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CHIEF OLISA METUH
AND
1. FEDERAL REPUBLIC OF NIGERIA
2. DESTRA INVESTMENTS LIMITED

SC. 457/2016

IN THE SUPREME COURT OF NIGERIA
HOLDEN AT ABUJA

FRIDAY, 9TH JUNE, 2017

BEFORE THEIR LORDSHIPS

MUSA DATTIJO MUHAMMAD	**JUSTICE, SUPREME COURT**
CLARA BATA OGUNBIYI	**JUSTICE, SUPREME COURT**
KUDIRAT M. O. KEKERE-EKUN	**JUSTICE, SUPREME COURT**
EJEMBI EKO	**JUSTICE, SUPREME COURT**
SIDI DAUDA BAGE	**JUSTICE, SUPREME COURT**

COURT: Code of Conduct Tribunal – Whether not a court of superior record but rather of quasi Criminal jurisdiction – Implication.

COURT: Court of Appeal – Jurisdiction thereof – S. 15 Court of Appeal Act – Whether does not apply where the trial court lacks jurisdiction – Principle in Olufu Vs. Itodo (2010) 18 NWLR (Pt. 1225).

COURT: Supreme Court – Jurisdiction – Power to stay proceedings pending appeal – S. 22 of Supreme Court Act – Extent of power thereof – Whether lacks power to make order where the lower court does not have similar power.

PRACTICE AND PROCEDURE: Slay of Proceedings – Equitable remedy – Whether discretionary and to be exercised judiciary and judiciously.

STATUTE: CFRN 1999 (as amended) – S. 56 (4) thereof Import and imperatives – Practice and Procedure: Stay of proceedings – Whether will not be granted where it will unnecessarily delay and prolong proceedings contrary to S. 36 (4) of CFRN 1999 (as amended).

STATUTE: Supreme Court Act – S. 22 thereof – Whether provides the general powers for stay of proceedings pending appeal to the Supreme Court.

Issues for Determination

Whether the Supreme Court has the powers to grant the prayers as prayed and if so whether the appellant/applicant has made out a case for a grant of this application.

Whether the Supreme Court has the power under Section 6(6)(b) CFRN, 1999 (as amended) or under inherent jurisdiction to order for stay of further proceedings in a criminal case in view of the provisions of Section 36(4) CFRN, 1999, Section 40 of the Economic and Financial Crimes Commission (Establishment) Act, 2004 and Section 306 of the Administration of Criminal Justice Act, 2015 which prohibits courts from making/granting stay of proceedings in criminal cases.

Facts of the matter

The application herein is brought by the appellant/applicant praying for the court's order in terms of the following reliefs:

"1. AN ORDER of this honourable court staying further proceedings in Charge No. FHC/ABJ/CR/05/2015. FEDERAL REPUBLIC OF NIGERIA Vs. OLISA METUH & ANOR. Before His Lordship Hon. Justice O. E. Abang sitting at the Federal High Court, holden at

Abuja (F.C.T.) pending the hearing and determination of the appeal lodged by the appellant/applicant against the judgment of the Court of Appeal delivered on 24th May, 2016 in the said case wherein His Lordships dismissed a no case submission made by the appellant/applicant, the said appeal having been set down for hearing by this court for 2nd day of November, 2017.

Or in the alternative:

AN ORDER of this honourable court abridging the time within which the appeal may be heard to the date of hearing of this application or any other date in March, 2016, the appeal being ripe for hearing.

2. AND such Order or further Orders as this honourable court may deem fit to make in the circumstance".

The motion is supported by a 15 paragraph affidavit with one document attached and marked Exhibit 1, being a copy of the ruling of the Supreme Court delivered on Wednesday the 8th of February, 2017 and which adjourned the substantive appeal to the 2nd day of November, 2017.

There are seven grounds upon which this application is predicated as follows:

1. The appeal is guided by the Supreme Court (Criminal Appeals) Practice Direction 2013 and ought to be heard expeditiously.

2. The appellant/applicant's notice of appeal was lodged within seven (7) days from the date of the decision of the Court of Appeal.

3. The record of appeal was thereafter compiled within fifteen (15) days, and the appellant's brief of argument filed within ten (10) as constrained by the said Practice Direction. The respondent's brief has equally been filed.

4. By the ruling of this honourable court delivered on Wednesday, the 8th of February, 2017, the substantive appeal was adjourned to the 2nd day of November, 2017.

5. The hearing of the matter is adjourned to 20th, 22nd and 23rd March, 2016 and is proceeding with great speed at the trial court and the appellant/applicant will be greatly prejudiced if this appeal is not determined before a final and perhaps adverse judgment is delivered by the trial court.

6. Allowing the proceedings to continue in this case at the trial court will render nugatory the decision of this court and foist a fait accompli on both this honourable court and the appellant/applicant in the likely event this appeal succeeds.

7. All parties have filed their respective briefs of argument and none will be prejudiced if the date of hearing the substantive appeal is abridged to the day of hearing this application or any other date in March, 2017.

On the 16th March, 2017 being the date the application came up for hearing. Dr. Onyechi Ikpeazu, SAN in company of his learned brother Emeka Etiaba, SAN led a host of other counsel and appeared for the appellant/applicant. Sylvanus Tahir, Esq. also led a host of counsel and represented the 1st respondent. The learned senior counsel, Tochukwu Onwugbufor, SAN with his juniors in chambers appeared on behalf of the 2nd respondent.

In moving the application, Dr. Ikpeazu, SAN adopted and relied on their written address filed along with the motion and urged that relief 1 of the motion paper be granted. In respect of the alternative prayer however, the said senior

counsel applied that it should be abandoned.

In other words, the said alternative relief is, for the abridgement of time within which to hear the appeal on the date of hearing the application or such other time as the honourable court may deem fit.

The appellant/applicant and the 2nd respondent are standing trial before the Federal High Court, Abuja Division, on allegations of money laundering of funds. Upon being arraigned at the trial court, they both pleaded not guilty to the 7 counts charge.

Thereafter, trial commenced on the 25th January, 2016. In proof of its case, the prosecution called eight (8) witnesses all of who testified and were cross-examined by the defence. On the 9th February, 2016 the prosecution closed its case and the matter was adjourned to 18th February, 2016 for the defendants to open their defence. Appellant/applicant made a "No case" submission which the trial court dismissed on the 9th March, 2016. Upon an appeal to the Court of Appeal, the Court of Appeal delivered its judgment on the 24th day of May, 2016 dismissing the appellant/applicant's No case submission.

Within seven (7) days of the date of judgment by the Court of Appeal, the appellant/applicant filed a notice of appeal to the Supreme Court. The record of appeal was thereafter compiled within fifteen (15) days, and the appellant's brief of argument was filed within ten (10) days as constrained by the Practice Direction. The respondents' brief was equally filed. The appellant/applicant vide a motion exparte prayed this court for a date for hearing of the substantive appeal.

By the ruling of the Supreme Court delivered on Wednesday, the 8th of February, 2017, the substantive appeal was adjourned to the 2nd day of November, 2017.

Held: *(Unanimously dismissing the appeal)*

1. *Stay of proceeding is discretionary*

It is well settled and established as provided by law that both stay of execution and stay of proceedings pending appeal are equitable remedies which are dependent entirely on the discretionary powers of the court. The court is expected to exercise the discretion

judicially and judiciously and not as a matter of course. See the case of State Vs. Ajayi (1996) 1 NWLR (Pt. 423) 169. (P *22 paras H – I*)

2. *S. 6(6)(b) of the constitution does not confer specific powers on the court to stay proceedings*

As rightly submitted by the 1st respondent's counsel, Section 6(6)(b) of the constitution from all perspective does not confer specific powers on the Supreme Court to issue or grant an order or orders staying further proceedings in a criminal case. This is because, all that the section provides is to confer powers on courts to adjudicate matters between persons or between government or authority and to any persons in Nigeria with respect to their civil rights and obligations. *(P 23 paras D – F)*

3. *General Powers to stay proceedings are provided under S. 22 of the Supreme Court Act*

It is pertinent to state that the order sought on the application is interim by nature since it seeks a stay pending the hearing and determination of a pending appeal. Such general powers are provided for under Section 22 of the Supreme Court Act as follows:-

> **"22. The Supreme Court may, from time to time…….make an interim Order or grant any injunction which the court below is authorized to make or grant….."**

I wish to state pointedly that the application at hand cannot be determined without making reference to the foregoing Section 22 of the Supreme Court Act (reproduced supra) and read along also with Sections 306, Administration of Criminal Justice Act 2015, Section 40 EFCC (Establishment) Act, 2004 as well as section 15 Court of Appeal Act.

The reproduction of Section 306 of the Administration of Criminal Justice Act, 2015 provides:

> **"306. An application for stay of proceedings in respect of a Criminal matter before the court shall not be entertained."**

Furthermore, Section 40 of the EFCC (Establishment) Act 2004 states thus:

> **"Subject to the provisions of the constitution of the Federal Republic of Nigeria 1999, an application for stay of proceedings in respect of any criminal matter brought by the commission before the High Court shall not be entertained until judgment is delivered by the High Court."**

Lastly, Section 15 Court of Appeal Act has this to say on the general powers of the court:

> **"The Court of Appeal may make an interim order or grant any injunction which the court below is authorized to make."**

Following from the above provisions of the law, the pertinent question, as rightly asked by the 1st respondent's counsel is, since the trial court lacks the powers to order for stay of proceedings, likewise the Court of Appeal lacks same powers under Section 15 of the Court of Appeal Act, does this court have the powers to order for stay of proceedings? This is bearing in mind the provision of Section 22 of the Supreme Court Act (supra). In other words, the powers given this court to stay further proceedings is only to the extent: In respect of the orders which the court below is authorized to make or grant…"

Contrary to the submission advanced by the applicant's counsel, the consequential effect is that, the Supreme Court, like the two lower courts, also lacks the powers to stay proceedings under

section 22 Supreme Court Act or under its inherent powers.

At this point in time, references will be made to a number of judicial decisions for better exposition of the application of the provisions, wherein total jurisdiction is absent.

In the case of **Olofu Vs. Itodo (2010) 18 NWLR (Pt. 1225) SC 545 at 579** for instance, this court per **Onnoghen JSC (now CJN)** said:

> **"Where the trial court has no jurisdiction to hear and determine the matter, the Court of Appeal will be without jurisdiction to invoke and act on its powers under Section 15 of the Act."** *(Pp 23 – 25 paras F – D)*

5. *Court of Appeal can only assume first instance jurisdiction under S. 15 of the Act where the trial court has similar jurisdiction*

Similarly in the Court of Appeal decision (although of a persuasive authority it may be, was rightly decided) of the case of FCDA Vs. Koripamo Agary (2010) 14 NWLR (Pt. 1213) 364 at 394 it was held that:

> **"The incontestable limit to the power of the Court of Appeal to assume a first instance jurisdiction under Section 16 of the Court of Appeal Act, 1976 is that such first instance jurisdiction does not include what the trial court could not have done."**

Following from the foregoing authority therefore, the jurisdiction of the Court of Appeal, as provided by Section 15 of the Act, can be invoked only if the relief sought for is that which comes within the jurisdiction of the trial court. In other words and put differently, where the lower court acts in violation to the Act, the powers so exercised will be declared of non-effect and a nullity.

Other judicial authorities in support and also relevant are the cases of A-G Anambra Vs. Okeke (2002) 12 NWLR (Pt. 782) 575 and Jadesimi Vs. Okotie Eboh (No. 2) (1986) 1 NWLR (Pt. 16) 264.

(P 25 paras D – I)

6. *Supreme Court does not have power to stay proceedings where the lower courts do not*

On a community reading of the foregoing authorities, the totality is obvious to say that, since the trial court lacked the powers to make an order for stay of proceedings in the application before us, likewise the court below, this court cannot also be different. This is because as it is clearly specified under Section 22 of the Supreme Court Act reproduced supra, this court can make such orders only if the court below is authorized to make or grant. *(P 26 paras A – B)*

7. *The import of S. 36(4) CFRN 1999 (as amended)*

In contra interpretation by the learned counsel for the appellant, the constitution of the Federal Republic of Nigeria, 1999 (as amended) being the ground norm also provides for dealing with criminal trials within a reasonable time. Section 36(4) specifically provides thus:-

> **"36(4) Whenever any person is charged with a criminal offence, he shall, unless the charge is withdrawn, be entitled to a fair hearing in public within a reasonable time by a court or tribunal."**

(P 26 paras B – D)

8. *Stay of proceedings will not be granted when it will unnecessarily delay and prolong the procedures*

It is only logical to interpret the spirit of the foregoing constitutional provision to translate that, where the grant of an application for stay will unnecessarily delay and prolong the proceedings, it will not be granted.

The appellant's counsel argued vehemently that Section 306 of the ACJA does not apply either to the court below or this court. The argument, in my view, is grossly misconceived as rightly submitted by the 1st respondent's counsel. The conclusion, as stated earlier, is predicated squarely on the contention of Section 306 ACJA 2015 and Section 40 EFCC (Establishment) Act, 2004 whereby the

trial court lacks the powers to order for stay of proceedings; also the court below under Section 15 of the Court of Appeal Act as well as this court under Section 22 of the Supreme Court Act also lacks the power to order for stay of further proceedings pending before the trial court.

I wish to emphasize that this is a criminal proceeding. There are also clear constitutional and statutory provisions that enjoin and mandate the trial court not to delay criminal cases. *(P 26 paras E – I)*

9. *Code of Conduct Tribunal is not a court of supreme record*

"The principle in Saraki Vs. Kotoye (supra) relates squarely to civil cases, as rightly recorded by the 1st respondent's counsel. This court pronounced also in Saraki Vs. FRN (2016) 3 NWLR (Pt. 1500) SC 531 that the Code of Conduct tribunal is not a court of superior record or jurisdiction, but a court of quasi-criminal jurisdiction. Therefore, the application of the cases to the circumstance of this case cannot be relevant, as rightly submitted by the learned counsel to the 1st respondent.

The appellant/applicant's motion for stay of proceedings is violently in conflict with the provisions of Section 36(4) CFRN, 1999 (as amended) Section 306 ACJA, 2015 and Section 40 of the EFCC (Establishment) Act, 2004 as well as the plethora of case law authorities cited.

The application in the circumstance is hereby refused and dismissed." *(P 27 paras A – C)*

Per M.D. Mohamed (JSC)

"**The application brings to the fore, once again, the overriding duty a law court has in giving effect to statutory provisions and court practice directions.**

The applicant is being tried for corruption, economic and financial crimes and money laundering related offences.

Aggrieved by some of the interlocutory decisions of the trial court, the applicant has appealed against same. He now seeks stay

of proceedings at the trial court pending the determination of his appeal. The applicant's similar entreaty at the lower court was unsuccessful.

The applicant's trial at the Federal High Court sitting at Abuja persists after the court has overruled his no-case submission thereat. In relation to the trial court, Section 254 of the 1999 constitution has stipulated thus:-

> **"Subject to the provisions of any Act of the National Assembly, the Chief Judge of the Federal High Court may make rules for regulating the practice and procedure of the Federal High Court."**

Section 306 of the Administration of Criminal Justice Act (ACJA) 2015 provides:

> **"An application for stay of proceedings in respect of a criminal matter before the court shall not be entertained."**

Section 40 of the EFCC (Establishment) Act 2004 also provides:

> **"Subject to the provisions of the Constitution of the Federal Republic of Nigeria, an application for stay of proceedings in respect of any criminal matter brought by the commission before the High Court shall not be entertained until judgment is delivered by the High Court."**

The Chief Judge of the Federal High Court has also issued the court's Practice Directions 2013 to further facilitate the two foregoing legislations.

Under Section 22 of the Supreme Court Act, this court can only make such orders the lower court is empowered to do but did

not. The lower court, by virtue of Section 15 of the Court of Appeal Act, in the context of the instant application too, lacks the vires of making any order the trial court is not empowered to make. It is clearly not within the jurisdiction of the trial court to make the order of stay of proceedings which application, following its refusal by both courts below, is further agitated at this court." *(Pp 27 – 28 paras E – H)*

Per Kekere-Ekun (JSC)

"**It is pertinent to observe that the new dispensation throughout the hierarchy of our courts, as evidenced by the recent Practice Directions issued by respective heads of court in relation to matters pertaining *inter alia* to corruption, economic and financial crimes, human trafficking, money laundering, rape, kidnapping and terrorism, is to fast track the hearing and determination of such matters. See: Federal High Court (Criminal Trails) Practice Directions, 2013, Court of Appeal Practice Directions 2013 and Supreme Court (Criminal Appeals) Practice Directions, 2013. The explanatory note to the Federal High Court (Criminal Appeals) Practice Directions states:**

> **"These Practice Directions establish a system of case management that will provide for the fair, impartial and expeditious administration of criminal cases arising out of cases listed in Rule 2(1) of these Practice Directions and other related cases."**

Rule 2(1) provides:

> **"This Practice Direction shall, save to the extent and as may otherwise be ordered by the Honourable Chief Judge apply to all criminal cases particularly those relating to Terrorism, Kidnapping, Trafficking in Person, Rape, Corruption and Money Laundering cases."**

The 2013 Practice Directions of the Court of Appeal and Supreme Court respectively have the same objective. This is not only in keeping with the constitutional requirement of a fair hearing within a reasonable time guaranteed to any person charged with a criminal offence, but also to forestall the frustration of criminal trials by mischievous defendants." *(Pp 29 – 30 paras B – A*)

10. *The import of S. 306 ACJA*
Section 306 of the Administration of Criminal Justice Act (ACJA) 2015 provides:

> **"An application for stay of proceedings in respect of a criminal matter before the court shall not be entertained."**

Under Section 494(1) of the ACJA "Court" includes Federal Courts, the Magistrates' Court and Federal Capital Territory Area Courts presided over by legal practitioners while "High Court" is defined to mean the Federal High Court or the High Court of the Federal Capital Territory. Section 40 of the EFCC (Establishment) Act 2004 provides:

> **"Subject to the provisions of the Constitution of the Federal Republic of Nigeria 1999, an application for stay of proceedings in respect of any criminal matter brought by the commission before the High Court shall not be entertained until judgment is delivered by the High Court."**

The above provisions are geared towards eliminating delay and ensuring the expeditious determination of criminal matters pending before the trial courts." *(P 30 paras A – F)*

Per kekere Ekun (JSC)

"**In exercising its jurisdiction under Section 22 of the Supreme Court Act, Cap. S15 LFN 2004, this court is only empowered to make orders which the court below has jurisdiction to make. Likewise, the Court of Appeal in the exercise of its powers under Section 15 of the Court of Appeal Act Cap. C36 LFN 2004, may only make orders which the trial court is empowered to make. I agree with my learned brother, Ogunbiyi, JSC that in so far as the trial court is precluded from granting a stay of proceedings in respect of a criminal trial pending before it, neither the Court of Appeal nor the Supreme Court can exercise such powers under Section 15 of the Court of Appeal Act or Section 22 of the Supreme Court Act respectively.**

I also agree that Section 6(6) of the 1999 Constitution, as amended merely provides for the vesting of judicial powers in the superior courts of record set out in sub-paragraph (5) thereof and does not confer specific powers on the court to grant an order staying proceedings in a criminal trial.

There is no doubt that the grant of an order for stay of proceedings in this case would result in undue delay in the determination of the pending charge before the trial court. The appellant/applicant has failed to satisfy me that there is any special circumstance warranting the exercise of the court's discretion in his favour. The application filed on 03/03/2017 is without merit. It is refused and accordingly dismissed. *(Pp 30 – 31 paras F– C*)

Nigerian cases cited in this judgment28

A-G Anambra Vs. Okeke (2002) 12 NWLR (Pt. 782) 575,
Dr. Olubukola Saraki Vs. Federal Republic of Nigeria,
Eyesan Vs. Sanusi (1984) LPELR 1185 (SC)
Eyesan Vs. Sanusi (1984) LPELR 1185 (SC),
FCDA Vs. Koripamo Agary (2010) 14 NWLR (Pt. 1213) 364,
FEDERAL REPUBLIC OF NIGERIA Vs. OLISA METUH & ANOR,
Jadesimi Vs. Okotie Eboh (No. 2) 1986 1 NWLR (Pt. 16) 264,

A *Olofu Vs. Itodo (2010) 18 NWLR (Pt. 1225) SC 545,*
Saraki Vs. FRN (2016) 3 NWLR (Pt. 1500) SC 531,
Saraki Vs. Kotoye,
Saraki Vs. Kotoye (1992) 9 NWLR
B *Saraki Vs. Kotoye and Saraki Vs. FRN,*
State Vs. Ajayi (1996) 1 NWLR (Pt. 423) 169

Nigerian Statues cited in this judgment
C *ACJA, 2015 Section 306*
Administration of Criminal Justice Act, 2015 (ACJA) Section 306
CFRN, 1999 (as amended) Section 233(2), 36(4), 6(6)(b)
Constitution of the Federal Republic of Nigeria (as amended) 1999 Section 6(6)
D *Court of Appeal Act Section 15*
EFCC (Establishment) Act, 2004 Section 40
Supreme Court Act (supra) Section 22

E **APPEARANCES:**
Dr. Onyechi Ikpeazu, (SAN) with **Emeka Etiaba, (SAN)** for the appellant/applicant appearing with: **Prisca Ozoilejike; A.A. Akaahs, (Esq.); Melvin Oputa, (Esq.); Nkemakonam Obiesie (Miss); Nzube**
F **Akpaniteaku (Miss); Amaka Moka (Miss)** and **Chidimma Nweke (Miss).**
Mr. Sylvanus Tahir for the 1st respondent appearing with: **I.S. Azegbeobor (Mrs.), I.G. Odibo (Mrs.)** and **F. A. Jimbo.**
G **Mr. Tochukwu Onwugbufor (SAN)** for the 2nd respondent appearing with: **O. Onwugbufor (Ms)** and **Gerald Ajoku.**

CLARA BATA OGUNBIYI, (JSC) (Delivering the lead judgment):
H The application herein is brought by the appellant/applicant praying for the court's order in terms of the following reliefs:

I **"1. AN ORDER of this honourable court staying further proceedings in Charge No. FHC/ABJ/CR/05/2015. FEDERAL REPUBLIC**

OF NIGERIA Vs. OLISA METUH & ANOR. Before His Lordship Hon. Justice O. E. Abang sitting at the Federal High Court, holden at Abuja (F.C.T.) pending the hearing and determination of the appeal lodged by the appellant/applicant against the judgment of the Court of Appeal delivered on 24th May, 2016 in the said case wherein His Lordships dismissed a no case submission made by the appellant/applicant, the said appeal having been set down for hearing by this court for 2nd day of November, 2017.

Or in the alternative :

AN ORDER of this honourable court abridging the time within which the appeal may be heard to the date of hearing of this application or any other date in March, 2016, the appeal being ripe for hearing.

2. AND such Order or further Orders as this honourable court may deem fit to make in the circumstance".

The motion is supported by a 15 paragraph affidavit with one document attached and marked Exhibit 1, being a copy of the ruling of this court delivered on Wednesday the 8th of February, 2017 and which adjourned the substantive appeal to the 2nd day of November, 2017.

.....There are seven grounds upon which this application is predicated as follows:

1. The appeal is guided by the Supreme Court (Criminal Appeals) Practice Direction 2013 and ought to be heard expeditiously.

2. The appellant/applicant's notice of appeal was lodged within seven (7) days from the date of the decision of the Court of Appeal.

3. The record of appeal was thereafter compiled within fifteen (15) days, and the appellant's brief of argument filed within ten (10) as constrained by the said Practice Direction. The respondent's brief has equally been filed.

4. By the ruling of this honourable court delivered on Wednesday, the 8th of February, 2017, the substantive appeal was adjourned to the 2nd day of November, 2017.

5. The hearing of the matter is adjourned to 20th, 22nd and 23rd March, 2016 and is proceeding with great speed at the trial court and the appellant/applicant will be greatly prejudiced if this appeal is not determined before a final and perhaps adverse judgment is delivered by the trial court.

6. Allowing the proceedings to continue in this case at the trial court will render nugatory the decision of this court and foist a fait accompli on both this honourable court and the appellant/applicant in the likely event this appeal succeeds.

7. All parties have filed their respective briefs of argument and none will be prejudiced if the date of hearing the substantive appeal is abridged to the day of hearing this application or any other date in March, 2017.

On the 16th March, 2017 being the date the application came up for hearing. Dr. Onyechi Ikpeazu, SAN in company of his learned brother Emeka Etiaba, SAN led a host of other counsel and appeared for the

appellant/applicant. Sylvanus Tahir, Esq. also led a host of counsel and represented the 1st respondent. The learned senior counsel, Tochukwu Onwugbufor, SAN with his juniors in chambers appeared on behalf of the 2nd respondent.

In moving the application, Dr. Ikpeazu, SAN adopted and relied on their written address filed along with the motion and urged that relief 1 of the motion paper be granted. In respect of the alternative prayer however, the said senior counsel applied that it should be abandoned.

In other words, the said alternative relief is, for the abridgement of time within which to hear the appeal on the date of hearing the application or such other time as the honourable court may deem fit.

BRIEF BACKGROUND FACTS OF THIS CASE

The appellant/applicant and the 2nd respondent are standing trial before the Federal High Court, Abuja Division, on allegations of money laundering of funds. Upon being arraigned at the trial court, they both pleaded not guilty to the 7 counts charge.

Thereafter, trial commenced on the 25th January, 2016. In proof of its case, the prosecution called eight (8) witnesses all of who testified and were cross-examined by the defence. On the 9th February, 2016 the prosecution closed its case and the matter was adjourned to 18th February, 2016 for the defendants to open their defence. Appellant/applicant made a "No case" submission which the trial court dismissed on the 9th March, 2016. Upon an appeal to the lower court, the court below delivered its judgment on the 24th day of May, 2016 dismissing the appellant/applicant's No case submission.

Within seven (7) days of the date of judgment by the Court of Appeal, the appellant/applicant filed a notice of appeal to this court. The record of appeal was thereafter compiled within fifteen (15) days, and the appellant's brief of argument was filed with ten (10) days as constrained by the Practice Direction. The respondents' brief was equally filed. The appellant/applicant vide a motion exparte prayed this court for a date for hearing of the substantive appeal.

By the ruling of this court delivered on Wednesday, the 8th of

A February, 2017, the substantive appeal was adjourned to the 2nd day of November, 2017.

As a preliminary point to the determination of this application, it will be pertinent to make an order that the alternative relief sought for on the B motion paper, having been withdrawn by the applicant's counsel without any objection is hereby struck out.

The lone issue formulated on behalf of the appellant/applicant from his application is very simple and straight forward as follows:-

C

> **Whether the Supreme Court has the powers to grant the prayers as prayed and if so whether the appellant/ applicant has made out a case for a grant of this** D **application.**

In his submission to ground the application, the learned counsel for the appellant/applicant related to Section 6(6) of the 1999 Constitution of the E Federal Republic of Nigeria (as amended), copiously and drew the attention of this court to the superiority of the constitution over and above any other legislation or enactment.

In further submission, the counsel poised the right of an accused to F appeal as is prescribed by the constitution of the Federal Republic of Nigeria. Reference was made for instance to Section 233(2)(a) of the said constitution which provides that an appeal shall lie from the decisions of the Court of Appeal to this court as of right, where the ground of appeal G involves questions of law alone, decisions in any civil or criminal proceedings before the Court of Appeal. The learned counsel in buttress of his submission cites the decision of this court in the case of **Eyesan Vs. Sanusi (1984) LPELR 1185 (SC),** which warned that the:

H

> **"right of appeal to the Court of Appeal is a Constitutional Right exercisable by a party in a civil case. See Section 222(a) and (b) of the 1979 Constitution. The right** I **exercisable against another person who has complaints touching his civil rights and obligations against another**

person, government under Section 236(1) of the 1979 Constitution. Once the exercise of this right of action has commenced, the exercise is not completed until action is finally and completely determined by the court of 1st instance or the appeal court."

The right of appeal which is prescribed by the constitution, counsel submits, is what the appellant/applicant has approached this court in exercise thereof; that the supremacy of the constitution is exhibited by the provision of Section 1(3) of same.

The learned counsel related copiously to Section 306 of the Administration of Criminal Justice Act, 2015 (ACJA) and submitted that the provision is not applicable to any appellate court in Nigeria. Reference was also made to Section 494 of the said ACJA, which defines court to include Federal Courts, the Magistrate Court and the Federal Capital Territory or Area Court, presided over by the legal practitioners. The use of court in Section 306, counsel argues can only apply to those listed in Section 494 of ACJA. In other words, it relates to the court of first instance or trial court only, which cannot be interpreted to include Court of Appeal or Supreme Court; that the maxim of **"expression unis est exclusion alterius"** applies; that the power of this court cannot be ousted by Section 306 of ACJA; from the plain wording of Section 306, the ACJA applies only to the trial court, which is conducting **"the criminal trial."**

In support of his submission, the learned counsel referred pointedly to the ruling delivered by this court in **SC/852/2015: Dr. Olubukola Saraki Vs. Federal Republic of Nigeria,** where this court stayed further proceeding at the CCT pending the hearing of the appeal. Again, further reference was made to the case of **Saraki Vs. Kotoye (1992) 9 NWLR 17** wherein this court considered an application of a similar nature.

In the exercise of its discretion, counsel re-iterates that the court must take into account the peculiarities of each case also that no two cases are the same; that the court must further consider certain factors which are necessary and to be taken note of.

A On the totality, the learned counsel submitted that the affidavit in support of this application has met the stipulated criteria and urged that the discretion should be exercised in their favour.

In response to the application, is the 1st respondent's 13 paragraphs B counter affidavit in opposition to appellant/applicant's affidavit in support of the said motion. Also in addition is the 1st respondent's written address in response to the appellant/applicant's written address in support of the motion on notice filed.

C The lone issue also formulated on behalf of the said respondent is substantially similar to that by the applicant's counsel. I will not reproduce same.

With reference to Section 6(6)(b) of the CFRN 1999 (as amended) D and which same was relied upon by the applicant's counsel, the respondent's counsel submits same as dead on arrival. This, counsel argues is predicated on a non-existing provision of the law, substantive or procedural; that this court cannot act in vacuo under Section 6(6)(b) of the E constitution, which provides only for the judicial powers vested in accordance with the foregoing provisions of the section. The counsel submits further that the section does not confer specific powers on this court to issue or grant an order or orders staying further proceedings in a F criminal case.

It is submitted by counsel also that this court cannot, in this application, invoke its inherent jurisdiction to order for stay of further proceedings in the ongoing trial at the Federal High Court. The G appellant/applicant, counsel submits, ought to have moved this court pursuant to or under Section 22 of the Supreme Court Act.

To buttress his submission further, the learned counsel cited the case of **Olofu Vs. Itodo (2010) 18 NWLR (Pt. 1225) SC 545 at 579;** that no H such application was made at the trial court.

Contrary to the submission by the appellant/applicant's counsel, it is submitted on behalf of the respondent that section 6(6)(b) of the CFRN 1999 is not helpful to this application.

I The learned counsel in stressing his point strongly emphasized that the applicant did not bring his application under any relevant section of the

Supreme Court Act or Supreme Court Rules to enable the court grant the application. The learned counsel re-iterated and said that, by bringing the motion pursuant to Section 6(6)(b)CFRN, 1999 (as amended) same is hopelessly incompetent and should be dismissed without much ado; that the cases of **Saraki Vs. Kotoye and Saraki Vs. FRN** cited by the appellant/applicant's counsel are irrelevant and inapplicable in the circumstance of this case.

The learned counsel on the totality urged in favour of dismissal of the application as being violently in conflict with the provisions of Section 36(4) CFRN, 1999 (as amended), Section 306 ACJA and Section 40 of the EFCC (Establishment) Act, 2004; as well as the plethora of case law authorities cited.

On behalf of the 2nd respondent, a further affidavit was filed in support of the motion and the learned counsel in his submission urged this court to exercise discretion and grant same thereof.

The lone issue which is agreed upon by all parties is similar basically in principle. For the resolution of the application, I wish to restate the formulation by the 1st respondent which is all encompassing as follows:

> **Whether the Supreme Court has the power under Section 6(6)(b) CFRN, 1999 (as amended) or under inherent jurisdiction to order for stay of further proceedings in a criminal case in view of the provisions of Section 36(4) CFRN, 1999, Section 40 of the Economic and Financial Crimes Commission (Establishment) Act, 2004 and Section 306 of the Administration of Criminal Justice Act, 2015 which prohibits courts from making/granting stay of proceedings in criminal cases.**

It is well settled and established as provided by law that both stay of execution and stay of proceedings pending appeal are equitable remedies which are dependent entirely on the discretionary powers of the court. The court is expected to exercise the discretion judicially and judiciously and not as a matter of course. See the case of **State Vs. Ajayi (1996) 1 NWLR (Pt. 423) 169.**

The learned counsel for the appellant sought to rely copiously on the constitutional right of appeal as it is guaranteed by Section 233(2) of the CFRN, 1999 (as amended), bearing in mind the supremacy of the said constitution under Section 1(3) of the same.

It is the contention of the applicant's counsel therefore that the judicial powers of this court as provided by Section 6(6) of the constitution are enormous as it extends to all matters and to all actions and proceedings relating thereto. The counsel related to the warning sounded by this court in the case of **Eyesan Vs. Sanusi (1984) LPELR 1185 (SC)** in saying that the:

> **"right of appeal to the Court of Appeal is a Constitutional Right exercisable by a party in a civil case."**

As rightly submitted by the 1st respondent's counsel, Section 6(6)(b) of the constitution from all perspective does not confer specific powers on the Supreme Court to issue or grant an order or orders staying further proceedings in a criminal case. This is because, all that the section provides is to confer powers on courts to adjudicate matters between persons or between government or authority and to any persons in Nigeria with respect to their civil rights and obligations.

It is pertinent to state that the order sought on the application is interim by nature since it seeks a stay pending the hearing and determination of a pending appeal. Such general powers are provided for under Section 22 of the Supreme Court Act as follows:

> **"22. The Supreme Court may, from time to time…….make an interim Order or grant any injunction which the court below is authorized to make or grant….."**

I wish to state pointedly that the application at hand cannot be determined without making reference to the foregoing Section 22 of the Supreme Court Act (reproduced supra) and read along also with Sections 306,

Administration of Criminal Justice Act 2015, Section 40 EFCC (Establishment) Act, 2004 as well as section 15 Court of Appeal Act.

The reproduction of Section 306 of the Administration of Criminal Justice Act, 2015 provides:-

> **"306. An application for stay of proceedings in respect of a Criminal matter before the court shall not be entertained."**

Furthermore, Section 40 of the EFCC (Establishment) Act 2004 states thus:

> **"Subject to the provisions of the constitution of the Federal Republic of Nigeria 1999, an application for stay of proceedings in respect of any criminal matter brought by the commission before the High Court shall not be entertained until judgment is delivered by the High Court."**

Lastly, Section 15 Court of Appeal Act has this to say on the general powers of the court:-

> **"The Court of Appeal may make an interim order or grant any injunction which the court below is authorized to make."**

Following from the above provisions of the law, the pertinent question, as rightly asked by the 1st respondent's counsel is, since the trial court lacks the powers to order for stay of proceedings, likewise the Court of Appeal lacks same powers under Section 15 of the Court of Appeal Act, does this court have the powers to order for stay of proceedings? This is bearing in mind the provision of Section 22 of the Supreme Court Act (supra). In other words, the powers given this court to stay further proceedings is only to the extent: In respect of the orders **which the court below is authorized to make or grant…"**

Contrary to the submission advanced by the applicant's counsel, the consequential effect is that, the Supreme Court, like the two lower courts, also lacks the powers to stay proceedings under section 22 Supreme Court Act or under its inherent powers.

At this point in time, references will be made to a number of judicial decisions for better exposition of the application of the provisions, wherein total jurisdiction is absent.

In the case of **Olofu Vs. Itodo (2010) 18 NWLR (Pt. 1225) SC 545 at 579** for instance, this court per **Onnoghen JSC (now CJN)** said:

> **"Where the trial court has no jurisdiction to hear and determine the matter, the Court of Appeal will be without jurisdiction to invoke and act on its powers under Section 15 of the Act."**

Similarly in the Court of Appeal decision (although of a persuasive authority it may be was rightly decided) of the case of **FCDA Vs. Koripamo Agary (2010) 14 NWLR (Pt. 1213) 364 at 394** it was held that:

> **"The incontestable limit to the power of the Court of Appeal to assume a first instance jurisdiction under Section 15 of the Court of Appeal Act, 1976 is that such first instance jurisdiction does not include what the trial court could not have done."**

Following from the foregoing authority therefore, the jurisdiction of the Court of Appeal, as provided by Section 15 of the Act, can be invoked only if the relief sought for is that which comes within the jurisdiction of the trial court. In other words and put differently, where the lower court acts in violation to the Act, the powers so exercised will be declared of non-effect and a nullity.

Other judicial authorities in support and also relevant are the cases of **A-G Anambra Vs. Okeke (2002) 12 NWLR (Pt. 782) 575 and Jadesimi Vs. Okotie Eboh (No. 2) 1986 1 NWLR (Pt. 16) 264.**

A On a community reading of the foregoing authorities, the totality is obvious to say that, since the trial court lacked the powers to make an order for stay of proceedings in the application before us, likewise the court below, this court cannot also be different. This is because as it is clearly
B specified under Section 22 of the Supreme Court Act reproduced supra, this court can make such orders only if the court below is authorized to make or grant.

In contra interpretation by the learned counsel for the appellant, the
C constitution of the Federal Republic of Nigeria, 1999 (as amended) being the ground norm also provides for dealing with criminal trials within a reasonable time. Section 36(4) specifically provides thus:

D **"36(4) Whenever any person is charged with a criminal offence, he shall, unless the charge is withdrawn, be entitled to a fair hearing in public within a reasonable time by a court or tribunal."**

E

It is only logical to interpret the spirit of the foregoing constitutional provision to translate that, where the grant of an application for stay will unnecessarily delay and prolong the proceedings, it will not be granted.

F The appellant's counsel argued vehemently that Section 306 of the ACJA does not apply either to the court below or this court. The argument, in my view, is grossly misconceived as rightly submitted by the 1st respondent's counsel. The conclusion, as stated earlier, is predicated
G squarely on the contention of Section 306 ACJA 2015 and Section 40 EFCC (Establishment) Act, 2004 whereby the trial court lacks the powers to order for stay of proceedings; also the court below under Section 15 of the Court of Appeal Act as well as this court under Section 22 of the Supreme Court
H Act also lacks the power to order for stay of further proceedings pending before the trial court.

I wish to emphasize that this is a criminal proceeding. There are also clear constitutional and statutory provisions that enjoin and mandate the
I trial court not to delay criminal cases.

A The principle in **Saraki Vs. Kotoye (supra)** relates squarely to civil cases, as rightly recorded by the 1st respondent's counsel. This court pronounced also in **Saraki Vs. FRN (2016) 3 NWLR (Pt. 1500) SC 531** that the Code of Conduct tribunal is not a court of superior record or B jurisdiction, but a court of quasi-criminal jurisdiction. Therefore, the application of the cases to the circumstance of this case cannot be relevant, as rightly submitted by the learned counsel to the 1st respondent.

The appellant/applicant's motion for stay of proceedings is violently C in conflict with the provisions of Section 36(4) CFRN, 1999 (as amended) Section 306 ACJA, 2015 and Section 40 of the EFCC (Establishment) Act, 2004 as well as the plethora of case law authorities cited.

The application in the circumstance is hereby refused and dismissed.

D **Clara Bata Ogunbiyi**
Justice, Supreme Court

MUSA DATTIJO MUHAMMAD, (JSC): Having read in draft the lead E ruling of my learned brother **CLARA BATA OGUNBIYI, JSC** just delivered, I entirely agree with the reasoning leading to the conclusion therein that the application being unmeritorious requires to be dismissed.

The application brings to the fore, once again, the overriding duty a F law court has in giving effect to statutory provisions and court practice directions.

The applicant is being tried for corruption, economic and financial crimes and money laundering related offences.

G Aggrieved by some of the interlocutory decisions of the trial court, the applicant has appealed against same. He now seeks stay of proceedings at the trial court pending the determination of his appeal. The applicant's similar entreaty at the lower court was unsuccessful.

H The applicant's trial at the Federal High Court sitting at Abuja persists after the court has overruled his no-case submission thereat. In relation to the trial court, Section 254 of the 1999 constitution has stipulated thus:

I

A **"Subject to the provisions of any Act of the National Assembly, the Chief Judge of the Federal High Court may make rules for regulating the practice and procedure of the Federal High Court."**

B

Section 306 of the Administration of Criminal Justice Act (ACJA) 2015 provides:

C **"An application for stay of proceedings in respect of a criminal matter before the court shall not be entertained."**

Section 40 of the EFCC (Establishment) Act 2004 also provides:

D

"Subject to the provisions of the Constitution of the Federal Republic of Nigeria, an application for stay of proceedings in respect of any criminal matter brought by

E **the commission before the High Court shall not be entertained until judgment is delivered by the High Court."**

F The Chief Judge of the Federal High Court has also issued the court's Practice Directions 2013 to further facilitate the two foregoing legislations.

Under Section 22 of the Supreme Court Act, this court can only make such orders the lower court is empowered to do but did not. The lower

G court, by virtue of Section 15 of the Court of Appeal Act, in the context of the instant application too, lacks the vires of making any order the trial court is not empowered to make. It is clearly not within the jurisdiction of the trial court to make the order of stay of proceedings which application,

H following its refusal by both courts below, is further agitated at this court.

It is for this same reason and the further and fuller reasons contained in the lead ruling that I find the application devoid of merit and dismiss same.

I **Musa Dattijo Muhammad**
Justice, Supreme Court

KUDIRAT MOTONMORI OLATOKUNBO KEKERE-EKUN , (JSC): I have had a preview of the ruling just delivered by my learned brother, CLARA BATA OGUNBIYI, JSC. I am in full agreement with the reasoning and conclusion reached.

It is pertinent to observe that the new dispensation throughout the hierarchy of our courts, as evidenced by the recent Practice Directions issued by respective heads of court in relation to matters pertaining *inter alia* to corruption, economic and financial crimes, human trafficking, money laundering, rape, kidnapping and terrorism, is to fast track the hearing and determination of such matters. See: **Federal High Court (Criminal Trails) Practice Directions, 2013, Court of Appeal Practice Directions 2013 and Supreme Court (Criminal Appeals) Practice Directions, 2013**. The explanatory note to the Federal High Court (Criminal Appeals) Practice Directions states:

> **"These Practice Directions establish a system of case management that will provide for the fair, impartial and expeditious administration of criminal cases arising out of cases listed in Rule 2(1) of these Practice Directions and other related cases."**

Rule 2(1) provides:

> **"This Practice Direction shall, save to the extent and as may otherwise be ordered by the Honourable Chief Judge apply to all criminal cases particularly those relating to Terrorism, Kidnapping, Trafficking in Person, Rape, Corruption and Money Laundering cases."**

The 2013 Practice Directions of the Court of Appeal and Supreme Court respectively have the same objective. This is not only in keeping with the constitutional requirement of a fair hearing within a reasonable time guaranteed to any person charged with a criminal offence, but also to

forestall the frustration of criminal trials by mischievous defendants.

Section 306 of the Administration of Criminal Justice Act (ACJA) 2015 provides:

> **"An application for stay of proceedings in respect of a criminal matter before the court shall not be entertained."**

Under Section 494(1) of the ACJA "Court" includes Federal Courts, the Magistrates' Court and Federal Capital Territory Area Courts presided over by legal practitioners while "High Court" is defined to mean the Federal High Court or the High Court of the Federal Capital Territory. Section 40 of the EFCC (Establishment) Act 2004 provides:

> **"Subject to the provisions of the Constitution of the Federal Republic of Nigeria 1999, an application for stay of proceedings in respect of any criminal matter brought by the commission before the High Court shall not be entertained until judgment is delivered by the High Court."**

The above provisions are geared towards eliminating delay and ensuring the expeditious determination of criminal matters pending before the trial courts.

In exercising its jurisdiction under Section 22 of the Supreme Court Act, Cap. S15 LFN 2004, this court is only empowered to make orders which the court below has jurisdiction to make. Likewise, the Court of Appeal in the exercise of its powers under Section 15 of the Court of Appeal Act Cap. C36 LFN 2004, may only make orders which the trial court is empowered to make. I agree with my learned brother, Ogunbiyi, JSC that in so far as the trial court is precluded from granting a stay of proceedings in respect of a criminal trial pending before it, neither the Court of Appeal nor the Supreme Court can exercise such powers under Section 15 of the Court of Appeal Act or Section 22 of the Supreme Court Act respectively.

A I also agree that Section 6(6) of the 1999 Constitution, as amended merely provides for the vesting of judicial powers in the superior courts of record set out in sub-paragraph (5) thereof and does not confer specific powers on the court to grant an order staying proceedings in a criminal trial.

B There is no doubt that the grant of an order for stay of proceedings in this case would result in undue delay in the determination of the pending charge before the trial court. The appellant/applicant has failed to satisfy me that there is any special circumstance warranting the exercise of the C court's discretion in his favour. The application filed on 03/03/2017 is without merit. It is refused and accordingly dismissed.

Kudirat M. O. Kekere-Ekun
Justice, Supreme Court

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I

1. CHIEF RITA LORI OGBEBOR
2. MRS. AIDA DORTI
3. MR. DAVID IWERE
4. MR. AWANI KENNEDY
5. MRS. FELICIA OKOME
6. MR. OMOLUBI NEWUWUMI
7. MR. MOSES OYIBO
8. MRS. OMOKO URUNTIE
9. MR. REX EDE
10. MR. ROBERT ATAKERE

[Suing for themselves and as representatives of the Itsekiri Ethnic Nationality of Warri Kingdom in Delta State of Nigeria]

AND

1. INDEPENDENT NATIONAL ELECTORAL COMMISSION
2. NATIONAL POPULATION COMMISSION
3. ATTORNEY GENERAL OF THE FEDERATION
4. DELTA STATE INDEPENDENT ELECTORAL COMMISSION
5. WARRI SOUTH LOCAL GOVERNMENT COUNCIL
6. WARRI SOUTH WEST LOCAL GOVERNMENT COUNCIL
7. WARRI NORTH LOCAL GOVERNMENT COUNCIL
(a) CHIEF PETER OROMONI
(b) CHIEF PAULY EINANAGBEHA
(c) CHIEF JOWEL POSTMASTER
(d) CHIEF JOSEPH IPEDIE
(e) CHIEF P.F. OWEKPODI
(f) HON. LUCKY OROMONI
(g) MR. SAMSON OYIMI
(i) MR. ALFRED YOLA
(j) REV. IKENNACHA SAMUEL

[*for themselves and on behalf of the Izon Ethnic Nationality in the three Warri Local Government Areas of Delta State of Nigeria]*

SC. 212/2006

IN THE SUPREME COURT OF NIGERIA
HOLDEN AT ABUJA

FRIDAY, 16TH JUNE 2017

BEFORE THEIR LORDSHIPS

OLUKAYODE ARIWOOLA	**JUSTICE, SUPREME COURT**
KUMAI BAYANG AKA'AHS	**JUSTICE, SUPREME COURT**
AMINA ADAMU AUGIE	**JUSTICE, SUPREME COURT**
EJEMBI EKO	**JUSTICE, SUPREME COURT**
PAUL ADAMU GALINJE	**JUSTICE, SUPREME COURT**

ACTION: Constitution thereof – When is an action properly constituted – Whether a properly constituted action must have a plaintiff, defendant and a dispute.

CONSTITUTIONAL LAW: Structure, composition and establishment of each local government council – S. 7(1) of the Constitution of the Federal republic of Nigeria, 1999 – Whether an exclusive matter for the state government

COURT: Jurisdiction – Where court has limited jurisdiction to entertain only ancillary claims – Whether it is proper to approach court with jurisdiction of the entire claims.

COURT: Court of Appeal – Appellate powers – S. 15 of Court of Appeal Act, 2004 – Whether cannot be invoked where the lower court lacks jurisdiction to entertain the matter on appeal

COURT: Jurisdiction Federal High Court – S. 251 of CFN 1999 – Whether does not have jurisdiction to entertain dispute relating to structures of local government councils

COURT: Jurisdiction – Federal High Court – Where a Federal Agency has a simple contract with a third party – Whether the jurisdiction of the Federal High Court is thereby ousted – Principle in ***Onuoha Vs.***

Kaduna Refinery & Petrochemical Company (2005) 6 NWLR (Pt 921) 393 at 405.

COURT: Jurisdiction – When a suit is not properly constituted – Whether the trial court lacks the requisite jurisdiction.

LEGISLATION: Power to make laws in respect of division of local government areas into wards for purposes of local government council elections – Whether not within the legislative competence of the National Assembly

PRACTICE AND PROCEDURE: Error of the trial court – Whether it is not every error of the trial court will result in the appeal being set aside

Issues for Determination

1. ***Whether the lower court rightly upheld the decision of the trial court declining jurisdiction to entertain the reliefs sought in this case, having regards to the cumulative jurisdiction vested in the High Court under the Federal High Court Act, and Section 251 of the Constitution [Grounds 1 and 6].***

2. ***Whether the lower court rightly affirmed the procedure followed by the trial court in striking out the Federal agencies in the suit, suo motu, in order to strip the Federal High Court of jurisdiction to entertain the suit. [Grounds 2 & 3].***

3. ***Whether the lower court misdirected itself and occasioned a miscarriage of justice by allowing the cross-appeal instead of invoking its powers of re-hearting under Section 16 of the Court of Appeal Act in order to give its decision on the merits of the case commenced by Originating Summons, and devoid of any controversial or conflicting facts, the trial court having failed to***

pronounce on same as required by the binding decision of the Supreme Court in KATTO Vs. CBN (1991) 9 NWLR (pt. 214) 126. [Grounds 4 & 5].

Facts of the Matter

The original action, leading to this appeal, was commenced by way of originating summons at the Federal High Court, Abuja. The suit was before S. J. Adah, F.J. (as he then was). The plaintiffs, now the appellants, had sued the Seven (7) defendants, including the Independent National Electoral Commission (INEC), National Population Commission (NPC) and the Attorney-General of the Federation (AGF) - all agencies or agents of the Federal Government of Nigeria. The appellants, as the plaintiffs, had obtained leave of court to take out the suit for themselves and as representatives of the Itsekiri Ethnic Nationality of Warri Kingdom in the Delta State of Nigeria concerning the creation of Local Government electoral wards and boundary adjustments in the Local Government Areas. These structural adjustments were intended for the purpose of Local Government elections. The Delta State Independent Electoral Commission had advertised the Guidelines for the creation of additional electoral wards in all the Local Government Areas of Delta State. The Guidelines are Exhibit **R2** and **R7,** as published respectively in the Pointer and the Vanguard Newspapers. No action had yet been taken physically on ground on the Ward creation or the delineation of the boundaries of existing wards. At the time this suit was taken out the plaintiffs were merely being guided by speculation as to what shape the additional wards and their boundaries would look like.

The foregoing are the basis of the suit brought in the Originating Summons wherein the appellants, are the plaintiffs, sought the Federal High Court to determine the following questions and then grant the following reliefs -

"1. WHETHER having regard to the powers conferred upon Delta State Independent Electoral Commission as set out in Item D in Part II of the Third Schedule to the 1999 Constitution; the Independent National Electoral Commission and the National Population Commission,

being federal agencies, can supply the former with electoral register, census data and ballot papers respectively for the conduct of election into a local government purportedly created (without prior constitutionally stipulated request or referendum) by the Delta State Government as Warri South West Local Government Area having as the boundary of its headquarters the ward known as Ogbeljoh as against and in substitution for Warri South West Local Government Area having as the boundary of its headquarters a ward known as Ogidigben by virtue of section 3 & 315 of the Constitution, Part I of the First Schedule to the Constitution of the Federal Republic of Nigeria, 1999 and section 8(5) thereof dealing with powers of the National Assembly to amend by law the boundary of the headquarters and area of a designated local government newly created or adjusted by the relevant authority of a state.

2. ***WHETHER the power of Delta State government to create or restructure local government and/or delineate wards or readjust boundary of wards in local governments pursuant to Section 7 of the constitution of the Federal Republic of Nigeria (1999) as confirmed by the decision of the Supreme Court in the case of* A-G Abia State v. A-G Federation (2002) 6 NWLR (pt 763) 264 *is subject to prior compliance with the entrenched provisions of Section 8 subsections (3) and (4) of the Constitution.***

It is against this decision striking out the 1st, 2nd and 3rd defendants from the suit **No. FHC/ABJ/C^{S}/272/2002** that prompted the appellants herein, as the plaintiffs, to lodge their appeal to the Court of Appeal. The appeal **No. CA/A/52^{M}/03** was heard, and dismissed on 14th June, 2005, hence this further appeal.

Held: *(Unanimously dismissing the appeal)*

1. *When an action is properly constituted*

The law is settled on the elementary, but fundamental, principle that in every suit at the court of law there must be a plaintiff, who has the legal capacity to bring the action, and a defendant with the legal capacity to defend the action. There must also be a claim against the defendant for him to defend. In other words, there must exist a dispute between the plaintiff and the defendant for the action to be properly constituted. *See* Nnodi Vs. Okafor (1964) NMLR 132. A properly constituted action, therefore, must have the trinity of the plaintiff, the defendant and the claim against the defendant. *See* Ayorinde Vs. Oni (2000) 3 NWLR (pt. 649) 348 at 367. It is improper to join as co-defendants to an action, persons against whom the plaintiff has no cause of action and against whom he has not made any claim. *See* Lajumoke Vs. Doherty (1969) NMLR 281; ALHAJI Aromire Vs. Awoyemi (1972) 1 ALL NLR (pt. 1) 10; Ayorinde Vs. Oni (supra). These sound principles have been developed to prevent the filing of frivolous and vexatious actions, and of course, the abuse of court's process. *(P 60 paras D – H)*

2. *Where specific findings are not challenged on appeal*

The 1st, 2nd and 3rd defendants at the trial court were, respectively, the INEC, NPC and the AGF. They were held, rightly, to be Federal agencies. The ruling of the trial court which necessitated the appeal to the lower court has, at pages 83-85 of the Record, four major decisions or pronouncements that are material for the consideration of Issue 1 in this appeal. That is, (1) that from the questions and reliefs in this case, the principal issue for consideration has to do with matters associated with creation of Local Government and wards alongside the Guidelines set for the creation of Electoral Wards in Delta State, (2) that the Federal High Court is not endowed, under Section 251 of the 1999 Constitution, with jurisdiction over the issues relating to the creation of Local Government or delineation of Wards by the authorities of the State

Government and the State Independent Electoral Commission and that such state matters or causes are not amenable to the jurisdiction of the Federal High Court; (3) that the 1st, 2nd and 3rd defendants have not been linked directly or primarily to the issues and reliefs raised in the originating summons to warrant the intervention accepted that specific finding of fact or specific point of the decision, and they subsist against him. ***See*** **S.P.D.C. (Nig.) Ltd. Vs. Edamkue (2009) ALL FWLR (pt. 489) 407 at 434; Calabar Central Co-op Thrift & Credit Society Ltd. Vs. Ekpo (2008) 6 NWLR (pt. 1083) 362 at 388.** *(Pp 61 – 62 paras F – C)*

Per Eko (JSC)

"Such specific findings of fact or point in the decision, not appealed, cannot be disturbed by the appellant court. It lacks jurisdiction to do so. The jurisdiction of the Appeal Court is limited to the grievance of the appellant, as expressed in the grounds of appeal and the issues formulated therefrom for the determination of the appeal. ***See*** **Moses Vs. The State (2006) 11 NWLR (pt. 992) 458, where this court, per Onnoghen, JSC (as he then was) stated that where a finding or decision of the court below, whether on an issue of fact or law, is not challenged in an appeal to the appeal court, such finding or decision, rightly or wrongly, must not be disturbed. When an issue is not placed before an appellate court, the appellate court has no business whatsoever to deal with it.** ***See*** **Florence Olusanya Vs. Oluremi Olusanya (1983) 3 SC 41 at 56 57; Nwabueze Vs. Okoye (1988) 4 NWLR (pt. 91) 664. This Court, like any other court, cannot adjudicate on matters not before it.** ***See*** **Overseas Construction Ltd. Vs. Creek Enterprises (Nig.) Ltd. (1985) 3 NWLR (pt. 13) 407; Okpanum Vs. S.G.E. (Nig.) Ltd. (1998) 7 NWLR (pt. 559) 537.**

The holding of the lower court that the 1st – 3rd respondents, as the 1st – 3rd defendants at the trial court, "were not proper parties" before the trial court and that the matter was between the appellant

and the 3rd – 7th defendants/respondents was, in the matter or appeal before it, very fundamental decision of the lower court, particularly under Issues 2 and 3 argued in that court. The decision subsists and remains binding between the parties. The decision, rightly or wrongly, cannot be disturbed. This Court lacks jurisdiction and powers to disturb it." *(P* **62** *paras* **C – I***)*

3. *The Court has no jurisdiction when a suit is not properly constituted*
When a suit is not properly constituted the court lacks jurisdiction to adjudicate on it. There must be a competent plaintiff and a competent defendant against when the plaintiff has a cause of action or grievance for the trial court to be competent in its adjudicatory function. ***See*** **Ataguba & Co. Vs. Gura Nig. Ltd. (2005) ALL FWLR (pt. 265) 1219; (2005) 2 SC (pt. 1) 101. It is only then that the action could be said to have been initiated in accordance with the due process of law.** ***See*** **Madukolu Vs. Nkemdilim (1962) 2 SCNLR 374, (1962) ANLR (pt.4) 587. The defect in the condition precedent for the trial court to assume jurisdiction over the suit and the parties renders the suit incompetent. An improperly constituted suit denies the court the jurisdiction to entertain it. In the instant case, the holding of the lower court that, as between the appellants, as the plaintiffs, and the 1st 3rd defendants/respondents, the suit at the Federal High Court was not properly constituted means that the said trial court had no jurisdiction to adjudicate in the action of the plaintiffs/appellants against the said 1st, 2nd and 3rd defendants/ respondents.** *(Pp 62 – 63 paras I – D)*

4. *Court has no jurisdiction to entertain the principal reliefs*
The 1st respondent submits, and 1 agree, that a scrupulous examination of the case of the appellants, as borne out by the supporting affidavit particularly paragraphs 7 – 21 thereof would reveal that the action of the appellants had only to deal with the Local Government elections, the creation of additional electoral wards within the three Local Government Areas. The Itsekiris claim to have numerical superiority and that the consequential adjustment of the boundaries within each of the three (3) Local Government Area would lead to diminution of that superiority.

Those are the principal issues or questions, in the action.

I tend or lean towards agreeing with the 1st respondent. The 4th respondent submits, in support of the trial court, that once the trial court cannot competently entertain and determine the principal question or issue, it follows that it cannot adjudicate over ancillary or incidental claims. The 4th respondent has made a strong point. In Tukur Vs. Government of Gongola State (1989) 4 NWLR (pt. 117) 517, the main claim or issue in the action at the Federal High Court for the enforcement of the plaintiff's fundamental rights was an order sought to quash the deposition of the plaintiff as the Emir of Muri, an issue the Federal High Court lacks jurisdiction to entertain. It was held by this court, per Obaseki, JSC at page 549, that if there is a court with jurisdiction to determine all the issues raised in the matter, including the principal issue, it is improper to approach a court that is competent to determine only some of the issues; and that the incompetence of the court to entertain and determine the principal question is enough to nullify the whole proceedings and the judgment as there is no room for half judgment in any matter. Oputa, JSC, at page 567 of the report puts it bluntly; that a court cannot adjudicate over ancillary claim if it has no jurisdiction to entertain the main claim particularly if the determination of the ancillary claim will inevitably involve a discussion of the main claim. *(Pp 64 – 65 paras C – A)*

Per Eko (JSC)

"In the instant suit, the main issue is the proposed creation of additional electoral wards within each Local Government Area for the purpose of Local Government elections in Delta State. It involves adjustment of the boundaries of the existing wards within each Local Government Area. The appellants call the exercise "gerrymandering" and that it would dilute the voting rights and effective representation of the Itsekiris therein and thereby discriminate in favour of the Ijaws and Urhobo minority communities in the forthcoming Local Government elections. The alleged voters registration in the additional Wards by INEC, using the population data compiled by the National Population Commission, are all ancillary or incidental matters. An ancillary

matter is a matter that is subordinate to main issue or matter.

The main issue in the suit of the appellants at the Federal High Court was the division of the Local Government Areas into Wards or Local Government constituencies for purposes of election into the three (3) Local Government Councils in Delta State. It is not a Federal cause or matter. This court in Attorney-General of Abia State Vs. Attorney-General of the Federation (2002) 6 NWLR (pt. 763) 264 at 373 per Kutigi, JSC, (as he then was) had stated, unequivocally, that "the National Assembly has no power, except in relation to the Federal Capital Territory alone, to make any law with respect to the division of Local Government Areas into Wards for purposes of election into Local Government Councils in Nigeria". That of course and undeniably falls within the Legislative sphere of competence of the State House of Assembly. Section 7(1) of the 1999 Constitution further puts it beyond further argument that the establishment, structure and composition of each Local Government is an exclusive affair or matter for the State Government. The function of organizing, undertaking and supervising all elections to the Local Government Councils within the State is exclusive to the State Independent Electoral Commission, as the 7th defendant/respondent in this appeal. This can be seen clearly from Paragraph 4 to Part II B of the Third Schedule to the 1999 Constitution.

