djukpan vs. Rhorhadjor Orovuyovbe & Anor. (1967) 1 All N.L.R. 134,
Ede vs. mba (2011) 121 SCNJ (Pt. 1) 147;
K. Akpene vs. Barclavs Bank of Nigeria Ltd. (1977) 1 S.C. 47;
Katto vs. CBN (1991) 11-12 SC 176;
Lado & 43 Ors vs. CPC & 53 others (2011) 12 SC (Pt III) 113;

Lafia local Government vs. Gov. of Nasarawa State & Ors (2012) 7 SCNJ 648;
Long John vs. Blakk (1998) 6 NWLR (Pt. 555) 524;
Madukolu vs. Nkemdilim (1962) 1 ALL NLR 581;
Management Enterprises Ltd vs. Otusanya (1987) 2 NWLR (Pt.55) 179;
Mr. Victor Adelekan vs. Elu Line NV (2006) 5 SCNJ 137;
Niwa vs. Shell Petroleum (2011) 1 SCNJ 212;
Nnakwe vs. The State (2013) 7 SCNJ 179;
Okwaranoni vs. Mbedugha (2014) ALLFWLR (Pt.728) 914;
Okwaraojinaka Okwaranoni vs. Ibeke Mbadugha (2014) ALL FWLR (Pt 728) 914;
Oloriegbe vs Omotesho (1993) 1 SCNJ 30;
Oloriegbe vs. Omotosho (1993) 1 SCNJ 30 at 40;
Oloriode vs. Oyebi (1984) 5 SC 1;
Olutunde vs. Abike Kassim (2013) ALL FWLR (Pt 674) 39;
Oruche vs. Cop (1997) 4 NWLR (Pt. 497) 1261;
Petrojessica Enterprises Ltd vs. Leventis Technical Co Ltd (1992) 6 SC (Pt II) 1;
Salati vs. Shehu (1986) 1 NWLR (Pt.15) 198;
Salati vs. Shehu (1986) 1 NWLR7 (Pt 15) 198;
Senator Amange Nimi Barigha vs. PDP & 2 Ors (2012) 12 SC (Pt V) 1;
Ukwu vs. Bunge (1997) 8 NWLR (PT. 518) 527 AT 543;
United Marketing Co. Ltd. vs. Kura (1963) 1 W.L.R. 523;.
Victor Adelekan vs. Elu Line NV (2006) 5 SCNJ 137
Yare vs. National Salaries, Wages and Income Commission (2013) 5 SCNJ 406.

Foreign Cases cited in this judgment
Re Cowburn ex parte Firth, (1881-85) All E.R. 987,

Nigerian Statutes cited in this Judgment
Kwara State Limitation Law Cap K30, Laws of Kwara State, 2006 – S.1
Supreme Court Act, 1960 – S. 31.
Supreme Court Rules Or. 2 Rule 28, Or. 7 Rules 4 and 8
The Constitution of the Federal Republic of Nigeria, 1999 - – Ss 223(2) and (3)

Representations
Akin Akintoye II with him; Gbenga Oyewole *for the Appellant/Applicant*.

J.S. Bamigboye, SAN, with him; T. A. B. Oladipo and J. S. Muhammad *for the Respondent*.

DATTIJO MUHAMMAD, (JSC) (Delivering the Lead Judgment): By his motion on notice pursuant to Order 2 rule 28(1), Order 7 rules 4 & 8 of the Supreme Court Rules and under the inherent powers of this Court filed on 22nd April, 2015, the appellant/applicant seeks the following six reliefs:

6. An Order of this court extending time within which the appellant/applicant may compile and transmit the Record of Appeal in this case to this court.

7. An Order deeming the already compiled and transmitted Record of Appeal as properly transmitted and served.

8. An Order of this Honourable Court granting leave to the appellant/applicant to raise for the first time before the Supreme Court fresh issue on the application of the Limitation Law to the case of the respondent pursuant to the provision of Kwara State Limitation Law Cap K30, Laws of Kwara State, 2006.

9. An Order of this Honourable Court granting leave to the Appellant/Applicant to amend his Notice of Appeal by including the fresh issue on the application of Limitation Law to the case of the respondent pursuant to the provisions of the Kwara State Limitation Law Cap K30, Laws of Kwara State, 2006 on the one hand and to harmonize and amend all existing grounds of appeal with the inclusion of particulars on the other hand as per the attached Schedule of Amendment and proposed Amended Notice of Appeal.

10. An Order of this Honourable Court granting leave to theaAppellant/applicant to appeal against the decision of the Court of Appeal, Ilorin Division in Appeal No: CA/IL/70/1999 on grounds other than law alone.

11. And for such further Order(s) as this Honourable Court may deem fit to make in

the circumstances of this case". (Underlining supplied for emphasis).

The application is premised on the following grounds:

19. The appellant/applicant being dissatisfied with the judgment of the lower court delivered on 3rd July, 2000 filed a Notice of Appeal against the judgment on 10th July, 2000 and additional grounds of appeal filed on 21st September, 2000.

20. The time limited by the Rules of the court for the lower court Registrar to compile and transmit the Record of Appeal to this court has lapsed.

21. The appellant/applicant could not meet the demand of funds charged by the Registry of the lower court to compile and transmit the Record of Appeal; hence, it could not be so compiled within time.

22. The judgment of the lower court was executed after the dismissal of the appellant's application for stay of execution.

23. Following the execution of the judgment, the appellant/applicant's business office on the land in dispute was demolished and he was evicted. This greatly affected the appellant/

applicant's finance, mental being and family life.

24. When the business of the appellant/applicant which was then worth Ten Million Naira (N10,000,000.00) suffered set back and collapsed, the appellant/applicant was psychologically affected and could not even meet the immediate needs of his family which eventually affected his state of health. This lasted for about eight years.

25. It was well-wishers and family members who are sympathetic to the plight of the appellant/applicant that made funds available to ensure that the Registry of the lower court compile and transmit the Record of Appeal and prosecute the Appeal. This was after the appellant started recovering from his ill health.

