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ALL PROGRESSIVE CONGRESS (APC)
AND
1. ENGINEER GEORGE T. A. NDUUL
2. BARR. BENJAMIN WAYO
3. INDEPENDENT NATIONAL ELECTORAL COMMISSION (INEC).

SC. 332/2016

IN THE SUPREME COURT OF NIGERIA
HOLDEN AT ABUJA

FRIDAY, 19TH MAY, 2017

BEFORE THEIR LORDSHIPS

MARY UKAEGO PETER-ODILI	**JUSTICE, SUPREME COURT**
OLUKAYODE ARIWOOLA	**JUSTICE, SUPREME COURT**
KUMAI BAYANG AKAAHS	**JUSTICE, SUPREME COURT**
PAUL ADAMU GALINJE	**JUSTICE, SUPREME COURT**
SIDI DAUDA BAGE	**JUSTICE, SUPREME COURT**

APPEAL: A ground of appeal challenging jurisdiction – Whether does not necessarily flow from the decision on which appeal lies – Rationale

COURT: Inherent jurisdiction – Where a court of record makes a null or void order – Whether has the inherent jurisdiction to set aside such on application and in appropriate circumstances.

EQUITY: Waiver – Issue of jurisdiction – Whether a party has not the competence to waive issue of jurisdiction – The principle in ***Mobil Producing (Nig) Unlimited Vs. Monokpo (2003) 18 NWLR (Pt. 852) 346.***

PRACTICE AND PROCEDURE: Failure to serve a process – Appeal thereon

– Whether no leave of either the trial court or appellate court required – Rationale

PRACTICE AND PROCEDURE: Jurisdiction – Where raised as a preliminary point – Whether must be settled first before embarking on further hearing – The principle in ***Elugbe Vs. Omokhage (2004) 18 NWLR (Pt. 905) 319.***

PRACTICE AND PROCEDURE: Service – Failure thereto – Whether a party affected is entitled ex-dibito justiciae to have the proceedings set aside – Principle in ***Auto Import and Export Vs. Adebayo (2002) 18 NWLR (pt. 799) 554.***

SERVICE: Failure thereof – Whether a jurisdictional issue – Relevant considerations thereof.

SERVICE: Failure to serve process where required – Effect.

SERVICE: Non service thereof – Where motion was not served nor ripe for hearing – Whether court lacked jurisdiction thereto.

Issue for Determination

Whether the lower Court had jurisdiction to hear and determine the application filed on the 11/4/2016.

Facts of the Matter

This is an interlocutory appeal against the ruling of the Court of Appeal, Makurdi Division, which was delivered on the 13th April, 2016. learned counsel for the 1st respondent herein who was the appellant at the lower court, by a motion on notice filed on the 11/4/2016 sought for the following prayers:

> ***"An order of this Honourable Court to hear the appeal in Appeal No: CA/MK/16/2016 between Engr. George T. A. Nduul Vs. Barr. Benjamin Wayo Solely on the appellant/application's brief of Argument."***

When this application came up, the 1st respondent who was the applicant was in Court.

The appellant herein and the 2nd and 3rd respondents who were respondents at the lower court were absent. The registrar informed the court that the respondents were served with hearing notice on the 23rd March, 2016.

Since the respondents were on notice and failed to put up appearance, the lower court proceeded to hear learned counsel for the appellant who moved in terms of the sole prayer as reproduced elsewhere in this judgment.

Thereafter their Lordships Omoleye, Ogbuinya and Jombo-Ofo JJCA ruled as follows:

> ***"The appellant/applicant's application is granted as prayed. The appeal is adjourned to 28/04/2016 for hearing. Hearing notice to issue on all the respondents."***

It is against this ruling that the appellant who was the 2nd respondent at the lower court has brought this appeal.

Held: *(Unanimously allowing the appeal)*

1. Effect of failure to serve process where required is a jurisdictional issue

The Law is settled that where service of process is required, failure to serve it is a fundamental vice that touches on the jurisdiction of the Court that is sessied with the matter. *See* Auto Import Export Vs. Adebayo (2002)18 NWLR (pt.799) 554, Mbadinuju Vs. Ezuka (1994)8 NWLR (pt. 364) 535, Skenconsult (Nig.) Ltd Vs. Ukey (1981) 12 SC, Obimonure Vs. Erinosho (1966) 1 All NLR 250.

The three grounds of appeal before this Court complained that the appellant was not served with the necessary processes

including the first respondent's brief of argument. To that extent, the grounds of appeal are raising jurisdictional issues. The Law is settled that a failure to serve the opposing party with the necessary process which will facilitate the hearing of a case connotes that the condition precedent to the exercise of jurisdiction of the Court is not fulfilled. In other words, absence of service of court processes, where those processes are required to be served, is a fundamental vice that goes to the jurisdiction of the court. A party who complains that he has not been served necessary Court processes does not require leave of either the lower Court or this Court to raise it in his ground of appeal.

***See* Auto Import Export Vs. Adebayo (2002) 18 NWLR (pt. 799) 554 at 583 Paragraph B-D.** *(P 19 Paras B– C)*

2. *A ground challenging jurisdiction does not necessary have to flow from the decision against which the appeal lies*

A ground of appeal which raises the issue of jurisdiction does not necessarily have to relate or flow from the decision against which the appeal lies. This is so because jurisdiction is the soul of adjudication, and if a Court has no jurisdiction, it does not matter whether the question was raised during the proceedings or not, a party will not be prevented from raising it in this court.

The three grounds are therefore competent. The preliminary objection is accordingly overruled. *(P 19 paras G – H.)*

3. *Failure to serve a process is a fundamental vice and a person affected is entitled to have the proceedings set aside.*

From the proceeding reproduced herein above, it is very clear that the registrar misled the lower Court when he told the Court that the respondents were served. However if the lower Court has paid careful attention to the registrar's information, it would have come to conclusion that it was impossible to serve the motion dated and filed on the 11th day of April, 2016 on the respondent on 23/03/2016, a date when the motion aforesaid had not been filed. The motion

which the registrar said he served on the 23/03/2016, must have been a different motion and not the motion that was moved and granted by the lower Court. There is, therefore, no evidence that the motion dated and filled on the 11/04/2016 was served on the respondent.

I therefore, agree with learned counsel for the appellant that the motion dated 11/04/2016 was not ripe for hearing and the lower court has no jurisdiction to hear and determine the application. In Auto Import Export Vs. Adebayo (Supra) at page 582 paragraph: C F this Court had this to say:

> ***"Where as in the present case, service of process is required, failure to serve it is a fundamental vice and the person affected by the order but was not served with the process, again as in the present case, is entitled ex-debito justitiate to have the order set aside as a nullity.*** *See* ***Obimonure Vs. Erinosho and Anor (1966) 1 ALL NLR 250, Mbadinuju Vs. Ezuka (1994)8 NWLR (pt. 364) 535 (1994) 10 SCNJ 109 AT 128; Skenconsult Vs. Ukey (1980) 1 SC6 at 26. Accordingly, service of a process in proceedings other than in ex parte proceedings is fundamental to the assumption of jurisdiction. Failure to serve a process where service is required goes to the root of proper conceptions of recognized procedure of litigation. It is a fundamental vice which renders null and void an order made against the party who should have been served as the idea that an order can validly be made against a party who has no notification of the action against him is one that is clearly undesirable and indeed unacceptable in our judicial system."*** *(Pp 21 – 22 Paras H – H)*

4. A court of record has jurisdiction to set aside its null or void order

The option open to the appellant was to apply to the Court of Appeal to discharge the order it made that the appeal be heard on the appellant's brief alone or to appeal against the ruling Court. The

appellant opted to appeal, a process deployed to delay the hearing of the substantive matter still pending in that Court. This, I think, is not the best approach. As a general rule, every Court of record has inherent jurisdiction on application and in appropriate cases and circumstances to set aside its judgment or decision, where the judgment or decision is null and void *ab initio* or where there was a fundamental defect in the proceedings which vitiates and renders same incompetent and invalid. *See* Alhaji Taofeek Alao Vs. ACB Ltd (2000)6 SC (Pt. 1) 27 at 1071, Odofin & Ors Vs. Abraham Olabanji & Anor. (1996) 3 NWLR (pt. 435) 126, Skenconsult Nig. Ltd Vs. Ukey ((1981) 1 SC6. *(Pp 22 – 23 Paras H – C)*

Per Galinje (JSC)

"Even though the appellant admitted that the motion dated and filed on the 11/04/2016 was served on it, on the same date that is not borne out by the record of appeal, as the motion that is admittedly served on the appellant is different from the one served on it.

The issue of non-service of the 1st respondents brief of argument on the appellant was raised by the appellant. This information was not available to the lower Court and therefore was not capable of influencing its decision. The failure to serve the motion on notice dated and filed on the 11/04/2016 on the appellant has rendered the ruling of the lower Court null and void.

The sole issue formulated by me is hereby resolved in favour of the appellant. Accordingly, this appeal shall be and it is hereby allowed. The ruling of the lower Court delivered on the 13/04/2016 is set aside." *(P 23 Paras C – F)*

6. *Issue of jurisdiction must be settled before further hearing is entitled upon*

What is in issue in the preliminary objection is that of jurisdiction which can be raised at any stage of the proceedings even on appeal, up to the Supreme Court and in that regard, it is not mandatory that leave of Court be obtained before the issue of jurisdiction can be raised, this appeal has to do with the issue of breach of fair hearing which when at play would render the proceedings no matter how well conducted, come to naught. The reason being that the right to fair hearing is a fundamental constitutional right deeply entrenched and an infraction of which vitiates such proceedings, rendering same null and void. I shall refer to the stance of this Court in this matter in the case of:Elugbe Vs. Omokfaje (2004) 18 NWLR (pt.905) 319 at 334. In the case of State Vs. Onagoruwa (1992) 2 SCNJ (pt. 1)1 at 308 Belgore, JSC (as he then was) stated:

> ***"The red light to court be cautions is the jurisdiction and it must be settled by proper hearing of parties before further proceedings in a matter can be embarked upon. Similarly, there are occasions after a matter has been before the Court for long before the issue of jurisdiction arises some in the middle of the entire proceedings or towards its tail end in that case the jurisdiction must first be settled before proceeding further …… it is therefore never too late to raise the issue of jurisdiction and in the case of this nature it is never premature to raise it… The preliminary objection as to jurisdiction ought to have been taken first and decided upon." See also Olufeagba Vs. Abdur Raheem (2009) 40 NSCQR 634 at 724 per Mukhtar JSC (as he then was)*** *(Pp 26 – 27 Paras F – D)*

7. *Party has not the competence to waive issue of jurisdiction*

On whether a party can waive the issue of lack of jurisdiction, this Court in Mobil Producing Nig. Unlimited Vs. Monokpo (2003) 18

NWLR (pt. 852) 346 at 436-435. Tobi JSC said:

> ***"The law is elementary that a party cannot or has not the competence to waive lack of jurisdiction of the Court. Where a Court lacks jurisdiction, the entire proceedings however well conducted are a nullity and a party cannot in law resuscitate or revive a nullity by waiver. Jurisdiction is basic to the entire adjudication. It affects the power of the Court to adjudicate on a matter. Where a Court lacks jurisdiction, no amount of indolent conduct on the part of any of the parties, particularly the defendant, can ripen into the defence of waiver. It is my view that the jurisdiction of a Court, where there is none, cannot be enlarged either by estoppel or waiver.***
>
> ***Jurisdiction, being the forerunner of the judicial process, cannot, by acquiescence, collusion, compromise, or as in this case, Waiver, confer jurisdiction on a Court that lacks it. Parties do not have the legal right to donate jurisdiction on a Court that lacks it."*** *(Pp 27 – 28 Paras D – A)*

Per Galinge (JSC)

"Considering the paramount nature of jurisdiction or competence of an appeal and as a follow up the vires of Court thereby, the issue of jurisdiction is taken as such that leave is not needed to raise it. Also because of its fundamental position it can be brought up at any level of the proceedings even for the first time on appeal whether at the Court of Appeal or Supreme Court. It would therefore be self defeating, if there must be leave of Court before it can be raised or that where the leave has not been obtained previously, to raise it, the proceedings are vitiated. That cannot be part of our adjudicatory system. ***See*** **FRN Vs. Ifegwu (2003) 15 NWLR (pt. 842) 113 at 212.**

I shall make further references to some dicta of this court for emphasis. Bello, CJN in Utih Vs. Onoyivwe (1991) 1 NWLR (pt. 166) aptly captured its fundamental nature in adjudication. He viewed it in an organic form thus:

> ***"Moreover, jurisdiction is blood that gives life to the survival of an action in a Court of law and without jurisdiction; the action will be like an animal that has been drained of its blood. It will cease to have life and any attempt to resuscitate it without infusing blood into it would be an abortive exercise."***

Okoro Vs. Egbuoh (2006) 15 NWLR (pt. 1001) 1 at 23-24 per Tobi JSC Stated as thus:

> ***"Although jurisdiction is a word of large purport and significance in the judicial process, it is not a subject of speculation or gossip by counsel as it is a matter of strict and hard law donated by the constitution and statues. It is a threshold issue, the blood that gives life to the survival of the action and occupying such an important place in judicial process ……."***

There is no need beating about the bush in this matter and it is only right to discountenance the preliminary objection so the meat of the matter can be handled. The objection is overruled.
(Pp 28 – 29 Paras A – A)

9. *Service of process is fundamental without it court has no jurisdiction*
It has to be reiterated even at the risk of repeating what has become trite and perhaps looked upon as over flogged but must be said, that service of court process is fundamental as without it the court lacks jurisdiction to proceed with the hearing and determination of the matter. Also, it is the law that jurisdiction is the life wire of any

adjudication and therefore not such as can be waived by the parties, and the Court with the hearing and determination of the matter. He cited Eke Vs. Ogbonda (2007) ALL FWLR (pt. 351) 1456; Ben Anachebe Vs. Kingsley Ijeoma (2015) vol. 240 LRCN 69 at 77-78.

Tobi JSC (of blessed memory) had to say in Mobil Producing Nig. Unlimited Vs. Monokpo (2003) 18 NWLR (pt. 852) 346 at 436-435,

> ***"…The law is elementary that a party cannot or has not the competence to waive lack of jurisdiction of the court. Where a court lacks jurisdiction, the entire proceedings however well conducted are a nullity and a party cannot in law resuscitate or revive a nullity by waiver. Jurisdiction is basic to the entire adjudication. It affects the power of the court to adjudicate on a matter. Where a court lacks jurisdiction, no amount of indolent conduct on the part of any of the parties particularly the defendant, can ripen into the defence of the waiver.***
>
> ***It is my view that the jurisdiction of a court, where there is none, cannot be enlarged either by estopped or waiver ….Jurisdiction being the forerunner of the judicial process, cannot, by acquiescence, collusion, compromise, or as in this case, waiver confer jurisdiction on a court that lacks it. Parties do not have the legal right to donate jurisdiction on a court that lacks it."*** *(P 32 Paras A – H)*

10. Non-compliance with Rules on service violated appellant's right to fair hearing

The rules of the Court of Appeal, 2011, order 7 Rule 8 provides for 7 days to a respondent to make a reply if he so wishes after the service of the process on him.

What has come clearly from the facts and the prevailing laws including the Rules of the court below and practice Direction is that

when the motion filed on the 11th day of April, 2016 and heard and granted on the 13/4/2016 without complying with those Rules as to service and the period of notice thereof, the right of the notice thereof, the right of the appellant to fair hearing was definitely infracted and the jurisdiction of the court below to so hear the matter was absent. There was and remains no way around the situation as the proceedings are vitiated on account of that. ***See*** **Olufeagba Vs. Abdul-Raheem (supra) 49; Okoro Vs. Egbuoh (2006) 15 NWLR (pt. 1001) 1 at 23-24.** *(Pp 33 – 34 Paras F – A)*

11. Court lacked jurisdiction to hear a motion not served nor ripe for hearing

I am one with him in allowing the appeal and setting aside the ruling delivered by the lower court on 13/4/2016. The said ruling was delivered without jurisdiction since the motion of 11/4/2016 was not served and even if it had been served, was not ripe for hearing on 13/4/2016. It is settled law that where service of process is required, failure to serve it is fundamental vice and touches on the jurisdiction of the court that is seized of the. ***See*** **Obimonure Vs. Erinosho (1966) 1 ALL NLR 250; Skenconsult (Nig) Ltd Vs. Ukey (1981)12 SC 1 Mbadinuju Vs. Ezuka (1994) 8 NWLR (Pt. 384) 535; Auto Import Export Vs. Adebayo (2002) 18 NWLR (Pt. 799) 554.**

(P 34 Paras E – G)

The law is settled that, a hearing cannot be said to be fair if any of the parties is refused a hearing or denied the opportunity to be heard or present his case or call evidence.

The right to fair hearing is substantially a question of opportunity of being heard. The right lies in the procedure followed in the determination of a case and not in the correctness of the decision arrived in a case. ***See*** **FBN Plc Vs. TSA Ind. Ltd. (2010) 4-7 SC (pt.1)242; Bamgboye Vs. University of Ilorin (1999)10 NWLR (pt. 622) 290; Awoniyi Vs. Registered Trustees of the Rosicrucian Order Amorc (Nigeria) (2000) 6 SC (pt. 1)108; Araka Vs. Ejeagwu (2001) 12 SC (pt. 1) 99; Okafor Vs. A.G. Anambra State (1991)6**

NWLR (pt. 200) 659 and Mohammed Vs. Olawunmi (1990)2 NWLR (pt.133) 458. The failure to serve the motion on notice dated and filed on the 11/4/2016 on the appellant in the present appeal amounted to denial of his right to fair hearing. I agree with the Lead Judgment, that the ruling of the Lower Court anchored on the motion stands as null and void. For the more detail reasoning contained in the Lead Judgment, I also allow the appeal, and set aside the ruling of the lower court delivered on the 13/4/2016. I abide by the order as to costs contained in the Lead Judgment. *(P 35 Paras B – F)*

Nigerian Cases cited in this Judgment

Adebayo Vs. A. G. Ogun State (2008) 7 NWLR (pt. 1085)201;
Adeogun Vs. Fasogbo (2011)8 NWLR (pt. 1250)427;
Ajide Vs. Kelani (1985) 3 NWLR (pt. 12) 249;
Akpan Vs. Bob (2010) 17 NWLR (pt. 1223) 421;
Akwiwu Motors Ltd Vs. Sangonuga (1984) 5 SC 184;
Alhaji Taofeek Alao Vs. ACB Ltd (2000)6 SC (pt. 1)27;
Araka Vs. Ejeagwu (2001) 12 SC (pt. 1) 99;
ASTC Vs. Quaum Consortium Ltd (2009) 9 NWLR (pt. 1145) 1;
Auto Import Export Vs. Adebayo (2002) 18 NWLR (Pt. 799) 554;
Awoniyi Vs. Te Registered Trustees of the Resicrucian Order Amorc (Nigeria) (2000) 6 SC (pt. 1)108;
Bamgboye Vs. University of Ilorin (1999)10 NWLR (pt. 622) 290;
Ben Anachebe Esq., Vs. Kingsley Ijeoma (2015)240 LRCN 69;
Commissioner For Works Benue State Vs. Devcon Ltd (1988) 3 NWLR (pt. 83) 407;
Eke Vs. Ogbonda (2007) All FWLR (pt.351) 1456;
Ekunola Vs. CBN (2013) 15 NWLR (pt. 1377) 224;
Elugbe Vs. Omokhaje (2004) 18 NWLR (pt.905) 319;
FBN Plc Vs. TSA Ind. Ltd. (2010) 4-7 SC (pt.1)242;
FRN v. Ifegwu (2003) 15 NWLR (pt. 842) 113;
Gongola State Vs. Tukur (1989) 4 NWLR (pt.117) 592;
Jev Vs. Iyortom (2014) 14 NWLR (pt. 1428) 575;
KTP Ltd Vs. G & H Nig. Ltd. (2005) 13 NWLR(Pt. 943) 680;

Maigoro Vs. Garba (1999) 10 NWLR (pt.624) 555;
Mbadinuju Vs. Ezuka (1994)8 NWLR (pt. 364) 535 (1994) 10 SCNJ 109;
Mobil Prod. (Nig) UnLtd Vs. Monokop (2003) 18 NWLR (pt.852) 346;
Mohammed Vs. Olawunmi (1990)2 NWLR 9pt. 133) 458;
Newswatch Communications Ltd Vs. Attah (2006)12 NWLR (pt. 993)144;
Obimonure Vs. Erinosho and Anor (1966) 1 ALL NLR 250;
Odom Vs. PDP (2015) 6 NWLR (pt. 1456) 527;
Ogbe Vs. Asadu (2009) 18 NWLR (pt. 1172) 106;
Ojemeni Vs. Momodu (1983) 1 SCNLR 188;
Okafor Vs. A.G. Anambra State (1991)6 NWLR (pt.200) 659;
Okoro Vs. Egbuoh (2006) 15 NWLR (pt. 1001) 1;
Olufeagba Vs. Abdul Raheem (2009) 40 NSCQR 634;
Olufeagba Vs. Abdul-Raheem (supra) 49;
Oriorkio Vs. Osain (2012)16 NWLR (pt. 1329) 560;
Orugbo & Anor. Vs. Una & 10 Ors. (2002) 9 10 SC 61;
Pet Ind Ltd Vs. Cocoa Ind. Ltd (2008)13 NWLR (pt. 1105) 486;
Odofin & Ors Vs. Abraham Olabanji & Anor (1996) 3 NWLR (pt. 435) 126;
Elugbe Vs. Omokfaje (2004)18 NWLR (pt. 905) 319;
Skenconsult (Nig) Ltd Vs. Ukey (1981) 12 SC. 1;
State Vs. Onagoruwa (1992) 2 SCNJ (pt. 1)1;
UBN Plc Vs. Astra Builders (WA) Ltd (2010) 5 NWLR (pt. 1186) 1;
UTB Ltd Vs. Dalmetech Pharm (Nig.) Ltd (2007) 16 NWLR (pt. 1061) 520;
Utih Vs. Onoyivwe (1991) 1 NWLR (pt. 166) 166; and
Yet Pet Ind. Ltd. Vs. Cocoa Ind. Ltd (2008) 13 NWLR (pt. 1105) 486.

Nigerian Statutes cited in this Judgment
1999 Constitution of the Federal Republic of Nigeria (as amended) Sections 233 (1) (2) (a),36.

Representation
Mr. S.A. Akpehe (Esq.), with **V.T. Uji (Esq.),** and **I.R. Adekwagh (Esq.),** for the appellant.

Mr. Alex Ejesieme (Esq.), with **Uchenna C. Oparaugo (Esq.), Prosperity Nwachukwu (Esq.), P.D. Adi (Esq.), C.N. Udengwu (Esq.), and J.T. Damsa Esq.)**, for the 1st respondent.
Mr. G. T. Yango (Esq.), with **Barr**. **Benjamin Wayo (Esq**.), for the 2nd respondent
Mr. Ahmed Raji (SAN), with **Tunde Babalola (Esq.),** and **Adeola Adedipe** (**Esq.)**, for the 3rd respondent's.

ADAMU GALINJE, JSC (Delivering the Lead Judgment): This is an interlocutory appeal against the ruling of the Court of Appeal, Makurdi Division, which was delivered on the 13th April, 2016. Learned counsel for the 1st respondent herein who was the appellant at the lower court, by a motion on notice filed on the 11/4/2016 sought for the following prayers:

> ***"An order of this Honourable Court to hear the appeal in Appeal No: CA/MK/16/2016 between Engr. George T. A. Nduul Vs. Barr. Benjamin Wayo Solely on the appellant/application's brief of Argument."***

When this application came up, the 1st respondent who was the applicant was in Court.

The appellant herein and the 2nd and 3rd respondents who were respondents at the lower court were absent. The registrar informed the court that the respondents were served with hearing notice on the 23rd March, 2016.

Since the respondents were on notice and failed to put up appearance, the lower court proceeded to hear learned counsel for the appellant who moved in terms of the sole prayer as reproduced elsewhere in this judgment.

Thereafter their Lordships Omoleye, Ogbuinya and Jombo-Ofo JJCA ruled as follows:

A ***"The appellant/applicant's application is granted as prayed. The appeal is adjourned to 28/04/2016 for hearing. Hearing notice to issue on all the respondents."***

B It is against this ruling that the appellant who was the 2nd respondent at the lower court has brought this appeal. Its notice of appeal at pages 51-54 of the printed record of this appeal contains three grounds of appeal without their particulars as follows:

C

" 1. The lower court (Court of Appeal) erred in law when it heard the application of the 1st respondent and granted same, that the appeal of the 1st respondent before it be

D ***heard on the 1st respondent's brief, without giving the appellant fair hearing and this occasioned a miscarriage of justice.***

E ***2. The lower court erred in Law, when it came in conclusion that the appellant, was served with the requisite process before it, warranting the hearing of the appeal of the 1st respondent on his brief of***

F ***argument alone, and this occasioned a miscarriage of justice.***

3. The court of appeal lacked the jurisdiction to have

G ***entertained the application of the appellant, to have his appeal heard on basis of his brief of argument alone, when the brief of argument was not served on the appellant and even the application that was heard***

H ***and granted by the lower court was not ripe for hearing for the lower court to have entertain (sic) same against the 2nd respondent before the lower court."***

I

Parties filed and exchanged briefs of argument. At page 2 of the appellant's brief of argument settled by V. T. Uji Esq, of counsel for the appellant, and filed on 13/6 2016, but deemed filed on the 11/1/2017, two issues for determination of this appeal were formulated as follows:

> ***1. "Whether non-service of requisite court process on the appellant cloth the lower court with jurisdiction to have heard and granted 1st respondent's motion and whether service of a motion which was filed on the 11th day of April, 2016 and same heard and granted on the 13th day of April, 2016 which was not ripe for hearing occasioned fair hearing on the appellant.***
>
> ***2. Whether the Lower court was right to have assumed jurisdiction to have granted any application in CA/MK/16/2016 on 13/4/2016 without meeting the condition precedent imposed (Sic) by Law."***

The 1st issue is said to have been formulated from the 1st and 2nd grounds of Appeal, while the 2nd issue is formulated from the 3rd ground of Appeal.

The 1st respondent's brief of argument filed on 10/1/2017 and deemed filed on 11/1/2017, is settled by Alex Ejesieme, Esq of counsel for the 1st respondent. At page 6 of the brief aforesaid, a preliminary objection to the competence of this appeal is issued as follows:

> ***"Take Notice that the 1st respondent shall contend as a preliminary objection that grounds 1, 2, and 3 of the notice of appeal dated 21st of April , 2016 and filed on the same day are grounds of mixed law and fact for which no leave of court was obtained and therefore incompetent as well as the two issues distilled there from. The 1st respondent shall also contend that Ground two of the notice and grounds of appeal did not arise from decision of the court of Appeal."***

Learned counsel argued the preliminary objection at pages 6-8 of the 1st respondent's brief of argument, and in case the preliminary objection is overruled, he thereafter formulated one issue for determination of this appeal, as follows:

> ***"Considering the fact that the appellant was served with another copy of 1st respondent's/appellant's brief of argument in the open Court, afforded enough time and enjoined by the Justices of the Court of Appeal to file his respondent's Brief after denying earlier service of 1st respondent's appellant's brief of argument at lower Court, whether the appellant could still complain of denial of fair hearing and/or pursue the present interlocutory appeal."***

The 3rd respondent's brief of argument, settled by Ahmed Raji SAN, was filed on 15/12/2016, but deemed filed on 11/1/17. Learned Senior Counsel merely adopted the two issues formulated by the appellant's learned counsel.