I do not have any difficulty holding that the issue of creation of additional Wards within each Local Government Area for purposes of Local Government election is a state cause within the context of Section 286 of the 1999 Constitution. While, by virtue of Section 251 of the same Constitution, the Federal High Court has jurisdiction over Federal causes therein listed, it does not, conversely, have jurisdiction over state causes; which denote a reference to any matter with respect to which the State House of Assembly has powers to make Laws. *See* Enugwu Vs. Okefi (2000) 3 NWLR (pt. 650) 620." *(Pp 65 – 66 paras A – C)*

5. *Jurisdiction of the Federal High Court does not extend to issue of simple contract between a federal agency and a third party*

I come back to the contention of the appellants that what determines

the jurisdiction of the Federal High Court is the Parties, and not the nature of the claim. To be specific, the appellants contend that where the action is in relation to the matters covered by Section 251 (1) (p), (q) & (r) of the Constitution the determinant is whether the party, either as the plaintiff or defendant, is the Federal Government or any of its agencies. To some extent this statement of law is correct, but in a limited sense. In the instant case, the appellants as the plaintiffs, have not been able to convince the judex that their suit has anything to do with the administration, management or control of the Federal Government or any of its agencies, of the validity of any executive/administrative action or decision of the Federal Government or any of its agencies to warrant the Federal High Court interpretation of the provisions of the Constitution in that regard.

This court has shifted position from the blanket statement that in any suit, where the Federal Government or any of its agencies is a party, only the Federal High Court has jurisdiction to entertain such an action. In Onuoha Vs. Kaduna Refinery & Petrochemical Company (2005) 6 NWLR (pt. 921) 393 at 405 it has stated clearly that the jurisdiction conferred on the Federal High Court by the 1999 Constitution does not extend to claims founded on simple contract between the Federal Government or any of its agencies, and a third party. ***See also*** **Adelekan Vs. Ecu-Line NV (2006) 12 NWLR (pt. 993) 33; (2006) 5 SC (pt. 2) 32 where ONNOGHEN, JSC (as he then was) stated that the jurisdiction of the Federal High Court does not include dealing with any case of simple contract.**

As I had demonstrated through Tukur Vs. Government of Gongola State (supra) when the Federal High Court would have no jurisdiction to adjudicate in the suit. I therefore agree with the lower court that the joinder of the 1st, 2nd and 3rd defendants/respondents against whom the appellants, as plaintiffs, had no major claim or identifiable grievance was a mere subterfuge for forum shopping. Clearly, it was an abuse of court's process.
(Pp 66 – 67 paras C – B)

6. *Federal High Court has no jurisdiction to entertain dispute in respect of structure of a local government council*
The learned trial judge was, in my firm view, right to have declined jurisdiction to entertain the main claim in the action of the appellants, as plaintiffs. The Federal High Court has no jurisdiction, under Section 251 (1) of the 1999 Constitution, to entertain disputes in respect of the structure of Local Government including the creation of wards or additional wards and adjustment of the boundaries of the existing wards within a Local Government Area for purpose of Local Government elections. The lower court therefore was right in affirming the said decision of the Federal High Court. Accordingly, I resolve Issue 1 against the appellants.
(P 67 paras B – D)

7. *It was proper for the trial court to strike out the case since it has no jurisdiction to entertain the main claim*
I had earlier, in this judgment, held that the appeal had become academic as the appellants' complaint does not include a challenge to the holding or finding of the court below that the action against the 1st, 2nd and 3rd defendants/respondents was not properly constituted; there being no identifiable grievance or remedy against them as defendants.

There is a complaint in the appeal that the order of the trial court striking out the Federal agencies, that is: 1st – 3rd defendants, from the suit paved way for the trial court to hold, wrongly, that it lacked jurisdiction to entertain the suit on the merits. I do not think that the appellants are correct on this assertion. The principal Issue in the suit at the trial court as I earlier demonstrated in this judgment, is not one in respect of which the Federal High Court has jurisdiction over. In that regard, the trial Federal High Court was right in so holding. It proceeded thereafter to strike out the 1st, 2nd and 3rd defendants before it. *(P 67 paras E – H)*

8. *Order of striking out was not made suo motu*
The appellants posit that the order striking out the (3) federal

agencies was made *suo motu* without the trial court giving them an opportunity to be heard on it.

I have painstakingly perused the record of appeal. I do not agree with the appellants that the order striking out the (3) Federal agencies was made *suo motu* by the trial court. The parties were heard on whether the Federal High Court has jurisdiction to entertain the principal issue in the action of the appellants, as the plaintiffs, and whether the three (3) federal agencies were directly linked to the principal grievance and the remedies sought. It was on these bases that the trial court held that no where in Section 251 of the Constitution is the Federal High Court endowed with jurisdiction over issues relating to creation of electoral wards and delineation of the boundaries of such electoral wards in any Local Government Area. The 3rd defendant/respondent, through his counsel, Miss Bola Braimoh, had specifically prayed, under Order 12 Rule 16 of the extant Federal High Court (Civil Procedure) Rules, that his name be struck out as no relief was claimed against him. The appellants, as the plaintiffs conceded that fact by not joining issues on it.

The appellant was duly heard on objections of the (3) Federal agencies on which the orders striking out their names and the action against them on the ground that the Federal High Court lacks jurisdiction to entertain the main grievance and remedy sought in the suit. The decision of the lower court affirming that of the trial court cannot be faulted. *(Pp 67 – 68 paras H – E)*

9. Not every error a trial court will result in the appeal being set aside

Even if it was true that the Federal High Court failed to give the appellants, as the plaintiffs, an opportunity to be heard before it rightly declined jurisdiction in the circumstance, the law is settled that it is not every error committed by the court below that would result in the decision appealed being set aside. This Court in Katto Vs. CBN (1991) 9 NWLR (pt 214) 126 at 149 has held that though it is prudent on the part of every court to give an opportunity to the

parties to be heard when it raises *suo motu* an issue of jurisdiction, the appeal court will however not set aside a correct decision of the trial court that it has no jurisdiction to entertain the subject matter of an action before it, as in this case. The rationale for this is that jurisdiction being a fundamental or threshold issue can be raised at any stage of the proceedings. Without it the court would labour in vain and its decision a nullity, no matter how well decided. *See* Madukolu Vs. Nkedmilim (supra), Katto Vs. CBN (supra).
(P 68 paras E – I)

Per Eko (JSC)

"In my firm view the appellants, as plaintiffs, suffered no prejudice or miscarriage of justice by the Federal High Court correctly declining jurisdiction to entertain their principal grievance and reliefs; even if the said court did so *suo motu* without giving them an opportunity to be heard on it. The decision was correct in law. The appellants were heard on the issue. The order striking out the 1st, 2nd and 3rd defendants and the suit against them was correctly made by the trial court. It was also correctly affirmed by the lower court. In the circumstance of the case, the lower court could not have correctly invoked Section 16 (now S. 15) of the Court of Appeal Act to consider the merits of the action remaining only against the 4th – 7th defendants/respondents. We cannot, also, in this court invoke Section 22 of the Supreme Court Act, *in pari materia* with Section 16 of the Court of Appeal Act, to consider the merits of the action against the 4th – 7th defendants/respondents. No aspect of that dispute was before the lower court or this court. What the lower court decided, and what is now before us, was/is whether the suit or action, as it pertained to the 1st – 3rd respondents, as the defendants, was properly before the Federal High Court to assume jurisdiction competent defendants in that suit there being identifiable grievance or remedy against them. The lower court could have been justified

in invoking Section 16 (now S.15) of the Court of Appeal Act, *in pari materia* with Section 22 of the Supreme Court Act, if the Federal High Court, in the place, had jurisdiction to adjudicate in the matter between the appellants, as the defendants." *(Pp 68 – 69 paras I – F)*

10. Section 15 court of Appeal Act cannot be invoked where the lower court lacks jurisdiction

Section 16 (now S.15) of the Court of Appeal does not confer unlimited jurisdiction on the Court of Appeal to assume first instance jurisdiction on any matter before the trial court. The jurisdiction vested in the Court of Appeal by the said provisions does not include doing what, in law, the trial court could not do or could not have done in the first place. The jurisdiction of the Court of Appeal, under Section 16 (now S. 15) of the Court of Appeal is coterminous with the jurisdiction of the trial court. Thus, as the Court of Appeal held in Ajao Ajadi Adams Vs. Babatunde & Ors. (2008) LPELR 3591 (CA), relying on the dicta of this court Mba Vs. Agu (1999)12 NWLR (pt. 629)1; Comptoir Ltd. Vs. Ogun State Water Corporation Board (2002)4 SC (pt. 11) 212; A.G. Anambra State Vs. Okeke (2002) 5 SC (Pt. 11) 58; Peter Obi Vs. INEC (2007) 11 NWLR (pt. 1046) 560 at 639, since the lower court could only, by virtue of Section 16 (now S. 15) of the Court of Appeal Act, exercise the power which the trial Federal High Court could exercise, if the Federal High Court lacks jurisdiction to entertain or determine the issue of the creation of additional wards in a Local Government Area for the purpose of Local Government elections, it follows that the lower court could not invoke Section 16 of the Court of Appeal Act to adjudicate on and/or determine the matter.

My answer, therefore, to the complaint that the lower court misdirected itself in law for not invoking its powers under Section 16 (now S. 15) of the Court of Appeal Act to decide the matter remaining between the appellants, as the plaintiffs, and the 4th – 7th defendants/respondents in the suit transferred to the Delta State High Court for hearing and determination; is that the lower court was right in so declining.

On the whole, there is no substance in this appeal. It is as frivolous and vexatious as the plaintiffs/appellants' decision to seek

redress in the Federal High Court when in law the Federal High Court has no jurisdiction to entertain their principal grievance and remedy. The joinder of the 1st, 2nd and 3rd defendants at the Federal High Court was a mere subterfuge for forum shopping. The appeal is hereby dismissed in its entirety. The decision of the lower court in the appeal No. CA/ABJ/52M/2003 which affirmed the decision of the Federal High Court in the suit No. FHC/ABJ/CS/272/2002 is hereby affirmed. *(Pp 69 – 70 paras F – F)*

11. *The purport of gerrymandering*

In the process of setting electoral districts, gerrymandering is a practice intended to establish a political advantage for a particular party or group by manipulating district boundaries ***See*** **Wikipedia, wherein it was further explained as follows:**

> ***The term gerrymandering has negative connotations. Two principal tactics are used in gerrymandering: "cracking" (i.e. diluting the voting power of the opposing party's supporters across many districts) and "packing" (concentrating the opposing party's voting power in one district to reduce their voting power in other districts). In addition to its use achieving desired electoral result for a particular party, gerrymandering may be used to help or hinder a particular demographic, such as a political, ethnic, racial, linguistic, religious or class group.***
> *(P 71 paras A – D*

12. *The extent of jurisdiction of the Federal High Court*

Federal High Court is a specialized court with limited jurisdiction to hear and determine cases concerning those items listed in Section 251 of the 1999 Constitution of the Federal Republic of Nigeria and such other matters as jurisdiction may be conferred upon it by an Act of the National Assembly. The claims of the appellants at the trial court are elaborately reproduced in the lead judgment and I do not need to reproduce them here. It is sufficient to state that the

claims have to do with creation of local government electoral wards, the adjustment of local government boundaries and registration of voters for the purpose of Local Government Elections in Warri South Local Government. Clearly these claims do not fall within Section 251 of the 1999 Constitution of the Federal Republic of Nigeria. There is also no evidence before the court that the National Assembly has promulgated an Act which conferred jurisdiction on the Federal High Court in that regard. It is therefore clear that, by virtue of Section 251 of the 1999 Constitution, the Federal High Court has no jurisdiction to entertain disputes in respect of the structure of local government including the creation of wards or additional wards and adjustment of the boundaries of the existing wards for the purpose of local government elections. The lower court was perfectly right to have affirmed the decision of the Federal High Court that it had no jurisdiction to hear and determine the case and accordingly transferred the case to the Delta State High Court.*(P 73 paras B – G)***

Nigerian cases cited in this Judgment

A.G. Anambra State Vs. Okeke (2002) 5 SCNJ 318;
Adeleke Vs. Ecu-Line NV (2006) 12 NWLR (pt. 992) 33; (2006) 5 SC (pt. 2) 32;
A-G Abia State Vs. A-G Federation (2002) 6 NWLR (pt 763) 264;
Ajao Ajadi Adams Vs. Babatunde & ORS. (2008) LPELR 3591 (CA);
Alhaji Aromire Vs. Awoyemi (1972) 1 ALL NLR (pt. 1) 105;
Ataguba & Co. Vs. Gura Nig. Ltd. (2005) ALL FWLR (pt. 265) 1219; (2005) 2 SC (Pt. 1) 101;
Attorney-General of Abia State Vs. Attorney-General of the Federation (2002) 6 NWLR (pt. 763) 264;
Ayorinde Vs. Oni (2000) 3 NWLR (pt. 647) 348;
Calabar Central Co-op Thrift & Credit Society Ltd. Vs. Ekpo (2008) 6 NWLR (pt. 1083) 362;
Comptoir Ltd. Vs. Ogun State Water Board (2002) 4 SC (Pt. 11)58;
Enugwu Vs. Okefi (2000) 1 NWLR (pt. 650) 620;
Florence Olusanya Vs. Oluremi Olusanya (1983) 3 SC 41;
Gbileye Vs. Addingi (2014) 16 NWLR (pt. 1433) 394;

Katto Vs. CBN (1991) 9 NWLR (pt. 214) 126;
Lajumoke Vs. Doherty (1969) NMLR 281;
Madukolu Vs. Nkemdilim (1962) 2 SCNLR 374, (1962) ANLR (pt.4) 587;
Mba Vs. Agu (1999)12 NWLR (Pt. 629)1;
Moses Vs. The State (2006) 11 NWLR (pt. 992) 458;
NEPA Vs. Edegbero (2002) 18 NWLR (Pt. 798) 79;
Nnodi Vs. Okafor (1964) NWLR 132;
Nwabueze Vs. Okoye (1988) 4 NWLR (pt. 91) 664;
Okpanum Vs. S.G.E. (Nig.) Ltd. (1998) 7 NWLR (pt. 559) 537.
Onuoha Vs. Kaduna Refinery & Petrochemical Company (2005) 6 NWLR (pt. 921) 393;
Osakue Vs. Federal College of Education, Asaba (2010) 10 NWLR (pt. 1201) 1;
Overseas Construction Ltd. Vs. Creek Enterprises (Nig.) Ltd. (1985) 3 NWLR (pt. 13) 407;
Peter Obi Vs. INEC (2007) 11 NWLR (pt. 1046) 560;
S.P.D.C. (Nig.) Ltd. Vs. Edamuke (2009) ALL FWLR (pt. 489) 407; and
Tukur Vs. Government of Gongola State (1989) 4 NWLR (pt. 117) 517.

Nigerian Statutes cited in this Judgment
1999 Constitution Sections 3(6);42 (1); (2); 7 (4); 8;
Court of Appeal Act Section 16 (now S. 15);
Electoral Act 2001 Sections 164; 2(1) (c), 14, 116 and 164;
Section 22 of the Supreme Court Act.

Representation
A.J. Owonikoko, (SAN), with **Felix Tyokase, (Esq.),** and **M.K. Fidelis, (Esq.)**, for the appellants.
Alhassan A. Umar, (Esq.), with **Maryam Ibrahim (Mrs), Bashir Abubakar, (Esq.),** and **I.S. Mohammed, (Esq.)**, for the 1st respondent
Abdullahi Haruna, (Esq.), for the 2nd respondent.
Barnaba O. Onamusi, (Esq.), with **Abdulrahman A. Wakta, (Esq.), Keffas Gadzama, (Esq.); Nwakaego A. Ukachukwu, (Esq.), Linda Shajaba (Miss), Ijeoma Nwala (Miss),** and **Alfred Lortyaver, (Esq.)**, for the 3rd

respondent.
L.A.D. Nylander, (Esq.), with **Morenikeji Akah (Mrs.),** for the 4th respondent.
A.V. Etuwewe, (Esq.), for the 5th respondent.
Chief M.O. Akoubodo, for the 6th respondent.
R.G. Ireyefoju, (Esq.), for the 7th respondent.
D.E. Iseru, (Esq.), for the 8th respondent.

EJEMBI EKO JSC (Delivering the Lead Judgment): The original action, leading to this appeal, was commenced by way of Originating Summons at the Federal High Court, Abuja. The suit was before S. J. Adah, F.J. (as he then was). The plaintiffs, now the appellants, had sued the Seven (7) defendants, including the Independent National Electoral Commission (INEC), National Population Commission (NPC) and the Attorney-General of the Federation (AGF) - all agencies or agents of the Federal Government of Nigeria. The appellants, as the plaintiffs, had obtained leave of court to take out the suit for themselves and as representatives of the Itsekiri Ethnic Nationality of Warri Kingdom in the Delta State of Nigeria concerning the creation of Local Government electoral wards and boundary adjustments in the Local Government Areas. These structural adjustments were intended for the purpose of Local Government elections. The Delta State Independent Electoral Commission had advertised the Guidelines for the creation of additional electoral wards in all the Local Government Areas of Delta State. The Guidelines are Exhibit **R2** and **R7,** as published respectively in the Pointer and the Vanguard Newspapers. No action had yet been taken physically on ground on the Ward creation or the delineation of the boundaries of existing wards. At the time this suit was taken out the plaintiffs were merely being guided by speculation as to what shape the additional wards and their boundaries would look like.

Fear begets, as the old adage says. The fear of the appellants that begat this suit at the Federal High Court is that expressed in paragraph 24 of the supporting affidavit to the effect that:

A ***"the Delta State Independent Electoral Commission is purporting to re-draw without regard to our (Itsekiri) rights under the 1999 Constitution. For example, as opposed to the previous 10 wards making up the Warri South-West Local*** B ***Government with boundaries composed of 5 wards in the Itsekiri area and 2 in the Urhobo Area, 8 in the Urhobo Area, 21 have been created arbitrarily comprising 10 in the Itsekiri area, 8 in the Urhobo areas and one for the Ijaws all of which*** C ***have been assigned different names and boundaries yet to be made public officially but which upon our protest have not been denied".***

D Paragraphs 18 of the supporting affidavit further drums out the Itsekiri fear in the advertised creation of additional Local Government Electoral Wards in Delta State thus:

E ***"18, That despite all the steps above the Delta State Independent Electoral Commission is hell bent on the exercise and indeed has purported to create new wards in the three Local Government Area to disenfranchise,*** F ***gerrymander and dilute the voting rights and elective representation of the Itsekiri therein and discriminate in favour of the Ijaws and Urhobo minority communities in the Local Governments as outlined in*** G ***Exhibit R3 for the purpose of the forthcoming Local Government elections. We are certain that the design of the Guidelines are directed at depriving us (the Itsekiris) of fair and effective democratic*** H ***representation in the governance of our Local Government Areas in direct affront to the 1999 Constitution and the provisions of the Electoral Act".*** *[underlining supplied].*

I

The roles of the **INEC** and **NPC**, sued as the 1st and 2nd defendants respectively at the trial court are, as articulated in Paragraphs 21 and 22 of the Supporting Affidavit. That is:

> **"21.** *That the foregoing activities of the State Independent Electoral Commission have been conducted on the basis of population and voting data and electoral legislations purportedly furnished by the National Population Commission and the Independent National Electoral Commission notwithstanding that since the last Local Government election in 1998, no new population census has been conducted nor has there been any new voters" registration exercise conducted as required by law.*
>
> **22.** *That we know as a fact that the Independent National Electoral Commission is legally responsible for, and is preparing to conduct voters' registration exercise as a precondition for the conduct of Local Government election on the basis of the previous wards and Local Government constituencies applied in the 1998. This is completely the opposite of the stand taken by the Delta State Independent Electoral Commission which is threatening to disregard INEC data and Electoral Act, 2001 if same does not reflect the proposed ward exercise they intend to advise INEC in pretended fulfillment of their constitutional duty to INEC".*

The foregoing are the basis of the suit brought in the Originating Summons wherein the appellants, are the plaintiffs, sought the Federal High Court to determine the following questions and then grant the following reliefs:

> ***"1. WHETHER having regard to the powers conferred***

A *upon Delta State Independent Electoral Commission as set out in Item D in Part II of the Third Schedule to the 1999 Constitution; the Independent National Electoral Commission and the National Population*
B *Commission, being federal agencies, can supply the former with electoral register, census data and ballot papers respectively for the conduct of election into a local government purportedly created (without prior*
C *constitutionally stipulated request or referendum) by the Delta State Government as Warri South West Local Government Area having as the boundary of its headquarters the ward known as Ogbeljoh as against*
D *and in substitution for Warri South West Local Government Area having as the boundary of its headquarters a ward known as Ogidigben by virtue of section 3& 315 of the Constitution, Part I of the First*
E *Schedule to the Constitution of the Federal Republic of Nigeria, 1999 and section 8(5) thereof dealing with powers of the National Assembly to amend by law the boundary of the headquarters and area of a designated*
F *local government newly created or adjusted by the relevant authority of a state.*

2. WHETHER the power of Delta State government to
G *create or restructure local government and/or delineate wards or readjust boundary of wards in local governments pursuant to Section 7 of the constitution of the Federal Republic of Nigeria (1999) as confirmed*
H *by the decision of the Supreme Court in the case of* **A-G Abia State v. A-G Federation (2002) 6 NWLR pt 763** *is subject to prior compliance with the entrenched provisions of Section 8 subsections (3) and (4) of the*
I *Constitution.*

IF THE ANSWER to Question No. 2 is POSITIVE.

3. WHETHER creation of local governments or adjustments of the boundaries of same by way of ward creation is a shared constitutional function between the legislature and executive of Delta State on the one hand and the affected local government council as well as their inhabitants on the other hand pursuant to section 8 of the Constitution of the Federal Republic of Nigeria, 1999.

If the answer to Issue No. 3 is POSITIVE,

4. ***WHETHER such power is capable of being delegated by the Delta State Executive to Delta State Independent Electoral Commission as part of constitutional functions of the commission as set out in Item B under Part II of the Third Schedule to the 1999 Constitution or pursuant to a state law that is inconsistent with the entrenched provisions of the Constitution.***

If the answer to issue No. 4 is in the NEGATIVE.

5. WHETHER GUIDELINES FOR CREATION OF ELECTORAL 'WARDS IN DELTA STATE issued by the Delta State Independent Electoral Commission and published in the Pointer Newspaper of Friday May 17th 2002 on the authority of the said Commission is unconstitutional and consequentially null void and of no effect whatsoever.

6. WHETHER in view of the questions formulated above, the guidelines for ward creation in Warri South, Warri North and Warri South West Local Government

Areas of the Delta State by Delta State Independent Electoral Commission protested to the Independent National Electoral Commission, Delta State Independent Electoral Commission and National Population Commission amounts to gerrymandering.

If the answer to issue No. 6 is the positive.

7. ***WHETHER gerrymandering as relates to the personal electoral, communal and ethnic interest of the plaintiffs is not a breach of their fundamental right from discrimination contrary to Section 42(1) and (2) of the 1999 Constitution and their right to equality and quality their votes as provided for under Section 7(4) of the 1999 Constitution and Section 2(1) (c), 14, 116 and 164 of the Electoral Act 2001.***

WHEREUPON the Plaintiffs claims the following reliefs:

8. ***A DECLARATION that it is unconstitutional and a criminal breach of section 2(1) (c) and 14 of the Electoral Act 2001 for any electoral officer or authority, qualified voter or whosoever, to procure or assist the Independent National Electoral Commission to supply or divert voters registration materials or conduct voters registration exercise in the Warri South, Warri South West and Warri North on the basis of any local governments area or adjusted boundaries and wards inchoately created local government Areas or wards, other than those identified under the 1999 Constitution and in respect whereof Local Government Elections were conducted in 1998, unless such newly created local government area, ward, or adjusted boundaries have been***

recognized gazetted and enacted into law by an Act of the National Assembly pursuant to Section 8 (5) and (6) of the Constitution and Section 164 of Electoral Act 2001.

9. ***A DECLARATION that the guidelines for the electoral ward creation published by the Delta State Independent Electoral Commission is unconstitutional and ultra vires the Delta State Independent Electoral Commission and that any election proposed to be conducted on the basis of voters registration based upon such local government area or wards creation exercise is outside the contemplation of the Electoral Act 2001 which defines local government for the purpose of the Act to mean "…. Local Government or Area Councils recognized and existing by virtue of section 3(6) of the 1999 Constitution and set out in Parts I and II of the First Schedule thereof and any additional Local Government or Area Councils provided for by an Act of the National Assembly in accordance with section 8(5) of the Constitution".***

10. ***A DECLARATION that Warri South West Local Government Area with headquarters of Ogidigben in Delta State and its 10 wards, is a local government area "..recognized and existing by virtue of section 3(6) of the 1999 Constitution and set out in Parts I and II of the First Schedule thereof and any additional Local Government or Area Councils provided for by an Act of the National Assembly in accordance with section 8(5) of the Constitution", & section 8 of Decree No, 7 of 1997 and section 2(1) of Decree No. 36 of 1998 as repealed, modified and incorporated into***

the 1999 Constitution.

11. ***AN INJUNCTION restraining the Independent National Electoral Commission, the National Population Commission and Delta State Independent Electoral Commission from conducting any registration exercise, advising, supplying or applying voters' registration, census data and voting materials for the conduct of such registration or election in Warri North, Warri South and Warri South West Local Government Areas of Delta State based upon non-existent, illegal or inchoately created wards or local government boundaries purported, or proposed, to be created for the purpose of the elections into the aforesaid local government council areas upon the expiration of the tenure of the democratically elected officials of the said local government councils effective 2nd June, 2002.***

12. ***AN ORDER setting aside the GUIDELINES FOR CREATION OF ELECTORAL WARDS IN Delta State' issued by the Delta State Independent Electoral Commission and published in the Pointer Newspaper of Friday May 17th 2002 on the authority of the said Commission on grounds of unconstitutionality and breach of the Electoral Act 2001.***

13. ***AN ORDER of Injunction restraining the Independent National Electoral Commission and the National Population Commission from supplying voters register and/or voting materials, or Census data to Delta State Independent National Electoral Commission for the purpose of having the plaintiffs (and the class of citizens represented by them in this***

> ***action) register or vote in the coming local government elections postponed since 29th May, 2002 as residents or indigenes of Warri South West Local Government Area with headquarters at Ogbeljoh (an illegitimate local government) thereby exposing the plaintiff to the offence of giving and using false information for election purposes contrary to Sections 14(1) (2), 116 and 164 of the Electoral Act 2001 or any other or later law having similar provisions".***

The record of Appeal shows that the defendants at the trial court joined issues with the appellants, as the plaintiffs. They also raised objections to the competence of the suit. The main planks of the objection are four, that is:

> ***i. The propriety of instituting the suit by way of originating summons;***
> ***ii. Whether the Federal High Court has jurisdiction over the subject matter or cause,***
> ***iii. Whether the suit discloses any reasonable cause of action;***
> ***iv. And whether the plaintiffs have locus standi to sue.***

The learned trial Judge, upon hearing the parties on the objections, held thus in his ruling:

> **1. From the questions and reliefs in this case, the <u>principal issue</u> for consideration has to do <u>with matters associated with the creation of Local Government and Wards alongside the Guidelines set for the creation of Electoral wards</u> in Delta State.** ***[See page 83 of the Record]***
>
> **2. The only fundamental issue to be tackled is as to the jurisdiction of this court to entertain this action.**

This court is endowed with the range of jurisdiction outlined in Section 251 of the Constitution. -. <u>There is no where this court is endowed with jurisdiction over the issues relating to the creation of Local Government or delineation of wards by the authorities of the State Government and the State Independent Electoral Commission.</u> There is no leg of the jurisdiction of the Federal High Court that extends to the issues set out for determination in this matter. <u>The fact that the 1st, 2nd and 3rd defendants are agencies of the Federal Government per se does not make the cause here amenable to the jurisdiction of the Federal High Court. The issues are bothering on the state apparatus in charge of Local Government and Ward deleanation (sic) matters. The 1st, 2nd and 3rd defendants have not been linked primarily with any of the issues and reliefs raised in this matter to warrant this court's intervention in hearing of the issues raised.</u> ***[see page 84 of the Record].***

3. <u>The 3rd defendant is the Attorney-General of the Federation. There is nothing claimed against the Party in this case.</u> The Party is a nominal party. It is always the practice of suing him to represent the Federal Government where the Federal Government is genuinely a party. <u>From the composition of this action there is no where any of the reliefs is directed against the Federal Government of Nigeria. The 3rd defendant Attorney-General, is not a properly located party in this suit.</u> His name is hereby struck out. The same goes for the 1st and 2nd defendants. <u>There is no link between these 1st and 2nd defendants directly with the cause of action.</u> They are also struck out. All the questions and the principal reliefs are directed at the 4th to 7th defendants in this case. The retention of the 1st and 2nd defendants does not in any where (sic:

way) confer jurisdiction in this Court to entertain this matter, ***[see page 85 of the Record]***

It is against this decision striking out the 1st, 2nd and 3rd defendants from the suit **No. FHC/ABJ/C^{S}/272/2002** that prompted the appellants herein, as the plaintiffs, to lodge their appeal to the Court of Appeal. The appeal **No. CA/A/52^{M}/03** was heard, and dismissed on 14th June, 2005, hence this further appeal. In affirming the decision of the Federal High Court, the lower court held *inter alia* that a dispute must arise between the parties before a court is called upon to adjudicate; that there must be proper parties linked to the cause of action before a court can assume jurisdiction in the matter, and that it is improper to join, as a co-defendant, to an action a person against whom the plaintiff has made out no cause of action and against whom he has no claim. These are sound principles of law on the cause of action and the party to join in an action as the defendant to defend the action. I hereby adopt the principles.

The law is settled on the elementary, but fundamental, principle that in every suit at the court of law there must be a plaintiff, who has the legal capacity to bring the action, and a defendant with the legal capacity to defend the action. There must also be a claim against the defendant for him to defend. In other words, there must exist a dispute between the plaintiff and the defendant for the action to be properly constituted. *See* **Nnodi Vs. Okafor (1964) NWLR 132.** A properly constituted action, therefore, must have the trinity of the plaintiff, the defendant and the claim against the defendant. *See* **Ayorinde Vs. Oni (2000) 3 NWLR (pt. 647) 348 at 367.** It is improper to join as co-defendants to an action, persons against whom the plaintiff has no cause of action and against whom he has not made any claim. *See* **Lajumoke Vs. Doherty (1969) NMLR 281; ALHAJI Aromire Vs. Awoyemi (1972) 1 ALL NLR (pt. 1) 101; Ayorinde Vs. Oni (supra).** These sound principles have been developed to prevent the filing of frivolous and vexatious actions, and of course, the abuse of court's process.

In this further appeal the appellants have raised three (3) Issues for the determination of the appeal. They are:

A

1. ***Whether the lower court rightly upheld the decision of the trial court declining jurisdiction to entertain the reliefs sought in this case, having regards to the cumulative jurisdiction vested in the High Court under the Federal High Court Act, and Section 251 of the Constitution [Grounds 1 and 6].***

B

C

2. ***Whether the lower court rightly affirmed the procedure followed by the trial court in striking out the Federal agencies in the suit, suo motu, in order to strip the Federal High Court of jurisdiction to entertain the suit. [Grounds 2 & 3].***

D

3. ***Whether the lower court misdirected itself and occasioned a miscarriage of justice by allowing the cross-appeal instead of invoking its powers of re-hearting under Section 16 of the Court of Appeal Act in order to give its decision on the merits of the case commenced by Originating Summons, and devoid of any controversial or conflicting facts, the trial court having failed to pronounce on same as required by the binding decision of the Supreme Court in Katto Vs. CBN (1991) 9 NWLR (pt. 214) 126. [Grounds 4 & 5].***

E

F

ISSUES 1

G The 1st, 2nd and 3rd defendants at the trial court were, respectively, the INEC, NPC and the AGF. They were held, rightly, to be Federal agencies. The ruling of the trial court which necessitated the appeal to the lower court has, at pages 83-85 of the Record, four major decisions or pronouncements that

H are material for the consideration of Issue 1 in this appeal. That is, **(1)** that from the questions and reliefs in this case, the principal issue for consideration has to do with matters associated with creation of Local Government and wards alongside the Guidelines set for the creation of

I Electoral Wards in Delta State, **(2)** that the Federal High Court is not endowed, under Section 251 of the 1999 Constitution, with jurisdiction

over the issues relating to the creation of Local Government or delineation of Wards by the authorities of the State Government and the State Independent Electoral Commission and that such state matters or causes are not amenable to the jurisdiction of the Federal High Court; **(3)** that the 1st, 2nd and 3rd defendants have not been linked directly or primarily to the issues and reliefs raised in the originating summons to warrant the intervention accepted that specific finding of fact or specific point of the decision, and they subsist against him. *See* **S.P.D.C. (Nig.) Ltd. Vs. Edamuke (2009) ALL FWLR (pt. 489) 407 at 434; Calabar Central Co-op Thrift & Credit Society Ltd. Vs. Ekpo (2008) 6 NWLR (pt. 1083) 362 at 388.** Such specific findings of fact or point in the decision, not appealed, cannot be disturbed by the appellant court. It lacks jurisdiction to do so. The jurisdiction of the Appeal Court is limited to the grievance of the appellant, as expressed in the grounds of appeal and the issues formulated therefrom for the determination of the appeal. *See* **Moses Vs. The State (2006) 11 NWLR (pt. 992) 458,** where this court, per Onnoghen, JSC (as he then was) stated that where a finding or decision of the court below, whether on an issue of fact or law, is not challenged in an appeal to the appeal court, such finding or decision, rightly or wrongly, must not be disturbed. When an issue is not placed before an appellate court, the appellate court has no business whatsoever to deal with it. *See* **Florence Olusanya Vs. Oluremi Olusanya (1983) 3 SC 41 at 56 57; Nwabueze Vs. Okoye (1988) 4 NWLR (pt. 91) 664.** This Court, like any other court, cannot adjudicate on matters not before it. *See* **Overseas Construction Ltd. Vs. Creek Enterprises (Nig.) Ltd. (1985) 3 NWLR (pt. 13) 407; Okpanum Vs. S.G.E. (Nig.) Ltd. (1998) 7 NWLR (pt. 559) 537.**

The holding of the lower court that the 1st – 3rd respondents, as the 1st – 3rd defendants at the trial court, "were not proper parties" before the trial court and that the matter was between the appellant and the 3rd – 7th defendants/respondents was, in the matter or appeal before it, very fundamental decision of the lower court, particularly under Issues 2 and 3 argued in that court. The decision subsists and remains binding between the parties. The decision, rightly or wrongly, cannot be disturbed. This Court lacks jurisdiction and powers to disturb it.

When a suit is not properly constituted the court lacks jurisdiction to adjudicate on it. There must be a competent plaintiff and a competent defendant against when the plaintiff has a cause of action or grievance for the trial court to be competent in its adjudicatory function. *See* **Ataguba & Co. Vs. Gura Nig. Ltd. (2005) ALL FWLR (pt. 265) 1219; (2005) 2 SCNJ. 139.** It is only then that the action could be said to have been initiated in accordance with the due process of law. *See* **Madukolu Vs. Nkemdilim (1962) 2 SCNLR 341, (1962) ANLR (pt.4) 587.** The defect in the condition precedent for the trial court to assume jurisdiction over the suit and the parties renders the suit incompetent. An improperly constituted suit denies the court the jurisdiction to entertain it. In the instant case, the holding of the lower court that, as between the appellants, as the plaintiffs, and the 1st – 3rd defendants/respondents, the suit at the Federal High Court was not properly constituted means that the said trial court had no jurisdiction to adjudicate in the action of the plaintiffs/appellants against the said 1st, 2nd and 3rd defendants/respondents.

The appellants submit under Issue 1 that once the Federal Government or any of its agencies is a party in an action the Federal High Court has exclusive jurisdiction over such action notwithstanding the nature of the claim in the action. The submission is to the effect that the determinant of the jurisdiction of the Federal High Court under Section 251 (1) (p), (q) and (r) of the 1999 Constitution is the party, and not the subject matter or the nature of the action. They call in aid **NEPA Vs. Edegbero (2002) 18 NWLR (Pt. 798) 79 at 96 SC; Osakue Vs. Federal College of Education, Asaba (2010) 10 NWLR (pt. 1201) 1 at 32 – 33; Gbileye Vs. Addingi (2014) 16 NWLR (pt. 1433) 394 at 419 – 420.** The same argument was proffered at the lower court and it was answered thus by the lower court:

> ***"The inclusion of the 1st – 3rd defendants appears to be (for) forum shopping for it (sic) is their joinder only in the matter that would confer jurisdiction the (Federal High Court) by virtue of NEPA Vs. Adegbenro-. As pointed out earlier a party is only relevant in a matter if there is an identifiable grievance to which the person suing him can claim a remedy against it.***

Here there is no such identifiable grievance in the appellants' claim"-

against the 1st, 2nd and 3rd defendants at the trial court. The lower court further held that the gravamen of the appellants' claim was against only the 4th – 7th defendants, and that they were the only parties the appellants had identifiable claims or remedy against. I had earlier stated that the appellants have not challenged or complained against the holding of the lower court that they had not identifiable grievance against 1st – 3rd defendants/respondents.

The 1st respondent submits, and 1 agree, that a scrupulous examination of the case of the appellants, as borne out by the supporting affidavit particularly paragraphs 7 21 thereof would reveal that the action of the appellants had only to deal with the Local Government elections, the creation of additional electoral wards within the three Local Government Areas. The Itsekiris claim to have numerical superiority and that the consequential adjustment of the boundaries within each of the three (3) Local Government Area would lead to diminution of that superiority. Those are the principal issues or questions, in the action.

I tend or lean towards agreeing with the 1st respondent. The 4th respondent submits, in support of the trial court, that once the trial court cannot competently entertain and determine the principal question or issue, it follows that it cannot adjudicate over ancillary or incidental claims. The 4th respondent has made a strong point. In **Tukur Vs. Government of Gongola State (1989) 4 NWLR (pt. 117) 517,** the main claim or issue in the action at the Federal High Court for the enforcement of the plaintiff's fundamental rights was an order sought to quash the deposition of the plaintiff as the Emir of Muri, an issue the Federal High Court lacks jurisdiction to entertain. It was held by this court, per Obaseki, **JSC** at page 549, that if there is a court with jurisdiction to determine all the issues raised in the matter, including the principal issue, it is improper to approach a court that is competent to determine only some of the issues; and that the incompetence of the court to entertain and determine the principal question is enough to nullify the whole proceedings and the judgment as there is no

room for half judgment in any matter. Oputa, JSC, at page 567 of the report puts it bluntly; that a court cannot adjudicate over ancillary claim if it has no jurisdiction to entertain the main claim particularly if the determination of the ancillary claim will inevitably involve a discussion of the main claim.

In the instant suit, the main issue is the proposed creation of additional electoral wards within each Local Government Area for the purpose of Local Government elections in Delta State. It involves adjustment of the boundaries of the existing wards within each Local Government Area. The appellants call the exercise "gerrymandering" and that it would dilute the voting rights and effective representation of the Itsekiris therein and thereby discriminate in favour of the Ijaws and Urhobo minority communities in the forthcoming Local Government elections. The alleged voters registration in the additional Wards by INEC, using the population data compiled by the National Population Commission, are all ancillary or incidental matters. An ancillary matter is a matter that is subordinate to main issue or matter.

The main issue in the suit of the appellants at the Federal High Court was the division of the Local Government Areas into Wards or Local Government constituencies for purposes of election into the three (3) Local Government Councils in Delta State. It is not a Federal cause or matter. This court in **Attorney-General of Abia State Vs. Attorney-General of the Federation (2002) 6 NWLR (pt. 763) 264 at 373** per Kutigi, **JSC**, (as he then was) had stated, unequivocally, that "the National Assembly has no power, except in relation to the Federal Capital Territory alone, to make any law with respect to the division of Local Government Areas into Wards for purposes of election into Local Government Councils in Nigeria". That of course and undeniably falls within the Legislative sphere of competence of the State House of Assembly. Section 7(1) of the 1999 Constitution further puts it beyond further argument that the establishment, structure and composition of each Local Government is an exclusive affair or matter for the State Government. The function of organizing, undertaking and supervising all elections to the Local Government Councils within the State is exclusive to the State Independent Electoral Commission, as the 7th

defendant/respondent in this appeal. This can be seen clearly from Paragraph 4 to Part II B of the Third Schedule to the 1999 Constitution.

I do not have any difficulty holding that the issue of creation of additional Wards within each Local Government Area for purposes of Local Government election is a state cause within the context of Section 286 of the 1999 Constitution. While, by virtue of Section 251 of the same Constitution, the Federal High Court has jurisdiction over Federal causes therein listed, it does not, conversely, have jurisdiction over state causes; which denote a reference to any matter with respect to which the State House of Assembly has powers to make Laws. *See* **Enugwu Vs. Okefi (2000) 1 NWLR (pt. 650) 620.**

Now, I come back to the contention of the appellants that what determines the jurisdiction of the Federal High Court is the Parties, and not the nature of the claim. To be specific, the appellants contend that where the action is in relation to the matters covered by Section 251 (1) (p), (q) & (r) of the Constitution the determinant is whether the party, either as the plaintiff or defendant, is the Federal Government or any of its agencies. To some extent this statement of law is correct, but in a limited sense. In the instant case, the appellants as the plaintiffs, have not been able to convince the judex that their suit has anything to do with the administration, management or control of the Federal Government or any of its agencies, of the validity of any executive/administrative action or decision of the Federal Government or any of its agencies to warrant the Federal High Court interpretation of the provisions of the Constitution in that regard.

This court has shifted position from the blanket statement that in any suit, where the Federal Government or any of its agencies is a party, only the Federal High Court has jurisdiction to entertain such an action. In **Onuoha Vs. Kaduna Refinery & Petrochemical Company (2005) 6 NWLR (pt. 921) 391 at 405** it has stated clearly that the jurisdiction conferred on the Federal High Court by the 1999 Constitution does not extend to claims founded on simple contract between the Federal Government or any of its agencies, and a third party. *See also* **Adeleke Vs. Ecu-Line NV (2006) 12 NWLR (pt. 992) 33; (2006) 5 SC (pt. 2) 32** where ONNOGHEN, JSC (as

he then was) stated that the jurisdiction of the Federal High Court does not include dealing with any case of simple contract.

As I had demonstrated through **Tukur Vs. Government of Gongola State (supra)** when the Federal High Court would have no jurisdiction to adjudicate in the suit. I therefore agree with the lower court that the joinder of the 1st, 2nd and 3rd defendants/respondents against whom the appellants, as plaintiffs, had no major claim or identifiable grievance was a mere subterfuge for forum shopping. Clearly, it was an abuse of court's process.

The learned trial judge was, in my firm view, right to have declined jurisdiction to entertain the main claim in the action of the appellants, as plaintiffs. The Federal High Court has no jurisdiction, under Section 251 (1) of the 1999 Constitution, to entertain disputes in respect of the structure of Local Government including the creation of wards or additional wards and adjustment of the boundaries of the existing wards within a Local Government Area for purpose of Local Government elections. The lower court therefore was right in affirming the said decision of the Federal High Court. Accordingly, I resolve Issue 1 against the appellants.

I had earlier, in this judgment, held that the appeal had become academic as the appellants' complaint does not include a challenge to the holding or finding of the court below that the action against the 1st, 2nd and 3rd defendants/respondents was not properly constituted; there being no identifiable grievance or remedy against them as defendants.

There is a complaint in the appeal that the order of the trial court striking out the Federal agencies, that is: 1st – 3rd defendants, from the suit paved way for the trial court to hold, wrongly, that it lacked jurisdiction to entertain the suit on the merits. I do not think that the appellants are correct on this assertion. The principal Issue in the suit at the trial court as I earlier demonstrated in this judgment, is not one in respect of which the Federal High Court has jurisdiction over. In that regard, the trial Federal High Court was right in so holding. It proceeded thereafter to strike out the 1st, 2nd and 3rd defendants before it. The appellants posit that the order striking out the (3) federal agencies was made *suo motu* without the trial court giving them an opportunity to be heard on it.

I have painstakingly perused the record of appeal. I do not agree with the appellants that the order striking out the (3) Federal agencies was made *suo motu* by the trial court. The parties were heard on whether the Federal High Court has jurisdiction to entertain the principal issue in the action of the appellants, as the plaintiffs, and whether the three (3) federal agencies were directly linked to the principal grievance and the remedies sought. It was on these bases that the trial court held that no where in Section 251 of the Constitution is the Federal High Court endowed with jurisdiction over issues relating to creation of electoral wards and delineation of the boundaries of such electoral wards in any Local Government Area. The 3rd defendant/respondent, through is counsel, Miss Bola Braimoh, had specifically prayed, under Order 12 Rule 16 of the extant Federal High Court (Civil Procedure) Rules, that his name be struck out as no relief was claimed against him. The appellants, as the plaintiffs conceded that fact by not joining issues on it.

The appellant was duly heard on objections of the (3) Federal agencies on which the orders striking out their names and the action against them on the ground that the Federal High Court lacks jurisdiction to entertain the main grievance and remedy sought in the suit. The decision of the lower court affirming that of the trial court cannot be faulted. Even if it was true that the Federal High Court failed to give the appellants, as the plaintiffs, an opportunity to be heard before it rightly declined jurisdiction in the circumstance, the law is settled that it is not every error committed by the court below that would result in the decision appealed being set aside. This Court in **Katto Vs. CBN (1991) 9 NWLR (pt……) 126 at** 149 has held that though it is prudent on the part of every court to give an opportunity to the parties to be heard when it raises *suo motu* an issue of jurisdiction, the appeal court will however not set aside a correct decision of the trial court that it has no jurisdiction to entertain the subject matter of an action before it, as in this case. The rationale for this is that jurisdiction being a fundamental or threshold issue can be raised at any stage of the proceedings. Without it the court would labour in vain and its decision a nullity, no matter how well decided. *See* **Madukolu Vs. Nkedmilim (supra), Katto Vs. CBN (supra).**

A In my firm view the appellants, as plaintiffs, suffered no prejudice or miscarriage of justice by the Federal High Court correctly declining jurisdiction to entertain their principal grievance and reliefs; even if the said court did so *suo motu* without giving them an opportunity to be heard on it. B The decision was correct in law. The appellants were heard on the issue. The order striking out the 1st, 2nd and 3rd defendants and the suit against them was correctly made by the trial court. It was also correctly affirmed by the lower court. In the circumstance of the case, the lower court could not have C correctly invoked Section 16 (now S. 15) of the Court of Appeal Act to consider the merits of the action remaining only against the 4th – 7th defendants/respondents. We cannot, also, in this court invoke Section 22 of the Supreme Court Act, *in pari materia* with Section 16 of the Court of D Appeal Act, to consider the merits of the action against the 4th – 7th defendants/respondents. No aspect of that dispute was before the lower court or this court. What the lower court decided, and what is now before us, was/is whether the suit or action, as it pertained to the 1st – 3rd E respondents, as the defendants, was properly before the Federal High Court to assume jurisdiction competent defendants in that suit there being identifiable grievance or remedy against them. The lower court could have been justified in invoking Section 16 (now S.15) of the Court of Appeal Act, F *in pari materia* with Section 22 of the Supreme Court Act, if the Federal High Court, in the place, had jurisdiction to adjudicate in the matter between the appellants, as the defendants.

Section 16 (now S.15) of the Court of Appeal does not confer G unlimited jurisdiction on the Court of Appeal to assume first instance jurisdiction on any matter before the trial court. The jurisdiction vested in the Court of Appeal by the said provisions does not include doing what, in law, the trial court could not do or could not have done in the first place. H The jurisdiction of the Court of Appeal, under Section 16 (now S. 15) of the Court of Appeal is coterminous with the jurisdiction of the trial court. Thus, as the Court of Appeal held in **Ajao Ajadi Adams Vs. Babatunde & ORS. (2008) LPELR 3591 (CA),** relying on the dicta of this court **Mba** I **Vs. Agu (1999) 9 SCNJ 84; Comptoir Ltd. Vs. Ogun State Water Board**

(2002) 3 SCNJ 342; A.G. Anambra State Vs. Okeke (2002) 5 SCNJ 318 at 333 335; Peter Obi Vs. INEC (2017) 11 NWLR (pt. 1046) 569 at 639, since the lower court could only, by virtue of Section 16 (now S. 15) of the Court of Appeal Act, exercise the power which the trial Federal High Court could exercise, if the Federal High Court lacks jurisdiction to entertain or determine the issue of the creation of additional wards in a Local Government Area for the purpose of Local Government elections, it follows that the lower court could not invoke Section 16 of the Court of Appeal Act to adjudicate on and/or determine the matter.

My answer, therefore, to the complaint that the lower court misdirected itself in law for not invoking its powers under Section 16 (now S. 15) of the Court of Appeal Act to decide the matter remaining between the appellants, as the plaintiffs, and the 4^{th} – 7^{th} defendants/respondents in the suit transferred to the Delta State High Court for hearing and determination; is that the lower court was right in so declining.

On the whole, there is no substance in this appeal. It is as frivolous and vexatious as the plaintiffs/appellants' decision to seek redress in the Federal High Court when in law the Federal High Court has no jurisdiction to entertain their principal grievance and remedy. The joinder of the 1^{st}, 2^{nd} and 3^{rd} defendants at the Federal High Court was a mere subterfuge for forum shopping. The appeal is hereby dismissed in its entirety. The decision of the lower court in the appeal **No. CA/ABJ/52^{M}/2003** which affirmed the decision of the Federal High Court in the suit **No. FHC/ABJ/C^{S}/272/2002** is hereby affirmed.

Cost at N200,000.00 shall be paid to each set of respondents by the appellants.

Ejembi Eko,
Justice, Supreme Court

ADAMU AUGIE, (JSC): I had a preview of the lead Judgment delivered by my learned brother Eko, JSC, and I agree with him one hundred per cent that this appeal lacks merit because the Federal High Court has no jurisdiction whatsoever to entertain disputes of this nature.

A He dealt with the issues raised by the Parties on all fronts, and I will only comment on the allegation of gerrymandering.

In the process of setting electoral districts, gerrymandering is a practice intended to establish a political advantage for a particular party or
B group by manipulating district boundaries see Wikipedia, wherein it was further explained as follows:

> ***The term gerrymandering has negative connotations. Two***
> C ***principal tactics are used in gerrymandering: "cracking" (i.e. diluting the voting power of the opposing party's supporters across many districts) and "packing" (concentrating the opposing party's voting power in one***
> D ***district to reduce their voting power in other districts). In addition to its use achieving desired electoral result for a particular party, gerrymandering may be used to help or hinder a particular demographic, such as a political, ethnic,***
> E ***racial, linguistic, religious or class group - - -.***

In this case, the appellants, who are "the representatives of the Itsekiri Ethnic Nationality of Warri Kingdom in the Delta State of Nigeria",
F claimed to be entitled to seek the determination by the Federal High Court of the following questions [Nos. 6 and 7] i.e.

> ***6. Whether the Guidelines for ward creation in Warri***
> G ***South, Warri North and Warri South West Local Government Areas of the Delta State by Delta State Independent Electoral Commission protested to INEC and National Population Commission amounts to***
> H ***gerrymandering.***
>
> ***7. Whether gerrymandering as relates to the personal, electoral, communal and ethnic interests of the***
> I ***plaintiffs is not a breach of their fundamental right from discrimination contrary to Section 42 (1) and (2)***

of the 1999 Constitution and their right to equality and quality of their votes as provided for under Section 7 (4) of the 1999 Constitution and Sections 2 (1)(c), 14, 116 & 164 of the Electoral Act.

It was averred in paragraph 18 of their supporting Affidavit that:

> ***The Delta State Independent Electoral Commission is hell bent on the exercise and indeed has purported to create new wards in the three Local Government Areas to disenfranchise, gerry mander and dilute the voting rights and elective representation of the Itsekiris therein and discriminate in favour of the Ijaws and Urhobo minority communities in the Local Government as outlined in Exhibit R3 for the purpose of the forthcoming Local Government Elections. We are certain that the design of the Guidelines are directed at depriving us of fair and effective democratic representation in the governance of our Local Government Areas in direct affront to the 1999 Constitution and the provisions of the Electoral Act.***

The said questions and above averment speak for themselves, and as my learned brother, Eko, JSC, aptly said the issues are that the Itsekiris claim to have numerical superiority; and that the consequential adjustment of the Local Government Areas would lead to diminution of that superiority, which they enjoy.

Obviously, the Federal High Court has no jurisdiction since the division of the three Local Government Areas into Wards for electoral purposes in the State is not a federal cause or matter.

It is for this and other reasons well-articulated in the lead judgment that I also dismiss the appeal, and I also award costs of N200,000.00 to each set of respondents by the appellants.

Amina Adamu Augie,

A ***Justice, Supreme Court***

ADAMU GALINJE, (JSC): I have had the privilege of reading in draft, the judgment just delivered by my learned brother **EKO** JSC and I entirely
B agree with the reasoning contained therein and the conclusion arrived thereat. Federal High Court is a specialized court with limited jurisdiction to hear and determine cases concerning those items listed in Section 251 of the 1999 Constitution of the Federal Republic of Nigeria and such other
C matters as jurisdiction may be conferred upon it by an Act of the National Assembly. The claims of the appellants at the trial court are elaborately reproduced in the lead judgment and I do not need to reproduce them here. It is sufficient to state that the claims have to do with creation of local
D government electoral wards, the adjustment of local government boundaries and registration of voters for the purpose of Local Government Elections in Warri South Local Government. Clearly these claims do not fall within Section 251 of the 1999 Constitution of the Federal Republic of
E Nigeria. There is also no evidence before the court that the National Assembly has promulgated an Act which conferred jurisdiction on the Federal High Court in that regard. It is therefore clear that, by virtue of Section 251 of the 1999 Constitution, the Federal High Court has no
F jurisdiction to entertain disputes in respect of the structure of local government including the creation of wards or additional wards and adjustment of the boundaries of the existing wards for the purpose of local government elections. The lower court was perfectly right to have affirmed
G the decision of the Federal High Court that it had no jurisdiction to hear and determine the case and accordingly transferred the case to the Delta State High Court.

For these few words and the more detailed reasoning in the lead
H judgment of my learned brother, this appeal shall be and it is accordingly dismissed. I endorse all the consequential orders made in the lead judgment including order as to costs.

Paul Adamu Galinje
I ***Justice, Supreme Court***

BAYANG AKAAHS (JSC): I read before now the judgment of my learned brother, Ejembi Eko JSC. I agree that no cause of action has been disclosed against any of the respondents since the complaints of the appellants do not relate to any action already taken, if anything, the appellants are merely speculating about what the 4th – 7th respondents are planning to do on the creation of additional electoral wards and the delineation of the boundaries of existing wards. This cannot give rise to a cause of action as no dispute has arisen requiring the court's intervention.

It is for this and the comprehensive reasons contained in the judgment of my learned brother, Eko JSC that I also dismissed the appeal. I abide by the consequential order made on costs contained in the leading judgment.

K. B. Akaahs
Justice, Supreme Court

CITEC INTERNATIONAL ESTATES LTD.
AND
EDICOMISA INTERNATIONAL INC.
& ASSOCIATES

SC. 163/2006

IN THE SUPREME COURT OF NIGERIA
HOLDEN AT ABUJA

FRIDAY, 9TH DAY OF JUNE, 2017

BEFORE THEIR LORDSHIPS

MUSA DATTIJO MUHAMMAD	**JUSTICE, SUPREME COURT**
KUDIRAT M. O. KEKERE-EKUN	**JUSTICE, SUPREME COURT**
AMIRU SANUSI	**JUSTICE, SUPREME COURT**
EJEMBI EKO	**JUSTICE, SUPREME COURT**
SIDI DAUDA BAGE	**JUSTICE, SUPREME COURT**

COMPANY LAW: Foreign company – Requirement of incorporation – Where a foreign company not duly incorporated but carries on business in Nigeria – Effect SS 54 and 55 of CAMA – Whether the transaction is void and criminal.

CONTRACT: Illegal contract – What constitutes – Whether is void and cannot be enforced – The principles in Alao Vs. A.C.B. Ltd. (1998) 3 NWLR (Pt. 542) 339.

CONTRACT: Illegality thereof – Whether a party has no right to enforce an illegal contract relevant considerations thereof.

COURT: Jurisdiction – Illegality of contract – Where raised – Whether it impacts on the jurisdiction of the court – Relevant considerations thereof.

EVIDENCE: Presumption – Where a specific finding of a court is not appealed or challenged, it is deemed acceptable and admitted by a party against whom it is made.

EVIDENCE: Proof – Incorporation of a company – How established – Whether it is only by tendering certificate of incorporation.

STATUTE: CAMA – S. 60 thereof – Capacity of foreign companies to sue in Nigeria – Whether can enforce rights accruing from lawful business or transactions in Nigerian courts.

STATUTE: Company's And Allied Matters Act – SS 54(1) and 55 thereof – Whether a foreign company not incorporated in Nigeria cannot carry on business in Nigeria or exercise the right of a registered company

STATUTE: Interpretation – Cardinal rule thereof – Relevant considerations

Issues for Determination

1. **Whether in view of Section 54(1), (2) and (3) of the Companies and Allied Matters Act (CAMA), a foreign entity, not registered in Nigeria pursuant to Section 54(1), or given the leave under Section 54(3), can enforce a contract to carry on business in Nigeria in view of Section 54(2) CAMA?**

2. **Whether the provisions of Section 60(b) of CAMA is applicable in the circumstances of this appeal and inures to the Respondent.**

3. **Was the Court of Appeal right in the circumstance of this case, to hold that the Respondent was not given the opportunity to establish its legal capacity or status by the trial court?**

Facts of the Matter

On 23rd July, 2003, the High Court of the Federal Capital Territory (FCT) presided by Hussein Mukhtar, J, delivered its ruling in the Suit No. FCT/HC/CV/405/2003 in the preliminary objection of the defendant in that suit. The learned trial Judge held in the said Ruling *inter alia* that "the plaintiff company though has the legal capacity to sue and be sued has no parallel capacity to carry on any business in Nigeria until it is so incorporated in Nigeria". Against this decision the plaintiff at the trial High Court of the FCT lodged its appeal on 1st August, 2003 to the Court of Appeal. The appeal at the lower court was heard and determined on the questions:

> ***"whether the companyEdicomsa International, Inc. & Associates, incorporated as a legal entity under the laws of the United States of America, has legal capacity to carry on business in Nigeria and consequently maintain an action in Nigerian Court to enforce its right in the business it carried on in Nigeria".***

The Court of Appeal held that a foreign company, not registered to carry on business in Nigeria, can maintain an action to enforce the rights to the business it carried on in Nigeria. It is against that decision that this appeal to the Supreme Court ensures.

Held: *(Unanimously allowing the appeal)*

1. *A foreign company not incorporated in Nigeria shall not carry on business in Nigeria or exercise any of the powers of a registered company in Nigeria*

   The lower court, in my view, got it right when it held at pages 170-171 of the record, to wit:

   > ***"My Lords, by virtue of the provisions of Section 54 (1) of the Companies and Allied Matters Act any foreign company seeking to carry on business in Nigeria shall***

take steps to obtain incorporation for that purpose, but until so incorporated the foreign company shall not carry on business in Nigeria or exercise any of the powers of a registered company.

If a foreign company fails to comply with the above provisions all its acts shall be void. That is to say (that) a foreign company cannot carry on business in Nigeria unless it is incorporated in Nigeria.

To carry on business means to conduct, prosecute or continue a particular vocation or business as a continuous operation as permanent occupation. The repetition of acts may be sufficient. It also means to hold oneself out to others as engaged in the selling of goods or services. See Black's Law Dictionary 5th edition p. 194.

In the instant case the appellant admits in its pleadings that it is a foreign company registered in the United States of America. It did not comply with the Provisions of Section 54(1) of CAMA since it is not incorporated in Nigeria.

The appellant executed contract with the respondent wherein it was to build housing units and similar work for the defendant. This falls within the warm embrace of "to carry on business in Nigeria". *(Pp 94 – 95 paras G – F)*

"I agree entirely. On this findings that the plaintiff, the respondent, herein, is a foreign company carrying on business in Nigeria without being duly registered to do so. The legal consequence is that provided in Section 55 of CAMA. The conduct criminalised by Section 55 of CAMA is what the trial court and the lower court has found the respondent to have done. The concurrent findings of fact,

based on the admission of the respondent in its pleadings, are unchallenged. The conduct of the respondent doing or carrying on business in Nigeria without being duly registered is not only criminal by virtue of Section 55 of CAMA, the transaction it entered into with the appellant, as the defendant, was void by dint of Section 54(2) of CAMA. There is no evidence that the plaintiff/respondent enjoyed any exemption under Section 54(3) of CAMA.