26. The funds to compile the Record of Appeal were to be made available to the appellant/applicant's former counsel, Prince (Dr.) J. O. Ijaodola, but he fell ill and eventually died in 2013. His ailment lasted for at least four years (2009-2013) before his death.

27. The appellant/applicant subsequently briefed another firm of solicitors Messrs. D. Akin

Akintoye & Co who agreed to prosecute the case pro bono for the appellant/applicant after payment of all court, travelling and filing expenses.

28. That the Record is now ready and has been transmitted to and before this Court.

29. <u>The new counsel saw the need to raise a fresh issue of jurisdiction which does not require calling evidence and to harmonize all the existing grounds of appeal with the addition of particulars, hence, the need to amend the appellant/applicant's Notice of Appeal before the Court.</u>

30. <u>Some of the existing grounds of appeal in the appellant/applicant's Notice of Appeal raise issues other than law alone for which leave of this court is required.</u>

31. <u>The grounds of appeal raise substantial and recondite issues of law capable of a positive determination of the appeal in favour of the appellant/applicant.</u>

32. The delay in compiling and transmitting the Record of Appeal and in bringing this application is not deliberate.

33. If this application is refused, the entire and

lifelong investment and business enterprise of the appellant/applicant would be lost with no other means of resuscitating same and no opportunity to exercise his constitutional right of appeal.

34. **<u>This court is the only court with powers to possibly remedy the position and plight of the appellant/applicant if his appeal succeeds.</u>**

35. **<u>The grant of the application will serve the interest of justice.</u>**

36. **The Record of Appeal transmitted to this court on 15th February, 2015 will be relied upon".** (Underlining supplied for emphasis).

The application is supported by a twenty-six paragraph affidavit sworn to by Comfort Stephen, a clerk in the chambers of applicant's counsel, the annexures thereto and verified therein and a further affidavit sworn to by Olujide Samuel Rotimi (Esq), counsel in the firm of the legal practitioners retained by the applicant. The annexures to the affidavit in support of the application are: Exhibit A, the judgment of the Court of Appeal delivered on 3rd July 2000 being appealed against, Exhibit B appellant's original Notice of Appeal, exhibit C, his proposed additional grounds of appeal, Exhibits D & D 1 his medical report, Exhibit E the schedule of Amendment in respect of applicant's Notice of Appeal, Exhibit F, his proposed amended Notice of Appeal and finally, the written address

in support of appellant/applicant's motion.

The respondent relies on his thirty three paragraph counter affidavit deposed to by John Ayodeji Esq a Research Assistant in the law firm retained by the respondent as well as the written address in opposition to the applicant's motion.

The issues formulated by the appellant/applicant as having arisen and on the basis of which his motion will be determined reads:

"**Whether this Honourable Court ought to grant this application considering the circumstance of this case"**

In arguing the motion, learned applicant's counsel submits that the grounds and affidavit in support of the applicant's motion contain cogent facts and reasons why it should be granted. Prominent among these facts is appellant/ applicant's resolve to raise the fundamental issue of jurisdiction which the law allows him to do even in this court for the first time. The issues raised in appellant/applicant's proposed amended Notice of Appeal, it is further submitted, are sub-stained as their determination will finally lay to rest the vexed issue of the ownership of the land in dispute. Relying inter-alia on **Long John vs. Blakk (1998) 6 NWLR (Pt.555) 524 at 542, Adelaja vs. Alade (1994) 7 NWLR (Pt. 358) 537 at 545, Niwa vs. Shell Petroleum (2011) 1 SCNJ 212, Ede vs. Mba (2011) 121 SCNJ (Pt. 1) 147, and Abake vs. Odunsi (2013) ALL FWLR (Pt.697) 659,** learned appellant/applicant's counsel

urges that the application be granted.

Replying, learned respondent counsel contends that with time having expired for the applicant to seek leave, the omission of a prayer for extension of time within which to seek the necessary leave in the prayers urged on the court renders the entire application incompetent. Learned counsel relies on the decision in **Mr. Victor Adelekan vs. elu Line NV (2006) 5 SCNJ 137 at 145 and Bolex Enterprises Nig Ltd vs. Incar Nig Plc (1997) 7 SCNJ 194.** The issue of jurisdiction the applicant asserts is a fresh one it is further argued, had been raised and determined at the trial court. It pertains to the limitation placed by the Public Officer's Protection Law on the respondent in suing the Kwara State Governor which the applicant aligned himself with. The applicant never appealed against the ruling on the objection even after the trial court's final judgment delivered on 4th March 1998. Findings of fact not appealed against, learned respondent counsel submits, subsists. Commending the decisions in **Chief Karimu Ajayi Arubo vs. Fatai Ayinla Aiyeleru (1993) 2 SCNJ 90 at 102** and **Okwaraojinaka Okwaranoni vs. Ibeke Mbadugha (2014) ALL FWLR (Pt 728) 914 at 932** and **Alhaji Raimi Oloriegbe vs. J.A. Omotosho (1993) 1 SCNJ 30 AT 40,** learned counsel submits that only a refusal of applicant's motion will estop him from resuscitating a matter long after it had been decided and settled. The applicant, it is urged, must not have the luxury of litigating his cause piecemeal.

Further responding, learned counsel submits that with applicant's motion coming more than fifteen years after the lower court's judgment being appealed against instead of the three months the law allows same to be brought, the

applicant is manifestly guilty of inordinate delay. Not having not provided cogent reasons for the delay, learned counsel submits, applicant is not, on the authorities, entitled to the reliefs he seeks. It will burdensome, oppressive, unfair and unjust to the respondent for the applicant to be allowed to appeal against the lower court's judgment that had long been executed. The relief the applicant seeks, it is submitted, is never granted as a matter of course. In the absence of credible and convincing reasons for the delay the application is unmeritorious and, prays respondent counsel, should be dismissed. inter-alia learned counsel refers in support of his submissions to **Ukwu vs. Bunge (1997) 8 NWLR (Pt. 518) 527 AT 543, Tunde Adeoye Famu vs. Chief (Mrs.) Olutunde Abike Kassim (2013) ALL FWLR (Pt 674) 39 at 70 bank of Baroda & anor vs. Merchantile Bank (Nig) Ltd (1987) 6 SCNJ 165 at 173.**

Now, the facts on which parties rely for and against the application are as contained in their respective affidavits and the annextures thereto.