2nd respondent did not file any brief of argument. Learned counsel for the appellant filed a reply brief to the 1st respondent's brief of argument on the 7th February, 2017.

I will consider the preliminary objection before I consider the argument of parties in respect of the main appeal. In arguing the preliminary objection, learned counsel for the 1st respondent submitted that the 1st, 2nd and 3rd grounds of appeal are of mixed Law and fact for which no leave of either the lower court or this Court was obtained before raising them. According to the learned counsel, the three grounds of appeal aforesaid are incompetent for failure of the appellant to apply for and obtain leave before they were filed. In aid, learned counsel cited S. 233 (1) (2) (a) of the 1999 Constitution of the Federal Republic of Nigeria (as amended) and the authorities in **KTP Ltd Vs. G & H Nigeria Ltd (2005) 13 NWLR (pt. 943) 680, Ojemeni Vs. Momodu (1983) 1 SCNLR 188 at**

205, Maigoro Vs. Garba (1999) 10 NWLR (pt.624) 555 at 568, Akwiwu Motors Ltd Vs. Sangonuga (1984) 5 SC 184 at 188, Ekunola Vs. CBN (2013) 15 NWLR (pt. 1377) 224 at 260 paragraphs E F.

In further argument, learned counsel submitted that the 2nd ground of appeal did not arise from the decision of the Court of Appeal. It is the learned counsel's contention that a ground of appeal that does not arise and flow or related to the judgment from the decision of the Court of Appeal; that does not arise and flow over or related to the judgment against which the appeal lies is incompetent and the court can not listen to the appellant.

In support of the argument herein, learned counsel cited **Odom Vs. PDP (2015)6 NWLR (pt. 1456)527 at 551 paragraphs C D. Yet Pet IND Ltd Vs. Cocoa Ind. Ltd (2008)13 NWLR (pt. 1105) 486, Ogbe Vs. Asadu (2009) 18 NWLR (pt. 1172) 106, Oriorkio Vs. Osain (2012)16 NWLR (pt. 1329) 560, Adeogun Vs. Fasogbo (2011)8 NWLR (pt. 1250) 427.** Still in argument, learned counsel submitted that the appellant's 1st issue is distilled from incompetent ground 2 which did not arise from and related to the decision of the lower Court and the first ground of appeal, as such, it is incompetent also. Finally, learned counsel urged this court to dismiss the appeal.

In reply, the Learned appellants Counsel submitted that the three grounds of appeal are complaining that the lower court has no Jurisdiction to hear and determine the motion on notice filed on 11/4/2016 and that the appellant, 2nd and 3rdrespondents were not given fair hearing at the lower court. According to the learned counsel, an appellant whose grounds of appeal complain about lack of jurisdiction on the part of the court that handled his matter and a breach of his fundamental right, does not require leave to raise and file such grounds of appeal.

In aid, learned counsel cited **Elugbe Vs. Omokhafe (2004)18 NWLR (pt. 905) 319 at 334, State Vs. Onagorowa (1992) 2 SCNJ (pt. 1) 1 at 308.**

In a further argument, learned counsel referred to the proceedings of the lower Court on the 5th May, 2016 and submitted that the said proceedings were conducted without jurisdiction since this appeal was

entered in this Court on the 25/4/2016. I wish to state straight away that the record of appeal before this court does not contain the alleged proceedings of 5/5/2016. That proceeding is not in contention before this Court, and the argument touching on it goes to no issue.

However, the 1st, 2nd and 3rd grounds of appeal touch on the issues of service of the Court processes. The Law is settled that where service of process is required, failure to serve it is a fundamental vice that touches on the jurisdiction of the Court that is sessied with the matter. *See* **Auto Import Export Vs. Adebayo (2002)18 NWLR (pt.799) 554, Mbadinuju Vs. Ezuka (1994)8 NWLR (pt. 384) 535, Skenconsult (Nig.) Ltd Vs. Ukey (1980) 1 SC6, Obimonure Vs. Erinosho (1966) 1 All NLR 250.**

The three grounds of appeal before this Court complained that the appellant was not served with the necessary processes including the first respondent's brief of argument. To that extent, the grounds of appeal are raising jurisdictional issues. The Law is settled that a failure to serve the opposing party with the necessary process which will facilitate the hearing of a case connotes that the condition precedent to the exercise of jurisdiction of the Court is not fulfilled. In other words, absence of service of court processes, where those processes are required to be served, is a fundamental vice that goes to the jurisdiction of the court. A party who complains that he has not been served necessary Court processes does not require leave of either the lower Court or this Court to raise it in his ground of appeal.

See **Auto Import Export Vs. Adebayo (2002) 18 NWLR (pt. 799) 584 at 583 Paragraph B-D.** Also, a ground of appeal which raises the issue of jurisdiction does not necessarily have to relate or flow from the decision against which the appeal lies. This is so because jurisdiction is the soul of adjudication, and if a Court has no jurisdiction, it does not matter whether the question was raised during the proceedings or not, a party will not be prevented from raising it in this Court.

The three grounds are therefore competent. The preliminary objection is accordingly overruled.

On the main appeal, having read through the record of appeal and the briefs of argument filed by the parties in this appeal, I am of the firm view

that the only issue calling for determination of this appeal is whether the lower Court had jurisdiction to hear and determine the application filed on the 11/4/2016.

In arguing the appeal, learned appellant's Counsel submitted that the lower court lacked jurisdiction to hear and determine the 1st respondent's motion on notice since the appellant was not served with the requisite processes. According to the learned counsel, the appellant was not served with the 1st respondent's Brief of Argument before the order to hear the appeal on the 1st respondent's brief alone was made on the 13/04/2016. Learned counsel admitted that the appellant was served with the 1st respondent's motion filed on 11/4/2016 on the same day, but that the motion was not ripe for hearing. In a further argument learned counsel submitted that the lower Court erred in Law when it came to conclusion that the appellant was served with the requisite process warranting the hearing of the 1st respondent's appeal on his brief alone. It is learned counsel's contention that the service of Court process is fundamental, without which the lower Court lacked jurisdiction to proceed with the hearing and determination of the application. In aid learned counsel cited **Eke Vs. Ogbonda (2007) All FWLR (pt.351) 1456, Ben Anachebe Esq, Vs. Kingsley Ijeoma (2015)240 LRCN 69 at 77 – 78, Mobil Prod. (Nig) UnLtd Vs. Monokop (2003) 18 NWLR (pt.852) 346 at 434 – 435.**

On whether the lower court denied the appellant fair hearing, learned counsel submitted that the appellant was not given fair hearing because the motion filed on the 11/4/2016 was not ripe for hearing by virtue of Section 5(a)(b) and (c) of the Court of Appeal practice Direction 2013. Learned counsel submitted further that the grant of motion on 13/4/2016 offended order 7 rule 8 of the Court of Appeal Rules 2011 which gives a respondent 7 days within which to reply, practice Direction, 2013 and common Law principle of Audi alteram paterm which is incorporated in S.36 of the 1999 Constitution of the Federal Republic of Nigeria (as amended)

Still in argument, learned counsel submitted that the registrar of the lower Court gave a wrong information with regard to the date of service in

compiling the record, the registrar failed to include proof of service of the motion which was granted on the 13th of April, 2016, which clearly offends S. 167(d) of the Evidence Act. Finally, learned counsel urged this Court to allow the appeal.

Alhaji Ahmed Raji, learned senior counsel for the 3rd respondent, took a neutral stand in this appeal even though he adopted the two issues formulated by the appellant. I take it therefore that the brief of argument filed on behalf of the 3rd respondent did not pray for any relief. It is accordingly discountenanced.

The proceedings that led to this appeal is so short. For the sake of clarity, I reproduce same as follows:

"Appellant is present.
Kelechi Udeoyibo with him,
Kenecukwu and P.D Adi for appellant.
Respondents and counsel absent.
Registrar-respondents served on
23/03/2016.

Udeoyibo-our motion dated and filed on 11/4/2016 is for the order of the Court to hear the appeal on the appellant/applicant's brief of argument only the respondent having failed to file their Brief of Argument within the time specified under the Rules of this Court. I move in terms.

Court: The appellant/applicant's application is granted as prayed. The appeal is adjourned to 28/04/2016 for hearing. Hearing notice to issue on all the respondents."

From the proceeding reproduced herein above, it is very clear that the registrar misled the lower Court when he told the Court that the respondents were served. However if the lower Court has paid careful attention to the registrar's information, it would have come to conclusion that it was impossible to serve the motion dated and filed on the 11th day of April, 2016

on the respondent on 23/03/2016, a date when the motion aforesaid had not been filed. The motion which the registrar said he served on the 23/03/2016, must have been a different motion and not the motion that was moved and granted by the lower Court. There is, therefore, no evidence that the motion dated and filled on the 11/04/2016 was served on the respondent.

I therefore, agree with learned counsel for the appellant that the motion dated 11/04/2016 was not ripe for hearing and the lower Court has no jurisdiction to hear and determine the application. **In Auto Import Export Vs. Adebayo (Supra) at page 582** paragraph: C F this Court had this to say:

> ***"Where as in the present case, service of process is required, failure to serve it is a fundamental vice and the person affected by the order but was not served with the process, again as in the present case is entitled ex-debito justitiate to have the order set aside as a nullity.*** *See* ***Obimonure Vs. Erinosho and Another (1966) 1 ALL NLR 250, Mbadinuju Vs. Ezuka (1994)8 NWLR (pt. 364) 535 (1994) 10 SCNJ 109 AT 128; Skenconsult Vs. Ukey (1980) 1 SC6 at 26. Accordingly, service of a process in proceeding is fundamental to the assumption of jurisdiction. Failure to serve a process where service is required goes to the root of proper conception of recognized procedure of litigation. It is a fundamental vice which renders null and void an order made against the party who should have been served as the idea that an order can validly be made against a party who has no notification of the action against him is one that is clearly undesirable and indeed unacceptable in our judicial system."***

The option open to the appellant was to apply to the Court of Appeal to discharge the order it made that the appeal be heard on the appellant's brief alone or to appeal against the ruling Court. The appellant opted to appeal, a

process deployed to delay the hearing of the substantive matter still pending in that Court. This, I think, is not the best approach. As a general rule, every Court of record has inherent jurisdiction on application and in appropriate cases and circumstances to set aside its judgment or decision, where the judgment or decision is null and void *ab initio* or where there was a fundamental defect in the proceedings which vitiates and renders same incompetent and invalid. *See* **Alhaji Taofeek Alao Vs. ACB Ltd (2000) 2 SCNQR 1067 at 1071, Salami Omokewu & Ors Vs. Abraham Olabanji & Anor (1996) 3 NWLR (pt. 435) 126, Skenconsult Nig. Ltd Vs. Ukey ((1981) 1 SC6.**

Even though the appellant admitted that the motion dated and filed on the 11/04/2016 was served on it, on the same date that is not borne out by the record of appeal, as the motion that is admittedly served on the appellant is different from the one served on it.

The issue of non-service of the 1st respondents brief of argument on the appellant was raised by the appellant. This information was not available to the lower Court and therefore was not capable of influencing its decision. The failure to serve the motion on notice dated and filed on the 11/04/2016 on the appellant has rendered the ruling of the lower Court null and void.

The sole issue formulated by me is hereby resolved in favour of the appellant. Accordingly, this appeal shall be and it is hereby allowed. The ruling of the lower Court delivered on the 13/04/2016 is set aside. There shall be no order on costs.

Paul Adamu Galinje
Justice, Supreme Court.

PETER-ODILI, (JSC): I am in complete agreement with the judgment just delivered by learned brother, Paul Adamu Galinje JSC and to underscore my support for reasoning, I shall make some remarks.

This is an interlocutory appeal against the ruling of the Court of Appeal, Makurdi Division delivered on the 13th day of April, 2016, granting the 1st respondent's prayer to hear the substantive appeal on the 1st respondent's (appellant at the lower court) on the appellant's brief alone.

FACTS BRIEFLY STATED

The 1st respondent as plaintiff, instituted the action at the Federal High Court, Markurdi by an originating summons against the appellant and the 2nd and 3rd respondents herein as defendants challenging the nomination or selection of the 2nd respondent by the appellants contest the primary election of 10/12/2014 of the appellant for Kwande/Ushongo Federal Constituency, Benue State for the Federal House of Representatives. The challenge was based on the qualification of the 2nd respondent to contest the said election for failure to comply with the Guidelines and Constitution of the appellant and allegedly presenting false information to the 3rd respondents. This was considered by the 1st respondent as plaintiff's non-compliance with the provisions of the appellant's constitution and consequently the provisions of the Electoral Act, 2010 (as amended).

The trial court, after hearing argument and considering all the processes filed by all the parties, delivered its judgment on 10/12/2015 and dismissed 1st respondent's case as lacking in merit.

Dissatisfied with the said decision, the 1st respondent appealed to the Court of Appeal or lower Court and during the pendency of the said appeal, 1st respondent filed a motion for the Court to order hearing of the substantive appeal on his brief alone as appellant for failure of all the respondent filing their briefs of argument after service on them of the appellant's brief and expiration of 30 days. The lower Court granted the prayer and aggrieved with the ruling the now appellant has come before this Court challenging that unfavourable decision.

On the 22nd February, 2017 date of hearing, learned counsel for the appellant, adopted its brief of argument filed on the 13/6/2016 and deemed filed on 11/11/17 and a reply brief of argument to 1st respondent's brief which appellant had filed on 7/2/2016. The appellant identified two issues for determination which are thus:

1. Whether non-service of requisite court process on the appellant clothed the lower court with jurisdiction to have heard and granted 1st respondent's motion and

A ***whether service of a motion which was filed on the 11/4/2016 and same heard and granted on the 13/4/2016 which was not ripe for hearing occasioned fair hearing on the appellant (Ground 1 and 2 of the***
B ***grounds of appeal)***

2. Whether the lower Court was right to have assumed jurisdiction to have granted any application in
C ***CA/MK/16/2016 on 15/4/2016 without meeting the condition precedent imposed by law (Ground 3 of the grounds of appeal).***

D Alex Ejesieme Esq. of counsel for the 1st respondent, adopted his brief of argument filed on 10/1/2017. In the brief of argument, the 1st respondent was argued the notice of preliminary objection which response thereto are in the reply brief of the appellant.

E It needs no saying that the preliminary objection which raises concerns on the competence of the appeal and by implication the jurisdiction of the Court has to be dealt with first before anything can be done by this Court.

F

PRELIMINARY OBJECTION

Learned Counsel for the 1st respondent contends that grounds 1, 2 and 3 of the notice of appeal filed on 21st April, 2016, are grounds of mixed law and
G fact for which no Leave of Court was obtained, that a community reading of the three grounds of appeal as well as their particulars will clearly show that they are of mixed law and facts. He cited Section 233(1)(2) (a) and (3) of the 1999 Constitution of the Federal Republic of Nigeria (as amended), that
H Without the leave of court, the appeal is incompetent and along with it, the competence and jurisdiction of the supreme Court to embark on the adjudication. He cited **KTP Ltd Vs. G & H Nig. Ltd. (2005) 13 NWLR(Pt. 943) 680;Ojemeni Vs. Momodu (1983) 1 SCNLR 188 at 205**
I etc.

For the 1st respondent, it was further contended that ground 2 of the grounds of appeal did not arise from the decision of the Court of Appeal and so appellant cannot be heard on it. He relied on **Odom Vs. PDP (2015) 6 NWLR (pt. 1456) 527 at 551, Yet Pet Ind. Ltd. Vs. Cocoa Ind. Ltd (2008) 13 NWLR (pt. 1105) 486** etc.

It follows, learned counsel for the 1st respondent said that the issues formulated from grounds 1, 2, and 3 of the notice of appeal are also incompetent. He referred to **Jev Vs. Iyortom (2014) 14 NWLR (pt. 1428) 575 at 608-609; Akpan Vs. Bob (2010) 17 NWLR (pt. 1223) 421** etc.

Learned counsel for the appellant responding stated that the objection is misconceived as in considering the matter, the nature of the appeal which subject matter is non service of the requisite Court process that goes to jurisdictional defect and fair hearing are at play. That a look at the three grounds of appeal show they are all grounds of law and nothing more and so covered by Section 233(2) (a) of the 1999 Constitution Federal Republic of Nigeria whereby no leave of the lower court is required before proceeding on the appeal. He cited **Elugbe Vs. Omokfaje (2004)18 NWLR (pt. 905) 319 at 334; Mobil Producing Nig. Unlimited Vs. Monokpo (2003) 18 NWLR (pt. 852) 346 at 436.**

That ground 2 of appellant's ground of appeal flows from or relates to the decision of the Court of Appeal.

What is in issue in the preliminary objection is that of jurisdiction which can be raised at any stage of the proceedings even on appeal, up to the Supreme Court and in that regard, it is not mandatory that leave of Court be obtained before the issue of jurisdiction can be raised, this appeal has to do with the issue of breach of fair hearing which when at play would render the proceedings no matter how well conducted, come to naught. The reason being that the right to fair hearing is a fundamental constitutional right deeply entrenched and an infraction of which vitiates such proceedings, rendering same null and void. I shall refer to the stance of this Court in this matter in the case of:**Elugbe Vs. Omokfaje (2004) 18 NWLR (pt.905) 319 at 334.** In the case of **State Vs. Onagorowa (1992) 2 SCNJ (pt. 1)1 at 308** Belgore, JSC (as he then was) stated:

"The red light to court be cautions is the jurisdiction and it must be settled by proper hearing of parties before further proceedings in a matter can be embarked upon. Similarly, there are occasions after a matter has been before the Court for long before the issue of jurisdiction arises some in the middle of the entire proceedings or towards its tail end in that case the jurisdiction must first be settled before proceeding further …… it is therefore never too late to raise the issue of jurisdiction and in the case of this nature it is never premature to raise it… The preliminary objection as to jurisdiction ought to have been taken first and decided upon." *See also* ***Olufeagba Vs. Abdul Raheem (2009) 40 NSCQR 634 at 724*** *per Mukhtar JSC (as he then was)*

On whether a party can waive the issue of lack of jurisdiction, this Court in **Mobil Producing Nig. Unlimited Vs. Monokpo (2003) 18 NWLR (pt. 852) 346 at 436-435.** Tobi JSC said:

"The law is elementary that party cannot or has not the competence to waive lack of jurisdiction of the Court. Where a Court lacks jurisdiction, the entire proceedings however well conducted are a nullity and a party cannot in law resuscitates or revive nullity by waiver. Jurisdiction is the basic to the entire adjudication. It affects the power of the Court to adjudication on the matter. Where a Court lacks jurisdiction, no amount of indolent conduct on the part of any of the parties, particularly the defendant, can ripen into the defence of waiver. It is my view that the jurisdiction of a Court, where there is none, cannot be enlarged either by estoppel or waiver.

Jurisdiction, being the forerunner of the judicial process, cannot, by acquiescence, collusion, compromise, or as in this case, Waiver, confer jurisdiction on a Court that lacks it.

A ***Parties do not have the legal right to denote jurisdiction on a Court that lacks it."***

Considering the paramount nature of jurisdiction or competence of an
B appeal and as a follow up the vires of Court thereby, the issue of jurisdiction is taken as such that leave is not needed to raise it. Also because of its fundamental position it can be brought up at any level of the proceedings even for the first time on appeal whether at the Court of Appeal or Supreme
C Court. It would therefore be self defeating, if there must be leave of Court before it can be raised or that where the leave has not been obtained previously, to raise it, the proceedings are vitiated. That cannot be part of our adjudicatory system. *See* **FRN Vs. Ifegwu (2003) 15 NWLR (pt. 842)**
D **113 at 212.**

I shall make further references to some dicta of this Court for emphasis. Bello, CJN in **Uti Vs. Onoyiwe (1991) 1 SCNJ 25 at 49** aptly captured its fundamental nature in adjudication. He viewed it in an organic
E form thus:

"Moreover, jurisdiction is blood that gives life to the survival of an action in a Court of law and without jurisdiction; the
F ***action will be like an animal that has been drained of its blood. It will cease to have life and any attempt to resuscitate it without infusing blood into it would be an abortive exercise."***

G

Okoro Vs. Egbuoh (2006) 15 NWLR (pt. 1001) 1 at 23-24 per Tobi JSC Stated as thus:

H ***"Although jurisdiction is a word of large purport and significance in the judicial process, it is not a subject of speculation or gossip…it is a matter of strict and hard law donated by constitution and statues. It is a threshold issue, the***
I ***blood that gives life to the survival of the action and occupying such an important place in the judicial process ……."***

There is no need beating about the bush in this matter and it is only right to discountenance the preliminary objection so the meat of the matter can be handled. The objection is overruled.

MAIN APPEAL
ISSUE 1 &

Whether non-service of requisite Court process on the appellant clothed the lower court with jurisdiction to have heard and granted 1st respondent's motion and whether service of a motion which was filed on the 11/4/2016 and same heard and granted on the 13/4/2016, which was not ripe for hearing occasioned fair hearing on the appellant.

Whether the lower court was right to have assumed jurisdiction to have granted any application in CA/MK/16/2016 on 13/4/2016 without meeting the condition precedent imposed by law.

Learned Counsel for the appellant contended that this court lacks jurisdiction to have heard and granted 1st respondent's requisite process on the appellant. That the appellant was not served with the appellant's brief of argument before the order to hear the appeal on appellant's (i.e. 1st respondent's herein) alone was made on the 13/4/2016 and meanwhile, 1st respondent's motion (appellant at the lower court) was served on the here appellant on the 11/4/2016 and same heard two days later on the 13/4/2016. That the service of Court process is fundamental without which the Court lacks jurisdiction to proceed with the hearing and determination of the matter. He cited **Eke Vs. Oglbonda (2007) ALL FWLR (Pt. 351) 1456; Ben Anachebe Vs. Kingsley Ijeoma (2015) vol. 240 LRCN 69 at 77-78; Mobi Producing (Nig) Unlimited Vs. Monokpo (2003) 18 NWLR (pt.852) 346 at 434-435;** S. 5(a), (b) and (c) of the Court of Appeal Practice Direction 2013.

The 1st respondent had raised a single issue which thus:

SOLE ISSUE

Considering the fact that the appellant was served with another copy of the 1st respondent's appellant brief of argument in the open court, afforded enough time and enjoined by the Justices of the Court of Appeal to file his respondent's brief after denying earlier service of 1st respondent's brief of appellant at the lower court, whether the appellant could still complain of denial of fair hearing and/or pursue the present interlocutory appeal.

Learned Counsel for the 1st respondent stated that what the appellant is pushing forward is akin to a chess game to explore and exploit the rules of the court to outsmart the other side which is not permitted. He cited **Ajide Vs. Kelani (1985) 3 NWLR (pt. 12) 249 at 269** per Oputa J.

That in the circumstances of this case as borne out by the record, no miscarriage of justice occurred and the appellant was afforded enough time to present the reaction to the said appellant's brief and cannot complain of denial of fair hearing.

He cited Government of **Gongola State Vs. Tukur (1989) 4 NWLR (pt.117) 592; Commissioner For Works Benue State Vs. Devcon Ltd (1988) 3 NWLR (pt. 83) 407, Orugbo & Anor. Vs. Una & 10 Ors. (2002) 9 – 10 SC 61 at 85 - 86; Adebayo Vs. A. G. Ogun State (2008) 7 NWLR (pt. 1085)201 at 221-222**; Order 2 Rules 1, 5, and 6 of the Court of Appeal Rules, 2011.

For the 1st respondent, it was submitted that a party who has been afforded the opportunity to put across his defence and who fails to take advantage of such opportunity cannot later turn round to complain that he was denied a right to fair hearing. The cases of **Newswatch Communications Ltd Vs. Attah (2006)12 NWLR (pt. 993)144; ASTC Vs. Quaum Consortium Ltd (2009) 9 NWLR (pt. 1145) 1 at 35; UTB Ltd Vs. Dalmetech Pharm (Nig.) Ltd (2007) 16 NWLR (pt. 1061) 520 at 544; UBN Plc Vs. Astra Builders (WA) Ltd (2010) 5 NWLR (pt. 1186) 1 at 34** were cited in support.

Learned Counsel for the 3rd respondent said they were maintaining their neutrality being the umpire.

In considering this interlocutory appeal, there has to be a revisit to the fact leading to it. The appellant was the 2nd respondent before the court of first instance, the Federal High Court, Makurdi, in suit filed by the 1st respondent as plaintiff. On the 10th day of December, 2015, the trial Court gave judgment dismissing the suit. The 1st respondent appealed to the Court of Appeal or court below filed a notice of appeal which was entered as Appeal No. CA/MK/16/2016 which notice was served on the appellant at All Progressive Congress (APC) National Headquarters at Wuse II, Abuja on the 22/12/2015.

On the 27/1/2016, the 1st respondent served on the appellant the compiled records at the same APC Headquarters. The 1st respondent served the appellant's brief of argument on Lorver Gideon Esq. of No. 16, Dansulaiman Street Utako on the 1st day of March, 2016 purported to be service on the appellant. The 1st respondent filed a motion on notice dated 11th April, 2016 and served on the same date at the APC Headquarters at Wuse II, Abuja.

However, the Registrar of the Court below omitted to include the proof of service in the record of appeal. The 1st respondent Counsel's submission that on the 13/4/2016, the Court heard the application of the 1st respondent as appellant before it of 11/4/2016 and granted same setting the appeal down for hearing on the 28/4/2016 on the 1st respondent's brief of argument alone. Interestingly, 1st respondent's motion filed on the 11/4/2016 and heard and granted by the Court below raised the question whether it was ripe for hearing on the 13/4/2016.

Upset by the Ruling on 13/4/2016, granting of the setting down the appeal for the appellant who was the 2nd respondent in the Court below and who was not served with the appellant's brief of argument though served with the respondent's motion of 11/4/2016 and heard and granted on 13/4/2016, has brought this challenge at this Court on a breach of fair hearing which has robbed the court of competence and jurisdiction.

The 1st respondent sees no breach of fair hearing and holds the view

that there was jurisdiction in the court below to do what it did.

It has to be reiterated even at the risk of repeating what has become trite and perhaps looked upon as over flogged but must be said, that service of court process is fundamental as without it the court lacks jurisdiction to proceed with the hearing and determination of the matter. Also, it is the law that jurisdiction is the life wire of any adjudication and therefore not such as can be waived by the parties, and the Court with the hearing and determination of the matter. He cited **Eke Vs. Ogbonda (2007) ALL FWLR (pt. 351) 1456; Ben Anachebe Vs. Kingsley Ijeoma (2015) vol. 240 LRCN 69 at 77-78.**

Tobi JSC (of blessed memory) had to say in **Mobil Producing Nig. Unlimited Vs. Monokpo (2003) 18 NWLR (pt. 852) 346 at 436-435,**

> ***"…The law is elementary that a party cannot or has not the competence to waive lack of jurisdiction, the entire proceedings however well conducted are a nullity and a party cannot in law resuscitate or revive a nullity by waiver. Jurisdiction is basic to the entire adjudication. It affects the power of the court to adjudicate on a matter. Where a court lacks jurisdiction, no amount of indolent conduct on the part of any of the parties particularly the defendant, can ripen into defence of the waiver.***
>
> ***It is my view that the jurisdiction of a court, where there is none, cannot be enlarged either by estopped or waiver….Jurisdiction being the forerunner of the judicial process cannot , by acquiescence, collusion, compromise, or as in this case, cannot confer jurisdiction on a court that lacks it. Parties do not have the legal right to donate jurisdiction on a court that lacks it."***

I shall refer to: Section 5(a), (b) and (c) of the Court of Appeal Direction 2013. The said section provides:

A ***5. (a) No party may serve an application or a Notice of the preliminary objection on an adverse party on the date scheduled for hearing. Such application must be served not later than 2 days prior to the date scheduled***
B ***for hearing***

(b) upon service of any application on the respondent, he may within 3 days file notice of intention not to contest
C ***the application and upon such notice the application may be heard by justices in the chambers without oral argument.***

D ***(c) in furtherance of the need to ensure speedy dispensation of justice, electronic means may be employed by the Court in order to inform counsel of urgent and case even. Hence, the parties are expected***
E ***to furnish the court with phone numbers and e-mail addresses of themselves or their counsel:***

<u>PROVIDED</u> that these notices should be given at
F ***least forty eight (48) hours before the scheduled court date."***

The rules of the Court of Appeal, 2011, order 7 Rule 8 provides for 7 days
G to a respondent to make a reply if he so wishes after the service of the process on him.