There had been, on the part of the plaintiff/respondent, an admission that it is a foreign company carrying on business in Nigeria without being registered to do so. The lower court has found, on the admission of the plaintiff/respondent, that being a foreign company carrying on business in Nigeria without being duly registered under the CAMA to do so "all its acts" or transactions in Nigeria are void. Throughout the judgment of the court below and notwithstanding the trial court's reliance on it in its decision at page 126 of the record, there was no mention of Section 55 of CAMA and/or its implication on the admission of the plaintiff/respondent and the lower court's unchallenged findings of fact that the plaintiff/respondent, as a foreign company, was carrying on business without it being registered to do so. I have no doubt whatsoever, reading Section 54 and 55 of CAMA together vis-a-vis the conduct of the plaintiff/respondent, that the latter's transactions with the defendant/appellant was criminal and void."
(Pp 95 – 96 paras G – E)

Per Eko (JSC)

2. *A contract is illegal if the consideration or the promise involves doing something that is illegal and therefore void and unenforceable.*
In Alao Vs. A.C.B. Ltd. (1998) 1-2 SC 179; (1998) 3 NWLR (Pt. 542) 339, per Kutigi, JSC (as he then was) stated at page 355 thus:

"The law is very clear on the effect of illegality on a transaction or contract. It is the law that a <u>contract is</u>

> ***illegal if the consideration or the promise involves doing something illegal or contrary to public policy or if the intention of the parties in making the contract is thereby to promote something which is illegal or contrary to public policy. An illegal contract is a void contract and it cannot be the foundation of any legal right. In other words, when the object of either the promise or the consideration is to promote the committal of an illegal act, the contract itself is illegal and cannot be enforced (See Herman Vs. Jeuchner (1888) 15 QBD 561; William Hill (Park Lane) Ltd. Vs. Hofman (1950) 1 ALL ER 1013; Chief Onyiuke III Vs. Okeke (1976) 1 ALL NLR (Pt.1) 148; Sodipo Vs. Lemminkainen Oy (No. 1) 1986 1 NWLR (Pt. 15) 220)".*** *(Pp 96 – 97 paras E – A)*

"The appellant's counsel submits, on the authority of Solanke Vs. Abed & Anor. (1962) 1 ALL NLR 230 at 233, and I agree, that where a statute, as CAMA does, not only declares a contract void, but also imposes penalty for making it, the contract is illegal. The contract, in the instant case, by operation of Sections 54 and 55 of CAMA, was illegal and void *ab initio*. Thus, as stated by Kutigi, JSC (as he then was) in Alao Vs. A.C.B (supra) and this Court in Oyeneyin Vs. Akinkugbe (2010) 4 NWLR (Pt. 1184) 265 at 285, an illegal act, that is a void act, does not confer any legal right or title whatsoever.

The respondent has not challenged the very loud and clear finding of fact by the lower court, at page 170 of the Record, to the effect that in the instant case the respondent, as the plaintiff, had admitted in its pleadings that it is a foreign company carrying on business in Nigeria without complying with Section 54(1) of CAMA, since it is not registered or incorporated in Nigeria to so do. Having not appealed or challenged these specific findings or decisions of the lower court very adverse to its interest, the respondent cannot now be heard here submitting that the contract or transaction it has with the defendant/appellant does not amount to "carrying on business in Nigeria". *(P 97 paras A – F)*

Per Eko (JSC)

3. *A finding of a court not appealed or challenged is deemed to be an acceptable and admitted fact by a party against whom it is made.*
The law is trite that a specific finding of fact by a court which is neither challenged nor appealed is deemed to be an acceptable and admitted fact by the party against whom it was made. In this case, this specific finding of fact was made concurrently by the trial court and the lower court. Such findings of fact, as this court held in Bakare Vs. The State (1987) 3 SC 1, are presumed to be correct. The burden of displacing this presumption is on the party challenging the specific finding, as this Respondent purports to do belatedly and without any cross-appeal. The burden, as Agim JCA, stated in Donatus Okafor Vs. Ifeanyi Isiadinso (2014) LPELR-23013 (CA), is not discharged by a mere assertion that the findings is wrong.
(P 97 paras F – H)

4. *A party has no right to enforce an illegal contract.*
Respondent's counsel has submitted tersely that the authorities cited by the appellant's counsel to the effect that the contract the respondent, as the plaintiff, was enforcing against the appellant, being an illegal and void transaction or contract, was unenforceable, are irrelevant. The learned counsel made no further effort, however, to show that the authorities are irrelevant and inapplicable. Clearly, the transaction or contract the respondent, as the plaintiff, is enforcing against the appellant is, by statute, an illegal and void contract or transaction. The respondent has no right in law to enforce such an illegality: *See* Alao Vs. A.C.B. Ltd. (supra); Sodipo Vs. Lemminkainen (supra); Oyeneyin Vs. Akinkugbe (supra); Solanke Vs. Abed (supra). The combined effect of Sections 54 (1) & (2) and 55 of CAMA making it illegal for a foreign company to carry on business in Nigeria without first being duly registered to do so is that the transaction or contract the respondent, a foreign company, has with the appellant is an

unenforceable transaction or contract.*(Pp 97 – 98 Paras I – D)*

"Section 54 and 55 of CAMA, on one hand, and Section 60 of CAMA, on the other hand, do not provide for similar or identical causes of action. The lower court had apparently mixed up the two distinct sets of fact provided for in Section 54 and 55, and Section 60 of CAMA.

Where a foreign company, not registered in Nigeria, purports to carry on business in Nigeria in defiance of Section 54(1) of CAMA, such transaction is not only void, it is illegal and a crime to do so. That is the legislative intent or purpose of Sections 54(2) and 55 of CAMA. In our interpretational responsibility or function, ours is to construe statutory provisions to bring out and promote its purpose. ***See*** **Rabiu Vs. The State (1980) 8-11 SC 130. The legislature has enacted Section 54 and 55 purposely not to allow a foreign company carry on business in Nigeria without being first duly registered in Nigeria in accordance with the provisions of CAMA. That is why the conduct is expressly criminalised by Section 55 of CAMA. Thus any conduct of a foreign company, in defiance of Section 54(2) of CAMA, renders whatever business it carries on not only void (by S.54(1) of CAMA), it is criminal to do so by virtue of Section 55 of CAMA. The law as put in** ***Latinism, ex dolomalo non oritur,*** **is simply that the court of justice will not lend its aid to a man who grounds his cause on illegality. If from the plaintiff's own pleading, his cause of action is founded on illegality or some transgression of the positive law of this country, then, as the trial court stated in its Judgment in this case, he has no right to be assisted by our law courts.***(Pp 98 – 99 paras D – A)*

Per Eko (JSC)

5. *S. 60 of CAMA permits a foreign company to enforce a legal right in Nigerian courts accruing to it from a lawful business.*

While Section 54 and 55 of CAMA are about the conduct of a foreign company that is illegal in Nigeria, Section 60 of CAMA on the other

hand, permits the enforcement by a foreign company a legal right accruing to it from a lawful business or transaction. Section 60 of CAMA does not vest in a foreign company a legal right to enforce an illegal contract. The situation the legislature has in mind, in enacting Section 60 of CAMA, is where, for instance, a foreign company has had a transaction with a Nigerian or a Nigerian entity which transaction could be enforced in Nigeria but which of course may not have been as a result of any business the foreign company is carrying on in Nigeria. Section 60 of CAMA, no doubt, was enacted to further enhance international trade or commerce. I have, in support of this view, the decision of Ademola, JCA, in Nigeria Bank for Commerce & Industry Ltd Vs. Europa Traders (UK) Ltd. (1990) 6 NWLR (Pt. 154) 36 at page 41; that is:

> ***"In as much as a Nigerian goes to Harrods to buy goods on credit can be sued by Harrods in Nigerian Courts, is also can a British Company from whom a Nigerian has bought goods and has not paid be sued in Nigerian Courts. <u>There is basis for reciprocity in international relations</u> and no nationalistic feelings or thoughts should destroy <u>this fundamental rules of International relations".</u>***

See also **Ritz & Co. KG. Vs. Techno Ltd. (1999) 4 NWLR (Pt. 598) 298 at 305.***(P 99 paras A – F)*

"The capacity of a foreign company to sue and/or be sued in Nigerian Courts, as a fundamental principle in reciprocity in International relations and mercantile practice, is the basis and purpose for enactment of Section 60 of CAMA. That capacity, in my firm view, does not warrant or permit, in view of Section 54 and 55 of CAMA, a foreign company to sue in Nigerian Courts to enforce contracts that are either illegal or expressly criminalised, as the instant, by the positive or expressly laws of Nigeria. Nigerian courts, I must say, are not established to legalise acts or conducts that are illegalised or criminalized by Parliament or statute. They are also

not established to declare as illegal acts or conduct that are by law legal and/or lawful. That definitely will be a negation of the principle of purposive interpretation or construction of statutes. *(Pp 97 – 98 paras G – B)*

Per Eko (JSC)

"The lower court held, at page 173 of the Record, that where the legal capacity of the plaintiff is challenged by the defendant, the onus is on the former to prove his legal status or capacity and that this is done by the plaintiff leading evidence, oral or documentary, to prove its legal capacity that is challenged. The lower court is quite right on this. The lower court further held that there is nothing on the Record that the plaintiff, now the respondent, was given an opportunity to prove that it has legal capacity.

There are two things here. One is whether the respondent, as a foreign company, has legal capacity to sue and be sued in Nigerian courts. The other is whether it can enforce an illegal contract? I had earlier in this Judgment made the point that the respondent, an admitted foreign company, on the basis of reciprocity in International relations has legal capacity to maintain an action in any Nigerian Court to enforce any legitimate contractual right pursuant to Section 60 of CAMA. I have also held that a foreign company, as the plaintiff/respondent, that is not registered in Nigeria cannot carry on business in Nigeria, and that where it carries on business in Nigeria in defiance of the positive or statutory provisions prohibiting it to do so such contract is illegal. For avoidance of doubt, Section 54(2) of CAMA provides that any contract or business transaction carried on in Nigeria by a foreign company, which has not been registered or incorporated in Nigeria to carry on business in Nigeria, is void. Section 55 of CAMA, without ambiguity, provides that a foreign company that carries on business without being so registered does so criminally. Accordingly, such business or contract performed by the foreign

company in contravention of the provisions of Section 54(1)) & (2) of CAMA is illegal and void. "*(P 100 paras B – H)*

Per Eko (JSC)

6. *It is by tendering certificate of incorporation that the incorporation of a company can be proved*

Clearly, on the state of pleadings and other facts it does not lie in the mouth of the plaintiff/respondent to say that it was not given an opportunity to prove that it was registered or incorporated in Nigeria to carry on business in Nigeria in compliance with Section 54(1) of the CAMA. It is only by such positive averment or evidence that it can raise and establish its defence to the Preliminary Objection. The learned counsel to the appellant submits, and I agree, that the only way incorporation of a company can be established in any proceedings is by tendering the certificate of its incorporation. *See* NNPC Vs. Lutin (2006) 2 NWLR (Pt. 965) 506 at 533.*(P 101 paras G – I)*

"On the state of pleadings an issue was raised that the plaintiff, a foreign company, having not been registered or incorporated in Nigeria to carry on business in Nigeria, could not legally carry on business in Nigeria with the defendant/appellant, and that "the contract purportedly giving rise to the cause of action is illegal and void. That should be enough notice, for purposes of *audi alteram partem,* to the plaintiff to prove that it, in doing business with the defendant/appellant in Nigeria it had, as a foreign company, complied with the provisions of Section 54(1) of CAMA, in order to avoid the harsh consequences of Sections 54(2) and 55 of CAMA. The plaintiff did not file any reply pleading to join issues with the defendant/appellant on this very major challenge to the enforceability of the contract it purportedly entered into with the defendant/appellant. The respondent, as the plaintiff, still missed the opportunity it had to establish that it was registered or incorporated in Nigeria, in compliance with Section 54(1) of CAMA

to carry on business in Nigeria as a foreign company, when it failed to file counter-affidavit to controvert or challenge the averments in the affidavit in support of the preliminary objection alleging that it was "not incorporated in Nigeria". I agree with the appellant, on authority of Mainagee Vs. Gwamma (2004) 14 NWLR (Pt. 893) 323 at 334, that the law is now settled, that if any evidence given by any party is not controverted by the other party who has the opportunity to do so, and such evidence is not inherently incredible or spurious, the court ought to give credence to such evidence and act on it.

The issue is whether the respondent, as the plaintiff, was given an opportunity to establish that it was incorporated or registered in Nigeria, as a foreign company, to carry on business in Nigeria as Section 54(1) of CAMA requires it to do. The learned counsel for the respondent completely missed the point when he submitted that when issues are joined on the pleadings, a party cannot just file a notice of Preliminary Objection supported by affidavit and thereby seek to have that issue resolved at the interlocutory stage. And that he should rather await the normal processes of the trial. This submission does not poignantly answer or address the issue whether his client was given an opportunity to establish that it carried on business in Nigeria, as a foreign company, in compliance with Section 54(1) of CAMA.

In any case, the extant Rules of the trial court, the High Court (Civil Procedure) Rules, 2006 by its Order 25, permitted the defendant to raise any point of law as a special defence which the trial Judge may set down for hearing and to be disposed at any time before trial, and where the point of law substantially disposes of the whole action the trial court may then dismiss the action or make such order as may be just. The appellant, as the defendant, pleaded illegality of the contract the plaintiff was purportedly enforcing against it, which illegality deprived the trial court of jurisdiction. The defendant had raised threshold question of jurisdiction which the trial court had to resolve first and foremost.

(Pp 102 – 103 paras A – C)

Per Eko (JSC)

7. Illegality of contract when raised impacts on the jurisdiction of the court

Illegality of a contract or transaction, whenever it is raised as a defence to a claim founded on the said transaction, impacts on the jurisdiction of the court. When the contract on which the plaintiff sues is *ex facie* illegal, the courts will decline to enforce it, for the courts exercise their jurisdiction only to administer the law of the land. They do not exercise their jurisdiction to help the Plaintiff break the law. *See* George & Ors Vs. Dominion Flour Mills Ltd (1963) 1 ALL NLR 71; Ibrahim Vs. Osim (1988) NWLR 257; Barclays Bank D.O.C. Vs. Memunatu Hassan (1961) ALL NLR 836. *(P 103 paras C – E)*

8. The cardinal rule of interpretation

The cardinal rule of interpretation of statutes is that words used in a statute must be given their natural and ordinary meaning unless such interpretation would lead to injustice or absurdity. It is said that where the language of the statute is clear and explicit, effect must be given to it, as in such circumstances the words of the statute speak the intention of the legislature. *See* Ibrahim Vs. Barde (1996) 9 NWLR (Pt.474) 513 @ 577B-C; Ojokolobo Vs. Alamu (1987) 3 NWLR (61) 377 @ 402 F-H; Ahmed Vs. Kassim (1958) SCNLR 28 @ 30C, it was held in Adewumi Vs. A-G Ekiti State &Ors (2002) SCNJ 27 @ 50, per Wali, JSC, that a court is not permitted to distort a statute's meaning in order to make it conform with the Judge's own version of sound social policy. *(P 106 paras A – C)*

"I have had a careful look at the provisions of Sections 54 and 55 of CAMA reproduced above. The language employed therein is clear and unambiguous. Section 54(1) clearly states that every foreign company incorporated outside Nigeria before or after the commencement of the Act must take steps to obtain incorporation in Nigeria. Until the process is complete and certificate of incorporation issued, the company is not entitled to carry on business in Nigeria nor can it exercise any of the powers of a

registered company. It is forbidden from having a place of business or an address for service of processes in Nigeria for any purpose other than the receipt of notice and other documents, as matters preliminary to incorporation. The exception is where the company has been granted exemption by virtue of sub-section (3)(a) or (b).

Subsection (2) of Section 54, in no uncertain terms, states that any act in contravention of Subsection (1) SHALL BE VOID.

I am of the considered view that in the face of such clear provisions no further enquiry need be made as to the status of a foreign company entering into and carrying on business in Nigeria without being incorporated under CAMA. In addition to any act of the company being void, section 55 provides for criminal liability and fines. While it may be said that the fines are paltry, the fact that defaulters will be criminally culpable and liable to conviction underscores the seriousness with which the legislature views non-compliance with the provisions.*(P 106 paras C – I)*

Per Kekere-Ekun (JSC)

9. Respondents were given full opportunity to satisfy the court on its incorporation

The argument of learned counsel for the respondent that it was not afforded an opportunity to satisfy the court as to the fact of its registration is very feeble. This is because one of the main contentions in the preliminary objection was the respondent's non-incorporation. It was clear that the respondent's, now appellant's intention was to truncate the hearing of the suit on this ground. An affidavit of facts was deposed to asserting that the respondent was a foreign company not registered in Nigeria but carrying on business in the country. What better opportunity could there have been to satisfy the court to the contrary? I am of the view and do hold that there was no breach of the respondent's right to fair hearing nor any miscarriage of justice in the decision of the trial court.
(P 107 paras F – I)

Nigerian cases cited in this Judgment
Adewumi Vs. A-G Ekiti State &Ors (2002) SCNJ 27;
Ahmed Vs. Kassim (1958) SCNLR 28;
Alao Vs. A.C.B. LTD. (1998) 1-2 SC 179; (1998) 3 NWLR (Pt. 542) 339
Bakare Vs. The State (1987) 3 SC 1;
Barclays Bank D.O.C. Vs. Memunatu Hassan (1961) ALL NLR 836;
Chief Onyiuke III Vs. Okeke (1976) 1 ALL NLR (Pt.1) 181.
Donatus Okafor Vs. Ifeanyi Isiadinso (2014) LPELR-23013 (CA);
George & Ors Vs. Dominion Flour Mills Ltd (1963) 1 ALL NLR 71;
Herman Vs. Jeuchner (1888) is QBD 561;
Ibrahim Vs. Barde (1996) 9 NWLR (Pt.474) 513;
Ibrahim Vs. Osim (1988) NWLR 257;
Lutin Vs. NNPC (2006) 2 NWLR (Pt. 965) 506;
Mainagee Vs. Gwamma (2004) 14 NWLR (Pt. 893) 323;
Nigeria Bank for Commerce & Industry Ltd Vs. Europa Traders (UK) Ltd. (1990) 6 NWLR (Pt. 154) 36;
Ojokolobo Vs. Alamu (1987) 3 NWLR (61) 377;
Oyeneyin Vs. Akinkugbe (2010) 4 NWLR (Pt. 1184) 265;
Rabiu Vs. The State (1980) 8-11 SC 130;
Ritz & Co. KG. Vs. Techno Ltd. (1999) 4 NWLR (Pt. 598) 298;
Sodipo Vs. Lemminkainen Oy (No. 2) 1986 1 NWLR (Pt. 15) 220); and
Solanke Vs. Abed &Anor. (1962) 1 ALL NLR 230.

Foreign case cited in this Judgment
William Hill (Park Lane) Ltd. Vs. Hofman (1950) 1 ALL ER 1013.

Nigerian Statutes cited in this Judgment
Companies and Allied Matters Act (CAMA)Sections 54, 55, 56,59 and 60.

Representation
A.M. Kayode, (Esq.), with **Adiza Shata (Miss)** for the appellant.
F.R. Onoja, (Esq.), with **I.C. Akwiwu (Miss)** and **O.O. Ajisegiri (Miss),** for the respondent.

EJEMBI EKO, JSC: On 23rd July, 2003, the High Court of the Federal Capital Territory (FCT) presided by Hussein Mukhtar, J, delivered its ruling in the Suit **No.FCT/HC/CV/405/2003** in the preliminary objection of the defendant in that suit. The learned trial Judge held in the said Ruling *inter alia* that "the plaintiff company though has the legal capacity to sue and be sued has no parallel capacity to carry on any business in Nigeria until it is so incorporated in Nigeria". Against this decision the plaintiff at the trial High Court of the FCT lodged its appeal on 1st August, 2003 to the Court of Appeal (hereinafter referred to as the "lower court").

The appeal at the lower court was heard and determined on the questions:

> **"Whether the company Edicomsa International, Inc. & Associates, incorporated as a legal entity under the laws of the United States of America, has legal capacity to carry on business in Nigeria and consequently maintain an action in Nigerian Court to enforce its right in the business it carried on in Nigeria".**

The lower court held that a foreign company, not registered to carry on business in Nigeria, can maintain an action to enforce the rights to the business it carried on in Nigeria. This further appeal by the defendant at the trial court raises, in my view, the question only, of the proper or correct interpretation of the provisions of Sections 54, 55 and 60 of the Companies and Allied Matters Act (CAMA) which I herein below reproduce:

> ***""54 (1) Subject to Sections 56 to 59 of this Act, every foreign company which, before or after the commencement of this Act, was incorporated outside Nigeria, and having the intention of carrying on business in Nigeria shall take all steps necessary to obtain incorporation as a separate entity in Nigeria for that purpose, but until so incorporated, the foreign company shall not carry on business in Nigeria or exercise any of the powers of a***

registered company and shall not have a place of business or an address for service of documents or processes in Nigeria for any purpose other than the receipt of notices and other documents, as matters preliminary to incorporation under this Act.

(2) Any act of the company in contravention of subsection (1) of this Section shall be void.

(3) Nothing in this Section shall affect the status of

(a) any foreign company which before the commencement of this Act was granted exemption from compliance with Part X of the Companies Act, 1968.

(b) any foreign company exempted under any treaty to which Nigeria is a party.

55. If any foreign company fails to comply with the requirements of Section 54 of this Act in so far as they may apply to the company, the company shall be guilty of an offence and liable on conviction to a fine of not less than N2,500; and every officer or agent of the company who knowingly and willingly authorises or permits the defaults or failure to comply with those requirements shall, whether or not the company is also convicted of an offence, be liable on conviction to a fine of not less than N250 and where the offence is a continuing one to a further fine of N25 for every day during which the default continues.

60. For avoidance of doubt, it is hereby declared that:

(a) save as provided in Section 55, 56, 57 and 59 of this Act, nothing in this Act shall be construed as authorizing the disregard by any exempted foreign company of any enactment or rule of law; and

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> ***(b) nothing in this Chapter shall be construed as affecting the rights and liability of a foreign company to sue or be sued in its name or in the name of its agent****".*

B

The lower court had also held that since the legal capacity of the plaintiffs/respondent was in issue "the parties should have been allowed to call evidence to determine the issue of the plaintiff's legal capacity". It C further held that the onus was on the appellant, as the defendant, who had challenged the plaintiff/respondent's legal capacity to prove that the plaintiff/respondent did not have the legal capacity; and that "this is done by leading evidence, oral or documentary, in proof of the same", and further D that the plaintiff/respondent "was not given the opportunity to do so".

The parties are in agreement that the issues for the determination of the appeal are:

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> **1. Whether in view of Section 54(1), (2) and (3) of the Companies and Allied Matters Act (CAMA), a foreign entity, not registered in Nigeria pursuant to Section 54(1), or given the leave under Section 54(3),** F **can enforce a contract to carry on business in Nigeria in view of Section 54(2) CAMA?**
>
> **2. Whether the provisions of Section 60(b) of CAMA is** G **applicable in the circumstances of this appeal and inures to the Respondent.**
>
> **3. Was the Court of Appeal right in the circumstance of this case, to hold that the Respondent was not** H **given the opportunity to establish its legal capacity or status by the trial court?**

Certain facts are not in dispute between the parties at the trial court. Some I of those facts are that:

A

1. **The respondent, as the plaintiff, "is a company registered under the Laws of the United States of America" as a corporate entity which carries on the business of Architecture, Engineering, Planning,**

B

Construction and Interiors and having its principal place of business at C/Serrano, 8d, IZq, 28001 Madrid, Spain" Paragraph 1 of the Statement of Claim.

C

2. **The defendant/appellant employed the plaintiff/ respondent as its "architects and Engineers/ Consultants and Sole-Contractor to do for the**

D

defendant and the Federal Government of Nigeria, the conceptualisation, design, infrastructure and construction of five thousand Housing Units at Nbera District in Abuja". Part of the business the

E

defendant/appellant engaged the plaintiff/ respondent to carry on in Nigeria, as part of the agreements between the parties, was the commitment of the plaintiff "to build 2 factories for

F

the production of Simplex Cepol Wall and Slab Panels as well as other elements to be used in the construction of the Housing Units for the defendant". See paragraphs 3, 4, and 6.

G

3. **The plaintiff/respondent, in furtherance of the agreements it had bought all the machinery, equipment and vehicles for the building and**

H

operation of the said factories", which it had built and "immediately commenced the production of the Simplex Cepol Panels used to build the model houses". See paragraph 10 of the Statement of

I

Claim.

4. The immediate cause of action is the alleged breach of the terms of the Agreements the plaintiffs and the defendant executed. The defendant allegedly had not been paying for jobs done by the plaintiff, which jobs had been duly certified upon valuations. See paragraphs 13, 14, 15 of the statement of claim.

5. The Companies i.e. the plaintiff and Edicomsa International Nigeria Limited are doing business in Nigeria at the defendant's site. See paragraphs 9.16 of the statement of claim".

It is clear from the plaintiff's own averments in the statement of claim that the plaintiff, a legal entity incorporated under the Laws of the USA, is carrying on business in Nigeria in furtherance of the agreements it entered into with the defendant/appellant. I do not think that it is in dispute that the plaintiff//respondent is a foreign company doing business in Nigeria. Its juristic personality, as an entity registered or incorporated in the USA, is not in dispute. The narrow issue is whether it has been registered in Nigeria, under the Nigerian Laws, particularly CAMA, to carry on business in Nigeria. Edicomsa International Nigeria Limited, incorporated in Nigeria by the plaintiff to carry on business in Nigeria, jointly with the plaintiff in pursuance of the Agreements the plaintiff had with the defendant, is a Nigerian Company that is distinct and different from the plaintiff.

I earlier reproduced the provisions of Section 54(1) and 55 of CAMA. The lower court, in my view, got it right when it held at pages 170-171 of the record, to wit:

"My Lords, by virtue of the provisions of Section 54 (1) of the Companies and Allied Matters Act any foreign company seeking to carry on business in Nigeria shall take steps to obtain incorporation for that purpose, but until so incorporated the foreign company shall not carry on business in Nigeria or exercise any of the powers of a

A ***registered company.***

If a foreign company fails to comply with the above provisions all its acts shall be void. That is to say (that) a
B ***foreign company cannot carry on business in Nigeria unless it is incorporated in Nigeria.***

To carry on business means to conduct, prosecute or
C ***continue a particular vocation or business as a continuous operation as permanent occupation. The repetition of acts may be sufficient. It also means to hold oneself out to others as engaged in the selling of goods or services. See Black's***
D ***Law Dictionary 5th edition p. 194.***

In the instant case the appellant admits in its pleadings that it is a foreign company registered in the United States of
E ***America. It did not comply with the Provisions of Section 54(1) of CAMA since it is not incorporated in Nigeria.***

The appellant executed contract with the respondent
F ***wherein it was to build housing units and similar work for the defendant. This falls within the warm embrace of "to carry on business in Nigeria".***

G I agree entirely. On this findings that the plaintiff, the respondent, herein, is a foreign company carrying on business in Nigeria without being duly registered to do so. The legal consequence is that provided in Section 55 of CAMA. The conduct criminalised by Section 55 of CAMA is what the trial
H court and the lower court has found the respondent to have done. The concurrent findings of fact, based on the admission of the respondent in its pleadings, are unchallenged. The conduct of the respondent doing or carrying on business in Nigeria without being duly registered is not only
I criminal by virtue of Section 55 of CAMA, the transaction it entered into with the appellant, as the defendant, was void by dint of Section 54(2) of

CAMA. There is no evidence that the plaintiff/respondent enjoyed any exemption under Section 54(3) of CAMA.

There had been, on the part of the plaintiff/respondent, an admission that it is a foreign company carrying on business in Nigeria without being registered to do so. The lower court has found, on the admission of the plaintiff/respondent, that being a foreign company carrying on business in Nigeria without being duly registered under the CAMA to do so "all its acts" or transactions in Nigeria are void. Throughout the judgment of the court below and notwithstanding the trial court's reliance on it in its decision at page 126 of the record, there was no mention of Section 55 of CAMA and/or its implication on the admission of the plaintiff/respondent and the lower court's unchallenged findings of fact that the plaintiff/respondent, as a foreign company, was carrying on business without it being registered to do so. I have no doubt whatsoever, reading Section 54 and 55 of CAMA together vis-a-vis the conduct of the plaintiff/respondent, that the latter's transactions with the defendant/appellant was criminal and void.

In **ALAO Vs. A.C.B. LTD. (1998) 1-2 SC 179; (1998) 3 NWLR (Pt. 542) 339,** per Kutigi, JSC (as he then was) stated at page 355 thus:

> **"The law is very clear on the effect of illegality on a transaction or contract. It is the law that a <u>contract is illegal if the consideration or the promise involves doing something illegal</u> or contrary to public policy or if the intention of the parties in making the contract is thereby to promote something which is illegal or contrary to public policy. <u>An illegal contract is a void contract and it cannot be the foundation of any legal right.</u> In other words, when the object of either the promise or the consideration is to promote the committal of an illegal act, <u>the contract itself is illegal and cannot be enforced</u> (*See* Herman Vs. Jeuchner (1888) is QBD 561; William Hill (Park Lane) Ltd. Vs. Hofman (1950) 1 ALL ER 1013; Chief Onyiuke III Vs. Okeke (1976) 1 ALL NLR (Pt.1) 181; SodipoVs.**

Lemminkainen Oy (No. 2) 1986 1 NWLR (Pt. 15) 220)". (Emphasis supplied).

The appellant's counsel submits, on the authority of **Solanke Vs. Abed & Anor. (1962) 1 ALL NLR 230 at233**, and I agree, that where a statute, as CAMA does, not only declares a contract void, but also imposes penalty for making it, the contract is illegal. The contract, in the instant case, by operation of Sections 54 and 55 of CAMA, was illegal and void *ab initio*. Thus, as stated by Kutigi, **JSC** (as he then was) in **ALAO v. A.CB (supra)** and this Court in **OyeneyinVs. Akinkugbe (2010) 4 NWLR (Pt. 1184) 265 at 285,** an illegal act, that is a void act, does not confer any legal right or title whatsoever.

The respondent has not challenged the very loud and clear finding of fact by the lower court, at page 170 of the Record, to the effect that in the instant case the respondent, as the plaintiff, had admitted in its pleadings that it is a foreign company carrying on business in Nigeria without complying with Section 54(1) of CAMA, since it is not registered or incorporated in Nigeria to so do. Having not appealed or challenged these specific findings or decisions of the lower court very adverse to its interest, the respondent cannot now be heard here submitting that the contract or transaction it has with the defendant/appellant does not amount to "carrying on business in Nigeria". The law is trite that a specific finding of fact by a court which is neither challenged nor appealed is deemed to be an acceptable and admitted fact by the party against whom it was made. In this case, this specific finding of fact was made concurrently by the trial court and the lower court. Such findings of fact, as this court held in **Bakare Vs. The State (1987) 3 SC 1,** are presumed to be correct. The burden of displacing this presumption is on the party challenging the specific finding, as this Respondent purports to do belatedly and without any cross-appeal. The burden, as Agim JCA, stated in **Donatus Okafor Vs. Ifeanyi Isiadinso (2014) LPELR-23013 (CA),** is not discharged by a mere assertion that the findings is wrong.

Respondent's counsel has submitted tersely that the authorities cited by the appellant's counsel to the effect that the contract the respondent, as

the plaintiff, was enforcing against the appellant, being an illegal and void transaction or contract, was unenforceable, are irrelevant. The learned counsel made no further effort, however, to show that the authorities are irrelevant and inapplicable. Clearly, the transaction or contract the respondent, as the plaintiff, is enforcing against the appellant is, by statute, an illegal and void contract or transaction. The respondent has no right in law to enforce such an illegality: *See* **Alao Vs. A.C.B. Ltd. (supra); Sodipo Vs. Lemminkainen (supra); Oyeneyin Vs. Akinkugbe(supra); Solanke Vs. Abed (supra).** The combined effect of Sections 54 (1) & (2) and 55 of CAMA making it illegal for a foreign company to carry on business in Nigeria without first being duly registered to do so is that the transaction or contract the respondent, a foreign company, has with the appellant is an unenforceable transaction or contract.

Section 54 and 55 of CAMA, on one hand, and Section 60 of CAMA, on the other hand, do not provide for similar or identical causes of action. The lower court had apparently mixed up the two distinct sets of fact provided for in Section 54 and 55, and Section 60 of CAMA.

Where a foreign company, not registered in Nigeria, purports to carry on business in Nigeria in defiance of Section 54(1) of CAMA, such transaction is not only void, it is illegal and a crime to do so. That is the legislative intent or purpose of Sections 54(2) and 55 of CAMA. In our interpretational responsibility or function, ours is to construe statutory provisions to bring out and promote its purpose. *See* **Rabiu Vs. The State (1980) 8-11 SC 130.** The legislature has enacted Section 54 and 55 purposely not to allow a foreign company carry on business in Nigeria without being first duly registered in Nigeria in accordance with the provisions of CAMA. That is why the conduct is expressly criminalised by Section 55 of CAMA. Thus any conduct of a foreign company, in defiance of Section 54(2) of CAMA, renders whatever business it carries on not only void (by S.54(1) of CAMA), it is criminal to do so by virtue of Section 55 of CAMA. The law as put in *Latinism, ex dolomalo non oritur,* is simply that the court of justice will not lend its aid to a man who grounds his cause on illegality. If from the plaintiff's own pleading, his cause of action is founded on illegality or some transgression of the positive law of this

country, then, as the trial court stated in its Judgment in this case, he has no right to be assisted by our law courts.

While Section 54 and 55 of CAMA are about the conduct of a foreign company that is illegal in Nigeria, Section 60 of CAMA on the other hand, permits the enforcement by a foreign company a legal right accruing to it from a lawful business or transaction. Section 60 of CAMA does not vest in a foreign company a legal right to enforce an illegal contract. The situation the legislature has in mind, in enacting Section 60 of CAMA, is where, for instance, a foreign company has had a transaction with a Nigerian or a Nigerian entity which transaction could be enforced in Nigeria but which of course may not have been as a result of any business the foreign company is carrying on in Nigeria. Section 60 of CAMA, no doubt, was enacted to further enhance international trade or commerce. I have, in support of this view, the decision of Ademola, JCA, in **Nigeria Bank for Commerce & Industry Ltd Vs. Europa Traders (UK) Ltd. (1990) 6 NWLR (Pt. 154) 36 at page 41;** that is:

> ***"In as much as a Nigerian goes to Harrods to buy goods on credit can be sued by Harrods in Nigerian Courts, is also can a British Company from whom a Nigerian has bought goods and has not paid be sued in Nigerian Courts. There is basis for reciprocity in international relations and no nationalistic feelings or thoughts should destroy this fundamental rules of International relations".***

See also **Ritz & Co. KG. Vs. Techno Ltd. (1999) 4 NWLR (Pt. 598) 298 at 305.**

The capacity of a foreign company to sue and/or be sued in Nigerian Courts, as a fundamental principle in reciprocity in International relations and mercantile practice, is the basis and purpose for enactment of Section 60 of CAMA. That capacity, in my firm view, does not warrant or permit, in view of Section 54 and 55 of CAMA, a foreign company to sue in Nigerian Courts to enforce contracts that are either illegal or expressly criminalised, as the instant, by the positive or expressly laws of Nigeria.

Nigerian courts, I must say, are not established to legalise acts or conducts that are illegal or criminalized by Parliament or statute. They are also not established to declare as illegal acts or conduct that are by law legal and/or lawful. That definitely will be a negation of the principle of purposive interpretation or construction of statutes.

The lower court held, at page 173 of the Record, that where the legal capacity of the plaintiff is challenged by the defendant, the onus is on the former to prove his legal status or capacity and that this is done by the plaintiff leading evidence, oral or documentary, to prove its legal capacity that is challenged. The lower court is quite right on this. The lower court further held that there is nothing on the Record that the plaintiff, now the respondent, was given an opportunity to prove that it has legal capacity.

There are two things here. One is whether the respondent, as a foreign company, has legal capacity to sue and be sued in Nigerian courts. The other is whether it can enforce an illegal contract? I had earlier in this Judgment made the point that the respondent, an admitted foreign company, on the basis of reciprocity in International relations has legal capacity to maintain an action in any Nigerian Court to enforce any legitimate contractual right pursuant to Section 60 of CAMA. I have also held that a foreign company, as the plaintiff/respondent, that is not registered in Nigeria cannot carry on business in Nigeria, and that where it carries on business in Nigeria in defiance of the positive or statutory provisions prohibiting it to do so such contract is illegal. For avoidance of doubt, Section 54(2) of CAMA provides that any contract or business transaction carried on in Nigeria by a foreign company, which has not been registered or incorporated in Nigeria to carry on business in Nigeria, is void. Section 55 of CAMA, without ambiguity, provides that a foreign company that carries on business without being so registered does so criminally. Accordingly, such business or contract performed by the foreign company in contravention of the provisions of Section 54(1)) & (2) of CAMA is illegal and void.

There was no dispute at the trial court that the plaintiff was a foreign company. This fact was expressly admitted in paragraph 1 of the Statement of Claim. In the same Statement of Claim the plaintiff further admitted that

it was carrying on business in Nigeria with the defendant/appellant. Against these pleadings it was averred by the defendant/appellant in paragraph 1(b) of the Statement of Defence that:

> ***"The Defendant shall also contend that (the) Plaintiff being an entity not known to law in Nigeria cannot carry on business in Nigeria and consequently any purported agreement entered into with the Defendant is illegal, null and void and no legal effect in view of Section 54(1) and (2) of the Corporate (sic: Companies) and Allied Matters Act Cap. 59 LFN, 1990".***

Thereafter, the defendant, now the appellant, filed Notice of preliminary objection challenging the jurisdiction of the trial court to entertain the action. Among the grounds upon which the objection was brought was the plea that "the contract purportedly giving rise to the cause of action is VOID and ILLEGAL. The supporting affidavit averred in paragraph 4(a) that the plaintiff was not incorporated in Nigeria. This fact was not disputed. The plaintiff filed no counter affidavit. The law is settled that facts not disputed are taken as admitted, and therefore, need no further proof.

The preliminary objection was on the cause list of the trial court for hearing on four diverse dates from 16th April, 2003 before it was heard on 19th June, 2003. The Ruling on it was delivered on 23rd July, 2003.

Clearly, on the state of pleadings and other facts it does not lie in the mouth of the plaintiff/respondent to say that it was not given an opportunity to prove that it was registered or incorporated in Nigeria to carry on business in Nigeria in compliance with Section 54(1) of the CAMA. It is only by such positive averment or evidence that it can raise and establish its defence to the Preliminary Objection. The learned counsel to the appellant submits, and I agree, that the only way incorporation of a company can be established in any proceedings is by tendering the certificate of its incorporation. *See* **Lutin Vs. NNPC (2006) 2 NWLR (Pt. 965) 506 at 533.**

On the state of pleadings an issue was raised that the plaintiff, a foreign company, having not been registered or incorporated in Nigeria to carry on business in Nigeria, could not legally carry on business in Nigeria with the defendant/appellant, and that "the contract purportedly giving rise to the cause of action is illegal and void. That should be enough notice, for purposes of *audi alteram partem,* to the plaintiff to prove that, in doing business with the defendant/appellant in Nigeria it had, as a foreign company, complied with the provisions of Section 54(1) of CAMA, in order to avoid the harsh consequences of Sections 54(2) and 55 of CAMA. The plaintiff did not file any reply pleading to join issues with the defendant/appellant on this very major challenge to the enforceability of the contract it purportedly entered into with the defendant/appellant. The respondent, as the plaintiff, still missed the opportunity it had to establish that it was registered or incorporated in Nigeria, in compliance with Section 54(1) of CAMA to carry on business in Nigeria as a foreign company, when it failed to file counter-affidavit to controvert or challenge the averments in the affidavit in support of the preliminary objection alleging that it was "not incorporated in Nigeria". I agree with the appellant, on authority of **Mainagee Vs. Gwamma (2004) 14 NWLR (Pt. 893) 323 at 334,** that the law is now settled, that if any evidence given by any party is not controverted by the other party who has the opportunity to do so, and such evidence is not inherently incredible or spurious, the court ought to give credence to such evidence and act on it.

The issue is whether the respondent, as the plaintiff, was given an opportunity to establish that it was incorporated or registered in Nigeria, as a foreign company, to carry on business in Nigeria as Section 54(1) of CAMA requires it to do. The learned counsel for the respondent completely missed the point when he submitted that when issues are joined on the pleadings, a party cannot just file a notice of Preliminary Objection supported by affidavit and thereby seek to have that issue resolved at the interlocutory stage. And that he should rather await the normal processes of the trial. This submission does not poignantly answer or address the issue whether his client was given an opportunity to establish that it carried on business in Nigeria, as a foreign company, in compliance with Section

A 54(1) of CAMA.

In any case, the extant Rules of the trial court, the High Court (Civil Procedure) Rules, 2006 by its Order 25, permitted the defendant to raise any point of law as a special defence which the trial Judge may set down for
B hearing and to be disposed at any time before trial, and where the point of law substantially disposes of the whole action the trial court may then dismiss the action or make such order as may be just. The appellant, as the defendant, pleaded illegality of the contract the plaintiff was purportedly
C enforcing against it, which illegality deprived the trial court of jurisdiction. The defendant had raised threshold question of jurisdiction which the trial court had to resolve first and foremost.

Illegality of a contract or transaction, whenever it is raised as a
D defence to a claim founded on the said transaction, impacts on the jurisdiction of the court. When the contract on which the plaintiff sues is *ex facie* illegal, the courts will decline to enforce it, for the courts exercise their jurisdiction only to administer the law of the land. They do not exercise
E their jurisdiction to help the Plaintiff break the law. *See* **George & Ors Vs. Dominion Flour Mills Ltd (1963) 1 ALL NLR 71; Ibrahim Vs. Osim (1988) NWLR 257; Barclays Bank D.O.C. Vs. Memunatu Hassan (1961) ALL NLR 836.**

F From all that I have been labouring to say or demonstrate, I find substance in the appeal on all the issues canvassed. I hereby resolve all the issues in favour of the Appellant. The appeal is allowed. The Judgment of the lower court delivered on 8th December, 2005, in the appeal No.
G CA/A/175/2003 is hereby set aside. In its stead the decision of the High Court of the Federal Capital Territory delivered on 23rd July, 2003 in the suit No. FCT/CV/405/2003 is hereby restored and affirmed.

Ejembi Eko,
H ***Justice, Supreme Court***

KEKERE-EKUN, JSC: My learned brother, EJEMBI EKO, JSC has obliged me with a copy of the judgment just delivered. His Lordship has
I exhaustively considered and ably resolved the issues in contention in this appeal. I am in entire agreement with the reasoning and conclusion reached

A therein. I adopt the summary of the facts as set out in the judgment in making some comments in support.

The High Court of the Federal Capital Territory (FCT) in its ruling delivered on 23/7/2003 held as follows:

B

> ***"By Section 54(2) of the CAMA any act of the plaintiff in defiance of the provisions of Subsection (1) thereof shall be void. The alleged contract project upon which this suit is*** C ***brought, having been entered into and being executed in Nigeria without the plaintiff having been incorporated or registered in Nigeria as a corporate entity is illegal, null and void by the combined effect of Sections 54(1) and (2) and 55*** D ***of CAMA 1990. The plaintiff's action in this suit is therefore a non-starter being void ab initio. The objection succeeds on this ground."***

E Based on this finding, the respondent's suit was struck out. It appealed to the Court of Appeal Abuja (the lower court) which, on 8/12/2005 allowed the appeal and ordered that the suit should commence *de novo* before another Judge of the FCT with dispatch. The lower court was of the view F that notwithstanding the provision of Section 54(1) of the Companies and Allied Matters Act (CAMA), requiring foreign companies intending to carry on business in Nigeria to take all necessary steps to obtain incorporation for that purpose, the light fine imposed for non-compliance, G provided in Section 55, suggests that there is an inherent intention that the law would not be strictly endorced. The court also held that the respondent was not given an opportunity to prove the fact of its incorporation in Nigeria. It was also of the view that an unincorporated foreign company H can sue and be sued in Nigeria.

Section 54 and 55 of CAMA provide as follows:

> ***"54 (1) Subject to Sections 56 to 59 of this Act, every foreign*** I ***company which before or after the commencement of this Act was incorporated outside Nigeria, and having***

A *the intention of carrying on business in Nigeria shall take all steps necessary to obtain incorporation as a separate entity in Nigeria for that purpose, but until so incorporated, the foreign company shall not carry on*
B *business in Nigeria or exercise any of the powers of a registered company and shall not have a place of business or an address for service of documents or processes in Nigeria for any purpose other than the*
C *receipt of notice and other documents, as matters preliminary to incorporation under this Act.*

(2) Any act of the company in contravention of subsection
D *(1) of this section SHALL BE VOID.*

(3) Nothing in this section shall affect the status of:
(a) any foreign company which before the
E *commencement of this Act was granted exemption from compliance with Part X of the Companies Act 1968;*
(b) any foreign companies exemption under any
F *treaty to which Nigeria is a party.*

55. If any foreign company fails to comply with the requirements of Section 54 of this Act in so far as they
G *may apply to the company, the company shall be guilty of an offence and liable on conviction to a fine of not less than N2,500; and every officer or agent of the company who knowingly and willfully authorises or*
H *permits the default or failure to comply with those requirements shall, whether or not the company is also convicted of any offence, be liable on conviction to a fine of not less than N250 and where the offence is*
I *a continuing one to a further fine of N25 for every day during which the default continues." (Emphasis mine)*

The cardinal rule of interpretation of statutes is that words used in a statute must be given their natural and ordinary meaning unless such interpretation would lead to injustice or absurdity. It is said that where the language of the statute is clear and explicit, effect must be given to it, as in such circumstances the words of the statute speak the intention of the legislature. *See* **Ibrahim Vs. Barde (1996) 9 NWLR (Pt.474) 513 @ 577B-C; Ojokolobo Vs.Alamu (1987) 3 NWLR (61) 377 @ 402 F-H; Ahmed Vs. Kassim (1958) SCNLR 28 @ 30C,**it was held in **Adewumi Vs. A-G Ekiti State &Ors (2002) SCNJ 27 @ 50,** per Wali, JSC, that a court is not permitted to distort a statute's meaning in order to make it conform with the Judge's own version of sound social policy.

I have had a careful look at the provisions of Sections 54 and 55 of CAMA reproduced above. The language employed therein is clear and unambiguous. Section 54(1) clearly states that every foreign company incorporated outside Nigeria before or after the commencement of the Act must take steps to obtain incorporation in Nigeria. Until the process is complete and certificate of incorporation issued, the company is not entitled to carry on business in Nigeria nor can it exercise any of the powers of a registered company. It is forbidden from having a place of business or an address for service of processes in Nigeria for any purpose other than the receipt of notice and other documents, as matters preliminary to incorporation. The exception is where the company has been granted exemption by virtue of sub-section (3)(a) or (b).

Subsection (2) of Section 54, in no uncertain terms, states that any act in contravention of Subsection (1) SHALL BE VOID.

I am of the considered view that in the face of such clear provisions no further enquiry need be made as to the status of a foreign company entering into and carrying on business in Nigeria without being incorporated under CAMA. In addition to any act of the company being void, section 55 provides for criminal liability and fines. While it may be said that the fines are paltry, the fact that defaulters will be criminally culpable and liable to conviction underscores the seriousness with which the legislature views non-compliance with the provisions.

The respondent, as plaintiff at the trial court sought to enforce agreements it had entered into with the appellant which were for consultancy services and the construction of two factories at its Nbora Abuja project site. Although the respondent was paid for the supply of 2 new factories at the Nbora site, the appellant terminated the contract on the ground that the respondent had installed second-hand and fairly used equipment in the factories while the factories supplied and constructed by the respondent were unserviceable and unfit for purpose.

Upon the termination of the contracts, the respondent instituted an action against the appellant seeking mandatory order of injunction and special and general damages.

The appellant by way of preliminary objection challenged the jurisdiction of the court to hear the suit on several grounds including the fact that the contract was a nullity, having been entered into by the respondent without it being incorporated in Nigeria under the Companies and Allied Matters Act.

I am of the considered view that the finding of the trial court, reproduced earlier, is a correct statement of the law on this issue. There is no doubt that the respondent was carrying on business in Nigeria without being incorporated under CAMA and was therefore in breach of Section 54(1) of the Act. The consequence of the non-compliance is clearly spelt out in subsection (2). The agreements are null and void.

The argument of learned counsel for the respondent that it was not afforded an opportunity to satisfy the court as to the fact of its registration is very feeble. This is because one of the main contentions in the preliminary objection was the respondent's non-incorporation. It was clear that the respondent's, now appellant's intention was to truncate the hearing of the suit on this ground. An affidavit of facts was deposed to asserting that the respondent was a foreign company not registered in Nigeria but carrying on business in the country. What better opportunity could there have been to satisfy the court to the contrary? I am of the view and do hold that there was no breach of the respondent's right to fair hearing nor any miscarriage of justice in the decision of the trial court.

A For these and the more detailed reasons stated in the lead judgment, I am of the view that the court below erred in setting aside the decision of the trial court. There is merit in this appeal and I hereby allow it. The judgment of the Court of Appeal, Abuja in CA/A/175/2003 delivered on 8/12/2005 is
B set aside. The ruling of the High Court of the FCT delivered on 23/7/2003 is affirmed.

Kudirat Motonmori Olatokunbo Kekere-ekun
Justice, Supreme Court

C

AMIRU SANUSI, JSC: I had the opportunity of reading in draft copy of the judgment supplied to me before now by my learned brother Ejembi Eko JSC just delivered.

D His lordship had adequately addressed all the salient issues canvassed by learned counsel in the appeal before arriving at the conclusion that the appeal is meritorious. I am at one with his reasoning and conclusion that in view of the merit of the appeal, it has to be allowed
E and I accordingly do same. It is hereby also allowed by me. Appeal allowed.

Amiru Sanusi
Justice, Supreme Court

F

DAUDA BAGE, JSC: I have had the benefit of reading in draft the lead Judgment of my learned brother Ejembi Eko, JSC, just delivered. I agree entirely with the reasoning and conclusion reached. I do not have anything
G useful to add. The appeal is allowed, judgment of the lower Court is hereby set aside. The decision of the trial Court delivered on 23rd July, 2003 is hereby restored.

I abide by all the orders contained in the lead Judgment.

H **Sidi Dauda Bage,**
Justice, Supreme Court

I

COMPAGNIE GENERALE DE GEOPHYSIQUE
(NIG) LTD
AND
1. ALHAJI MUSA ODURUSAM
2. CHEVRON (NIG) LTD

SC. 310/2008

IN THE SUPREME COURT OF NIGERIA
HOLDENAT ABUJA

FRIDAY, 23rd DAY OF JUNE, 2017

BEFORE THEIR LORDSHIPS

OLABODE RHODES-VIVOUR	**JUSTICE, SUPREME COURT**
MUSA DATTIJO MUHAMMAD	**JUSTICE, SUPREME COURT**
CHIMA CENTUS NWEZE	**JUSTICE, SUPREME COURT**
AMIRU SANUSI	**JUSTICE, SUPREME COURT**
PAUL ADAMU GALINJE	**JUSTICE, SUPREME COURT**

COURT: Decision in court – Whether final or interlocutory – Applicable test – Whether to look at the nature of order made by court rather than the nature of proceedings thereof.

COURT: Decision thereof – Whether final or interlocutory – How determined – Applicable tests – The principles in Akinsanya Vs. U.B.A. (1986) NSCC (Vol.17) (Pt. 17) 968.

COURT: Decision thereof – Whether final or interlocutory – How determined – The principles in Western Steel Workers Union of Nigeria Ltd (1986) NSCC Vol. 17 (Pt 2) 786 – Whether the Supreme Court has reviewed the principles stated therein.

COURT: Jurisdiction – Where a court decides that it has jurisdiction –

Whether it is an interlocutory order – Relevant considerations.

JUDGMENT AND ORDERS: Final orders – Meaning – Whether brings to an end the rights of the parties in the action – The principles in Igunbor Vs. Afolabi (2001 11 NWLR (Pt. 723) 148.

JUDGMENT AND ORDERS: Interlocutory and final orders – Distinction – Principles in Alor Vs. Ngene (2007) 17 NWLR (Pt. 1062) 163

JUDGMENT AND ORDERS: Nature of order – Whether final or interlocutory – How determined – Relevant considerations thereof.

Issue for Determination

"Whether the Court of Appeal was right by holding that the appeal from the High Court on issue of jurisdiction is interlocutory for which an appeal must be within 14 days."

Facts of the Matter

The 1st respondent as plaintiff at the Imo State High Court sitting in Oguta, hereinafter referred to as the trial court, commenced the instant suit against the appellant and the 2nd respondent as defendants, claiming damages for trespass and injunction. On dismissing the defendants' challenge to its jurisdiction, the trial court adjourned the matter to a future date for hearing.

Aggrieved, the appellant, by its notice filed on 22nd October, 2002, appealed against the trial court's decision to the Court of Appeal, Port Harcourt Division, hereinafter referred to as the lower court. Prompted by the court, counsel to the parties made submissions on the competence of the appeal in the light of Section 24(2)(a) of the Court of Appeal Act. In a well considered ruling dated 14th July, 2008, the lower court, on finding the appeal to be against the trial court's interlocutory decision, filed outside the 14 days prescribed by Section 24 (2)(a) of the Court of Appeal Act and without the leave of either of the two courts having been sought and obtained, struck it out for being incompetent.

Dissatisfied, the appellant has appealed to this Court against the lower court's decision.

Held: *(Unanimously dismissing the appeal)*

1. *The principle that determine whether a court's decision is final or interlocutory*

   My lords, learned respondent's counsel is right that this Court had to consider its decisions including the Western Steel Works Vs. Iron and Steel Workers Union of Nigeria (supra) on the applicable test in adjudging whether or not a court's decision is final or otherwise in the course of determining the appeal in Akinsanya Vs. U.B.A. (supra). Inspite of its decision in Western Steel Works Limited Vs. Iron and Steel Workers Union of Nigeria (supra), the court inter-alia at pages 980-983 of the report enthused per Eso JSC, of blessed memory as follows:

   > ***"And so, it has been that the courts in this country have adopted the test that looks at the order made as against the test that looks at the nature of the proceedings. .... If the court of first instance orders that a matter before it be terminated (struck out) for it has no jurisdiction to determine the issue before it, that is the end of all the issues arising in the cause or matter and there is no longer any issue between the parties in that cause or matter that remains for determination in that court. But it would be interlocutory if its order is that it has jurisdiction for there will be reference of the remaining issues in the case to itself."*** *(Pp 120 – 121 Paras F – B)*
   >
   > **(Underlining supplied for emphasis).**

2. *A final order is one which brings to an end the rights of the parties in the action*

   There are indeed applications of the principle as propounded

(supra) by the Court prior and subsequent to its foregoing decision and inspite of the court's isolated decision in Western Steel Works Limited Vs. Iron and Steel Workers Union of Nigeria (supra). In Igunbor Vs. Afolabi (2001) 11 NWLR (Pt. 723) 148 at 165 this court dwelt on the extant principle per Karibi-Whyte thus:
(P ..... Paras .....)

3.

"A final order or judgment at law is one which brings to an end the rights of the parties in the action. It disposes of the subject matter of the controversy or determines the litigation as to all parties on the merits. On the other hand, an interlocutory order or judgment is one given in the process of the action or cause, which is only intermediate and does not finally determine the rights of the parties in the action. It is an order which determines some preliminary or subordinate issue or settles some step or question but does not adjudicate the ultimate rights of the parties, in the action. However, where the order made finally determines the rights of the parties, as to the particular issue disputed, it is a final order even if arising from an interlocutory application. For instance, an order of committal for contempt arising in the course of proceedings in an action is a final order See Toun Adeyemi Vs. Theophilus Awobokun (1968) 2 All NLR 318. The instant application is an interlocutory motion by the appellant to be joined as co-administrators with the respondents. The order of the learned trial judge granting the application determined the rights of the parties in the

application. It is an order which did not require something else to be done in answer, and without any further reference to itself or any other court or co-ordinate jurisdiction. The order of the learned trial judge is therefore a final order. An appeal on the said order is as of right under Section 220(1) of the Constitution 1979."
(Pp 121 – 122 Paras B – B)

4. *When an order does not finally dispose of the parties rights it is an interlocutory order*

The principle was further restated by the court in Alor Vs. Ngene (2007) 17 NWLR (Pt. 1062) 163 at 175-177 as follows:

"In plethora of decided cases, this court decided that in this country, if the order, decision or judgment of a court finally and completely determines the rights of the parties in the case, it is final but if it does not it is interlocutory only. And in order to determine whether the decision is final or interlocutory, the decision must relate to the subject matter in dispute between the parties and not the function of the court making the order. Therefore, the determining factor is not whether the court has finally determined the rights of the parties in the claim before the parties.....

But where the rights or claims of the parties in any action have not been looked into and determined by the court, they are still pending and the parties can still go back to any court or indeed the same court to examine and decide on those rights."

In his concurring contribution Tobi, JSC, at page 179-190 of the report stated as follows:

> ***"A decision is said to be final when the court that gave the decision has nothing else or nothing more to do with the case; to the extent that the court becomes functus officio ... in the context of the judge, it means the duty or function that the judge was legally empowered and charge to perform, has been wholly accomplished and the judge has no further authority or legal competence to revisit the matter."***

See also **Blay Vs. Solomon (1947) 12 WACA 175, Akintola Vs. Aderemi (supra); Adegbenro Vs. Akintola (supra); Ebokam Vs. Ekwenibe & Sons (supra), Omonuwa Vs. Oshodi (1985) NSCC (Vol. 16) (Pt. 1) 147.***(Pp 122 – 123 Paras C – B)*

5.

On the trial court's decision appealed against, the lower court at page 93 of the record of appeal held thus:

.

> ***"In the present appeal however, the decision of the court below was that it had jurisdiction over the claim by the 1st Respondent and so assumed jurisdiction thereby dismissing the objection of the appellant. The court then adjourned the matter for the parties to present their respective sides of the case before it. ..... The parties still had their rights in the case to be determined by that court and so the matter was adjourned to enable them pursue those rights. To that extent too, for being distinguished from the facts leading to the present appeal, case of Western Steel Works (supra) is inapplicable to the present appeal.....***

> ***In the above premises, since the decision of the court below was an interlocutory one .....filed on 22nd of October 2002, a period of three months from the date of delivery. The Notice of Appeal was therefore undoubtedly filed outside the fourteen (14) days prescribed by the provisions of Section 24 (2) (a) of the Court of Appeal Act ....and the Notice of Appeal is incompetent."***

It is the lower court's foregoing impeccable decision that learned appellant's counsel submits is perverse. It cannot be.

The lower court's decision which is in tandem with this Court's decisions cannot be said to be perverse. The lower court's finding that the trial court's decision is interlocutory on the very basis such decisions are held by this court not to be final decisions of the first instance courts remains unassailable. And this explains why this appeal has failed and is hereby dismissed.*(Pp 123 – 124 Paras C – B)*

Per M.D. Muhammad (JSC)

Where a court has determined the rights of the parties in the substantive case or application, the decision is final and not an interlocutory decision. See Ocean Steamship (Nig.) Ltd Vs. Sotiminu (No. 2) (1987) NWLR (Pt. 67) 996; Rabiu Vs. Kano State (1980) 8-11 SC 130.

In the instant case, the rights of the parties in the substantive case were claims for:

> **1. N10,000,000.00 being special and general damages for trespass, destruction of economic crops and willful desecration, violation, debasement and defilement of the plaintiff's family ancestral alaezi deity.**

2. Perpetual injunction restraining the defendants, their agents, servants, workmen and privies from further trespassing into the plaintiffs family residential premises at Obogwe Unuebeke in the Ohaji/Egbemo LGA of Imo State or from dealing with the plaintiff's said family residential premises in any way or manner inconsistent with or contrary to the plaintiff's interest howsoever.