Paragraphs 2, 3, 10, 12, 13, 14, 15, 16, 17, 18, 20, 21, 22, 23, 24 and 25 of the supporting affidavit to applicant's motion, being germane to our understating of the issues the application raises, are hereinunder reproduced:

> **2. That I was dissatisfied with the judgment of the lower court delivered against me on 3rd July, 2000 and I through my former counsel (Prince J.O. Ijaodola) filed a Notice of Appeal against the judgment on 10th July, 2000 and additional grounds of appeal filed on 21st September, 2000. Coppies are attached as**

Exhibits A,B respectively.

3. That I applied to the Registry of the lower court to compile and transmit the Record of Appeal within time.

10. That when my business suffered a great set back, I was psychologically affected and could not even meet the immediate needs of my family and which eventually affected my state of health adversely. This lasted for eight years (2002-2009).

12. That in the year 2010, precisely on 29th July, my wife, Rebecca Bosede Burmoh who has two children for me (a girl and a boy my only son) abandoned me and left with my two children as a result of my financial incapacitation and deteriorating health.

13. That the two successive unfortunate incidences above devastated me beyond description and almost led to my untimely death.

14. That by the time I recovered from my ill health some well-wishers and family members who are sympathetic to my plight and who saw me as someone desirous to prosecute this appeal on the merit, made funds available to ensure that the Registry of the lower court compile and transmit the Record of Appeal and

prosecute the appeal.

15. That the said funds were to be made available to my former counsel, Prince (Dr.) J.O. Ijaodala but he fell ill and eventually died in February, 2013. His ailment lasted for at least four (4) years (2009-2013) before his death.

16. That I was able to retrieve my file from the Chambers and house of my former counsel after 18 months of his death and thereafter briefed a new counsel, Mr. Akin Akintoye II, who agreed to prosecute the appeal pro bono after payment of all court, travelling and filing expenses.

17. That the Record is now ready and has been transmitted to this court on 15th February, 2015.

18. That my said counsel told me in his office on 27th February, 2015 and I verily believed him that he saw the need to raise a fresh issue on jurisdiction which does not require calling evidence. He also said there is need to harmonize all the existing grounds of appeal and include particulars of them, hence, the need to amend my earlier Notice of Appeal before the court.

20. That some of the grounds in my Notice of Appeal also raise issues other than law alone

for which leave of this court is said to be required by my new counsel Mr. Akin Akintoye II.

21. That I was informed by Mr. Akin Akintoye II and I verily believed him that the grounds of appeal raise substantial and recondite issues of law capable of a positive determination of the appeal in my favour.

22. That the delay in compiling and transmitting the Record of Appeal and in bringing this application is not deliberate.

23. That if this application is refused, my entire and lifelong investment and business enterprise would be lost with no opportunity to resuscitate it and exercise my constitutional right of appeal to the fullest.

24. That I have approached this court as the only court with power to possibly remedy my position and plight in the event that I succeed in this appeal

25. The grant of my application will serve the interest of justice." (Underlining supplied for emphasis).

Paragraphs 4, 5, 6, 7, 8, 9, 10, 13, 17, 18, 24, 25, 26, 30, 31 and 32 averred to in respondent's counter-affidavit in opposition to the foregoing paragraphs in the affidavit in

support of applicant's motion are hereinunder reproduced for their relevance:

3. That this suit was instituted against the Applicant at the High Court of Kwara State, Ilorin by a Writ of Summons filed on 15/9/92 but issued on 21/9/92, 23 years ago.

4. That in the course of trial at the High Court, Ilorin, the Governor of Kwara State was joined as the 2nd defendant in the suit.

5. That the Governor of Kwara State as 2nd defendant raised the issue of statue of limitation against the competence of the suit, and by way of a Preliminary Objection sought a striking out of the suit.

6. That the then counsel to the applicant late Mr. B. O. Odejayi forcefully aligned himself with the submissions of the counsel to the Governor, and urge the court to hold that the action is statue barred against both defendants, i.e., inclusive of the applicant.

7. That the trial judge on the 7th November, 1996 delivered a considered ruling in which he struck-out the Governor of Kwara State as a party, and held that no Statute of limitation barred the suit against the applicant, and in consequence the case proceeded to judgment against the applicant. A copy of the judgment

made out from pages 77-87 of the applicant's produced record of proceedings is herein attached as Exhibit A.

8. That the applicant did not appeal against the ruling, and there is nothing in the limitation law of Kwara State which the applicant is seeking to raise as a fresh issue that could not have been raised in the objection leading to the ruling in Exhibit A.

9. That the applicant appealed within time against the final judgment of the High Court, Ilorin to the Court of Appeal, Ilorin, and I know that judgment was delivered by the Court of Appeal, Ilorin on the 3rd July, 2000, 15 years before this application, in which the Applicant's appeal was dismissed in its entirety, while the cross-appeal of the respondent succeeded in its entirely.

13. That the applicant filed his appeal against the judgment of the Court of Appeal, Ilorin to this Honourable Court timeously on the 10th July, 2000 and filed additional grounds on the 21st September, 2000, 15 years ago, and thereafter abandoned the appeal.

17. That the present application, 15 years after the time for the compilation of the Record of Appeal had lapsed, and after which the entire

land had been fully developed is, I verily believe, unreasonable, oppressive and most unconscionable.

18. That the respondent's title is customary and I verily believe it cannot be assailed by prescription or statute of limitation, particularly as the applicant and his vendor admitted they had constantly been challenged, and his vendor was infact taken to court over the land, but he chose to settle out of court upon his conceding the ownership of the land to the respondent.