What has come clearly from the facts and the prevailing laws including the Rules of the court below and practice Direction is that when
H the motion filed on the 11th day of April, 2016 and heard and granted on the 13/4/2016 without complying with those Rules as to service and the period of notice thereof, the right of the notice thereof, the right of the appellant to fair hearing was definitely infracted and the jurisdiction of the court below
I to so hear the matter was absent. There was and remains no way around the situation as the proceedings are vitiated on account of that. *See* **Olufeagba**

Vs. Abdul-Raheem (supra) 49; Okoro Vs. Egbuoh (2006) 15 NWLR (pt. 1001) 1 at 23-24.

In conclusion based on the foregoing and better articulated lead judgment, there is merit in this appeal and I allow it. I abide by the consequential orders as made.

Mary Ukaego Peter-odili
Justice, Supreme Court

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

Appeal allowed.

Olu Ariwoola
Justice Supreme Court

BAYANG AKAAHS (JSC): My learned brother, Galinje JSC obliged me with the draft of the judgment just delivered. I am one with him in allowing the appeal and setting aside the ruling delivered by the lower court on 13/4/2016. The said ruling was delivered without jurisdiction since the motion of 11/4/2016 was not served and even if it had been served, was not ripe for hearing on 13/4/2016. It is settled law that where service of process is required, failure to serve it is fundamental vice and touches on the jurisdiction of the court that is seized of the. *See* **Obimonure Vs. Erinosho (1966) 1 ALL NLR 250; Skenconsult (Nig) Ltd Vs. Ukey (1980) Is. C. 6; Mbadinuju Vs. Ezuka (1994) 8 NWLR (Pt. 384) 535; Auto Import Export Vs. Adebayo (2002) 18 NWLR (Pt. 799) 554.**

For this reason and the more detailed reasons contained in the leading judgment of my learned brother, Galinje JSC, I also allow the appeal and set aside the ruling of the Court of Appeal, Makurdi delivered on 13/4/2016. I too make no order on costs.

K.b Aka'Ahs
Justice, Supreme Court

DAUDA BAGE, (JSC): I had the privilege of the preview of the judgment just delivered by my learned brother Galinje, JSC, I am in full agreement. I can only add a few words of my own in support.

Whether a hearing can be said to be fair if any of the parties to proceedings is denied an opportunity to be heard or present his case or call evidence. Certainly not. The law is settled that, a hearing cannot be said to be fair if any of the parties is refused a hearing or denied the opportunity to be heard or present his case or call evidence.

The right to fair hearing is substantially a question of opportunity of being heard. The right lies in the procedure followed in the determination of a case and not in the correctness of the decision arrived in a case. *See* **FBN Plc Vs. TSA Ind. Ltd. (2010) 4-7 SC (pt.1)242; Bamgboye Vs. University of Ilorin (1999) 6 S.C (pt. 11) 72**; **Awoniyi Vs. Te Registered Trusteea of the Resicucion Order Amoc (Nigeria) (2000) 6 SC (pt. 1)108; Araka Vs. Ejeagwu (2001) 12 SC (pt. 1) 99; Okafor Vs. A.G. Anambra State (1991) 7 SC (pt. 11) 138** and **Mohammed Vs. Olawumi 1990) 4 SC 40**. The failure to serve the motion on notice dated and filed on the 11/4/2016 on the appellant in the present appeal amounted to denial of his right to fair hearing. I agree with the Lead Judgment, that the ruling of the Lower Court anchored on the motion stands as null and void. For the more detail reasoning contained in the Lead Judgment, I also allow the appeal, and set aside the ruling of the lower court delivered on the 13/4/2016. I abide by the order as to costs contained in the Lead Judgment.

Sidi Dauda Bage,
Justice, Supreme Court.

BLESSING BOTU
AND
THE STATE

SC. 405/2014

IN THE SUPREME COURT OF NIGERIA
HOLDEN AT ABUJA

FRIDAY, 12TH MAY, 2017

BEFORE THEIR LORDSHIPS

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

COURT: Identification of accused – Duty on court thereto – Need to carefully scrutinize evidence of identification – Relevant factors thereto.

CRIMINAL LAW AND PROCEDURE: Identification evidence – Purport – The principle in ***Ndidi Vs. The State (2007) 13 NWLR (Pt. 1052) 633.***

EVIDENCE: Doctrine of recent possession – S. 167(a) Evidence Act – Whether has a caveat thereto – Application thereof.

EVIDENCE: Presumption – Doctrine of recent possession – Where an accused offered explanation for his possession – Evidence thereof not challenged by prosecution – Whether presumption has been rebutted.

Issue for Determination

Whether from the totality of the evidence on the record and the circumstances of this case the lower court was right in upholding the conviction of the appellant by the trial court in respect of count III of the charge against the appellant.

Facts of the Matter

This is an appeal against the judgment of the Court of Appeal, Benin delivered on the 28th day of May, 2014, dismissing the appeal and affirming the judgment of the Delta State High Court, Ughelli which convicted the appellant for the offence of armed robbery and sentenced him to death on 23rd day of June, 2011.

The appellant was arraigned before the trial court upon an information containing three counts in Charge No.OUH/7C/2004.

The Charge read as follows:

STATEMENT OF OFFENCE: COUNT 1
Conspiracy to rob, contrary to section 5(b) and punishable under section 1(2)(a) of the Robbery and Firearms (Special Provisions) Act Cap. 398 Volume XXII Laws of the Federation of Nigeria 1990.

PARTICULARS OF OFFENCE
BLESSING BOTU (M) and OdafeAwhata (M) on or about the 18th day of August, 2002, at Effurun within Effurun Judicial Division, conspired with each other to commit armed robbery.

STATEMENT OF OFFENCE: COUNT II
Armed robbery, punishable under section 1(2)(a) of the Robbery and Firearms (Special Provisions) Act Cap. 398 Volume XXII Laws of the Federation of Nigeria, 1990.

PARTICULARS OF OFFENCE
Blessing Botu (M) and Odafe Awhata (M) on or about the 18th day of August, 2002 at DSC Township within Effurun Judicial Division robbed one John Eyalegin of his Mercedes Benz V/Boot Car and at the time of the robbery you were armed with a gun.

STATEMENT OF OFFENCE: COUNT III
Armed robber punishable under section 1(2)(a) of the Robbery and Firearms (Special Provisions) Act Cap. 398 Volume XXII, Laws of the Federation of Nigeria, 1990.

PARTICULARS OF OFFENCE
Blessing Botu (M) and Odafe Awhata (M) on or about the 24th day of August, 2002, at DSC Township within Effurun Judicial Division, robbed one Pastor A.B.J. Udoka of his Mercedes Benz V/Boot 300E with registration number BP 165 ABJ and at the time of the robbery, you were armed with an offensive weapon to wit: gun.

The prosecution called four witnesses while the appellant testified for himself. Count II relates to the robbery which occurred on 18th August, 2002, involving PW1 while the second robbery took place on 24th August, 2002, as stated in Court III and Pastor A.B.J. Udoka, PW2 was the victim of that robbery. The prosecution sought to tender alleged confessional statements of the appellant and Mr. Olokor, the learned counsel who represented him, objected to the admissibility of the statements alleging that the accused was tortured and induced to make the statements. The learned trial Judge ordered for a trial within trial to be conducted and ruled that Exhibit 1 was inadmissible because it was not made voluntarily.

In its judgment, the learned trial Judge discharged and acquitted the appellant in count 1 touching on conspiracy on the ground that PW1's evidence on this count cannot be relied on due to inconsistency. He however held that the prosecution proved the substantive offence of armed robbery in counts II and III beyond reasonable doubt based on the evidence of PW2 and convicted him accordingly.

Dissatisfied with the judgment of the learned trial Judge, he appealed to the Court of Appeal, Benin on 28/7/2011. The lower court partly allowed the appeal in relation to count II. He was discharged and acquitted of the offence laid under count II and affirmed the conviction on count III.

Further aggrieved by the decision of the lower court the appellant appealed to this Court.

Held: *(Unanimously allowing the appeal)*

1. The purport of an identification evidence and the duty of court thereon.

In **Ndidi Vs. State (2007) 13 NWLR (Pt. 1052) 633,**Aderemi JSC observed at page 651 thus:

"Generally in criminal cases, the crucial issue is not ordinarily whether or not the offence was committed. More often than not the controversy always rages over the identification of the person or persons alleged as the actual perpetrators of the offence charged. It follows that identification evidence is that evidence which tends to show that the person charged is the same as the person who was seen committing the offence".

He went further to state that the courts in guarding against cases of mistaken identity must meticulously consider the following:

1. **Circumstances in which the eye-witness saw the subject or defendant.**
2. **The length of time the witness saw the suspect or defendant.**
3. **The lighting conditions.**
4. **The opportunity of close observation**
5. **Any previous contacts between the two parties.**

See: Ikemson Vs. The State (1989) 3 NWLR (Pt. 110) 455; Ogoala v The State (1991) 2 NWLR (Pt. 175) 509; and Bashaya Vs. State (1998) 5 NWLR (Pt. 550) 351.
(Pp 48 – 49 Paras E – C)

2. *There is doubt whether this is a robbery case at all.*
The evidence elicited from PW2, under cross-examination, has casts serious doubt as to whether this case is a robbery case at all. In his evidence in chief, PW2 did not say the appellant and his co-accused identified him as their uncle. He merely said:

> **"I was link up with some other men and they brought the suspect which are the accused person. They identified one in the mix as their uncle" (underlining is mine for emphasis)" Despite this nebulous means of unorthodox identification, the learned trial Judge said the accused identified him (PW2) as their uncle. (See page 196 of the record). But at page 97 line 25 what is recorded is "one" not "me".** *(P 51 Paras B – E)*

3. *There was no proper identification conducted*
One wonders why PW2 should say to the Police that his case has ended after the car was released to him on 26/8/2002. No proper identification was conducted on the appellant as the person who committed the offence charged or the PW2 as the victim of the alleged robbery. A vital element of the offence is therefore lacking in this case. *(P 51 paras E – F)*

4. *The doctrine of recent possession under S. 167(a) of Evidence Act is subject to a caveat*
As to the fact that the appellant was found in the stolen vehicle after the robbery incident thereby raising the presumption that the appellant is the thief or received it, knowing that it was stolen as stipulated in section 167(a) Evidence Act, there is a caveat that the presumption is rebuttable if the person accused can account for his possession. The section provides:

> ***"167 The court may presume the existence of any fact which it deems likely to have happened, regard shall be had to the common course of natural***

events, human conduct and public and private business, in their relationship to the facts of the particular case, and in particular the court may presume that:

(a) a man who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession".

Learned counsel for the appellant submitted that the presumption will apply if the accused is unable to account for the possession of the goods and in this case, the explanation that is expected of an accused person to displace the application of the presumption is established on a balance of probability. He maintained that the explanation given by the appellant remained unchallenged. In his evidence in chief, the appellant explained that on 24/8/2002, he was waiting for a vehicle at Orhuwhorun to take him to Effurun roundabout where he would enter a vehicle to Benin to check if his younger brother's name appeared on the list of admission for JAMB in 2002, when he saw Odafe Awhotu driving in a Mercedes Benz v-Boot car, who stopped to find out where he was going to. He answered that he was travelling to Benin. Odafe informed him that he too was going to Benin to pick his uncle who was the owner of the car. He then entered the car and they headed off for Benin but they were stopped at a police check point at Elume junction and asked to disembark from the vehicle. It was then he learned that the vehicle matched the description of the vehicle that was stolen from where it was parked. He explained to the police that he was given a lift and so did not know anything about the vehicle. His explanation fell on deaf ears as he was arrested along with Odafe.

(Pp 51 – 52 paras G – G.)

Per K.B. Akaahs (JSC)

"I am now left with the explanation which the appellant offered regarding his presence inside the stolen vehicle. It is not necessary for the learned trial Judge to be convinced of the truth of the explanation before the presumption is rebutted.

What is important is that the explanation was not controverted by the prosecution and so it remained unchallenged. In State Vs. Nnolim (1994) 5 NWLR (Pt. 345) 394 this court held per Adio JSC (of blessed memory) that "*an explanation by an accused of the way in which a stolen property came into his possession which might reasonably be true and which is consistent with innocence, although the court may not be convinced of its truth, would displace the presumption under section 148(a) Evidence Act. See: Salami Vs. The State (1988) 3 NWLR (Pt. 85) 670".*

PW2's evidence was crucial in dislodging the story put up by the appellant to explain how he came into possession of the stolen vehicle; failing which the only other evidence, apart from that of an eye witness, is if the appellant made a voluntary confessional statement on the theft of the vehicle. The evidence of PW3 and PW4 cannot qualify as eye-witness evidence. PW1's evidence was found to have suffered interference by the Police. There is nothing left on which the prosecution could controvert the explanation given by the appellant. Consequently, it will be unsafe to affirm the conviction and sentence passed on the appellant by the learned trial Judge which the lower court found was in order. *(P 53 paras C – I.)*

Nigerian Cases cited in this Judgment

Aruna Vs. State (1990) 6 NWLR (Pt.155) 125;
Bashaya Vs. State (1998) 5 NWLR (Pt. 550) 351;
Egboghonome Vs. State (1993) NWLR (Pt. 306) 383;
Ikemson Vs. State (1989) 3 NWLR (Pt.110) 455;

A *Ikemson Vs. The State (1989) 3 NWLR (Pt. 110) 455;*
Michael Alor Vs. State (1997) 4 NWLR (Pt. 501) 511;
Mohammed Garba Vs. State (2000) 6 NWLR (Pt. 661) 378 (2000) 4 SCNJ 315;
B *Ndidi Vs. State (2007) 13 NWLR (Pt. 1052) 633;*
Oforlete Vs. State (2000) 12 NWLR (Pt.681) 415;
Ogoala Vs. The State (1991) 2 NWLR (Pt. 175) 509;
Oguonzee Vs. State (1998) 5 NWLR (Pt.551) 521;
C *People of Lagos State Vs. Umaru (2014) 7 NWLR (Pt.1407) 54;*
Salami Vs. The State (1988) 3 NWLR (Pt. 85) 670;
State Vs. Nnolim (1994) 5 NWLR (Pt. 345) 394; and
State Vs. Salawu (2012) All FWLR (Pt. 614) 1.
D

Nigerian statutes cited in this Judgment
Robbery and Firearms (Special Provisions) Act Cap. 398 Volume XXII Laws of the Federation of Nigeria 1990 Section 1(2)(a);
E *Evidence Act, 2011 Section 167(a);*
Evidence Act Section 167(a); and
Evidence Act Section 148(a).

F **Representation**
Ayo Asala (Esq.), with him **A.M. Sanusi (Esq**.), for the appellant.
O.F. Enenmo, Director Appeals, Ministry of Justice, Delta State (with him **Martins Omakor** DDPP) for respondent.
G

BAYANG AKA'AHS, JSC (Delivering the Lead Judgment): This is an appeal against the judgment of the Court of Appeal, Benin delivered on the 28th day of May, 2014, dismissing the appeal and affirming the judgment of
H the Delta State High Court, Ughelli which convicted the appellant for the offence of armed robbery and sentenced him to death on 23rd day of June, 2011.

The appellant was arraigned before the trial court upon an
I information containing three counts in Charge No.OUH/7C/2004.

The Charge read as follows:

STATEMENT OF OFFENCE: COUNT 1

Conspiracy to rob, contrary to section 5(b) and punishable under section 1(2)(a) of the Robbery and Firearms (Special Provisions) Act Cap. 398 Volume XXII Laws of the Federation of Nigeria 1990.

PARTICULARS OF OFFENCE

BLESSING BOTU (M) and OdafeAwhata (M) on or about the 18th day of August, 2002, at Effurun within Effurun Judicial Division, conspired with each other to commit armed robbery.

STATEMENT OF OFFENCE: COUNT II

Armed robbery, punishable under section 1(2)(a) of the Robbery and Firearms (Special Provisions) Act Cap. 398 Volume XXII Laws of the Federation of Nigeria, 1990.

PARTICULARS OF OFFENCE

Blessing Botu (M) and OdafeAwhata (M) on or about the 18th day of August, 2002 at DSC Township within Effurun Judicial Division robbed one John Eyalegin of his Mercedes Benz V/Boot Car and at the time of the robbery you were armed with a gun.

STATEMENT OF OFFENCE: COUNT III

Armed robber punishable under section 1(2)(a) of the Robbery and Firearms (Special Provisions) Act Cap. 398 VolumeXXII, Laws of the Federation of Nigeria, 1990.

PARTICULARS OF OFFENCE

BlessingBotu (M) and OdafeAwhata (M) on or about the 24th day of August, 2002, at DSC Township within Effurun Judicial Division, robbed one Pastor A.B.J. Udoka of his Mercedes Benz V/Boot 300E with registration number BP 165 ABJ and at the time of the robbery, you were armed with an offensive weapon to wit: gun.

A The prosecution called four witnesses while the appellant testified for himself. Count II relates to the robbery which occurred on 18th August, 2002, involving PW1 while the second robbery took place on 24th August, 2002, as stated in Court III and Pastor A.B.J. Udoka, PW2 was the victim of
B that robbery. The prosecution sought to tender alleged confessional statements of the appellant and Mr.Olokor, the learned counsel who represented him, objected to the admissibility of the statements alleging that the accused was tortured and induced to make the statements. The
C learned trial Judge ordered for a trial within trial to be conducted and ruled thatExhibit 1 was inadmissible because it was not made voluntarily.

In its judgment, the learned trial Judge discharged and acquitted the appellant in count 1 touching on conspiracy on the ground that PW1's
D evidence on this count cannot be relied on due to inconsistency. He however held that the prosecution proved the substantive offence of armed robbery in counts II and III beyond reasonable doubt based on the evidence of PW2 and convicted him accordingly.

E Dissatisfied with the judgment of the learned trial Judge, he appealed to the Court of Appeal, Benin on 28/7/2011. The lower court partly allowed the appeal in relation to count II. He was discharged and acquitted of the offence laid under count II and affirmed the conviction on count III.

F Further aggrieved by the decision of the lower court the appellant appealed to this Court in the notice of appeal filed on 20/6/2014. The notice of appeal contained two grounds from which the appellant distilled a lone issue for dermination namely:

G

Whether from the totality of the evidence on the record and the circumstances of this case the lower court was right in upholding the conviction of the appellant by the trial court
H ***in respect of count III of the charge against the appellant. The respondent adopted the issue framed by the appellant.***

Learned counsel for the appellant argued that the evidence of PW2, PW3
I and PW4 which the lower court relied upon in affirming the decision of the trial court to hold that the appellant was properly identified as one of the

A armed robbers that attacked PW2 and that the circumstantial evidenceproffered by the prosecution to prove the offence as laid in Court 11 is unreliable and it fell far short of the quality of evidence required to prove a criminal charge beyond reasonable doubt. He contended that
B PW2's evidence on identification is belated, unreliable, inconsistent and it should have been rejected by the learned trial Judge. He pointed to the evidence on record that the extra-judicial statements made by PW2 to the police on the alleged involvement of the appellant in the armed robbery
C incident is not the product of his personal knowledge but what he was told by the police. He referred to the evidence of PW2 in the records showing that when he reported thematter to the police, he did not give them a description of the appellant. While conceding that this court will not
D normally interfere with concurrent findings of fact by both the trial court and the Court of Appeal, but where the findings are found to be perverse or not supported by the evidence or were reached as a result of a wrong approach to or a wrong application of a principle of substantive law or
E procedure, the appellate court will interfere. Two cases namely **Oguonzee Vs. State (1998) 5 NWLR (Pt.551) 521** and **Aruna Vs. State (1990) 6 NWLR (Pt.155) 125.**were cited in support. He maintained the stance that the issue of the credibility of the evidence of PW2, on the identification of
F the appellant, has to do with whether he properly identified the appellant to the police at the earliest opportunity and not his demeanour from the witness box.

On the application of section 167(a) of Evidence Act to the doctrine
G of recent possession, learned counsel submitted that before a trial court can apply this presumption in respect of stolen goods found in possession of a accused person, the following essential elements must co-exist namely:

H **(i) It must be established that the goods are stolen.**
(ii) The accused must have been found in possession.
(iii) The possession must have been soon after the theft; and
(iv) The accused is unable to account for his possession of the goods recently stolen and relied on the People of Lagos
I **State Vs. Umaru (2014) 7 NWLR (Pt.1407) 54**

Learned counsel for the respondent after, enumerating the elements of the offence of armed robbery as stated in **Ikemson Vs. State (1989) 3 NWLR (Pt.110) 455** which the prosecution must prove, submitted there was enough evidence both direct and circumstantial which the trial court relied on to convict the appellant and upheld by the court below. He pointed to the evidence of PW2 which he said was direct. He also pointed to the evidence of PW3 and PW4 who were not cross-examined on material facts and relying on **Oforlete Vs. State (2000) 12 NWLR (Pt.681) 415** submitted that where a witness evidence is unchallenged under cross-examination, the court is not only entitled to act on or accept such evidence but is, in fact, bound to do so provided that such evidence by its very nature is not incredible. He said PW2 identified the appellant visually and so it was unnecessary to conduct a formal identification parade and the lower court rightly affirmed the unshaken recognizable evidence of the appellant as among the robbers that robbed PW2 of his car. As there were concurrent findings by the two lower courts, this Court will not interfere unless the findings are perverse. He argued that the facts and circumstances of this case must be distinguished from the facts in **State Vs. Salawu (2012) All FWLR (Pt. 614) 1** and that the Supreme Court did not base its decision to discharge and acquit Salawu (the respondent) solely because of the improper identification parade conducted wherein the respondent identified his victim. Learned counsel further submitted that if the identification parade accepted by the lower court was improper, there was another available and credible evidence which the lower court rightly relied upon to affirm the judgment of the trial court by the invocation of the doctrine of recent possession under Section 167(a) Evidence Act, 2011. He said the trial court considered the explanation of theappellant and found it to be clear and damaging after thought. He maintained that the very circumstance of the arrest of the appellant leaves room for very little doubt as to his guilt in respect of Count III. He argued that non-tendering of the weapon used in the commission of thearmed robbery was not fatal to the prosecution's case since the learned trial judge believed the evidence of PW2 that his car was snatched from him at gun point and there was no challenge to this evidence. He placed reliance on **Michael Alor Vs. State**

(1997) 4 NWLR (Pt. 501) 511; and **Mohammed Garba Vs. State (2000) 6 NWLR (Pt. 661) 378 (2000) 4 SCNJ 315**. On the conduct of the Police during investigation, learned counsel submitted that the dishonourable conduct of the police condemned by the trial court and the lower court was that of the police investigator at Sapele Police Station who took the first statement made by PW2 and that policeman was neither PW3 nor PW4. Even if PW3 and PW4 were among the Policemen that suggested the additions in PW2's first statement, the things suggested did not mean that armed robbery did not happen to PW2.

This appeal has turned heavily on the identification of the appellant and the application of the principle of recent possession of stolen goods as stipulated in Section 167(1) Evidence Act.

The lower court stated the principle that where the identity of an accused person is in issue, a trial court must be careful to examine the evidence of recognition carefully to detect whether there are any weaknesses capable of diminishing the strength and veracity of the evidence given by the witnesses for the prosecution. In this regard the court should examine closely the circumstances in which the identification by the witness was made. In **Ndidi Vs. State (2007) 13 NWLR (Pt. 1052) 633,**Aderemi JSC observed at page 651 thus:

> ***"Generally in criminal cases, the crucial issue is not ordinarily whether or not the offence was committed. More often than not the controversy always rages over the identification of the person or persons alleged as the actual perpetrators of the offence charged. It follows that identification evidence is that evidence which tends to show that the person charged is the same as the person who was seen committing the offence".***

He went further to state that the courts in guarding against cases of mistaken identity must meticulously consider the following:

(A) Circumstances in which the eye-witness saw the subject or defendant.
(B) The length of time the witness saw the suspect or defendant.
(C) The lighting conditions.
(D) The opportunity of close observation
(E) Any previous contacts between the two parties. See: Ikemson Vs. The State (1989) 3 NWLR (Pt. 110) 455; Ogoala Vs. The State (1991) 2 NWLR (Pt. 175) 509; and BashayaVs. State (1998) 5 NWLR (Pt. 550) 351.

The facts leading to the appellant's arrest are as follows:
On 24/8/2002, around 7.00 p.m., PW2's car was snatched by armed robbers in DSC Township, Orhuwhorun, but was recovered within two hours or less by PW3 on its way to Benin with the appellant as the occupant. PW2 who was the victim of the robbery gave evidence and said:

"I was line up with some other men and they brought the suspect which are the accused person. They identified one in the mix as their uncle. I was not asked to identify them. The Police told me to make a statement. That was in Sapele. I made the Statement. We were told to go and come back the next day. The car was finally released to us on the 26/8/2002. That was when I told the Police my case has ended. I made another statement on 26/8/2002. In both statements I said I could only identify one of them. This is because it was the 1st accused that wasdirectly facing me when the car was taken. The robbers were not masked".

From the evaluation of the evidence, the lower court allowed the conviction of the appellant on count III to stand, simply, because the appellant was found in the car. The lower court, at page 308, had expressed its total agreement with the learned trial Judge's consideration of the issue as reflected at page 206 of the record. There the learned trial Judge said:

A ***"Another interesting aspect of this case is that the accused was found in the car which was stolen about an hour later on the way to Benin. Though I do not accept the evidence that cartridges were found in the car because I am not satisfied***
B ***with the search done by the police, the fact still remains that the accused was found inside a stolen car within an hour of the theft. Even if I do not accept the direct evidence, the circumstantial evidence is also very strong and indeed***
C ***credible particularly in relation to count 3 which accommodates the evidence of PW2. There are circumstances co-existing that make a complete and unbroken chain which constitute sufficient and cogent proof***
D ***that the accused committed the offence. This is a requirement in using circumstantial evidence as the bases (sic) to convict an accused".***

E The lower court had earlier deprecated the action of the police in tampering with the statement of PW2 which could cast some doubt on the credibility of his evidence. When he was cross-examined by the learned counsel of the appellant, PW2 gave the following answer:

F

"In one of my statements to the Police, I said the robbers put me in the first seat drove with me for a distance before asking me to drop. This was the first statement I made to the Police
G ***in Sapele. I made the 2nd statement days after, that is 26/8/2002. I did not talk about the robbers driving with me in the 2nd statement. The second statement is more correct. This court should rely on the second statement than the first***
H ***statement. There are some additions in the first statement which I was asked to make which I would not have made initially. The additions were suggested to me by people around me. Some of the people around me were the police***
I ***officers. I cannot remember whether in the second statement I mentioned that I could identify any of the***

A ***robbers. Going through the statement of 26/8/2002 I now say that I did not state that I can identify any of the robbers..... The police told me that when the robbers were arrested, there was no gun found on them.....".***

B

The evidence elicited from PW2, under cross-examination, has casts serious doubt as to whether this case is a robbery case at all. In his evidence in chief, PW2 did not say the appellant and his co-accused identified him as C their uncle. He merely said:

"I was link up with some other men and they brought the suspect which are the accused person. They identified one D ***in the mix as their uncle" (underlining is mine for emphasis)" Despite this nebulous means of unorthodox identification, the learned trial Judge said the accused identified him (PW2) as their uncle. (See page 196 of the*** E ***record). But at page 97 line 25 what is recorded is "one" not "me".***

One wonders why PW2 should say to the Police that his case has ended F after the car was released to him on 26/8/2002. No proper identification was conducted on the appellant as the person who committed the offence charged or the PW2 as the victim of the alleged robbery. A vital element of the offence is therefore lacking in this case.