The decision of the trial court would have been final if the claims as enumerated above had been resolved and a decision rendered one way or the other. The matter that was determined by the trial court was rightly held to be interlocutory decision by the Court of Appeal as that question of jurisdiction was just one issue in the course of proceedings which did not effectively terminate or determine the dispute between the parties finally. In Omonuwa Vs. Oshodin (1985) 2 NWLR (Pt. 10) 924 at 938, this court, per Karibi-Whyte stated the position as follows:

> ***"All the cases cited agree on the proposition that a decision between the parties can only be regarded as final when the determination of the court disposes of the rights of the parties (and not merely an issue) in the case. Where only an issue is the subject matter of an order or appeal the determination of that court which is a final decision on the issue or issues before it which does not finally determine the rights of the parties, is in my respectful opinion interlocutory." See*** **Afuwape Vs. Shadipe (1057) 2 FSC 12; Ude Vs. Agu (1961) ALL NLR 65; AQUA Ltd. Vs. Ondo State Sports Council (1988) 4 NWLR (Pt. 91) 622 at 655.**

The essence of granting a very short period, i.e. 14 days within which to appeal against interlocutory decision is that the main dispute

which is still pending should not suffer unnecessary adjournment with attendant delay in its disposal.*(Pp 125 – 126 Paras B – D)*

Nigerian cases cited in this Judgment

Adegbenro Vs. Akintola (1963) AC 614;
Afuwape Vs. Shadipe (1057) 2 FSC 12;
Akinsanya Vs. U.B.A. Plc (1986) NSCC (Vol. 17) (Pt. 11) 968;
Akintola Vs. Aderemi (1963) 1 All NLR 461;
Alor Vs. Ngene (2007) 17 NWLR (Pt. 1062) 163;
AQUA Ltd. Vs. Ondo State Sports Council (1988) 4 NWLR (Pt. 91) 622;
Blay Vs. Solomon (1947) 12 WACA 175;
Chike Obi (No. 2) Vs. DPP (1961) All NLR 458;
Ebokam Vs. Ekwewnibe & Sons Trading Co. Ltd (1999) 10 NWLR (Pt. 622) 242 at 258;
Igunbor Vs. Afolabi (2001) 11 NWLR (Pt. 723) 148;
Ocean Steamship (Nig.) Ltd Vs. Sotiminu (No. 2) (1987) NWLR (Pt. 67) 996;
Odiba Vs. Azege (1998) 9 NWLR (Pt. 566) 370;
Omonuwa Vs. Oshodi (1985) NSCC (Vol. 16) (Pt. 1) 147;
Omonuwa Vs. Oshodi (1985) NSCC (Vol. 16) (Pt. 1) 147;
Omonuwa Vs. Oshodin (1985) 2 NWLR (Pt. 10) 924;
RabiuVs. Kano State (1980) 8-11 SC 130;
Toun Adeyemi Vs. Theophilus Awobokun (1968) 2 All NLR 318;
Ude Vs. Agu (1961) ALL NLR 65;
Western Steel Workers Ltd Vs. Iron and Steel Workers Union of Nigeria Ltd (1986) NSCC (Vol. 17 (Pt. 2) 786; and
Western Steel Works Ltd Vs. Iron and Steel Workers Union of Nigeria (1986) 3 NWLR (Pt. 30) 617.

Nigerian Statutes cited in this Judgment

Constitution 1979Section 220(1);
Court of Appeal ActSection 24 (2) (a).

Representation
David I.Agaba with **Esla Thomas** for the appellant.
O. J. Irerhimefor 1st respondent

DATTIJO MUHAMMAD, JSC (Delivering the Lead Judgment): The 1st respondent as plaintiff at the Imo State High Court sitting in Oguta, hereinafter referred to as the trial court, commenced the instant suit against the appellant and the 2nd respondent as defendants, claiming damages for trespass and injunction. On dismissing the defendants' challenge to its jurisdiction, the trial court adjourned the matter to a future date for hearing.

Aggrieved, the appellant, by its notice filed on 22nd October, 2002, appealed against the trial court's decision to the Court of Appeal, Port Harcourt Division, hereinafter referred to as the lower court. Prompted by the court, counsel to the parties made submissions on the competence of the appeal in the light of Section 24(2)(a) of the Court of Appeal Act. In a well considered ruling dated 14th July, 2008, the lower court, on finding the appeal to be against the trial court's interlocutory decision, filed outside the 14 days prescribed by Section 24 (2)(a) of the Court of Appeal Act and without the leave of either of the two courts having been sought and obtained, struck it out for being incompetent. Dissatisfied, the appellant has appealed to this Court against the lower court's decision.

At the hearing of the appeal, parties identified, adopted and relied on their briefs as their respective arguments for and against the appeal. The lone issue formulated by the appellant as having arisen for the determination of the appeal reads:

> ***"Whether the Court of Appeal was right by holding that the appeal from the High Court on issue of jurisdiction is interlocutory for which an appeal must be within 14 days."***

Although the respondent has distilled a not dissimilar issue in its brief of argument, the appellant's foregoing issue shall be the basis of the determination of the appeal since, in any event, being his issue, it

A circumscribes the aggrieved party's complaint against the lower court's decision.

On the lone issue, learned appellant's counsel contends that the lower court's finding at pages 89-90 of the record of appeal that since appellant's B appeal before it has been stated in the Notice of Appeal to be interlocutory, the appeal is necessarily so wrong. Whether an appeal is interlocutory or not, it is submitted, depends on the decision appealed against and not simply because the appellant has so couched the appeal. The interlocutory C or final nature of an appeal, it is further contended, is not determined by the stage of proceedings at which the appeal arose. In the instant matter, learned appellant's counsel submits, the lower court is wrong to have conclude that the issue of jurisdiction, which is a specialized question, as D decided by the trial court, does not finally determine the rights of the parties. The trial court having ruled on the issue cannot be further approached by the appellant. To the extent, it is argued, the rights of the parties in relation to the question have been finally determined. The lower E court, it is further contended, is wrong to have held contrary to the decision in **Western Steel Works Ltd Vs. Iron and Steel Workers Union of Nigeria (1986) 3 NWLR (Pt. 30) 617,** wherein the Supreme Court held any decision on the issue of jurisdiction, notwithstanding, whether the trial F court has, AFTER the decision, assumed or declined jurisdiction, is a final decision for which leave is not required. In the present case, therefore appellant's appeal filed outside 14 days remains competent and the otherwise decision of the lower court, submits counsel, is perverse.

G Concluding, learned counsel relies on **Odiba Vs. Azege (1998) 9 NWLR (Pt. 566) 370,** to urge that this Court invokes Section 22 of the Supreme Court Act Cap 515, Laws of the Federation 2004, to determine the appeal the lower court wrongly declined jurisdiction to hear and determine.

H Responding, learned counsel to the 1st respondent's submits that this Court per Eso has, after a thorough consideration of the two tests for determining whether or not a decision is interlocutory or final, put the issue to rest in **Akinsanya Vs. U.B.A. Plc (1986) NSCC (Vol. 17) (Pt. 11) 968.** I The position of this Court after examining the earlier decisions including **Omonuwa Vs. Oshodi (1985) NSCC (Vol. 16) (Pt. 1) 147** and **Western**

Steel Workers Ltd Vs. Iron and Steel Workers Union of Nigeria Ltd (1986) NSCC (Vol. 17 (Pt. 2) 786 which learned appellant's counsel gravely misconceives, it is submitted, is the nature of the order test. Had learned appellant's counsel carefully perused the Akinsanya's case (supra), it is submitted, it would have dawned on him that **Western Steel Workers Ltd Vs. Iron and Steel Workers Union of Nigeria** (supra) does not avail the appellant. After examining the earlier decisions of the court on the issue including the **Western Steel Works Nigeria Ltd Vs. The Iron and Steel Workers Union of Nigeria (supra)**, the court at pages 980-983 concluded the criteria to be applied in determining whether a decision is interlocutory or final, in applying these same criteria, learned counsel submits, the lower court cannot be said to be perverse in its decision in that regard. Citing inter-alia **Ebokam Vs. Ekwewnibe& Sons Trading Co. Ltd (1999) 10 NWLR (Pt. 622) 242 at 258; Chike Obi (No. 2) Vs. DPP (1961) All NLR 458, Akintola Vs. Aderemi (1963) 1 All NLR 461 and Adegbenro Vs. Akintola (1963) AC 614,** learned respondents' counsel submits that the Supreme Court has continued to apply the test it specified in **Akinsanya Vs. U.B.A. Ltd** which criteria the lower court applied in arriving at its decision presently appealed against.

My lords, learned respondent's counsel is right that this Court had to consider its decisions including the **Western Steel Works Vs. Iron and Steel Workers Union of Nigeria (supra)** on the applicable test in adjudging whether or not a court's decision is final or otherwise in the course of determining the appeal in **Akinsanya Vs. U.B.A. (supra)**. Inspite of its decision in **Western Steel Works Limited Vs. Iron and Steel Workers Union of Nigeria** (supra), the court inter-alia at pages 980-983 of the report enthused per Eso JSC, of blessed memory as follows:

> ***"And so, it has been that the courts in this country have adopted the test that looks at the order made as against the test that looks at the nature of the proceedings. .... If the court of first instance orders that a matter before it be terminated (struck out) for it has no jurisdiction to determine the issue before it, that is the end of all the issues***

arising in the cause or matter and there is no longer any issue between the parties in that cause or matter that remains for determination in that court. But it would be interlocutory if its order is that it has jurisdiction for there will be reference of the remaining issues in the case to itself." (Underlining supplied for emphasis).

There are indeed applications of the principle as propounded (supra) by the Court prior and subsequent to its foregoing decision and inspite of the court's isolated decision in **Western Steel Works Limited Vs. Iron and Steel Workers Union of Nigeria (supra).** In **Igunbor Vs. afolabi (2001) 11 NWLR (Pt. 723) 148 at 165** this court dwelt on the extant principle per Karibi-Whyte thus:

"A final order or judgment at law is one which brings to an end the rights of the parties in the action. It disposes of the subject matter of the controversy or determines the litigation as to all parties on the merits. On the other hand, an interlocutory order or judgment is one given in the process of the action or cause, which is only intermediate and does not finally determine the rights of the parties in the action. It is an order which determines some preliminary or subordinate issue or settles some step or question but does not adjudicate the ultimate rights of the parties, in the action. However, where the order made finally determines the rights of the parties, as to the particular issue disputed, it is a final order even if arising from an interlocutory application. For instance, an order of committal for contempt arising in the course of proceedings in an action is a final order See Toun Adeyemi Vs. Theophilus Awobokun (1968) 2 All NLR 318. The instant application is an interlocutory motion by the appellant to be joined as co-administrators with the respondents. The order of the learned trial judge granting

A ***the application determined the rights of the parties in the application. It is an order which did not require something else to be done in answer, and without any further reference to itself or any other court of co-ordinate jurisdiction. The***
B ***order of the learned trial judge is therefore a final order. An appeal on the said order is as of right under Section 220(1) of the Constitution 1979."***

C The principle was further restated by the court in **AlorVs. Ngene (2007) 17 NWLR (Pt. 1062) 163 at 175-177** as follows:

"In plethora of decided cases, this court decided that in this
D ***country, if the order, decision or judgment of a court finally and completely determines the rights of the parties in the case, it is final but if it does not it is interlocutory only. And in order to determine whether the decision is final or***
E ***interlocutory, the decision must relate to the subject matter in dispute between the parties and not the function of the court making the order. Therefore, the determining factor is not whether the court has finally determined the rights of***
F ***the parties in the claim before the parties.....***

But where the rights or claims of the parties in any action have not been looked into and determined by the court, they
G ***are still pending and the parties can still go back to any court or indeed the same court to examine and decide on those rights."***

H In his concurring contribution Tobi, JSC, at page 179-190 of the report stated as follows:

"A decision is said to be final when the court that gave the
I ***decision has nothing else or nothing more to do with the case; to the extent that the court becomes functus officio ...***

A ***in the context of the judge, it means the duty or function that the judge was legally empowered and charge to perform, has been wholly accomplished and the judge has no further authority or legal competence to revisit the matter."***

B

See also **Blay Vs. Solomon (1947) 12 WACA 175, Akintola Vs. Aderemi (supra); Adegbenro Vs. Akintola (supra); Ebokam Vs. Ekwenibe & Sons (supra), Omonuwa Vs. Oshodi (1985) NSCC (Vol. 16) (Pt. 1) 147.**

C On the trial court's decision appealed against, the lower court at page 93 of the record of appeal held thus:

"In the present appeal however, the decision of the court
D ***below was that it had jurisdiction over the claim by the 1st Respondent and so assumed jurisdiction thereby dismissing the objection of the appellant. The court then adjourned the matter for the parties to present their***
E ***respective sides of the case before it. ..... The parties still had their rights in the case to be determined by that court and so the matter was adjourned to enable them pursue those rights. To that extent too, for being distinguished***
F ***from the facts leading to the present appeal, case of Western Steel Works (supra) is inapplicable to the present appeal .....***

G ***In the above premises, since the decision of the court below was an interlocutory one .....filed on 22nd of October 2002, a period of three months from the date of delivery. The Notice of Appeal was therefore undoubtedly filed outside the***
H ***fourteen (14) days prescribed by the provisions of Section 24 (2) (a) of the Court of Appeal Act ....and the Notice of Appeal is incompetent."***

I It is the lower court's foregoing impeccable decision that learned appellant's counsel submits is perverse. It cannot be.

A

The lower court's decision which is in tandem with this Court's decisions cannot be said to be perverse. The lower court's finding that the trial court's decision is interlocutory on the very basis such decisions are
B held by this court not to be final decisions of the first instance courts remains unassailable. And this explains why this appeal has failed and is hereby dismissed. Parties are to bear their respective costs.

Musa Dattijo Muhammad
Justice, Supreme Court

C

RHODES-VIVOUR, JSC: I have read in advance the leading judgment of my learned brother, **M. D. Muhammad, JSC,** just delivered. I agree
D entirely with his reasoning and conclusions. There is no merit in this appeal. It is accordingly dismissed.

Olabode Rhodes-vivour
Justice, Supreme Court

E

CENTUS NWEZE, JSC: My lord, Mohammad, JSC, obliged me with the draft of the leading judgment just delivered now. I agree with the conclusion that this appeal, being unmeritorious, ought to be dismissed.
F Appeal is hereby dismissed.

Chima Centus Nweze
Justice, Supreme Court

G **AMIRU SANUSI JSC:** I had the advantage of reading the lead judgment just delivered by my learned brother **Musa Dattijo Muhammad JSC,** before now. I am at one with his reasoning and conclusion that this appeal lacks merit. It fails and is accordingly dismissed by me. I have nothing
H useful to add. Appeal dismissed.

Amiru Sanusi
Justice, Supreme Court

I **ADAMU GALINJE, JSC:** I have had the opportunity of reading in draft, the judgment just delivered by my learned brother **M. D. Muhammad,**

JSC and I agree with the reasoning contained therein and the conclusion arrived threat. My lord, as usual, has adequately resolved the sole issue submitted for determination of this appeal. Where a court has determined the rights of the parties in the substantive case or application, the decision is final and not an interlocutory decision. See **Ocean Steamship (Nig.) Ltd Vs. Sotiminu (No. 2) (1987) NWLR (Pt. 67) 996; Rabiu Vs. Kano State (1980) 8-11 SC 130.**

In the instant case, the rights of the parties in the substantive case were claims for:

> **1. N10,000,000.00 being special and general damages for trespass, destruction of economic crops and willful desecration, violation, debasement and defilement of the plaintiff's family ancestral alaezi deity.**
>
> **2. Perpetual injunction restraining the defendants, their agents, servants, workmen and privies from further trespassing into the plaintiffs family residential premises at Obogwe Unuebeke in the Ohaji/Egbemo LGA of Imo State or from dealing with the plaintiff's said family residential premises in any way or manner inconsistent with or contrary to the plaintiff's interest howsoever.**

The decision of the trial court would have been final if the claims as enumerated above had been resolved and a decision rendered one way or the other. The matter that was determined by the trial court was rightly held to be interlocutory decision by the Court of Appeal as that question of jurisdiction was just one issue in the course of proceedings which did not effectively terminate or determine the dispute between the parties finally. In **Omonuwa Vs. Oshodin (1985) 2 NWLR (Pt. 10) 924 at 938,** this court, per Karibi-Whyte stated the position as follows:

A ***"All the cases cited agree on the proposition that a decision between the parties can only be regarded as final when the determination of the court disposes of the rights of the parties (and not merely an issue) in the case. Where only an***
B ***issue is the subject matter of an order or appeal the determination of that court which is a final decision on the issue or issues before it which does not finally determine the rights of the parties, is in my respectful opinion***
C ***interlocutory."*** *See* ***Afuwape Vs. Shadipe (1057) 2 FSC 12; UDE Vs. Agu (1961) ALL NLR 65; AQUA Ltd. Vs. Ondo State Sports Council (1988) 4 NWLR (Pt. 91) 622 at 655.***

D The essence of granting a very short period, i.e. 14 days within which to appeal against interlocutory decision is that the main dispute,which is still pending, should not suffer unnecessary adjournment with attendant delay in its disposal.

E With these few words and the more detailed reasoning in the lead judgment of my learned brother, I find no merit in this appeal. Accordingly, same shall be and it is hereby dismissed.

Paul Adamu Galinje
F ***Justice, Supreme Court***

G

H

I

CUSTOMARY COURT OF APPEAL EDO STATE
AND
1. CHIEF (ENGR.) E. A. AGUELE
2. MRS. BEATRICE AGUELE
3. ATTORNEY GENERAL, EDO STATE

SC. 123/2006

IN THE SUPREME COURT OF NIGERIA
HOLDEN AT ABUJA

FRIDAY, 9TH JUNE, 2017

BEFORE THEIR LORDSHIPS

MARY UKAEGO PETER-ODILI	**JUSTICE, SUPREME COURT**
MUSA DATTIJO MUHAMMAD	**JUSTICE, SUPREME COURT**
KUDIRAT M. O. KEKERE-EKUN	**JUSTICE, SUPREME COURT**
AMIRU SANUSI	**JUSTICE, SUPREME COURT**
AMINA ADAMU AUGIE	**JUSTICE, SUPREME COURT**
EJEMBI EKO	**JUSTICE, SUPREME COURT**
SIDI DAUDA BAGE	**JUSTICE, SUPREME COURT**

APPEAL: Appeal arising from Court of Appeal to the Supreme Court – Where the Court of Appeal lacks the necessary vires to entertain an appeal – Whether Supreme Court will declare the appeal before it incompetent.

APPEAL: Cross appeal – When the main appeal is to struck out for lack jurisdiction – Whether a cross appeal arising from the appeal will also be struck out.

CONSTITUTIONAL LAW : CFRN 1999 (as amended) – S. 240 thereof – Appellate jurisdiction of the Court of Appeal – Whether it is only the Court of Appeal that ha exclusive appellate jurisdiction of over Superior Courts listed in S. 6(5) (c) (i)

CONSTITUTIONAL LAW: CFRN 1999 – S. 245 thereof – Right of appeal from the Customary Court of Appeal to the Court of Appeal – Whether appeal with leave on a matter other than a question of Customary law is permissible Under S. 245.

CONSTITUTIONAL LAW: CFRN 1999 – S. 282 (2) thereof – Additional jurisdiction of the Customary Court of Appeal – Whether by virture of S. 282 (2) the Customary Court of Appeal may entertain a question other than one involving customary law.

COURT: Appellate and supervisory jurisdiction – Whether a court exercising supervisory powers must not stray into the realms of appellate jurisdiction – The principles in Military Governor of Imo State and Anor vs Chief B.A.E Nwauwa (1997) LPELR – 1876 (SC).

COURT: Appellate Court – Where a lower court exercises jurisdiction it does not have – Attitude of an appellate therein – Whether to set aside the said decision.

COURT: Court of Appeal – Appellate jurisdiction – Where an appeal arises from a decision of a trial court that lacks jurisdiction to the Court of Appeal – Proper approach whereto – Whether the Court of Appeal shall decline jurisdiction.

COURT: Customary Court of Appeal – Jurisdiction – Whether a State legislation can validly confer additional jurisdiction on the Customary Court of appeal under S. 282 (2) of CFRN 1999 – The principle in Uwazuruonye vs Governor Imo State (2005) NWLR (Pt 906) 19

COURT: High Court – Jurisdiction thereof – Statutorily conferred – Whether lacks jurisdiction when it ventures to entertain appeal or supervise the Customary Court of Appeal.

COURT: High Court of a State – Jurisdiction thereof – Ss 272 and 273 of CFRN 1999 – Whether does not have either supervisory or appellate jurisdiction over decisions of the Customary Court of Appeal.

COURT: High Court of a State and Customary Court of Appeal – Whether both are counts of co-ordinate jurisdiction – Relevant Considerations thereof.

COURT: Jurisdiction – Different forms thereof – Original appellate and Supervisory Distinctions therein – The principle in Sule vs Nigerian Cotton Board (1978) 6 SC 62,

COURT: Jurisdiction – nherent Jurisdiction – Meaning and significance – Whether inherent jurisdiction does not supersede the statutory jurisdiction of a court – The principle in Gombe vs P.W. (Nig.) Ltd. (1995) 6 NWLR (Pt. 402) 402 Sc.

COURT: Jurisdiction – Statutorily conferred – Whether parties cannot confer jurisdiction by conduct, consent or by inference.

COURT: Jurisdiction – Supervisory jurisdiction – Meaning significance and source.

COURT: Jurisdiction thereof – Supervisory jurisdiction purpose – Whether it can in some cases have the same essence as an appeal where both are aimed at setting aside the decision of an inferior tribunal.

PRACTICE AND PROCEDURE: Appeal on additional jurisdiction of a court – Where a statute confess additional jurisdiction on a Court – Whether any decision relating to a matter in the additional jurisdiction is appealable – Principles in Garba vs Mohammed (2015) 16 NWLR (Pt. 1537) 114.

STATUTE: Constitution of Federal Republic of Nigeria 1999 (as amended) – Ss 272 (1) and (a) and 273 – The nature of jurisdiction of a State High Court.

WORDS AND PHRASES: Jurisdiction – Meaning and Significance.

Issues for Determination

1. **Whether having regard to the provisions of Section 36 (1) of the Constitution of the Federal Republic of Nigeria, 1999, the lower court was right when it held that the grounds of appeal from the Customary Court of Appeal can derive its jurisdiction must relate to customary law alone. (Covers Ground 1).**

2. **Whether the decision of the Court of Appeal in the interlocutory appeal disposed of the substantive matter before the High Court. (Covers Ground 2).**

3. **Whether the application by the Court of Appeal of the decision in Golok Vs. Diyalpwan (1990) 3 NWLR (Pt. 139) 411 and the interpretation of Sections 282 (1) and 245 (1) of the Constitution to the instant case has occasioned a miscarriage of justice. (Covers additional Ground 3).**

Facts of the Matter

This is an appeal against a part of the judgment of the Court of Appeal, Benin Division delivered on the 24th day of May, 2006 in which the lower court held that the trial court was biased in its ruling delivered in Suit. No. B/163/05/2003 on the 26th January 2004.

Dissatisfied with the said ruling of the trial court, the appellant appealed to the Court of Appeal which upheld the trial court's ruling that it had jurisdiction to hear and determine the 1st respondent originating summons but

allowed the appeal on the ground that the learned trial judge was biased.

Also aggrieved by the part of the lower court's judgment, the 1st respondent has cross appealed with the leave of this court granted on the 22nd June, 2009.

***Facts Briefly Stated*:**

On 20th September, 2001, the 1st respondent (as plaintiff) filed Suit No. UBACC/26/2001 against the 2nd respondent at the Esan South East Area Customary Court, Ubiaja, for the dissolution of his marriage.

Subsequently, 2nd respondent filed a motion and in it, she raised an objection to the competence of the claim on the ground of lack of personal service amongst others. The court ruled against the 2nd respondent.

Dissatisfied, the 2nd respondent herein appealed against the ruling to the customary Court of Appeal (now appellant). The substance of the appeal was whether or not there was denial of fair hearing on the part of the trial court when it dismissed the application of Mrs. Aguele (2nd respondent) requesting for time to react to a counter affidavit. The appellant herein held that the refusal of the trial court to give time to the 2nd respondent to react to the counter affidavit served on her was a denial of fair hearing and therefore ordered that the substantive case be sent to another court for hearing and determination.

Rather than appeal to the Court of Appeal against this judgment, the 1st respondent proceeded to the High Court and filed an originating summons requesting the court to determine whether, having regards to the provisions of Section 282(1) of the Constitution of the Federal Republic of Nigeria 1999, the Customary Court of Appeal could adjudicate on a matter raising question of fair hearing under Section 36 (1) of the Constitution.

In response, the appellant herein filed a notice of preliminary objection for an order requesting the High Court to strike out the suit for lack of jurisdiction on the ground that the High Court, being a court of co-ordinate jurisdiction with the Customary Court of Appeal, did not have appellate and/or supervisory jurisdiction over decisions of the Customary Court of Appeal.

Arguments were proffered by both sides and the High Court ruled that it had jurisdiction to hear or entertain the matter. Needless to state that the High

Court, in the closing pages of the ruling, made very derogatory remarks about the Customary Court of Appeal for daring to raise such an objection.

Dissatisfied with the ruling, appellant appealed to the Court of Appeal, Benin Division. The grounds of appeal are as contained in the notice of appeal at pages 102 to 105 of the records. Therefore, appellant filed additional ground of appeal.

In its judgment, the Court of Appeal, although it set aside the entire ruling of the High Court on the ground of bias, it proceeded to pronounce on the substantive matter in the originating summons before the High Court.

Aggrieved by these pronouncements by the Court of Appeal, which pronouncements were seriously detrimental to the jurisdiction of the customary Court of Appeal, appellant appealed to the Supreme Court on 7/06/06 within the statutory period of 14 days allowed by this honourable court. The appellant complied with the conditions of appeal.

Held *(Unanimously dismissing the appeal)*

1. *The nature and purport of Ss 272 (1) and 273 of CFRN on jurisdiction of the High Court of a state.*

   In relation to the jurisdiction of the High Court, the 1999 Constitution of the Federal Republic of Nigeria provides as follows:

   Section 272(1):

   (1) To hear/determine civil proceeding in which civil rights and obligations are in issue.

   (2) Hear and determine criminal proceedings involving/relating to forfeiture, penalty, punishment or other liability are in issue.

   Section 272(2):

   Reference to civil and criminal proceedings in the section <u>includes</u> a reference to the proceedings which originate in the High Court and those brought to be dealt with by the High Court in the exercise of its appellate and or supervisory jurisdiction.

Section 273:
Contemplates any other jurisdiction that may be conferred on the high court by a state law.
(Pp 150 – 151 paras F – B)

2. *High court has no appellate or supervisory jurisdiction over decisions of the Customary Court of Appeal*
It is clear that neither of the two Sections 272 and 273 has vested on the High Court an appellate or supervisory jurisdiction over decisions of the Customary Court of Appeal.
No such jurisdiction or power has been conferred on the High Court by the State House of Assembly subjecting Customary Court of Appeal to the supervisory jurisdiction of the High Court.
(P 151 paras C – D)

3. *Both High Court and Customary Court of Appeal are courts of co-ordinate jurisdiction*
Both High Court and Customary Court of Appeal are intended by the Constitution to be superior courts of records. Appeals from both courts lie to the Court of Appeals. Both are courts of co-ordinate jurisdiction. See Section 282 Appeal from Customary Court of Appeal i.e. to Court of Appeal:

(a) Appellate/supervisory jurisdiction in civil proceedings restricts to <u>questions involving customary law</u>.

(b) For purpose of Section 282(1) Constitution of law enacted by House of Assembly may empower the Customary Court of Appeal to exercise any other appellate/supervisory jurisdiction over such matters as the House of Assembly may deem fit.

(c) Either under Sections 292 (1) or 282 (2) of the Constitution, Customary Court of Appeal can

competently exercise appellate/supervisory jurisdiction over decisions of customary court.
(P 151 paras D – H.)

4. *Jurisdiction of the High Court is statutorily conferred and lacks jurisdiction when it goes outside its statutory power*
Since jurisdiction of every court is statutorily endowed, the High Court as in this case goes outside its powers to entertain appeals from the Customary Court of Appeal or to venture to supervise that court. It follows that the Edo State High Court acted beyond its mandate when it took on the review powers over the matter from the Customary Court of Appeal Edo State even if by way of originating summons which looks like taking from the back door what has not been given it from the front door. *(Pp 151 – 152 Paras I – B)*

5. *Court of Appeal was wrong to hold that the High Court of Edo State has supervisory jurisdiction over the Customary Court of Appeal of Edo State*
By the same token, the court below adopted that wrong path by holding that the High Court had the power to entertain and determine those questions in the originating summons which were another way of bringing the Customary Court of Appeal Edo State under subjugation to the High Court of the same Edo State, a situation clearly running counter to the glaring unambiguous provisions of Sections 6(2) (5) k, 36(1), 245(1), 272(1) and 282 of the constitution. *(P 152 paras B – C)*

6. *Appeal lie from the Customary Court of Appeal in the Court of Appeal as the High Court has no appellate or supervisory jurisdiction over the Customary Court of Appeal*
The provisions of Sections 245(1), 272(1) and 282 of the 1999 Constitution having clearly spelt out the exclusive jurisdiction of the Customary Court of a State and its Customary Court of Appeal having the exclusive jurisdiction to exercise appellate and

supervisory jurisdiction in civil proceeding involving questions of customary law. Therefore the 1st respondent being aggrieved with the decision of the Customary Court of Appeal had no business going to the High Court, a court of co-ordinate jurisdiction instead of going to the Court of Appeal, Benin Judicial Division. It follows logically that when the appeal from the High Court in the presumed jurisdiction over the originating summons came before the Court of Appeal, that court below ought to have declined jurisdiction since the High Court from which the appeal arose lacked the vires. In this regard I rely on the cases of:

1. **PDP Vs. INEC (1999) 11 NWLR (Pt. 626) 200.**
2. **Agua Limited Vs. Ondo State Sports Council (1988) 4 NWLR (Pt. 9) 622.**
3. **Chime Vs. Ude (1996) 7 NWLR (Pt. 461) 379.**
4. **Nuhu Vs. Ogele (2003) 18 NWLR (Pt. 852) 251.**
5. **Arjay Limited Vs. Airline Management Limited (2003) 108 LRCN 1173.** *(P 152 paras D – H)*

7. *Supreme Court will declare appeal before it in competent where court of Appeal has no jurisdiction*

In the light of the foregoing since the matter as seductively argued by the respondents in this appeal talking of the grounds of appeal being the yardstick upon which this court or any other is to assume jurisdiction, the court has to remind itself at all times that the strict prescription of the constitution and its provisions are the appropriate guide. The court has no right to venture beyond the boundaries circumscribed by the constitution and so the appeal within the prism of Sections 245(1), 272 and 282 of the Constitution of the Federal Republic of Nigeria being incompetent since the Court of Appeal had no jurisdiction, just like the High Court before it, the option open to this court is to give it the formal declaration of incompetence due to a lack of jurisdiction.

(Pp 152 – 153 paras I – C)

8. *A cross appeal will be struck out where there is no jurisdiction in entertain the main appeal*

The decision in the main appeal has decided this cross-appeal as the appeal having been struck out for incompetence and lack of jurisdiction in the court, therefore no jurisdiction would lie to deal with this cross-appeal which would suffer the same fate, as an appeal being non-existent there is nothing to cross-appeal on.

Cross-appeal is struck out.

Parties to bear their costs. *(P…… paras ……..)*

Per M.D. Mohammed (JSC)

In my firm and considered view the germane question both the appeal and cross appeal raise is whether the lower court has the jurisdiction over the issues the High Court sought to determine which issues had earlier been heard and disposed of by the Customary Court of Appeal. All the issues the parties to the two appeals purport to raise are unpardonably diversionary and misleading.

A community reading of Sections 240, 241 and 245 of the 1999 Constitution as amended shows clearly that the High Court and the Customary Court of Appeal, which decision the former sought to review, are courts of coordinate jurisdiction and that the Court of Appeal, to the exclusion of any other court, hears and determines appeals from the two. It is settled that no Judge is empowered to reverse, vary or alter the decision of another Judge of coordinate jurisdiction except on the issue of jurisdiction. In the absence of statutory authority, a judge has no power to set aside or vary the order of another judge of concurrent or coordinate jurisdiction. See Akporue & Anor Vs. Okei (1973) 12 SC 137; Amanabu Vs. Okafor (1966) 1 All NLR 205 at 207 and Shell Petroleum Company Nigeria Limited Vs. Edamkue & Ors (2009) 14 NWLR (Pt. 1160) 1 SC and National Insurance Corporation of Nigeria Vs. Power Industrial Engineering Co. Ltd (1990) 1 NWLR (Pt. 29) 697 at 707.
(P 155 paras C – H)

11. *A court which supervisory jurisdiction must not stray into the realms of appellate jurisdiction*

Secondly, this court has cautioned that in the exercise of its powers of judicial review the court must not stray into the realms of appellate jurisdiction for that would constitute a wrongful usurpation of powers. The court's powers as a reviewing tribunal has best been alluded to by Lord Green M.R in Associated Provincial Picture Houses Ltd Vs. Wednesbury Corporation (1948) 1 KB 223, 233, a case cited with authority by this court in Military Governor of Imo State and Anor Vs. Chief B.A.E. Nwauwa (1997) LPELR-1876 (SC), the master of the polls stated:

> **"The power of the court to interfere in each case is not as an appellate authority to override a decision of the local authority, but as a judicial authority which is concerned, and concerned only, to see whether the local authority have contravened the law by action in excess of the powers which parliament has confided in them."**
> *(Pp 155 – 156 paras H – C)*

12. *Attitude of an appellate court where a lower court exercises jurisdiction it does not have*

In the case at hand the law does not allow the decision already made by the Customary Court of Appeal to be referred to the High Court for another decision on the same or similar question. The only way to obtain a review of the decision is by way of an appeal to the Court of Appeal that has that jurisdiction, to the exclusion of any other court, conferred on it by the constitution. See Dr. Basil Ukaegbu Vs. Attorney General of Imo State (1983) LPELR – 3339 (SC). The only jurisdiction the lower court has, in turn, is to set aside the High Court's decision in the exercise of jurisdiction that it does not possess. See Chief Air Staff Vs. Iyen (2005) 6 NWLR (Pt. 922) 496; Oshotoba & Anor Vs. Olujitan & Anor (2000) 5 NWLR (Pt. 655) 159 and Abba Tukur Vs. Governor of Gongola State (1988) 1 NWLR (Pt. 68) 39. *(P 156 paras D – G)*

Per Kekere-Ekun (JSC)

The pith and substance of this appeal in my considered view is whether the trial High Court had jurisdiction to entertain the originating summons seeking to quash the decision of the Customary Court of Appeal (i.e. the appellant herein). In other words, whether the High Court of Edo State or indeed any High Court can exercise supervisory jurisdiction over the Customary Court of Appeal of the state. In the event that the High Court lacks the requisite jurisdiction, it follows that the entire proceedings and any decision reached therein would amount to a nullity and would accordingly be void. Where the decision of the trial court is a nullity, it means there is no valid decision from which an appeal could lie. The Court of Appeal, in the circumstance would also be bereft of jurisdiction to entertain the appeal before it.

It is well settled that the jurisdiction of any court to adjudicate in any cause or matter is conferred by the statute which creates it. The only circumstance in which the court's jurisdiction may be expanded or extended is by specific legislation to that effect enacted by the legislature. Neither the court nor any of the parties can confer jurisdiction on the court by conduct, consent or by inference. See: Okulate Vs. Awosanya (2000) 1 SC 107; Obieuweubi Vs. CBN (2011) 7 NWLR (Pt. 1247) 465; Okezie Vs. Fed. A.G & Anor. (1979) 6-9 SC (Reprint) 1; Ukpong Vs. Comm. For Finance (2006) 19 NWLR (Pt. 1013) 187. *(P 157 paras B – G)*

13. *The nature and purport of the jurisdiction of a High Court of a State*
Section 272(1) and (2) of the 1999 Constitution provides for the jurisdiction of the High Court of a state as follows:

"272 (1) Subject to the provision of Section 251 and other provisions of this constitution, the High Court of a state shall have jurisdiction to hear and determine any civil proceedings in which the existence or extent of a legal

right, power, duty, liability, privilege, interest, obligation or claim is in issue or to hear and determine any criminal proceedings involving or relating to any penalty, forfeiture, punishment or other liability in respect of an offence committed by any person.

(2) The reference to civil and criminal proceedings in this section includes a reference to the proceedings which originate in the High Court of a state and those which are brought before the High Court to be dealt with by the court in the exercise of its appellate or supervisory jurisdiction".

From the above provisions the High Court of a state may exercise original, appellate and/or supervisory jurisdiction.
(Pp 157 – 158 paras G – D)

14. *The appellate jurisdiction of the Customary Court of Appeal*
Pursuant to Section 282(1) of the Constitution, a Customary Court of Appeal shall exercise appellate jurisdiction in civil proceedings involving questions of customary law while sub section (2) provides that the Customary Court of Appeal may also exercise such jurisdiction and decide such questions as may be prescribed by an Act of the National Assembly. In other words, the jurisdiction of the Customary Court of Appeal can only be extended or expanded beyond what is provided for in Section 282(1) by an Act of the National Assembly. *(P 158 Paras D – F)*

15. *Only the Court of Appeal has appellate jurisdiction over decisions of the Customary Court of Appeal*
By virtue of Section 240 of the constitution, the Court of Appeal, subject to the provisions of the constitution, shall have jurisdiction to the exclusion of any other court of law in Nigeria to hear and determine appeals from all the superior courts of record set out in

Section 6(5) (c) to (i) of the constitution, which includes the High Court of a state and the Customary Court of Appeal of a state. These courts are all courts of co-ordinate jurisdiction.

There is no provision of the constitution that confers supervisory jurisdiction on the High Court of a state in respect of decisions emanating from the Customary Court of Appeal. The provisions are clear and unequivocal as to which court has jurisdiction to entertain a complaint against the decision of a Customary Court of Appeal. It does not reside in the High Court of a state and cannot be so inferred. Clearly the High Court of Edo State lacked jurisdiction to entertain the suit before it seeking to set aside the ruling of the Customary Court of Appeal.

Having acted without jurisdiction, I agree with my learned brother in the lead judgment that the trial court lacked jurisdiction to entertain the originating summons and the lower court equally lacked jurisdiction to determine the questions arising therefrom. *(Pp 158 – 159 paras F – B)*

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A *Sken Consult (Nig.) Ltd & Another Vs. Ukey (1981) 1 SC 6, 18*
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B *Ukpong Vs. Comm. For Finance (2006) 19 NWLR (Pt. 1013) 187, 10, 25*
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C *1979 Constitution Section 224 (1), 245(1), 272(1), 273 and 282*
constitution, the Court of Appeal Section 240
Constitution of the Federal Republic of Nigeria 1999Section 282(1)
the Constitution, a Customary Court of Appeal Section 282(1) 292 (1)

D
Representations:
G. E. Ezomo for the appellant.
K. O. Obamogie for the 1st respondent/cross respondent and with him are
E **O. J. Umah and O. E. Osunde.**
E. Robert Emukpoeruo Esq. for the 3rd respondent.

MARY UKAEGO PETER-ODILI, (JSC) (Delivering the lead judgment): This is an appeal against a part of the judgment of the Court of
F Appeal, Benin Division delivered on the 24th day of May, 2006 in which the lower court held that the trial court was biased in its ruling delivered in Suit. No. B/163/05/2003 on the 26th January 2004.

G Dissatisfied with the said ruling of the trial court, the appellant appealed to the Court of Appeal which upheld the trial court's ruling that it had jurisdiction to hear and determine the 1st respondent originating summons but allowed the appeal on the ground that the learned trial judge
H was biased.

Also aggrieved by the part of the lower court's judgment, the 1st respondent has cross appealed with the leave of this court granted on the 22nd June, 2009.

I ***Facts Briefly Stated***

A On 20th September, 2001, the 1st respondent (as plaintiff) filed Suit No. UBACC/26/2001 against the 2nd respondent at the Esan South East Area Customary Court, Ubiaja, for the dissolution of his marriage.

Subsequently, 2nd respondent filed a motion and in it, she raised an B objection to the competence of the claim on the ground of lack of personal service amongst others. The court ruled against the 2nd respondent.

Dissatisfied, the 2nd respondent herein appealed against the ruling to the customary Court of Appeal (now appellant). The substance of the C appeal was whether or not there was denial of fair hearing on the part of the trial court when it dismissed the application of Mrs. Aguele (2nd respondent) requesting for time to react to a counter affidavit. The appellant herein held that the refusal of the trial court to give time to the 2nd respondent to react to D the counter affidavit served on her was a denial of fair hearing and therefore ordered that the substantive case be sent to another court for hearing and determination.

Rather than appeal to the Court of Appeal against this judgment, the 1st E respondent proceeded to the High Court and filed an originating summons requesting the court to determine whether, having regards to the provisions of Section 282(1) of the Constitution of the Federal Republic of Nigeria 1999, the Customary Court of Appeal could adjudicate on a matter raising F question of fair hearing under Section 36 (1) of the Constitution.

In response, the appellant herein filed a notice of preliminary objection for an order requesting the High Court to strike out the suit for lack of jurisdiction on the ground that the High Court, being a court of co- G ordinate jurisdiction with the Customary Court of Appeal, did not have appellate and/or supervisory jurisdiction over decisions of the Customary Court of Appeal.

Arguments were proffered by both sides and the High Court ruled that H it had jurisdiction to hear or entertain the matter. Needless to state that the High Court, in the closing pages of the ruling, made very derogatory remarks about the Customary Court of Appeal for daring to raise such an objection.

Dissatisfied with the ruling, appellant appealed to the Court of I Appeal, Benin Division. The grounds of appeal are as contained in the notice of appeal at pages 102 to 105 of the records. Therefore, appellant

filed additional ground of appeal.

In its judgment, the Court of Appeal, although it set aside the entire ruling of the High Court on the ground of bias, it proceeded to pronounce on the substantive matter in the originating summons before the High Court.

Aggrieved by these pronouncements by the Court of Appeal, which pronouncements were seriously detrimental to the jurisdiction of the customary Court of Appeal, appellant appealed to the Supreme Court on 7/06/06 within the statutory period of 14 days allowed by this honourable court. The appellant complied with the conditions of appeal.

The claims before the High Court are hereunder stated thus:-

WHEREFOR the plaintiff claims against the defendant jointly and severally the following reliefs:

(a) A declaration that the judgment of the Customary Court of Appeal, Edo State, i.e the 5th respondent delivered in Appeal No. CCA/12A/2002: Emmanuel Aguele Vs. Mrs. Beatrice Aguele on 14th July, 2003 is unconstitutional, null and void of no effect whatsoever.

(b) An order setting aside the said judgment of the Customary Court of Appeal, Edo State in its entirety.

The summary of the background to this appeal is that on the 20th September, 2001, the 1st respondent filed a divorce petition at the Esan South-East Area Customary Court, Ubiaja against the 2nd respondent for the dissolution of their marriage contracted under Isoko native law and custom. Upon service of the summons on her, the 2nd respondent filed a motion in which she challenged the service of the summons on her and the jurisdiction of the trial Area Customary Court to hear and determine the respondent's claim. The motion was argued before the Area Customary Court, Ubiaja which delivered a considered ruling dismissing the application.

The 2nd respondent not satisfied appealed to the Customary Court of

appeal, Edo State principally on the ground of denial of fair hearing under Section 36 (1) of the Constitution of the Federal Republic of Nigeria, 1999. That appellate customary court allowed the appeal on the ground that 2nd respondent was denied fair hearing.

1st respondent aggrieved set out for the High Court Edo State by originating summons raised three questions for the determination of the court asking it to set aside the judgment of the Customary Court of Appeal on the ground of a lack of jurisdiction.

Upon service of the originating summons, the appellant and others raised a preliminary objection to the jurisdiction of the high court of Edo State. The High Court dismissed the objection holding that it had the vires to hear and entertain the suit.

Dissatisfied, the appellant appealed to the Court of Appeal, Benin Division which court held that the High Court was right and had jurisdiction to hear and determine the originating summons before it. It is in dissatisfaction of the later judgment that the appellant has come before the Supreme Court on appeal.

The 1st respondent however cross-appealed.

Main Appeal

On the 13th day of March, 2017 date of hearing, learned counsel for the appellant, G. E. Ezomo Esq. adopted its brief of argument settled by Sir Alfred Eghobabien SAN, filed on the 7th August, 2006. He argued what I can identify as three issues for determination in a way that the questions were not formally set out and it is for the reader discern.

Ogage Ovrawah Esq., learned counsel for the 2nd respondent who identified properly the issues for determination and has thus guided the court well. I commend learned counsel for being a proper officer of the court. He set out the issues thus:

5. Whether having regard to the provisions of Section 36 (1) of the Constitution of the Federal Republic of Nigeria, 1999, the lower court was right when it held

that the grounds of appeal from the Customary Court of Appeal can derive its jurisdiction must relate to customary law alone. (Covers Ground 1).

6. Whether the decision of the Court of Appeal in the interlocutory appeal disposed of the substantive matter before the High Court. (Covers Ground 2).

7. Whether the application by the Court of Appeal of the decision in Golok Vs. Diyalpwan (1990) 3 NWLR (Pt. 139) 411 and the interpretation of Sections 282 (1) and 245 (1) of the Constitution to the instant case has occasioned a miscarriage of justice. (Covers additional Ground 3).

E. Robert Emukpoeruo Esq. of counsel for the 3rd respondent adopted his brief filed on 16/4/13 and in it went along the issues as framed.

I see issue No. 2 as sufficient to resolve this appeal and so I shall make use of it.

Issue no. 2

Whether the decision of the Court of Appeal in the interlocutory appeal disposed of the substantive matter before the High Court.

Learned counsel for the appellant contended that the court below disposed of the 1st and 2nd legal questions raised in the originating summons now pending at the High Court.

That the originating summons before the High Court was for the High Court to quash the decision of the Customary Court of Appeal for lack of jurisdiction and the narrow question is whether the trial High Court has the jurisdiction to quash the decision of the Customary Court of Appeal, that is the appellant. That the decision reached by the Court of Appeal amounted to a denial of fair hearing and the implication is that the judgment of the Court of Appeal or court below or lower court is null and void. He

A cited **Adigun Vs. A.G. of Oyo State** (1987) 2 NWLR (Pt. 56) 197 at 199.

For the appellant it was submitted that the learned trial judge erred in law when he held that he had jurisdiction to entertain this suit having regard to the provisions of Section 6 (2) (5) k, 36 (1), 245 (1), 272 (1) and 282 of the
B Constitution which was affirmed by the Court of Appeal.

Learned counsel for the 1st respondent submitted that the jurisdiction of the State High Court to give judicial succour to litigants before the Customary Court of Appeal of a State who have no right of appeal to the
C Court of Appeal was recognized by the Court of Appeal in **David Vs. Zabia** (1998) 7 NWLR (Pt. 556) 105 at 113 – 114; **Okoye Vs. Nigerian Construction and Furniture Company Ltd** (1991) 6 NWLR (Pt. 199) 501 at 538. He urged the court not to revisit its earlier decision of **Golok**
D **Vs. Diyalpwan (supra)** on the provisions of Section 245 (1) and 282 (1) of the Constitution of the Federal Republic of Nigeria.

Learned counsel for the 2nd respondent submitted that the issue before the learned justices of the Court of Appeal was the decision of the
E High Court of justice which dismissed the preliminary objection by the respondents. That the Court of Appeal in that interlocutory matter judgment decided the substantive issue in the High Court which was not before the Court of Appeal. That the 2nd respondent was denied fair hearing
F contrary to Section 36 (1) of the Constitution of the Federal Republic of Nigeria. He cited **Kenon Vs. Tekam** (2001) 14 NWLR (Pt. 732) 12 at 33 34; **Okotie Eboh Vs. Manager** (2004) 18 NWLR (Pt. 905) 242 at 267.

The 2nd respondent aligns with the arguments of the appellant.

G The Court of Appeal in the judgment anchored by Bulkachuwa JCA (as she then was) held thus:

> **"In a similar manner appeals shall lie from the Customary**
> H **Court of Appeal to the Court of Appeal in matters that relate to questions of Customary law or such other matters as may be prescribed by an Act of the National Assembly. See Section 245 (1) of the 1999 Constitution which**
> I **provides:**

A

> **"245 (1): An appeal shall lie from decisions of a Customary Court of Appeal to the Court of Appeal as of right in any civil proceedings before the Customary Court of Appeal with respect to any question of customary law and such other matters as may be prescribed by an act of the National Assembly.**

B

This section had been interpreted by the courts to mean that an appeal can only lie to the Court of Appeal from the Customary Court of Appeal of a State on questions of Customary Law alone.

C

The locus classicus on this is Golok Vs. Diyalpwan (1990) 3 NWLR (Pt. 139) 411 at 418, where Uwais JSC (as he then was) in interpreting the provisions of Section 224 (1) of the 1979 Constitution which is at pari material with the provisions of Section 245 (1) of the 1999 Constitution said:

D

E

> **"The provisions of Section 224 of the 1979 Constitution which are material to this appeal are those contained in sub-section (1) of the section which reads:**

F

> > **"224(1): An appeal shall lie from decisions of the Customary Court of Appeal of a state to the Court of Appeal as of right in any civil proceedings before the Customary Court of Appeal with respect to any question of customary law and such other matters as may be prescribed by an Act of the National Assembly".**

G

H

"There is yet no other matter which has been prescribed by either an Act of the National Assembly or a Decree. It is clear from the provisions of sub-section (1) of the Section

I

224 of the 1979 Constitution that there is only one right of appeal to the Court of Appeal from the decision of a state Customary Court of Appeal. That right pertains to a complaint or ground of appeal which raises a question of customary law alone. It does not accommodate any complaint or ground of appeal which does not raise a question of customary law". See also Ononiwu Vs. Ukaegbu (2001) 14 NWLR (Pt. 734) 530; Mashuwareng Vs Abdu (2003) 11 NWLR (Pt. 831) 403; Customary Court of Appeal cannot therefore approach the Court of Appeal for the remedy to his grievances. He can only approach the court itself to set aside the decision which is null and void or another court of concurrent jurisdiction to set aside the said decision. The High Court of a state has been recognized by the appellate courts as such a court which litigants can approach when they have no right of appeal to the Court of Appeal against the decisions of Customary Courts of Appeal. See Koden Vs. Shidon (1998) 10 NWLR (Pt. 662) at 675 per Edozie, JCA (as he then was).

"The general proposition of the law is that a court of coordinate jurisdiction does not have the jurisdiction to set aside the judgment of another court of similar jurisdiction Onogoruwa Vs. IGP (1991) 5 NWLR (Pt. 193) 593, but if the judgment is ab initio, void, it could be set aside by another court of similar jurisdiction without much ado: See Sken Consult (Nig.) Ltd & Another Vs. Ukey (1981) 1 SC 6. An order which is a nullity is something which the person affected by it is entitled to have set aside ex debito justitiae: See Adegoke Motors Ltd. Vs. Dr. Adesanya & Another (1989) 2 NWLR (Pt. 109) 250. See also David Vs. Zabia (1998) 7 NWLR (Pt. 556) 105 at 114 per Edozie, JCA (as he then was).

"In the same vein, if a party to a case before a customary court of appeal can make out a case for a nullity by reason of that court deciding a case outside its jurisdiction and an appeal to its decision is not cognizable before the Court of Appeal, that decision can be validly challenged by an action in the High Court".

"In the circumstance of this case the lower court has the jurisdiction to set aside the decision of the Customary Court of Appeal, Edo State which on its face is a nullity and I so hold".

In the determination of the appeal before this court which is that from the Court of Appeal which sat over the matter by originating summons from the Edo State High Court in a way exercising supervisory rights over the Edo State, Customary Court of Appeal, the appellant herein. A visit to the constitutional provisions relevant to the matter at hand would be helpful and I shall refer to them as follows:-

In relation to the jurisdiction of the High Court, the 1999 Constitution of the Federal Republic of Nigeria provides as follows:

Section 272(1):

(3) To hear/determine civil proceeding in which civil rights and obligations are in issue.

(4) Hear and determine criminal proceedings involving/relating to forfeiture, penalty, punishment or other liability are in issue.

Section 272(2):

Reference to civil and criminal proceedings in the section <u>includes</u> a reference to the proceedings which originate in the High Court and those brought to be dealt with by the High Court in the exercise of its appellate and or

supervisory jurisdiction.

Section 273:
Contemplates any other jurisdiction that may be conferred on the high court by a state law.

It is clear that neither of the two Sections 272 and 273 has vested on the High Court an appellate or supervisory jurisdiction over decisions of the Customary Court of Appeal.

No such jurisdiction or power has been conferred on the High Court by the State House of Assembly subjecting Customary Court of Appeal to the supervisory jurisdiction of the High Court. Both High Court and Customary Court of Appeal are intended by the Constitution to be superior courts of records. Appeals from both courts lie to the Court of Appeal. Both are courts of co-ordinate jurisdiction. See **Section 282 Appeal from Customary Court of Appeal i.e. to Court of Appeal:**

(d) Appellate/supervisory jurisdiction in civil proceedings restricts to <u>questions involving customary law</u>.

(e) For purpose of Section 282(1) Constitution of law enacted by House of Assembly may empower the Customary Court of Appeal to exercise any other appellate/supervisory jurisdiction over such matters as the House of Assembly may deem fit.

(f) Either under Sections 292 (1) or 282 (2) of the Constitution, Customary Court of Appeal can competently exercise appellate/supervisory jurisdiction over decisions of customary court.

Since jurisdiction of every court is statutorily endowed, the High Court as in this case goes outside its powers to entertain appeals from the Customary Court of Appeal or to venture to supervise that court. It follows that the Edo

State High Court acted beyond its mandate when it took on the review powers over the matter from the Customary Court of Appeal Edo State even if by way of originating summons which looks like taking from the back door what has not been given it from the front door. By the same token, the court below adopted that wrong path by holding that the High Court had the power to entertain and determine those questions in the originating summons which were another way of bringing the Customary Court of Appeal Edo State under subjugation to the High Court of the same Edo State, a situation clearly running counter to the glaring unambiguous provisions of Sections 6(2) (5) k, 36(1), 245(1), 272(1) and 282 of the constitution.

The provisions of Sections 245(1), 272(1) and 282 of the 1999 Constitution having clearly spelt out the exclusive jurisdiction of the Customary Court of Appeal of a State and its Customary Court of Appeal having the exclusive jurisdiction to exercise appellate and supervisory jurisdiction in civil proceeding involving questions of customary law. Therefore the 1st respondent being aggrieved with the decision of the Customary Court of Appeal had no business going to the High Court, a court of co-ordinate jurisdiction instead of going to the Court of Appeal, Benin Judicial Division. It follows logically that when the appeal from the High Court in the presumed jurisdiction over the originating summons came before the Court of Appeal, that court below ought to have declined jurisdiction since the High Court from which the appeal arose lacked the vires. In this regard I rely on the cases of:

6. **PDP Vs. INEC (1999) 11 NWLR (Pt. 626) 200.**
7. **Agua Limited Vs. Ondo State Sports Council (1988) 4 NWLR (Pt. 9) 622.**
8. **Chime Vs. Ude (1996) 7 NWLR (Pt. 461) 379.**
9. **Nuhu Vs. Ogele (2003) 18 NWLR (Pt. 852) 251.**
10. **Arjay Limited Vs. Airline Management Limited (2003) 108 LRCN 1173.**

In the light of the foregoing since the matter as seductively argued by the respondents in this appeal talking of the grounds of appeal being the yardstick upon which this court or any other is to assume jurisdiction, the

court has to remind itself at all times that the strict prescription of the constitution and its provisions are the appropriate guide. The court has no right to venture beyond the boundaries circumscribed by the constitution and so the appeal within the prism of Sections 245(1), 272 and 282 of the Constitution of the Federal Republic of Nigeria being incompetent since the Court of Appeal had no jurisdiction, just like the High Court before it, the option open to this court is to give it the formal declaration of incompetence due to a lack of jurisdiction. The appeal is allowed and the judgment of the Court of Appeal set aside. The suit in the High Court, Edo State is hereby, struck out.

Cross-Appeal

In fulfillment of righteousness since a cross-appeal was filed and argued, I shall make some remarks on account thereof.

The 1st respondent in the main appeal now cross-appellant has appealed against a part of the judgment of the court of appeal, Benin Division when it held that the trial High Court was biased in its ruling delivered in Suit No. B/163/05/2003 on the 26th January, 2004.

The details of what led to the present situation are well set out in the facts at the beginning of the appeal and I see no reason for a repeat herein.

The cross-appellant raised two issues for determination which are, viz:

1. **Was the Court of Appeal right to hold that the learned trial judge was biased in his ruling? (Ground 1 of the cross-appellant's ground of appeal).**

2. **Whether the lower court has jurisdiction to entertain an appeal against an obiter dictum of the trial court? (from Ground 2).**

Learned counsel had adopted the brief of the cross-appellant filed on 2/2/2015 settled by himself, K.O. Obamogie Esq.

He submitted that the Court of Appeal was wrong when it held that

the learned trial judge was biased in his ruling delivered on the 26th January, 2014. That the opinion of the trial court was predicated on the submissions canvassed before it by the parties and the court was right to make the necessary comments. He cited **Ezeugo Vs. Ohanyere** (1978)6 7 SC 171 at 184.

That the comments of the trial judge were obiter dictum and not subject to appeal. He referred to **C.C.B. Plc Vs. Ekperi** (2007) 3 NWLR (Pt. 1022) 493 at 508; **Coker Vs. UBA Plc** (1997) 2 NWLR (Pt. 490) 641 at 664; **Abacha Vs. Fawehinmi** (2000) 6 NWLR (Pt. 660) 228 at 297, 351.

Learned counsel for the 3rd respondent/cross-respondent contended that the Court of Appeal decided on a decision of the trial court which was not an obiter dictum.

The decision in the main appeal has decided this cross-appeal as the appeal having been struck out for incompetence and lack of jurisdiction in the court, therefore no jurisdiction would lie to deal with this cross-appeal which would suffer the same fate, as an appeal being non-existent there is nothing to cross-appeal on.

Cross-appeal is struck out.

Parties to bear their costs.

Mary Ukaego Peter-Odili
Justice, Supreme Court

MUSA DATTIJO MUHAMMAD, (JSC): Having read in draft the lead judgment of my learned brother MARY UKAEGO PETER-ODILI JSC just delivered, I agree with his lordship's reasoning and conclusion that the appeal has merit and that it should be allowed.

At the trial court the 2nd respondent challenged the competence of the divorce petition commenced by the 1st respondent on the ground that same had not been properly served on her.

Dissatisfied by the dismissal of her application in that regard, she appealed to the Edo State Customary Court of Appeal asserting that the trial court's decision is an infringement of her constitutional right to fair hearing. The Customary Court of Appeal declined jurisdiction having held that the preliminary point raised at the trial court is not a customary law issue.

Instead of appealing against the decision of the Customary Court of Appeal, the 1st respondent commenced a fresh action by way of an originating summons at the Edo State High Court ostensibly to facilitate the review of the decision of the Customary Court of Appeal. The High Court overruled the preliminary objections of the defendants to 1st respondent's action to its jurisdiction and sought to determine the suit before it. An appeal against this decision of the High Court to the Court of Appeal failed and thus the instant appeal to this court.

In my firm and considered view the germane question both the appeal and cross appeal raise is whether the lower court has the jurisdiction over the issues the High Court sought to determine which issues had earlier been heard and disposed of by the Customary Court of Appeal. All the issues the parties to the two appeals purport to raise are unpardonably diversionary and misleading.

A community reading of Sections 240, 241 and 245 of the 1999 Constitution as amended shows clearly that the High Court and the Customary Court of Appeal, which decision the former sought to review, are courts of coordinate jurisdiction and that the Court of Appeal, to the exclusion of any other court, hears and determines appeals from the two. It is settled that no Judge is empowered to reverse, vary or alter the decision of another Judge of coordinate jurisdiction except on the issue of jurisdiction. In the absence of statutory authority, a judge has no power to set aside or vary the order of another judge of concurrent or coordinate jurisdiction. See **Akporue & Anor Vs. Okei (1973) 12 SC 137; Amanabu Vs. Okafor (1966) 1 All NLR 205 at 207** and **Shell Petroleum Company Nigeria Limited Vs. Edamkue & Ors (2009) 14 NWLR (Pt. 1160) 1 SC** and **National Insurance Corporation of Nigeria Vs. Power Industrial Engineering Co. Ltd (1990) 1 NWLR (Pt. 29) 697 at 707.**

Secondly, this court has cautioned that in the exercise of its powers of judicial review the court must not stray into the realms of appellate jurisdiction for that would constitute a wrongful usurpation of powers. The court's powers as a reviewing tribunal has best been alluded to by **Lord Green M.R in Associated Provincial Picture Houses Ltd Vs. Wednesbury Corporation (1948) 1 KB 223, 233,** a case cited with

A authority by this court in **Military Governor of Imo State and Anor Vs. Chief B.A.E. Nwauwa (1997) LPELR-1876 (SC),** the master of the polls stated:

> **"The power of the court to interfere in each case is not as**
> B **an appellate authority to override a decision of the local authority, but as a judicial authority which is concerned, and concerned only, to see whether the local authority have contravened the law by action in excess of the powers**
> C **which parliament has confided in them."**

In the case at hand the law does not allow the decision already made by the Customary Court of Appeal to be referred to the High Court for another
D decision on the same or similar question. The only way to obtain a review of the decision is by way of an appeal to the Court of Appeal that has that jurisdiction, to the exclusion of any other court, conferred on it by the constitution. See **Dr. Basil Ukaegbu Vs. Attorney General of Imo State**
E **(1983) LPELR – 3339 (SC).** The only jurisdiction the lower court has, in turn, is to set aside the High Court's decision in the exercise of jurisdiction that it does not possess. See **Chief Air Staff Vs. Iyen (2005) 6 NWLR (Pt. 922) 496; Oshotoba & Anor Vs. Olujitan & Anor (2000) 5 NWLR (Pt.**
F **655) 159** and **Abba Tukur Vs. Governor of Gongola State (1988) 1 NWLR (Pt. 68) 39.**

It is for the foregoing and the fuller reasons adumbrated in the lead judgment that I find merit in the appeal, set aside the judgment of the lower
G court and the suit in the Edo State High Court. The cross-appeal dies along with the non-existent judgment of the lower court set-aside in the appeal.