24. That the respondent informed me in our office during briefing and I verily believe him that it is height of falsehood to say that in September, 2000 the cost of transmitting record to the Supreme Court from the Court of Appeal is in the region of N200,000 even now in 2015, 15 years after, I know records are transmitted for less than N150,000 at the highest.

25. That I know the applicant very well, and at all times material to this suit he operated commercial transportation plying Ilorin to several towns in the trade name of "Blue Cross Express", and I also know he neither suffered mental health issues nor ever

bedridden.

26. That assuming without conceding to the falsehood that the applicant was ill for 8 years spanning 2002-2008, he has not accounted for his failure to compile the record of appeal from 2000-2002 during which period it had lapsed.

30. That I verily believe that the entire content of the Affidavit in support of this motion are falsehood made up to justify the inordinate, unreasonable delay of the applicant in pursuing this appeal.

31. That I verily believe this application is oppressive and will work grave injustice against the respondent if granted.

32. That I verily believe there are no recondite point of law raised in the Notice of Appeal."

(Underlining supplied for emphasis).

Paragraphs 6, 7, 8, 9, 10, 12, 18, 26 and 27 of applicant's further affidavit in support of his application controverting respondent's foregoing averments being relevant are also hereinunder supplied:

6. That contrary to paragraphs 7,8 and 9 of the respondent's Counter Affidavit, I know the appellant/applicant never at any time raised the issue of statute of limitation, the proper

way to raise an issue of statute of limitation is by filing a Notice of Preliminary Objection with an affidavit in its support, which the appellant/applicant never did.

7. That the objection raised by the Counsel to the Governor at the trial High court borders on the application of the provisions of Public Officers Protection Law to the Governor not on Limitation Law of Kwara State as misconceived by the respondent.

8. **That contrary to paragraph 11 of the respondent's Counter Affidavit, I know that the mere alignment of the appellant/ applicant's then counsel, B. O. Odejayi with the submission of the 2nd defendant's counsel cannot translate to the appellant/applicant to have raised an issue of statute of limitation.**

9. That I also know that a fresh issue on the jurisdiction of a court can be raised at anytime, even when the suit is on appeal, the issue of law in the proposed amended Notice of Appeal (Exhibit F attached to the Motion on Notice) disclose substantial issue to be tried.

10. That I know that the objection raised by then 2nd defendant in the suit cannot preclude the appellant/applicant from raising a fresh issue on the jurisdiction

of the court.

12. **That contrary to paragraphs 13,26 and 27 of the respondent's Counter Affidavit, the appellant/applicant never abandoned the appeal and the delay in compiling and transmitting the Record of Appeal was due to his financial incapacity, Ill health and the eventual death of Prince J. O. Ijaodola, the appellant/applicant's former counsel. That the appellant/applicant informed me during the briefing in our office and I verily believe him that these three factors cover the period of year 2000 to the time I filed this present application which started immediately the respondent levied execution of the appellant/applicant's land notwithstanding the fact that he was aware of the pending Notice of Appeal and the additional grounds of appeal filed in the year 2000.**

18. **That the claim that the appellant/applicant admitted he had constantly been challenged of his presence on the land is at variance with the court records. Paragraph 2 of the appellant/applicant's Statement of Defence at page 20 of the Record, his oral evidence at page 106 of the Record and PW2's**

oral evidence at page 98 of the Record emphatically shows the appellant/applicant's denial that anybody ever challenged him over the land before this case was filed in 1992. This issue is on the merit of the appeal itself and does not have anything to do with present application before the court.

26. **That contrary to paragraph 30 of the respondent's Counter Affidavit, I know that the appellant/applicant desires to pursue this appeal timeously but for his ill health, financial capacity which spanned for several years and the death of his former counsel.**

27. **That contrary to paragraphs 31 and 32 of the respondent's Counter Affidavit, I verily believe the granting of this application will be in the best interest of justice and that there are recondite points of law in the Notice of Appeal to be tried by this court."** (Underlining supplied for emphasis).

My lords, given the foregoing averments and the annextures to the affidavits of both sides, it appears to me that the main grounds on which the applicant predicates his motion have ceased to be in contention. The settled facts include: that the appellant/applicant had, on 10th July 2000,

timeously appealed against the judgment of the lower court delivered against him on 3rd July 2000; that further to his Notice of Appeal, Exhibit B, he also filed additional grounds, Exhibit C, in respect of the very appeal; that the respondent commenced the suit decided in his favour and against the appellant; that the name of the Governor of Kwara State, earlier joined as the 2nd defendant in the suit, on his preliminary objection pursuant to the Public Officers Protection Law being sustained by the trial court, was struck out; that the appellant/applicant's sickness, evidenced by Exhibits D & D1, impecuniosity and the death of his former counsel, Dr. J. O. Ijaodola, generally accounted for the delay in the transmission of the record and prosecution of the appeal; that the applicant having recovered and, on being assisted financially, engaged a new counsel, is desirous of prosecuting his appeal; that some of the grounds in applicant's existing Notice of Appeal, not being grounds of law alone, need to be regularized and, most importantly, that the applicant desires to raise the issue of jurisdiction he neither raised at the trial court nor the lower court.

Learned respondent counsel has forcefully argued that the jurisdictional issue the applicant seeks, by leave of this court, to raise and argue in his appeal, having been raised at and determined by the trial court, is not a fresh issue. Not having appealed against the trial court's ruling on the issue, it is contended, the applicant cannot be allowed to otherwise do so by the grant of his application. I am unable to appreciate learned counsel's arguments.