G As to the fact that the appellant was found in the stolen vehicle afterthe robbery incident thereby raising the presumption that the appellant is the thief or received it, knowing that it was stolen as stipulated in section 167(a) Evidence Act, there is a caveat that the presumptionis rebuttable if H the person accused can account for his possession. The section provides:

"167 The court may presume the existence of any fact which it deems likely to have happened, regard shall I ***be had to the common course of natural events, human conduct and public and private business, in***

A ***their relationship to the facts of the particular case, and in particular the court may presume that:***

(a) a man who is in possession of stolen goods soon after the theft is either the thief or has received the goods

B ***knowing them to be stolen, unless he can account for his possession".***

Learned counsel for the appellant submitted that the presumption will

C apply if the accused is unable to account for the possession of the goods and in this case, the explanation that is expected of an accused person to displace the application of the presumption is established on a balance of probability. He maintained that the explanation given by the appellant

D remained unchallenged. In his evidence in chief, the appellant explained that on 24/8/2002, he was waiting for a vehicle at Orhuwhorun to take him to Effurun roundabout where he would enter a vehicle to Benin to check if his younger brother's name appeared on the list of admission for JAMB in

E 2002, when he saw Odafe Awhotu driving in a Mercedes Benz v-Boot car, who stopped to find out where he was going to. He answered that he was travelling to Benin. Odafe informed him that he too was going to Benin to pick his uncle who was the owner of the car. He thenentered the car and

F they headed off for Benin but they were stopped at a police check point at Elume junction and asked to disembark from the vehicle. It was then he learned that the vehicle matched the description of the vehicle that was stolen from where it was parked. He explained to the police that he was

G given a lift and so did not know anything about the vehicle. His explanation fell on deaf ears as he was arrested along with Odafe.

The learned trial Judge disbelieved the appellant and held that the appellant was positively identified by PW1, who recognised him as the one

H who pointed the gun at PW1 and demanded for the keys of the vehicle and by PW2, who recognised him since he faced PW2 during the incident and was not masked.

The lower court referred to the statement of PW2 who stated that it

I was the 1st accused who pointed a gun at him and asked him (PW2) to hand over the car keys to him and it was 1st accused who entered the driver's seat

and they drove away. The lower court said the witness was unshaken regarding his evidence that he recognized the appellant among the robbers that attacked him and he was the one who faced him directly when the car was taken. Having pointed out the inconsistencies in PW2's evidence where he admitted in cross-examination that he did not state in his statement of 26/8/2002, that he could identify any of the robbers and maintained that the second statement is more correct, has destroyed the lower court's finding that PW2 was unshaken in his recognition of the appellant as one of the robbers who attacked him. The cross-examination has effectively cast a serious doubt on his credibility. *See* **Egboghonome Vs. State (1993) NWLR (Pt. 306) 383.**

I am now left with the explanation which the appellant offered regarding his presence inside the stolen vehicle. It is not necessary for the learned trial Judge to be convinced of the truth of the explanation before the presumption is rebutted.

What is important is that the explanation was not controverted by the prosecution and so it remained unchallenged. In **State Vs. Nnolim (1994) 5 NWLR (Pt. 345) 394** this court held per Adio JSC (of blessed memory) that "an explanation by an accused of the way in which a stolen property came into his possession which might reasonably be true and which is consistent with innocence, although the court may not be convinced of its truth, would displace the presumption underSection 148(a) Evidence Act. *See* **Salami Vs.The State (1988) 3 NWLR (Pt. 85) 670".**

PW2's evidence was crucial in dislodging the story put up by the appellant to explain how he came into possession of the stolen vehicle; failing which the only other evidence, apart from that of an eye witness, is if the appellant made a voluntary confessional statement on the theft of the vehicle. The evidence of PW3 and PW4 cannot qualify as eye-witness evidence. PW1's evidence was found to have suffered interference by the Police. There is nothing left on which the prosecution could controvert the explanation given by the appellant. Consequently, it will be unsafe to affirm the conviction and sentence passed on the appellant by the learned trial Judge which the lower court found was in order.

A The appeal has merit and I hereby allow it. The conviction of the appellant on count 3 and sentence of the death which was affirmed by the lower court is hereby set aside. There was no appeal against his conviction on count 2 which the lower court had set aside in its judgment delivered on
B 28/5/2014. The High Court had found the appellant not guilty of the offence of conspiracy contained in count 1. The appeal therefore succeeds and it is hereby allowed. The appellant is accordingly acquitted and discharged and should be released forthwith from the prison where he had
C been confined awaiting execution.

K.B. AKA'AHS
Justice, Supreme Court

D **DATTIJO MUHAMMAD, JSC:** Having read in draft the lead judgment of my learned brother KUMAI BAYANG AKAAHS JSC just delivered, I agree with the reasoning and conclusion therein that the appeal has succeeded. I allow same and abide by the consequential orders made in
E the lead judgment.

Musa Dattijo Muhammad
Justice, Supreme Court

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I

1. CENTRAL BANK OF NIGERIA
2. DIRECTOR, BANKING SUPERVISION CENTRAL BANK OF NIGERIA

AND

OLAYATO ARIBO

SC/9/2011

IN THE SUPREME COURT OF NIGERIA
HOLDEN AT ABUJA

FRIDAY, 12TH MAY, 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**

ACTION: Originating summons – What the court considers in its determination – The relevance of affidavit evidence and exhibits attached thereto.

COURT: Findings of fact – Where made by a court of co-ordinate jurisdiction – Attitude of trial court thereto – Whether such findings remain valid and subsisting until set aside by an appellate court.

EQUITY: Estoppel – Plea thereof – Whether estoppel must be specifically pleaded – Whether does not have to be in a specified form – Relevant considerations.

EQUITY: Issue estoppel – Meaning – When does it arise in a suit.

EQUITY: Issue estoppel – Where causes of action are not same – Whether issue estoppel can still apply in a subsequent suit.

EVIDENCE: Where a party pleads a judgment – Implication – Section 174 (1) and (2) of the Evidence Act 2011 – Relevancy.

PERVERSE DECISION: Where there is no evidence to show that the judgment of a trial court is perverse – Whether an appellate court is not entitled to interfere therewith.

PRACTICE AND PROCEDURE: Burden of proof – Civil cases – Where lies – SS 131-133 of the Evidence Act 2011 – Principles thereof.

WORDS AND PHRASES: Findings of fact – Meaning.

WORDS AND PHRASES Serious misconduct – Meaning.

Issues for Determination

1. ***Whether the appellants were entitled to rely on the findings of fact in an earlier judgment in the later action as a defence in the later action?***

2. ***Whether there was sufficient evidence before the Court of Appeal to justify the reversal of the decision of the trial court and consequently grant of the relief of de-blacklisting sought by the respondent?***

Facts of the Matter

This appeal is against part of the judgment of the Court of Appeal, Lagos Division delivered on 22/3/2010 allowing the appeal of the respondent against part of the judgment of the Federal High Court, Lagos Division delivered on 14/7/2008 by setting aside the order blacklisting him.

The facts that gave rise to the appeal are as follows: The respondent was the Divisional Head of the department in charge of foreign exchange documentation at Equity Bank of Nig. Ltd. Sometime in 2002 the 1st appellant (the Central Bank of Nigeria CBN) revoked the bank's licence to conduct foreign exchange transactions when it was discovered that it was selling foreign exchange in breach of laid down procedures. The bank was also penalized in the sum of N293.129 million. As a result, the bank's board of directors advised the respondent and two other employees to resign their appointments. The respondent accordingly tendered his letter of resignation on 10th October 2002.

The 1st appellant set up a Special Board Committee to look into the foreign exchange transactions of the bank. Based on the report, the 1st appellant advised the bank to terminate the employment of the respondent and other employees found to be complicit in the illegal foreign exchange transactions. The 1st appellant deemed the actions of the respondent and other affected employees to constitute serious misconduct, which entitled the bank under Section 44(2)(d) of the Banks and Other Financial Institutions Act 1991 (BOFIA) (as amended) (now Section 48(2)(d) of the Banks and other Financial Institutions Act Cap. B3, Laws of the Federation of Nigeria, 2004) to blacklist him. His appointment was accordingly terminated vide a letter dated 5th February, 2003. Consequently he instituted an action before the Federal High Court vide Suit No FHC/L/CS/163/2003 Coram Abutu, J against Equity Bank as 1st defendant and the Central Bank of Nigeria (1st appellant) as 2nd defendant challenging the termination of his appointment for the purpose of blacklisting him under Section 44(4) of BOFIA (now Section 48(4) of BOFIA, LFN 2004) even though the bank had accepted his letter of resignation and had paid him his entitlements. The bank had purported to reject the letter of resignation with a letter of termination.

Abutu, J entered judgment in the respondent's favour as follows:

> **"1. It is declared that the Plaintiff not having been dismissed and his appointment not having been terminated for reasons of fraud, dishonesty or**

conviction for an offence involving fraud or dishonesty, the 2nd defendant cannot invoke the provisions of Section 44(4) of the Banks and other Financial Institutions Act, 1991 (as amended) against the plaintiff to blacklist him.

2. It is further declared that the 1st defendant having accepted the resignation of the plaintiff and paid him his entitlements cannot subsequently validly terminate the appointment of the plaintiff.

3. The 1st defendant's letter dated 5th February 2003 for the termination of the appointment of the plaintiff is hereby declared null and void and of no effect. The said letter is hereby set aside."

After the success of the action, the respondent sought employment in other financial institutions. He was unsuccessful because, having regard to his position as a management staff in the banking industry, he required clearance from the CBN before any bank or financial institution could employ him. The 1st appellant refused to grant the clearance on the ground that he had been blacklisted.

In an attempt to overcome this roadblock, he instituted a fresh action against the appellants herein by way of originating summons filed on 31/3/2008 before the Federal High Court, Lagos (the trial court) vide suit No. FHC/L/CS/305/2008. He sought the following reliefs:

1. A mandatory order directing the defendants, particularly the 2nd defendant to de-blacklist the plaintiff and to delete his name from the list of blacklisted persons.

2. An order directing the defendants, particularly the 2nd defendant to comply with the declaration of Hon.

Justice D.D. Abutu in the judgment delivered on 11/4/2005.

3. **An order directing the defendants, particularly the 2nd defendant, to notify the plaintiff in writing [of] the removal of his name from the blacklisted list.**

4. **An order for payment of exemplary and aggravated damages in the sum of N40,000,000.00 for loss of employment and earnings from 2005 to date of judgment in this suit.**

5. **The cost of this suit."**

The following documents were attached to the supporting affidavit.

i. **Exhibit DM1 Certified True Copy of the judgment of Abutu, J. dated 11/4/2005;**

ii. **Exhibit DM2 respondent's letter of appeal to the 2nd appellant dated 28/7/2005;**

iii. **Exhibit DM3 2nd appellant's letter dated 19/9/2005 notifying the respondent that his name had been blacklisted; and**

iv. **Exhibit DM4 respondent's solicitor's letter dated 26/9/2005 to the 2nd appellant.**

The appellants filed a counter affidavit in opposition to the summons.

At the conclusion of the hearing and relying on the findings of Abutu, J in Exhibit DM1, the trial court per Hon. Justice Okechukwu J. Okeke, in a considered judgment delivered on 14/7/2008, upheld the blacklisting of the respondent. In reaching his decision, His Lordship relied on findings made by Abutu J. in Exhibit DM1 to the effect that the respondent was indicted in the report of the Special Board Committee tendered before him which found him

guilty of foreign exchange malpractices. The respondent was dissatisfied with the decision and filed an appeal before the lower court. He formulated 3 issues for determination. In its judgment delivered on 22/3/2010 the court struck out two of the issues formulated on the ground that they did not arise from the decision of the trial court. It allowed the appeal in part.

Held: *(Unanimously dismissing the appeal)*

1. Meaning of findings of fact

In resolving this issue, I am of the view that it is necessary to determine what is meant by the phrase "findings of fact." Black's Law Dictionary, 8th edition defines it as:

> ***"A determination by a judge, jury or administrative agency of a fact supported by the evidence in the record, usually presented at the trial or hearing."***

This court in the case of EgbeVs. Adafarasin (1987) 1 NWLR (Pt.47) 1 @ 20 F – H gave further elucidation on the issue as follows:

> ***"A finding is a result of deliberations of a jury or a court. It is a decision upon a question of fact reached as a result of judicial examination or investigation by a court, jury, referee, coroner, etc. it is more appropriately called a finding of fact and as the name implies it is a determination from the evidence of a case concerning facts averred by one side and denied by the other side. Findings of fact are the results of reasoning from evidentiary facts. They are conclusions drawn by the court from the facts without the application of law or exercise of legal judgment. A trial court must first find the facts or make appropriate findings of fact on the issues in dispute before applying the relevant and applicable law. Findings of fact fall within the peculiar preserve of the trial judge. Conclusions or inference***

from those facts can be drawn by any court, including appellate courts: See Bannmax Vs. Austin Motor Auto Co. Ltd. (1955) A.C. 370 at page 375; (1955) 1 All ER 326 pp. 327/328."

***See also*: Fointrades Ltd. Vs Universal Association Co. Ltd. (2002) 8 NWLR (Pt. 770) 699; Edosa & Anor. Vs. Ogiemwanre (2010) LPELR-8618 (C/A).**

Thus findings of fact are made by a trial judge after carefully reviewing the evidence before the court and conclusions or inferences can be drawn from those facts by any court. It is settled law that an appellate court is always loth to interfere with findings of fact made by a trial court unless the decision of the court is shown to be unreasonable, perverse, not supported by the evidence or where such decision is not the result of a genuine exercise of judicial discretion and had resulted in a miscarriage of justice. *See* Kodilinye Vs. Odu (1935) 2 WACA 336; Yesufu Vs. Adama (2010) 5 NWLR (Pt.1188) 522. The law is also settled that a decision of a court of competent jurisdiction is valid and subsisting unless set aside by an appellate court. It follows therefore that a vital finding of fact upon which a judgment is predicated, which is not appealed against remains intact. It remains valid and binding on the parties. *See* Kraus Thompson Org. Ltd. Vs. UNICAL (2004) 9 NWLR (Pt.879) 631 @ 642; Okonkwo Vs. INEC (2004) 1 NWLR (Pt.554) 242 @ 256; Amale Vs. Sokoto Local Government &Ors. (2012) LPELR-7842 (SC); AnyanwuVs. Ogunewe&Ors (2014) LPELR-22184 (SC) @ 47 C – F. *(Pp 80 – 81 paras E – H)*

2. What the court relies on in the determination of an originating summons

Now, in the originating summons that led to this appeal, the respondent sought an order "directing the defendant, particularly the 2nd defendant to comply with the judgment of Hon. Justice D.D. Abutu in the judgment delivered on 11th April, 2005." The judgment was annexed to the affidavit in support as Exhibit DM1. In a trial on

originating summons, the averments in the affidavit in support and the exhibits annexed thereto constitute the evidence upon which the court will rely in reaching its decision. In paragraph 9 of the affidavit in support the respondent averred that there was no appeal filed against the judgment by the 1st defendant i.e. the 1st appellant herein. It is also evident that having obtained judgment in his favour, the respondent was satisfied with the judgment in all respects and did not deem it necessary to appeal against any of the findings made. Thus the judgment delivered by Abutu, J. in suit No FHC/L/CS/163/2003 is valid, subsisting and binding on the parties thereto. *(Pp 81 - 82 paras I – C)*

3. *A judge is bound by the findings of fact made by a co-ordinate court*
Those findings are quite damning. There is no appeal against them. They remain binding on the parties until set aside by an appellate court. Both judgments are judgments of the Federal High Court. His Lordship Okeke, J., in the absence of any appeal against the judgment of Abutu, J. could not have done otherwise than adopt the findings and conclusions made therein since he was being called upon to direct the defendants to comply with it. *(P 86 paras A – B)*

4. *Where a party pleads judgment Implication*
Section 174(1) & (2) of the Evidence Act, 2011 provides:

> ***"174(1)If a judgment is not pleaded by way of estoppel, it is as between the parties and privies deemed to be a relevant fact, whenever any matter, which was or might have been decided in the action in which it is given, is in issue or is deemed to be relevant to the issue in any subsequent proceeding.***
>
> ***(2) Such judgment is conclusive proof of the facts which it decides, or might have decided, if the party who gives evidence of it had no opportunity of pleading it as an estoppel."*** *(P 86 paras C – E)*

Suit No FHC/L/CS/163/2003 before Abutu, J. was predicated on the respondent's contention that having accepted his letter of resignation and paid his entitlements, which had determined the master/servant relationship between him and Equity Bank of Nig. Ltd., the bank was not entitled to terminate his appointment. The reliefs sought in the statement of claim are reproduced in Exhibit DM1. He sought, inter alia, a declaration against the 2nd defendant (1st appellant herein) that he had not breached any of the provisions of the Banks and other Financial Institutions Act 1991 and a declaration that the 2nd defendant could not rely on the purported letter of termination dated 5th February, 2003 to blacklist him under Section 44(4) of BOFIA, having resigned his appointment on 10th October, 2002. The Section provides:

> ***"44 (4) Any person whose appointment with a bank been terminated or who has been dismissed for reasons of fraud, dishonesty or conviction for an offence involving dishonesty or fraud shall not be employed by any bank in Nigeria."***

Per Kekere-Ekun (JSC)

"At the trial before Abutu, J. the respondent had contended that he was not aware of the reason for his disengagement, that he was not aware that the committee produced a report containing findings and recommendations and he denied being indicted by the committee. In its defence the 2nd defendant relied on Exhibit 9, the proceedings of the committee, which showed that the respondent participated in the proceedings and Exhibit 10, the report of the committee, which indicted the respondent and two other officers. After considering the evidence led by both sides the court found and held that the report showed that the respondent was guilty of serious misconduct arising from illegal foreign exchange transactions. In order to determine the circumstances and legal effect of the respondent's resignation vis a

vis the subsequent purported termination, the court had to consider the facts that gave rise to it. It found that the resignation was not voluntary. That the respondent was compelled to resign as a result of his indictment by the committee. The learned trial Judge frowned at the fact that the illegal activity was apparently condoned since the respondent was merely asked to resign." *(Pp 86 – 87 paras F – F)*

5. *The purport of issue estoppel*

Issue estoppel arises in a subsequent suit when the issue involved in the latter suit has been raised and distinctly determined in a previous suit between the same parties or their privies. The decision relied upon for the plea of estoppel must be final and the parties must be the same. ***See*** **Anwoyi Vs. Sodeke 92006) 12 NWLR (Pt. 996) 34; Udo Vs. Obot (1989) 1 NWLR (Pt. 95) 59. Issue estoppel may arise where a plea of res judicata could not be established because the causes of action are not the same.** ***See*** **AdedayoVs. Babalola (1995) 7 NWLR (Pt. 408) 383 where this court at pages 402 H and 405 B C held:**

> ***"Even if the objects of the first and second actions are different, as in the instant case, the finding on a matter which came directly in issue in the first action whether the Agbonbifa family is a ruling family for the purpose of the Elesie Chieftaincy Stool was embodied in the earlier decision. That decision is final and conclusive in this second action which involves the parties or their privies. ……***
>
> ***A party is precluded from contenting in perpetuity any precise point, which, having been once distinctively put in issue has been properly determined against him. And even if the objects of the first and second actions are different (as in this case), the finding on a matter which came directly (not collaterally or incidentally) … in issue in the first action, provided it is embodied in a judicial***

decision that is final (also as in this case), is conclusive in a second action between the same parties and privies. It has been held that this principle would apply whether the point involved in the earlier decision and to which the parties are estopped, is one of law or one of mixed law and fact." *(Pp 88 – 89 paras B – A)*

Per Kekere-Ekun (JSC)

"In the circumstances of this case, the judgment of Abutu, J. in FHC/L/CS/163/2003, is a final one, not appealed against. The 1st appellant and the respondent were parties to both suits. The 2nd appellant herein is a privy of the 1st appellant. The circumstances of the respondent's resignation from Equity Bank of Nigeria Limited were specifically in issue in that suit and finally determined by Abutu, J. The general rule is that a plea of estoppel must be specifically pleaded. However, it is not necessary to plead it in any particular form so long as the facts constituting estoppel are stated in such a manner as to show that the party pleading relies on it as a defence or answer. *See* Alakija Vs. Abdulai (1998) 6 NWLR (Pt. 552) 1 @ 15 A – B; Ezewani Vs. Onwordi (1986) 4 NWLR (Pt. 33) 27. Suit no FHC/L/CS/163/2003 before Abutu, J. was initiated by way of originating summons where pleadings are not filed. However in paragraph 6 of the appellants' counter affidavit the intention to rely on issue estoppel was clearly indicated. I am of the view that even though the two suits were predicated on different provisions of BOFIA, the substratum of both suits was the report of the Special Committee, which indicted the respondent. The finding of the court in the earlier suit that the respondent was indeed indicted by the said report, not appealed against, is valid and subsisting. Okeke, J. did not make any pronouncement on the report. He adopted the findings of Abutu, J. I hold that the trial court was entitled to adopt and rely on the said unappealed findings of fact made in the earlier judgment. This issue is accordingly resolved in favour of the appellants."
(P 89 paras B – G)

6. Burden of proof in civil cases

The law is that he who assets must prove. In civil cases, the burden of first proving the existence or non-existence of a fact lies on the party against whom the judgment of the court would be given if no evidence were produced on either side, regard being had to any presumption that may arise on the pleading. It is also trite that the burden of proof of particular facts shifts from side to side throughout the proceedings until all the issues in contention have been dealt with. See Section 131 133 of the Evidence Act, 2011.

In the instant case, the respondent's main reliefs before the trial court were questions 1 and 2 reproduced above. In the main, the respondent, as plaintiff in that suit had the burden of satisfying the court that the defendants/appellants had no right to blacklist him under Section 44(2)(d) of BOFIA, which is repeated here for ease of reference. It provides:

> **"44. (2) No person shall be appointed or shall remain a director, secretary or an officer of a bank who ……..**
> **(d) is guilty of serious misconduct in relation to his duties."** *(P 93 paras D – I)*

7. The nature and purport of S. 44 (2) (d) of the Act

Section 44(2)(d) of the Act on the other hand operates where a person seeking appointment in the management of a bank, must obtain the prior consent of the Central Bank of Nigeria, which has a statutory duty to withhold such consent where the applicant has been found guilty of serious misconduct in relation to his duties. The Act does not define 'serious misconduct'. What amounts to serious misconduct where not specifically defined and as such would depend on the facts of a particular case. Gross or serious misconduct has been described as conduct of such grave and weighty character as to undermine the relationship of confidence, which should exist between the employee and his employer. *See* Yusuf Vs. U.B.N (1996) 6 NWLR (Pt. 457) 632; Babatunde Ajayi Vs. Texaco Nig. Ltd & Ors.

(1987) 3 NWLR (Pt.62) 577; Osakwe Vs. Nigerian Paper Mill Ltd (1998) 7 SC (Pt.2) 108.*(P 94 paras F – I)*

Per Kekere-Ekun (JSC)

"In reaction to the respondent's application for clearance for appointment with National Bank of Nigeria, the 1st appellant in its letter dated 19th September, 2005 (Exhibit DM3), relied on the verdict of the Special Committee of Foreign Exchange Transactions of Equity Bank to the effect that he had been found guilty of foreign exchange dealings and notified him that he had been blacklisted. The contention of the respondent is that in order to justify the blacklisting, the appellants ought to have tendered the report. Having regard to the peculiar facts of this case, I disagree. The report was before Abutu, J. in FHC/L/CS/163/2003. He made far reaching findings thereon, including the fact that the respondent was found guilty of serious misconduct by the Special Committee. The findings have not been appealed against till date. The judgment in FHC/L/CS/163/2003 was specifically made a part of the respondent's case. Having regard to the finding of the learned trial Judge in Exhibit DM1, the onus was on the respondent who would fail if no further evidence was lead on either side, to satisfy the court that he was not indicted by the report. He ought to have produced it since he was the one asserting that he ought not to have been blacklisted. He cannot approbate and reprobate. He cannot rely on a part of the judgment, which is in his favour and jettison those aspects he does not agree with. Once the appellants were satisfied that the respondent had been found guilty of serious misconduct in relation to his duties, they were entitled to invoke Section 44(2)(d) of BOFIA to blacklist him notwithstanding the fact that he had resigned his appointment. As a supervisory bank, the CBN has a responsibility not to permit a person who has been indicted for serious misconduct in the performance of his duties bordering on dishonesty, to find his way back into any bank or other financial institution. The decision of the trial court was based on the evidence before it." *(P 95 paras B – I)*

8. *No evidence to show that decision of lower court was perverse*
There was nothing before the lower court to show that the decision of the trial court was perverse. It is only where the decision of the trial court is shown to be perverse that an appellate court would be entitled to interfere. I reiterate once again the decisions in the two suits were judgments of the same court. In the absence of an appeal against the specific findings of Abutu, J. in FHC/L/CS/163/2003, His Lordship Okeke, J. was quite in order to have relied on those findings in reaching his conclusions. The onus was on the respondent to show that there were special circumstances warranting the interference of the court below. He failed to do so. The court therefore erred in setting aside the decision and ordering the de-blacklisting of the respondent. This issue is accordingly resolved in favour of the appellants and against the respondent.
(Pp 95 – 96 paras I – C)

Per Eko (JSC)

"The misconduct of the plaintiff arising from the illegal foreign exchange transactions for which the plaintiff was adjudged guilty by the Committee set up by the board of the 1st Defendant in this case appears to have been condoned by the 1stDefendant. I hold that the plaintiff validly resigned his appointment.

The judgment of Abutu J. dated 11th April, 2005 (Exhibit DM1) was one of the four documents attached to the originating summons taken out by the respondent and filed on 31st March, 2008 against the appellants at the Federal High Court for determination.

The respondent herein in the circumstance sought to rely on the judgment Exhibit DM1 which is not shown to have been appealed against.