Parties to bear their respective costs.

Musa Dattijo Muhammad
H *Justice, Supreme Court*

KUDIRAT MOTONMORI OLATOKUNBO KEKERE-EKUN, (JSC): I have had the benefit of reading in draft the judgment of my learned
I brother, MARY UKAEGO PETER-ODILI, JSC just delivered. The issues

in contention in this appeal have been exhaustively considered and I am in agreement with the reasoning and conclusions reached.

I offer a few comments in support. The facts that gave rise to this appeal have been adequately captured in the lead judgment. The pith and substance of this appeal in my considered view is whether the trial High Court had jurisdiction to entertain the originating summons seeking to quash the decision of the Customary Court of Appeal (i.e. the appellant herein). In other words, whether the High Court of Edo State or indeed any High Court can exercise supervisory jurisdiction over the Customary Court of Appeal of the state. In the event that the High Court lacks the requisite jurisdiction, it follows that the entire proceedings and any decision reached therein would amount to a nullity and would accordingly be void. Where the decision of the trial court is a nullity, it means there is no valid decision from which an appeal could lie. The Court of Appeal, in the circumstance would also be bereft of jurisdiction to entertain the appeal before it.

It is well settled that the jurisdiction of any court to adjudicate in any cause or matter is conferred by the statute which creates it. The only circumstance in which the court's jurisdiction may be expanded or extended is by specific legislation to that effect enacted by the legislature. Neither the court nor any of the parties can confer jurisdiction on the court by conduct, consent or by inference. **See: Okulate Vs. Awosanya (2000) 1 SC 107; Obieuweubi Vs. CBN (2011) 7 NWLR (Pt. 1247) 465; Okezie Vs. Fed. A.G & Anor. (1979) 6-9 SC (Reprint) 1; Ukpong Vs. Comm. For Finance (2006) 19 NWLR (Pt. 1013) 187.**

Section 272(1) and (2) of the 1999 Constitution provides for the jurisdiction of the High Court of a state as follows:

> **"272 (1)Subject to the provision of Section 251 and other provisions of this constitution, the High Court of a state shall have jurisdiction to hear and determine any civil proceedings in which the existence or extent of a legal right, power, duty, liability, privilege, interest, obligation or claim is in issue or to hear and determine any criminal proceedings**

involving or relating to any penalty, forfeiture, punishment or other liability in respect of an offence committed by any person.

(2) The reference to civil and criminal proceedings in this section includes a reference to the proceedings which originate in the High Court of a state and those which are brought before the High Court to be dealt with by the court in the exercise of its appellate or supervisory jurisdiction".

From the above provisions the High Court of a state may exercise original, appellate and/or supervisory jurisdiction.

Pursuant to Section 282(1) of the Constitution, a Customary Court of Appeal shall exercise appellate jurisdiction in civil proceedings involving questions of customary law while sub section (2) provides that the Customary Court of Appeal may also exercise such jurisdiction and decide such questions as may be prescribed by an Act of the National Assembly. In other words, the jurisdiction of the Customary Court of Appeal can only be extended or expanded beyond what is provided for in Section 282(1) by an Act of the National Assembly.

By virtue of Section 240 of the constitution, the Court of Appeal, subject to the provisions of the constitution, shall have jurisdiction to the exclusion of any other court of law in Nigeria to hear and determine appeals from all the superior courts of record set out in Section 6(5) (c) to (i) of the constitution, which includes the High Court of a state and the Customary Court of Appeal of a state. These courts are all courts of co-ordinate jurisdiction.

There is no provision of the constitution that confers supervisory jurisdiction on the High Court of a state in respect of decisions emanating from the Customary Court of Appeal. The provisions are clear and unequivocal as to which court has jurisdiction to entertain a complaint against the decision of a Customary Court of Appeal. It does not reside in the High Court of a state and cannot be so inferred. Clearly the High Court

of Edo State lacked jurisdiction to entertain the suit before it seeking to set aside the ruling of the Customary Court of Appeal.

Having acted without jurisdiction, I agree with my learned brother in the lead judgment that the trial court lacked jurisdiction to entertain the originating summons and the lower court equally lacked jurisdiction to determine the questions arising therefrom.

For these and the fuller reasons ably adumbrated in the lead judgment, I allow the appeal on the ground that both the lower court and the trial court lacked jurisdiction to entertain the proceedings before them. The judgment of the court below is accordingly set aside while the suit before the High Court of Edo State is struck out.

The cross appeal is also struck out.

The parties shall bear their respective costs in the appeal.

Kudirat M. O. Kekere-Ekun
Justice, Supreme Court

AMIRU SANUSI, (JSC): My noble lord Mary Peter-Odili obliged me with a draft copy of her judgment just delivered, before now. On reading same, I find myself in total agreement with her reasoning and the conclusion she arrived at that this appeal is devoid of any merit. While adopting her reasoning which informed the striking out of the main appeal as mien, I hereby also strike out he appeal and the cross appeal too.

Amiru Sanusi
Justice, Supreme Court

AMINA ADAMU AUGIE, (JSC): I had a preview of the lead judgment just delivered by my learned brother Peter-Odili, JSC, and I agree with him that the appeal must be allowed in the circumstances of this case. He dealt with the issues raised and I agree with his reasoning and conclusion, which I adopt.

Suffice it to say that the focal point of this appeal is the issue of jurisdiction, which is the authority a court has to decide matters or take cognizance of matters presented in a formal way for its decision **Mobil**

Prod. (Nig.) Unitd. Vs. LASEPA (2002) 18 NWLR (Pt. 798) 1

There are different forms of jurisdiction e.g. original jurisdiction is the court's power to hear and decide a matter before any other court can review it, while appellate jurisdiction has some remblance of supervisory jurisdiction. See **Sule Vs. Nigerian Cotton Board (1978) 6 SC 62,** wherein this court, Oputa, JSC, explained as follows

> **A court is said to have original jurisdiction in a particular matter when that matter can be initiated before it; while a court is said to have appellate jurisdiction when it can only go into the matter on appeal after it had been adjudicated on by a court of first instance.**

An appellate jurisdiction is statutory, which means that jurisdiction to hear and determine any appeals exercisable by one court over another must be statutorily conferred, and that is not so in this case.

As my learned brother pointed out, none of the two Sections 272 and 273 of the 1999 Constitution, which lays out the jurisdiction of the High Court, vests the High Court with appellate or supervisory jurisdictions over the decisions of the Customary Court of Appeal.

It is well-settled that inherent jurisdiction does not supersede the statutory jurisdiction of a court see **Gombe Vs. P.W. (Nig.) Ltd. (1995) 6 NWLR (Pt. 402) 402 SC,** wherein Iguh, JSC, explained that

> **The inherent power of a court is entirely supplementary to and dependent on the statutory jurisdiction of the court in a cause. A court may have or exercise inherent power or inherent jurisdiction in respect of a cause or matter within its jurisdiction. It has, however, no inherent power or jurisdiction over a cause or matter not within its jurisdiction. …An inherent power or inherent jurisdiction is not and has never been known to be distinct or separate jurisdiction. No inherent power can add to the jurisdiction of any court of record where no jurisdiction to**

entertain a cause had not been vested in the constitution or statute law. Inherent power is only exercised to enhance statutory jurisdiction in a cause or matter within the jurisdiction of the court.

In other words, the jurisdiction of any court is statutorily bestowed, and since the High Court of Edo State is not mandated by any statute to entertain appeals from or supervise the appellant in this case, i.e. the Customary Court of Appeal, Edo State, it goes without saying that the court below erred when it held that the High Court had power to entertain and determine the questions in the originating summons.

It is for this and the other well-marshaled reasons in the lead judgment that I do allow the appeal and strike out the cross-appeal. I also abide by the consequential orders in the lead judgment.

Amina Adamu Augie
Justice, Supreme Court

EJEMBI EKO, (JSC): The facts of this case are as summarized in the lead judgment of my learned brother, Mary Ukaego Peter-Odili, JSC. I hereby endorse it.

The appeal has its genesis in the divorce petition between the 1st and 2nd respondents at the Esan-East Customary Area Court, Ubiaja. The 2nd respondent, alleging that the processes of the said customary court entitling it to assume jurisdiction over her and the divorce petition were not properly served on her, filed a motion to challenge the jurisdiction of the Customary Court. The application was dismissed. Aggrieved, the 2nd respondent appealed to the Customary Court of Appeal of Edo State complaining that her right to fair hearing had been violated by the Customary Court. The Customary Court of Appeal allowed the appeal and set aside the decision of the Customary Court. The Customary Court of Appeal however did not comment on the 1st respondent's objection that fair hearing, not being an issue of customary law, the Customary Court of Appeal had no jurisdiction to entertain it.

The 1st respondent, aggrieved by the decision of the Customary

Court of Appeal, approached the High Court of Edo State for judicial review of the decision.

He took out an originating summons raising the following three questions in respect of which he sought two reliefs. The questions asked and the reliefs sought are:

a. Whether in the light of the clear and unequivocal provisions of section 282(1) of the Constitution of the Federal Republic of Nigeria, 1999 the Customary Court of Appeal of Edo State can entertain, hear and determine a matter that does not raise questions of Customary Law.

b. Whether or not the Customary Court of Appeal, Edo State is competent to adjudicate on a matter raising question of fair hearing either under section 36(1) of the Constitution of the Federal Republic of Nigeria, 1999 or under the rules of natural justice.

c. Whether or not it is permissible for the Customary Court of Appeal, Edo State to extend its jurisdiction beyond what is specifically granted by the Constitution of the Federal Republic of Nigeria via section 282(1) thereof".

WHEREFORE the plaintiff claims against the defendants jointly and severally the following reliefs:

"a. A declaration that the judgment of the Customary Court of Appeal, Edo State i.e. the 5th defendant delivered in Appeal No. CCA/12A/2002. *Emmanuel Aguele Vs. Mrs. Beatrice Aguele* on 14th July, 2003 is unconstitutional, null and void and of no effect whatsoever.

b. An Order *setting aside the said Judgment of the Customary Court of Appeal, Edo State in its entirety".*

The suit drew a lot of protests or preliminary objections from the defendants. The objections summarized are:

1. That the High Court and the Customary Court of Appeal, being courts of co-ordinate jurisdiction the High Court lacked supervisory jurisdiction to review the decisions of the Customary Court of Appeal; and

2. That the 1st respondent, as the party against whom the decision of the Customary Court of Appeal was delivered, was guilty of abuse of court process in the initiation and maintenance of the suit at the High Court. The option he had being only to appeal to the Court of Appeal.

The learned trial judge had correctly noted in his ruling that the common thread that runs through the objections is that the High Court was incompetent to hear the matter brought before him on the originating summons at page 88, he had reasoned that:

"objection as to want of jurisdiction on the part of (his) court to entertain the plaintiffs originating summons is meant to becloud the real issue at stake and the same is therefore is not only misconceived but grossly misleading".

Having put his entire ego and personality in the case, and he should not have, the learned trial judge finally ruled:

The objections raised against this court hearing the plaintiff's claim and regardless of the forces put behind them, are therefore not only misconceived but grossly

misleading.

He had, however, before then commented profusely on the merits of the suit. Admitting that he felt "very strongly about the much vaunted claim that the High Court and the Customary Court of Appeal have co-ordinate or concurrent jurisdictions", the learned Judge Roland Izebe Amaize ruled that the two courts, the High Court and the Customary Court of Appeal, are not of co-ordinate jurisdiction. This prompted the appeal of the Customary Court of Appeal, as a party in the originating summons, to the Court of Appeal. The appeal was allowed in part. The Court of Appeal (the lower court) affirmed the decision of the High Court that it had "jurisdiction to set aside the decision of the Customary Court of Appeal, Edo State which on its face is a nullity", it, however, allowed the appeal on the issue of the trial High Court being overtly partisan and biased in the decision it rendered.

The issues in this appeal are broadly two. That is:

1. **Does the High Court exercise or have supervisory jurisdiction over Customary Court of Appeal. In other words, is the Customary Court of Appeal an inferior tribunal/court to the High Court for purposes of judicial review of the former by the latter?**

2. **Since appeal from the decision of the Customary Court of Appeal lie to the Court of Appeal does the High Court not act *ultra vires* to entertain the suit on the originating summons which tantamounted to its exercising supervisory jurisdiction to review the decision of the Customary Court of Appeal?**

Both the High Court and the Customary Court are creations of the 1999 Constitution. Sections 270(1) and 280(1) of the said Constitution, respectively establish the High Court and the Customary Court of Appeal.

Section 272(1) of the Constitution endows the High Court with the jurisdiction to hear and determine civil proceedings in which civil rights

and obligations are in issue, and to hear and determine any criminal proceedings involving or relating to any penalty. Forfeiture, punishment or other liability in respect of an offence committed by any person. Be it noted that no provisions of section 272 vests in the High Court appellate or supervisory jurisdiction over decisions of the Customary Court of Appeal.

The same Constitution, in section 282(1) vests in the Customary Court of appeal "appellate and supervisory jurisdiction in civil proceedings involving questions of Customary law". Subsection (2) of section 282 of the Constitution empowers the Customary Court of Appeal to:

> **"exercise such jurisdiction and decide such questions as may be prescribed by law of the House of Assembly of the State for which it is established".**

This jurisdiction is additional to the principal or main jurisdiction vested in the Customary Court of Appeal by section 282(1).

The additional jurisdiction of the Customary Court of Appeal vested by section 282(2) of Constitution has been dormant or fallow because the National Assembly has not yet enacted any Act pursuant to section 245(1) of the Constitution to give effect to section 282(2) of the Constitution which is herein below reproduced

"245(1). An appeal shall lie from decisions of a Customary Court of Appeal as of right in any civil proceedings before the Customary Court of appeal with respect to any question of customary law and *such other matters as may be prescribed by an Act of the National Assembly".*

Section 245(1) of the 1999 Constitution and section224(1) of the 1979 Constitution are *in pari material. Golok v. Diyalpwan* (1990) 3 NWLR (Pt. 139) 411 decided by this court interpreted section 224(1) of the 1979 Constitution, now repealed. The *ratio decidendi* of that decision as can be found at page 418 of the Report is simply:

> **"There is yet no any other matter which has been prescribed by an Act of the National Assembly -. It is clear from the provisions of sub-section (1) of section 224 of the**

1979 Constitution that there is only one right of appeal to the Court of Appeal from the decision of a State Customary Court of Appeal".

I have great deference to this opinion. Let me however ask: From these provisions *in pari mariteria* with section 245(1) of the 1999 Constitution can it be inferred that the exercise of the right of appeal to the Court of Appeal from the decision of the Customary Court of Appeal upon leave sought and obtained has been barred or prohibited? I should think, on the universal principle of interpretation, that what is not expressly prohibited is impliedly or implicitly permitted; that an appeal to the Court of Appeal from the decision of the Customary Court of Appeal on any matter or issue other than an issue of customary law, upon leave sought and granted having not been expressly prohibited, is permissible.

I have seriously thought about the provisions of section 282(2) of the Constitution which are permissive of additional jurisdiction to the Customary Court of Appeal, and I ask: if section 282(2) of the Constitution has prescribed how the Customary Court of Appeal could validly acquire the additional jurisdiction through the legislation of the State House of Assembly will it still be right that appeals from the decision of the Customary Court of Appeal in exercise of such additional jurisdiction should be restricted to questions of customary law alone? Such insistence, in my humble view, may be a negation of the clear intent and purpose of section 282(2) of the Constitution. The Court of Appeal in *Uwazuruonye v. Governor, Imo State* (2005) 1 NWLR (Pt. 906) 19 opined that in view of S. 247(2) of the 1979 Constitution, *in pari material* with S. 282(2) of the 1999 Constitution, section 79 of Imo State Customary Court (Amendment) Edict, 1989, which conferred on the Customary Court of appeal "original jurisdiction in any matter in which prerogative writ is sought against a customary court" had validly vested in the Customary Court of Appeal such function.

Where a court is by law vested with jurisdiction, that is additional to its original jurisdiction, any decision in respect of any matter covered by the additional jurisdiction is appealable. I draw inspiration from the additional

jurisdiction vested in the Federal High Court by SS. 31 and 87 of the Electoral act. See *Garba v. Mohammed* (2016) 16 NWLR (Pt. 1537) 114 and *Lokpobiri v. Ogoala* (2016) 3 NWLR (Pt 1499) 328 where appeals from the Federal High Court decisions from pre-election disputes, over which the Federal High Court exercised jurisdiction pursuant to section 87(9) of the Electoral Act, 2010 came as far as to this court. In *Garba v. Mohammed* (supra) Mohammed, CJN, stated quite instructively at pages 164 – 165:

> **"As for the additional jurisdiction conferred on the Federal High Court under section 87(9) of the Electoral Act, 2010, as (amended) quoted above, it gives any aspirant member of a registered political party who participated in a primary election conducted by a political party to choose a candidate to contest on election under its platform, who is not satisfied with the outcome of the primary election contested with other members of the same political party, to approach the Federal High Court or High Court of a State or FCT High Court for redress. This jurisdiction under the Electoral Act is quite distinct and separate from the jurisdiction of the Federal High Court conferred under the 1999 Constitution. In other words, any dispute arising from the conduct of primary elections by political parties to nominate candidates to contest elections, may be brought to the Federal High Court under section 87(9) of the Electoral Act, 2010, (as amended) by an aggrieved aspirant of any political party who participated in the primary election conducted by a political party.**

The lower court seems to have proffered two options to the litigant aggrieved by the decision of the Customary Court of Appeal on any issue other than an issue of Customary law. That is, either to approach the customary Court of Appeal to set aside the decision *ex debito justitae* on the ground that the decision is *ultra vires*. In alternative to approach another

court of co-ordinate jurisdiction to set aside the *ex debito justitae* decision of the Customary Court of Appeal. The question is; How does he do that?

The High Court must be *intra vires* to exercise that supervisory jurisdiction. The Constitution does not make the Customary Court of Appeal an inferior court to the High Court. It also has not vested in the High Court supervisory jurisdiction over decisions of the Customary Court of Appeal for purposes of judicial review. The lower court seems to agree that the High Court and the Customary Court of Appeal are courts of co-ordinate jurisdiction. I also agree.

Supervisory jurisdiction means the control exercised by the superior court to compel the inferior court to act within its jurisdiction, or to prohibit the inferior court from acting outside or in excess of its jurisdiction. By this the superior court reverses the extra-jurisdictional acts of the inferior court. Exercise of supervisory jurisdiction usually is done through prerogative remedies. See Black's Law Dictionary, 9th ed. Pp. 1576 1577. Appellate and or supervisory jurisdictions are statutory and must be vested expressly by the enabling law or the Constitution. It is the very basis on which any court tries a case. It is the lifeline of all trials. A trial without it is a nullity. See *P.E. Ltd Vs. Leventis Trading Co. Ltd.* (1992) NWLR (Pt. 244) 675.

Supervisory jurisdiction, exercised through proceedings for judicial review, particularly *certiorari* proceeding, is in my view alternative to appellate jurisdiction. It is akin to and an alternative to appeal. Because the prerogative order of *certiorari* is akin to the procedure of appeal and both serving the common purpose of quashing the decision and orders of an inferior or tribunal made erroneously or *ultra vires,* it had been held undesirable for the applicant for order for *certiorari* to bring the application for the order to quash a decision when he had an appeal pending against the same decision or order of the inferior court. See *R v. Barnes, Ex P. Lord Vernon* (1910) 102 L.T. 860; *R v. Monaghan J.J.* (1906) 40 *I.L.T.* 51; The *Queen v. The Judges of Uhie District Court, Ex Parte Chijioke Atti* (1963) 7 E.N.L.R. 43 at 44. The subsistence of both simultaneously may render the latter in time an abuse of court's process.

The learned trial judge had arrogated to himself and exercised supervisory jurisdiction to judicially review the decision of the Customary

Court of Appeal, via the procedure of originating summons, without any legal source or fountain head of the *vires* in law to do so. No law empowers him to do what he did. He therefore acted *ultra vires.* No matter his ego or how strongly he feels, he cannot arrogate to himself the function of the legislature and arrogate to himself supervisory jurisdiction over Customary Court of Appeal. The lower court is, in my firm view, wrong to have affirmed the decision of the trial court that patently was *ultra vires,* null and void.

The lower court, like the trial court, fell into the error of isolating the mandatory procedural rules of fair hearing or fair trial contained in section 36(1) of the 1999 constitution from civil proceedings at the customary court involving questions of customary law. The customary court is a court of record established by statute. It is imperative, by virtue of section 36(1) of the 1999 Constitution that the customary court, established by Law, for the Customary Court in its adjudicatory function to observe and make affordable to all parties in every proceeding the right to fair hearing. It is a right the customary court cannot deprive any party to in any proceedings before it.

Fair hearing, whether in the context of customary natural justice principles or under the express provisions of section 36(1) of the Constitution, is inseverable from any proceedings before the customary court. It is now dictated and driven by section 36(1) of the Constitution. It is also inherent in every Customary Law or proceedings before every customary court. Any rule of Customary Law that repudiates the principles of fair hearing is invalid for being repugnant to natural justice, equity and good conscience.

I dare say that rules of fair hearing either, as rules of natural justice or rules incorporated into section 36(1) of the Constitution, are now integrated into customary law principles. Let me reproduce section 36(1) of the Constitution to demonstrate and emphasis my point. That is:

> **"36(1) In the determination of his civil rights and obligations, including any question or determination by or against any government or authority, a person shall be**

entitled to a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such a manner as to secure its independence and impartiality".

I deliberately underlined "in the determination of his Civil rights and obligations a persons hall be entitled to a fair hearing by a court established by law". When section 36(1) is read together with the supremacy provisions of the same Constitution in section 1 thereof it becomes obvious that the rules of fair hearing have been infused into the practice and procedure of Customary Courts. Any decision of the Customary Court and any proceeding of that court delivered or conducted in breach of the rules of fair hearing will be a nullity either by operation of the repugnant test or direct operation of sections 36(1) and I of the Constitution read together.

The rules of fair hearing have diffused into the rules of customary law. By the far reaching provisions of section 36(1) of the Constitution the customary courts are bound to observe the rules of fair hearing. See *Adesina v. Afolabi* (2001) 31 WRN 159 at 168; *Folodun v. Ogunse & anor.* (2009) LPELR – 3735 (CA)

The rules of fair hearing are simple and basic principles of law based on common sense and the sense of administering justice. They are applicable in customary courts. See *Ekpa v. Utong* (1991) 6 NWLR (Pt. 187) 258 at 278. Every customary law has rules of fair hearing, particularly *audi alteram partem*. The Customary Court of Appeal was right in my view therefore, when it assumed jurisdiction to hear and determine the appeal from the customary court on the issue of fair hearing and the service of the processes, of the customary court for the hearing of 1st respondent's petition for divorce brought against eh 2nd respondent.

There is substance in this appeal. I hereby allow the appeal. The judgment of the Court of Appeal delivered on 24th May, 2006 in the appeal No. CA/B/40/2004 on the issue whether the High Court has vires to exercise supervisory jurisdiction to judicially review the decision of the Customary Court of Appeal is hereby set aside. As the High Court lacks

A the supervisory jurisdiction to judicially review the decision of the Customary Court of appeal the proceedings of the High Court in the suit No. 8/163/05/2003 the suit are hereby struck out.

Since the central issue in the cross appeal sprang or sprouted from the B incompetent suit No. 8/163/05/2003 I no longer consider it necessary to consider it. The main suit having been struck out, the cross appeal suffers the same fate. It is hereby consequently struck out.

Parties shall bear their respective costs.

C **Ejembi Eko**
Justice, Supreme Court

SIDI DAUDA BAGE, (JSC): I have had the benefit of reading n draft the D lead judgment of my learned brother Mary Ukaego Peter-Odili, JSC, just delivered. I agree entirely with the reasoning and conclusion reached. I do not have anything useful to add. The cross appeal lacks merit, and it is accordingly dismissed by me. I abide by all the orders contained in the lead E judgment.

Sidi Dauda Bage
Justice, Supreme Court

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ENGR. MUSTAPHA YUNUSA MAIHAJA
AND
1. ALHAJI IBRAHIM GAIDAM
2. ALL PROGRESSIVE CONGRESS (APC)
3. INDEPENDENT NATIONAL ELECTORAL COMMISSION (INEC)

SC.758/2016

IN THE SUPREME COURT OF NIGERIA
HOLDEN AT ABUJA

FRIDAY, 2ND JUNE, 2017

BEFORE THEIR LORDSHIPS

WALTER SAMUEL NKANU ONNOGHEN	**CHIEF JUSTICE OF NIGERIA**
MUSA DATTIJO MUHAMMAD	**JUSTICE, SUPREME COURT**
KUDIRAT M. O. KEKERE-EKUN	**JUSTICE, SUPREME COURT**
EJEMBI EKO	**JUSTICE, SUPREME COURT**
SIDI DAUDA BAGE	**JUSTICE, SUPREME COURT**

CONSTITUTIONAL LAW: Requirement as to the age of the contestant – S. 177 (c) of CFRN – Forgery thereof – Whether it is necessary to prove that a candidate has not attained the age of 35 years – Whether any discrepancy must have bearing on the constitutional provision on age.

CONSTITUTIONAL LAW: S. 191(1) of CFRN – Tenure of a Governor- – Relevant considerations thereof.

COURT: Interpretation of the Constitution – Principles thereof – Proper approach thereto.

CRIMINAL LAW AND PROCEDURE: Forgery – Proof thereof – SS 362 and 363 Penal Code – Whether it is necessary to prove that the party

presented a forged certificate knowing that it will be used fraudulently as genuine – Principle in ***Kakih Vs. PDP (2014) 15 NWLR (Pt. 1430) 374.***

CRIMINAL LAW AND PROCEDURE: Forgery – Standard of proof thereof – Whether proof is beyond reasonable doubt – S. 135 of the Evidence Act, 2011 – Relevant considerations thereof.

CRIMINAL LAW AND PROCEDURE: Forgery and false declarations – Onus on party thereof – How discharged.

ELECTION PETITION: Locus standi – S.87(9) of the Electoral Act 2010 (as amended) – Who is eligible to sue thereon – Whether it is a party who was an aspirant in the primary election.

PARTIES: Locus standi Pre-election proceedings – S. 87(9) of the Electoral Act, 2010 (as amended) – Relevant considerations thereof.

STATUTE: Electoral Act – S. 182 thereof – Presentation of forged certificate to INEC – Whether the forger has ever presented a forged certificate to INEC and not whether he has ever been charged.

STATUTE: Electoral Act – S.87(9) thereof – Extent, purport and imperatives.

STATUTE: Electoral Act 2010 (as amended) – S. 31(5) thereof – Action for false entry of information – Locus standi thereof – Whether any member of the public can bring action.

STATUTE: Electoral Act 2010 (as amended) – S. 31(5) thereof – Violation thereof – Onus of proof – Whether it has to be proved that the false information complained of must relate to the constitutional requirements for election into the office.

STATUTE: Evidence Act S. 131(1) – Burden of proof – Whether it is who asserts that has the burden of proof in respect of matter alleged.

STATUTE: Interpretation thereof – A statute is the will of the legislature – Whether the duty of court is to interpret the statute according to the will of the legislature – Principle in ***Ugwu Vs. Ararume (2007) 12 NWLR (Pt. 1048) 367.***

WORDS AND PHRASES: Testimonial – Meaning.

Issues for Determination

> ***"1. Whether the lower court was right to have held that the appellant was not an aspirant in the 2nd respondent's primaries dated 4th December, 2014 culminating in this appeal for the purpose of invoking the provisions of Section 87(9) of Electoral Act (as amended).***
>
> ***2. Whether the lower court was right in holding that the appellant has not establish the allegation of forged documents and declaration regarding the 1st respondent's INEC Form CF 001 bordering his certificate and date of birth.***
>
> ***3. Whether the lower court was right in holding that the 1st respondent had not been elected into office as Governor of Yobe State more than twice in two previous elections prior to the April 2015 Governorship election."***

Facts of the Matter

This appeal emanates from the judgment of the Court of Appeal, Abuja Judicial Division in Appeal No. CA/A/809/2015 between **Engr. Mustapha Yunusa Maihaja Vs. Alhaji Ibrahim Gaidam & 2 Ors, Coram Moore A.A. Adumein, Joseph E. Ekanem and Muhammed MUSTAPHA JJCA.** The judgment being appealed against was delivered by the Court of Appeal on the

28th of July, 2016. In the judgment, the Court of Appeal partly resolved issue one (out of the three issues formulated) in favour of the appellant but dismissed the appeal of the appellant.

Dissatisfied with the said judgment, the appellant filed a notice of appeal dated 11th August, 2016 containing five (5) grounds of appeal. The appellant also filed another notice of appeal on the 12th of October, 2016 in expressing his grievances and dissatisfaction with the judgment of the Court of Appeal. He (the appellant) has however indicated in paragraph 5.1 of his brief of argument to rely on his notice of appeal filed on 12th day of October, 2016 containing six (6) grounds of appeal.

The appellant was the plaintiff in an originating summons filed in Suit No. **FHC/ABJ/CS/220/2015, Engr. Mustapha Yunusa Maihaja Vs. Alhaji Ibrahim Gaidam & 2 ORS** dated 19th day of March, 2015 and filed at the registry of the Federal High Court, Abuja. The suit sought a number of declaratory reliefs and sundry orders including nullification of the nomination of the 1st respondent as the candidate of the 2nd respondent in the 2015 governorship election of Yobe State.

The grouses of the appellant, from the inception of the political tussle, are summarized thus; that:

i) The 1st respondent made false information in his Form CF001, affidavit of personal particulars (Exhibit MAIHAJA 1 attached to the originating summons) by annexing a Primary School Leaving Testimonial dated 22nd day of December, 1969 issued by Yunusari Local Education Authority (LEA) of Borno State of Nigeria.

ii) The appellant also alleged that the 1st respondent submitted the said Primary School Leaving Testimonial to the 3rd respondent knowing same to be a forged Certificate contrary to Section 182(1)(J) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) and pursuant to Section 31(5) of the Electoral Act 2010 (as amended).

iii) The appellant also claimed that the 1st respondent ought to

be disqualified from contesting for the office of the Governor of Yobe State on the grounds of false declaration in Form CF001 and for allegedly presenting a forged Certificate to the 3rd respondent contrary to the provision of Section 182(1)(J) of the Constitution (Supra) and pursuant to Section 31(5) of the Electoral Act 2010 (as amended).

iv) The 1st respondent was also alleged to have furnished some other documents along with Form CF001 and which documents bear some other dates of birth different from 15th September, 1956 contained in Form CF001 and the birth certificate Exhibit MAIHAJA 13A issued by the National Population Commission to the 1st respondent.

v) The 1st respondent was alleged not to be eligible to contest the 11th April, 2015 Governorship election of Yobe State on the ground that by virtue of the combined effects of Sections 180(2)(a), 181(1), 182(1)(b) and 185(1) of the Constitution (Supra) he had been twice elected into the office of the Governor of Yobe State, and

Vi) The appellant's position is that, being the only other aspirant for the office of Governor of Yobe State in respect of the 11th April, 2015 Governorship election under the platform of the 2nd respondent, he was entitled to take the place of the 1st respondent.

The case of the 1st and 2nd respondents on the originating Summons as canvassed at the trial stage was that:

"i) ***The appellant did not submit his forms as required by the***

Guidelines of the 2nd respondent and because of the said failure, he could not participate in the screening of the aspirants on 30th of November, 2014.

ii) The appellant therefore was not an aspirant at the primary election where the 1st respondent emerged as the winner.

iii) The 1st and 2nd respondents also state that prior to the election of 11th April 2015, the 1st respondent had only been elected as the Governor of Yobe state Once and that was in the election of April 2011.

iv) It was also the case of 1st and 2nd respondents that the 1st respondent was born on the 15th September, 1956 as shown in his birth certificate issued by the National Population Commission (Exhibit A) and the 1st respondent only noticed the discrepancy in the date and month of his birth wrongly stated in 1st respondent's National Youth Service Corp Exemption Certificate and in his Voters Card when he read the affidavit in support of the originating summons.

v) It was also contended that there was no time the 1st respondent gave any information that he was born on any other date than 15th September, 1956 to the National Youth Service Corps and/or the 3rd respondent and that his School Leaving Testimonial of Primary Education was issued to the 1st respondent by the relevant authority long after he left the school."

The originating summons was heard by the trial court on 21st May, 2015 along

with the notice of preliminary objection of the 1st & 2nd respondents and judgment was delivered by the trial court on the 16th November, 2016 upholding the preliminary objection of the 1st and 2nd respondents and striking out the entire suit of the appellant for want of jurisdiction.

Aggrieved by the decision of the trial court, the appellant filed an appeal at the Court of Appeal which appeal was heard on 31st May, 2016 and judgment delivered on 28th day of July, 2016 as earlier indicated above. The Court of Appeal allowed the appeal in part while it substantially dismissed the appeal of the appellant. The lower court after dismissing the preliminary objection filed by the 1st and 2nd respondents to the appeal partially resolved in favour of the appellant Issue No. 1 on the question of the jurisdiction of the Federal High Court to entertain the appellant's originating summons and duty of the trial court to express its opinion or decision on all issues canvassed before it even if the preliminary objection succeeded.

The Court of Appeal resolved issues No. 2 and 3 in the appeal in favour of the respondents and also dismissed the appeal with costs. But, being dissatisfied with the judgment of the Court of Appeal the appellant decided to appeal to the Supreme Court.

Held: *(Unanimously dismissing the appeal)*

1. *The purport of S. 87(9) of the Electoral Act, 2010 (as amended).*

I have chewed and digested the respective arguments put forward for and against by the parties on issue one. One central fact keeps resonating as to the position of the law under Section 87(9), whether it exists for the benefit of a party who did not participate in the party primaries. Having quoted the said provisions verbatim above, what remains for me to do is x-ray the law vis-à-vis the facts of this matter on issue one. Beyond doubt, the said section permits an aspirant who complains that any of the provisions of the Electoral Act (Supra) or the guideline of a political party has not been complied with in the selection or a nomination of a candidate of a political party for election may apply to a Federal High Court, or the High Court of a state or FCT for redress. *(P 210 paras F – I)*

Per Baje (JSC)

"Did the appellant participate in the primary election of the 2nd respondent conducted on the 4th December, 2014 or was he prevented, or did he not, for whatever reason or reasons, participate in the said primaries. As I shall justify below, the law seems settled on these legal arguments. The evidence of the appellant, as contained in pages 14-18, paragraphs 8, 9, 14, 15, 24 and 25 of the appellant's affidavit in support of the originating summons, is to the effect that another agency or institution prevented him from submitting his nomination forms which he spent Five Hundred Thousand Naira (N500,000) for the Expression of Interest and another Five Million Naira (N5m) to procure. To be specific, paragraph 14 of the affidavit is to the effect that men of the Nigeria Police Force directly and/or on the alleged instruction of the State Party Chairman of the 2nd defendant prevented the appellant from gaining access to the State Secretariat of the Party to submit his expensive nomination forms, among other formalities. Regrettably, neither the police nor the Chairman of the Yobe State chapter of the 2nd respondent against whom specific allegations have been made was made a party to the suit when it was filed.

More revealing are the depositions in paragraphs 24 and 25 of the appellant's affidavit of 9th March, 2015 in support of the originating summons which unequivocally showed, from the horse's mouth (by the appellant) that no access was allowed for the conduct of the primaries and that, as a matter of fact (deposed on oath by no one other than the appellant himself), no primary election was conducted on 4th December, 2014 by the 2nd respondent.

Two possibilities exist here. One is the appellant was excluded or prevented from accessing the secretariat of the 2nd respondent by the police. The other possibility is that the appellant; for personal, private, political, religious or other considerations failed to participate in the said primaries." *(P 211 Paras A – G)*

2. Extent and scope of S.87(9)

The law is too well settled to warrant restatement. For the avoidance of doubt, this court will endeavour to repeat itself on this vital issue of law. It was, and remains our firm conviction, informed by law, that in order to be qualified to complain about the propriety of the conduct

of a primary election of a political party, the appellant would need to show convincingly by unassailable evidence, that he actually participated in the said primary election that formed the basis of this appeal. Otherwise, he would have robbed himself of the legal right, put differently, his suit will lack the legal potency to avail him any protection under Section 87(9) of the Electoral Act, 2010 (supra).
(Pp 211 Paras H – B)

3. *Courts have jurisdiction to hear complaint by an aspirant on the conduct of primary elections*
See Peoples Democratic Party Vs. Timipre Sylva & Ors (2012) 13 NWLR (Pt 1316) 85 at 126, where this court held as follows:

> **"Section 87(9) of the Electoral Act confers jurisdiction on the courts to hear complaints from a candidate who participated at his party's primaries. The fact in this case are conclusive that the 1st respondent did not participate as candidate in the PDP primaries which held on 19/11/11 to choose the party candidate for general election for Governor of Bayelsa State which was fixed for 12/12/12. The 1st respondent not being a candidate at the primaries cannot be heard to complain about the conduct of the primaries. Section 87(9) of the Electoral Act is thus not applicable. The PDP has the right to bar the 1st respondent, or any of its members from contesting its primaries if it so desires."**
> *(P 212 paras B – E)*

Per Baje (JSC)

"We are also bound by our earlier decision in Ukachukwu Vs. PDP (2014)17 NWLR (Pt.1435) 134, on this issue where we restated that to invoke the provisions of Section 87(9) of the Electoral Act, 2010 (as amended) would necessarily require that: (1) there must be complaint that the party's guidelines or the provisions of the Electoral Act were not observed in the nomination process and (2) The complainant must have participated in the primary election. In

the words of this court per Kekere-Ekun, JSC in Ukachukwu Vs. PDP (supra) at page 182 paragraph F – H. The learned jurist had stated the unambiguous position of the law as follows:

> ***"The Point being made by this court is that Section 87(9) of the Electoral Act is very narrow in scope as to the jurisdiction exercisable by the court. The literal interpretation of Section 87(9) of the Electoral Act is that an aspirant has a right to complain where the provisions of the Electoral Act and/or the guidelines of a political party have not been complied with in the selection or nomination of a candidate for election…However, the provision is not at large. The complainant must be an aspirant who participated in the primary election that produced the sponsored candidate. See Uwazuruike Vs. Nwachukwu (2013) 3 NWLR (Pt. 1342) 503 at 526, E – G."***

The above position was also re-stated in Daniel Vs. INEC & Ors (2015) 3-4 MJSC 1 at 45, F-G that before a candidate for the primaries can have a *locus standi* to sue on the conduct of the primaries, he must be screened, cleared by his political party and participate at the said primaries. Anything short of that, the candidate who did not participate in the primaries could be conveniently classified as a meddlesome interloper with no real interest in the primaries.

As stated above, the evidence of the appellant as stated in pages 14-18, paragraph 8, 9, 14, 15, 24 and 25 of his affidavit in support of the originating summons, is to the effect that, another agency or institution prevented him from submitting his nomination forms which he spent Five Hundred Thousand Naira (N500,000) for the Expression of Interest and another Five Million Naira (N5m) to procure. *(Pp 212 – 213 paras F – F)*

4. Appellant was not an aspirant and has no remedy under S.87(9)

By his own admission, the appellant did well in stating correctly

what transpired before the primary election conducted by the 2nd respondent on 4th December, 2014. While I sympathise with the appellant, I am unable to close my eyes to the resonating facts of non-participation in the primaries. Assuming he was wrongly or unlawfully excluded, his remedies would be elsewhere in other forms of civil claims in damages for the refund of political expenses and sundry remedies. Section 87(9) of Electoral Act, 2010 (as amended) appears to me to fall within the category of 'closed rights'. It is not open-ended. I am of the considered view that; it does not capture (wrongful) exclusion, prevention or obstruction orchestrated by or through the instrumentality of third parties or agencies. May be this is saved for future amendment of the Electoral Act. A recap of the provision of Section 87(9) of the Electoral Act 2010 (as amended) states that; "Notwithstanding the provisions of this Act or rules of a political party, an aspirant who complains that any of the provisions of this Act and the guidelines of a political party has not been complied with in the selection or nomination of a candidate of a political party for election, may apply to the Federal High Court or the High Court of a State or Federal Capital Territory, for redress."

Given the above analyses and expositions on facts, statutory provisions and case law, I resolve issue one against the appellant. I hold that, by his own affidavit evidence, the appellant did not participate in the primary election conducted by the 2nd respondent on 4th December, 2014 and thus unable to take benefit of the provisions of Section 87(9) of the Electoral Act 2010 (as amended).
(P 214 paras B – H)

5. *Every forgery requires proof of the requisite mens rea*

I recall the ugly days of the "Toronto Saga" where a convicted but later pardoned former Speaker of the House of Representatives was found to have forged his certificate to assume that prominent National office. This court has since taken a stern position on the issue of falsification of document or forgery of certificates particularly to secure unmerited political advantages. Only recently, in another similar but different scenario involving political gladiators in the case of Hon. Hassan Anthony Saleh Vs. Christain Adabah Abah (SUPREME Court Suit No. SC/144/2016), this court

was emphatic in declaring that every forgery requires proof of requisite *mens rea,* i.e. knowledge that the document presented was going to be used fraudulently or dishonestly as genuine, which onus must be discharged by the appellant. This becomes crucial in view of the far-reaching implications of the provisions of Section 182(1)(j) of the 1999 Constitution (as amended) which is to the effect that, quote:

> **"182. (1) No person shall be qualified for election to the office of Governor of a State if**
> **(j) he has presented a forged certificate to the independent National Electoral Commission."**
> *(P 217 Paras D – H)*

6. *Any person who had ever presented forged certificate to INEC stands disqualified*

The law is very clear to warrant any form of colourated interpretations. The question is whether a certificate that turned out to be forged has ever been presented, and not whether the forger has ever been charged, tried or convicted on this. I made it abundantly clear in Saleh Vs. Abah (supra), and our position in that case is instructive in this circumstances, that:

> ***"The intention of the Constitution is that anyone who had presented a forged certificate to INEC should stand automatically disqualified. No decent system or polity should condone, or through judicial policy and decisions, encourage the dangerous culture of forging certificates with impunity to seek electoral contest. This court must take the lead in righting the wrongs in our society, if and when the opportunity presents itself as in this appeal. Allowing criminality and certificate forgery to continue to percolate into the streams, water and oceans of our national polity would only mean our waters are, and will remain dangerously contaminated. The purification efforts must start now, and be sustained as we seek, as a nation, to now 'change' from our old culture of reckless impunity."***

The above is a pointer that our position is stern against certification forgery when and if we found it sufficiently and satisfactorily proved. *(Pp 217 – 218 paras H – F)*

7. *What a party must prove in order to succeed in a case of forgery and false declarations*

The necessary question is what must a party prove to succeed on the allegation of forgery and false declaration. As rightly held by the court below, it is crucial to prove:

> **"1) The existence of a document in writing;**
> **2) That the document or writing was forged**
> **3) That the forgery was by the person being accused;**
> **4) That the party who made it knew that the document or writing was false; and**
> **5) The party alleged intended the forged document to be acted upon as genuine."**

***See* Alhaji Kashim Ibrahim Imam & 2 Ors Vs. Senator Alli Modu Sheriff & 11 Ors. (2005) 4 NWLR (PT.914) 80 and APC Vs. PDP (2015) 15 NWLR (PT. 1481) 1.** *(Pp 218 – 219 paras F – A)*

*Per Baje (JSC)***"**

I have noted conjectures, speculative and inferential analogies on the part of the appellant in drawing a nexus between the documents submitted by the 1st respondent to the 3rd respondent in Form CF001 (Exhibit MAIHAJA 13). The 1st respondent did not state in the said declaration that Borno State was created in 1969 and/or that it was Borno State that issued the Testimonial in question. The appellant has also not debunked or disproved the fact that, on the face of the said testimonial, nothing indicates the fact that it was issued by Borno State or by Yunusari Local Education Authority. I also agree with the learned counsel to the 1st and 2nd respondents that there is no evidence from the appellant that "Yunusari Primary School", which the 1st respondent stated in his Form CF001 (Exhibit MAIHAJA 13)

that he attended between 1963 to 1969, was never in existence at that particular period.

The allegations of dates of birth made by the appellant as basis for seeking the nullification of the 1st respondent election is also, in our considered view misplaced. This is because the deposition in paragraph 21 (c) and (d) of the counter affidavit filed by the 1st respondent at page 247 of the record of appeal that the 1st respondent indicated that he was born on 15th September, 1956. This evidence is unchallenged and also further corroborated by Form CF001 filed on oath (page 118 of record of appeal) by the 1st respondent and by Exhibit MAIHAJA 13A1 which was issued by National Population Commission which has the statutory responsibility under Section 6(1)(b) of the National Population Commission Act, Cap. N7, Laws of Federation, 2004.

The consequence of submitting forged document to the 3rd respondent is grave. It therefore required direct, sharp and somewhat precise evidence and proof which leads to no other conclusion that the 1st respondent forged documents and made false declaration to the 3rd respondent. The nature of evidence required in this kind of situation is similar to that of 'mathematical precision' of two multiplied by two, equals four (2x2=4).” *(P 219 paras A – H.)*

8. *Requirements of proof under SS 362 and 363 of Penal Code*
In Kakih Vs. PDP (2014) 15 NWLR Pt. 1430) 374, this court held thus:

> ***“By virtue of Section 362 and 363 of the penal code, a party who asserts that another person presented a forged certificate must prove beyond reasonable doubt that the certificate was presented with the knowledge that it would be used fraudulently or dishonestly as genuine. In this case, for the appellant to succeed in his case, of presentation of forged certificate, he ought to have presented evidence that the 4th respondent presented a forged certificate to the 2nd respondent knowing that it would be used fraudulently or dishonestly as genuine...”*** *(P 220 paras A – C)*

9. *Proof of forgery must be beyond reasonable doubt*
In politically oriented litigations, where the allegation of

presentation of forged certificate to INEC is in issue, the accusing party must prove that the certificate presented to the INEC was forged and that it was the candidate that presented the certificate and that the two ingredients must be proved beyond reasonable doubt as held in Audu Vs. INEC (No. 2) (2010) 13 NWLR (Pt. 1212) 456 at 507 paras E-F. In resolving issue two, it is my considered view that the lower Court was right to have held on page 859 of the record of appeal that the appellant in order to establish criminal allegation of forgery of the Testimonial in question under the provision of Section 135 of the Evidence Act, 2011 must do so by proof beyond reasonable doubt of the said allegation. I see no logical or legal basis for disturbing the mandate of the 1st respondent on this ground. The existence of those facts, if at all, only resonates in the imagination of the appellant who has refused and/or failed to prove that there is no "Yunusari Primary School" that could have issued such certificate, or that the 1st respondent was not born on the 15th September, 1956 being the date declared in Form Cf001.

In view of the above, issue two is also resolved against the appellant. Put differently, issue two is resolved in favour of the 1st, 2nd and 3rd respondents. *(P 220 paras C – H)*

10. A statute is the will of the legislature and the duty of court is to interpret it according to the will of the legislature.

The duty of court, particularly ours as the Apex court, is to interpret the statute in accordance with the intention of the law makers. In Ugwu Vs. Ararume (2007) 12 NWLR (Pt. 1048) 367 at 498 this court stated thus:

> ***"A statute it is always said, is "the will of the legislature" and any document which is presented to it as a statute is an authentic expression of the legislative will. The function of the court is to interpret that document according to the intent of those who made it. Thus, the court declares the intention of the legislature".***
> *(P 223 Paras A – D)*

Per Baje (JSC)

"The principles of interpretation of the provisions of the constitution enjoin the court to interpret the constitution as a whole taking into consideration, related sections. The lead judgment of this court in Brig. Gen. Mohammed Buba Marwa & ORS. Vs. Admiral Murtala Nyako & Ors. (supra) is instructive. Quoting the decision in A.T. LTD. Vs. A. D. H. LTD (2007) 15 NWLR (Pt. 1056) 118 at 166 167, in the lead Judgment, Onnoghen JSC (as he then was; now CJN) stated thus:

> ***"The law is settled law that when a court is faced with the interpretation of a constitutional provision, the entire provision must be read together as a whole so as to determine the object of that provision. Secondly, it is settled principle of law that where a court is faced with alternatives in the course of interpreting the constitution or statute, the alternative construction that is consistent with smooth running of the system shall prevail as held in Tukur Vs. Government of Gongola State (1989) 4 NWLR (Pt.117) 517 at 579; I must remember that this court has said it several times that the provisions of the constitution ought to be read and interpreted as a whole in that related sections must be construed together…Finally, I must approach the matter from the view point that since the decision of this court in Rabiu Vs. Ogun State (1981) 2 NCLR 293, this court has opted for the principle of construction often expressed in the maxim: ut res magis valeat quam pereat. This means that even if alternative construction are equally open, I shall opt for that alternative which is to be consistent with the smooth working of the system which constitution read as a whole has set out to regulate, and so the alternative which will disrupt the smooth development of the system is to be rejected." Per ONNOGHEN, J.S.C (Pp. 56-57, paras. A-B)."***

The above casts upon institutional duties of ensuring that

Constitutional language is to be given a reasonable construction and absurd consequences are to be avoided. Constitutional provisions dealing with the same subject matter are to be constructed together. Seemingly conflicting parts are to be harmonized, if possible, so that effect can be given to all parts of the constitution. *See* Brig. Gen. Mohammed Buba Marwa & Ors. Vs. Admiral Murtala Nyako & Ors (supra) Per ONNOGHEN, J.S.C (Pp. 52-54, paras. C-B)."
(Pp 223 – 224 paras D – C)

11. Interpretation of operation of S. 191(1) of CFRN

Turning to the issue at hand, there is no dispute as to the fact that the 1st respondent became Governor by operation of Section 191(1) of the Constitution (Supra) upon the demise of the then Governor of Yobe State. Put differently, the 1st respondent did not assume office as Governor in 2009 as a result of his election into that office. He was constitutionally "holding", and held the office in trust for the duration of the remaining tenure of the late Governor Senator Ali Mamman. Section 182(1)(b) of the Constitution does not affect or impact on when tenure is spent-out by operation of Section 191(1) of the same constitution. A community reading of Sections 180(1), (a), (2)(a), 181(1), 182 (1)(b), 185, 186 and 191(1) of the Constitution of the Federal Republic of Nigeria 1999 (as amended) reveal that the 1st respondent had not been elected into the office of Governor of Yobe State twice prior to the holding of the Governorship election on the 11th of April, 2015 in Yobe State.

The above becomes even more compelling given the fact that the appellant had unambiguously stated in paragraphs 36, 37 and 39 of the affidavit in support of originating summons that the 1st respondent became the Governor of Yobe on 28th January, 2009 by operation of the Constitution of the Federal Republic of Nigeria following the death of Senator Ali Mamman who was elected Governor in 2007. The 1st respondent, by necessary implications, only stepped in and completed the tenure of Late Senator Ali Mamman as Governor in holding capacity. Therefore, the 1st respondent validly, legally and constitutionally contested and won for the first time as Governor of Yobe State in his own right in 2011, and thus qualified to contest the Governorship election in Yobe State

in 2015. *(Pp 224 – 225 Paras F – C)*

Per Baje (JSC)

"For clarity, I will endeavour to shed further lights on the provisions of Section 191(1) of the Constitution. It states, and I quote:

> ***"191. (1) The Deputy Governor of a State shall hold the office of Governor of the State if the office of Governor becomes vacant by reason of death, resignation, impeachment, permanent incapacity or removal of the governor from office for any other reason in accordance with section 188or189 of this constitution."***

The word is "hold office of Governor". Such person only acts in position of Governor by 'holding' the office in a kind of public trust (and I also think for the dead, the living and unborn) till expiration of the tenure of the late Governor. To the best of my understanding, given the fact that the words used in the said provisions of the Constitution was clear and unambiguous, "holding" connotes acting in the capacity of Governor, by operation of Section 191(1) of the Constitution of the Federal Republic of Nigeria (as amended). The person "holding" the office of Governor under this provision continues to function and may step-aside in the very unlikely event that the former, deceased Governor resurrects from the dead, or, under miraculous circumstances, had his permanent incapacity turned around to become subsequently active and capable. The section does not envisage "permanence" or a permanent tenure. It envisages "holding office" in a kind of interim, stop-gap arrangement to avoid a vacuum, which the Constitution abhors and provides against under section 191(1) of the Constitution of the Federal Republic of Nigeria (as amended).

In my candid opinion, the respondent had not been elected into the office of Governor of Yobe twice prior to the holding of the Governorship election on the 11th of April, 2015 in Yobe State. He is therefore qualified to contest the April 2015 election which he had already contested and won.

On this note, and given the above, I resolve issue three against the appellant. In sum, this appeal fails and is hereby dismissed. I affirm the judgment of the lower court. I make no order as to costs. *(Pp 225 – 226 Paras C – C)*

12. Locus standi of a party under S.87(9) of the Electoral Act

Much have been written by this court on the provisions of Section 87(9) of the Electoral Act, 2010, as amended, as it relates to invocation of the jurisdiction of the court in a matter of nomination of a candidate of a political party to contest a general election. In the circumstances it should now be taken as settled law only an aspirant who took part in the primary election for the nomination of a party's candidate for the particular election has the *locus standi* to approach the court for reliefs against the result or conduct of the said election. This means that any person who did not participate in the said primary election as an aspirant lacks the *locus standi* to approach the court to challenge the result of the said election *see* PDP Vs. Sylva (2012) 13 NWLR (Pt. 1316) 85 at 125; APGA Vs. Anyanwu (2014) 7 NWLR (Pt. 1407) 541 at 575; Ukachukwu Vs. PDP (2014) 17 NWLR (Pt. 1435) 134; Daniel Vs. INEC (2015) 3-4 MJSC 1 at 45 etc.

In the instant case, it is not in dispute that appellant did not participate in the primary election scheduled for the nomination of the Governorship candidate of the APC for the Yobe State Governorship election of 2015. The situation being as it is, it is very clear that appellant lacks the *locus standi* to contest the said primary election in any court of law neither would the court have the requisite jurisdiction to entertain his complaint(s). *(Pp 226 – 227 Paras E – A)*

Per Onnoghen (CJN)

"Though the provisions of Section 31(5)and 6 of the Electoral Act, 2010 as amended confers the right on any parson who alleges that a candidate for an election has given false information in the forms or processes filed with INEC for the purpose of an election to approach the court for redress, the issue is whether appellant has established the falsity of the information contained in the affidavit accompanying the nomination form filled by 1st respondent. The

answer is clearly in the negative. The fact that the Borno State was not in existence by December, 1969 when the Primary School Leaving Testimonial was said to have been issued does not mean that the primary school in question does not exist or located in the present day Borno State neither does it mean or establish the fact that 1st respondent did not attend the said primary school. The document in question is simply a testimonial which usually affirms facts that had existed in the past. It can be issued today to confirm facts existing on record of very many years ago. It follows that the geographic location in which the primary school in question has changed does not, in my considered view, make statement of the fact that 1st respondent attended that institution for the period in question, false.

Apart from that, appellant has failed woefully to prove the falsity of the document in accordance with the provisions of the law which makes the standard of proof to be beyond reasonable doubt, being a criminal allegation." *(P 227 paras B – G)*

Per Kekere-Ekun (JSC)

"The law is settled that whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts, which he asserts, shall prove that those facts exist. It is also the law that burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side. Where the commission of a crime is directly in issue in any proceeding, civil or criminal, it must be proved beyond reasonable doubt. See Sections 131, 132 and 135 (c) of the Evidence Act 2011.

It follows that where there is an allegation made pursuant to Section 31 (5) of the Electoral Act 2010, as amended, that any information given by a candidate in the affidavit or any document submitted by that candidate is false, the burden is on the person who makes the assertion to prove that fact.

The appellant's contention before the trial court was that the 1st respondent was not qualified to contest the Office of the Governor of Yobe State in the General Election which took place on 11th April, 2015 because he had given false information in his form CF001 (Affidavit of Personal Particulars Exhibit MAIHAJA 13) submitted

to the 3rd respondent (INEC)." *(P 228 paras C– G)*

13. Interpretation of S. 31 (5) of the Electoral Act 2010 (as amended)
My understanding of subsection (5) of Section 31 is that the false information complained of must relate to the constitutional requirements for election into the office in dispute in this case the requirements of Section 177 (b) & (c) of the Constitution.

The applicant therefore had the onus of satisfying the court below not only that the testimonial was forged but also that the 1st respondent does not possess the educational qualification stipulated in Section 177 (c) of the Constitution. He failed woefully on both counts. Having alleged forgery, which is a criminal offence, the onus was on him to establish that fact beyond reasonable doubt notwithstanding the fact that the allegation was made in civil proceedings. I agree with the court below that the appellant failed to tender any evidence, such as a disclaimer from the authority that issued the testimonial, stating that it was a forged document. Not only must it be proved that the document was forged, it must also be proved that it was the 1st respondent who forged the document. ***See*** **Ansa Vs. Ishie (2005) 15 NWLR (Pt. 948) 210; Eya Vs. Olepade & Anor. (2011) LPELR – 1184 (SC); APC Vs. PDP (2015) LPELR – 24587 (SC). It must also be shown that the person relying on the document knew it to be false and presented it with the intent that it may be used or acted upon as genuine to the prejudice of any person or with intent that any person may, in the belief that it is genuine be induced to do or refrain from doing any act, whether in Nigeria or elsewhere.** ***See*** **Ndoma-Egba Vs. ACB PLC (2005) 14 NWLR (Pt. 944) 79. There was no such evidence before the trial court. There was also no evidence before the court to contradict the 1st respondent's claim of having attended Yunusari Primary School from 1963 1969. The fact that Borno State was not in existence in 1969 is not proof that the school did not exist.** *(Pp 230 – 231 paras E – C)*

14. Requirement of proof of age as stipulated under S. 177(c) of the CFRN
As regards the age of the 1st respondent, the onus was on the appellant to prove that as at the time he contested the election, that 1st respondent had not attained the age of 35 years as required by

Section 177 (c) of the Constitution. If there is any discrepancy in the age of a candidate, it must have a bearing on the constitutional requirement before it can have the effect of disqualifying him. *See* Joe Odey Agi, SAN Vs. PDP & Ors. (2016) 12 SC (Pt. 1) 74 @ 138 – 141. It was held in this case that there must be evidence of an intention by the candidate to circumvent the provisions of the Constitution. There was none established in this case.
(P 231 paras D – F)

15. It is only an aspirant who complains non-compliance with S. 87(9) that can sue

Section 87(9) of the Electoral Act, 2010, as amended, is unambiguously clear that it is only an aspirant who complains that the provisions of the Act and the guidelines of his political party have not been complied with in the selection or nomination of a candidate of his political party for the general election has the *locus standi* to apply to the Federal High Court, or the High Court of a State, or the High Court of the Federal Capital Territorial for redress. The provisions of Section 87(9) of the Electoral Act, 2010, as amended, have been interpreted in a number of cases by this court to the effect that the plaintiff or complainant who did not participate in the party primary election, as an aspirant, has no *locus standi* to complain about the outcome of the said primary election. *See* PDP Vs. Sylva (2012) 13 NWLR (Pt. 1316) 85 at 125; Umazuruike Vs. Nwachukwu (2013) 3 NWLR (pt. 1342) 503 at 526; APGA Vs. Anyanwu (2014) 7 NWLR (pt. 1407) 541 at 575; Anyanwu Vs. Ogunenwe (2014) 8 NWLR (pt. 1410) 437; Ukachukwu Vs. PDP (2014) 17 NWLR (pt. 1435) 134; Daniel Vs. INEC & ORS. (2015) 3 – 4 MJSC 1 at 45.
(P 232 paras D – H)

Per Eko (JSC)

"The point was made more poignant in PDP Vs. Sylva (supra) at 126 where this court stated the law thus:

"Section 87(9) of the Electoral Act confers jurisdiction on

courts to hear complainants from "candidate who participated at his party's primaries. The fact in this case are conclusive that the 1st respondent did not participate as a candidate in the PDP primaries which held on 19/11/11 to choose the party candidate for the general election for (election of the) Governor of Bayelsa State

The 1st respondent not being a candidate at the primaries cannot be heard to complain about the conduct of the primaries. Section 87(9) of the Electoral Act is thus not applicable. The PDP has the right to bar the 1st respondent, or any of its members from contesting its primaries if it so desires.