Annexed to respondent's counter-affidavit is Exhibit B, the ruling of the trial court of 7th day of November 1996, sustaining the Preliminary Objection raised by the Governor

of Kwara State whose name as a party in the suit was, consequently, struck out. The content of Exhibit B particularly at page 10 belies the learned respondent counsel's stand with the trial court's finding thus:

> **"The law is settled, as I pointed out earlier, that the defence of statute of limitation is a complete defence to any action to which it applied. I agree with the submission of learned state counsel for the 2nd defendant that the plaintiff ought to have brought the 2nd defendant in the case for whatever reason he wanted him within the period prescribed by the law.**
>
> **I hold that the plaintiff having failed to bring the 2nd defendant as party in this case within the period of limitation cannot maintain the action against him. The action is statute barred and is to be terminated as against the 2nd defendant.**
>
> **Lastly the 1st defendant is sued in this case not as a Public Officer. He is also sued not for any action of his in the discharge of a public duty or execution of any law. He can therefore not avail himself of the protection afforded by the 3 months limitation period under the Public Officers Protection Law."**
> (Underlining supplied for emphasis).

The foregoing finding of the trial court manifestly speaks for itself.

The place of jurisdiction in the adjudication process cannot be over-emphasized. The fundamental nature of jurisdiction explains the various descriptions given to it by jurists and the courts themselves. Jurisdiction has thus variously been described as the life blood, the fiat, the stamp of authority which necessarily ensures to the court or tribunal and empowers either to adjudicate. Learned applicant's counsel is right in his submission that the fundamental nature of the issue of jurisdiction underscores the liberty allowed in competently raising it even orally and for the first time by any of the parties or the court suo motu at whatever level in the adjudication process. See **Oloriode vs. Oyebi (1984) 5 SC 1; Katto vs. CBN (1991) 11-12 SC 176; Petrojessica Enterprises Ltd vs. Leventis Technical Co Ltd (1992) 6 SC (Pt II) 1 and Lado & 43 Ors vs. CPC & 53 others (2011) 12 SC (Pt III) 113.**

The Kwara State Limitation Law CAP 89 of 1994 the applicant asserts entitles him to raise the jurisdictional issue in the appeal, on being granted leave to add and argue a new ground thereon, provides in Section 4 thereof as follows:

> **"4 No action shall be brought by any person to recover any land after the expiration of ten years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person."**

Being clear and unambiguous, the section does not brook of any subtle, clever or deviant interpretation. It is an undoubted fetter to the court's assumption and exercise of

jurisdiction. See **Madukolu vs. Nkemdilim (1962) 1 ALL NLR 581,** a court is only competent to assume jurisdiction in respect of any matter if:

(e) It is properly constituted with respect to the number and qualification of its members,

(f) The subject matter of the action is within its jurisdiction

(g) The action is initiated by due process of the law and

(h) Any condition precedent to the exercise of its jurisdiction must have been fulfilled see also **Dangara & Anor vs. Usman & 4 Ors (2012) 2 SC (Pt III) 103.**

Notwithstanding the authorities on the issue of jurisdiction, learned respondent counsel remains unrelenting. If indeed the action that brought about the instant appeal had been commenced "after the expiration of ten years, from the date on which the right of action accrued to the plaintiff", the respondent herein, learned counsel insists that since applicant is guilty of inordinate delay, he should be foreclosed from raising the issue of the jurisdiction of the courts and competence of the suit. He further submits that ex-facie the materials before us do not suggest lack of jurisdiction of the two lower courts and indeed this court over the instant matter. For all these, it is contended, applicant's frivolous and incompetent motion should be discountenanced. Again, I disagree.

Learned respondent counsel must be reminded of certain principles that are very relevant in the determination of applicant's motion. Firstly, there are the criteria for determining the applicant's motion seeking leave to raise a

fresh issue not raised at the two lower courts which this court dwelt on in too many of its decisions. In **Salati vs. Shehu (1986) 1 NWLR (Pt 15) 198** Nnamani (JSC) (of blessed memory) restated the criteria thus:

> **"It was the additional prayer to raise a new matter not raised in the three lower courts that merited closer examination. The attitude of this Court has been that it will not allow a party on appeal to raise a question not raised in the court of trial or grant leave to a party to argue new grounds not canvassed in the lower courts except where the new grounds involve substantial points of law substantive or procedural which need to be allowed to prevent an obvious miscarriage of justice. See K. Akpene vs. Barcla vs. Bank of Nigeria Ltd. (1977) 1 S.C. 47, Debesi Djukpan vs. Rhorhadjor Orovuyovbe & Anor. (1967) 1 All N.L.R. 134, 137; Re Cowburn ex parte Firth, (1881-85) All E.R. 987, 991; Agness Deborah Ejiofodomi vs. H.C. Okonkwo (1982) II S.C. 74 at 96-98, 109; United Marketing Co. Ltd. vs. Kura (1963) 1 W.L.R. 523.**
>
> **Idigbe, J.S.C., in Fadiora vs. Gbadebo 1 L.R.N. 97, 108 touched on the other points which this Court takes into consideration. The learned and revered late Justice said:**
>
> > **"However, the law is that where a point of law which has not been taken**

> **in the court below has been put forward by an appellant for the first time in a Court of Appeal that court ought not to decide in his favour unless it is satisfied beyond reasonable doubt:**
> **(c) That it has before it all the facts bearing on the new contention as completely as if it has been raised in the lower court (i.e. court of first instance) and**
> **(b) That no satisfactory explanation could have been given in the court below if it had been so raised See Tasmania (Owners) and Freight Owners vs. Smith, etc. City of Corinth (Owners) (1890) 15 App. Cas. 223"**

Secondly, a court must avoid the determination of a substantive issue at the interlocutory stage. It is never proper for a court to make pronouncements in the course of interlocutory proceedings on issues capable of prejudging the substantive issues before the court. Interlocutory applications, which applicant's motion is, must remain the handmaid and aid that enable the courts reach the ultimate goal of doing substantial justice between the parties in the real issues in litigation between the parties. See **Consortium MC vs. NEPA (1992) NWLR (Pt 246) 132 and Senator Amange Nimi Barigha vs. PDP & 2 Ors (2012) 12 SC (Pt V) 1.**

A A party's resolve to challenge the legality of the decision of a court given without jurisdiction cannot be too late. It is either the court has jurisdiction or it does not. In the case at hand, therefore, learned respondent counsel's
B contention that the motion be refused because of the applicant's failure to explain the inordinate delay for the application is accordingly legally incorrect.