It is needless to re-affirm therefore that the respondent is deemed to have relied on every part of the judgment inclusive of the findings of

facts made, whether favourable or otherwise. It is not now open to the respondent to pick and choose a favourable part of the judgment while at the same time seek to jettison the findings of fact deemed as unfavourable. See the view held by this Court in A.C.B Plc Vs. Losada (Nig) Ltd. (1995) 7 NWLR (Pt. 405) 26 at 53 that:

> ***"Where the words of an order made by a court are clear and are free from ambiguity in themselves and there is no doubt as to the subject matter to which they relate, they are to be given their strict plain and their common meaning."***

Again, see the case of K. T & Ind. Plc. Vs. The Tug Boat "M/V/Japaul B" (2011) 9 NWLR (pt. 1251) 133 at 157 where judgment or order of every law court remains in force and binding until it is set aside on appeal by a court of competent jurisdiction.

As rightly submitted by the appellants' counsel, the document Exhibit DM1 has shown clearly that the questions presented by the respondent at the trial court had been decided by the judgment of Abutu, J. In the result, I hold that the trial court, did rightly base its decision on the findings of the earlier judgment as it did.

I seek to state further that it is not within the power and jurisdiction of the trial court, as a court of co-ordinate jurisdiction, to upturn the judgment of Abutu, J. Again see the case of Okoye Vs. Nigerian Cons. & Furniture Co. Ltd (1991) 6 NWLR (Pt. 199) 501 at 538.

Therefore, as rightly submitted by the learned counsel on behalf of the appellants, the lower court, misapplied the principle in relation to the trial court's reliance on the judgment of Abutu, J. (Exhibit DM1). It would, in other words, have tantamount to judicial rascality if the trial court had interfered with the findings of fact made by Abutu, J. being a court of co-ordinate jurisdiction. This, the trial court could not have done. It is obvious therefore that the lower court did fell into great error as it did and the issue herein is resolved in favour of the appellants. *(Pp 98 – 99 Paras C – F)*

The CBN, the regulatory body, was in my view right to have regarded the actions of the respondent on which he was advised by the board of Equity Bank to resign as constituting serious misconduct under Section 44(2)(d) of the Banks and other Financial Institutions Act, 1991 (BOFIA), as amended.

The board of Equity Bank did not just direct the respondent to resign his appointment. It had set up a Special Committee on Foreign Exchange Transactions of Equity Bank to investigate and establish the respondent's complicity. The Special Committee found him guilty of illegal foreign exchange transactions. That report has not been set aside.

The CBN as a regulatory body has a duty to keep shady characters from holding appointments in the commercial banks. That function of CBN has not been denied. I think it would have been dereliction of duty on the part of CBN to have closed its eyes to the obvious misconduct of the respondent as found by the Special Committee. The respondent, if he was aggrieved by the indictment of the Special Committee, should have taken necessary steps to overturn the report. This he never did. He is therefore estopped from insisting that he was not found guilty of serious misconduct while he discharged his office as Head of Department in charge of foreign exchange portfolio of Equity Bank.

The CBN has a discretion to exercise in respect of the respondent's application to it to clear him for another appointment in National Bank of Nigeria. I cannot fault CBN decision refusing to clear the respondent for that appointment. The CBN, in my firm view, was right in predicating its decision on the report of the Special Committee which had indicted and found the respondent guilty of illegal foreign exchange transactions while in the employment of Equity Bank.

The respondent's suit was conceived to compel the CBN to exercise its discretion. I do not think that the suit is well founded. The CBN cannot be compelled to exercise its discretion in a manner favourable to the respondent. I had earlier stated that, in view of the

report of the Special Committee that found the respondent guilty of illegal foreign exchange transactions, it would amount to dereliction of duty for the CBN to have cleared or recommended the respondent for appointment in another commercial Bank. The respondent's past reprehensible serious misconduct, does not speak well for his appointment in another commercial bank. Characters like the respondent do not deserve a place in sensitive banking institutions over which the CBN is the regulatory body." *(Pp 100 – 101 paras E – F)*

Nigerian Cases cited in this Judgment

A.C.B Plc Vs. Losada (Nig.) Ltd. (1995) 7 NWLR (pt.405) 26;
Adedayo Vs. Babalola (1995) 7 NWLR (Pt. 408) 383;
Alakija & Ors. Vs. Abdullai (1998) 6 NWLR (Pt. 552) 1;
Amale Vs. Sokoto Local Government &Ors. (2012) LPELR-7842 (SC);
Anwoyi Vs. Sodeke 92006) 12 NWLR (Pt. 996) 34;
Anyanwu Vs. Ogunewe & Ors (2014) LPELR-22184 (SC);
Babatunde Ajayi Vs. Texaco Nig. Ltd &Ors. (1987) 3 NWLR (Pt.62) 577;
Bannmax Vs. Austin Motor Auto Co. Ltd. (1955) A.C. 370;
Dakolo Vs. Rewane-Dakolo (2011) 16 NWLR (Pt. 1272) 22;
David Itauma Vs. Akpe Ime (2000) 12 NWLR (Pt.680) 156;
Edosa & Anor. Vs. Ogiemwanre (2010) LPELR-8618 (C/A);
Egbe Vs. Adafarasin (1987) 1 NWLR (Pt.47) 1;
Ezewani Vs. Onwordi (1986) 4 NWLR (Pt. 33) 27;
Fointrades Ltd. Vs Universal Association Co. Ltd. (2002) 8 NWLR (Pt. 770) 699;
G & T Investment Co. Ltd Vs. Witt Bush (2011) 8 NWLR (Pt. 1250) 500;
K.T & Ind. Plc. Vs. The Tugboat "M/v JAPAUL B" (2011) 9 NWLR (Pt.1251) 133;
Kodilinye Vs. Odu (1935) 2 WACA 336;
Kraus Thompson Org. Ltd. Vs. UNICAL (2004) 9 NWLR (Pt.879) 631;
Momoh Vs. Umoru (2011) 15 NWLR (Pt 1270) 217;
Odukwe Vs. Ogunbiyi (1998) 6 SC 72;
Okonkwo Vs. INEC (2004) 1 NWLR (Pt.554) 242 @ 256;
Okoye Vs. Nigerian Cons. & Furniture Co. Ltd (1991) 6 NWLR (Pt. 199) 501;

Osakwe Vs. Nigerian Paper Mill Ltd (1998) 7 SC (Pt.2) 108;
Udo Vs. Obot (1989) 1 NWLR (Pt. 95) 59;
Yaro Vs. Arewa Construction Ltd (2007) 17 NWLR (Pt. 1063) 333;
Yesufu Vs. Adama (2010) 5 NWLR (Pt.1188) 522; and
Yusuf Vs. U.B.N (1996) 6 NWLR (Pt. 457) 632.

Nigerian statutes cited in this Judgment

Evidence Act, 2011 Section 131 133 and 136 (1);
Evidence Act 2011 Section 174 (1) & (2);
CBN Act Cap. C4, LFN 2004 & Section 48 of BOFIA, 2004Section 37(b);
Constitution of the Federal Republic of Nigeria, 1999 (as amended) Section 318(1);
Banks and Other Financial Institutions Act 1991 (BOFIA) (as amended) Section 44(2)(d) (now Section 48(2)(d);
Banks and other Financial Institutions Act, 1991 (as amended)Section 44(4); and
Evidence ActSections 167(d) and 123.

Representations

Elubode B. Omoboriowa(Esq.), for the appellants.
A.M Makinde(Esq.),for the respondent with **S.J Odumosu(Esq.**), and **M. Gambo(Esq.)**

KEKERE-EKUN, JSC (Delivering the Lead Judgment): This appeal is against part of the judgment of the Court of Appeal, Lagos Division delivered on 22/3/2010 allowing the appeal of the respondent against part of the judgment of the Federal High Court, Lagos Division delivered on 14/7/2008 by setting aside the order blacklisting him.

The facts that gave rise to the appeal are as follows: The respondent was the Divisional Head of the department in charge of foreign exchange documentation at Equity Bank of Nig. Ltd. Sometime in 2002 the 1st appellant (the Central Bank of Nigeria CBN) revoked the bank's licence to conduct foreign exchange transactions when it was discovered that it was selling foreign exchange in breach of laid down procedures. The bank was

also penalized in the sum of N293.129 million. As a result, the bank's board of directors advised the respondent and two other employees to resign their appointments. The respondent accordingly tendered his letter of resignation on 10th October 2002.

The 1st appellant set up a Special Board Committee to look into the foreign exchange transactions of the bank. Based on the report, the 1st appellant advised the bank to terminate the employment of the respondent and other employees found to be complicit in the illegal foreign exchange transactions. The 1st appellant deemed the actions of the respondent and other affected employees to constitute serious misconduct, which entitled the bank under Section 44(2)(d) of the Banks and Other Financial Institutions Act 1991 (BOFIA) (as amended) (now Section 48(2)(d) of the Banks and other Financial Institutions Act Cap. B3, Laws of the Federation of Nigeria, 2004) to blacklist him. His appointment was accordingly terminated vide a letter dated 5th February, 2003. Consequently he instituted an action before the Federal High Court vide Suit No FHC/L/CS/163/2003 Coram Abutu, J against Equity Bank as 1st defendant and the Central Bank of Nigeria (1st appellant) as 2nd defendant challenging the termination of his appointment for the purpose of blacklisting him under Section 44(4) of BOFIA (now Section 48(4) of BOFIA, LFN 2004) even though the bank had accepted his letter of resignation and had paid him his entitlements. The bank had purported to reject the letter of resignation with a letter of termination.

Abutu, J entered judgment in the respondent's favour as follows:

> **"1. It is declared that the Plaintiff not having been dismissed and his appointment not having been terminated for reasons of fraud, dishonesty or conviction for an offence involving fraud or dishonesty, the 2nd defendant cannot invoke the provisions of Section 44(4) of the Banks and other Financial Institutions Act, 1991 (as amended) against the plaintiff to blacklist him.**

2. It is further declared that the 1st defendant having accepted the resignation of the plaintiff and paid him his entitlements cannot subsequently validly terminate the appointment of the plaintiff.

3. The 1st defendant's letter dated 5th February 2003 for the termination of the appointment of the plaintiff is hereby declared null and void and of no effect. The said letter is hereby set aside."

After the success of the action, the respondent sought employment in other financial institutions. He was unsuccessful because, having regard to his position as a management staff in the banking industry, he required clearance from the CBN before any bank or financial institution could employ him. The 1st appellant refused to grant the clearance on the ground that he had been blacklisted.

In an attempt to overcome this roadblock, he instituted a fresh action against the appellants herein by way of originating summons filed on 31/3/2008 before the Federal High Court, Lagos (the trial court) vide suit No. FHC/L/CS/305/2008. He sought the following reliefs:

1. A mandatory order directing the defendants, particularly the 2nd defendant to de-blacklist the plaintiff and to delete his name from the list of blacklisted persons.

2. An order directing the defendants, particularly the 2nd defendant to comply with the declaration of Hon. Justice D.D. Abutu in the judgment delivered on 11/4/2005.

3. An order directing the defendants, particularly the 2nd defendant, to notify the plaintiff in writing [of] the removal

of his name from the blacklisted list.

4. An order for payment of exemplary and aggravated damages in the sum of N40,000,000.00 for loss of employment and earnings from 2005 to date of judgment in this suit.

5. The cost of this suit."

The following documents were attached to the supporting affidavit:

i. Exhibit DM1 Certified True Copy of the judgment of Abutu, J. dated 11/4/2005;

ii. Exhibit DM2 respondent's letter of appeal to the 2nd appellant dated 28/7/2005;

iii. Exhibit DM3 2nd appellant's letter dated 19/9/2005 notifying the respondent that his name had been blacklisted; and

iv. Exhibit DM4 respondent's solicitor's letter dated 26/9/2005 to the 2nd appellant.

The appellants filed a counter affidavit in opposition to the summons.

At the conclusion of the hearing and relying on the findings of Abutu, J in Exhibit DM1, the trial court per Hon. Justice Okechukwu J. Okeke, in a considered judgment delivered on 14/7/2008, upheld the blacklisting of the respondent. In reaching his decision, His Lordship relied on findings made by Abutu J. in Exhibit DM1 to the effect that the respondent was indicted in the report of the Special Board Committee tendered before him which found him guilty of foreign exchange malpractices. The respondent was dissatisfied with the decision and filed an appeal before the lower court. He formulated 3 issues for determination. In its judgment delivered on

22/3/2010 the court struck out two of the issues formulated on the ground that they did not arise from the decision of the trial court. It allowed the appeal in part as follows:

> ***"I set aside the decision of the learned trial judge on the 14/7/08 in respect of reliefs 1 & 3 on the originating summons. In its place, I order that the name of the appellant be de-blacklisted by the respondent. I award costs of N30,000.00 in favour of the appellant."***

The appellants are dissatisfied with the part of the judgment directing that the respondent's name be de-blacklisted, hence the instant appeal. The parties duly filed and exchanged their respective briefs in compliance with the rules of this court. At the hearing of the appeal on 20th February, 2017, Elubode B. Omoboriowo Esq. adopted and relied on the appellant's brief filed on 26/2/2013, settled by Chief Tunde Olojo, in urging the court to allow the appeal, A.M Makinde Esq. leading Messrs S.J. Odumoso and M. Gambo, adopted the respondent's brief filed on 15/5/13, settled by him, urging the court to dismiss the appeal.

The appellants formulated 2 issues for the determination of the appeal as follows:

> ***1. Whether the appellants were entitled to rely on the findings of fact in an earlier judgment in the later action as a defence in the later action?***
>
> ***2. Whether there was sufficient evidence before the Court of Appeal to justify the reversal of the decision of the trial court and consequently grant of the relief of de-blacklisting sought by the respondent?***

The respondent also identified 2 issues for determination thus:

A

1. ***Whether the court below was correct when it reversed the decision of the learned trial judge on the ground that the appellants did not justify the blacklisting of the respondent from the evidence before the trial court?***

B

2. ***Whether the court below was right when it held that the trial judge was in error when he relied upon the findings of Abutu, J. in another judgment in arriving at its own decision especially when the evidence to support the decision was neither produced nor the issues in both cases the same?***

C

D The issues formulated by both parties are substantially the same. I shall adopt the issues formulated by the appellants is determining the appeal.

ISSUE 1

E

Whether the appellants were entitled to rely on the findings of fact in an earlier judgment in the later action as a defence in the later action?

F

This issue is the same as the respondent's issue 2.

Learned counsel for the appellant commenced his submissions by contending that the finding of the lower court to the effect that the parties did not plead *estoppels* or *resjudicata* is not supported by the evidence before that court. He noted that the case before the trial court was predicated mainly on the judgment of Abutu, J. in FHC/L/CS/163/2003 exhibited by the respondent as Exhibit DM1 in support of his originating summons, as his complaint was that the appellants had failed to comply with the said judgment. He submitted that a judgment includes not only the conclusion reached therein but also the findings of fact upon which the conclusion is based. He referred to the definition of "decision" as stated in Section 318(1) of the 1999 Constitution of the Federal Republic of Nigeria, 1999 (as amended). He also referred to the definition of "*finding of fact"* as

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H

I

contained in Black's Law Dictionary, 7th edition, to wit: **"a determination by a Judge, Jury or administrative agency of a fact supported by evidence on record usually presented at a trial or hearing",**and submitted that a finding of fact contained in the judgment qualifies as a decision of that court, which remains subsisting until set aside. He submitted that in the course of the hearing of the originating summons, learned counsel for the appellants identified salient findings of Abutu, J. in Exhibit DM1 and related them to the issues in contention in the suit before Okeke, J. He contended that the averments in the counter affidavit and the submissions of learned counsel raised the principle of issue estoppel. That issue estoppel need not be pleaded in any particular form so long as the matters constituting estoppel are stated in such a manner as to show that the party relies on it as a defence or answer. He relied on: **Alakija & Ors. Vs. Abdullai (1998) 6 NWLR (Pt. 552) 1 @ 15 A – B.** He urged the court to find and hold that the parties duly raised and argued the issue of issue estoppel/res judicata.

He argued further that even if the court does not agree that the parties raised issue estoppel, the judgment in Exhibit DM1 remains relevant and binding on the parties by virtue of Section 174 (1) & (2) of the Evidence Act 2011. He submitted that the lower court correctly stated the principle that evidence in an earlier case cannot be relied upon in a later case but erroneously went on to hold that while the final decision of Abutu, J. could constitute evidence by producing his judgment, the evidence led therein could not be relied upon by the court in another case to grant the reliefs sought on a different cause of complaint. He submitted that the principles were misapplied in the circumstances of this case, having regard to the fact that the respondent had approached the trial court seeking an order compelling the appellants to obey the decision reached in Exhibit DM1. He submitted that Exhibit DM1 contained several findings of fact and considerations of the law from which a conclusion was finally drawn and that the appellants relied on those findings of fact and not the evidence. He referred to paragraph 6 of the appellants' counter affidavit at pages 35 36 of the record.

In addition to Section 174 (1) and (2) of the Evidence Act, he also relied on Sections 59 and 173 to buttress his submission that a judgment is conclusive proof of what it decides. He submitted that where a party relies on a judgment against which he has not appealed, he is deemed to rely on every part of the judgment including the findings leading to the ultimate conclusion reached. He submitted that the respondent was not entitled to rely on the aspects of the judgment favourable to him and jettison those parts which are not. He referred to: **A.C.B Plc Vs. Losada (Nig.) Ltd. (1995) 7 NWLR (pt.405) 26 @ 53 D.** On the effect of a judgment not appealed against he relied on: **K.T & Ind. Plc. Vs. The Tugboat "M/v JAPAUL B" (2011) 9 NWLR (Pt.1251) 133 @ 157 B – G.** He submitted further that the questions raised by the respondent in the earlier suit were fully decided by Abutu, J. in Exhibit DM1 and the trial court was therefore entitled to rely on the findings therein. He contended that to act otherwise would have amounted to Okeke, J. sitting on appeal over the decision of a court of co-ordinate jurisdiction. He relied on: **Okoye Vs. Nigerian Furniture Co. Ltd (1991) 6 NWLR (Pt.199) 501 @ 538 C – D.** He urged the court to resolve this issue in favour of the appellants.

In reaction to the above submission, learned counsel for the respondent submitted that the cause of action in the two suits before the Federal High Court were different and that the trial court was wrong to have relied on the judgment in Exhibit DM1 in reaching its decision. He contended that while the issue before Abutu, J. was the termination of the respondent's employment bordering on Section 44(4) of BOFIA and the threat to blacklist him, the issue in the later suit before Okeke, J. was the blacklisting of the respondent under Section 44(2)(d) of BOFIA which, in his view, is a completely different issue. He submitted that the court below was right in upholding the respondent's contention that the learned trial judge was in error to have relied on the findings of Abutu, J. in Exhibit DM1 to the effect that the respondent was involved in illegal foreign exchange transactions when the Special Committee Report was not before him. He relied on the case of **David Itauma Vs. Akpe Ime (2000) 12 NWLR (Pt.680) 156.** He stoutly rejected the contention of learned counsel for the appellants that a finding of fact may qualify as a decision of the court. He

posited that the evidence led in the suit before Abutu, J. could not be relied upon as evidence in the suit before the learned trial judge, having regard to the fact that the cause of action before Okeke, J. arose after the decision of Abutu, J. upon the issuance of the letter of de-listing to the respondent by the appellants.

He submitted that learned counsel for the appellants misapplied the provisions of Section 174 (1) and (2) of the Evidence Act, as the facts and circumstances of this case and the issues before Abutu, J. were not the same and therefore could not constitute issue estoppel between the parties and the findings of Abutu, J. could not constitute evidence in the instant case. While conceding that an appellate court is usually reluctant to set aside the findings of fact made by a trial court, he submitted that the findings in the instant case were rightly set aside by the lower court, as the findings were perverse, the trial court having taken into account matters which it ought not to have taken into account. He also contended that the findings of the trial court run counter to the evidence before it. He relied on: **Yaro Vs. Arewa Construction Ltd (2007) 17 NWLR (Pt. 1063) 333.**

In resolving this issue, I am of the view that it is necessary to determine what is meant by the phrase "findings of fact." Black's Law Dictionary, 8th edition defines it as:

> ***"A determination by a judge, jury or administrative agency of a fact supported by the evidence in the record, usually presented at the trial or hearing."***

This court in the case of **Egbe Vs. Adafarasin (1987) 1 NWLR (Pt.47) 1 @ 20 F – H** gave further elucidation on the issue as follows:

> ***"A finding is a result of deliberations of a jury or a court. It is a decision upon a question of fact reached as a result of judicial examination or investigation by a court, jury, referee, coroner, etc. it is more appropriately called a finding of fact and as the name implies it is a determination from the evidence of a case concerning facts averred by one side and***

denied by the other side. Findings of fact are the results of reasoning from evidentiary facts. They are conclusions drawn by the court from the facts without the application of law or exercise of legal judgment. A trial court must first find the facts or make appropriate findings of fact on the issues in dispute before applying the relevant and applicable law. Findings of fact fall within the peculiar preserve of the trial judge. Conclusions or inference from those facts can be drawn by any court, including appellate courts: See Bannmax Vs. Austin Motor Auto Co. Ltd. (1955) A.C. 370 at page 375; (1955) 1 All ER 326 pp. 327/328."

See also: **Fointrades Ltd. Vs Universal Association Co. Ltd. (2002) 8 NWLR (Pt. 770) 699; Edosa & Anor. Vs. Ogiemwanre (2010) LPELR-8618 (C/A).**

Thus findings of fact are made by a trial judge after carefully reviewing the evidence before the court and conclusions or inferences can be drawn from those facts by any court. It is settled law that an appellate court is always loth to interfere with findings of fact made by a trial court unless the decision of the court is shown to be unreasonable, perverse, not supported by the evidence or where such decision is not the result of a genuine exercise of judicial discretion and had resulted in a miscarriage of justice. *See* **Kodilinye Vs. Odu (1935) 2 WACA 336; Yesufu Vs. Adama (2010) 5 NWLR (Pt.1188) 522.** The law is also settled that a decision of a court of competent jurisdiction is valid and subsisting unless set aside by an appellate court. It follows therefore that a vital finding of fact upon which a judgment is predicated, which is not appealed against remains intact. It remains valid and binding on the parties. *See* **Kraus Thompson Org. Ltd. Vs. UNICAL (2004) 9 NWLR (Pt.879) 631 @ 642; Okonkwo Vs. INEC (2004) 1 NWLR (Pt.554) 242 @ 256; Amale Vs. Sokoto Local Government & Ors. (2012) LPELR-7842 (SC); Anyanwu Vs. Ogunewe & Ors (2014) LPELR-22184 (SC) @ 47 C– F.**

Now, in the originating summons that led to this appeal, the respondent sought an order **"directing the defendant, particularly the 2nd**

defendant to comply with the judgment of Hon. Justice D.D. Abutu in the judgment delivered on 11th April, 2005."Thejudgment was annexed to the affidavit in support as Exhibit DM1. In a trial on originating summons, the averments in the affidavit in support and the exhibits annexed thereto constitute the evidence upon which the court will rely in reaching its decision. In paragraph 9 of the affidavit in support the respondent averred that there was no appeal filed against the judgment by the 1st defendant i.e. the 1st appellant herein. It is also evident that having obtained judgment in his favour, the respondent was satisfied with the judgment in all respects and did not deem it necessary to appeal against any of the findings made. Thus the judgment delivered by Abutu, J. in suit No FHC/L/CS/163/2003 is valid, subsisting and binding on the parties thereto.

His Lordship, Okeke, J. made some findings based on Exhibit DM1 as follows:

> **"On page 16 of Exhibit DM1, Honourable Justice D.D. Abutu held thus:-**
>
> ***i. "The evidence on both sides, which I accept is that the plaintiff was an employee of the 1st defendant and that the plaintiff took part in the foreign exchange transactions in respect of which the 1st defendant was penalized in the sum of N293.129 million for illegal foreign exchange transactions and its dealership licence suspended indefinitely. ……***
>
> ***Exhibit 2 is the 2nd defendant's query letter to the plaintiff. The plaintiff's reply to Exhibit 2 is Exhibit 7. Exhibit 9 is the minute of the Special Board Committee before which the plaintiff admittedly appeared and Exhibit 10 is the report of the committee wherein the plaintiff, MessrsKalu and Adegboye were adjudged guilty of forex malpractices. The evidence is that notwithstanding the findings of the committee***

A ***that the three officers were guilty of malpractices, the 1st defendant merely advised them to resign."***

It is not in dispute that the plaintiff herein and its (sic) B ***erstwhile employer, Equity Bank of Nigeria Limited were involved in foreign exchange transactions for which the Central Bank of Nigeria can impose sanctions. Equity Bank of Nigeria Limited (plaintiff's*** C ***erstwhile employer) was penalized in the whopping sum of N293,129 million and its dealership licence suspended indefinitely. It is my humble view the plaintiff's involvement in the illegal foreign exchange*** D ***is serious misconduct in relation to his duties while in the services of Equity Bank of Nigeria Ltd.***

It is also my view that the condonation of the plaintiff's E ***serious misconduct in the illegal foreign exchange transactions by a fellow culprit is no bar to the Central Bank of Nigeria exercising its power to sanction the plaintiff."*** (Underlining supplied for emphasis)

F

The court below rejected the findings above on the following grounds.

a. That the learned trial judge should not have arrived G **at his decision on the respondent's involvement in illegal foreign exchange transductions without looking at the Special Committee Report.**

H **b. That in the absence of the report there was insufficient evidence upon which the court could have decided whether or not to grant the prayer to de-blacklist him or not.**

I **c. That the decision of Abutu, J. was not based on the**

issue of illegal transactions.

d. That the parties did not plead issue estoppel or res judicata.

It should be reiterated that it was the respondent who exhibited and relied upon the judgment of Abutu, J. in FHC/L/CS/163/2003 as part of his evidence in the suit, in support of his prayer for an order of the court directing the defendants to comply therewith among other reliefs. As can be seen from the excerpt of the judgment of Abutu, J. reproduced in the judgment of Okeke, J., His Lordship considered the entirety of the evidence before him, which he accepted, before arriving at the final decision made in that suit. in concluding the judgment he held thus:

"The misconduct of the plaintiff arising from the illegal foreign exchange transactions for which the plaintiff was adjudged guilty by the committee set up by the board of the 1st defendant in this case appears to have been condoned by the 1st defendant. I hold that the plaintiff validly resigned his appointment."

The decision was based on findings of fact, which have not been appealed against. The findings were referred to and relied upon by the appellants in paragraphs 5, 6 and 7 of their counter affidavit to the originating summons at pages 35 36 of the record wherein it was averred as follows:

"5 That further to the averments in paragraph 4 thereof, while it is true to state that the honourable court kept within the scope of the issues before it, it is clear that after considering the evidence at the trial and the arguments of all counsel, the court further held that any bank officer who has been found guilty of misconduct in relation to his duties, can be validly blacklisted by the CBN.

A

6. The trial court specifically found as FACTS the following:

(i) That the plaintiff appeared before a Board Committee set up to investigate illegal foreign
B *exchange transactions by Foreign Exchange Documentation Department of which he, the plaintiff, was Head;*

C

(ii) That the said committee submitted a report which found the (three) officials, including the plaintiff, guilty of misconduct in relation to their duties;

D

(iii) That the trial court held the Committee's report as having adjudged the plaintiff guilty of misconduct arising from the illegal foreign
E *exchange transactions;*

(iv) That the Central Bank of Nigeria can invoke the provisions of Section 44 (2) (d) of BOFIA to
F *"blacklist" a bank officer who has been found guilty of misconduct in relation to his duties;*

(v) That the plaintiff's resignation was not
G *voluntary but induced by his employers following the Committee's report of his misconduct, thus foisting a stalemate and state of helplessness and inability of the plaintiff to*
H *retain his job and/or sustain his career any further.*

7. That the plaintiff has not appealed against any of the above
I *findings of the trial court."*

Those findings are quite damning. There is no appeal against them. They remain binding on the parties until set aside by an appellate court. Both judgments are judgments of the Federal High Court. His Lordship Okeke, J., in the absence of any appeal against the judgment of Abutu, J. could not have done otherwise than adopt the findings and conclusions made therein since he was being called upon to direct the defendants to comply with it.