The appellant, by his own showing, did not participate in the primary election of his party, APC, for the election of the party's candidates for the election to the office of Governor of Yobe State. He, therefore, did not have the *locus standi* under Section 87(9) of the Electoral Act, 2010, as amended, to approach the Federal High Court to complain about the conduct of the APC primary election for the election/nomination of the party's candidate for the office of Governor of Yobe State. To this extent he was, being a busybody, rightly shut out by the courts. I have no cause therefore to disturb the concurrent findings or judgments of the trial court and the court below on this issue, which I resolve against the appellant."
(Pp 232 – 233 paras H – F)

16. Locus to sue under S. 31(5)

Issue 2 argued in this appeal seemingly was brought before the trial court under Section 31(5) & (6) of the Electoral Act. In that wise, as a member of the public the appellant was empowered by subsection (5) of Section 31 of the Act to approach the High Court to seek "a declaration that the information contained in the affidavit" required under subsection (2) thereof to accompany the 1st respondent's nomination forms is false. The High Court if satisfied, on the complaint or application that the information contained in the nomination form of the respondent was false, is obligated to

issuing an order disqualifying the 1st respondent from contesting the election. *(P 233 Paras G – I)*

17. *Meaning of the word testimonial*

A testimonial, as it appears from the world, is a formal written statement or testimony, often by a former teacher or employer, about somebody's abilities, qualities and character. See Oxford Advanced Learner's Dictionary. A testimonial normally or in its usual context, affirms or confirms facts that existed in the past.

The testimonial in dispute forms part of Exhibit MAIHAJA 13. It is Exhibit MAIHAJA 13 A9 and it is at page 130 of the record. It certifies that the 1st respondent attended a named primary school and completed his primary education thereat on 22nd December, 1969. The appellant asserts that this information on oath is false and also that the testimonial is a forgery. By that assertion some criminal offences had allegedly been committed. That is, perjury, forgery and using as genuine a forged document.

On these weighty allegation of the commission of criminal offences it is not enough for the appellant to contend that the Yunusari Primary School never existed between 1963 and 1969. A more empirical evidence proving beyond reasonable doubt that the information on oath was false, that the primary school never existed in actuality and that the testimonial was a forgery should have come from the appellant in view of Sections 131(1), 132 and 135 of the Evidence Act. *(P 234 paras D – G)*

18. *He who asserts has the burden to prove*

Section 131(1) of the Evidence Act, 2011 provides that whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts shall prove that those facts exist. Put streetwise, he who asserts must prove his assertion. It therefore logically follows that what is alleged without proof can be denied without proof. When a fact is asserted without proof then the existence of the alleged fact is not established. That is why Section 132 of the Evidence Act provides further that the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

Where, as in this case, the commission of a crime by a party to the proceeding is alleged, the alleged criminal offence must be proved beyond reasonable doubt; and the burden of proving the commission of the criminal offence beyond reasonable doubt is on that person who asserts it. See Section 135(1) of the Evidence Act, See Nwobodo Vs. C.C. Onoh & Ors. (1983) 14 NSCC 470. Allegations beyond imaginable conjectures and speculations in political times and proof beyond reasonable doubt such allegations of criminal offences are not one and the same thing. The former may be of unacceptable political desperation. The latter is an imperative in criminal law practice and procedure.*(Pp 234 – 235 paras H – D)*

*Per Eko (JSC)***"**

The appellant also makes the same blunder on the assertion that the 1st respondent presented false particulars of his date of birth. Not only that the appellant failed to prove the perforative allegation beyond reasonable doubt, he was effectively subdued and silenced by the overwhelming evidence marshaled in paragraph 21(c) & (d) of the counter-affidavit of the 1st respondent. The appellant just failed to, or did not, prove the allegation that is criminal in nature beyond reasonable doubt, as the law requires.

Issues 1 and 2, as argued in this appeal are hereby resolved against the appellant. I am in complete agreement with my learned brother, SIDI DAUDA BAGE, JSC, on these Issues as he did resolve them.

Issues 1 and 2, as argued, are matters touching on the scope and operation of Sections 87(9) and 31(2), (5) and (6) of the Electoral Act, 2010, as amended. The questions they raised are largely pre-election issues. I have held that the appellant lacked locus *standi under* Section 87(9) of the Act to complain about the primary election of his political party that he never participated in. He also failed to prove the allegations that 1st respondent had furnished false informations to the affidavit verifying his Personal Particulars in the nomination form that the latter submitted to INEC the 3rd respondent. The proof of the said allegations would have obligated the trial High Court to issue an Order, under Section 31(6) of the Electoral Act, 2010, as amended, disqualifying the 1st respondent

from contesting in the election to the office of the Governor of Yobe State.

The resolutions of Issues 1 and 2 in the appeal are enough to end the dispute. The appellant, in my view, could not have raised the question under Issue 3 under section 31 and 87 of the Electoral Act. Issue 3 appears to me to be largely post election issue that the trial High Court had no jurisdiction to entertain, as the issue appears to belong to Election Tribunal duly constituted under Section 285 of the 1999 Constitution, as altered. The appellant did not, eventually, participate in the Governorship election to warrant his challenging the election of the 1st respondent on the ground that the 1st respondent having been elected to the office of Governor prior to the April, 2015 Governorship election was no longer qualified, under Section 182(1)(b) of the Constitution, to be elected to that office.

The appellant did not bring the question under Section 31 of the Electoral Act, albeit in any polymer act of stretching things to warrant the trial High Court exercising its jurisdiction to entertain it." *(Pp 235 – 236 paras D – D)*

Nigerian cases cited in this Judgment

A.T. Ltd. Vs. A. D. H. Ltd (2007) 15 NWLR (Pt. 1056) 118;
Alhaji Kashim Ibrahim Imam & 2 Ors Vs. Senator Ah Modu Sheriff & 11 Ors. (2005) 4 NWLR (PT.914) 89;
Ansa Vs. Ishie (2005) 15 NWLR (Pt. 948) 210;
Anyanwu Vs. Ogunenwe (2014) 8 NWLR (pt. 1410) 437;
APC Vs. PDP (2015) 15 NWLR (PT. 1481) 1;
APGA Vs. Anyanwu (2014) 7 NWLR (PART 1407) 541-575;
Arebi Vs. Gbabijo (2008) 2 LRECN PAGE 467;
Audu Vs. INEC (No. 2) (2010) 13 NWLR (Pt. 1212) 456;
Brig. Gen. Mohammed Buba Marwa & ORS. Vs. Admiral Murtala Nyako & Ors.;
Chief Chukwuemeka Odumegwu Ojukwu Vs. Chief Olusegun Obasanjo (2004) 12 NWLR (Pt.886);
Daniel Vs. INEC & ORS. (2015) 3 4 MJSC 1;
Eya Vs. Olepade & Anor. (2011) LPELR 1184 (SC);

Joe Odey Agi, SAN Vs. PDP & Ors. (2016) 12 SC (Pt. 1) 74;
Kakih Vs. PDP (2014) 15 NWLR Pt. 1430) 374;
Marwa Vs. Nyako & Ors (2012) 6 NWLR (Pt. 1296) pg. 199
Ndoma-Egba Vs. ACB PLC (2005) 14 NWLR (Pt. 944) 79;
Nwobodo Vs. C.C. Onoh & ORS. (1983) 14 NS 470;
PDP Vs. Sylva & 2 Ors (2012) 18 NWLR (Pt. 1316) 85;
Rabiu Vs. Ogun State (1981) 2 NCLR 293,
Saleh Vs. Abah;
Tukur Vs. Government of Gongola State (1989) 4 NWLR (Pt.117) 517;
Ugwu Vs. Ararume (2007) 12 NWLR (Pt. 1048) 367;
Ukachukwu Vs. PDP (2014) 17 NWLR (Pt. 1435) p. 134;and
Uwazuruike Vs. Nwachukwu (2013) 3 NWLR (Pt. 1342) 503.

Nigerian Statutes cited in this Judgment
1999 Constitution Sections 180 (2) (a), 181 (1) (b), 185, 191 and 251;
Electoral Act 2010 (as amended) Sections 156, 31(5) and 87(9);
Evidence Act 2011 Sections 122(2)(a) 131,132,135 and 135(c);
National Population Commission Act, Cap. N7, Laws of Federation, 2004 Section 6(1)(b);
Penal Code Section 362 and 363

Representation
I.Y.C. Maikyau (SAN) with **T.R. Agbamu, T. A. Rapu, M. Abiodun, P.A. Joseph, A. Belgore, H.A. Matunji, P.C. Nwozor** and **N. Umar**; for the appellant.

H. Fajimite with **B. Olumo, A.A. Shehu, S.A. Yelwa, K.O. Lawal, A.O. Usman** and **S.A. Oke** for the 1st and 2nd respondents.

Alhassan A. Umar with **O. Ikechukwu, G.A. Ismail E. Agbaje, B.M. Abubakar** and **I.S. Mohammed** for the 3rd respondent.

Folasade Afolaju for appellant appearing with **O. Oyelami** and **O. Akinola** (person interest applicant).

DAUDA BAGE, JSC (Delivering the Lead Judgment): This appeal emanates from the judgment of the court below, that is the Court of Appeal, Abuja Judicial Division in Appeal No. CA/A/809/2015 between **Engr. Mustapha Yunusa Maihaja Vs. Alhaji Ibrahim Gaidam & 2 Ors, Coram Moore A.A. Adumein, Joseph E. Ekanem and Muhammed Mustapha JJCA.** The judgment being appealed against was delivered by the court below on the 28th of July, 2016 as captured at pages 824 to 867 of the record of appeal. In the judgment, the court below partly resolved issue one (out of the three issues formulated) in favour of the appellant but dismissed the appeal of the appellant.

Dissatisfied with the said judgment, the appellant filed a notice of appeal dated 11th August, 2016 containing five (5) grounds of appeal. The notice of appeal is contained at pages 868 to 876 of the record of appeal. The appellant also filed another notice of appeal on the 12th of October, 2016 in expressing his grievances and dissatisfaction with the judgment of the Court of Appeal. He (the appellant) has however indicated in paragraph 5.1 of his brief of argument to rely on his notice of appeal filed on 12th day of October, 2016 containing six (6) grounds of appeal as set out on pages 30 to 44 of the supplementary record of appeal transmitted to this honourable court at this instance of the appellant.

SUMMARY OF THE FACTS

The appellant was the plaintiff in an originating summons filed in Suit No. **FHC/ABJ/CS/220/2015, Engr. Mustapha Yunusa Maihaja Vs. Alhaji Ibrahim Gaidam & 2 ORS** dated 19th day of March, 2015 and filed at the registry of the Federal High Court, Abuja. The suit sought a number of declaratory reliefs and sundry orders including nullification of the nomination of the 1st respondent as the candidate of the 2nd respondent in the 2015 governorship election of Yobe State.

The grouses of the appellant, from the inception of the political

tussle, are summarized thus:

vii) The 1st respondent made false information in his Form CF001, affidavit of personal particulars (Exhibit MAIHAJA 1 attached to the originating summons) by annexing a Primary School Leaving Testimonial dated 22nd day of December, 1969 issued by Yunusari Local Education Authority (LEA) of Borno State of Nigeria.

viii) The appellant also alleged that the 1st respondent submitted the said Primary School Leaving Testimonial to the 3rd respondent knowing same to be a forged Certificate contrary to Section 182(1)(J) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) and pursuant to Section 31(5) of the Electoral Act 2010 (as amended).

ix) The appellant also claimed that the 1st respondent ought to be disqualified from contesting for the office of the Governor of Yobe State on the grounds of false declaration in Form CF001 and for allegedly presenting a forged Certificate to the 3rd respondent contrary to the provision of Section 182(1)(J) of the Constitution (Supra) and pursuant to Section 31(5) of the Electoral Act 2010 (as amended).

x) The 1st respondent was also alleged to have furnished some other documents along with Form CF001 and which documents bear some other dates of birth different from 15th September, 1956 contained in Form CF001 and the birth certificate Exhibit MAIHAJA 13A issued by the National

Population Commission to the 1st respondent.

xi) The 1st respondent was alleged not to be eligible to contest the 11th April, 2015 Governorship election of Yobe State on the ground that by virtue of the combined effects of Sections 180(2)(a), 181(1), 182(1)(b) and 185(1) of the Constitution (Supra) he had been twice elected into the office of the Governor of Yobe State, and

xii) The appellant's position is that, being the only other aspirant for the office of Governor of Yobe State in respect of the 11th April, 2015 Governorship election under the platform of the 2nd respondent, he was entitled to take the place of the 1st respondent.

The case of the 1st and 2nd respondents on the originating Summons as canvassed at the trial stage was that:

"I) The appellant did not submit his forms as required by the Guidelines of the 2nd respondent and because of the said failure, he could not participate in the screening of the aspirants on 30th of November, 2014.

ii) The appellant therefore was not an aspirant at the primary election where the 1st respondent emerged as the winner.

iii) The 1st and 2nd respondents also state that prior to the election of 11th April 2015, the 1st respondent had only been elected as the Governor of Yobe state Once and that was in the election of April 2011.

A

iv) It was also the case of 1st and 2nd respondents that the 1st respondent was born on the 15th September, 1956 as shown in his birth certificate issue d by the
B **National Population Commission (Exhibit A) and the 1st respondent only noticed the discrepancy in the date and month of his birth wrongly stated in 1st respondent's National Youth Service Corp**
C **Exemption Certificate and in his Voters Card when he read the affidavit in support of the originating summons.**

D **v) It was also contended that there was no time the 1st respondent gave any information that he was born on any other date than 15th September, 1956 to the National Youth Service Corps and /or the 3rd**
E **respondent and that his School Leaving Testimonial of Primary Education was issued to the 1st respondent by the relevant authority long after he left the school."**

F

The originating summons was heard by the trial court on **21st May, 2015** along with the notice of preliminary objection of the 1st & 2nd respondents and judgment was delivered by the trial court on the 16th **November, 2016**
G upholding the preliminary objection of the 1st and 2nd respondents and striking out the entire suit of the appellant for want of jurisdiction.

Aggrieved by the decision of the trial court, the appellant filed an appeal at the lower court which appeal was heard on **31st May, 2016** and
H judgment delivered on 28th day of July, 2016 as earlier indicated above. The lower court allowed the appeal in part while it substantially dismissed the appeal of the appellant. The lower court after dismissing the preliminary objection filed by the 1st and 2nd respondents to the appeal partially resolved
I in favour of the appellant Issue No. 1 on the question of the jurisdiction of

the Federal High Court to entertain the appellant's originating summons and duty of the trial court to express its opinion or decision on all issues canvassed before it even if the preliminary objection succeeded.

The Court of Appeal resolved issues No. 2 and 3 in the appeal in favour of the respondents and also dismissed the appeal with costs. But, being dissatisfied with the judgment of the Court of Appeal the appellant decided to come meet us upstairs; a not too long journey of a few meters from the Abuja Division of the Court of Appeal to the Supreme Court. That, in not-too-brief, is a summary of the facts and background to this appeal.

Towards resolving the knotty issues in this appeal, the appellant filed his brief of argument dated 25th November, 2016 and a reply brief in response to the 1st and 2nd respondents dated 28th February, 2017. The appellant formulated three issues for the determination of this appeal contained in pages 7-8, paragraph 7.0 – 7.5 of the brief of argument as follows:

> **"Whether having regard to the provisions of Section 31(5) of the Electoral Act, 2010 (as amended) read together with Section 182(1) (J) of the Constitution of the Federal Republic of Nigeria 1999 (as amended), the undisputed depositions contained in the affidavit in support of the originating summons, the provisions of the States (creation and Transitional Provisions) Decree No. 12 of 1976, which clearly established the creation of BORNO STATE on the 3rd of February, 1976, the lower Court properly came to the conclusion that, the appellant failed to show that the Primary School Leaving Testimonial purportedly issued by BORNO STATE GOVERNMENT of Nigeria, on the 22nd of December 1969, which the 1st respondent presented to INEC along with his Form CF001 (Affidavit of Personal Particulars) was forged, as to disqualify him (the 1st respondent) from contesting the election for the office of Governor of Yobe State, held on the 11th of April 2015?**

Grounds 1 and 6.

Whether having regard to the provisions of Section 182(1)(b) of the Constitution of the Federal Republic of Nigeria 1999 (as amended) and the false representation made by the 1st respondent in his Form CF001 as to his eligibility to contest for the office of Governor of Yobe State and the decision of this court in Marwa Vs. Nyako (supra), the lower court was not wrong in coming to the conclusion that the 1st respondent was not elected in two (2) previous elections, as to disqualify him from contesting the election into the office of Governor of Yobe State held on 11th April 2015 and further that the appellant's case did not fall within the jurisdiction of the Federal High Court under Section 251 of the Constitution of the Federal Republic of Nigeria 1999 (as amended) and 87(a) of the Electoral Act 2010 (as amended)? Grounds 2 and 3.

Whether giving the peculiarities of the appellant's case as constituted in the originating summons, the lower court was not wrong in coming to the conclusion that the appellant was not an aspirant and that his complaint did not fall within the ambit of Section 87(a) of the Electoral Act 2010 (as amended)? Grounds 4 and 5.

On their part, the 1st and 2nd respondents filed their respondents' brief on 14th February, 2017 and also formulated three issues for determination at pages 5-6, paragraphs 3.1 to 3.1.3 of the respondents' brief of argument as follows:

"Whether having regard to the appellant's affidavit evidence in support of his originating summons inter alia that he did not submit his nomination form to contest in

A *the 2015 Yobe State Governorship primary election of the 2nd respondent and having regard to the clear provisions and intendments of Section 87(9) of the electoral Act, 2010 (as amended), the lower court was not right to have*
B *held that the appellant was not an aspirant who could in law invoke the provisions of Section 87(9) of the Electoral Act, 2010 (as amended) to complain of any breach of the Guideline of the 2nd respondent in the conduct of the said*
C *primary election and/or that the appellant was otherwise excluded from the said primary election? (Grounds 4 & 5).*

D *Whether the lower court was not right in holding that the appellant did not in law establish his allegation that the 1st respondent forged the document(s) attached to the 1st respondent's INEC FORM CF001 or that the 1st*
E *respondent otherwise gave false information in his INEC FORM CF001 sufficient in law to disqualify the 1st respondent from contesting the Gubernatorial election of Yobe State in the 2015 general election? (Grounds 1 and*
F *6).*

Whether having regard to the clear and unambiguous provisions of Section 182(1)(3) of the Constitution of the
G *Federal Republic of Nigeria, 1999 (as amended), the lower court was not correct inlaw to have distinguished the facts in the case of Marwa Vs. Nyako (2012) 6 NWLR (Pt.1296) in coming to the conclusion that the 1st*
H *respondent had not been elected into the office of Governor of Yobe State and had not taken oath of office and oath of allegiance as a Governor more than once before April 11, 2015 election when he contested and won*
I *the election to remain in office as Governor of Yobe State?*

(Grounds 2 &3)."

The 3rd respondents the referee in the election that culminated in the subject matter of the appeal also followed the path charted by the appellant and 1st and 2nd respondents respectively by likewise formulating three issues at pages 7-8, paragraphs 3.0 of its brief of argument dated 4th January, 2017 as follows:

"Whether the lower court was right when it held that the appellant had no locus standi to question the primaries of the 2nd respondent conducted on 4th December, 2014 having not participate in same.

Whether the appellant discharged the evidential burden of proof that the 1st respondent presented forged certificate to the 3rd respondent gave false information in INEC Form CF 001 and ipso facto disqualified from contesting the Yobe State Governorship election conduction in April, 2015.

Whether having regard to the materials placed before the court, the 1st respondent has been shown to have been elected as Governor of Yobe State in two previous elections prior to the April, 2015 Governorship election in Yobe State.

On this side, I am in accord with the parties that the several issues in this appeal will, and could, be adequately resolved and answered under three issues. Therefore, for the purpose of this judgment, I have reformulated three (3) issues not entirely different from those formulated by the parties, but with necessary modifications to avoid verbosity and long sentences as grammarians have taught us, thus:

A ***"1) Whether the lower court was right to have held that the appellant was not an aspirant in the 2nd respondent's primaries dated 4th December, 2014 culminating in this appeal for the purpose of invoking the provisions***
B ***of Section 87(9) of Electoral Act (as amended).***

2) Whether the lower court was right in holding that the appellant has not establish the allegation of forged
C ***documents and declaration regarding the 1st respondent's INEC Form CF 001 bordering his certificate and date of birth.***

D ***3) Whether the lower court was right in holding that the 1st respondent had not been elected into office as Governor of Yobe State more than twice in two previous elections prior to the April 2015***
E ***Governorship election."***

CONSIDERATION AND RESOLUTION OF RELEVANT ISSUES
ISSUE 1:

F

Whether the lower court was right to have held that the appellant was not an aspirant in the 2nd respondent's primaries dated 4th December, 2014 culminating in this
G ***appeal for the purpose of invoking the provisions of section 87(9) of the Electoral Act (as amended)."***

The first issue formulated by the court in this appeal was made issue No. 1
H by the appellant. In his arguments on the issue, the learned senior counsel to the appellant contended that the lower court was wrong in holding that the appellant did not participate in the primary election conducted by the 2nd respondent. Counsel hinged his submission on the fact that the learned
I justices of the lower court failed to advert their minds to the jurisdiction of

the Federal High Court over political matters under Section 87(9) of the Electoral Act 2010 (as amended) which states that:

> ***"Notwithstanding the provisions of this Act or rules of a political party, an aspirant who complains that any of the provisions of this Act and the guidelines of a political party has not been complied with in the selection or nomination of a candidate of a political party for election, may apply to the Federal High Court or the High Court of a State or Federal Capital Territory, for redress."***

The learned senior counsel argued that the appellant's originating summons complained specifically about breaches of specific provisions of the Electoral Act, the 2nd respondent's Constitution and the 2014 Guidelines for the nomination of candidates for public office. Reliance was placed on section 156 of the Electoral Act 2010 (as amended) which defines **"Aspirants" to mean a person who aspires or seeks or strives to contest an election to a political office.**

Counsel cited the case of **Ukachukwu Vs. PDP (2014) 17 NWLR (Pt. 1435) Pages 134 Per Kereke-Ekun JSC at Page 182 Paragraphs E-H.** Counsel also quoted in page 57, second paragraph of the appellant's brief the reference made in the above cited case to **Uwazuruike Vs. Nwachukwu (2013) 3 NWLR (Pt. 1342) 503 at 526, E-G** to the effect that, **"…The complainant must be an aspirant who participated in the primary that produced the sponsored candidate".**

In urging this court to reverse the decision of the lower court on the issue, the learned senior counsel concluded his submission by amplifying the fact that since there was no primaries and having demonstrated the steps taken in purchasing the necessary forms for nomination among others, the appellant is qualified as an aspirant as defined by Section 156 of the [2017] JSCNLR, VOL. 11Engr. Mustapha Yunusa Maihaja and Alhaji Ibrahim Gaidam (Dauda Bage, JSC)Electoral Act (as amended).

The 1st and 2nd respondents argued in support of issue one in this appeal,

which also forms issue number one in their brief of argument. The learned counsel submitted that it is now settled that in order to be qualified to complain about the propriety of the conduct of a primary election of a political party, a member of the political party must establish by preponderance of evidence that he actually participated in the said primary election otherwise, he would be held by the courts to lack the locus standi under the provision of Section 87(9) of the Electoral Act, 2010. Counsel cited the case of **Peoples Democratic Party Vs. Timipre Sylva & Ors (2012) 13 NWLR (Pt 1316) 85 at 126.**

The learned counsel also relied on the case of **Ukachukwu Vs. PDP (2014) 17 NWLR (Pt. 1435) 134**, where this court again laid down two conditions that would confer the necessary *locus standi* on a person before he could invoke the provisions of Section 87 (9) of the Electoral Act, 2010 (as amended) which are that: (a)There must be complaint that the party's guidelines or the provisions of the Electoral Act were not observed in the nomination process, and (b) the complainant must have participated in the primary election. These two conditions must be present and not as alternatives. The learned counsel quoted extensively the position of this court per **Kekere-Ekun, JSC in Ukachukwu Vs. PDP (supra)** at page 182 paragraph F – H on the effect and purport of that Section 87(9) of the Electoral Act as well as the case of **Uwazuruike Vs. Nwachukwu (2013) 3 NWLR (Pt. 1342) 503 at 526, E – G."**

The learned counsel also placed reliance on the decision of this honourable court on the provision of Section 87(9) of the Electoral Act 2010 (as amended) in **Daniel Vs. INEC & ORS** (2015) 3-4MJSC 1 at 45, F – G to the effect that before a candidate for the primaries can have a *locus standi* to sue on the conduct of the primaries, he must be screened, cleared by his political party and participated in the primaries. Anything short of that, the candidate who did not participate in the primaries could be conveniently classified as a meddlesome interloper with no real interest in the primaries. The learned counsel to the 1st and 2nd respondent concluded that the only conclusion to draw in view of the foregoing is that the appellant did not participate at the said primary election that produced the 1st respondent as the candidate of the 2nd respondent for the 2015 Gubernatorial election in Yobe State.

A He therefore urged this court to uphold the position of the lower court on this issue.

The 3rd respondent also formulated issue number one as same in this regards with slight modification. The 3rd respondent posited that having
B clearly admitted in paragraph 24 of the affidavit in support of the originating summons deposed to by the appellant, the claim made by the appellant is at best on pre-primaries issues and an internal affair(s) of the 2nd respondent in respect of which the courts had no jurisdiction. The learned
C counsel to the 3rd respondent further submitted that the limited jurisdiction vested in the courts under Section 87(9) of the Electoral Act 2010 (as amended) is not exercisable in respect of powers of a political party. Counsel relied on the case of **PDP Vs. Sylva (2012) 13 NWLR (PT 1316)**
D **85 at 125 Paras. C E** and also the case of **APGA Vs. Anyanwu (2014) 7 NWLR (PART 1407) 541, 575, Anyanwu Vs. Ogunewe (2014) 8 NWLR (Pt.1410) 437** and **Ukachukwu Vs. PDP (2014) 17 NWLR (Pt.1435) 134.** In his concluding arguments, the learned counsel submitted that
E having not participated in the primaries of the 2nd respondent dated 4th December, 2014 the appellant cannot avail himself the benefit of section 87 of the Electoral Act (Supra). Counsel cited the case of **PDP Vs. Sylva & 2 ORS (2012) 18 NWLR (Pt. 1316) 85** and urged His Lordships to affirm the
F decision of the lower court and resolve issue one against the appellant.

I have chewed and digested the respective arguments put forward for and against by the parties on issues one. One central fact keeps resonating as to the position of the law under Section 87(9), whether it exists for the
G benefit of a party who did not participate in the party primaries. Having quoted the said provisons verbatim above, what remains for me to do is x-ray the law **vis-à-vis** the facts of this matter on issue one. Beyond doubt, the said section permits an aspirant who complains that any of the provision of
H the Electoral Act (Supra) or the guideline of a political party has not been complied with in the selection or a nomination of a candidate of a political party for election may apply to a Federal High Court, or the High Court of a state or FCT for redress.

I Did the appellant participate in the primary election of the 2nd respondent conducted on the 4th December, 2014 or was he prevented, or did

he not, for whatever reason or reasons, participate in the said primaries. As I shall justify below, the law seems settled on these legal arguments. The evidence of the appellant, as contained in pages 14-18, paragraphs 8, 9, 14, 15, 24 and 25 of the appellant's affidavit in support of the originating summons, is to the effect that another agency or institution prevented him from submitting his nomination forms which he spent Five Hundred Thousand Naira (N500,000) for the Expression of Interest and another Five Million Naira (N5m) to procure. To be specific, paragraph 14 of the affidavit is to the effect that men of the Nigeria Police Force directly and/or on the alleged instruction of the State Party Chairman of the 2nd defendant prevented the appellant from gaining access to the State Secretariat of the Party to submit his expensive nomination forms, among other formalities. Regrettably, neither the police nor the Chairman of the Yobe State chapter of the 2nd Respondent against whom specific allegations have been made was made a party to the suit when it was filed.

More revealing are the depositions in paragraphs 24 and 25 of the appellant's affidavit of 9th March, 2015 in support of the originating summons which unequivocally showed, from the horse's mouth (by the appellant) that no access was allowed for the conduct of the primaries and that, as a matter of fact (deposed on oath by no one other than the appellant himself), no primary election was conducted on 4th December, 2014 by the 2nd respondent.

Two possibilities exist here. One is the appellant was excluded or prevented from accessing the secretariat of the 2nd respondent by the police. The other possibility is that the appellant; for personal, private, political, religious or other considerations failed to participate in the said primaries. The law is too well settled to warrant restatement. For the avoidance of doubt, this court will endeavour to repeat itself on this vital issue of law. It was, and remains our firm conviction, informed by law, that in order to be qualified to complain about the propriety of the conduct of a primary election of a political party, the appellant would need to show convincingly by unassailable evidence, that he actually participated in the said primary election that formed the basis of this appeal. Otherwise, he would have

robbed himself of the legal right, put differently, his suit will lack the legal potency to avail him any protection under Section 87(9) of the Electoral Act, 2010 (supra). See **Peoples Democratic Party Vs. Timipre Sylva & Ors (2012) 13 NWLR (Pt 1316) 85 at 126, where** this court held as follows:

> ***"Section 87(9) of the Electoral Act confers jurisdiction on the courts to hear complaints from a candidate who participated at his party's primaries. The fact in this case are conclusive that the 1st respondent did not participate as candidate in the PDP primaries which held on 19/11/11 to choose the party candidate for general election for Governor of Bayelsa State which was fixed for 12/12/12. The 1st respondent not being a candidate at the primaries cannot be heard to complain about the conduct of the primaries. Section 87(9) of the Electoral Act is thus not applicable. The PDP has the right to bar the 1st respondent, or any of its members from contesting its primaries if it so desires."***

We are also bound by our earlier decision in **Ukachukwu Vs. PDP** (2014)17 NWLR (Pt.1435) 134, on this issue where we restated that to invoke the provisions of Section 87(9) of the Electoral Act, 2010 (as amended) would necessarily require that: (1) there must be complaint that the party's guidelines or the provisions of the Electoral Act were not observed in the nomination process and (2) The complainant must have participated in the primary election. In the words of this court per **Kekere-Ekun, JSC in Ukachukwu Vs. PDP (supra)** at page 182 paragraph F – H. The learned jurist had stated the unambiguous position of the law as follows:

> ***"The Point being made by this court is that Section 87(9) of the Electoral Act is very narrow in scope as to the jurisdiction exercisable by the court. The literal interpretation of Section 87(9) of the Electoral, Act is that an aspirant has a right to complain where the provisions of the***

A ***Electoral Act and/or the guidelines of a political party have not been complied with in the selection or nomination of a candidate for election…However, the provision is not at large. The complainant must be an aspirant who*** B ***participated in the primary election that produced the sponsored candidate. See Uwazuruike Vs. Nwachukwu (2013) 3 NWLR (Pt. 1342) 503 at 526, E – G."***

C The above position was also re-stated in **Daniel Vs. INEC & Ors (2015) 3-4 MJSC 1 at 45, F-G** that before a candidate for the primaries can have a *locus standi* to sue on the conduct of the primaries, he must be screened, cleared by his political party and participated at the said primaries. D Anything short of that, the candidate who did not participate in the primaries could be conveniently classified as a meddlesome interloper with no real interest in the primaries.

As stated above, the evidence of the appellant as stated in pages 14-18, E paragraph 8, 9, 14, 15, 24 and 25 of his affidavit in support of the originating summons, is to the effect that, another agency or institution prevented him from submitting his nomination forms which he spent Five Hundred Thousand Naira (N500,000) for the Expression of Interest and another Five F Million Naira (N5m) to procure. The lower court also got it right, in my opinion on the issue of the affidavit evidence of the appellant upon which the Court of Appeal found, and rightly so, at page 27 of its judgment contained at pages 850 851 of the record of appeal thus:

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"In this case, by his depositions in the affidavit in support of the originating summons, the appellant alleged unequivocally that he was not screened by his political party. H ***By his own showing as stated earlier, the appellant did not participate in any primary election which produced the 1st respondent as the 2nd respondent's candidate for the election in issue. Therefore, the appellant, who was not screened by*** I ***his political party in respect (sic) of any governorship primary election and who did not participate in any***

A ***governorship primary election has no locus standi as he failed to bring himself with (sic) the provision of Section 87(9) of Electoral Act, 2010 (as amended).”***

B By his own admission, the appellant did well in stating correctly what transpired before the primary election conducted by the 2nd respondent on 4th December, 2014. While I sympathise with the appellant, I am unable to close my eyes to the resonating facts of non-participation in the primaries.
C Assuming he was wrongly or unlawfully excluded, his remedies would be elsewhere in other forms of civil claims in damages for the refund of political expenses and sundry remedies. Section 87(9) of Electoral Act, 2010 (as amended) appears to me to fall within the category of 'closed
D rights'. It is not open-ended. I am of the considered view that; it does not capture (wrongful) exclusion, prevention or obstruction orchestrated by or through the instrumentality of third parties or agencies. May be this is saved for future amendment of the Electoral Act. A recap of the provision of
E Section 87(9) of the Electoral Act 2010 (as amended) states that; “Notwithstanding the provisions of this Act or rules of a political party, an aspirant who complains that any of the provisions of this Act and the guidelines of a political party has not been complied with in the selection or nomination of a
F candidate of a candidate of a political party for election, may apply to the Federal High Court or the High Court of a State or Federal Capital Territory, for redress.”

Given the above analyses and expositions on facts, statutory provisions and case law, I resolve issue one against the appellant. I hold that,
G by his own affidavit evidence, the appellant did not participate in the primary election conducted by the 2nd respondent on 4th December, 2014 and thus unable to take benefit of the provisions of Section 87(9) of the Electoral Act 2010 (as amended).

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ISSUE 2:

“Whether the lower court was right in holding that the
I ***appellant has not established the allegation of forged documents and declaration regarding the 1st respondent's***

INEC Form CF 001 bordering his certificate and date of birth."

This is argued as issue number one in the appellant's brief of argument, the appellant contended that, in completing or deposing to form CF 001 (Affidavit of Personal Particulars), the 1st respondent falsely indicated he never presented a forged certificate to the 3rd respondent. The contention of the learned senior counsel is that the Primary School Leaving Testimonial (as against Certificate) presented by the 1st respondent was purportedly issued to him (1st respondent) on 22nd December, 1969 by Borno State Government, whereas no State existed at that time by name "Borno State". The learned senior counsel then submitted that the 1st respondent, by so doing, had made false declaration in Form CF001 and presented a forged certificate to the 3rd respondent contrary to Section 31(5) of the Electoral Act 2010 (as amended) and Section 182(i) of t he Constitution of the Federal Republic of Nigeria 1999 (as amended). Counsel relied on the case of **Audu Vs. INEC (NO.2) (2010) 13 NWLR (Pt. 1212) PAGE 456; Arebi Vs. Gbabijo (2008) 2 LRECN PAGE 467 and States (Creation and Transitional Provision) Decree No. 37 of 1991** as well as Section 122(2)(a) of the Evidence Act 2011 in concluding that the lower court was wrong to have held otherwise.

On the sub-issue of date of birth, the appellant contended that the 1st respondent's date of birth indicated on Exhibit MAIHAJA 13A3 was 15th September, 1956 which also appeared on the voter's card of the 1st respondent as well as the certificate issued by the National Population Commission (MAIHAJA 13A1). Counsel harped on the fact that Certificate of Exemption purportedly issued by National Youth Service Corps (Exhibit MAIHAJA 13A6) gave the date of birth of the 1st respondent as 8th February, 1956 and 22nd September 1956 respectively. Counsel also contended that the Certificate of Bachelor of Science Degree in Accounting dated 14th August 1990 from Ahmadu Bello University (MAIHAJA 13A4) and the certificate of Exemption MAIHAJA 13A6) all issued to "Ibrahim Geidam" and "Geidam Ibrahim" respectively who was born on three different dates

of birth. He therefore concluded by urging us to hold that the 1st respondent, having made false declarations in his affidavit of Personal Particulars, MAIHAJA 13, and having presented MAIHAJA 13A9 to the 3rd respondent, coupled with the falsity in his alleged date of birth, was not qualified or was disqualified from contesting office of Governor of Yobe State.

In strenuous opposition to the submissions of the appellant, the 1st and 2nd respondents addressed this issue also as issue number two (2) in their brief of argument. On whether or not Borno State was in existence as the material time, counsel submitted that the 1st respondent did not in anyway state that Borno State was created in 1969 and/or that it was Borno State that issued the Testimonial in question. On the face of the said Testimonial, nothing indicates the fact that the Testimonial was issued by Borno State or by Yunusari Local Education Authority. He contended that there is no evidence from the appellant that "Yunusari Primary School", which the 1sr respondent stated in his Form CF001 (Exhibit MAIHAJA 13) that he attended between 1963 to 1969, was never in existence at that particular period.

On the allegations of dates of birth, the learned counsel countered that by virtue of paragraph 21 (c) and (d) of the counter affidavit filed by the 1st respondent at page 247 of the record of appeal, he (the 1st respondent) was born on 15th September, 1956 and this, according to him, is further corroborated by Form CF001 filed on oath (page 118 of record of appeal) by the 1st respondent and by Exhibit MAIHAJA 13A1 which was issued by National Population Commission which has the statutory responsibility under Section 6(1)(b) of the National Population Commission Act, Cap. N7, Laws of Federation, 2004. In his final submission, the learned counsel prayed us to resolve issue two in favour of the 1st and 2nd respondents. On his part, the 3rd respondent submission on issue two tallies with that of the 1st and 2nd respondents. I will therefore not repeat same having extensively given what qualifies as a "detailed" summary of submission of parties on the issue. In sum, the learned counsel to the 3rd respondent also hinged his arguments on failure to prove perjury and/or forgery against the 1st respondent. In his conclusion, the learned counsel to the 3rd respondent urged us to resolve issue two against the appellant and affirm the decision of the lower court as, according to him, same is correct and unassailable.

Beyond doubts, having carefully read and digested the submissions of counsel to the parties on this issue, I felt immersed in the waters of criminal procedures. This, although unintentional has, therefore, becomes unavoidable given the direction of the respective arguments and submissions of parties which made legal, clinical and evidentiary details of criminal proceedings handy in resolving those weighty allegations bordering on certificate forgery, inconsistencies in dates of birth, and false declaration particularly in Form CF001 submitted to the 3rd respondent.

I recall the ugly days of the "Toronto Saga" where a convicted but later pardoned former Speaker of the House of Representatives was found to have forged his certificate to assume that prominent National office. This court has since taken a stern position on the issue of falsification of document or forgery of certificates particularly to secure unmerited political advantages. Only recently, in another similar but different scenario involving political gladiators in the case of **Hon. Hassan Anthony Saleh Vs. Christain Adabah Abah (Supreme Court Suit No. SC/144/2016),** this court was emphatic in declaring that every forgery requires proof of requisite *mens rea,* i.e. knowledge that the document presented was going to be used fraudulently or dishonestly as genuine, which onus must be discharged by the appellant. This becomes crucial in view of the far-reaching implications of the provisions of Section 182(1)(j) of the 1999 Constitution (as amended) which is to the effect that, quote:

> ***"182. (1) No person shall be qualified for election to the office of Governor of a State if***
> ***(j) he has presented a forged certificate to the independent National Electoral Commission."***

The law is very clear to warrant any form of colourated interpretations. The question is whether a certificate that turned out to be forged has ever been presented, and not whether the forger has ever been charged, tried or convicted on this. I made it abundantly clear in **Saleh Vs. Abah** (**supra**), and our position in that case is instructive in this circumstances, that:

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> ***"The intention of the Constitution is that anyone who had presented a forged certificate to INEC should stand automatically disqualified. No decent system or polity should condone, or through judicial policy and decisions, encourage the dangerous culture of forging certificates with impunity to seek electoral contest. This court must take the lead in righting the wrongs in our society, if and when the opportunity presents itself as in this appeal. Allowing criminality and certificate forgery to continue to percolate into the streams, water and oceans of our national polity would only mean our waters are, and will remain dangerously contaminated. The purification efforts must start now, and be sustained as we seek, as a nation, to now 'change' from our old culture of reckless impunity."***

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E The above is a pointer that our position is stern against certification forgery when and if we found it sufficiently and satisfactorily proved. The necessary question is what must a party prove to succeed on the allegation of forgery and false declaration. As rightly held by the court below, it is crucial to prove:

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> **"1) The existence of a document in writing;**
> **2) That the document or writing was forged**
> **3) That the forgery was by the person being accused;**
> **4) That the party who made it knew that the document or writing was false; and**
> **5) The party alleged intended the forged document to be acted upon as genuine."**

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See **Alhaji Kashim Ibrahim Imam & 2 Ors Vs. Senator Ah Modu Sheriff & 11 Ors. (2005) 4 NWLR (PT.914) 89 and ARC Vs. PDP (2015) 15 NWLR (PT. 1482) 1.**

I I have noted conjectures, speculative and inferential analogies on the part of the appellant in drawing a nexus between the documents submitted

by the 1st respondent to the 3rd respondent in Form CF001 (Exhibit MAIHAJA 13). The 1st respondent did not state in the said declaration that Borno State was created in 1969 and/or that it was Borno State that issued the Testimonial in question. The appellant has also not debunked or disproved the fact that, on the face of the said testimonial, nothing indicates the fact that it was issued by Borno State or by Yunusari Local Education Authority. I also agree with the learned counsel to the 1st and 2nd respondents that there is no evidence from the appellant that "Yunusari Primary School", which the 1st respondent stated in his Form CF001 (Exhibit MAIHAJA 13) that he attended between 1963 to 1969, was never in existence at that particular period.

The allegations of dates of birth made by the appellant as basis for seeking the nullification of the 1st respondent elected is also, in our considered view misplaced. This is because the deposition in paragraph 21 (c) and (d) of the counter affidavit filed by the 1st respondent at page 247 of the record of appeal that the 1st respondent indicated that he was born on 15th September, 1956. This evidence is unchallenged and also further corroborated by Form CF001 filed on oath (page 118 of record of appeal) by the 1st respondent and by Exhibit MAIHAJA 13A1 which was issued by National Population Commission which has the statutory responsibility under Section 6(1)(b) of the National Population Commission Act, Cap. N7, Laws of Federation, 2004.

The consequence of submitting forged document to the 3rd respondent is grave. It therefore required direct, sharp and somewhat precise evidence and proof which leads to no other conclusion that the 1st respondent forged documents and made false declaration to the 3rd respondent. The nature of evidence required in this kind of situation is similar to that of 'mathematical precision' of two multiplied by two, equals four (2x2=4). In **Kakih Vs. PDP (2014) 15 NWLR Pt. 1430) 374**, this court held thus:

> ***"By virtue of Section 362 and 363 of the penal code, a party who asserts that another person presented a forged certificate must prove beyond reasonable doubt that the certificate was***

A ***presented with the knowledge that it would be used fraudulently or dishonestly as genuine. In this case, for the appellant to succeed in his case, of presentation of forged certificate, he ought to have presented evidence that the 4th***
B ***respondent presented a forged certificate to the 2nd respondent knowing that it would be used fraudulently or dishonestly as genuine...”***

C In politically oriented litigations, where the allegation of presentation of forged certificate to INEC is in issue, the accusing party must prove that the certificate presented to the INEC was forged and that it was the candidate that presented the certificate and that the two ingredients must be proved
D beyond reasonable doubt as held in **Audu Vs. INEC (No. 2) (2010) 13 NWLR (Pt. 1212) 456 at 507** paras E-F. In resolving issue two, it is my considered view that the lower Court was right to have held on page **859** of the record of appeal that the appellant in order to establish criminal
E allegation of forgery of the Testimonial in question under the provision of Section 135 of the Evidence Act, 2011 must do so by proof beyond reasonable doubt of the said allegation. I see no logical or legal basis for disturbing the mandate of the 1st respondent on this ground. The existence of
F those facts, if at all, only resonates in the imagination of the appellant who has refused and/or failed to prove that there is no “Yunusari Primary School” that could have issued such certificate, or that the 1st respondent was not born on the 15th September, 1956 being the date declared in Form CF001.

G In view of the above, issue two is also resolved against the appellant. Put differently, issue two is resolved in favour of the 1st, 2nd and 3rd respondents.

H **ISSUE 3**

“Whether the lower court was right in holding that the 1st respondent had not been elected into office as Governor of
I ***Yobe State more than twice in two previous elections prior to the April 2015 Governorship election.”***

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The appellant dealt with issue three as issue number two in his brief of argument. The appellant contention was that the 1st respondent contested as running mate of Late Senator Mamman Ali and took oath of allegiance and
B office on the 29th of May, 2007, and continue to hold office as Governor of Yobe State from 28th January, 2009 until his re-election in the year 2011 when he allegedly took a second oath of allegiance and office on the 29th May, 2011 for a term of four years which ended on the 29th May, 2015.

C The learned senior counsel to the appellant relied on the provisions of Section 180(1)(a), 181(1), 182(1)(b), 185(1) and 191 of the Constitution of the Federal Republic of Nigeria 1999 (as amended) and the decision of this court in the case of **Marwa Vs. Nyako & Ors (2012) 6 NWLR (Pt. 1296)**
D **PAGE 199** and submitted that having been elected into the office of Governor of Yobe State and taken oath of allegiance and office at two previous elections, the 1st respondent is ineligible to contest or be elected as Governor of Yobe State.

E In his conclusion, the learned senior counsel for the appellant urged us to resolve this issue in favour of the appellant and to hold that, on the authorities of **PDP Vs. INEC (supra)** and **Marwa Vs. Nyako (supra),** the 1st respondent was disqualified from contesting the election held on the 11th
F of April, 2015 into the office of Governor of Yobe State. In the 1st and 2nd respondents' brief of argument, the learned counsel contended, in opposition to the appellant's submission that a calm reading and analytical perception of Sections 180(1), (a), (2)(a), 181(1), 182(1)(b), 185, 186 and
G 191(1) of the Constitution of the Federal Republic of Nigeria 1999 (as amended), will reveal that the 1st respondent had not been elected into the office of Governor of Yobe State twice prior to the holding of the Governorship election on 11th of April, 2015 in Yobe State. Counsel
H submitted further that the operative phrase in the section is "elected" to such office at any two previous elections".

Counsel contended that the 1st respondent was only first sworn in as Governor by operation of Section 191(1) of the Constitution (Supra) and

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upon the demise of the then Governor of Yobe State. In other words, the 1st respondent did not assume office as Governor in 2009 as a result of his election into that office. Thus, counsel submitted that the situation at hand where the 1st respondent will spend more than eight (8) years cumulatively as Governor is not contemplated by Section 182(1)(b) of the Constitution and therefore not prohibited by any provision of the constitution.

In his conclusion, the learned counsel to the 1st and 2nd respondents urged this court to hold that the 1st respondent having not been elected and sworn in as Governor of Yobe State before the 29th day of May, 2011 had not held office as elected Governor of Yobe State on two previous occasion. He implored us to resolve the issue in favour of the 1st and 2nd respondents by holding that the 1st respondent was not disqualified under the provision of section 182(1)(b) of the Constitution or under any of its other provisions to contest the governorship election of Yobe State in 2015.

The 3rd respondent (INEC) dealt with issue three summarily. In its brief of argument, the learned counsel to the 3rd respondent contended that the appellant had unambiguously stated in paragraphs36, 37, and 38 of the affidavit in support of originating summons that the 1st respondent became the Governor of Yobe State on 28th January, 2009 by operation of the Constitution of the Federal Republic of Nigeria following the death of Senator Ali Mamman who was elected Governor in 2007. He contended that the 1st respondent by necessary implication only stepped in and completed the tenure of Late Senator Ali Mamman as Governor. He stressed further that the 1st respondent only contested and won for the first time as Governor of Yobe State in his right in 2011, and thus qualified to contest the Governorship election in Yobe State in 2015. In his final submission, the learned counsel to the 3rd respondent cited and interpreted the provisions of Section 181(1)(b) of the Constitution (supra) and the case of **Chief Chukwuemeka Odumegwu Ojukwu Vs. Chief Olusegun Obasanjo (2004) 12 NWLR (Pt.886) at 169** and urged this court to resolve this issue against the appellant.

The salient issue here is whether Section 182(1)(b) of the Constitution affects or impacts on when tenure is spent-out by operation of Section

191(1) of the same Constitution. The duty of court, particularly ours as the Apex court, is to interpret the statute in accordance with the intention of the law makers. In **Ugwu Vs. Ararume (2007) 12 NWLR (Pt. 1048) 367 at 498** this court stated thus:

> ***"A statute it is always said, is "the will of the legislature" and any document which is presented to it as a statute is an authentic expression of the legislative will. The function of the court is to interpret that document according to the intent of those who made it. Thus, the court declares the intention of the legislature".***

The principles of interpretation of the provisions of the constitution enjoin the court to interpret the constitution as a whole taking into consideration, related sections. The lead judgment of this court in **Brig. Gen. Mohammed Buba Marwa & ORS. Vs. Admiral Murtala Nyako & Ors. (supra)** is instructive. Quoting the decision in **A.T. Ltd. Vs. A. D. H. LTD (2007) 15 NWLR (Pt. 1056) 118 at 166 – 167,** in the lead Judgment, Onnoghen JSC (as he then was; now CJN) stated thus:

> ***"The law is settled law that when a court is faced with the interpretation of a constitutional provision, the entire provision must be read together as a whole so as to determine the object of that provision. Secondly, it is settled principle of law that where a court is faced with alternatives in the course of interpreting the constitution or statute, the alternative construction that is consistent with smooth running of the system shall prevail as held in Tukur Vs. Government of Gongola State (1989) 4 NWLR (Pt.117) 517 at 579; I must remember that this court has said it several times that the provisions of the constitution ought to be read and interpreted as a whole in that related sections must be constructed together…Finally, I must approach from the view point that since the decision of this court in Rabiu Vs.***

A ***Ogun State (1981) 2 NCLR 293, this court has opted for the principle of construction often expressed in the maxim: ut res magis valeat quam pereat. This means that even if alternative construction are equally open, I shall opt for that alternative***
B ***which is to be consistent with the constitution read as a whole as set out to regulate, and so the alternative which will disrupt the smooth development of the system is to be rejected." Per ONNOGHEN, J.S.C (Pp. 56-57, paras. A-B)."***

C

The above casts upon institutional duties of ensuring that Constitutional language is to be given a reasonable construction and absurd consequences are to be avoided. Constitutional provisions dealing with the same subject
D matter are to be constructed together. Seemingly conflicting parts are to be harmonized, if possible, so that effect can be given to all parts of the constitution. *See* **Brig. Gen. Mohammed Buba Marwa & Ors. Vs. Admiral Murtala Nyako & Ors (supra)** Per ONNOGHEN, J.S.C (Pp. 52-
E 54, paras. C-B).

Turning to the issue at hand, there is no dispute as to the fact that the 1st respondent became Governor by operation of Section 191(1) of the Constitution (Supra) upon the demise of the then Governor of Yobe State.
F Put differently, the 1st respondent did not assume office as Governor in 2009 as a result of his election into that office. He was constitutionally "holding", and held the office in trust for the duration of the remaining tenure of the late Governor Senator Ali Mamman. Section 182(1)(b) of the Constitution
G does not affect or impact on when tenure is spent-out by operation of Section 191(1) of the same constitution. A community reading of Sections 180(1), (a), (2)(a), 181(1), 182 (1)(b), 185, 186 and 191(1) of the Constitution of the Federal Republic of Nigeria 1999 (as amended) reveal
H that the 1st respondent had not been elected into the office of Governor of Yobe State twice prior to the holding of the Governorship election on the 11th of April, 2015 in Yobe State.

The above becomes even more compelling given the fact that the
I appellant had unambiguously stated in paragraphs 36, 37 and 39 of the affidavit in support of originating summons that the 1st respondent became

the Governor of Yobe on 28th January, 2009 by operation of the Constitution of the Federal Republic of Nigeria following the death of Senator Ali Mamman who was elected Governor in 2007. The 1st respondent, by necessary implications, only stepped in and completed the tenure of Late Senator Ali Mamman as Governor in holding capacity. Therefore, the 1st respondent validly, legally and constitutionally contested and won for the first time as Governor of Yobe State in his own right in 2011, and thus qualified to contest the Governorship election in Yobe State in 2015.

For clarity, I will endeavour to shed further lights on the provisions of Section 191(1) of the Constitution. It states, and I quote:

> ***"191. (1) The Deputy Governor of a State shall hold the office of Governor of the State if the office of Governor becomes vacant by reason of death, resignation, impeachment, permanent incapacity or removal of the governor from office for any other reason in accordance with section 188or189 of this constitution."***

The word is **"hold office of Governor".** Such person only acts in position of Governor by **'holding'** the office in a kind of public trust (and I also think for the dead, the living and unborn) till expiration of the tenure of the late Governor. To the best of my understanding, given the fact that the words used in the said provisions of the Constitution was clear and unambiguous, "holding" connotes acting in the capacity of Governor, by operation of Section 191(1) of the Constitution of the Federal Republic of Nigeria (as amended). The person "holding" the office of Governor under this provision continues to function and may step-aside in the very unlikely event that the former, deceased Governor resurrects from the dead, or, under miraculous circumstances, had his permanent incapacity turned around to become subsequently active and capable. The section does not envisage "permanence" or a permanent tenure. It envisages "holding office" in a kind of interim, stop-gap arrangement to avoid a vacuum, which the Constitution abhors and provides against under section 191(1) of the

A Constitution of the Federal Republic of Nigeria (as amended).

In my candid opinion, the respondent had not been elected into the office of Governor of Yobe twice prior to the holding of the Governorship election on the 11th of April, 2015 in Yobe State. He is therefore qualified to
B contest the April 2015 election which he had already contested and won.

On this note, and given the above, I resolve issue three against the appellant. In sum, this appeal fails and is hereby dismissed. I affirm the judgment of the lower court. I make no order as to costs.

C **Sidi Dauda Bage**
Justice, Supreme Court

NKANU ONNOGHEN, (JSC): I have had the benefits of reading in draft
D the lead judgment of my learned brother, BAGE, JSC just delivered. I agree with his reasoning and conclusion that the appeal lacks merit and should be dismissed.

Much have been written by this court on the provisions of Section
E 87(9) of the Electoral Act, 2010, as amended, as it relates to invocation of the jurisdiction of the court in a matter of nomination of a candidate of a political party to contest a general election. In the circumstances it should now be taken as settled law only an aspirant who took part in the primary
F election for the nomination of a party's candidate for the particular election has the *locus standi* to approach the court for reliefs against the result or conduct of the said election. This means that any person who did not participate in the said primary election as an aspirant lacks the *locus standi*
G to approach the court to challenge the result of the said election *see* **PDP Vs. Sylva (2012) 13 NWLR (Pt. 1316) 85 at 125; APGA Vs. Anyanwu (2014) 7 NWLR (Pt. 1407) 541 at 575; Ukachukwu Vs. PDP (2014) 17 NWLR (Pt. 1435) 134; Daniel Vs. INEC (2015) 3-4 MJSC 1 at 45** etc.

H In the instant case, it is not in dispute that appellant did not participate in the primary election scheduled for the nomination of the Governorship candidate of the APC for the Yobe State Governorship election of 2015. The situation being as it is, it is very clear that appellant lacks the *locus*
I *standi* to contest of the said primary election in any court of law neither would the court have the requisite jurisdiction to entertain his complaint(s).

A Though the provisions of Section 31(5)and 6 of the Electoral Act, 2010 as amended confers the right on any parson who alleges that a candidate for an election has given false information in the forms or processes filed with INEC for the purpose of an election to approach the B court for redress, the issue is whether appellant has established the falsity of the information contained in the affidavit accompanying the nomination form filled by 1st respondent. The answer is clearly in the negative. The fact that the Borno State was not in existence by December, 1969 when the C Primary School Leaving Testimonial was said to have been issued does not mean that the primary school in question does not exist or located in the present day Borno State neither does it mean or establish the fact that 1st respondent did not attend the said primary school. The document in D question is simply a testimonial which usually affirms facts that had existed in the past. It can be issued today to confirm facts existing on record of very many years ago. It follows that the geographic location in which the primary school in question has changed does not, in my considered view, E make statement of the fact that 1st respondent attended that institution for the period in question, false.

Apart from that, appellant has failed woefully to prove the falsity of the document in accordance with the provisions of the law which makes the standard F of proof to be beyond reasonable doubt, being a criminal allegation.

It is for the above reasons and those contained in the lead judgment that I too find no merit, whatsoever, in the appeal and consequently dismiss same. I abide by the consequential orders contained in the said lead G judgment including the order as to costs.

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

Walter Samuel Nkanu Onnoghen,
Chief Justice Of Nigeria

H

DATTIJO MUHAMMAD, (JSC): My learned brother **SIDI DAUDA BAGE JSC** did oblige me in draft his lead judgment just delivered. On perusal I agree with his lordship's reasoning and conclusion that the appeal I lacks merit and stands dismissed. I abide by the consequential orders made in the lead judgment including the order on costs.

Musa Dattijo Muhammad,
Justice, Supreme Court

KEKERE-EKUN, (JSC): I have had a preview of the judgment of my learned brother SIDI DAUDA BAGE, JSC just delivered. I agree with the reasoning and conclusion that the appeal lacks merit and ought to be dismissed.

The law is settled that whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts, which he asserts, shall prove that those facts exist. It is also the law that burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side. Where the commission of a crime is directly in issue in any proceeding, civil or criminal, it must be proved beyond reasonable doubt. See Sections 131, 132 and 135 (c) of the Evidence Act 2011.

It follows that where there is an allegation made pursuant to Section 31 (5) of the Electoral Act 2010, as amended, that any information given by a candidate in the affidavit or any document submitted by that candidate is false, the burden is on the person who makes the assertion to prove that fact.

The appellant's contention before the trial court was that the 1st respondent was not qualified to contest the Office of the Governor of Yobe State in the General Election which took place on 11th April, 2015 because he had given false information in his form CF001 (Affidavit of Personal Particulars Exhibit MAIHAJA 13) submitted to the 3rd respondent (INEC) to wit:

> **(1) That his Primary School Leaving Testimonial purportedly issued by Yunusari Local Education Authority of Borno State in 22/12/69 was false because Borno State was not in existence as at the date the testimonial was issued. That the said testimonial is a forged document presented to the 3rd respondent by the 1st respondent in breach of Section 182 (1) (j) of the 1999 Constitution.**

A

(2) That the documents submitted to INEC contain discrepancies as to the 1st respondent's actual date of birth.

B

It was also contended that the 1st respondent was not eligible to contest the said election into the office of Governor of the State having been elected on two previous occasions into the said office. Reliance was placed on

C Sections 180 (2) (a), 181 (1) (b) and 185 of the 1999 Constitution and the case of **Marwa Vs. Nyako (2012) 6 NWLR (Pt. 1296) 199.**

The facts that gave rise to the appeal have been sufficiently captured in the lead judgment. I need not repeat the exercise.

D The attack on the 1st respondent's Primary School Leaving Testimonial is based solely on the fact that Borno State was not in existence as at 22nd December, 1969 and it is thus contended that the testimonial issued y the Yunusari Local Education Authority of Borno State must have been

E forged.

Section 177 of the 1999 Constitution provides as follows:

117. A person shall be qualified for election to the office

F **of Governor if:**

(a) he is a citizen of Nigerian by birth;

(b) he has attained the age of thirty-five years, and

G **(c) he has been educated up to at least the School Certificate Level or its equivalent.**

Where a candidate lacks any of these requirements, he would be ineligible to contest the election.

H

Section 31 of the Electoral Act provides for the submission of the list of candidates and their affidavits by political parties. Section 31 (2) & (5) provide:

I

"31 (2). The list or information submitted by each

candidate shall be accompanied by an affidavit sworn to by the candidate at the Federal High Court, High Court of a State or Federal Capital Territory, indicating that he has fulfilled all constitutional requirements for election into that office.

(5) Any person who has reasonable grounds to believe that any information given by a candidate in the affidavit or any document submitted by that candidate is false may file a suit at the Federal High Court, High Court of a State or Federal Capital Territory against such person seeking a declaration that the information contained in the affidavit is false.

My understanding of subsection (5) of Section 31 is that the false information complained of must relate to the constitutional requirements for election into the office in dispute in this case the requirements of Section 177 (b) & (c) of the Constitution.

The applicant therefore had the onus of satisfying the court below not only that the testimonial was forged but also that the 1st respondent does not possess the educational qualification stipulated in Section 177 (c) of the Constitution. He failed woefully on both counts. Having alleged forgery, which is a criminal offence, the onus was on him to establish that fact beyond reasonable doubt notwithstanding the fact that the allegation was made in civil proceedings. I agree with the court below that the appellant failed to tender any evidence, such as a disclaimer from the authority that issued the testimonial, stating that it was a forged document. Not only must it be proved that the document was forged, it must also be proved that it was the 1st respondent who forged the document. *See* **Ansa Vs. Ishie (2005) 15 NWLR (Pt. 948) 210; Eya Vs. Olepade & Anor. (2011) LPELR – 1184 (SC); APC Vs. PDP (2015) LPELR – 4587 (SC).** It must also be shown that the person relying on the document knew it to be false and presented it

with the intent that it may be used or acted upon as genuine to the prejudice of any person or with intent that any person may, in the belief that it is genuine be induced to do or refrain from doing any act, whether in Nigeria or elsewhere. *See* **Ndoma-Egba Vs. ACB PLC (2005) 14 NWLR (Pt. 944) 79.** There was no such evidence before the trial court. There was also no evidence before the court to contradict the 1st respondent's claim of having attended Yunusari Primary School from 1963 1969. The fact that Borno State was not in existence in 1969 is not proof that the school did not exist.