Lastly, I am satisfied that the materials the respective
C parties require to argue and contest the issue the applicant seeks to raise in his appeal are readily available. It is for all these reasons that I find merit in the application and grant same in terms. Consequently an order is hereby made:

D

1. **Extending time within which the appellant/ applicant may compile and transmit the Record of Appeal in this case to this court.**

E

2. **Deeming the already compiled and transmitted Record of Appeal as properly transmitted and served.**

F

3. **Granting leave to the appellant/applicant to raise for the first time before the Supreme Court fresh issue on the application of the**
G **Limitation Law to the case of the Respondent pursuant to the provision of Kwara State Limitation Law Cap K30, Laws of Kwara State, 2006.**

H

4. **Granting leave to the appellant/applicant to amend his Notice of Appeal by including the**

A **fresh issue on the application of Limitation Law to the case of the Respondent pursuant to the provisions of the Kwara State Limitation Law Cap K30, Laws of Kwara State, 2006 on**
B **the one hand and to harmonize and amend all existing grounds of appeal with the inclusion of particulars on the other hand as per the attached Schedule of Amendment and**
C **proposed Amended Notice of Appeal and**

5. **Granting leave to the appellant/applicant to appeal against the decision of the Court of**
D **Appeal, Ilorin Division in Appeal No: CA/IL/70/1999 on grounds other than law alone.**

E Parties are to bear their respective costs.

Musa Dattijo Muhammad,
Justice, Supreme Court

F **Appearances**
Akin Akintoye II, with him; Gbenga Oyewole for the Appellant/Applicant.

G **J.S. Bamigboye, (SAN),** with him: T. A. B. Oladipo and J. S. Muhammad for the Respondent.

PETER-ODILI, (JSC): I agree with the Ruling just
H delivered by my learned brother, Musa Dattijo Muhammad (JSC) and in support of the reasoning I shall make some remarks.

In the motion filed on 22/4/2015, the appellant/ applicant prays for the following:

1. **An Order of this court extending time within which the appellant/applicant may compile and transmit the record of appeal in this to this court.**

2. **An Order deeming the already compiled and transmitted Record of Appeal as properly transmitted and served.**

3. **An Order of this Honourable court granting leave to the appellant/applicant to raise for the first time before the Supreme Court fresh issue on the application of the Limitation Law to the case of the respondent pursuant to the provision of Kwara State Limitation Law Cap K30, Laws of Kwara State, 2006.**

4. **An Order of this Honourable Court granting leave to the appellant/applicant to amend his Notice of Appeal by including the fresh issue on the application of Limitation Law to the case of the respondent pursuant to the provisions of the Kwara State Limitation Law Cap K30, Laws of Kwara State, 2006 on the one hand and to harmonize and amend all existing grounds of appeal with the inclusion of particulars on the other hand as per the attached Schedule of Amendment and proposed Amended Notice of Appeal.**

5. **An Order of this Honourable Court granting leave to the appellant/applicant to appeal against the decision of the Court of Appeal, Ilorin Division in Appeal No.CA/IL/70/1999 on grounds other than law alone.**

6. **And for such further Order(s) as this Honourable Court may deem fit to make in the circumstance of this case.**

The motion is supported by a 25 paragraph affidavit deposed to by Job Kolawole Buremoh, the applicant himself and a further affidavit deposed to by Olujide Samuel Rotimi, legal practitioner of the firm representing the applicant and further affidavit deposed to by the applicant.

The respondent opposed the motion with a counter affidavit filed on the 2/10/15 deposed to by John Ayodeji, a research assistant of the legal firm of the respondent.

On the 18th day of October, 2016 date of hearing, learned counsel for the applicant , Akin Akintoye II adopted and relied on his written Brief in support of the motion.

J.S. Bamigboye adopted respondent's reply filed on the 17/10/16 and deemed filed on the 18/10/16.

In moving the motion learned counsel for the applicant referred to the documents exhibited to in their affidavit such as the judgment of the Court of Appeal, Notice of Appeal and Additional Grounds of Appeal. Also the medical reports on the appellant's ill health. He submitted that the grounds of appeal complain essentially of

the failure of the lower court to properly evaluate the case of the appellant/applicant and apply the law to his case. That the burden of proving that the respondent is entitled to the declaration sought which burden was not discharged and the issue of fraud raised by the respondent lacked the necessary particulars and proof that the law required.

For the applicant was raised a sole issue which is thus:

> **Whether from facts disclosed in the affidavit in support of this application and the attached annexure marked Exhibits A, B, C and D this Honourable court ought to grant the application of the appellant/applicant.**

Respondent also raised a single issue which is as follows:

> **Whether this application on the affidavit evidence and attached Exhibits has made out a favourable exercise of a judicial and judicious discretion.**

Indeed the two issues of the parties are saying the same thing though stated differently and it does not matter which issue is utilized. I shall use that as couched by the respondent.

SOLE ISSUE

Whether this application on the affidavit evidence and attached Exhibits has made out a favourable exercise of a judicial and judicious discretion.

Learned counsel for the applicant submitted that

section 223(2) and (3) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) and Order 2 Rules 28 and order 7 Rule4 and 5 of the Supreme Court Rules, 2005 are relevant.

That from the grounds and supporting affidavit the applicant has stated and deposed to cogent reasons/facts why the application should be granted. That all the grounds complained of the failure of the lower court to properly evaluate and appreciate the case of the applicant as out before it and the intention of the applicant to raise fundamental issue of jurisdiction before this court for the first time.

He further stated that the proposed amended Notice of Appeal raise substantial issues to be tried by this court which resolution of issues will finally lay to rest the vexed issue of ownership of the land in dispute as between the appellant/applicant and the respondent.