Section 174(1) & (2) of the Evidence Act, 2011 provides:

> ***"174(1) If a judgment is not pleaded by way of estoppel, it is as between the parties and privies deemed to be a relevant fact, whenever any matter, which was or might have been decided in the action in which it is given, is in issue or is deemed to be relevant to the issue in any subsequent proceeding.***
>
> ***(2) Such judgment is conclusive proof of the facts which it decides, or might have decided, if the party who gives evidence of it had no opportunity of pleading it as an estoppel."***

Suit No FHC/L/CS/163/2003 before Abutu, J. was predicated on the respondent's contention that having accepted his letter of resignation and paid his entitlements, which had determined the master/servant relationship between him and Equity Bank of Nig. Ltd., the bank was not entitled to terminate his appointment. The reliefs sought in the statement of claim are reproduced in Exhibit DM1. He sought, inter alia, a declaration against the 2nd defendant (1st appellant herein) that he had not breached any of the provisions of the Banks and other Financial Institutions Act 1991 and a declaration that the 2nd defendant could not rely on the purported letter of termination dated 5th February, 2003 to blacklist him under Section 44(4) of BOFIA, having resigned his appointment on 10th October, 2002. The Section provides:

A ***"44 (4) Any person whose appointment with a bank been terminated or who has been dismissed for reasons of fraud, dishonesty or conviction for an offence involving dishonesty or fraud shall not be employed by***
B ***any bank in Nigeria."***

At the trial before Abutu, J. the respondent had contended that he was not aware of the reason for his disengagement, that he was not aware that the
C committee produced a report containing findings and recommendations and he denied being indicted by the committee. In its defence the 2nd defendant relied on Exhibit 9, the proceedings of the committee, which showed that the respondent participated in the proceedings and Exhibit 10,
D the report of the committee, which indicted the respondent and two other offices. After considering the evidence led by both sides the court found and held that the report showed that the respondent was guilty of serious misconduct arising from illegal foreign exchange transactions. In order to
E determine the circumstances and legal effect of the respondent's resignation vis a vis the subsequent purported termination, the court had to consider the facts that gave rise to it. It found that the resignation was not voluntary. That the respondent was compelled to resign as a result of his
F indictment by the committee. The learned trial Judge frowned at the fact that the illegal activity was apparently condoned since the respondent was merely asked to resign. It however concluded, as stated earlier, that having accepted his resignation the defendants could no longer terminate his
G appointment.

The respondent contends that the issues in FHC/L/CS/163/2003 are not the same as in FHC/L/CS/205/2008 as the former was predicated on the provisions of Section 44(4) of BOFIA while the latter arose from facts that
H occurred after the judgment of Abutu, J. and was predicated on Section 44(2) (d) of the Act. Sections 44(1) & (2)(d) of the Act provide:

"44 (1) Every bank shall, before appointing any
I ***director or chief executive seek and obtain <u>the Bank's</u> written approval for the proposed appointment.***

A ***(2) No person shall be appointed or shall remain a director, secretary or an officer of a bank who-***
(d) is guilty of serious misconduct in relation to his duties."

B

By Section 1(1) of the Act, "the Bank" (as underlined) means the Central Bank of Nigeria.

Issue estoppel arises in a subsequent suit when the issue involved in
C the latter suit has been raised and distinctly determined in a previous suit between the same parties or their privies. The decision relied upon for the plea of estoppel must be final and the parties must be the same. *See* **Anwoyi Vs. Sodeke 92006) 12 NWLR (Pt. 996) 34; Udo Vs. Obot (1989) 1**
D **NWLR (Pt. 95) 59.** Issue estoppel may arise where a plea of res judicata could not be established because the causes of action are not the same. *See***AdedayoVs. Babalola (1995) 7 NWLR (Pt. 408) 383** where this court at pages 402 H and 405 B C held:

E

"Even if the objects of the first and second actions are different, as in the instant case, the finding on a matter which came directly in issue in the first action whether the
F ***Agbonbifa family is a ruling family for the purpose of the Elesie Chieftaincy Stool was embodied in the earlier decision. That decision is final and conclusive in this second action which involves the parties or their privies. ……***

G

A party is precluded from contenting in perpetuity any precise point, which, having been once distinctively put in issue has been properly determined against him. And even if
H ***the objects of the first and second actions are different (as in this case), the finding on a matter which came directly (not collaterally or incidentally) … in issue in the first action, provided it is embodied in a judicial decision that is final***
I ***(also as in this case), is conclusive in a second action between the same parties and privies. It has been held that***

this principle would apply whether the point involved in the earlier decision and to which the parties are estopped, is one of law or one of mixed law and fact."

In the circumstances of this case, the judgment of Abutu, J. in FHC/L/CS/163/2003, is a final one, not appealed against. The 1st appellant and the respondent were parties to both suits. The 2nd appellant herein is a privy of the 1st appellant. The circumstances of the respondent's resignation from Equity Bank of Nigeria Limited were specifically in issue in that suit and finally determined by Abutu, J. The general rule is that a plea of estoppel must be specifically pleaded. However, it is not necessary to plead it in any particular form so long as the facts constituting estoppel are stated in such a manner as to show that the party pleading relies on it as a defence or answer. *See* **Alakija Vs. Abdulai (1998) 6 NWLR (Pt. 552) 1 @ 15 A – B; Ezewani Vs. Onwordi (1986) 4 NWLR (Pt. 33) 27.** Suit no FHC/L/CS/163/2003 before Abutu, J. was initiated by way of originating summons where pleadings are not filed. However in paragraph 6 of the appellants' counter affidavit the intention to rely on issue estoppel was clearly indicated. I am of the view that even though the two suits were predicated on different provisions of BOFIA, the substratum of both suits was the report of the Special Committee, which indicted the respondent. The finding of the court in the earlier suit that the respondent was indeed indicted by the said report, not appealed against, is valid and subsisting. Okeke, J. did not make any pronouncement on the report. He adopted the findings of Abutu, J. I hold that the trial court was entitled to adopt and rely on the said unappealed findings of fact made in the earlier judgment. This issue is accordingly resolved in favour of the appellants.

ISSUE 2

Whether there was sufficient evidence before the Court of Appeal to justify the reversal of the decision of the trial court and consequent grant of the relief of de-blacklisting sought by the respondent.

A This issue is substantially similar to the respondent's issue 1.

Relying on Section 132, 133 and 136 (1) of the Evidence Act, 2011 learned counsel for the appellant submitted that the burden was on the respondent to prove his case. He submitted that he was required to succeed
B on the strength of his case. He referred to: **Momoh Vs. Umoru (2011) 15 NWLR (Pt 1270) 217** where it was held that where the respondents had not set up a counterclaim, the burden on them was just to defend the suit after the appellants must have discharged the burden placed on them. He also
C relied on: **G & T Investment Co. Ltd Vs. Witt Bush (2011) 8 NWLR (Pt. 1250) 500 @ 531 B.** He submitted that the appellant's main relief before the trial court was for an order directing the 2nd defendant to comply with the declaration of Abutu, J. in the judgment delivered on 11th April 2005 i.e
D Exhibit DM1. He referred to the 5 questions for determination on the originating summons and argued that nos. 1 and 2 are the main reliefs, while questions 3, 4 and 5 are ancillary, as they are dependent on a favourable resolution of nos. 1 & 2. For ease of reference, the 5 questions
E for determination are reproduced hereunder:

1. **Whether the defendants could blacklist the plaintiff under S. 44 (2) (d) of BOFIA?**

F

2. **Whether the act of blacklisting the Plaintiff by the 2nd defendant's letter of 19th September, 2005 is not a violation and act of disrespect to the judgment of Abutu, J. delivered on 11th April, 2005?**

G

3. **Whether the defendants ought to be compelled to delete the name of the plaintiff from the list of blacklisted persons?**

H

4. **Whether the act of the defendants has unlawfully deprived the plaintiff of security gainful employment and loss of earning?**

5. **Whether the plaintiff is entitled to damages claimed?**

I

Learned counsel submitted that by exhibiting and relying on Exhibit DM1 DM4, the respondent believed the documents sufficient to convince the court that he was entitled to the reliefs sought. With regard to question1, he submitted that the court had already pronounced in Exhibit DM1 at pages 23 24 of the record that the Central Bank of Nigeria could invoke the provisions of Section 44(2)(d) of BOFIA against a person found guilty of serious misconduct and had also found at page 21 of the record that the respondent was guilty of misconduct arising from illegal foreign exchange transactions. With regard to question 2, he submitted that the court, in Exhibit DM1 at page 24 of the record, had pronounced that no blacklisting had been done even though the appellants had the power to do so under Section 44(2)(d) of BOFIA. He contended that the most important document the court was bound to examine was Exhibit DM1 and that it did so painstakingly. He submitted that the Special Committee Report was not necessary for the determination of the questions raised by the respondent because it was in evidence before Abutu, J. who made findings on it in his judgment. He submitted that an appellate court would not usually interfere with findings of fact made by a trial court where such findings are supported by evidence. He referred to: **Momoh Vs. Umoru (supra) at 271 D.**

Learned counsel argued further that assuming, without conceding, that the Special Committee Report ought to have been before the trial court, it was the respondent's duty to produce it to show that he was neither indicted nor implicated in any act of misconduct. He submitted that he would not have been able to do so in light of the subsisting finding of Abutu, J. on the issue. He submitted that the respondent admitted the existence of the report but failed to produce it because it would have been unfavourable to him. He relied on Sections 167(d) and 123 of the Evidence Act. He submitted that the evidence before the trial court, particularly Exhibit DM1 was completely against the case put forward by the respondent and he had no choice but to sink with it. He submitted that the evidence did not entitle him to any of the reliefs sought.

Learned counsel observed that at pages 115 to 116 of the record, the court below held that in the absence of the Committee Report, there was

A insufficient evidence before the court upon which it could reach a determination as to whether or not the respondent should be blacklisted. He argued that it was contradictory for the court to thereafter make an order at page 118 of the record that the name of the appellant be de-blacklisted. He
B submitted that having failed to lead sufficient evidence to prove that he ought not to have been blacklisted, the respondent's case was rightly dismissed by the trial court. He submitted that where a trial court, which observed and heard witnesses who testified before it, has performed its duty
C of evaluating the evidence and drawing conclusions therefrom, an appellate court would not interfere unless it is demonstrated that such conclusions are perverse and not supported by credible unchallenged evidence. He relied on: **Dakolo Vs. Rewane-Dakolo (2011) 16 NWLR**
D **(Pt. 1272) 22 @ 60 E – F.** He submitted that the lower court was wrong to have set aside the decision of the trial court in the circumstances of this case, as its effect is to overturn some of the findings of fact in Exhibit DM1, which judgment was not before it on appeal.

E In response, learned counsel for the respondent contended that there is a difference between the legal burden of proof and the evidential burden. He submitted that the legal burden is the burden of establishing a case while the evidential burden is the burden of adducing evidence. He submitted that
F while the legal burden is always stable, the evidential burden may shift constantly depending on how the scale of evidence preponderates. He cited the case of **Odukwe Vs. Ogunbiyi (1998) 6 SC 72.** He argued that the complaint of the appellants is in relation to the evidential burden. He
G referred to Section 131 of the Evidence Act. He contended that the only way the appellants could have satisfied the court that the respondent's blacklisting was based on the verdict of the Special Board Committee, which it referred to in Exhibit DM3, was by the production of the report. He
H submitted that it was not open to the trial court to speculate on the content of the report. He submitted further that the blacklisting of the respondent was not an issue considered by Abutu, J. in FHC/L/CS/163/2002, as it arose upon the issuance of Exhibit DM3 which came after the judgment. He
I maintained that the issues in the suits were not the same, as the judgment in Exhibit DM1 related to Section 44(4) of BOFIA while the suit that gave rise

to this appeal related to Section 44(2)(d) of the Act. He submitted that failure to produce the report of the committee meant that the appellants had failed to justify the blacklisting of the respondent.

Learned counsel submitted that the authority of **Momoh Vs. Umoru (supra)** relied upon by learned counsel for the appellants is not applicable to this case, as it relates to ascribing probative value to evidence while the instant case is concerned with reliance on inadmissible evidence of the findings made by Abutu, J. He also argued that contrary to the submission of learned counsel that the respondent's main relief was relief 2, the main relief was for an order de-blacklisting him. He submitted further that the principle that a plaintiff must rely on the strength of his own case and not on the weakness of the defence, is only relevant in claims for declaration of title to land.

The law is that he who assets must prove. In civil cases, the burden of first proving the existence or non-existence of a fact lies on the party against whom the judgment of the court would be given if no evidence were produced on either side, regard being had to any presumption that may arise on the pleading. It is also trite that the burden of proof of particular facts shifts from side to side throughout the proceedings until all the issues in contention have been dealt with. See Section 131 133 of the Evidence Act, 2011.

In the instant case, the respondent's main reliefs before the trial court were questions 1 and 2 reproduced above. In the main, the respondent, as plaintiff in that suit had the burden of satisfying the court that the defendants/appellants had no right to blacklist him under Section 44(2)(d) of BOFIA, which is repeated here for ease of reference. It provides:

> ***"44. (2) No person shall be appointed or shall remain a director, secretary or an officer of a bank who …….***
>
> ***(d) is guilty of serious misconduct in relation to his duties."***

The respondent, in an attempt to establish his case, placed reliance on the judgment in FHC/L/CS/163/2003. The judgment of Abutu, J. annexed to the summons as Exhibit DM1 remained evidence before the court. The issue for determination in Exhibit DM1 was whether having accepted the respondent's resignation and paid his entitlements, the defendants could later reject his resignation and purport to terminate his employment in order to blacklist him under Section 44(4) of BOFIA. The circumstances that led to the respondent's resignation were relevant facts before that court. Abutu, J. found that the report of the Special Committee indicted the respondent of serious misconduct and that by merely advising him to resign instead of terminating his appointment, his employer, Equity Bank of Nigeria Ltd., appeared to have condoned the misconduct. He however concluded that since the bank had accepted his resignation and paid him his entitlements, the resignation was valid and therefore the bank could not turn around to terminate the same appointment in order to invoke the provisions of Section 44(4) of BOFIA. He held that in order for Section 44(4) to be operative, the affected persons' appointment must have been terminated on grounds of fraud, dishonesty or upon conviction for an offence involving dishonesty or fraud. Thus termination of appointment for the reasons stated is the basis for the activation of Section 44(4) of the Act.

Section 44(2)(d) of the Act on the other hand operates where a person seeking appointment in the management of a bank, must obtain the prior consent of the Central Bank of Nigeria, which has a statutory duty to withhold such consent where the applicant has been found guilty of serious misconduct in relation to his duties. The Act does not define 'serious misconduct'. What amounts to serious misconduct where not specifically defined and as such would depend on the facts of a particular case. Gross or serious misconduct has been described as conduct of such grave and weighty character as to undermine the relationship of confidence, which should exist between the employee and his employer. *See* **Yusuf Vs. U.B.N (1996) 6 NWLR (Pt. 457) 632; Babatunde Ajayi Vs. Texaco Nig. Ltd & Ors. (1987) 3 NWLR (Pt.62) 577; Osakwe Vs. Nigerian Paper Mill Ltd (1998) 7 SC (Pt.2) 108.** Illegal foreign exchange transactions carried out in violation of banking regulations certainly amounts to serious misconduct.

The banking industry is one of the institutions where a high level of confidence and trust is expected of employees. The Central Bank of Nigeria performs a supervisory role over banks and other financial institutions in Nigeria. See Section 37(b) of the CBN Act Cap. C4, LFN 2004 & Section 48 of BOFIA, 2004.

In reaction to the respondent's application for clearance for appointment with National Bank of Nigeria, the 1st appellant in its letter dated 19th September, 2005 (Exhibit DM3), relied on the verdict of the Special Committee of Foreign Exchange Transactions of Equity Bank to the effect that he had been found guilty of foreign exchange dealings and notified him that he had been blacklisted. The contention of the respondent is that in order to justify the blacklisting, the appellants ought to have tendered the report. Having regard to the peculiar facts of this case, I disagree. The report was before Abutu, J. in FHC/L/CS/163/2003. He made far reaching findings thereon, including the fact that the respondent was found guilty of serious misconduct by the Special Committee. The findings have not been appealed against till date. The judgment in FHC/L/CS/163/2003 was specifically made a part of the respondent's case. Having regard to the finding of the learned trial Judge in Exhibit DM1, the onus was on the respondent who would fail if no further evidence was lead on either side, to satisfy the court that he was not indicted by the report. He ought to have produced it since he was the one asserting that he ought not to have been blacklisted. He cannot approbate and reprobate. He cannot rely on a part of the judgment, which is in his favour and jettison those aspects he does not agree with. Once the appellants were satisfied that the respondent had been found guilty of serious misconduct in relation to his duties, they were entitled to invoke Section 44(2)(d) of BOFIA to blacklist him notwithstanding the fact that he had resigned his appointment. As a supervisory bank, the CBN has a responsibility not to permit a person who has been indicted for serious misconduct in the performance of his duties bordering on dishonesty, to find his way back into any bank or other financial institution. The decision of the trial court was based on the evidence before it. There was nothing before the lower court to show that the decision of the trial court was perverse. It is only where the decision of

the trial court is shown to be perverse that an appellate court would be entitled to interfere. I reiterate once again the decisions in the two suits were judgments of the same court. In the absence of an appeal against the specific findings of Abutu, J. in FHC/L/CS/163/2003, His Lordship Okeke, J. was quite in order to have relied on those findings in reaching his conclusions. The onus was on the respondent to show that there were special circumstances warranting the interference of the court below. He failed to do so. The court therefore erred in setting aside the decision and ordering the de-blacklisting of the respondent. This issue is accordingly resolved in favour of the appellants and against the respondent.

In conclusion the appeal is meritorious. It is hereby allowed. The judgment of the Court of Appeal, Lagos delivered on 22/3/2010 is hereby set aside. The judgment of the Federal High Court delivered on 14/7/2008 is hereby restored.

The parties shall bear their respective costs in the appeal.

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

DATTIJO MUHAMMAD, JSC: Having read in draft the lead judgment by my learned brother **K.M.O Kekere-Ekun JSC** I agree with the reasoning and conclusion therein and relying on same I hereby allow the appeal and abide by the consequential orders made in the lead judgment including the order as to costs.

Musa Dattijo Muhammad
Justice, Supreme Court

BATA OGUNBIYI, JSC: The facts and the background history giving rise to this appeal have been well and clearly spelt out by my learned brother, Kekere-Ekun, JSC in her lead judgment. I do not have reason to repeat same.

My learned brother had dealt with the two issues raised in this appeal comprehensively and I hereby adopt his judgment as mine.

For the sake of emphasis however, I wish to say a word or two in respect of the 1st issue raised by the appellant. The issue in other words,

poses a question whether the appellants were entitled to rely on the findings of fact in an earlier judgment as a defence in the later action.

With reference made to the record of appeal and specifically at page 116, the lower court on the issue of Estoppel had this to say:

> ***"This is not a question of relying on facts already established in another judgment as parties did not plead issue Estoppel nor Res Judicata."***

For the determination as to whether or not the principle of estoppel applies, recourse must be had to the case of the respondent at the trial court; which as rightly submitted by the counsel for the appellants was predicated mainly on the findings and conclusions of the earlier judgment by Abutu, J. per Exhibit DM1. With the respondent laying a complaint in the later suit that the appellants had not complied with the earlier judgment, there can be no misgiving that what was an issue at stake was the judgment.

The respondent herein was the plaintiff before Abutu, J. who made an order setting aside the termination and blacklisting of the respondent under Section 44(4) of the Banks and other Financial Institution Act 1991 (as amended).

As rightly submitted by the counsel for the appellants also, on a careful perusal of the judgment of the trial court per Abutu J. it is pertinent to note that his lordship had made some findings of fact which are very crucial. An example is where the court at pages 20 and 21 of the Record of appeal said:

> ***"The evidence on both sides which I accept is that the plaintiff was an employee of the 1st defendant and that the plaintiff took part in the foreign exchange transactions in respect of which the 1st defendant was penalized in the sum of N293,129 million for illegal foreign exchange transactions and its dealership licence suspended indefinitely. ……***

A ***There is no documentary evidence before me in this case which shows that the Plaintiff has been blacklisted ….. Exhibit 10 is the report of the committee wherein the Plaintiff, MessrsKalu and Adegboye were adjudged guilty***
B ***of forex malpractices. The evidence is that notwithstanding the findings of the committee that the three officers were guilty of foreign exchange malpractices, the 1st defendant merely advised them to resign. The Plaintiff resigned and***
C ***his resignation was accepted by the 1st defendant. ……..***

The misconduct of the plaintiff arising from the illegal
D ***foreign exchange transactions for which the plaintiff was adjudged guilty by the Committee set up by the board of the 1st Defendant in this case appears to have been condoned by the 1st Defendant. I hold that the plaintiff validly resigned***
E ***his appointment."***

The judgment of Abutu J. dated 11th April, 2005 (Exhibit DM1) was one of the four documents attached to the originating summons taken out by the
F respondent and filed on 31st March, 2008 against the appellants at the Federal High Court for determination.

The respondent herein in the circumstance sought to rely on the judgment Exhibit DM1 which is not shown to have been appealed against.

G It is needless to re-affirm therefore that the respondent is deemed to have relied on every part of the judgment inclusive of the findings of facts made, whether favourable or otherwise. It is not now open to the respondent to pick and choose a favourable part of the judgment while at the same time
H seek to jettison the findings of fact deemed as unfavourable. See the view held by this Court in **A.C.B Plc Vs. Losada (Nig) Ltd. (1995) 7 NWLR (Pt. 405) 26 at 53** that:

I ***"Where the words of an order made by a court are clear and are free from ambiguity in themselves and there is no doubt***

A ***as to the subject matter to which they relate, they are to be given their strict plain and their common meaning."***

Again, see the case of **K. T & Ind. Plc. vs. The Tug Boat "M/V/Japaul B"**
B **(2011) 9 NWLR (pt. 1251) 133 at 157** where judgment or order of every law court remains in force and binding until it is set aside on appeal by a court of competent jurisdiction.

As rightly submitted by the appellants' counsel, the document
C Exhibit DM1 has shown clearly that the questions presented by the respondent at the trial court had been decided by the judgment of Abutu, J. In the result, I hold that the trial court, did rightly base its decision on the findings of the earlier judgment as it did.

D I seek to state further that it is not within the power and jurisdiction of the trial court, as a court of co-ordinate jurisdiction, to upturn the judgment of Abutu, J. Again see the case of **Okoye Vs. Nigerian Cons. & Furniture Co. Ltd (1991) 6 NWLR (Pt. 199) 501 at 538.**

E Therefore, as rightly submitted by the learned counsel on behalf of the appellants, the lower court, misapplied the principle in relation to the trial court's reliance on the judgment of Abutu, J. (Exhibit DM1). It would, in other words, have tantamount to judicial rascality if the trial court had
F interfered with the findings of fact made by Abutu, J. being a court of co-ordinate jurisdiction. This, the trial court could not have done. It is obvious therefore that the lower court did fell into great error as it did and the issue herein is resolved in favour of the appellants.

G My learned brother Kekere-Ekun, JSC, has resolved both issues adequately and I endorse her well considered judgment and adopt same as mine.

In terms of the lead judgment, I also allow this appeal and set aside
H the judgment of the Court of Appeal, Lagos Division delivered on 22/3/2010, while the judgment of the Federal High Court delivered on 14/7/2008 is also restored by me. I further abide by the order made as to costs.

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

EJEMBI EKO, JSC: I read in draft the judgment just delivered in this appeal by my learned brother, K. M. O. Kekere-Ekun, JSC. I hereby adopt the judgment as I agree entirely with my learned brother on all the issues as resolved.

The respondent was the Divisional Head of Department in charge of foreign exchange documentation at Equity Bank of Nigeria Limited. In 2002 the Central Bank of Nigeria (CBN), 1st appellant, revoked the bank's license to conduct foreign exchange transaction when it was discovered that Equity Bank of Nigeria Ltd was selling foreign exchange in flagrant violation of laid down procedures. The bank was penalized by the CBN in the sum of N293,129,000.00. As a result, the board of Equity Bank advised the respondent and two others to resign their appointments. The respondent accordingly submitted his resignation on 10th October, 2002. He did not voluntarily resign his appointment. The resignation was a compulsory one. In my firm view this amount to constructive dismissal associated with misconduct. That is the respondent's complicity in illegal foreign exchange transaction, the soft landing given to him by Equity notwithstanding.

The CBN, the regulatory body, was in my view right to have regarded the actions of the respondent on which he was advised by the board of Equity Bank to resign as constituting serious misconduct under Section 44(2)(d) of the Banks and other Financial Institutions Act, 1991 (BOFIA), as amended.

The board of Equity Bank did not just direct the respondent to resign his appointment. It had set up a Special Committee on Foreign Exchange Transactions of Equity Bank to investigate and establish the respondent's complicity. The Special Committee found him guilty of illegal foreign exchange transactions. That report has not been set aside.

The CBN as a regulatory body has a duty to keep shady characters from holding appointments in the commercial banks. That function of CBN has not been denied. I think it would have been dereliction of duty on the part of CBN to have closed its eyes to the obvious misconduct of the respondent as found by the Special Committee. The respondent, if he was aggrieved by the indictment of the Special Committee, should have taken necessary steps to overturn the report. This he never did. He is therefore

estopped from insisting that he was not found guilty of serious misconduct while he discharged his office as Head of Department in charge of foreign exchange portfolio of Equity Bank.

The CBN has a discretion to exercise in respect of the respondent's application to it to clear him for another appointment in National Bank of Nigeria. I cannot fault CBN decision refusing to clear the respondent for that appointment. The CBN, in my firm view, was right in predicating its decision on the report of the Special Committee which had indicted and found the respondent guilty of illegal foreign exchange transactions while in the employment of Equity Bank.

The respondent's suit was conceived to compel the CBN to exercise its discretion. I do not think that the suit is well founded. The CBN cannot be compelled to exercise its discretion in a manner favourable to the respondent. I had earlier stated that, in view of the report of the Special Committee that found the respondent guilty of illegal foreign exchange transactions, it would amount to dereliction of duty for the CBN to have cleared or recommended the respondent for appointment in another commercial Bank. The respondent's past reprehensible serious misconduct, does not speak well for his appointment in another commercial bank. Characters like the respondent do not deserve a place in sensitive banking institutions over which the CBN is the regulatory body.

The lead judgment which I adopt has given fuller reasons for allowing this appeal. I allow the appeal. The judgment of the Court of Appeal delivered in the appeal No. CA/L/786/2008 on 22nd March, 2010 is hereby set aside. In its place the decision of the Federal High Court delivered in the suit No FHC/L/CS/305/2000 on 14th July, 2008 is hereby restored.

I make no order as to costs.