As regards the age of the 1st respondent, the onus was on the appellant to prove that as at the time he contested the election, that 1st respondent had not attained the age of 35 years as required by Section 177 (c) of the Constitution. If there is any discrepancy in the age of a candidate, it must have a bearing on the constitutional requirement before it can have the effect of disqualifying him. *See* **Joe Odey Agi, SAN Vs. PDP & Ors. (2016) 12 SC (Pt. 1) 74 @ 138 – 141.** It was held in this case that there must be evidence of an intention by the candidate to circumvent the provisions of the Constitution. There was none established in this case.

For these and the more comprehensive reasons advanced in the lead judgment, I find no merit in this appeal. It is accordingly dismissed. I abide by the order on costs.

Kudirat M. O. Kekere-Ekun
Justice, Supreme Court

EJEMBI EKO, (JSC): I had the privilege of reading in draft the judgment just delivered in this appeal by my learned brother SIDI DAUDA BAGE, JSC.

The first issue, raised and argued, in the appeal is enough to determine the fate of the appeal and the parties thereto. The Issue is:

> ***"Whether the lower court was right to have held that the appellant was not an aspirant in the 2nd respondent's primaries dated 4th December, 2014 culminating in this appeal for the purpose of invoking the Provisions of Section 87(9) of the Electoral Act, 2010, (as amended)"?***

The summary of the facts on this has been adroitly done by my learned brother SIDI DAUDA BAGE, JSC, and I hereby adopt it.

The appellant, as the plaintiff, did admit in the affidavit in support of his originating summons that for sundry reasons he could not submit his "completed Expression of Interest and Nomination Forms" to the 2nd respondent, All Progressive Congress (APC) (the political party, he intended to seek its sponsorship as a candidate for the general election), either at the National or State Secretariats of the Party. The appellant, in consequence thereof, could not or did not participate in the primary election of the APC to nominate the APC candidate to contest for the office of the Governor of Yobe State.

Section 87(9) of the Electoral Act, 2010, as amended, is unambiguously clear that it is only an aspirant who complains that the provisions of the Act and the guidelines of his political party have not been complied with in the selection or nomination of a candidate of his political party for the general election has the *locus standi* to apply to the Federal High Court, or the High Court of a State, or the High Court of the Federal Capital Territorial for redress. The provisions of Section 87(9) of the Electoral Act, 2010, as amended, have been interpreted in a number of cases by this court to the effect that the plaintiff or complainant who did not participate in the party primary election, as an aspirant, has no *locus standi* to complain about the outcome of the said primary election. *See* **PDP Vs. Sylva (2012) 13 NWLR (Pt. 1316) 85 at 125; Umazuruike Vs. Nwachukwu (2013) 3 NWLR (pt. 1342) 503 at 526; APGA Vs. Anyanwu (2014) 7 NWLR (pt. 1407) 541 at 575; Anyanwu Vs. Ogunenwe (2014) 8 NWLR (pt. 1410) 437; Ukachukwu Vs. PDP (2014) 17 NWLR (pt. 1435) 134; Daniel Vs. INEC & ORS. (2015) 3 4 MJSC 1 at 45.**

The point was made more poignant in **PDP Vs. Sylva (supra) at 126** where this court stated the law thus:

> ***"Section 87(9) of the Electoral Act confers jurisdiction on courts to hear complainants from "candidate who***

participated at his party's primaries. The facts in this case are conclusive that the 1st respondent did not participate as a candidate in the PDP primaries which held on 19/11/11 to choose the party candidate for the general election for (election of the) Governor of Bayelsa State

The 1st respondent not being a candidate at the primaries cannot be heard to complain about the conduct of the primaries. Section 87(9) of the Electoral Act is thus not applicable. The PDP has the right to bar the 1st respondent, or any of its members from contesting its primaries if it so desires.

The appellant, by his own showing, did not participate in the primary election of his party, APC, for the election of the party's candidates for the election to the office of Governor of Yobe State. He, therefore, did not have the *locus standi* under Section 87(9) of the Electoral Act, 2010, as amended, to approach the Federal High Court to complain about the conduct of the APC primary election for the election/nomination of the party's candidate for the office of Governor of Yobe State. To this extent he was, being a busybody, rightly shut out by the courts. I have no cause therefore to disturb the concurrent findings or judgments of the trial court and the court below on this issue, which I resolve against the appellant.

Issue 2 argued in this appeal seemingly was brought before the trial court under Section 31(5) & (6) of the Electoral Act. In that wise, as a member of the public the appellant was empowered by subsection (5) of Section 31 of the Act to approach the High Court to seek "a declaration that the information contained in the affidavit" required under subsection (2) thereof to accompany the 1st respondent's nomination forms is false. The High Court if satisfied, on the complaint or application that the information contained in the nomination form of the respondent was false, is obligated to issuing an order disqualifying the 1st respondent from contesting the election.

It was alleged that the 1st respondent furnished to INEC among the documents accompanying his nomination forms, duly verified by his

affidavit of Personal Particulars, a Primary School Leaving Testimonial purporting that it was issued to him on 1st December, 1969 by Borno State Government. The senior counsel for the appellant argues on this that since Borno State did not exist as 1st December, 1969, the said Primary School Leaving Testimonial was a forged document, and that by virtue of Section 182(1)(i) of the Constitution, as amended, the testimonial was a forged document. A testimonial, as it appears from the world, is a formal written statement or testimony, often by a former teacher or employer, about somebody's abilities, qualifies and character. See Oxford Advanced Learner's Dictionary. A testimonial normally or in its usual context, affirms or confirms facts that existed in the past.

The testimonial in dispute forms part of Exhibit MAIHAJA 13. It is Exhibit MAIHAJA 13 A9 and it is at page 130 of the record. It certifies that the 1st respondent attended a named primary school and completed his primary education thereat on 22nd December, 1969. The appellant asserts that this information on oath is false and also that the testimonial is a forgery. By that assertion some criminal offences had allegedly been committed. That is, perjury, forgery and using as genuine a forged document.

On these weighty allegation of the commission of criminal offences it is not enough for the appellant to contend that the Yunusari Primary School never existed between 1963 and 1969. A more empirical evidence proving beyond reasonable doubt that the information on oath was false, that the primary school never existed in actuality and that the testimonial was a forgery should have come from the appellant in view of Sections 131(1), 132 and 135 of the Evidence Act.

Section 131(1) of the Evidence Act, 2011 provides that whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts shall prove that those facts exist. Put streetwise, he who asserts must prove his assertion. It therefore logically follows that what is alleged without proof can be denied without proof. When a fact is asserted without proof then the existence of the alleged fact is not established. That is why Section 132 of the Evidence

Act provides further that the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

Where, as in this case, the commission of a crime by a party to the proceeding is alleged, the alleged criminal offence must be proved beyond reasonable doubt; and the burden of proving the commission of the criminal offence beyond reasonable doubt is on that person who asserts it. See Section 135(1) of the Evidence Act, See **Nwobodo Vs. C.C. Onoh & ORS. (1983) 14 NSCC 478.** Allegations beyond imaginable conjectures and speculations in political times and proof beyond reasonable doubt such allegations of criminal offences are not one and the same thing. The former may be of unacceptable political desperation. The latter is an imperative in criminal law practice and procedure.

The appellant also makes the same blunder on the assertion that the 1st respondent presented false particulars of his date of birth. Not only that the appellant failed to prove the perforative allegation beyond reasonable doubt, he was effectively subdued and silenced by the overwhelming evidence marshaled in paragraph 21(c) & (d) of the counter-affidavit of the 1st respondent. The appellant just failed to, or did not, prove the allegation that is criminal in nature beyond reasonable doubt, as the law requires.

Issues 1 and 2, as argued in this appeal are hereby resolved against the appellant. I am in complete agreement with my learned brother, SIDI DAUDA BAGE, JSC, on these Issues as he did resolve them.

Issues 1 and 2, as argued, are matters touching on the scope and operation of Sections 87(9) and 31(2), (5) and (6) of the Electoral Act, 2010, as amended. The questions they raised are largely pre-election issues. I have held that the appellant lacked locus *standi under* Section 87(9) of the Act to complain about the primary election of his political party that he never participated in. He also failed to prove the allegations that 1st respondent had furnished false informations to the affidavit verifying his Personal Particulars in the nomination form that the latter submitted to INEC the 3rd respondent. The proof of the said allegations would have obligated the trial High Court to issue an Order, under Section 31(6) of the Electoral Act, 2010, as amended, disqualifying the 1st respondent from contesting in the election to the office of the Governor of Yobe State.

A The resolutions of Issues 1 and 2 in the appeal are enough to end the dispute. The appellant, in my view, could not have raised the question under Issue 3 under section 31 and 87 of the Electoral Act. Issue 3 appears to me to be largely post election issue that the trial High Court had no **B** jurisdiction to entertain, as the issue appears to belong to Election Tribunal duly constituted under Section 285 of the 1999 Constitution, as altered. The appellant did not, eventually, participate in the Governorship election to warrant his challenging the election of the 1st respondent on the ground **C** that the 1st respondent having been elected to the office of Governor prior to the April, 2015 Governorship election was no longer qualified, under Section 182(1)(b) of the Constitution, to be elected to that office.

The appellant did not bring the question under Section 31 of the **D** Electoral Act, albeit in any polymer act of stretching things to warrant the trial High Court exercising its jurisdiction to entertain it.

There is no substance in this appeal. It is hereby dismissed. Parties shall bear their respective costs.

E

Ejembi Eko,
Justice, Supreme Court

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ESSIEN IBOK ESSIEN
AND
THE STATE

SC. 256/2015

IN THE SUPREME COURT OF NIGERIA
HOLDEN AT ABUJA

FRIDAY, 23RD DAY OF JUNE, 2017

BEFORE THEIR LORDSHIPS

OLABODE RHODES-VIVOUR	**JUSTICE, SUPREME COURT**
MUSA DATTIJO MUHAMMAD	**JUSTICE, SUPREME COURT**
CHIMA CENTUS NWEZE	**JUSTICE, SUPREME COURT**
AMIRU SANUSI	**JUSTICE, SUPREME COURT**
PAUL ADAMU GALINJE	**JUSTICE, SUPREME COURT**

COURT: Evaluation of evidence – Where accused in a latter statement adopts the content of an earlier statement – Whether it will be right to rely on the two statements against the accused

CRIMINAL LAW AND PROCEDURE: Armed robbery – Elements thereof – Onus on prosecution to prove beyond reasonable doubt.

CRIMINAL LAW AND PROCEDURE: Corroborative evidence – Where conviction of accused is based on his confessional statement – Need to seek corroboration outside the confessional statement – Whether requirement is not mandatory.

CRIMINAL LAW AND PROCEDURE Proof of armed robbery – Direct or circumstantial evidence – How prosecution may prove offence thereof.

Issue for Determination

> ***"Given that, in all aspects, the evidence adduced by the prosecution was materially contradictory, was the court below right in coming to the conclusion that the prosecution discharged the legal burden on it of proving the guilt of the appellant beyond reasonable doubt?"***

Facts of the matter

The appellant was charged, tried and convicted along with one Ekong Akpan Thomas on a lone count of armed robbery contrary to Section 1(2)(a) of the Armed Robbery and Firearms (Special Provision) Act 1990 at the Akwa Ibom State Robbery and Firearms Tribunal, sitting at Ikot Epene. The appellant was the 2nd accused at the trial tribunal.

To establish its case, the prosecution called five witnesses, PW1 PW3, the victims of the criminal conduct of the two accused persons, and PW4 and PW5, police officers, who investigated the case against the appellant and his co-traveller in crime. The prosecution also tendered and relied on ten exhibits, A, B, C, D, E, F, G, G1, G2 AND H in fashioning their case. The appellant gave evidence in his defence. He called no other witness. At the end of the trial, the trial tribunal in a considered judgment delivered on 28th May, 1999, the 1st accused and the appellant were convicted as charged and sentenced to death.

Dissatisfied with the tribunal's judgment, the appellant appealed on a single ground vide a notice dated 4th December, 2013 to the Court of Appeal, Calabar Division, which judgment of 4th December, 2014 affirmed appellant's conviction and sentence by the trial court. Still aggrieved, the appellant has further appealed to the Supreme Court.

Held: *(Unanimously dismissing the appeal)*

1. *Elements of armed robbery which prosecution must prove beyond reasonable doubt*

   Parties herein agree and rightly too, for authorities on the principle are legion, that to successfully establish the charge of armed

robbery against the appellant the respondent has to prove beyond reasonable doubt:

(i) That there was in fact a robbery

(ii) That the robbery was an armed robbery

(iii) That the appellant took part in the robbery. See The State Vs. Isiaka (2013) LPELR-20521 (SC); Afolalu Vs. The State (2010) 16 NWLR (Pt. 1220) 584; Tirimisiyu Adebayo Vs. State (2014) lpelr-22988 (SC) and Suberu Vs.The State (2010) 8 NWLR (Pt. 1197 586.

In the instant case, appellant's strongest wicket lies in the third ingredient of the offence which his counsel strongly contends that the lower court has proceeded to affirm the trial court's finding thereon, inspite of the failure of the prosecution to establish same. It cannot be denied the appellant that the prosecutions failure to link him to the robbery he is charged and convicted for will be fatal to the concurrent findings of the two courts below. On what then, it may be asked, did the lower court rely in its affirmation of the trial court's finding on the third ingredient of the offence and conviction of the appellant? The answer is to be found at pages 186-187 of the records where, after reviewing the evidence of PW1 in the course of its judgment, the court held as follows:

> ***"The question is whether PW1 could have clearly recognized the appellant in this state four years after the incident. <u>It would appear doubtiful in my opinion."</u>***
> *(Pp 244 – 245 paras F – I)* **(Underlining supplied for emphasis)**

2. How the prosecution may establish the offence of armed robbery

It is a given principle that in establishing the offence of armed robbery, the prosecution's evidence need not necessarily be the direct evidence of an eye witness as same could also be either

circumstantial evidence or the confessional statement of the accused. *See*Onyenye Vs. State (2012) LPELR-7866 (SC) Lori Vs. State (1980) 8-11 SC 81.*(P 246 Paras F – G)*

3. *Courts were right in relying on Exhibits H and G.*
I cannot agree more with the foregoing unassailable finding of the lower court. Where as in the instant case, the appellant in Exhibit H adopts the content of Exhibit G, the two courts are entitled to rely on the latter in addition to the former against the appellant. See State Vs. Onyeukwu (2004) 14 NWLR (Pt. 893) 340 and Aikhadueki Vs. State (2013) LPELR-20906 (SC).*(P 249 paras G – H)*

4. *The requirement to base conviction on a corroborative evidence of the accused confessional statement is not mandatory.*
I agree with learned appellant's counsel that by virtue of a chain of decisions of this Court, *See* R. Vs. Sykes (supra) Dawa Vs. State (supra) and Ikpasa Vs. State (supra), it is desirable to base the appellant's conviction on further evidence outside his confession, the requirement for such corroborative evidence is, however, not mandatory. The principle still is that the court, where the confession is direct, positive and unequivocal and is properly proved, may convict an accused solely on such a confession. As learned respondent's counsel rightly submitted, there is no evidence stronger than a person's admission of the state of affairs: *See* Stephen Vs. State (supra), Oguonze Vs. State (supra) and Ogoala Vs. State (1991) 2 NWLR (Pt. 175) 509. In the case at hand, the concurrent findings of the two lower courts that proceeded not only on the basis of Exhibit H, appellant's voluntary confessional statement admitted without objection, but on the basis of Exhibit G as well, is impeccable. Not being perverse, the findings must persist*.*(Pp 247 – 248 paras G – C)*

Nigerian cases cited in this Judgment

Afolalu Vs. The State (2010) 16 NWLR (Pt. 1220) 584;
Agboola Vs. State (2013) Vol 224 LRCN (Pt. 1) 159;
Aikhadueki Vs. State (2013) LPELR-20906 (SC);
Akpan Vs. State (2008) Vol. 163 LRCN 186;
Basil Akpa Vs. State (2008) 163 LRCN 186;
Ebienwe Vs. State (2011) Vol. 201 LRCN 220;
Effiong Vs. The State (1998) 8 NWLR (Pt. 562) 362;
FataiOlayinka Vs. State (2007) 9 NWLR (Pt. 1040) 516;
Lori Vs. State (1980) 8-11 SC 81;
Ogoala Vs. State (1991) 2 NWLR (Pt. 175) 509;
Onyenye Vs. State (2012) LPELR-7866 (SC);
State Vs. Onyeukwu (2004) 14 NWLR (Pt. 893) 340;
Suberu Vs. The State (2010) 8 NWLR (Pt. 1197 586;
The State Vs. Isiaka (2013) LPELR-20521 (SC); and
Tirimisiyu Adebayo Vs. State (2014) lpelr-22988 (SC).

Nigerian Statutes cited in this Judgment

Armed Robbery and Firearms (Special Provision) Act 1990Section 1(2)(a).

Representation

Arnold Ushiadi with **Christiana Ali** and **Deinma Kalama,** for the appellant.

Uwemedimo Nwoko (HAG AKS) with **Uduak Eyo-Nsa** (DPP AKS) and **Godwin Udom (SSC AKS)** for the respondent.

DATTIJO MUHAMMAD, JSC (Delivering the Lead Judgment): The appellant was charged, tried and convicted along with one Ekong Akpan Thomas on a lone count of armed robbery contrary to Section 1(2)(a) of the Armed Robbery and Firearms (Special Provision) Act 1990 at the Akwa Ibom State Robbery and Firearms Tribunal, sitting at Ikot Epene. The appellant was the 2nd accused at the trial tribunal.

To establish its case, the prosecution called five witnesses, PW1 PW3, the victims of the criminal conduct of the two accused persons, and PW4 and PW5, police officers, who investigated the case against the appellant and his co-traveller in crime. The prosecution also tendered and relied on ten exhibits, A, B, C, D, E, F, G, G1, G2 AND H in fashioning their case. The appellant gave evidence in his defence. He called no other witness. At the end of the trial, the trial tribunal in a considered judgment delivered on 28th May, 1999, the 1st accused and the appellant were convicted as charged and sentenced to death.

Dissatisfied with the tribunal's judgment, the appellant appealed on a single ground vide a notice dated 4th December, 2013 to the Court of Appeal, Calabar Division, hereinafter referred to as the lower court, which judgment of 4th December, 2014 affirmed appellant's conviction and sentence by the trial court. Still aggrieved, the appellant has further appealed to this Court on a notice containing two grounds dated and filed on the 5th January, 2015.

In his brief settled by Godwin Omoaka and deemed filed on 30th March, 2017, the appellant has distilled a lone issue on the basis of which he requires the appeal to be determined.

The issue reads:

> ***"Given that, in all aspects, the evidence adduced by the prosecution was materially contradictory, was the court below right in coming to the conclusion that the prosecution discharged the legal burden on it of proving the guilt of the appellant beyond reasonable doubt? (Proof beyond reasonable doubt issue)."***

The similar issue formulated in the respondent's brief settled by Uwemedimo Nwoko Esq. the Hon Attorney General of Akwa Ibom State and deemed filed on 30/3/2017 too reads:

> ***"Whether the court below was right in affirming the judgment of the trial court and dismissing the appeal on the evidence on record before the court."***

On the lone issue, learned appellant counsel submits that the trial court has

the duty of ensuring that the prosecution had discharged the burden of proof of the offence against the appellant beyond reasonable doubt. The lower court's finding at page 57 of the record of appeal in affirming the trial court's decision that the respondent has established the essential ingredients of the offence against the appellant is not sustainable. The evidence of PW1, PW2 and PW3 on the fact of the occurrence of the armed robbery for which the appellant is convicted, it is submitted, falls short of the standard of proof the law demands. Not only was the armed robbery not reported on the date it took place, it is further submitted, the prosecution has failed to situate the appellant at the scene of the robbery. There is violent discrepancies in the evidence of PW1, PW2 and PW3 as to the date the offence took place making such evidence on the fact unreliable.

Most importantly, learned appellant's counsel further argues, the state of alertness of the victims of the robbery, PW1, PW2 and PW3 as well as visibility at the scene,, submits learned counsel, makes the identification of the appellant at the scene suspect. Poor visibility at the vicinity and time of the offence, submits learned counsel, made identification of the appellant impossible. The appellant, it is submitted, was simply pinpointed to the witnesses rather than paraded for them to identify him. Learned Counsel relies on the decisions in **Effiong Vs. The State (1998) 8 NWLR (Pt. 562) 362 at 372; Basil Akpa Vs. State (2008) 163 LRCN 186 at 295; Fatai Olayinka Vs. State (2007) 9 NWLR (Pt. 1040) 516.**

Lastly, learned appellant's counsel contends, there is no evidence outside appellant's purported confessional statement as obtained on his arrest almost four years after the date of the robbery. The law, it is submitted, prescribes that the conviction of the appellant proceeds only where evidence corroborative of the confessional statement is available. In the circumstance, therefore, learned counsel submits the conviction by the trial court and its affirmation by the lower court cannot persist. The confessional statement of the 1st accused the two courts relied on against the appellant does not avail the prosecution. As to the date of the robbery, it is contended, are not fatal to the prosecution's case. The case of **Akpan Vs. State (2008) Vol. 163 LRCN 186 at 295** is cited by counsel in support.

The prosecution witnesses, it is submitted, are consistent in their evidence and the discrepancy if any, does not go to the root of their

A evidence. Appellant's voluntary confessional statement, Exhibit H, it is submitted, clearly confirms the evidence of the prosecution witnesses. The appellant cannot, it is contended, challenge the prosecution's failure to tender the statements of its witnesses. If the defence has the need for the statements to
B make out its case, it is for it to seek and tender same. The defence, it is submitted, can neither complain nor blame the respondent. In their evidence, PW1 and PW2, it is submitted, remain very firm that the robbers that came to their house not only pointed a gun at them but also stabbed PW1 with a knife.
C This evidence, it is urged, establishes the two essential ingredients of armed robbery. Exhibit H, appellant's confessional statement, it is submitted, further establishes the entire ingredients of the offence against him. There is no evidence stronger that a person's admission of what he did.
D The identification parade canvassed by the appellant, it is further argued, is unnecessary. The law allows appellant's conviction on his own admission. It only makes corroborative evidence to the confession desirable and not mandatory. Relying on **Agboola Vs. State (2013) Vol 224 LRCN (Pt. 1) 159 at 166; Ogoala Vs. State (1991) 2 NWLR (Pt. 175) 509 at 523 and Ebienwe Vs. State (2011) Vol. 201 LRCN 220 @ 223** learned respondent's counsel urges the resolution of the lone issue against the appellant and the dismissal of the appeal.

Now, the very narrow issue the appeal raises is, whether given the facts on record, it is also safe for this Court to rely on appellant's extra judicial confessional statement to further affirm his conviction. Parties herein agree and rightly too, for authorities on the principle are legion, that to successfully establish the charge of armed robbery against the appellant the respondent has to prove beyond reasonable doubt:

(i) That there was in fact a robbery
(ii) That the robbery was an armed robbery
(iii) That the appellant took part in the robbery. See **The State Vs. Isiaka (2013) LPELR-20521 (SC); Afolalu Vs. The State (2010) 16 NWLR (Pt. 1220) 554; Tirimisiyu Adebayo Vs. State (2014) lpelr-22988 (SC) and Suberu Vs.The State (2010) 8 NWLR (Pt. 1197 586.**

In the instant case, appellant's strongest wicket lies in the third ingredient of the offence which his counsel strongly contends that the lower court has

proceeded to affirm the trial court's finding thereon, inspite of the failure of the prosecution to establish same. It cannot be denied the appellant that the prosecutions failure to link him to the robbery he is charged and convicted for will be fatal to the concurrent findings of the two courts below. On what then, it may be asked, did the lower court rely in its affirmation of the trial court's finding on the third ingredient of the offence and conviction of the appellant? The answer is to be found at pages 186-187 of the records where, after reviewing the evidence of PW1 in the course of its judgment, the court held as follows:

> ***"The question is whether PW1 could have clearly recognized the appellant in this state four years after the incident. <u>It would appear doubtiful in my opinion."</u>*** (Underlining supplied for emphasis)

On PW3, PW1's wife, the other eye witness to the armed robbery, the lower court proceeded at page 187 of the record thus:

> ***"PW3 said in evidence-in-chief that there was a lit lantern in the room which enabled her to see who came into the room. Under cross examination at page 25, she said:***
>
> > ***"...In my statement I described to the police that one of the robbers was tall with an open teeth while the other two were short."***
>
> **But in her statement made on 24/1/96, which was marked Exhibit C, she had stated thus:**
>
> > ***"...I saw three men armed with short guns.. I can identify that one who cut my husband with matchet on his right hand if seen..."***
>
> **<u>This implies that the robber she could easily identify was the one who cut her husband with a matchet. The</u>**

Appellant was not arrested until about four years after this incident but PW3 said at page 26:

> ***"... I was shown the 2nd accused person in the cell and I recognized him. It was stated in my statement that I identified him."***

It is not clear if the Appellant was the one who cut her husband with a matchet." (Underlining supplied for emphasis).

The court then rightly resolved thus:

> ***"I would agree with Mr. Omoaka for the appellant that it would be wise to exercise caution in convicting an accused person upon such fluid identification. But the trial court also considered Exhibit G and H whichwere confessional statements from the 1st accused person and from the appellant respectively."*** (Underlining supplied for emphasis).

It is a given principle that in establishing the offence of armed robbery, the prosecution's evidence need not necessarily be the direct evidence of an eye witness as same could also be either circumstantial evidence or the confessional statement of the accused. *See***Onyenye Vs. State (2012) LPELR-7866 (SC) Lori Vs. State (1980) 8-11 SC 81.**

The appellant in Exhibit H stated as follows:

> ***"I know one Ekong Akpan Thomas he is from Etinam living at No. 3, AdohaA kpo Street, Etinan. I also know one Aniedi Sampson Bassey. Aniedi Sampson Bassey is my in-law and I know Ekong Akpan Thomas through Aniedi Sampson Bassey alias Ikpe and Ekong Akpan Thomas were my partners in crime we use to steal goats. And we also went to***

A ***Oniong Iman Village together and rob the owner of the house and gave him a matchet cut on his hand. We were the people who stole his money, his clothes in a bag, one Bicycle and a Radio. Yes I was together with Ekong Akpan Thomas***
B ***and Aniedi Sampson Bassey alias 'Ikpe' at Etinan Motor Pack (sic) on 23/1/96 when one boy identified his pollo shirt which was one of the loots given to Ekong-Akpan Thomas..."***

C

On the foregoing, the court at page 196 of the record enthused as follows:

"The evidence of PW5 to the effect that Exhibit H and
D ***Exhibit G were both voluntarily made was not challenged. The evidence of PW1 and PW3 that the long sleeved polo shirt, Exhibit E, was part of the items stolen by the armed robbers who invaded their home on 17/12/95 was not***
E ***challenged. The evidence that Exhibit E was the same shirt worn by the 1st accused person on 23/1/96 at Etinan Motor Park was not challenged. In fact the 1st accused admitted this fact in Exhibit G while the appellant admitted this fact in***
F ***Exhibit H ... the tribunal was right to have accepted and acted on Exhibit H."***

I cannot agree more with the foregoing unassailable finding of the lower
G court. Where as in the instant case, the appellant in Exhibit H adopts the content of Exhibit G, the two courts are entitled to rely on the latter in addition to the former against the appellant. See **State Vs. Onyeukwu (2004) 14 NWLR (Pt. 893) 378 and Aikhadueki Vs. State (2013)**
H **LPELR-20906 (SC).**

I agree with learned appellant's counsel that by virtue of a chain of decisions of this Court, *See* **R.Vs. Sykes (supra) Dawa Vs. State (supra) and Ikpasa Vs. State (supra),** it is desirable to base the appellant's
I conviction on further evidence outside his confession, the requirement for such corroborative evidence is, however, not mandatory. The principle still

is that the court, where the confession is direct, positive and unequivocal and is properly proved, may convict an accused solely on such a confession. As learned respondent's counsel rightly submitted, there is no evidence stronger than a person's admission of the state of affairs: *See* **Stephen Vs. State (supra), Oguonze Vs. State (supra) and Ogoala Vs. State (1991) 2 NWLR (Pt. 175) 523.** In the case at hand, the concurrent findings of the two lower courts that proceeded not only on the basis of Exhibit H, appellant's voluntary confessional statement admitted without objection, but on the basis of Exhibit G as well, is impeccable. Not being perverse, the findings must persist.

It is for the foregoing that I resolve the lone issue against the appellant and dismiss his unmeritorious appeal. The judgment of the lower court is hereby accordingly affirmed.

Musa Dattijo Muhammad,
Justice, Supreme Court

RHODES-VIVOUR, JSC: I read a draft copy of the leading judgment delivered by my learned brother, Muhammad, JSC. I agree with his lordship that there is no merit in this appeal. The appeal is hereby dismissed.

Olabode Rhodes-vivour
Justice, Supreme Court

ADAMU GALINJE, JSC: I have had the privilege of reading in draft the judgment just delivered by my learned brother, **M. D. MUHAMMAD JSC** and I agree with the reasoning contained therein and the conclusion arrived thereat. I have nothing useful to add as my learned brother has exhaustively considered all the issues submitted for determination of this appeal.

For the same reasons ably articulated by my learned brother, which I adopt as mine, this appeal shall be and it is hereby dismissed. The judgment of the lower court is hereby affirmed.

Paul Adamu Galinje
Justice, Supreme Court

AMIRU SANUSI, JSC: I read before now the judgment just delivered by my learned brother **MUSA DATTIJO MUHAMMAD.** I am in entire

A agreement with his reasoning and conclusion that this appeal lacks merit. I too, accordingly dismiss it.

Amiru Sanusi
Justice, Supreme Court

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HON. BAYO ADEGBOLA
AND

1. **HON. GODWIN OSIYI**
2. **PEOPLES DEMOCRATIC PARTY (PDP)**
3. **INDEPENDENT NATIONAL ELECTORAL COMMISSION (INEC)**

SC. 1005/2016

IN THE SUPREME COURT OF NIGERIA
HOLDEN AT ABUJA

FRIDAY, 2ND JUNE, 2017

BEFORE THEIR LORDSHIPS

WALTER SAMUEL NKANU ONNOGHEN	**CHIEF JUSTICE OF NIGERIA**
MUSA DATTIJO MUHAMMAD	**JUSTICE, SUPREME COURT**
KUDIRAT M. O. KEKERE-EKUN	**JUSTICE, SUPREME COURT**
EJEMBI EKO	**JUSTICE, SUPREME COURT**
SIDI DAUDA BAGE	**JUSTICE, SUPREME COURT**

COURT: Jurisdiction – Fundamental nature thereof – The rationale for determining jurisdiction as preliminary point – Need to save time of court and parties.

COURT: Service of process – Where there is failure of service where necessary – Whether court does not have the necessary jurisdiction and competence to conclude proceedings.

EVIDENCE: Affidavit – Essentials and requirements of an admissible affidavit – Need to comply with SS 108, 109, 113 and 117(4) of the Evidence Act 2011.

EVIDENCE: Affidavit of service – Need to be sworn before a person authorized to take it – Where the name of the Commissioner for Oath is not indicated thereon – Whether such affidavit of service is inadmissible and worthless.

EVIDENCE: Affidavit of service – Where not sworn by and signed before a person authorized to take it – Implication – Whether worthless and inadmissible.

PRACTICE AND PROCEDURE: Affidavit of service – Admissibility thereof – Need to comply with relevant provisions of the Evidence Act 2011.

PRACTICE AND PROCEDURE: Failure to serve process – Where there is failure to serve a process where required – Whether a party adversely affected by an order made thereon is entitled to have it set aside.

PRACTICE AND PROCEDURE: Proof of service – Where a declaration made by a bailiff does not comply with the requirements of a valid affidavit under the Evidence Act – Implications.

PRACTICE AND PROCEDURE: Proof of service – Where a deficient affidavit of service is filed – Whether cannot be used and is inadmissible to prove service – Relevant considerations thereof.

SERVICE: Notice of appeal – Failure to serve therewith – Whether a fundamental defect and not a mere irregularity – Relevant considerations therefore.

SERVICE: Notice of appeal – Proper service of notice of appeal – Significance – Whether a condition precedent to the assumption of the appellate jurisdiction of the Supreme Court.

SERVICE: Notice of appeal – Requirement for service – Or. 2 Rule 3(1) (b) of

the Supreme Court Rules 1985 (as amended) – Rationale thereof.

SERVICE: Originating process – Where an origination process is not served where required – Implication.

STATUTE: Evidence Act 2011 SS 108, 109, 113 and 117(4) thereof – Nature and purport thereof.

Facts of the Matter

This is an appeal against the judgment of the Court of Appeal, Abuja Division, delivered on the 4th November, 2016, affirming the ruling of the Federal High Court sitting at Lokoja, dated 15th November, 2015. The brief facts of the case that brought about the appeal are as hereinunder supplied.

The 2nd respondent's primary election for the nomination of its Ogori/Magongo Kogi State Constituency candidate in the 11th April, 2015, House of Assembly General Elections, eventually held on 11th December 2014. With the victory of the 1st respondent at the primary election, the 2nd respondent forwarded his name to the 3rd respondent, the Independent National Electoral Commission, as the party's candidate in respect of the Ogori/Magongo State Constituency in the forth coming House of Assembly General Election. Aggrieved by this turn of events, the appellant, by way of an originating summons at the Lokoja Division of the Federal High Court, challenged the nomination of the 1st respondent, as the 2nd respondent's candidate at House of Assembly election in respect of the Ogori/Magongo State Constituency.

In addition to contesting appellant's claim, the 1st respondent by way of preliminary objection, challenged the competence of the suit. In its ruling of 19th November, 2015, the trial court sustained the objection and struck out the suit for want of jurisdiction. Dissatisfied, the appellant appealed against the ruling at the Court of Appeal, Abuja Division. In a considered judgment delivered on 4th November, 2016, the court sustained the trial court's decision and dismissed appellant's appeal. The appellant has now appealed against the judgment of the Court of Appeal, upon his notice filed on 17th November, 2016.

Held: *(Unanimously striking out the appeal)*

1. *Fundamental nature of court's jurisdiction*

Jurisdiction, this Court has held in a plethora of cases, is the very basis on which any court or tribunal, including the apex Court, tries a case. It is the lifeline of all trials as a trial without jurisdiction is a nullity. In order to save time and costs and to avoid a trial of a nullity, 1st respondent's preliminary objection will be determined first. See NDIC Vs. CBN and Anor (2002) 3SC; Petrojessica Enterprises Ltd Vs. Leventis Technical Company Ltd (1992) LPELR-2915 (SC).

In the preliminary objection, the 1st respondent's seeks the following:

> ***"1. An order striking out this appeal, the Appellant having failed to serve the Notice of Appeal on the 1st respondent as required by the Rules of this Court.***
>
> ***2. An order striking out this Appeal for want of jurisdiction as the Appellant's Notice of Appeal filed is defective and incompetent having failed to state the address of the parties interested in the appeal as mandatorily required by the Supreme Court Rules.***
>
> ***3. An order striking out Grounds 1, 2, 5 and 6 of the Notice of Appeal."*** *(Pp 262 – 263 paras D – A)*

2. *Failure to serve a notice of appeal is a fundamental defect*

1st respondent's preliminary objection draws its strength from its first arm, the fact of the non service of the notice of appeal on the 1st respondent. I agree with learned counsel to the 1st respondent that notice of appeal is the foundation of the appeal and that non-service

of the notice, if established, goes to the root of the appeal. The defect is not a mere irregularity as, being fundamental, it robs the appellate court the jurisdiction to hear and determine the appeal. This Court has repeatedly held that service of an initiating process, which the notice of appeal is, is a sine qua non for a court to assume jurisdiction over a case. In S.G.B.N. Ltd Vs. Adewunmi (2003) LPELR-3081 (SC); (2003) 10 NWLR (Pt 829) 526 this Court restated its concerns thus:

> ***"Service of process on a party to a proceeding is fundamental. It is service that confers competence and jurisdiction on the court seised of the matter. Due service of process of court is therefore a condition sine qua non to the hearing of any suit. If there is a failure to serve process where service of process is required, the failure goes to the root of the case, and the person affected by the order but not served with the process is entitled ex debito justitiae to have the order set-aside as a nullity."***

In the case at hand, learned counsel to the 1st respondent would, therefore, be right to insist that this Court lacks the jurisdiction to hear and determine this appeal if indeed the notice of appeal is established not to have been served on the 1st respondent: Obimonure Vs. Erinosho (1966) 1 ALL NLR 245 at 252; Tukur Vs. Government of Gongola State (No.1) (1988) 1 NWLR (Pt 68) 39 and Josiah Cornelius Ltd. &Ors Vs. Chief Cornelius Okeke Ezenwa (1996) 4 NWLR (Pt 443) 391.*(P 265 paras B – I)*

3. Essentials of a proper affidavit of service

Learned appellant's counsel asserts that the notice of the instant appeal has been served on the respondents and that an affidavit of service abides in the court's files. Does it?

Sections 108, 109, 113 and 117(4) of the Evidence Act 2011, provide for the type of affidavit which, given the extant

circumstances, shall avail the appellant. The Sections read:

"Section 108 Before an affidavit is used in the court for any purpose, the original shall be filed in the court, and the original or an office copy shall alone be recognized in the court.

Section 109 Any affidavit sworn before any judge, officer or other person duly authorized to take affidavits in Nigeria may be used in the court in all cases where affidavits are admissible.

Section 113 The court may permit an affidavit to be used, notwithstanding that it is defective in form according to this Act, if the court is satisfied that it has been sworn before a person authorized.

Section 117(4) An affidavit when sworn shall be signed by the deponent or if he cannot write or is blind, marked by him personally with his mark in the presence of the person before whom it is taken." *(P 266 paras A – G)*

Per M.D. Muhammed (JSC)

"A community reading of the foregoing reveals that only the filed original of the affidavit, the appellant seeks to rely on in establishing the fact of service of his notice of appeal on the 1st respondent or an office copy of the original shall suffice. Most importantly, the affidavit must be sworn to and signed or marked by the deponent before the authorized person or officer. By these requirements of the law, an unsworn and unsigned affidavit is worthless. In the absence of the swearing by the deponent, therefore, the declaration will not be as worthy as the paper on which it is made. The person before whom the oath is subscribed must so endorse on the affidavit

by indicating, in addition to the official stamp, his name. ***See*** **Maraya Plastic Industries Ltd Vs. Inland bank of Nigeria Plc (2002) FWLR (Pt 120) 1732 at 1737; Oparaugo Vs. Oparaugo (2008) 5 NWLR (Pt 1081) 574; Apugo Vs. Nwoke (2010) 1 NWLR (Pt 1176) 600 and Onujabe Vs. Idris (2012) 2 NWLR (Pt 1284)285."**
(Pp 266 – 267 paras H – B)

4. *Where a declaration made by a bailiff does not satisfy requirements of a valid affidavit of service*
A declaration by one Emeka John, a bailiff, asserting the fact of service on the 1st respondent abides in the court's records. It is made on the 23rd November, 2017, and purports to have been sworn to before a commissioner for oath, who is the authorized officer. The declaration however, neither bears the authorized officer's name and signature, nor the official stamp of the office of the commissioner of oath before whom the oath is said to have been subscribed to. In the circumstance, the declaration cannot be said to have been sworn to, as required by law. Being an unsworn declaration it is not, in the eyes of the law, the affidavit of service learned appellant's counsel asserts it is. The fundamentally defective affidavit cannot evidence the fact of service of the notice of appeal on the 1st respondent.*(P 267 paras C – E)*

5. *Service of notice of appeal is a condition precedent to the assumption of appellate jurisdiction of the Supreme Court*
Effective service of the notice of appeal, I agree with learned counsel to the 1st respondent, is a condition precedent to the exercise of jurisdiction by this Court. Absence of such service, it follows, is a fundamental omission which bars the court from assuming jurisdiction to hear and determine the appeal. Proceeding inspite of the non-service of the notice of appeal, will constitute a denial of the 1st respondent's right to fair hearing as guaranteed under Section 36

of the 1999 Constitution. *See* Madukolu Vs. Nkemdilim (1962) 1 ALL NLR 581 at 595 and Estate of Late Chief I.S. Idisi Vs. Ecodril Nigeria Limited &ors (2016) LPELR-40438 (SC).

For the foregoing, 1st respondent's preliminary objection is well taken. It succeeds and is hereby sustained. Resultantly, the incompetent appeal is hereby struck out. *(P 267 paras E – H)*

Per Onnoghen (CJN)

"We have confirmed from the record that there is no legally admissible affidavit evidence to support the contention of learned counsel for appellant, that the notice of appeal was duly served on the 1st respondent and consequently, hold the omission a fundamental defect which vitiates the jurisdiction of the court. The non service of the notice of appeal on 1st respondent has resulted in the denial of 1st respondent's right to fair hearing as constitutionally guaranteed in the Constitution of the Federal Republic of Nigeria, 1999, as amended."*(P 268 paras D – F)*

Per KekereEkun (JSC)

"The most fundamental of the grounds of objection is the first ground. This is because the notice of appeal is the substratum of the appeal. It is the foundation upon which every other process or proceeding in the appeal rests. Being an originating process, it is a fundamental requirement not only of the Rules of this court but also of the constitutional right of fair hearing guaranteed under Section 36(1) of the 1999 Constitution, that all parties to the appeal be duly served therewith. It is only when a party has notice of proceedings, that he is in a position to react thereto, and place his own side of the case before the court. In an appeal, service of the notice of appeal on

the respondent provides him with an opportunity to participate in the compilation of records and to file a cross-appeal, if necessary. On the mandatoriness of personal service of the notice of appeal, see Order 2 Rule 3 (1) (b) of the Rules of this court.

Failure to serve an originating process on a party to the proceedings, is a fundamental defect which goes to the root of the court's jurisdiction to adjudicate. I agree with my learned brother, M.D. Muhammad, JSC, that there is no legally acceptable evidence in the record before us to show that the 1st respondent was duly served with the notice of appeal. The failure has rendered the appeal before this court incompetent thereby robbing the court of jurisdiction to entertain it. The preliminary objection is well founded and accordingly sustained. The appeal is hereby struck out.

The parties shall bear their respective costs in the appeal."
(Pp 269 – 270 paras E – B)

6. Rationale for the requirement of service of notice of appeal

Let me add that there is a purpose for the requirement that the notice of appeal shall be served on the respondent as soon as it was filed. See Order 2 Rule 3 (1) (b) of the Rules of this Court. The purpose is for the respondent to be notified that the appellant is challenging the correctness of the judgment given to the respondent by the court below and for him to prepare his defence thereto. It serves the purpose of *audi alteram partem*, and so it is constitutional and one of the pillars of fair hearing.

The effect of non-service on the respondent of the notice of appeal is that it deprives the respondent the opportunity he has to file notice of cross-appeal within the time stipulated. It also deprives him of the opportunity of participating in the settlement of the

record of appeal.*(P 270 paras D – F)*

Per Eko (JSC)

"I should think that any conduct of a litigant calculated or designed to undermine the statutory right of his opponent in litigation should be assumed or presumed to be malicious and that he did so not only to secure for himself an undue advantage, but also to cause miscarriage of justice to his adversary. This is why in the court of justice the rule is: he who comes to justice must come with clean hands.

Justice is not a game of hide and seek. The appellant who engages in a game of surprise and attack must be prepared for the full wrath of the court of justice, if it turns out that he had not been fair to his adversary." *(P 271 Paras E – G)*

7. Proof of service confers jurisdiction on the court

It is settled law, that the proof of service of processes on all parties to the suit before the Court is the factor which confers jurisdiction of the Court on the parties. In the absence of proof of service, the court acts in vain, and the proceedings a nullity.

However, Section 36(2) of the Constitution of Nigeria 1999, provided that an opportunity should be provided for a person whose rights and obligation may be affected to make Representation to the administration authority before that authority makes decision affecting that person. *(P 272 paras B – D)*

Nigerian Cases cited in this Judgment

Ajayi Vs. Military Adm., Ondo State (1997) 5 NWLR (Pt 504) 237;
Amata Vs. Omogume (1997) 2 NWLR (Pt 485) 93;
Apugo Vs. Nwoke (2010) 1 NWLR (Pt 1176) 600;
Attorney General of Lagos State Vs. Dosunmu (1989) 3 NWLR (Pt III) 552;

Estate of Late Chief I.S. Idisi Vs. Ecodril Nigeria Limited &Ors (2016) LPELR-40438 (SC);
FBN Plc Vs. TSA Industries Ltd (2007) 1 FWLR (Pt 358) 1449;
Hon. Minister of Works and Housing Vs. Tomas (Nig) Ltd &Ors (2002) FWLR (Pt 124) 465;
Imonikhe Vs. A.G. Bendel State (1992) 6 NWLR (Pt 248) 396;
Josiah Cornelius Ltd. & Ors Vs. Chief Cornelius Okeke Ezenwa (1996) 4 NWLR (Pt 443) 391;
Kalu Vs. Odili (1992) 6 SCNJ (Pt 1) 76;
M. C. Investment Ltd V. C.I. and C.M. Ltd (2012) 12 NWLR (Pt 1313) 1;
Madukolu Vs. Nkemdilim (1962) 1 ALL NLR 581;
Maraya Plastic Industries Ltd Vs. Inland bank of Nigeria Plc (2002) FWLR (Pt 120) 1732;
Mbeledoju Vs. Aneto (1996) 2 NWLR (Part 429)15;
Mercantile Bank of Nigeria Plc and Anor Vs. Nwobodo (2005) 7 SC (Pt III) 1;
NDIC Vs. CBN and Anor (2002) 3SC;
Ndiwe Vs. Okocha (1992) 7 NWLR (Pt 252) 129;
Ndukwe Vs. State (2009) 2 SCNJ 223;
Obimonire Vs. Erinosho (1966) 1 ALL NLR 250;
Odi Vs. Osafile (1987) 2 NWLR (Pt 57) 510;
Odunze Vs. Nwosu (2007) 13 NWLR (Pt 1050) 1;
Onifade Vs. Olayiwola & Ors (1990) 7 NWLR (Pt 161) 130;
Onujabe Vs. Idris (2012) (Pt 1284)285;
Oparaugo Vs. Oparaugo (2008) 5 NWLR (Pt 1081) 574;
Petrojessica Enterprises Ltd Vs. Leventis Technical Company Ltd (1992) LPELR-2915 (SC);
Popoola Vs. Babatunde (2012) 7 NWLR (Pt 1299) 302;
Rossek Vs. ACB Ltd (1993) 8 NWLR (Pt 312) 382;
S.G.B.N. Ltd Vs. Adewunmi (2003) LPELR-3081 (SC); (2003) 10 NWLR (Pt 829) 526;
Tukur Vs. Government of Gongola State (1988) 1 NWLR (Pt 68) 39; and
Uwazurike Vs. AG Federation (2007) 8 NWLR (Pt 1035) 1.

Nigerian Statutes cited in this Judgment
Constitution of Nigeria 1999 Sections 36(1); 36(2);
Evidence Act 2011Sections 108, 109, 113 and 117(4).
Representations
Ameh Anthony Prince (Esq.), with him: **Reuben Egwuaba (Esq.)** and G. Edoh (Esq.), for the appellant.

Emeje Aruwa with him; **Alex Audu (Esq.),** and **E.A. Ekpa (Esq.),** for 1st respondent.

Sean Francis Kennedy Akaolisah (Esq.), for 2nd respondent.

T.M. Inuwa (Esq.), with him; **Goni A. Ismail, (Esq**.), **Bashir M. Abubakar (Esq**.), and **I. S. Mohammed (Esq**.), for 3rd respondent.

DATTIJO MUHAMMAD,JSC (**Delivering the Lead Judgment):** This is an appeal against the judgment of the Court of Appeal, Abuja Division, delivered on the 4th November, 2016, affirming the ruling of the Federal High Court sitting at Lokoja, dated 15th November, 2015. The brief facts of the case that brought about the appeal are as hereinunder supplied.

The 2nd respondent's primary election for the nomination of its Ogori/Magongo Kogi State Constituency candidate in the 11th April, 2015, House of Assembly General Elections, eventually held on 11th December 2014. With the victory of the 1st respondent at the primary election, the 2nd respondent forwarded his name to the 3rd respondent, the Independent National Electoral Commission, as the party's candidate in respect of the Ogori/Magongo State Constituency in the forthcoming House of Assembly General Election. Aggrieved by this turn of events, the appellant, by way of an originating summons at the Lokoja Division of the Federal High Court, challenged the nomination of the 1st respondent, as the 2nd respondent's candidate at House of Assembly election in respect of the Ogori/Magongo State Constituency.

In addition to contesting appellant's claim, the 1st respondent by way

of preliminary objection, challenged the competence of the suit. In its ruling of 19th November, 2015, the trial court sustained the objection and struck out the suit for want of jurisdiction. Dissatisfied, the appellant appealed against the ruling at the Court of Appeal, Abuja Division, hereinafter referred to as the court below. In a considered judgment delivered on 4th November, 2016, the court sustained the trial court's decision and dismissed appellant's appeal. The appellant has now appealed against the judgment of the Court of Appeal, upon his notice filed on 17th November, 2016.

Having issued a notice of preliminary objection against the competence of the appeal, the 1st respondent proceeded to argue the objection in his brief of argument settled by Emeje Aruwa Esq. of counsel. Appellant's reply brief, which was like his main brief, settled by Ameh Anthony Prince Esq., contain his response to the 1st respondent's arguments in respect of the preliminary objection to the competence of the appeal.

Jurisdiction, this Court has held in a plethora of cases, is the very basis on which any court or tribunal, including the apex Court, tries a case. It is the lifeline of all trials as a trial without jurisdiction is a nullity. In order to save time and costs and to avoid a trial of a nullity, 1st respondent's preliminary objection will be determined first. *See* **NDIC Vs. CBN and Anor (2002) 3SC; Petrojessica Enterprises Ltd Vs. Leventis Technical Company Ltd (1992) LPELR-2915 (SC).**

In the preliminary objection, the 1st respondent's seeks the following:

> ***"1. An order striking out this appeal, the Appellant having failed to serve the Notice of Appeal on the 1st respondent as required by the Rules of this Court.***
>
> ***2. An order striking out this Appeal for want of jurisdiction as the Appellant's Notice of Appeal filed is defective and incompetent having failed to state the address of the parties interested in the appeal as mandatorily required by the Supreme Court Rules.***

A

3. An order striking out Grounds 1, 2, 5 and 6 of the Notice of Appeal."

B

The Court of Appeal's judgment being appealed against, learned counsel submits, was delivered on the 4th of November, 2016. Since that date, no Notice of Appeal, it is further submitted, is served on the 1st respondent to C notify him on any pending appeal in the matter. The 1st respondent, it is contended, is only served, so far, with the already compiled record of appeal and the appellant's brief of argument. Appellant's failure to serve his notice of appeal to this Court on the 1st respondent, it is submitted, is fatal to D the jurisdiction of the court to entertain the appeal having not been initiated by the due process of the law. Order 2 Rule 3 and 4 of the Supreme Court Rules, learned counsel argues, makes it mandatory for the notice of appeal to be served on all the respondents. A breach of the rules, it is argued, is not E a mere irregularity but a fundamental breach as the notice is at the foundation of the appeal. Relying inter-alia on **Rossek Vs. ACB Ltd (1993) 8 NWLR (Pt 312) 382 at 437; Attorney General of Lagos State Vs. Dosunmu (1989) 3 NWLR (Pt III) 552 at 556;Popoola Vs.** F **Babatunde (2012) 7 NWLR (Pt 1299) 302 at 331 and M. C. Investment Ltd V. C.I. and C.M. Ltd (2012) 12 NWLR (Pt 1313) 1 at 20.**

Further relying on Order 8 rule 2(7) of the Supreme Court Rules, and **Uwazurike Vs. AG Federation (2007) 8 NWLR (Pt 1035) 1 at 17,** and G **Odunze Vs. Nwosu (2007) 13 NWLR (Pt 1050) 1,** learned counsel submits that the notice of appeal does not also reflect the names and addresses of all parties directly affected by the appeal thereby standing in further breach of Order 8 rule 2(1) and (6). Being the substratum of the H appeal, it is submitted, these defects have cumulatively rendered the appeal incompetent and should be so held.

In further argument, it is submitted that no issues have been formulated from appellant's 1st, 2nd and 6th grounds and same, on the I authority of **Mbeledoju Vs. Aneto (1996) 2 NWLR (Part 429)15 at 165; Onifade Vs. Olayiwola &Ors(1990) 7 NWLR (Pt 161) 130** and **Ndiwe**

Vs. Okocha (1992) 7 NWLR (Pt 252) 129 should be deemed abandoned. Ground 5, on the other hand, it is contended, does not arise from the judgment appealed against. Since the ground purports to raise and attack an issue that is not decided by the judgment on appeal, it is incompetent. Relying inter-alia on **Hon. Minister of Works and Housing Vs. Tomas (Nig) Ltd & Ors (2002) FWLR (Pt 124) 465** and **Mercantile Bank of Nigeria Plc and Anor Vs. Nwobodo (2005) 7 SC (Pt III) 1 at 4-6,** learned counsel submits that the issue be struck out.

On the whole, the incompetent appeal, it is urged, be equally struck out.

Appellant's response to the preliminary objection is as contained in his reply brief to the 1st respondent's brief. Therein, it is argued that the preliminary objection is misplaced, unfounded and smirks of technicality. The bailiffof the court below who effected service on all the respondents, it is submitted, swore to an affidavit of service of the notice of appeal copies of which are in the file of the instant appeal. The 1st respondent gave the name and address of his counsel and if the counsel has ceased to be retained, he has the duty to notify the court. The 1st respondent was served through his counsel on record and this, by the decision in **FBN Plc Vs. TSA Industries Ltd (2007) 1 FWLR (Pt 358) 1449** is good and effective service.

In further response, learned counsel submits that the 2nd arm of 1st respondent's objection on appellant's failure to state the names and address of the persons directly affected by the appeal, has been held to be a mere irregularity which does not void the notice of appeal or render it incompetent. Learned counsel refers to **AmataVs. Omogume (1997) 2 NWLR (Pt 485) 93; Ajayi Vs. Military Adm., Ondo State (1997) 5 NWLR (Pt 504) 237** and **Odi Vs. Osafile (1987) 2 NWLR (Pt 57) 510.**

Concluding, it is submitted that it is not the law that an appellant must distill an issue from each of his grounds of appeal. It suffices if he distills an issue from a combination of his grounds of appeal. Appellant's issues, it is further contended, are formulated from all the grounds of appeal which directly attack the judgment appealed against. Citing the decisions

in **Imonikhe V. A.G. Bendel State (1992) 6 NWLR (Pt 248) 396; KaluVs. Odili (1992) 6 SCNJ (Pt 1) 76 at 93** and **Ndukewe Vs. State (2009) 2 SCNJ223** learned counsel submitsthat the 3rd arm of 1st respondent's objection be discountenanced.

On the whole, it is contended, the objection which lacks merit should be dismissed.

1st respondent's preliminary objection draws its strength from its first arm, the fact of the non service of the notice of appeal on the 1st respondent. I agree with learned counsel to the 1st respondent that notice of appeal is the foundation of the appeal and that non-service of the notice, if established, goes to the root of the appeal. The defect is not a mere irregularity as, being fundamental, it robs the appellate court the jurisdiction to hear and determine the appeal. This Court has repeatedly held that service of an initiating process, which the notice of appeal is, is a sine qua non for a court to assume jurisdiction over a case. In **S.G.B.N. Ltd Vs. Adewunmi (2003) LPELR-3081 (SC); (2003) 10 NWLR (Pt 829) 526** this Court restated its concerns thus:

> ***"Service of on a party to a proceeding is fundamental. It is service that confers competence and jurisdiction on the court seised of the matter. Clearly due service of process of court is a condition sine qua non to the hearing of any suit. Therefore, if there is a failure to serve process where service of process is required, the person affected by the order but not served with the process is entitled ex debito justitiae to have the order set-aside as a nullity."***

In the case at hand, learned counsel to the 1st respondent would, therefore, be right to insist that this Court lacks the jurisdiction to hear and determine this appeal if indeed the notice of appeal is established not to have been served on the 1st respondent: **Obimonire Vs. Erinosho (1966) 1 ALL NLR 250 at 252; Tukur Vs. Government of Gongola State (1988) 1 NWLR**

(Pt 68) 39 and **Josiah Cornelius Ltd. & Ors Vs. Chief Cornelius Okeke Ezenwa (1996) 4 NWLR (Pt 443) 391.**

Learned appellant's counsel asserts that the notice of the instant appeal has been served on the respondents and that an affidavit of service abides in the court's files. Does it?

Sections 108, 109, 113 and 117(4) of the Evidence Act 2011, provide for the type of affidavit which, given the extant circumstances, shall avail the appellant. The Sections read:

> ***"Section 108: Before an affidavit is used in the court for any purpose, the original shall be filed in the court, and the original or an office copy shall alone be recognized in the court.***
>
> ***Section 109: Any affidavit sworn before any judge, officer or other person duly authorized to take affidavits in Nigeria may be used in the court in all cases where affidavits are admissible.***
>
> ***Section 113: The court may permit an affidavit to be used, notwithstanding that it is defective in form according to this Act, if the court is satisfied that it has been sworn before a person authorized.***
>
> ***Section 117(4): An affidavit when sworn shall be signed by the deponent or if he cannot write or is blind, marked by him personally with his mark in the presence of the person before whom it is taken."***
>
> (Underlining supplied for emphasis).

A community reading of the foregoing reveals that only the filed original of the affidavit, the appellant seeks to rely on in establishing the fact of service of his notice of appeal on the 1st respondent or an office copy of the original shall suffice. Most importantly, the affidavit must be sworn to and signed

A or marked by the deponent before the authorized person or officer. By these requirements of the law, an unsworn and unsigned affidavit is worthless. In the absence of the swearing by the deponent, therefore, the declaration will not be as worthy as the paper on which it is made. The B person before whom the oath is subscribed must so endorse on the affidavit by indicating, in addition to the official stamp, his name. *See* **Maraya Plastic Industries Ltd Vs. Inland bank of Nigeria Plc (2002) FWLR (Pt 120) 1732 at 1737; Oparaugo Vs. Oparaugo (2008) 5 NWLR (Pt 1081) C 574;Apugo Vs. Nwoke (2010) 1 NWLR (Pt 1176) 600 and Onujabe Vs. Idris (2012) (Pt 1284)285.**

A declaration by one Emeka John, a bailiff, asserting the fact of service on the 1st respondent abides in the court's records. It is made on the D 23rd November, 2017, and purports to have been sworn to before a commissioner for oath, who is the authorized officer. The declaration however, neither bears the authorized officer's name and signature, nor the official stamp of the office of the commissioner of oath before whom the E oath is said to have been subscribed to. In the circumstance, the declaration cannot be said to have been sworn to, as required by law. Being an unsworn declaration it is not, in the eyes of the law, the affidavit of service learned appellant's counsel asserts it is. The fundamentally defective affidavit F cannot evidence the fact of service of the notice of appeal on the 1st respondent. Effective service of the notice of appeal, I agree with learned counsel to the 1st respondent, is a condition precedent to the exercise of jurisdiction by this Court. Absence of such service, it follows, is a G fundamental omission which bars the court from assuming jurisdiction to hear and determine the appeal. Proceeding inspite of the non-service of the notice of appeal, will constitute a denial of the 1st respondent's right to fair hearing as guaranteed under Section 36 of the 1999 Constitution. *See* H **Madukolu Vs. Nkemdilim (1962) 1 ALL NLR 581 at 595 and Estate of Late Chief I.S. Idisi Vs. Ecodril Nigeria Limited & Ors (2016) LPELR-40438 (SC).**

For the foregoing, 1st respondent's preliminary objection is well I taken. It succeeds and is hereby sustained. Resultantly, the incompetent

A appeal is hereby struck out.

Parties shall bear their respective costs.

Musa Dattijo Muhammad
Justice, Supreme Court

B

NKANU ONNOGHEN, JSC: I have had the privilege of reading in draft the lead Judgment of my learned brother, **MUHAMMAD JSC** just delivered. I agree with his reasoning and conclusion that the appeal is C incompetent and consequently, liable to be struck out.

Learned counsel for 1st respondent raised preliminary objection to the competence of the appeal, which he argued in the 1st respondent's brief of argument. It is the contention of the 1st respondent that appellant failed to D serve the notice of appeal on 1st respondent as required by the Rules of Court, thereby, depriving the court of the jurisdiction to hear and determine the appeal particularly as the address of the parties interested in the appeal were also not stated in the notice of appeal.

E We have confirmed from the record that there is no legally admissible affidavit evidence to support the contention of learned counsel for appellant, that the notice of appeal was duly served on the 1st respondent and consequently, hold the omission a fundamental defect which vitiates F the jurisdiction of the court. The non service of the notice of appeal on 1st respondent has resulted in the denial of 1st respondent's right to fair hearing as constitutionally guaranteed in the Constitution of the Federal Republic of Nigeria, 1999, as amended.