That in the exercise of its judicial discretion to extend time within which to take certain procedural steps prescribed by the Rules of court, substantial justice to the parties has always been the cardinal derteminant factor. He cited **Long John vs. Blakk** (1998) 6 NWLR (Pt.555) 524 at 542 and a List of Additional Authorities.

Learned counsel submitted for the applicant that this court has the discretion to deem the Record of Appeal as properly compiled and transmitted and grant leave to applicant to amend the Notice of Appeal and raise for the first time the issue and application of the limitation law to the case of the respondent.

He cited **Adelaje vs. Alade** (1994) 7 NWLR (Pt. 358) 573 at 545.

For the respondent learned counsel contended that the decision for which this leave is sought was delivered 15 years before the application as against the three month allowed by law, Section 31 of Supreme Court Act, 1960 that the grounds of appeal are incompetent, the necessary prayers for leave having not been earlier sought. That this has produced a fundamental defect and robs the court of jurisdiction. He cited **Adelekan vs. Elu Line NV** (2006) 5 SCNJ 137 at 145; **Bolex Enterprises Nig Ltd vs. Incar Nig. Plc** (1997) 7 SCNJ 194 at 199.

That the applicant cannot now competently raise the issue of statute of limitation against which findings he had not appealed to the Court of Appeal even though the matter came up at the trial High Court and so applicant is now estopped to raise the issue of limitation law. He cited **Arubo vs. Aiyeleru** (1993) 2 SCNJ 90 at 102.

That the applicant was before and during the pendency of the suit between his vendor and the respondent's family driven away from the land and he stayed away but he returned in 1991 and was sued in 1992. that these are facts found and believed by the trial court and against which there is no appeal and so those findings subsist. He cited **Okwaranoni vs. Mbedugha** (2014) ALLFWLR (Pt.728) 914 at 932 etc.

He stated on for the respondent that the applicant cannot be permitted to split issues and litigate on them one by one as the applicant seeks herein on the matter of the Public Officers Protection Law which was raised and decided on the 7th November, 1996 and now come up with the limitation law, referred to **Oloriegbe vs. Omotosho** (1993) 1 SCNJ 30 at 40.

That this application is an abuse of court process as the judgment was delivered on 3rd July 2000 and this application filed 22nd April, 2015, 14 years and 9 month after.

Learned counsel for the respondent said the explanations proffered for this long delay in bringing up this application are lacking in substance and should be rejected. He relied on **Oruche vs. Cop** (1997) 4 NWLR (Pt. 497) 1261 etc.

The main thrust of this application is that the lower court failed to properly evaluate and appreciate the case of the appellant/applicant as put before it and the intention of the applicant to raise the fundamental issue of jurisdiction before the Supreme Court for the first time. Also the need to amend the Notice of Appeal and raise for the first time the issue and application of limitation of law of Kwara State to the case of the respondent. The explanation proffered by the applicant for the long delay of 15 years in making this application anchored on the ill health of the applicant which created difficulties in his business thus hampering funds for compilation and transmission of records. The situation was not helped by the demise of his counsel, Dr. J.O. Ijaodola and the process of retrieving the case file and the procuring of a fresh counsel.

Indeed the fact that the judgment sought to be appealed against is 15 years old is a situation that would overwhelm any argument to the contrary such as the appellant/applicant is pushing forward. However, in this situation where the applicant is crying on the basis that substantial justice is the determinant factor and the matter of jurisdiction is raised in circumstances that cannot be safely

ignored. It behoves this court to take a second look at what really is at stake and if the 15 years plus delay is overriding. All things considered my answer would be an emphatic no. See **Long John vs. Blakk** (1998) 6 NWLR (Pt. 555) 524 at 542; **Adelaje vs. Alade** (1994) 7 NWLR (Pt.358) 537 at 545.

From the foregoing and the well-reasoned lead ruling, I grant this application. I abide by the consequential orders made.

Mary Ukaego Peter-Odili
Justice, Supreme Court

OLU ARIWOOLA, (JSC): I was obliged before now with a copy of the ruling of my learned brother, Musa Datijo Muhammad, (JSC) just delivered. I am in complete agreement with the reasoning and conclusion that this application has merit and should be allowed. I too will allow the application for the same reasoning.

Application is allowed. The application is granted in terms.

I abide by the consequential orders in the said lead ruling including the order on costs.

Olu Ariwoola
Justice, Supreme Court

BAYANG AKAAHS (JSC): I was privileged to read in draft the Lead Ruling of my learned brother, Musa Dattijo Muhammad JSC. I am in agreement with my Lord that the discretion of this court should be exercised in favour of granting the application despite the fact that the application is coming more than fifteen years after the Court of Appeal,

Iiorin delivered its judgment in CA/IL/70/1999 on 3rd July, 2000, after judgment was delivered, the Notice of Appeal was filed timerously on 10th July, 2000. The additional grounds of appeal were also filed within time on 21st September, 2000. What delayed the appeal from being heard was the compilation and transmission of records which came about as a result of the vicissitudes that visited the application and his former counsel who took ill in 2009 and died in 2013. Although the records were transmitted in 2015, there is need to deem the records properly transmitted.

The applicant is seeking leave to raise and argue a fresh issue bordering on the jurisdiction of the court that tried the case. In prayers 3,4 and 5 of the Motion, the applicant is praying for:

> **"3. An Order of this Honourable Court granting leave to the appellant/ applicant to raise for the first time before the Supreme Court fresh issue on the application of the limitation Law of the case of the respondent pursuant to the provision of kwara state limitation law cap K30, laws of Kwara state 2006.**
>
> **4. An order of this Honourable Court granting leave to the appellant/ applicant to amend his Notice of Appeal by including the fresh issue on the application to the case of the respondent pursuant to the provisions**

of the Kwara state limitation law cap k 30, laws of kwara state, 2006 on the one hand and to harmonies and amen all existing grounds of appeal with the inclusion of particulars on the other hand as per the attached Schedule of Amendment and proposed amended Notice of Appeal.