Ejembi Eko,
Justice, Supreme Court

1. MASSKEN NIGERIA LIMITED
2. MRS ALEX ONONYE
3. SURVEYOR ALEX ONONYE

AND

1. MR AMBILE AMAKA
2. JOHN DUGWE

SC. 266/2009

IN THE SUPREME COURT OF NIGERIA

HOLDEN AT ABUJA

FRIDAY, 28TH APRIL 2017

BEFORE THEIR LORDSHIPS

WALTER S. 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**

ACTION: Undefended list – Where plaintiff proved evidence that the defendant owes him by annexing unpaid post dated cheque (Exhibit A) – Defendant failed to disclose any defence thereto – Whether the trial court exercised its discretion judiciously when it failed to transfer the suit from the Undefended cause list to the General Cause list.

ACTION: Undefended list procedure – Essence thereof – Whether to enable a claimant obtain quick justice in a clam for debt or liquidated sum where the defendant has no genuine defence to the claim.

ACTION: Undefended List Procedure – Obligation of trial court thereto – Whether to act judicially and judiciously.

APPEAL: Concurrent findings – Attitude of appellate court thereto – Whether will not disturb except where found to be perverse or has occasioned a miscarriage of justice.

COURT: Undefended list proceedings – Obligations thereto.

PRACTICE AND PROCEDURE: Undefended list procedure – Onus on defendant – How discharged.

PRACTICE AND PROCEDURE: Undefended list procedure – Or. 23 Rule 3(1) Federal Capital Territory High Court Rules 1989 – Purport.

Issue for Determination

1. **Whether the learned Justices of the Court of Appeal were right by delving into proof at this stage and stated that there was no satisfactory explanation as to why 3rd appellant issued the cheque exhibit "A" and wrongly acceded by not transferring the suit to the General Cause List and affirmed the judgment of the trial court.**

2. **Whether the learned Justices of the Court of Appeal were right by holding that the learned trial Judge exercised her discretion judiciously and judicially by failing to transfer the suit to the General Cause List when there was no basis for the exercise of that discretion.**

3. **Whether the learned Justices of the Court of Appeal were right in holding that the averments in paragraphs 3(c), (d),(e), 4, 5 and 8 of the affidavit of Abubakar Mohammed in support of the Undefended List are not hearsay evidence and competent and dismissed the appeal.**

4. Whether the learned justices of the Court of Appeal were right in holding that the reply brief properly filed by the appellants is superfluous in this case and failed to consider it."

Facts of the Matter

This is an appeal against the judgment of the Court of Appeal Holden in Abuja, in appeal No. CA/A/184/2003 delivered on the 16th day of January, 2007 in which the court dismissed the appeal by the appellants against the decision of the High Court of the Federal Capital Territory, Abuja in suit No. FCT/HC/CV/234/2012 delivered on the 29th day of January, 2003.

The action was commenced under the undefended list procedure in which the present respondents claimed against the appellants as follows:

> ***"Whereas the plaintiffs claim from the defendants jointly and severally the sum of three million six hundred and fifty-five thousand naira plus 21% interest from January 2002 to date of judgment and thereafter same rate until judgment sum is finally liquidated."***

The respondents filed an affidavit of eleven (11) paragraphs in support of the writ of summons in which it was deposed that the amount of indebtedness arose from an outstanding friendly loan of three million naira and various other sums of money collected by the defendants/appellants. Exhibited to the affidavit in support are exhibits "A" and "B" being a cheque for a sum of N3,000,000= and a letter of demand respectively.

The processes were duly served on the appellants who filed a notice of intention to defend and a 40 (forty) paragraphed affidavit of defence. On the return date, the learned trial judge heard from Counsel to the parties and in a ruling delivered on the 29th day of January, 2003 held that appellants had not disclosed sufficient defence on the merit to make the court send the suit for hearing under the General Cause List. The court relied on exhibit 'A', the cheque, as evidence of the transaction between the parties in giving judgment in

favour of the respondents. The cliam for interest was however refused by the court.

Appellants were dissatisfied with the said judgment and consequently appealed to the Court of Appeal which appeal was dismissed resulting in the instant further appeal to the Supreme Court.

Held: *(Unanimously dismissing the appeal)*

1. *The purport of undefended list procedure Under Or. 23 Rule 3(1)*
I have carefully gone through the grounds of appeal filed herein and note that the appeal arose from an action instituted under the Undefended List procedure as provided under Order 23 Rule 3(1) of the High Court of Federal Capital Territory (Civil Procedure) Rules 1989 which is a specialized procedure crafted to aid expeditious recovery of a debt or liquidated money demand particularly where the facts are not in dispute and it is apparent to the court that the defendant has no defence to the claim. From the grounds of appeal complained of it is clear that they are rooted on the provisions of the said Order 23 Rule 3(1) etc of the said Rules of court and consequently grounds of law for which appellants need no leave of either the lower court or of this court prior to filing same.
(Pp 114 – 115 Paras G – A)

2. *The purport and procedure of undefended list*
It is settled law that Undefended List Procedure is designed and adopted for speedy trial for the recovery of any debt or liquidated money demand, particularly, where it is clear to the court that the defendant has no defence on the merit for the claim of the plaintiff. Where a defendant is served with a writ of summons entered under the Undefended List together with an affidavit deposed to by the plaintiff, as required by the Rules of court, and he desires to defend same, it is his duty to file a notice of intention to defend the suit together with an affidavit disclosing his defence on the merit of the claim for the liquidated money demand.

On the return date, the duty of the court is to consider the affidavits of claim and defence in order to determine whether the defendant has disclosed any defence to the claim of the plaintiff so as to decide whether the action should be transferred to the General Cause List to be dealt with according to the Rules of Court or enter judgment for the debt or liquidated money demanded for the plaintiff, where it comes to the conclusion that no defence, on the merit has been disclosed in the affidavit of defence. *(P 116 Paras B – F).*

3. *The obligations of a trial court towards undefended list proceedings*
I need to re-emphasis the point that the Undefended List Procedure is fashioned to take care of cases relating to simple, uncontested debt or liquidated money demand or monetary claims. Where, however serious disputes arose in the affidavits on points of law relating to the claim(s), the trial court ought to exercise caution in entering judgment under the Undefended List Procedure and should transfer the matter from the Undefended List to the General Causes List to be dealt with by pleadings etc. *(P 117 Paras D – E)***.**

Per Onnoghen (CJN)

"To begin with, I have carefully gone though the findings of the trial court and its affirmation by the lower court and find no difference, in substance, between the two as argued by learned Counsel for appellants in the reply brief. The lower courts are emphatic that exhibit 'A', a post dated cheque of the appellants, is evidence of a transaction giving rise to the claim under the Undefended List and that appellants have not disclosed sufficient explanation by way of defence, as to the existence of appellants' cheque, exhibit 'A' in the possession of the respondents.

These findings, to me are concurrent on the fact that exhibit 'A' is appellants post dated cheque evidencing a loan transaction of N3 million between the parties. Being a document, it is the best evidence of the transaction it relates to.

My view that the findings by the lower courts are concurrent is re-inforced by the submission of Counsel for appellants in which he invited the court to interfere with same on the ground that the said findings are perverse!! The said submission can only be relevant if the findings it relates to are concurrent which learned Counsel had clearly admitted.

As stated earlier in the judgment, I have gone through the record and the judgment of the lower courts and have come to the conclusion that the above concurrent findings of fact by the lower courts are very much supported by the facts on record and are consequently not perverse". *(Pp 118 – 119 Paras H – E).*

4. *Attitude of appellate courts to concurrent findings*

It is now trite law, that an appellate court will not disturb concurrent findings of fact of the courts below unless there is substantial error apparent on the record of proceedings or are shown to constitute a miscarriage of justice or in any way amount to a violation of some principles of substantive law or procedure. *(P 119 Paras E – F)*

5. *The trial court properly exercised its discretionary powers*

Haven agreed with the lower courts that exhibit 'A' is evidence of a debt owed by appellants to the respondents and that appellants have not disclosed any defence to a claim for its recovery which would have necessitated the trial court transferring the matter from the Undefended List to the General Cause List for adjudication, it follows that the trial court's exercise of its discretion not to so transfer the matter but enter judgment for the respondents in the circumstances, is a judicious and judicial exercise of discretion which cannot be disturbed by this court.

It is therefore my considered view that the decision reached in issue 1 is the pivot on which the case of appellants rests and the courts haven held that appellants have no defence to the claim as constituted, the matter ends there. ***(Pp 119 – 120 Paras H – B).***

6. *The essence of the undefended list procedure*

The essence of the Undefended List Procedure in the civil procedure rules of the various High Courts throughout Nigeria, including Order 23 Rule 3(1) of the High Court of the Federal Capital Territory (Civil Procedure) Rules 1989, is to allow a claimant obtain quick justice in respect of a debt or liquidated sum where the facts are clear and there is no genuine defence to the claims. It allows a court to enter judgment in favour of the claimant instantly without the need to go the whole hog of a full trial and the calling of witnesses. It is a veritable tool that saves judicial time and expense. However, where a defendant seeking to have the suit transferred to the General Cause Lists deposes to facts, which are contentions, the suit would be transferred to the General Cause List to be dealt with on the merits in the normal way. See: Obitude vs. Onyesom Community Bank Ltd. (2014) 9 NWLR(Pt. 1412) 352 @ 389 – 390 F-H; Macaulay vs. NAL Merchant Bank Ltd. (1990) 4 NWLR (Pt. 144) 283; Imoniyame Holdings Ltd. & Anor. vs. Soneb Enterprises Ltd. (2010) 4 NWLR (Pt. 1185) 561; Sodipo vs. Lemminkainen OY & Ors (1986) 1 NWLR (Pt. 15) 2200. *(Pp 120 – 121 Paras F – A).*

7. *Trial Court has duty to act judicially and judiciously and onus on defendant.*

In order to convince the court to transfer the suit to the General Cause List, the defendant must, in his affidavit disclosing a defence, among other things "condescend upon particular" and deal specifically with the plaintiff's claim by stating clearly and concisely what the defence is and the facts relied upon in support. He must show that he has a *bona fide defence* to the claim. See: Nishizawa Ltd. vs. Jethwani (1984) 15 SC 234 @ 260; Adegoke Motors Ltd. vs. Adesanya (1989) 3 NWLR (Pt. 109) 250 @ 271 -272 H-A; U.T.C. (Nig.) Ltd. vs. Pamotei (2002) FWLR (Pt. 129) 1557; (1989) 2 NWLR (Pt. 103) 244. *(P 121 Paras A – C).*

Per Kekere Ekun (JSC)

"In the instant case, the plaintiff's (respondents') claim against the defendants (now appellants) was for the sum of N3,655,000 being the amount of a friendly loan of N3 million given to the defendants by the plaintiffs and another loan of N655,000. They relied on a post-dated cheque for the sum of N3,000,000 issued by the defendants in settlement of the debt, which bounced.

It is true that the appellants deposed to a 40-paragraph affidavit in support of their notice of intention to defend the suit. The learned trial Judge examined it and rightly came to the conclusion that the post-dated cheque, Exhibit A constituted evidence of a transaction between the parties and that the averments in the affidavit in support of the notice of intention to defend were extraneous matters unrelated to the suit. In other words, the appellants failed to convince the court that they had a defence to the suit. Although the claim for an additional loan of N655,000 was found not to have been proved, the court has rightly satisfied that there was no defence to the claim for N3 million and entered judgment in the respondents' favour accordingly.

The court below found no reason to disturb the finding. I agree with my learned brother in the lead judgment that the appellants have equally failed to persuade this court to interfere with those concurrent findings, which have not been shown to be perverse.

In the circumstances, I also dismiss this appeal as lacking in merit and affirm the judgment of the court below. Costs of N250,000 are awarded in favour of the respondents against the appellants." *(Pp 121 – 122 Paras E – B).*

Per Eko (JSC)

"The appellants filed Notice of Intention to defend supported by a forty (40) paragraph affidavit. The trial court and the Court of

Appeal found that the affidavit failed to disclose any reasonable defence on the merit, and that it contained irrelevant and extraneous matters which are frivolous and unrelated to the suit. These are concurrent findings of fact which this Court is loathe to disturb.

The court below has specifically found that the appellants gave no satisfactory explanation as to why the 3rd Appellant issued the cheque, Exhibit A. A cheque is not an ordinary business card. In his book: Law and Practice of Banking, J. Milnes Holden defines a cheque as, "an unconditional order in writing addressed by one person to another, who must be a banker signed by the person giving it, requiring the banker to pay on demand a sum certain in money to or to the order of a specified person or to bearer". *See also Black's Law Dictionary 9th Edition.*

In my firm view, there was a transaction between the parties herein, and the cheque, Exhibit A, is *prima facie* evidence that the sum therein had been committed to be paid to the drawee by the drawer. There is no evidence that the said sum had been paid to the drawee. The burden of satisfactorily explaining why the commitment to pay the N3,000,000.00 on the cheque was made remained on the appellants to discharge. The burden was not discharged.

The sham and frivolous defences offered by the appellants were, in the concurrent findings of the two courts, dismissed as irrelevant, extraneous and totally unrelated to the claim of the respondents against them. I cannot fault these lucid findings of fact." *(Pp 122 – 123 Paras F – D).*

Nigerian cases cited

Adegoke Motors Ltd. vs. Adesanya (1989) 3 NWLR (Pt. 109) 250;
Imoniyame Holdings Ltd. & Anor. vs. Soneb Enterprises Ltd. (2010) 4 NWLR (Pt. 1185) 561;
Macaulay vs. NAL Merchant Bank Ltd. (1990) 4 NWLR (Pt. 144) 283;
Nishizawa Ltd. vs. Jethwani (1984) 12 SC 234 @ 260;
Obitude vs. Onyesom Community Bank Ltd. (2014) 9 NWLR (Pt. 1412) 352;

A *Sodipo vs. Lemminkainen OY & Ors (1986) 1 NWLR (Pt. 15) 2200.*
U.T.C. (Nig.) Ltd. vs. Pamotei (2002) FWLR (Pt. 129) 1557; (1989) 2 NWLR (Pt. 103) 244.

B ***Representation***
JIBO IBRAHIM (ESQ) for appellants
IKHIDE EHIGHELUA, (ESQ) for respondents.

C **NKANU ONNOGHEN, (JSC) (Delivering the Lead Judgment):** This is an appeal against the judgment of the Court of Appeal Holden in Abuja, in appeal No. CA/A/184/2003 delivered on the 16th day of January,2007 in which the court dismissed the appeal by the appellants against the decision
D of the High Court of the Fderal Capital Territory, Abuja in suit No. FCT/HC/CV/234/2012 delivered on the 29th day of January, 2003.

The action was commenced under the undefended list procedure in which the present respondents claimed against the appellants as follows:

E

> ***"Whereas the plaintiffs claim from the defendants jointly and severally the sum of three million six hundred and fifty-five thousand naira plus 21% interest from January 2002 to***
> F ***date of judgment and thereafter same rate until judgment sum is finally liquidated."***

The respondents filed an affidavit of eleven (11) paragraphs in support of
G the writ of summons in which it was deposed that the amount of indebtedness arose from an outstanding friendly loan of three million naira and various other sums of money collected by the defendants/appellants. Exhibited to the affidavit in support are exhibits "A" and "B" being a
H cheque for a sum of N3,000,000= and a letter of demand respectively.

The processes were duly served on the appellants who filed a notice of intention to defend and a 40 (forty) paragraphed affidavit of defence. On the return date, the learned trial judge heard from Counsel to the parties and
I in a ruling delivered on the 29th day of January, 2003 held that appellants had not disclosed sufficient defence on the merit to make the court send the

suit for hearing under the General Cause List. The court relied on exhibit 'A', the cheque, as evidence of the transaction between the parties in giving judgment in favour of the respondents. The cliam for interest was however refused by the court.

As stated earlier in this judgment, appellants were dissatisfied with the said judgment and consequently appealed to the lower court which appeal was dismissed resulting in the instant further appeal, the issues for the determination of which have been formulated by learned Counsel for appellants, JIBO IBRAHIM ESQ in the appellants' brief filed on 2/10/09 as follows:-

"1. **Whether the learned Justices of the Court of Appeal were right by delving into proof at this stage and stated that there was no satisfactory explanation as to why 3rd appellant issued the cheque exhibit "A" and wrongly acceded by not transferring the suit to the General Cause List and affirmed the judgment of the trial court.**

2. Whether the learned Justices of the Court of Appeal were right by holding that the learned trial Judge exercised her discretion judiciously and judicially by failing to transfer the suit to the General Cause List when there was no basis for the exercise of that discretion.

3. Whether the learned Justices of the Court of Appeal were right in holding that the averments in paragraphs 3(c), (d),((((e), 4, 5 and 8 of the affidavit of Abubakar Mohammed in support of the Undefended List are not hearsay evidence and competent and dismissed the appeal.

A **4. Whether the learned justices of the Court of Appeal were right in holding that the reply brief properly filed by the appellants is superfluous in this case and failed to consider it."**

B

Learned Counsel for respondents, IKHIDE EHIGHELUA ESQ, in the respondents brief filed on 22/10/09 also identified four issues as arising from the grounds of appeal for the determination of the appeal. These are
C as follows:

"1. Whether a defendant who has no real defence to a suit under the Undefended List should be allowed to
D ***dribble, cheat and frustrate a plaintiff out of a judgment to which the plaintiff is legitimately entitled.***

2. Whether the learned Justices of the Court of Appeal
E ***were right in holding that the learned trial Judge exercised her discretion judiciously and judicially in entering judgment under the Undefended List in favour of the plaintiff/respondent.***

F

3. Whether the learned Justices of the Court of Appeal were right in holding that paragraphs 3(c) (d), (e), 4, 5 and 8 of the affidavit in support placing the suit on the
G ***Undefended List are tenable in law and therefore admissible in evidence.***

4. Whether the learned Justices of the Court of Appeal
H ***were right in not countenancing the reply brief of the appellants before the Court of Appeal."***

It should be pointed out that but for respondents' issue No. 1 all the other
I three (3) issues are very similar to the issues formulated by learned Counsel for appellants. For the purpose of this judgment, I will adopt the issues

formulated by learned Counsel for appellants particularly as respondents issue 1 does not appear to flow from the grounds of appeal.

Before going on to consider the issues on their merit, if need be, it is necessary to consider the preliminary objection of the respondents as argued in the respondents brief.

It is the contention of learned Counsel for the respondents that grounds 1, 2 and 3 of the notice of appeal are grounds of fact or at best grounds of mixed law and fact in respect of which no leave was sought and obtained before being filed and urged the court to strike out issues 1 and 2 formulated therefore.

On his part, learned Counsel for appellants submitted, in the reply brief filed on 15/12/09, that the complaint in ground 1 of the notice of grounds of appeal centres on the lower court's misunderstanding of the law or a misapplication of the provisions of Order 23 Rule 3(1) of the High Court of the Federal Capital Territory, Abuja (Civil Procedure) Rules 1989 applicable to Undefended List Proceeding thereby making the complaint one on law relying on First Bank of Nigeria Plc vs. Kayode Abraham (2008) 12 SCNJ 747 at 755. Bamgboye vs. University of Ilorin (1999) 6 SCNJ 295 at 302; A.C.B. Ltd vs. Gwagwade (1994) 4 SCNJ (pt. 11) 268 at 270; 277-278.

It is the further contention of learned Counsel for appellants that ground 2 of the grounds of appeal is a complaint on the wrong inference of law, misconception of law and misunderstanding of the law which make the ground a ground of law and urged the court to overrule the preliminary objection.

I have carefully gone through the grounds of appeal filed herein and note that the appeal arose from an action instituted under the Undefended List procedure as provided under Order 23 Rule 3(1) of the High Court of Federal Capital Territory (Civil Procedure) Rules 1989 which is a specialized procedure crafted to aid expeditious recovery of a debt or liquidated money demand particularly where the facts are not in dispute and it is apparent to the court that the defendant has no defence to the claim. From the grounds of appeal complained of it is clear that they are rooted on the provisions of the said Order 23 Rule 3(1) etc of the said Rules of court

and consequently grounds of law for which appellants need no leave of either the lower court or of this court prior to filing same.

When one looks at ground 3 of the grounds of appeals it is clear that the complaint, as crafted, is against the judicial and judicious exercise of discretion of the court by not agreeing with appellants to transfer the suit commenced under the Undefended List Procedure to the General Cause List for adjudication and determination. It is clearly a wrong judicious and judicial exercise of discretion which is a ground of law.

In the circumstances I find no merit whatsoever in the preliminary objection which is consequently dismissed.

On issue 1, it is the contention of learned Counsel for appellants that the lower court was in error when it delved into the issue of proof at the stage of determining whether appellant had disclosed a defence to the action to make it necessary for the suit to be transferred from the Undefended to the General Cause List and that the court wrongly affirmed the judgment of the trial court on the matter. It is the argument of Counsel that paragraph 18 of the affidavit of defence disclosed that the 2nd respondent had appellants cheques for telegraphic transfers and that the 2nd respondent wrote the particulars in the cheque – exhibit "A" particularly the name *"Mr. Ambile Amoaka" "10th December 2001." "Three Million Naira only" and "N3,000,000,00k"* as contained in paragraph 22 of the said affidavit which facts were not considered by the lower courts; that it was not expected, at the stage, for appellants to establish their case; that appellants also raised the defence of fraud and forgery; and filed a conditional appearance arising from substituted service of processes on appellants contrary to the provisions of section 78 of the Companies and Allied Matters Act, 1990 and relying on Mark vs Eke (2004) 5 NWLR (pt. 865) 54 at 60, 78- 79.

Learned Counsel urged the court to resolve the issue in favour of appellants.

On his part, it is the submission of learned Counsel for the respondents that the claim of the respondents before the trial court is on the Undefended List procedure and involves a liquidated money demand to which appellants had no disclosed defence, relying on Olusola Stores vs.

A Standard Bank (NIG) Ltd (1975) 4 S.C 51, (1975) All NLR 125, (1975) SCCC 137, John Holt & Co (Liverpool) Ltd vs Fujemirokun (1961) All NLR 513, that the lower courts made concurrent findings of fact that the affidavit of appellants did not disclose a defence to the action and urged the B court not to disturb same, relying on Ibikunle vs. State (2007) All FWLR (pt. 354) 209 at 238; Eholor vs. Osayande (1992) 6 NWLR (pt. 249) 524; Yusuf vs. Tohim (2008) All FWLR (pt. 437) 34 at 39.

It is settled law that Undefended List Procedure is designed and C adopted for speedy trial for the recovery of any debt or liquidated money demand, particularly, where it is clear to the court that the defendant has no defence on the merit for the claim of the plaintiff. Where a defendant is served with a writ of summons entered under the Undefended List together D with an affidavit deposed to by the plaintiff, as required by the Rules of court, and he desires to defend same, it is his duty to file a notice of intention to defend the suit together with an affidavit disclosing his defence on the merit of the claim for the liquidated money demand.

E On the return date, the duty of the court is to consider the affidavits of claim and defence in order to determine whether the defendant has disclosed any defence to the claim of the plaintiff so as to decide whether the action should be transferred to the General Cause List to be dealt with F according to the Rules of Court or enter judgment for the debt or liquidated money demand for the plaintiff, where it comes to the conclusion that no defence, on the merit has been disclosed in the affidavit of defence.

It is very clear from the above description that the decision of the trial G judge on the matter on the return date is strictly based on the facts as disclosed in the affidavits filed before him. The Judge cannot therefore go outside the affidavit evidence in determining the matter.

From the record, including the Judgments of the lower courts, the H case of the respondents, then plaintiffs, is to the effect that sometime in 2001, the 2nd and 3rd defendants/appellants while operating under the name of 1st appellant approached the respondents for a friendly loan of N3,000,000= and issued a post dated cheque drawn on Union Bank of I Nigeria Plc, exhibit "A" to the respondents; that the appellants also collected various other sums amounting to N655,000= only; that appellants

failed and or neglected to repay the loans inspite of demand.

On the other hand, the appellants denied that 1st appellant ever approached 1st respondent through the 2nd respondents for any loan of three million naira neither did 1st appellant enter into any loan agreement with the respondents; the 2nd appellant stated that sometime in the year 2000 she went to the 2nd respondent's office in Union Bank of Nigeria Plc, Ajaokuta branch and the cheque of the 1st appellant got missing so another cheque was issue for a transaction and that the 1st respondent is not known to the appellants; that the 2nd respondent lured the appellants to buy 17 plots of land at New Karu and Old Karu which turned out to be fake after collecting N1,775,000= as a result of which exhibit 5, a letter of demand was written to the 2nd respondent.

I need to re-emphasis the point that the Undefended List Procedure is fashioned to take care of cases relating to simple, uncontested debt or liquidated money demand or monetary claims. Where, however serious disputes arose in the affidavits on points of law relating to the claim(s), the trial court ought to exercise caution in entering judgment under the Undefended List Procedure and should transfer the matter from the Undefended List to the General Causes List to be dealt with by pleadings etc.

In the instant case, the trial court at pages 84 85 of the record found/held as follows:

> ***"The defendants have not successfully shown how the plaintiffs came about their cheque worth N3m.***
>
> ***The Defendant in their 40 paragraphs affidavit have brought in a lot of matters unrelated to the suit …..***
>
> ***The defendants have not disclosed sufficient defence on the merit to persuade the court to send this suit to the General Cause List."***

A On appeal against the above decision/finding, the lower court, in its judgment at page 127 of the record found/held thus:

B ***"I have looked at the affidavit filed by the appellants attached to the notice of intention to defend on the merits on pages 13-17 of the Record and I concluded that the facts amount to a mere denial of the respondents claim. This is no satisfactory***
C ***explanation as to why the 3rd Appellant issued the cheque Exhibit 'A'. Most of the facts deposed to are irrelevant and extraneous in terms of the matter before the trial court. The facts deposed to are equally frivolous they do not support or***
D ***disclose a clear dispute or any triable issue between the parties which would necessitate a full trial in the General Cause List. All the issues introduced about the relationship between the appellants and respondents are calculated to***
E ***delay the trial. It is my conclusion that the learned trial Judge had judiciously and judicially exercised her discretion in not acceding to transfer the suit to the generation cause list."***

F

It is the submission of learned Counsel for appellants in the reply brief filed on 15/12/09 that concurrent findings of the lower courts reproduced above are perverse as a result of a misunderstanding of the provisions of Order 23
G Rule 3(1) of the High Court of the Federal Capital Territory, Abuja (Civil Procedure) Rules 1989: that whereas the trial court held that appellants have not disclosed sufficient defence on the merits to persuade the court to send the matter to the General Cause List, the lower court held that there is
H no satisfactory explanation as to why the 3rd appellant issued the cheque exhibit 'A' that the affidavit of defence disclosed a defence to the claim of the respondents and urged the court to set aside the concurrent findings.

To begin with, I have carefully gone though the findings of the trial
I court and its affirmation by the lower court and find no difference, in substance, between the two as argued by learned Counsel for appellants in

the reply brief. The lower courts are emphatic that exhibit 'A', a post dated cheque of the appellants, is evidence of a transaction giving rise to the claim under the Undefended List and that appellants have not disclosed sufficient explanation by way of defence, as to the existence of appellants' cheque, exhibit 'A' in the possession of the respondents.

These findings, to me are concurrent on the fact that exhibit 'A' is appellants post dated cheque evidencing a loan transaction of N3 million between the parties. Being a document, it is the best evidence of the transaction it relates to.

My view that the findings by the lower courts are concurrent is re-inforced by the submission of Counsel for appellants in which he invited the court to interfere with same on the ground that the said findings are perverse!! The said submission can only be relevant if the findings it relates to are concurrent which learned Counsel had clearly admitted.

As stated earlier in the judgment, I have gone through the record and the judgment of the lower courts and have come to the conclusion that the above concurrent findings of fact by the lower courts are very much supported by the facts on record and are consequently not perverse.