G In conclusion, I too find the appeal incompetent for lack of service of the notice of appeal on 1st respondent and consequently, strike same out.

I abide by the consequential orders made in the said lead Judgment including the order as to costs.

H Appeal struck out.

Walter Samuel Nkanu Onnoghen,
(chief Justice Of Nigeria)

I **KEKERE-EKUN, JSC:** I have had the benefit of reading in draft, the judgment of my learned brother, MUSA DATTIJO MUHAMMAD, JSC

A just delivered. I agree with the reasoning and conclusion that this appeal is incompetent and should be struck out.

The 1st respondent herein, has raised a preliminary objection to the hearing of this appeal on three grounds, namely:

B

1. That the Appellant failed to serve the Notice of Appeal on him as required by the Rules of this Court.

C **2. That the Notice of Appeal is defective and incompetent, having failed to state the addresses of the parties interested in the appeal, a mandatory requirement under the Rules of this Court.**

D

3. That grounds 1, 2 and 6 of the Notice of Appeal should be struck out as no issues were formulated therefrom. It is also contended that ground 5
E **should be struck out as it does not arise from the judgment appealed against.**

The most fundamental of the grounds of objection is the first ground. This
F is because the notice of appeal is the substratum of the appeal. It is the foundation upon which every other process or proceeding in the appeal rests. Being an originating process, it is a fundamental requirement not only of the Rules of this court but also of the constitutional right of fair
G hearing guaranteed under Section 36(1) of the 1999 Constitution, that all parties to the appeal be duly served therewith. It is only when a party has notice of proceedings, that he is in a position to react thereto, and place his own side of the case before the court. In an appeal, service of the notice of
H appeal on the respondent provides him with an opportunity to participate in the compilation of records and to file a cross-appeal, if necessary. On the mandatoriness of personal service of the notice of appeal, see Order 2 Rule 3 (1) (b) of the Rules of this court.

I Failure to serve an originating process on a party to the proceedings, is a fundamental defect which goes to the root of the court's jurisdiction to

A adjudicate. I agree with my learned brother, M.D. Muhammad, JSC, that there is no legally acceptable evidence in the record before us to show that the 1st respondent was duly served with the notice of appeal. The failure has rendered the appeal before this court incompetent thereby robbing the court
B of jurisdiction to entertain it. The preliminary objection is well founded and accordingly sustained. The appeal is hereby struck out.

The parties shall bear their respective costs in the appeal.

Kudirat M. O. Kekere-ekun
C ***Justice, Supreme Court***

EJEMBI EKO, JSC: My learned brother, MUSA DATTIJO MUHAMMAD, JSC, made available to me, before now, the draft of the
D judgment just delivered. I agree with him on all the issues resolved in the appeal.

Let me add that there is a purpose for the requirement that the notice of appeal shall be served on the respondent as soon as it was filed. See
E Order 2 Rule 3 (1) (b) of the Rules of this Court. The purpose is for the respondent to be notified that the appellant is challenging the correctness of the judgment given to the respondent by the court below and for him to prepare his defence thereto. It serves the purpose of ***andi alteram partem***,
F and so it is constitutional and one of the pillars of fair hearing.

The effect of non-service on the respondent of the notice of appeal is that it deprives the respondent the opportunity he has to file notice of cross-appeal within the time stipulated. It also deprives him of the opportunity of
G participating in the settlement of the record of appeal. Order 7 Rules 7 of the Supreme Court Rules provides:

> ***"7 (1) The appellant shall, in appeals to which this Rule***
> H ***applies either simultaneously with the filing of his notice of appeal or within 14days thereafter, prepare for the use of the Justices a record comprising***
> ***a) The index***
> I ***b) Office copies of documents and proceedings***

A ***which the appellant considers relevant to the appeal and;***

c) A copy of the notice of appeal.

B ***(2) If the respondent considers that the documents and proceedings filed by the appellant are inaccurate or are not sufficient for the purposes of the appeal, he shall, within a period of 7 days after service on him of***
C ***the record filed by the appellant, file any further or other documents that he wishes to file.***

(3) All documents filed by either party shall be verified
D ***by the affidavit of a person who has read them and compared them with authentic or certified true copies.***

E ***(4) In the case of the documents and proceedings mentioned in rule 7 (1) (b) and (c) of this order, the party filing shall lodge certified true copies thereof with the Registrar of the Court."***

F

I should think that any conduct of a litigant calculated or designed to undermine the statutory right of his opponent in litigation should be assumed or presumed to be malicious and that he did so not only to secure
G for himself an undue advantage, but also to cause miscarriage of justice to his adversary. This is why in the court of justice the rule is: he who comes to justice must come with clean hands:

Justice is not a game of hide and seek. The appellant who engages in
H a game of surprise and attack must be prepared for the full wrath of the court of justice, if it turns out that he had not been fair to his adversary.

I allow the preliminary objection. I adopt the reasons given in the lead judgment to sustain the objection. The appeal being incompetent is
I hereby struck out. I also make no order as to costs.

Ejembi Eko

A ***Justice, Supreme Court***

DAUDA BAGE, JSC):I have had the benefit of reading in draft the lead Judgment of my learned brother Musa Dattijo Muhammad, JSC, just
B delivered. I agree entirely with the reasoning and conclusion reached. I will only add a few words of my own.

It is settled law, that the proof of service of processes on all parties to the suit before the Court is the factor which confers jurisdiction of the Court
C on the parties. In the absence of proof of service, the court acts in vain, and the proceedings a nullity.

However, Section 36(2) of the Constitution of Nigeria 1999, provided that an opportunity should be provided for a person whose rights
D and obligation may be affected to make **Representation** to the administration authority before that authority makes decision affecting that person.

For the more detailed reasoning contained in the lead Judgment, the
E first Respondent's preliminary objection succeeds and is hereby sustained.

Sidi Dauda Bage
Justice, Supreme Court

F

G

H

I

INTEGRATED REALTY LIMITED
AND
1. MURTALA SAKA ODOFIN
2. ALHAJA DAUDA KARIMU
3. ALHAJI SADIKU IBADIARAN
4. SABITU LAGUDA
5. JIMOH SAULABIU
6. ALHAJI DUROJAIYE OJOMO
7. ALHAJI ISHOLA SALAMI
(For themselves and on behalf of all Members of the Ojomu Chieftaincy Family)

SC. 219/2010

IN THE SUPREME COURT OF NIGERIA
HOLDEN AT ABUJA

FRIDAY, 9TH JUNE, 2017

BEFORE THEIR LORDSHIPS

MUSA DATTIJO MUHAMMAD	**JUSTICE, SUPREME COURT**
KUDIRAT M. O. KEKERE-EKUN	**JUSTICE, SUPREME COURT**
AMINA ADAMU AUGIE	**JUSTICE, SUPREME COURT**
EJEMBI EKO	**JUSTICE, SUPREME COURT**
SIDI DAUDA BAGE	**JUSTICE, SUPREME COURT**

ACTION: Abuse of process – What constitutes.

ACTION: Applications – Where an applicant brings an application similar to an earlier one which has been dismissed on merit – Whether amounts to an abuse of process

ACTION: Estoppel – Distinction between an application struck out and one argued on its merit – Implications – Principle in ***Mohammed Vs.***

Olawunmi (1993) 4 NWLR (Pt. 288)384.

ACTION: Estoppel – Where the question determined in a previous action is the same with the question to be determined in the present proceedings.

COURT: Court of Appeal – Whether cannot sit on appeal over its decisions – Where it has decided an appeal, it becomes functus officio – Principle in ***Olowu Vs Abolore (1993) 5 NWLR (Pt. 293) 255.***

COURT: Functus officio – Where a court made an order refusing an application for extension of time – Court subsequently grants similar application – Whether the court was not functus officio when it granted the second application – Principle in ***Ugwajiofor Vs Onyekagbu (1964) NSCC 117.***

COURT: Funtus officio – Meaning.

COURT: Stare decisis – Application – Whether applies where the facts of the cases are similar – Principles in ***Chief of Air Staff Vs Iyen (2005) 6 NWLR (Pt. 922) 496***

Issue for Determination

Whether the lower Court erroneously dismissed the appellant's motion on notice dated 22/5/2008 and filed on 23/5/2008, and thereby denied the appellant an opportunity to ventilate against the Judgment of the High Court of Lagos State in Suit No. LD/2323/92 made against it.

Facts of the Matter

The respondents, who were plaintiffs at the Lagos State High Court, obtained Judgment in their favour on **4/2/2000.** The appellant filed an application at the Court of Appeal, Lagos Division, on **18/10/2004,** for extension of time within

which to appeal against the Judgment.

In its Bench Ruling delivered on **23/5/2006,** the Court of Appeal dismissed the said application on the ground that it lacked merit.

On **23/5/2008,** the appellant filed another application at the same Court of Appeal, Lagos Division [Court below] seeking the same Reliefs sought in the application that it had dismissed on 23/5/2006.

The respondents filed a notice of preliminary objection that the application is incompetent and ought to be dismissed because:

-

(1) The Court of Appeal is functus officio in respect of the appellant/Applicant's motion on notice dated 22/5/2008, a similar motion filed on 18/10/2004 having been argued and disposed of by this Honourable Court on 23/5/2006; and

(2) The appellant/Applicant's motion on notice dated 22/5/2008 amounts to gross abuse of the processes of this Honourable Court.

In moving the application, learned Counsel for the appellant did not contest the fact that *"a similar application has been refused before";* but argued that in view of *fresh facts* averred to in paragraphs 4(p-x) of the affidavit in support of the application, which are compelling, the appellant was entitled to his prayer. The said paragraphs read:

(p) That the Managing Director [MD] and Chief Executive Officer [CEO] of the appellant/Applicant, is the prime mover of the Company, and also its majority shareholder and alter ergo (sic).

(q) The MD provides the funds for the day to day running and operation of the Company and also spear head its activities and operations.

(r) The MD is also a mandatory co-signatory to all accounts of the appellant and without him; money cannot be disbursed for appellant's operations.

(s) During the proceedings leading to Exhibit 10 but before Judgment, the MD of the appellant was arraigned with others before the Failed Banks Tribunal sitting in Jos for allegedly being involved in taking loans from Royal Merchant Bank Limited, since 1998.

(t) Since the arraignment of the MD, and up till 19/1/05, the MD was never released, but was incarcerated and detained, first at Jos Prisons, later at Abuja and lastly at Ikoyi Prisons, in Lagos.

(u) The trial at the Failed banks Tribunal, Jos, was terminated when the civilian administration emerged in May, 1999, and fresh hearing/trial was to commence at the Federal High Court.

(v) Now shown to me, attached hereto and marked as Exhibit 12 and Exhibit 12A is a copy of a Ruling delivered by the Failed Bank Tribunal, Jos, on 20/8/98 whereby the Tribunal granted the MD bail on very stiff conditionalities and subsequently remanded him in Prison custody and that delivered by Justice Abdullahi Mustapha of the Federal High Court, Lagos, which refused him bail and thus remanded him in Prison.

(w) Subsequently, a fresh trial commenced at Federal High Court, Jos, and later at Federal High Court, Lagos.

(x) It was at Federal High Court, Lagos that the Charges against the MD were quashed on 7/1/05 and he was

discharged. Appellant's application at the Court of Appeal was refused hence a similar application to the Supreme Court

Held: *(Unanimously dismissing the application)*

1. Meaning of functus officio

***Functus officio* is Latin for *"having performed his or her task",* and refers to one who has exercised his or her authority and brought it to an end in a particular case Longman Dictionary of Law, 7th Ed.**

The position of the law is that once the Court has delivered its decision on a matter, it becomes *functus officio* with regard thereto. This is so, because a Court cannot sit on appeal on its own decisions, having not been vested with power to do so *see* Olowu Vs. Abolore (supra), wherein this Court, per Karibi-Whyte, JSC, observed that:

The constitutional and statutory jurisdiction of the Court of Appeal is to hear appeals from lower Courts. It cannot hear appeals from its own decisions. Thus, having finally decided a case before it, it becomes functus officio as to that case.

Thus, once a Court has decided a matter, it ceases to be seissed of it, and cannot re-open it, except in certain circumstances, of course.

In this case, there is nowhere in its ruling that the Court below held or decided that it was dismissing the second application on the ground that it was *functus officio.* It considered the application and found that the appellant failed to show exceptional circumstances or good cause why the application should be re-visited by the Court, and it dismissed the application for being an abuse of Court process. *(P 293 Paras C – I)*

Thus, the point of law raised by learned counsel for the respondents that was sustained by the Court below is not as regards the objection that the Court below was *functus officio*, but as regards the objection that the application itself was, indeed, an

abuse of Court process.

The said two grounds of objection are not one and the same the first Ground touches upon the Court, and its competency to hear the matter in whatever form. If the Court is *functus officio,* it is not allowed by law to venture into the matter not to mention consider it.

The second ground, which is what the Court below sustained, attacked the application itself- that it is an abuse of Court process. So, the ruling appealed against has nothing to do with the Objection that the Court of Appeal had become *functus officio* as to the matter; the arguments canvassed on the Objection are, therefore, irrelevant. *(Pp 294 – 295 paras G – B)*

2. *Stare decisis applies where the two cases are similar*

It is settled that the principles of *stare decisis* only has meaning when the *ratio or dictum* of a case is read along with facts of the case *See* Chief of Air Staff Vs. Iyen (2005) 6 NWLR (Pt. 922) 496 SC.

And Amaechi Vs. INEC (2008) 5 NWLR (Pt. 1080) 227 at 379/80, wherein this Court, per Onnoghen, JSC (as he then was), explained:

> ***The application of the principles of stare decisis or judicial precedent does not involve an exercise of judicial discretion at all. It is what must be done; mandatory. The doctrine is based first of all on the relevant likeness of or between the cases-the previous case and the one before the court. If there is no likeness between the two, it is an idle exercise to consider whether the previous one should be followed or departed from. It is settled law that a previous decision is not to be departed from or even followed, where the facts or the law applicable in the previous case are distinguishable from those in the later case.*** *(P 295 Paras D – H)*

3. *Application of stare decisis, occurs where the facts of the cases are substantially major and materially similar*
See also **Adetoun Oladeji (Nig.) Ltd. Vs. Nigerian Breweries** *(2007) 5 NWLR (Pt. 1027) 415,* where Tobi, JSC, further elucidated as follows:

> ***Stare decisi, which means to abide by or adhere to decided cases, as a policy of Courts to stand by precedent, is based on a certain state of facts, which are substantially the same. This means that the facts that gives rise to the principle of stare decisis are the material facts, devoid of or without the unimportant details. This also means that the facts need not be an all fours in the sense of exactness or exactitude. There can hardly be any two cases where the facts are exactly the same, and the doctrine of stare decisis which has been built by the judicial system over the years does not say that the facts must be exactly the same. Thus there could be inarticulate differences, that will not necessarily hinder the application of the doctrine. One major criterion in the determination of the matter is that the facts of the previous case are major, substantial and material to the facts of the current case begging for the application of the previous case.***

In other words, the facts that give rise to the principle of *stare decisis* are the material facts, devoid of or without unimportant details. So, the facts of a previous case must be major, substantial and material to the current case begging for the application of the previous case *See* Adetoun Oladeji (Nig.) Ltd. Vs. Nigerian Breweries Plc. (Supra).*(Pp 295 – 296 paras I – F)*

Per Augie (JSC)

"In this case, it is time to take a very good look at said two cases. In Ugwajiofor Vs. Onyekagbu (supra), the plaintiffs lost a land dispute

at a Native Court and on appeal to the District Officer and resident. They then applied to the Governor for leave to appeal out of time. The Deputy Governor refused their first application but granted their second one. The defendants' contention was that after the first one had been refused, the Governor was *functus officio.* This Court held:

-

> ***An order refusing an extension of time within which to appeal is not a decision on the merits, and we do not consider that it constitutes in law an absolute bar to a further application. The Deputy Governor had a discretion in the matter with which we cannot interfere, and we hold that he acted within his legal powers.***
> *(Pp 296 – 297 paras F – A)*

4. *Condition for the operation of estoppels is that the question determined in the first case must be the same question in the second case*

The appellants appealed, and it is this ruling of 27/5/1991 that led to the decision of this Court in Mohammed Vs. Olawunmi (No. 2), wherein this Court made reference to its decision delivered on the same day in Mohammed Vs. Olawunmi (No. 1) (1993)4 NWLR (Pt. 287) 254. It stated as follows:

> ***The application considered in the ruling of 4/4/1991 is the same as the Application before the Court on 8/5/1991. However, a number of events had since intervened to make the circumstances of the first and second applications different. On 4/4/1991 when the Court refused the first application, there was no appeal pending in the Supreme Court, whilst in the second application of 8/5/1991, there was an appeal against the ruling of 4/4/1991 entered in the Supreme Court as Suit No. SC. 135/1991. Secondly, when the first application was refused on 4/4/1991, the sentence***

for the contempt was yet to be passed by the High Court. When the second application came before the Court of Appeal, some of the defendants had been committed to prison custody until they purged themselves of the contempt. For an estoppel to be established, whatever determination made in the first proceedings must be the same question arising in the latter proceedings. Where the question in the second proceedings is not the same as that decided in the first, there can be estoppel. In Ugwajiofor & Anor Vs. Onyekagbu & Ors it was held by this Court that where an application for extension of time within which to appeal has been refused, such refusal is not a decision on the merits and does not, therefore, constitute in law an absolute to further application. See also Alhaji Sulaiman Mohammed & Anor. Vs. Lasisi Sanusi Olawunmi & 11 Ors (unreported) Suit No. SC.135/1991, Judgment delivered today (per Olatawura, JSC).
(P 299 Paras A – H)

5. *An application struck out can be re-litigated while it constitutes an abuse to re-litigate an application which has been determined on its merit*

The said SC. 135/1991 Mohammed Vs. Olawunmi (No. 1) dealt with the Court of Appeal's ruling of 4/4/1991. This Court also referred to the earlier Appeals SC. 42/1989 and SC. 61/80, and pointed out that after its decision in SC. 61/80, the respondents filed an application at the Court of Appeal in CA/L/341M/88, and relying on the decision in SC.61/80, that Court struck out the application; that Appeal No, SC. 42/1989 was filed by *"Mr. Bashua"*, and that the objection raised in respect of CA/L/341M/88, was also raised by same *"Mr. Bashua"*.

One of the Issues in that case was whether the Court of Appeal was right to hold that successive Applications for the same reliefs, same subject-matter and in respect of an Appeal against the same

Ruling of the High Court in respect of the same Suit No. LD/1213/76 is not an abuse of Court processes. Olatawura, JSC, held as follows:

> ***Mr. Bashua has made one fundamental error and that is the earlier decisions of the Court made on the merit of the application. I cannot see anywhere in all the judgments relied upon by Mr. Bashua, that the applications were refused because they lacked merit. In other words, there is a difference between an application dismissed on being heard on its merits and an application struck out for want of compliance with the Rules of Court. We come across this daily. Where an application is struck out, the applicant is not barred from bringing another application. A Court must draw a line between an application heard and dismissed on its merit and an application struck out for non-compliance with the Rules. In the case of the former, an appeal is the solution so as to correct the error made in Court but in the latter, the litigant is still in order to bring another application. A litigant should not be denied a further access to Court on the ground that an earlier application was struck out. He can, if he is willing, file another application. However, where a matter is fully argued and determined on its merit, it will amount to an abuse of the process of Court to re-litigate the same issues already determined.***
> *(Pp 300 – 301 paras A – A)*

Per Augie (JSC)

"It appears that the appellant homed in on the decision of this Court in Mohammed Vs. Olawunmi (No. 2), wherein it aligned itself with its decision in Ugwajiofor Vs. Onyekagbu (supra), to the effect that the refusal of an earlier application is not a bar to a further application.

But this Court also referred to its judgment based on the same Suit No. LD/1213/76 at the High Court, and delivered the same day in Mohammed Vs. Olawunmi (No. 1), where it spelled out that where an application is struck out for non-compliance with Rules of Court, an applicant is allowed to bring another application. However, where the application is heard and dismissed on the merits, it will amount to an abuse of the process of Court to bring in another application, and the only option open to a litigant is to file an appeal against it.

In this case, the two applications filed by the appellant at the Court below were for extension of time within which it may appeal against the same judgment of the High Court in Suit NO LD/2323/92. To succeed in the applications, the appellant was required to satisfy two conditions good and substantial reasons for failure to appeal within the prescribed time and grounds of appeal, which *prima facie,* show good cause why the appeal must be heard." *(P 301 paras A – F)*

6. The first application was determined on its merit

There is no question about it the first application was fully argued and determined on its merit. It was dismissed because the appellant failed to satisfy good and substantial reasons for its failure to appeal against the said Judgment within the period prescribed by the Rules.

The appellant filed the second application wherein it averred to facts relating to the detention of its Managing Director in prisons, from 1988 until 2005, when he was finally discharged and released.

The Court below looked at the averments in the said affidavit, and held that the information contained therein was available to the appellant when it filed the first application, and it also dismissed the second application because the appellant did not show exceptional circumstances why the application should be revisited by the Court.

The Court below also considered the second application on its merits, and as it pointed out, it has the discretion to grant or refuse

the application. Filing the second application in the same Court did not mean that it would be granted automatically, just for the asking. It exercised its discretion against the appellant, and as this Court said in Ugwajiofor Vs. Onyekagbu (supra), the Court below had discretion in the matter with which this Court cannot interfere, and so it will be.

More importantly, the Court below was well within its rights to dismiss the second application for being an abuse of Court process. The first application was fully argued and determined on its merits, and the decision of this Court in Mohammed Vs. Olawunmi (No. 1), which the appellant overlooked in preference to the decision of this same Court on the same facts in Mohammed Vs. Olawunmi (No. 2), speaks for itself, and what it says is that the appellant's contentions about the Court below making additional rules thereto, lacks merit. The only option open to the appellant is to appeal against the ruling. *(Pp 302 – 303 paras F – D)*

Per M.D. Muhammed (JSC)

"The manner in which the abuse of the process of court manifest itself depends on the peculiar facts of a given matter. The authorities have held that these circumstances are not exhaustive. The lower court is asked to exercise its discretion in the grant and refusal of the application before it. All that is required of the court is to carry out its task judiciously and judicially. Given the facts of the instant matter, the appellant's summation that the court has erred in the discharge of its duty does not avail him. It is certainly an abuse of the process of the court for the appellant to urge the court on the same facts the application was refused at the first instance. The subsequent application is an unpardonable irritation not only to the respondents thereto but more so the court. No one has the vested right to bring or continue proceedings which are an abuse of the process of the court which abuse, as in the instant case, is occasioned by appellant's frivolous and vexatious application, the

lower court has the inherent power to check as it has judicially and judicially employed in that regard. *See* Adesanoye Vs. Adewole (2000) 9 NWLR (Pt. 671) 127 at 153 and Yusuf Vs. Akindipe (2000) 8 NWLR (Pt 669) 376 at 387-388." *(P 304 paras C – G)*

Per Eko (JSC)

"The employment of judicial process is regarded as an abuse of court's process when a party improperly uses the issue of the judicial process to irritate, harass and annoy the opponent. This could manifest in multiplicity of actions on the same subject matter against the same opponent on the same issue(s). *See* Ogoejeofo Vs. Ogoejeofo (2006) 3 NWLR (Pt. 966) 205. Generally, all acts which interfere with the course of justice or proper administration of justice are regarded as abuse of court's process because they invariably end in the misuse of judicial process. *See* Dingyadi Vs. INEC No. 2 (2010) 18 NWLR (Pt. 1224) 154. Prolongation of dispute by reviving stale actions, resort to dilatory strategies and other acts calculated to impede the established public policy that there shall be an end to litigation or disputes in court are all species of abuse of court's judicial process.

In almost all the applications the party seeking extension of time within which to appeal always waves to the court that he does so in order to exercise his constitutional right. The right to appeal is only a constitutional right if it is exercised in accordance with enabling constitutional or statutory provisions including the rules of court for the time being in force. Once the time prescribed for the exercise of the right of appeal has elapsed, the right to appeal degenerates from a right so called to a mere privilege which the applicant gets by the grace of the court. The applicant for extension of time within which to appeal, especially after such an inordinate delay as the instant, is completely at the discretion of the court. If it were a right the applicant gets the indulgence as a matter of course and the court in the circumstance owes him a collateral duty to

grant him the indulgence anyway and anyhow.

The appellants have not impressed me that they were entitled to the indulgence at the court below, I will therefore not interfere with the discretion of the court below." *(Pp 306 – 307 Paras E – C)*

Nigerian Cases cited in this Judgment

Buhari Vs. Obasanjo (2005) 2 NWLR (Pt. 910) 241;
Adamu Vs. Akukalia (2005) 11 NWLR (Pt. 936) 26;
Adesanoye Vs. Adewole (2000) 9 NWLR (Pt. 671) 127;
Adetoun Oladeji (Nig.) Ltd. Vs. Nigerian Breweries (2007) 5 NWLR (Pt. 1027) 415;
Agbaje Vs. Ibru Sea Foods (1972) 5 SC 50;
Alhaji Sulaiman Mohammed & Anor. Vs. Lasisi Sanusi Olawunmi & 11 Ors;
Amaechi Vs. INEC (2008) 5 NWLR (Pt. 1080) 22;
Badru & 2 Ors. Vs. Olorunfemi & 7 Ors. (2006) 3 FWLR (Pt. 324) 4350;
Chief of Air Staff Vs. Iyen (2005) 6 NWLR (Pt. 922) 496 SC;
Dalhatu Vs. Turaki & Ors (2003) 15 NWLR (Pt. 483) 31;
Dingyadi Vs. INEC No. 2 (2010) 18 NWLR (Pt. 1224) 154;
F.G.N. Vs. A.I.C. Ltd. (2006) 11 NWLR (Pt. 264) 221;
Forson Vs. Calabar Municipal Government (2004) 9 NWLR (Pt. 878) 227;
High Grade Maritime Services Vs. FBN (1991)) 1 NWLR (Pt. 167) 290;
House of Representatives & Ors. Vs. SPDC & A-G (Fed.) (2010) 11 NWLR (Pt. 1205) 21;
Isiaka & Ors. Vs. Ogundimu & Ors.(2006) 13 NWLR (Pt. 997) 40;
Lagos State Vs. Purification Tech. (Ng.) Ltd. (2003) 16 NWLR (Pt. 845) 1;
Malgit Vs. Dachen (1998) (sic) NWLR (Pt.550) 384;
Merchantile Group A.G Vs. Aiyela;
Mohammed Vs. Olawunmi (1993) 4 NWLR (Pt. 288) 384;
Mohammed Vs. Olawunmi (No. 2) (1993) 4 NWLR (Pt. 287) 254;
Obioha Vs. Mil. Administrator of Imo State (1998) 10 NWLR (Pt. 569) 205;
Ogbuagu, JSC Osakue Vs. Federal College of Education (Technical), Asaba (2010) 10 NWLR (Pt. 1201) 1;
Ogoejeofo Vs. Ogoejeofo (2006)3 NWLR (Pt. 966) 205;

A *Ojiako Vs. A-G of Anambra State (2000) 1 NWLR (Pt. 641) 375;*
Okulate & 4 Ors. Vs. Awosanya Vs. 2 Ors.(2000) 2 NWLR (Pt. 646) 530;
Olowu Vs. Abolore (1993) 5 NWLR (Pt. 293) 225;
Osakue Vs. Federal College of Education (Technical), Asaba (2010) 10
B *NWLR (Pt. 1204);*
Prof. Olufuegba & 43 Ors. Vs. Prof. Shauib Oba Abdur-Raheem & 3 Ors. (2009) 18 NWLR (Pt 1173) 384 at 442 443;
Ugwajiofor Vs. Onyekagbu (1964) NSCC 94;
C *Yusuf Vs. Akindipe (2000) 8 NWLR (Pt 669) 376; and*
Yusuf Vs. Egbe (1987)) 2 NWLR (Pt. 56) 341.

Nigerian statutes cited in this Judgment
D Court of Appeal Act Section 25(2) (a) and 3).

Representations
U.H. Azikiwe, (Esq.), with
E **Ohireime Eboreime, (Esq.)**, for the appellant
Olagbade Benson, (Esq.), with
O.E. Osunbade, (Esq.), for the respondents

F **ADAMU AUGIE, JSC** (Delivering the Lead Judgment): The respondents, who were plaintiffs at the Lagos State High Court, obtained Judgment in their favour on **4/2/2000.** The appellant filed an application at the Court of Appeal, Lagos Division, on **18/10/2004,** for extension of time within which
G to appeal against the Judgment.

In its Bench Ruling delivered on **23/5/2006,** the Court of Appeal dismissed the said application on the ground that it lacked merit.

On **23/5/2008,** the appellant filed another application at the same
H Court of Appeal, Lagos Division [Court below] seeking the same Reliefs sought in the application that it had dismissed on 23/5/2006.

The respondents filed a notice of preliminary objection that the application is incompetent and ought to be dismissed because:
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A

(3) The Court of Appeal is functus officio in respect of the appellant/Applicant's motion on notice dated 22/5/2008, a similar motion filed on 18/10/2004 having been argued and disposed of by this

B

Honourable Court on 23/5/2006; and

(4) The appellant/applicant's motion on notice dated 22/5/2008 amounts to gross abuse of the processes of this Honourable Court.

C

In moving the application, learned Counsel for the appellant did not contest the fact that *"a similar application has been refused before";* but

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argued that in view of *fresh facts* averred to in paragraphs 4(p-x) of the affidavit in support of the application, which are compelling, the appellant was entitled to his prayer. The said paragraphs read:

E

(p) That the Managing Director [MD] and Chief Executive Officer [CEO] of the appellant/Applicant, is the prime mover of the Company, and also its majority shareholder and alter ergo (sic).

F

(q) The MD provides the funds for the day to day running and operation of the Company and also spear head its activities and operations.

G

(r) The MD is also a mandatory co-signatory to all accounts of the appellant and without him; money cannot be disbursed for appellant's operations.

H

(s) During the proceedings leading to Exhibit 10 but before Judgment, the MD of the appellant was arraigned with others before the Failed Banks Tribunal sitting in Jos for allegedly being involved in taking loans from Royal Merchant Bank Limited, since 1998.

I

A

(t) Since the arraignment of the MD, and up till 19/1/05, the MD was never released, but was incarcerated and detained, first at Jos Prisons, later at Abuja and lastly at Ikoyi Prisons, in Lagos.

B

(u) The trial at the Failed banks Tribunal, Jos, was terminated when the civilian administration emerged in May, 1999, and fresh hearing/trial was to

C

commence at the Federal High Court.

(v) Now shown to me, attached hereto and marked as Exhibit 12 and Exhibit 12A is a copy of a Ruling

D

delivered by the Failed Bank Tribunal, Jos, on 20/8/98 whereby the Tribunal granted the MD bail on very stiff conditionalities and subsequently remanded him in Prison custody and that delivered by Justice Abdullahi

E

Mustapha of the Federal High Court, Lagos, which refused him bail and thus remanded him in Prison.

(w) Subsequently, a fresh trial commenced at Federal

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High Court, Jos, and later at Federal High Court, Lagos.

(x) It was at Federal High Court, Lagos that the Charges

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against the MD were quashed on 7/1/05 and he was discharged.

In its Ruling delivered on **16/12/2009,** the Court below examined the afore-

H said paragraphs 4(p-x), and held that the facts averred therein cannot be classified as fresh facts. Mshelia, JCA, further held that:

The information contained therein was available to the

I

applicant at the time motion on notice dated 18/10/04 was filed. The information supplied is an afterthought.- The

A ***facts and circumstances in the earlier application, which was dismissed, and present application are the same. It is also worthy of note that the earlier application was determined on merit. In the Merchantile Group A.G. Vs.***
B ***Aiyela (supra), this Court allowed the application because the earlier one was not considered on the merit. As rightly observed by Uwaifo, JCA (as he then was) in Merchantile Group A.G Vs. Aiyela the principle laid down in Ugwajiofor***
C ***Vs. Onyekagbu (supra), has to be treated with caution. The application of the principle to any particular case must depend on the bona-fides of the Applicant. Each case must be considered according to its given set of facts and***
D ***circumstances. In [this] case, Applicant did not show any exceptional circumstance or good cause why the application should be re-visited by this Court. Since the materials placed before this Court are not different from the facts used in the***
E ***earlier application, which was dismissed by this Court, I am of the view that Applicant do not deserve to be given a second chance. It is well-established that all judicial discretion must be exercised judicially and judiciously. It should not be***
F ***exercised arbitrarily in the circumstances, I am of the view that the Applicant's second application for extension of time to appeal after it was earlier dismissed constitutes an abuse of Court process. The point of law raised by respondent's***
G ***counsel has merit and same is sustained. In the result I hold that the application is devoid of merit. It is accordingly dismissed.***

H Dissatisfied with this ruling, the appellant filed a notice of appeal in this Court, which contains two grounds of appeal, and it formulated one Issue for determination in its brief of argument and that is:

I ***Whether the lower Court erroneously dismissed the appellant's motion on notice dated 22/5/2008 and filed on***

23/5/2008, and thereby denied the appellant an opportunity to ventilate against the Judgment of the High Court of Lagos State in Suit No. LD/2323/92 made against it.

The respondents submitted that the sole issue for determination is:

Whether the learned Justices of the Court of Appeal were right when they dismissed the appellant's motion on notice dated 22/5/2008 and filed on 23/5/2008.

The issues as formulated are slanted from each Party's perspective appellant says the decision of the Court below is wrong in the light of this Court's decisions in **Ugwajiofor Vs. Onyekagbu (1964) NSCC 94, and Mohammed Vs. Olawunmi (No. 2) (1993) 4 NWLR (Pt. 287) 254.**

It argued that being subordinate to this Court, the Court below was bound by the decision and the principle enunciated by this Court in **Ugwajiofor Vs. Onyekagbu** ***(supra);*** and that it overruled this Court when it upheld respondent's contention that it was *functus officio.*

On this point, the appellant referred to the following decisions:

- Kolawole, JCA **Yusuf Vs. Egbe *(1987))* 2 NWLR (Pt. 56) 341 at 355**
- **Ogbuagu, JSC Osakue Vs. Federal College of Education (Technical), Asaba (2010) 10 NWLR (Pt. 1201) 1 at 34-37.**
- Galinje, JCA (as he then was) **Badru & 2 Ors. Vs. Olorunfemi & 7 Ors. (2006) 3 FWLR (Pt. 324) 4350 at 4382.**
- **Abdullahi, PCA Buhari Vs. Obasanjo (2005) 2 NWLR (Pt. 910) 241 at 407**

It also argued that the Court below and Uwaifo, JCA (as he then was) are not entitled and had no power to add to, modify, qualify or make additional rules for applying decisions of this Court in the two cases.

Furthermore, that it is settled law that it is unconstitutional, unlawful and a violation of the principle of *stare decisis* for any Court subordinate to this Court to make additional rules or conditions for application of the

principles, and it cited the following authorities:

- **Dalhatu Vs. Turaki & Ors (2003) 15 NWLR (Pt. 483) 310 at 336**
- **Osakue Vs. Federal College of Education (Technical), Asaba (supra)**
- **Prof. Olufuegba & 43 Ors. Vs. Prof. Shauib Oba Abdur-Raheem & 3 Ors. (2009) 18 NWLR (Pt 1173) 384 at 442 - 443**
- **Okulate & 4 Ors. Vs. Awosanya Vs. 2 Ors.(2000) 2 NWLR (Pt. 646) 530**

It further argued that the error of the Court below becomes obvious when it is noted that the respondent did not file a counter- affidavit; that where a Party files an affidavit deposing to certain vital facts, which are material to the case, the opposing party has the duty to counter those facts by way of a counter-affidavit; and that the failure to do so will result in the facts being deemed unchallenged, citing:

- **Malgit Vs. Dachen (1998) (sic) NWLR (Pt.550) 384**
- **Forson Vs. Calabar Municipal Government (2004) 9 NWLR (Pt. 878) 227**
- **F.G.N. Vs. A.I.C. Ltd. (2006) 11 NWLR (Pt. 264) 221**
- **Adamu Vs. Akukalia (2005) 11 NWLR (Pt. 936) 263**
- **Lagos State Vs. Purification Tech. (Ng.) Ltd. (2003) 16 NWLR (Pt. 845) 1**
- **Agbaje Vs. Ibru Sea Foods (1972) 5 SC 50 at 55**
- **House of Representatives & Ors. Vs. SPDC & A-G (Fed.) (2010) 11 NWLR (Pt. 1205) 213 at 258**

It submitted that it was the duty of the Court below to do justice and not shut the door of justice against it **High Grade Maritime Services Vs. FBN (1991)) 1 NWLR (Pt. 167) 290;** and that this Court is enabled by law to interfere with the wrongful exercise of its discretion, citing:

- **Ojiako Vs. A-G of Anambra State (2000) 1 NWLR (Pt. 641) 375 at 382**
- **Obioha Vs. Mil. Administrator of Imo State (1998) 10 NWLR (Pt. 569) 205**
- **Isiaka & Ors. Vs. Ogundimu & Ors.(2006) 13 NWLR (Pt. 997) 401 at 418**

The respondents say that the decision of the Court below sustained their objection that it was *functus officio,* and that the application is an abuse of Court process, which is right in law in the light of this Court's decision in **Olowu Vs. Abolore (1993) 5 NWLR (Pt. 293) 225.**

They concentrated their arguments and provided a number of authorities on the principle of *functus officio.* They kept hammering on the fact that the Court below sustained their objection that it was *functus officio,* but it is clear from the ruling that this is not correct.

Yes, they objected to the competency of the said application on two distinct **Grounds** that the Court below was *functus officio*, and that the application amounts to a gross abuse of Court process.

Functus officio is Latin for *"having performed his or her task",* and refers to one who has exercised his or her authority and brought it to an end in a particular case Longman Dictionary of Law, 7th Ed.

The position of the law is that once the Court has delivered its decision on a matter, it becomes *functus officio* with regard thereto. This is so, because a Court cannot sit on appeal on its own decisions, having not been vested with power to do so *See* **Olowu Vs. Abolore (supra)**, wherein this Court, per Karibi-Whyte, JSC, observed that:

> ***The constitutional and statutory jurisdiction of the Court of Appeal is to hear appeals from lower Courts. It cannot hear appeals from its own decisions. Thus, having finally decided a case before it, it becomes functus officio as to that case.***

Thus, once a Court has decided a matter, it ceases to be seissed of it, and cannot re-open it, except in certain circumstances, of course.

In this case, there is nowhere in its ruling that the Court below held or decided that it was dismissing the second application on the ground that it was *functus officio.* It considered the application and found that the appellant failed to show exceptional circumstances or good cause why the application should be re-visited by the Court, and it dismissed the application for being an abuse of Court process.

To make the point clear, I will set out the decision of the three

Justices of the Court below thereon, Mshelia, JCA, stated as follows:

> ***I am of the firm view that the applicant's second application for extension of time to appeal after it was earlier dismissed constitutes an abuse of Court process. An abuse of Court process simply means that the process of the Courts must be used bona-fide and properly and must not be abused. Once a Court is satisfied that any proceedings before it is an abuse of Court process, it has the power, indeed the duty, to dismiss it- The point of law raised by respondent's counsel has merit and same is sustained. The application is devoid of merit.***

In his contributory Ruling, Agbo, JCA, stated that the material placed before the Court does not justify the exercise of its discretion in the appellant's favour; and in his contribution, Nwodo, JCA, observed:

> ***The Court in applications for extension of time should never encourage Applicants to engage in fishing expeditions for good reasons, in order to satisfy the conditions stipulated under Order 7 rule 7 of the Rules of Court. Otherwise, there will be an unending stream of applications of such nature leading to abuse of Court process. Once an abuse of Court process is absolutely glaring, as in this case, the Court should not allow same to stand. The point of law raised by the learned counsel for the respondent has merit and same is sustained. The application lacks merit and is dismissed.***

Thus, the point of law raised by learned counsel for the respondents that was sustained by the Court below is not as regards the objection that the Court below was *functus officio*, but as regards the objection that the application itself was, indeed, an abuse of Court process.

The said two grounds of objection are not one and the same the first Ground touches upon the Court, and its competency to hear the matter in whatever form. If the Court is *functus officio,* it is not allowed by law to

venture into the matter not to mention consider it.

The second ground, which is what the Court below sustained, attacked the application itself- that it is an abuse of Court process. So, the ruling appealed against has nothing to do with the Objection that the Court of Appeal had become *functus officio* as to the matter; the arguments canvassed on the Objection are, therefore, irrelevant.

Besides, the appellant's main complaint against the said ruling is that the Court below was wrong to add to, modify, qualify or make additional rules for applying the decisions of this Court in **Ugwajiofor Vs. Onyekagbu** *(supra)* and **Mohammed Vs. Olawunmi (No. 2) (supra).** It submitted that where from the facts of a case, the principle of law stated by this Court is applicable; it is unconstitutional, unlawful and a violation of the principle of *stare decisi* for a subordinate Court to make rules or conditions for the application of that principle of law.

It is settled that the principles of *stare decisis* only has meaning when the *ratio or dictum* of a case is read along with facts of the case *see* **Chief of Air Staff Vs. Iyen (2005) 6 NWLR (Pt. 922) 496 SC.**

And **Amaechi Vs. INEC (2008) 5 NWLR (Pt. 1080) 227 at 379/80,** wherein this Court, per Onnoghen, JSC (as he then was), explained:

> ***The application of the principles of stare decisis or judicial precedent does not involve an exercise of judicial discretion. It is what must be done; mandatory. The doctrine is based on the relevant likeness of or between the cases. If there is no likeness between the two, it is an idle exercise to consider whether the previous one should be followed or departed from. It is settled law that a previous decision is not to be departed from or even followed, where the facts or the law applicable in the previous case are distinguishable from those in the later case.***

See also **Adetoun Oladeji (Nig.) Ltd. Vs. Nigerian Breweries** *(2007) 5 NWLR (Pt. 1027) 415,* where Tobi, JSC, further elucidated as follows:

A ***Stare decisi, which means to abide by or adhere to decided cases, as a policy of Courts to stand on precedent, is based on a certain state of facts, which are substantially the same, and here the word is substantially. This means that the facts that***
B ***gives rise to the principle of stare decisis are the material facts, devoid of or without unimportant details. [It] also means that the facts need not be an all fours in the sense of exactness or exactitude. There can hardly be two cases where***
C ***the facts are exactly the same, and the doctrine of stare decisis does not say that the facts must be exactly the same. And so there could be inarticulate differences, which will not necessarily be a poison in or to the application of stare***
D ***decisis. One major criterion in the determination of the matter is that the facts of the previous case are major, substantial and material to the current case begging for the application of the previous case.***

E

In other words, the facts that give rise to the principle of *stare decisis* are the material facts, devoid of or without unimportant details. So, the facts of a previous case must be major, substantial and material to the current case
F begging for the application of the previous case – see **Adetoun Oladeji (Nig.) Ltd. Vs. Nigerian Breweries Plc. (supra).**

In this case, it is time to take a very good look at the said two cases. In **Ugwajiofor Vs. Onyekagbu (supra***),* the plaintiffs lost a land dispute at
G a Native Court and on appeal to the District Officer and resident. They then applied to the Governor for leave to appeal out of time. The Deputy Governor refused their first application but granted their second one. The defendants' contention was that after the first one had been refused, the
H Governor was *functus officio.* This Court held:

An order refusing an extension of time within which to appeal is not a decision on the merits, and we do not consider
I ***that it constitutes in law an absolute bar to a further application. The Deputy Governor had a discretion in the***

A ***matter with which we cannot interfere, and we hold that he acted within his legal powers.***

The situation with **Mohammed Vs. Olawunmi**, is a bit more complex
B because the action [land dispute] filed at the Lagos State High Court, gave rise to a number of appeals at the Court below and culminated in two Judgments of this Court delivered on the same day **14/5/93.**

The two Judgments are reported as **Mohammed Vs. Olawunmi**
C **(1993) 4 NWLR (Pt. 288) 384 (hereinafter referred to as Case No. 1), and Mohammed Vs. Olawunmi(No. 2) (1993) 4 NWLR (Pt. 287) 254.**

The case had its roots in **Suit No. LD/1213/76** at the High Court, and got to the Court of Appeal in **Appeal No. FCA/L/95/78** before it reached
D this Court as **Appeal No. S. 61/1980**. In dismissing same, this Court granted an injunction in favour of the appellants that was disregarded by the respondents. The appellants filed an application at the High Court seeking the respondents' committal for contempt.

E In its Ruling delivered on **21/9/1988,** the High Court found in favour of the appellants. But there was an earlier ruling given by the High Court on **30/6/1988,** and the respondents had obtained leave to appeal to the Court of Appeal, and the said appeal had been filed.

F The respondents filed a notice of appeal against the ruling of **21/9/1988** without leave. They later applied to the Court of Appeal to regularize same, and stay proceedings pending the determination of the appeals against the said rulings of **30/6/1988** and **21/9/1988.**

G The appellants raised a preliminary objection that the notice of appeal for the ruling of **30/6/1988** was in breach of Section 25(2) (a) and 3) of the Court of Appeal Act, and that the leave granted by the High Court was invalid since it lacked jurisdiction to grant such leave. The Objection was
H upheld. The respondents appealed to this Court in **Appeal No. SC. 42/1989,** and this Court affirmed its decision on the ruling of **30/6/1988** but reversed its decision on that of **21/9/1988.**

But an application filed by the respondents on **2/11/1988** for
I enlargement of time to seek leave to appeal; leave to appeal against the ruling of **21/9/1988;** and to deem the notice of appeal against the said ruling

as properly filed still remained at the Court of Appeal.

On **10/4/1990,** the respondents brought another application for leave to apply for an extension of time within which to seek leave to appeal against the same ruling of **21/9/1988;** leave to appeal; and orders for stay of proceedings and stay of execution. The appellants filed a preliminary objection heard together with the application.

The Court of Appeal sustained the Objection and dismissed the application. But on **27/4/1990**, they filed another application for extension of time to apply for leave to appeal against the Ruling of **21/9/1988**; leave to appeal; enlargement of time to file the appeal; stay of further proceedings at the High Court, and stay of further proceedings pending the determination of the appeal being sought. The appellants once again objected. The Court of Appeal rejected the appellants' Objection, and granted the respondents' prayers.

The respondents later filed a notice of appeal. On **8/5/1991,** the respondents filed a further application in the Court of Appeal for the determination of the appeal they had lodged against the ruling of **4/4/1991,** and hearing and determination of their pending appeal against the rulings of the High Court made on **20th** and **21/9/1998.**

Meanwhile, the learned trial Judge, who was aware of the said application to the Court of Appeal, delivered his ruling on **9/5/1991,** a day after the application was filed, wherein he committed some of the respondents to prison for contempt of his Order of **21/9/1988.**

On **10/5/1991,** the respondents applied to the Court of Appeal asking for an Order admitting them to bail pending the hearing and determination of their application of **8/5/1991** for stay of further proceedings in the High Court; and the determination of their appeal already entered against their conviction by the learned trial Judge; and an Order setting aside the warrants of committal against them. Once again, the appellants filed a notice of preliminary objection.

The two applications and appellants' preliminary objection were heard together by the Court of Appeal, which rejected the said preliminary objection, and granted the applications on **27/5/1991.**

A The appellants appealed, and it is this ruling of **27/5/1991** that led to the decision of this Court in **Mohammed Vs. Olawunmi (No. 2),** wherein this Court made reference to its decision delivered on the same day in **Mohammed Vs. Olawunmi (No. 1)**. It stated as follows:

B

> ***The application considered in the ruling of 4/4/1991 is the same as the application before the Court on 8/5/1991. However, a number of events had since intervened to make*** C ***the circumstances of the first and second applications different. On 4/4/1991 when the Court refused the first application, there was no appeal pending in the Supreme Court, whilst in - - the second application of 8/5/1991, there*** D ***was an appeal against the ruling of 4/4/1991 entered in the Supreme Court as Suit No. SC. 135/1991. Secondly, when the first application was refused on 4/4/1991, the sentence for the contempt was yet to be passed by the High Court. When the*** E ***second application came before the Court of Appeal, some of the defendants had been committed to prison custody until they purged themselves of the contempt. For an estoppel to be established, whatever determination made in the first*** F ***proceedings must be the same question arising in the latter proceedings. Where the question in the second proceedings is not the same - - as that decided in the first, there can be estoppel. - - In Ugwajiofor & Anor Vs. Onyekagbu & Ors - - it*** G ***was held by this Court that where an application for extension of time within which to appeal has been refused, such refusal is not a decision on the merits and does not, therefore, constitute in law an absolute to further*** H ***application. See also Alhaji Sulaiman Mohammed & Anor. Vs. Lasisi Sanusi Olawunmi & 11 Ors (unreported) Suit No. SC.135/1991, Judgment delivered today (per Olatawura, JSC).***

I

A The said **SC. 135/1991 Mohammed Vs. Olawunmi (No. 1)** dealt with the Court of Appeal's ruling of **4/4/1991.** This Court also referred to the earlier Appeals **SC. 42/1989** and **SC. 61/80,** and pointed out that after its decision in **SC. 61/80,** the respondents filed an application at the Court of Appeal in
B **CA/L/341M/88,** and relying on the decision in **SC.61/80,** that Court struck out the application; that Appeal No, **SC. 42/1989** was filed by *"Mr. Bashua",* and that the objection raised in respect of **CA/L/341M/88,** was also raised by same *"Mr. Bashua".*

C One of the Issues in that case was whether the Court of Appeal was right to hold that successive applications for the same reliefs, same subject-matter and in respect of an Appeal against the same Ruling of the High Court in respect of the same **Suit No. LD/1213/76** is not an abuse of Court
D processes. Olatawura, JSC, held as follows:

> ***Mr. Bashua has made one fundamental error and that is the earlier decisions of the Court made on the merit of the***
> E ***application. I cannot see anywhere in all the judgments relied upon by Mr. Bashua, that the applications were refused because they lacked merit. In other words, there is a difference between an application dismissed on being***
> F ***heard on its merits and an application struck out for want of compliance with the Rules of Court. We come across this daily. Where an application is struck out, the applicant is not barred from bringing another***
> G ***application. A Court must draw a line between an application heard and dismissed on its merit and an application struck out for non-compliance with the Rules. In the case of the former, an appeal is the solution so as to***
> H ***correct the error made in Court but in the latter, the litigant is still in order to bring another application. A litigant should not be denied a further access to Court on the ground that an earlier application was struck out. He***
> I ***can, if he is willing, file another application. However, where a matter is fully argued and determined on its***

A ***merit, it will amount to an abuse of the process of Court to re-litigate the same issues already determined.***

It appears that the appellant homed in on the decision of this Court in
B **Mohammed Vs. Olawunmi (No. 2)**, wherein it aligned itself with its decision in **Ugwajiofor Vs. Onyekagbu (supra)**, to the effect that the refusal of an earlier application is not a bar to a further application.

But this Court also referred to its judgment based on the same **Suit**
C **No. LD/1213/76** at the High Court, and delivered the same day in **Mohammed Vs. Olawunmi (No. 1)**, where it spelled out that where an application is struck out for non-compliance with Rules of Court, an applicant is allowed to bring another application. However, where the
D application is heard and dismissed on the merits, it will amount to an abuse of the process of Court to bring in another application, and the only option open to a litigant is to file an appeal against it.

In this case, the two applications filed by the appellant at the Court
E below were for extension of time within which it may appeal against the same judgment of the High Court in **Suit NO LD/2323/92.** To succeed in the applications, the appellant was required to satisfy two conditions good and substantial reasons for failure to appeal within the prescribed time and
F grounds of appeal, which *prima facie,* show good cause why the appeal must be heard. The appellant had averred in its affidavit in support of the first application [para. 6]:

G ***That the appellant was desirous of appealing the Judgment and did instruct its counsel to file an appeal against the Judgment of the lower Court but the appeal could not be filed before the sudden and untimely death of the very learned Mr.***
H ***Bankole Aluko, Senior Advocate of Nigeria, of Blessed Memory.***

In its Bench Ruling of **23/5/2006,** the Court below, per Ogunbiyi, JCA (as
I he then was), referred to the said averment, and held as follows:

A ***It is pertinent to mention that the applicants have failed to state the date when the learned senior counsel died. However, the respondents provided the relevant date at paragraph 4 of their counter-affidavit. The date was put at***
B ***18/2/2001. From all indications, this was a time of one year after the date of the judgment. It is also significant to note that the applicants alleged their knowledge of the matter as new counsel only in May, 2004. As rightly submitted by***
C ***learned senior counsel for the respondent, their inability to take any necessary action until October, 2004, showed a very serious lapse, on their part. From all indications and circumstances of this case, it is my humble view that the***
D ***application at hand lacks merit and that which does not deserve any indulgence of this Court. With the applicants failing to satisfy the first condition required by Order 3 rule 4 (2) of the Rules of Court, the submission made on the***
E ***relevance and arguable ground of appeal holds no relevance. In the result, the application lacks merit and same is accordingly dismissed.***

F There is no question about it the first application was fully argued and determined on its merit. It was dismissed because the appellant failed to satisfy good and substantial reasons for its failure to appeal against the said Judgment within the period prescribed by the Rules.

G The appellant filed the second application wherein it averred to facts relating to the detention of its Managing Director in prisons, from **1988** until **2005,** when he was finally discharged and released.

The Court below looked at the averments in the said affidavit, and
H held that the information contained therein was available to the appellant when it filed the first application, and it also dismissed the second application because the appellant did not show exceptional circumstances why the application should be revisited by the Court.

I The Court below also considered the second application on its merits, and as it pointed out, it has the discretion to grant or refuse the

application. Filing the second application in the same Court did not mean that it would be granted automatically, just for the asking. It exercised its discretion against the appellant, and as this Court said in **Ugwajiofor Vs. Onyekagbu (supra),** the Court below had discretion in the matter with which this Court cannot interfere, and so it will be.

More importantly, the Court below was well within its rights to dismiss the second application for being an abuse of Court process. The first application was fully argued and determined on its merits, and the decision of this Court in **Mohammed Vs. Olawunmi (No. 1)**, which the appellant overlooked in preference to the decision of this same Court on the same facts in **Mohammed Vs. Olawunmi (No. 2)**, speaks for itself, and what it says is that the appellant's contentions about the Court below making additional rules thereto, lacks merit. The only option open to the appellant is to appeal against the ruling.

In the circumstances, this appeal lacks merit and it is dismissed. The decision of the Court below in the said Ruling is hereby affirmed.

Amina A. Augie
Justice, Supreme Court

DATTIJO MUHAMMAD, (JSC): I read in draft the lead judgment of my learned brother **AMINA ADAMU AUGIE JSC** with whose reasoning and conclusion that the appeal lacks merit I entirely agree.

The appellant had applied at the lower court twice and all on the same facts for extension of time to appeal against the decision of the Lagos State High Court, the trial court, in favour of the respondents herein who were plaintiffs thereat. The lower court has adjudged appellant's subsequent application and, in upholding the objection to its competence, dismissed same.

Nwodo JCA (of blessed memory) more succinctly concurred thus:

> ***"The Court in applications for extension of time should never encourage Applicants to engage in fishing expeditions for good reasons, in order to satisfy the conditions stipulated under Order 7 Rule 7 of the Rules of Court. Otherwise, there***

A ***will be an unending stream of applications of such nature leading to abuse of Court process. Once an abuse of Court process is absolutely glaring, as in this case, the Court should not allow same to stand. The point of law raised by the***
B ***learned counsel for the respondent has merit and same is sustained. I entirely agree the application lacks merit and is dismissed."***

C This issue now is whether the lower court is wrong in this finding.

The manner in which the abuse of the process of court manifest itself depends on the peculiar facts of a given matter. The authorities have held that these circumstances are not exhaustive. The lower court is asked to
D exercise its discretion in the grant and refusal of the application before it. All that is required of the court is to carry out its task judiciously and judicially. Given the facts of the instant matter, the appellant's summation that the court has erred in the discharge of its duty does not avail him. It is
E certainly an abuse of the process of the court for the appellant to urge the court on the same facts the application was refused at the first instance. The subsequent application is an unpardonable irritation not only to the respondents thereto but more so the court. No one has the vested right to
F bring or continue proceedings which are an abuse of the process of the court which abuse, as in the instant case, is occasioned by appellant's frivolous and vexatious application, the lower court has the inherent power to check as it has judiciously and judicially employed in that regard. *See*
G **Adesoneye Vs. Adewole (2000) 9 NWLR (Pt. 671) 127 at 153** and **Yusuf Vs. Akindipe (2000) 8 NWLR (Pt 669) 376 at 387-388.**

It is for the foregoing and the fuller reasons articulated in the lead judgment, which I hereby adopt as mine, that I also dismiss the
H unmeritorious appeal.

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

Musa Dattijo Muhammad
I ***Justice, Supreme Court***

EJEMBI EKO, (JSC): I read in draft the judgment just delivered by learned brother, AMINA ADAMU AUGIE, JSC, in this appeal. I agree that there is no merit in this appeal. From the facts the appellant did not deserve the indulgence sought of the court below.

On 4th February, 2000, the Lagos State High Court delivered its judgment against the appellant in favour of the respondent. The appellant did not immediately take steps to appeal the decision. On 18th October, 2004, about 57 months after the judgment delivered on 4th February, 2000, the appellant filed their motion praying for extension of time within which to appeal. The application was dismissed by the court below on 23rd May, 2008. The ruling dismissing the application, not appealed, should have been deemed or taken to be acceptable to all concerned and that litigation in respect of the subject matter of the judgment of 4thFebruary, 2000, had effectively come to an end. Public policy favours the stance that there shall be an end to litigation. A successful litigant is not only entitled to the fruits of his victory, the law and equity should also assure him of the peace of mind that the dispute is over, rather than place him in a state of siege wherein he is perpetually in suspense that his accrued right to the judgment he obtained is forever uncertain. It is for the purpose of removing the proverbial Sword of Dammocles hanging perennially over his head and neck that the principle of limitation of actions was evolved in litigation.

About 24 months after the ruling of 23rd May, 2008 that dismissed his application for extension of time within which to appeal, the appellant brought yet another application similar on facts seeking the same reliefs. The motion was on 16th December, 2009 dismissed on two grounds, namely: that the court had become ***fuctus officio*** and that the subsequent application was an abuse of the courts process.

The court below, per Mshelia, JCA, at pages 240 – 241 of the record gave reason for dismissing the application in the following terms:

> ***In the instant case the applicant did not show any exceptional circumstance or good cause why the application should be re-visited by this Court. Since the materials placed before***

this Court are not different from the facts used in the earlier application which was dismissed by this Court I am of the considered view that the application do not deserve to be given a second chance

In the circumstances, I am of the firm view that the applicant's second application for extension of time to appeal after it was earlier dismissed constitutes an abuse of court's process. An abuse of process simply means that the process of the courts must be used bonafide and properly and must not be abused. Once the court is satisfied that any proceeding before it is an abuse of court's process it has the power, indeed the duty to dismiss it. See Arubo Vs. Aiyeleru (1993) 3 NWLR (Pt. 279) 126 at 142 and The Merchantile Group AG Vs. Aiyela (supra).

I agree entirely.

The employment of judicial process is regarded as an abuse of court's process when a party improperly uses the issue of the judicial process to irritate, harass and annoy the opponent. This could manifest in multiplicity of actions on the same subject matter against the same opponent on the same issue(s). see **Ogoejiofo Vs. Ogoejofo (2006) 1 SC (Pt. 1) 157.** Generally, all acts which interfere with the course of justice or proper administration of justice are regarded as abuse of court's process because they invariably end in the misuse of judicial process. *See* **Dingyadi Vs. INEC No. 2 (2010) 18 NWLR (Pt. 1224) 154.** Prolongation of dispute by reviving stale actions, resort to dilatory strategies and other acts calculated to impede the established public policy that there shall be an end to litigation or disputes in court are all species of abuse of court's judicial process.

In almost all the applications the party seeking extension of time within which to appeal always waves to the court that he does so in order to exercise his constitutional right. The right to appeal is only a constitutional right if it is exercised in accordance with enabling constitutional or

A statutory provisions including the rules of court for the time being in force. Once the time prescribed for the exercise of the right of appeal has elapsed, the right to appeal degenerates from a right so called to a mere privilege which the applicant gets by the grace of the court. The applicant for
B extension of time within which to appeal, especially after such an inordinate delay as the instant, is completely at the discretion of the court. If it were a right the applicant gets the indulgence as a matter of course and the court in the circumstance owes him a collateral duty to grant him the
C indulgence anyway and anyhow.

The appellants have not impressed me that they were entitled to the indulgence at the court below, I will therefore not interfere with the discretion of the court below.

D The appeal lacking in substance is hereby dismissed. The decision of the court below is hereby affirmed.

Ejembi Eko
Justice, Supreme Court

E

DAUDA BAGE, (JSC): I have had the benefit of reading in draft the lead Judgment of my learned brother Amina Adamu Augie, JSC, just delivered. I agree entirely with the reasoning and conclusion reached. I do not have
F anything useful to add. The appeal lacks merit, and it is accordingly dismissed by me. I abide by all the orders contained in the lead Judgment.

Sidi Dauda Bage,
Justice, Supreme Court

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