5. An order of this Honourable court granting leave to the appellant /applicant to appeal against the decision of the court of appeal, Ilorin Division in Appeal No. CA/IL/70/1999 on grounds other than law alone"

Although the respondent opposed the application on the premise that it was incompetent as it was brought way out of time and did not contain the trinity prayers on **Bolex Enterpries Nig. Ltd vs. Incar Nig Plc (1997) 7 SCNJ 194** and **Victor Adelekan vs. Elu Line NV (2006) 5 SCNJ 137 at 145** and the fresh issue sought to be raised pertaining jurisdiction had already been dealt with; the applicant should not be indulged the luxury of litigating his cause of action piece meal. He urged this court to refuse the application because the application is guilty of inordinate delay and has not provided cogent reasons for the delay in bringing the application.

The applicant put forward his long period of ill-health and that of his former counsel to explain his delay in bringing the application. The fresh issue which the applicant wants to raise is that the action was filed outside the period

allowed by law and so is statute barred. The effect of the limitation law on the cause of action is that a court lacks the jurisdiction to entertain the action. This can be raised at anytime even for the first time in the Supreme Court. See **Salati vs. Shehu (1986) 1 NWLR (Pt.15) 198; A-G Oyo State vs. Fairlakes Hotel Ltd (1988) 5 NWLR (Pt.92) 1; Management Enterprises Ltd vs. Otusanya (1987) 2 NWLR (Pt.55) 179.**

Since the applicant has been able to satisfy this court with the reasons for the delay in bringing the motion coupled with the issue which he intends to raise in the appeal which could have an effect on the jurisdiction of the court which heard the matter at the trial court, the discretion ought to be exercised in favour of the applicant.

It is for these reasons and the more detailed reasons contained in the leading ruling of my learned brother, Musa Dattijo Muhammad (JSC), that I too found the application to be meritorious and accordingly granted same.

Application succeeds and it is hereby granted. Parties are to bear their respective costs.

Kumai Bayang Aka'ahs
Justice, Supreme Court

KEKERE-EKUN, (JSC): I have been obliged before now with a copy of the ruling of my learned brother, MUSA DATTIJO MUHAMMAD, (JSC) just delivered. I am in complete agreement with the reasoning and conclusion that this application has merit and should be allowed.

By this Motion on Notice filed on 22/4/2015 brought pursuant to Order 2 rule 28 (1) and Order 7 Rule 4 and 8 of the Supreme Court Rules and under the inherent jurisdiction

of the court, the appellant/applicant seeks the following reliefs:

1. An order of this court extending time within which the appellant/applicant may compile and transmit the Record of Appeal in this case to this court.
2. An order deeming the already compiled and transmitted Record of Appeal as proper transmitted and served.
3. An Order of this Honourable Court granting leave to the Appellant/Applicant to raise for the first time before the Supreme Court fresh issue on the Application of the Limitation Law to the case of the respondent pursuant to the provision of Kwara State Limitation Law cap k30, Laws of Kwara state, 2006.
4. An order of this Honourable Court granting leave to the appellant/applicant to amend his notice of appeal by including the fresh issue on the application of limitation law to the case of the respondent pursuant to the provisions of the kwara state, limitation law Cap K30, Law of kwara state 2006 on the one hand and to harmonize and amend all existing grounds of appeal with the inclusion of particulars on the other hand as per the attached schedule of amendment and proposed amended notice of appeal.
5. An order of this Honourable Court granting leave to the appellant/applicant to appeal against the decision of the court of appeal, Ilorin Division in appeal No: CA/IL/70/1999 on grounds other than law alone.
6. And for such further order(s) as this Honourable court may deem fit to make in the circumstances of this case.

An application of this nature is discretionary. The applicant

must place before the court sufficient material to warrant the exercise of the court's discretion in his favour. In the instant case such material would include cogent reasons for the delay in compiling and transmitting the record of appeal and the nature of the issue sought to be raised for the first time before this court.

My learned brother has reproduced *in extensor* the averments in the affidavits deposed to by the parties in support of and in opposition to the application. I do not deem it necessary to repeat them. Suffice it to say that I agree with my learned brother that the application has given satisfactory explanations for his inability to compile and transmit the record of appeal within the time stipulated by the rules of this court.

In addition, the fresh issue sought to be raised is a jurisdiction one i.e the application of the Kwara State Limitation Law Cap. k30 laws of Kwara State 2006 to the dispute between the parties.

The effect of a limitation law on a cause of action is that it removes the right of action the right of enforcement and the right to judicial relief. In other words an action filed outside the limitation period renders the action unenforceable. See **Yare vs. National Salaries, Wages and Income Commission (2013) 5 SCNJ 406; Lafia local Government vs. Gov. of Nasarawa State & Ors (2012) 7 SCNJ 648.** (In effect, where an action is statute barred, the court will lack jurisdiction to entertain it.

The settled position of the law is that the issue of jurisdiction, being so fundamental to the court's power to adjudicate, can be raised at any stage of the proceedings, even before this court. It can be raised orally. It can also be

raised *suo motu* by the court. This is because, no matter how well the proceedings are conducted or how erudite the judgment arising there from, it all amounts to a nullity where the court lacks jurisdiction. See **Madukolu vs. Nkemdilim (1962) 1 ALL NLR 587; NNAKWE vs. The State (2013) 7 SCNJ 179; OLORIEGBE vs. Omotesho (1993) 1 SCNJ 30.**

In the instant case, the issue of the failure of the plaintiff (now respondent) to comply with the provision of the Public Officers' Protection Law, which led to the striking out of the name of the 2nd defendant at the trial court, is a completely different issue from the applicability of the Limitation Law of Kwara State, 2006 to the entire claim.

I therefore agree with my learned brother that the applicant has placed sufficient material before the court to warrant the grant of this application. The application filed on 22/4/2015 is accordingly granted as prayed.

The parties shall bear their respective costs.

Kudirat Motonmori Olatokunbo Kekere-Ekun
***Justice, Supreme Court*)**