It is now trite law, that an appellate court will not disturb concurrent findings of fact of the courts below unless there is substantial error apparent on the record of proceedings or are shown to constitute a miscarriage of justice or in any way amount to a violation of some principles of substantive law or procedure.

In the circumstance, I resolve issue 1 against appellants

On issue 2 which is:

Whether the learned Justices of the Court of Appeal were right by holding that the learned trial judge exercised her discretion judiciously and judicially by failing to transfer the suit to the General Cause List when there was no basis for the exercise of that discretion, it is clear that my consideration of issue 1 has disposed of issue 2 and in fact the other issues as formulated. Having agreed with the lower courts that exhibit 'A' is evidence of a debt owed by appellants to the respondents and that appellants have not disclosed any defence to a claim for its recovery which would have necessitated the trial court transferring the matter from the

Undefended List to the General Cause List for adjudication, it follows that the trial court's exercise of its discretion not to so transfer the matter but enter judgment for the respondents in the circumstances, is a judicious and judicial exercise of discretion which cannot be disturbed by this court.

It is therefore my considered view that the decision reached in issue 1 is the pivot on which the case of appellants rests and the courts haven held that appellants have no defence to the claim as constituted, the matter ends there. In the circumstance, I hold that issues 2, 3 and 4 be and are hereby discountenanced.

In conclusion, I find no merit whatsoever in this appeal which is accordingly dismissed with costs of N250,000= in favour of the respondents and against appellants.

Appeal dismissed.

Hon. Justice Walter S.N. Onnoghen, GCON
Chief Justice of Nigeria

KEKERE-EKUN, (JSC): I have had the benefit of reading in draft, the judgment of my learned brother, WALTER SAMUEL NKANU ONNOGHEN, CJN just delivered. I agree with the reasoning and conclusion that the appeal is devoid of merit and should be dismissed.

The essence of the Undefended List Procedure in the civil procedure rules of the various High Courts throughout Nigeria, including Order 23 Rule 3(1) of the High Court of the Federal Capital Territory (Civil Procedure) Rules 1989, is to allow a claimant obtain quick justice in respect of a debt or liquidated sum where the facts are clear and there is no genuine defence to the claims. It allows a court to enter judgment in favour of the claimant instantly without the need to go the whole hog of a full trial and the calling of witnesses. It is a veritable tool that saves judicial time and expense. However, where a defendant seeking to have the suit transferred to the General Cause Lists deposes to facts, which are contentions, the suit would be transferred to the General Cause List to be dealt with on the merits in the normal way. **See: Obitude vs. Onyesom Community Bank Ltd. (2014) 9 NWLR (Pt. 1412) 353 @ 389 – 390 F-H; Macaulay vs. NAL Merchant Bank Ltd. (1990) 4 NWLR (Pt. 144) 283; Imoniyame**

Holdings Ltd. & Anor. vs. Soneb Enterprises Ltd. (2010) 4 NWLR (Pt. 1185) 561; Sodipo vs. Leminkainen OY & Ors (1986) 1 NWLR (Pt. 15) 2200.

In order to convince the court to transfer the suit to the General Cause List, the defendant must, in his affidavit disclosing a defence, among other things "condescend upon particular" and deal specifically with the plaintiff's claim by stating clearly and concisely what the defence is and the facts relied upon in support. He must show that he has a *bona fide defence* to the claim. **See: Nishizawa Ltd. vs. Jethwani (1984) 12 SC 234 @ 260; Adegoke Motors Ltd. vs. Adesanya (1989) 3 NWLR (Pt. 109) 250 @ 271 -272 H-A; U.T.C. (Nig.) Ltd. vs. Pamotei (2002) FWLR (Pt. 129) 1557; (1989) 2 NWLR (Pt. 103) 244.**

The effect of these principles is that a trial Judge has the discretion, which no doubt must be exercised judicially and judiciously, to determine whether on the facts deposed to by the defendant, he has disclosed a defence on the merit to warrant the transfer of the suit to the General Cause List.

In the instant case, the plaintiff's (respondents') claim against the defendants (now appellants) was for the sum of N3,655,000 being the amount of a friendly loan of N3 million given to the defendants by the plaintiffs and another loan of N655,000. They relied on a post-dated cheque for the sum of N3,000,000 issued by the defendants in settlement of the debt, which bounced.

It is true that the appellants deposed to a 40-paragraph affidavit in support of their notice of intention to defend the suit. The learned trial Judge examined it and rightly came to the conclusion that the post-dated cheque, Exhibit A constituted evidence of a transaction between the parties and that the averments in the affidavit in support of the notice of intention to defend were extraneous matters unrelated to the suit. In other words, the appellants failed to convince the court that they had a defence to the suit. Although the claim for an additional loan of N655,000 was found not to have been proved, the court has rightly satisfied that there was no defence to the claim for N3 million and entered judgment in the respondents' favour accordingly.

A The court below found no reason to disturb the finding. I agree with my learned brother in the lead judgment that the appellants have equally failed to persuade this court to interfere with those concurrent findings, which have not been shown to be perverse.

B In the circumstances, I also dismiss this appeal as lacking in merit and affirm the judgment of the court below. Costs of N250,000 are awarded in favour of the respondents against the appellants.

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

EJEMBI EKO, (JSC): The respondents, as the plaintiffs at the trial court, had averred in the affidavits in support of their suit on the
D Undefended List that on the appellant's request they advanced various sums, including N3,000,000.00 as a friendly loans to the appellants. And that appellants issued a post dated cheque, Exhibit A, in acknowledgement of their indebtedness in the sum of N3,000,000.00 to the respondents. They
E failed to pay within the time specified. A letter of demand, Exhibit B, was then written to the appellants, who still failed, neglected and or refused to pay.

Exhibits A and B were evidence of the indebtedness of the appellants
F to the respondents in the said sum of N3,000,000.00 and their failure to pay back on demand.

The appellants filed Notice of Intention to defend supported by a forty (40) paragraph affidavit. The trial court and the Court of Appeal
G found that the affidavit failed to disclose any reasonable defence on the merit, and that it contained irrelevant and extraneous matters which are frivolous and unrelated to the suit. These are concurrent findings of fact which this Court is loathe to disturb.

H The court below has specifically found that the appellants gave no satisfactory explanation as to why the 3rd Appellant issued the cheque, Exhibit A. A cheque is not an ordinary business card. In his book: Law and Practice of Banking, J. Milnes Holden defines a cheque as, "an
I unconditional order in writing addressed by one person to another, who must be a banker signed by the person giving it, requiring the banker to pay

on demand a sum certain in money to or to the order of a specified person or to bearer". *See also Black's Law Dictionary 9th Edition.*

In my firm view, there was a transaction between the parties herein, and the cheque, Exhibit A, is *prima facie* evidence that the sum therein had been committed to be paid to the drawee by the drawer. There is no evidence that the said sum had been paid to the drawee. The burden of satisfactorily explaining why the commitment to pay the N3,000,000.00 on the cheque was made remained on the appellants to discharge. The burden was not discharged.

The sham and frivolous defences offered by the appellants were, in the concurrent findings of the two courts, dismissed as irrelevant, extraneous and totally unrelated to the claim of the respondents against them. I cannot fault these lucid findings of fact.

I concur in the lead judgment just delivered by my learned brother WALTER ONNOGHEN, CJN. I hereby adopt the judgment, including all the orders therein, as I also dismiss the appeal.

Ejembi Eko,
Justice, Supreme Court

DAUDA BAGE, (JSC): My lord, Hon. Justice W.S.N. Onnoghen, The Chief Justice of Nigeria, had obliged me with the copy of this Judgment in draft form, before now, and just delivered. I agree with all the reasoning and conclusion contained therein. I do not have anything useful to add. I dismiss the appeal for lacking in merit, and affirm the Judgment of the Court below. I abide by the order as to costs contained in the Lead Judgment.

Sidi Dauda Bage,
Justice, Supreme Court

MRS. UJU B. OSUDE
AND
1. MRS. EUCHARIA AZODO
2. PEOPLES DEMOCRATIC PARTY (PDP)
3. INDEPENDENT NATIONAL ELECTORAL COMMISSION (INEC)

SC. 921/2015

IN THE SUPREME COURT OF NIGERIA
HOLDEN AT ABUJA

FRIDAY, 7TH APRIL, 2017

BEFORE THEIR LORDSHIPS

OLABODE RHODES-VIVOUR	**JUSTICE, SUPREME COURT**
CLARA BATA OGUNBIYI	**JUSTICE, SUPREME COURT**
CHIMA CENTUS NWEZE	**JUSTICE, SUPREME COURT**
AMIRU SANUSI	**JUSTICE, SUPREME COURT**
PAUL ADAMU GALINJE	**JUSTICE, SUPREME COURT**

ACTION: Preliminary objection – Where filed to challenge an action – Approach of court thereto.

APPEAL: Concurrent findings of two courts – Attitude of the Supreme Court thereto.

APPEAL: Ground of appeal – Issue of jurisdiction – Where arises from an incompetent ground – Whether……..can consider therewith.

CASE LAW: Principles in ***Lokpobiri Vs. Ogola (2016) 3 NWLR (Pt. 1499) 328.***

COURT: Issues of jurisdiction – Approach of court thereto – Whether issue

can be raised suo motu – Relevant principles.

COURT: Jurisdiction – Selection and nomination of a candidate of a political party for election – S. 87(9) and 87(4) of the Electoral Act 2010 – Powers of court thereto.

COURT: Jurisdiction of the Federal High Court – How determined – Whether it is the nature of the plaintiff's claims and not the nature of parties before the court that determines the jurisdiction thereof.

COURT: Role in adversary system of justice – Passive nature thereof – Whether Counsel plays an active role – Need to place all issues and materials before court for its adjudication.

ELECTION: Submission of candidate to INEC – Where a candidate emerges successful in the primary of a political party – Whether it is mandatory that his name shall be forwarded to INEC – Whether there are any exceptions thereto – S. 35 and 36 of the Electoral Act 2010 – Relevant considerations thereof.

ELECTION: Submission of name of candidate to INEC – Where a candidate emerges successful in the primary of a political party – Whether it is mandatory to submit only his name to INEC – S. 87(4) of Electoral Act 2010 – Relevant considerations thereof.

STATUTE: Electoral Act – Where a candidate of a political party complains of irregular conduct of primaries contrary to any provision of the Electoral Act 2010 or guidelines of a political party – Whether State High Court or Federal High Court has jurisdiction thereto – S.87(9) of the Electoral Act 2010 – Extent and scope thereof.

STATUTE: Electoral Act 2010 – Exceptions to the general rule that only the name of a candidate who emerges winner in a primary election of a political party shall be forwarded to INEC – S. 35 and 36 of the

Electoral Act 2010 – Extent and scope thereof.

STATUTE: Electoral Act – Where a candidate emerges winner of a primary election of a political party – Whether it is mandatory that only his name and no one else shall be submitted to INEC – S.87(4) of Electoral Act 2010 – Extent and scope thereof.

Issue for Determination

Whether the lower court has no jurisdiction to hear this case and that the question of the failure of the trial court to transfer the case after declining jurisdiction to appropriate court was a fresh issue that required leave to raise it on appeal.

Facts of the Matter

The appellant herein was a candidate in the primary election of Peoples Democratic Party (PDP), which was conducted on the 7th December, 2014, for the selection of its candidate for House of Representative representing Aguata Federal Constituency of Anambra State. She and others including the 1st respondent herein contested the primary election. At the end of the primary election, the appellant who claimed to have won the said primary election started hearing rumour that it was the 1st respondent's name that the PDP was proposing to send to the Independent National Electoral Commission (INEC) as the candidate of the 2nd respondent. She conducted an investigation and found that the rumour was true. She therefore took out a writ of summons at the Federal High Court, Awka, in which she claimed the following reliefs:

A. A declaration of court that the plaintiff who had contested and polled a majority of 42 out of the 60 votes cast in the primary election to elect the candidate of the 2nd defendant to represent her in the National Assembly for Aguata Federal Constituency Anambra State is the

proper person whose name should be forwarded by the aforementioned 2nd defendant to the 3rd defendant as its candidate in the 2015 general election and not the 1st defendant

B. A declaration of the court that the 2nd defendant's act in forwarding the 1st defendant's name to the 3rd defendant in the circumstances is invalid, ineffectual, null and void.

C. A declaration of court that the person entitled to contest in the election i.e. 2015 general election to elect the member to represent Aguata Federal Constituency in the National Assembly is the plaintiff and so that wherever the name of the 1st defendant appears in the record of the 3rd defendant as the candidate of the 2nd defendant in the election, that the same be regarded as or deleted to make way for the name of the plaintiff.

D. A declaration of court that the plaintiff is the person entitled to campaign in the election and as it were participate in all stages of the election 2015 to elect the member representing Aguata Federal Constituency in the National Assembly of the Federal Republic of Nigeria.

E. An order of injunction compelling the 2nd and 3rd defendants henceforth to treat the plaintiff as the candidate of the 2nd defendant in the election to elect the member of the National Assembly for Aguata Federal Constituency, Anambra State and the 3rd defendant to accord the said plaintiff the rights, privileges and perquisites of a candidate for the 2nd defendant in the

2015 general election and for the Aguata Federal Constituency, Anambra State, including to campaign in the election as such candidate of the party.

Appellant's writ was filed along with her statement of claim. After filing the necessary papers, the three respondents herein, as defendants at the lower court, filed separate applications in which they raised objection to the jurisdiction of the Federal High Court. This objection was forcefully contested by the appellant. In its ruling, the trial court held:

"The principal complaint of the plaintiff being that of unlawful substitution by her political party per se, not being a complaint directly against the "validity of any executive or administrative action or decision by the Federal Government or any of its agencies," her suit ought not to have been instituted in this court in view of the provisions of Section 251 (1)(r) of the Constitution (supra). This court lacks the requisite jurisdiction to determine her suit. The 2nd defendant's preliminary objection therefore succeeds and the plaintiff's suit liable to be struck out. Before doing that however I should point out that having determined the second defendant's preliminary objection as I just did, there is no need to further indulge in any further determination of both the plaintiff's motion for interlocutory injunctions and the other motions of preliminary objections by the 1st and 3rd defendants. The suit is struck out."

The appellant's appeal to the Court of Appeal, Enugu Division, was dismissed in a reserved and considered judgment which was delivered on the 6th of November, 2016.

The appeal herein is against the decision of the Court of Appeal, Enugu Division.

Held: *(Unanimously allowing the appeal)*

1. *A preliminary objection has to be determined first*

It is settled that where a preliminary objection is raised to the competence of an appeal, the objection has to be determined first. *See* Onyekwuluje Vs. Animashaun (1996) 3 NWLR (Pt. 439) 637; Uwazurike Vs. A-G Federal (2007) 8 NWLR (Pt. 1035) 1; SPDCN Ltd. Vs. Amadi (2011) 14 NWLR (Pt. 1266) 157; FBN Plc. Vs. T.S.A. Ind. Ltd. (2010) 15 NWLR (Pt. 1216) 247; Okereke Vs. James (2012) 16 NWLR (Pt. 1326) 339.

The 3rd respondent's objection to the 6th ground of appeal has been overtaken by the striking out of the said ground of appeal by this court. Also the 2nd issue for determination of this appeal was withdrawn by the learned counsel for the appellant when this appeal came up for hearing and same was accordingly struck out. Learned counsel for the 3rd respondent's argument in respect of the objection to the 6th ground of appeal and the 2nd issue for determination of this appeal is no longer relevant and deserves no consideration by this court, since doing so will amount to an academic exercise. Now with the striking out of the 2nd issue, the 1st issue for determination can now be accommodated by the 1st and 2nd grounds of appeal. I find the preliminary objection irrelevant and same is accordingly struck out. *(P 151 paras D – H)*

2. *Issues not raised at the trial court cannot be raised on appeal without leave*

The appellant admitted in his brief of argument that the issue of transfer of the suit raised in ground 2 was never raised and considered by the trial court. However his argument that the issue of transfer of the matter formed part of the decision of the trial court is hinged on the mandatory nature of Section 22 (2) of the Federal High Court Act. This to me sounds ridiculous. In this country, we operate the adversary system. The major feature of this system is the passive and inactive role of the judge in the presentation of cases in court.

The judge is at best an attentive listener to all that is said on both sides, since he is not an investigator. He speaks mainly to deliver judgments. This passive role of the judge emphasizes the active role of counsel for the parties who must place before the judge all the materials required for proper justice delivery. Indeed where parties have failed to raise issues and cite authorities in support for the consideration of the trial judge, they cannot suddenly raise those issues that were not raised at the trial on appeal and blame the trial court for failure to raise them. *(P 153 Paras A – E)*

Per Galinge (JSC)

"The law is settled that an appellant will not be allowed to raise on appeal a question which was not raised or tried or considered by the trial court, except where the question involves substantial points of law, substantive or procedural and it is plain that no further evidence could have been adduced which would affect the decision on them, the court will allow the question to be raised and the points taken in order to prevent an obvious miscarriage of justice." ***See*** **Apene Vs. Barclays Bank of Nigeria & Anor (1977) 11 NSCC 29; Shonekan Vs. Smith (1964) ALL NLR 168; Ogba Vs. Onwuzo (2005) 14 NWLR (Pt. 945) 331 at 344; Enang Vs. Adu (1981) 11-12 SC 25; Ezekude Vs. Odogwu (2002) 13 NWLR (Pt. 784) 366; Salati Vs. Shehu (1986) 1 NWLR (Pt. 15) 198; Raimi Vs. Akintoye (1986) 3 NWLR (Pt. 26) 97."** *(P 153 Paras E – H.)*

3. *With exception in few cases, leave of court must be sought before a fresh issue is raised on appeal*

It is very clear that, by the expression that the court will allow, is a strong directive that the leave of the court must be sought and obtained before any fresh issue of law whether substantive or procedural will be raised on appeal. The only exception to this rule is when the fresh issue concerns the jurisdiction of the lower court, a party raising it needs no leave of the court, in the instant case, since

both parties have admitted that the issue of transfer of this case was not raised and considered at the lower court, the appellant as of necessity required leave to raise it at the lower court as the issue of transfer of a case was not raised and considered at the lower court, the appellant as of necessity required leave to raise it at the lower court as the issue of transfer of a case has nothing to do with the jurisdiction of the lower court. The lower court in my view rightly stuck out the 2nd ground of appeal before it as it complained about the non-transfer of the case by the trial court. For avoidance of doubt the 2nd ground of appeal before the lower court without its particulars is reproduced thus:

> **"The learned trial judge erred in law when he had proceeded to strike out the case instead of transferring the case to the court that he felt had jurisdiction to hear the case."**

The next question is whether the lower court has the jurisdiction to hear and determine this case? The issue of jurisdiction was raised in the 1st ground of appeal at the lower court. The only issue that was canvassed at the lower court was formulated from the competent ground 1 and the incompetent ground 2 which was rightly struck out by the lower court. *(P 153 paras H – E)*

4. *Court will consider the issue of jurisdiction even when evolved from an incompetent ground of appeal*

Although the lower court struck out that issue for being incompetent and dismissed the appeal, it nonetheless went on to consider the issue of jurisdiction on its merit, since it is not the final court. I think this is commendable, as the question of jurisdiction can even be raised verbally and even by the court suo motu at any stage of the proceeding. The fact that a competent ground of appeal is lumped with an incompetent ground in an issue for determination will not constitute a ground for ignoring the jurisdictional question. This is

so because jurisdiction is the soul of any action. *See* UTIH & Ors Vs. Onoyvwe & Ors (1991) 1 SCNJ 25; (1991) 1 NWLR (Pt. 166) 166. *(P 154 Paras F – H.)*

Per Galinge (JSC)

"The decision in Lokpobiri Vs. Ogola (supra) was delivered after the decisions in PDP Vs. Sylva (supra) and KAKIH Vs. PDP. This court, apart from correcting the defect in the decisions of the lower court, has the onerous responsibility of correcting itself, since it is the Apex Court and there is no other court to which its errors can be submitted for correction. It follows therefore where its later decisions are at variance with its previous decisions, it means that the previous decisions have been overruled to the extent of the variation. Learned counsel for the respondents in this appeal seems to have paid more attention to the previous decisions of this court which seem to be at variance with the latest decision in Lokpobiri Vs. Ogola (supra). This I think is a wrong posture and ought to be discouraged. The decision in Lokpobiri Vs. Ogola (supra) is very clear, and that is that the Federal High Court have jurisdiction in respect of the matters provided for under Section 87(9) of the Electoral Act, 2010." *(P 156 paras C – G)*

(5) The nature of the claim and not the parties determine jurisdiction of Court.

The jurisdiction of the Federal High Court or any court at all is determined by the nature of the claim before the court and not the parties. In NEPA Vs. Edegbero & Ors (2002) 18 NWLR (Pt. 798) 79, the respondents were employees of the appellant, NEPA. Following an industrial action embarked upon by the employees of the appellant including the respondents, the respondents' appointments were terminated. The respondents instituted various suits against the appellant which were consolidated. It was contended at the High Court that the High Court had no jurisdiction to entertain the case

since NEPA was an agent of the Federal Government. Reference was made to Section 230(1)(a)(r) and (s) of the 1979 Constitution of the Federal Republic of Nigeria as amended by Decree 107 of 1993, which is in pari materia with Section 251(1)(c)(r) and (s) of the 1999 Constitution of the Federal Republic of Nigeria as amended. High Court overruled the objection on jurisdiction. The appeal to the Court of Appeal was dismissed. On further appeal to this court, it was held:

> **"It is not in dispute that the defendant NEPA is a Federal Government Agency, the two courts below made a finding of fact to this effect and this has not been challenged by the plaintiffs. It is also not disputed that the cause of action in this matter arose out of the administrative action or decision of the defendant.....**
>
> **A careful reading of paragraphs (9) (R) and (S) reveals that the intention of the law makers was to take away from the jurisdiction of the State High Court and confer same exclusively on the Federal High Court actions in which the Federal Government or any of its agencies is a party."**

In a later decision of this court in Onuorah Vs. KRPC (2005) 6 NWLR (Pt. 921) 393, where it was contended before this court that the Kaduna Refinery and Petrochemical Company (KRPC) being a subsidiary of NNPC, which in turn is an organ of the Federal Government and therefore the Federal High Court had jurisdiction to entertain the appellant's suit, it was held that the trial Federal High Court lacked jurisdiction to entertain the appellant's suit because it was based on simple contract and that only a State High Court has jurisdiction to entertain such claim. The court further held that when the jurisdiction of a court over a suit is challenged the court is entitled to consider the plaintiff's claim before it in order to

decide whether it has jurisdiction to entertain it *See* Izenkwe Vs. Nnadozie (1953) 74 WACA 361; Adeyemi Vs. Opeyori (1976) 9-10 SC 31; Tukur Vs. Government of Gongola State (1989) 4 NWLR (Pt. 117) 517; A-G Kwara State Vs. Olawale (1993) 1 NWLR (Pt. 272) 645; Isaac Obiuweubi Vs. CBN (2011) LPELR – 2185.
(Pp 156 – 158 Paras G – A.)

Per Galinge (JSC)

*"***The law at the moment is that it is the claim of the appellant that determines the jurisdiction of the court before which the action is pending. In the instant case, the claims of the appellant before the lower court did not attack the conduct of the primary election in which he participated. According to the evidence available, the appellant's quarrel was with the PDP that refused to send his name to the 3rd respondent, but sent the name of the 1st respondent who according to him did not win the primary election. The appellant has clearly admitted that the primary election was successfully conducted and the result announced wherewith he polled a majority of 42 out of the 60 votes cast in the primary election to elect the candidate of the 2nd respondent."** *(P 158 paras A – C.)*

6. *The court has jurisdiction to ensure that political parties comply with the issue of nomination in accordance with relevant provisions of the Electoral Act and guidelines of political parties*
The provisions of Section 87 of the Electoral Act 2010 as reproduced above are very clear and hold no ambiguity that will require any interpretation. It is mandatory for political parties to forward only names of the candidates who win their primaries. This is clearly a provision of Electoral Act which is justiciable under Section 87(9) of the Electoral Act. In Uzodinma Vs. Izunaso (No. 20) (2011 17 NWLR (Pt. 1275) 30 at 60 paragraph B.E, this court, per Rhodes-Vivour, JSC. said:

"The nomination of a candidate to contest an election is the sole responsibility of the political party concerned. The courts do not have jurisdiction to decide who should be sponsored by any political party as its candidate in an election. But where the political party nominates a candidate for an election contrary to its own constitution and guidelines a dissatisfied candidate has every right to approach the court for redress. In such a situation, the courts have jurisdiction to examine and interpret relevant legislations to see if the political party complied fully with legislation on the issue of nomination. The courts will never allow a political party to act arbitrarily or as it likes. Political party must obey their own constitution and once this is done there would be orderliness, and this would be good for politics and the country." *(P 159 Paras C – I.)*

Per Galinje (JSC)

"The only instance where the name of a candidate other than the candidate that won the primary will not be forwarded to INEC, is where the candidate that won the election withdraws his candidature by notice in writing signed by him and delivered by himself to the political party that nominated him for the election, or where he dies before his name is submitted to INEC or after the name has been submitted and before the elections. See Sections 35 and 36 of the Electoral Act 2010. These substitutions must follow due process.

In the instant case, the complaint is that Section 87(4)(c)(i)(ii) was not complied with. This complaint falls squarely within the provision of Section 87(9) of the Electoral Act, which I have reproduced elsewhere in this judgment. The Federal High Court has the requisite jurisdiction to hear and determine this case. The lower court was therefore wrong when it affirmed the decision of the Federal High Court, Awka.

For all I have said, the sole issue identified by me is resolved in favour of the appellant and against the respondents. In the result this appeal shall be, and it is hereby allowed. The cost of prosecuting this appeal is assessed at N300,000.00 against the 1st and 2nd respondents and in favour of the appellant. It is also ordered that the trial proceeds forth with at the Federal High Court, Awka." *(P 160 paras A – E.)*

Per Rhodes Vivour (JSC)

"By virtue of Section 87 (4) (c) (ii) of the Electoral Act, the 2nd respondent was wrong not to have forwarded the name of the appellant to INEC. Since the appellant complains that Section 87 (4) (c) (ii) of the Electoral Act was not complied with by the 2nd respondent in the selection or nomination of its candidate for the House of Representatives elections the appellant can file an action to seek redress in the Federal High Court, or a High Court of a State or High Court of the Federal Capital Abuja, as provided by Section 87 (9) of the Electoral Act. ***See*** **Gbileve Vs. Addingi (2014) 16 NWLR (Pt. 1433) pg 394 paragraph 394.**

Section 251 (i) of the Constitution reads:

> **251 (i) Notwithstanding anything to the contrary contained in this Constitution and in addition to such other jurisdiction as may be conferred upon it by an Act of the National Assembly, the Federal High Court shall have and exercise jurisdiction to the exclusion of any court in civil causes and matters:**

The Federal High Court has exclusive jurisdiction to the exclusion of any other court for the items listed under subsection (a) (s) of

Section 251 of the Constitution. Indeed section 87 (9) of the Electoral Act is an added jurisdiction conferred by the National Assembly on the Federal High court to hear actions from an aspirant who complains that any of the provisions of this Act (in this case Section 87 (4) (2) (ii) was not complied with in the selection or nomination of the 2nd respondents candidate for the House of Representatives election. It is blindingly clear that the Federal High Court has jurisdiction to hear the appellant's case. The trial court was wrong to decline jurisdiction to hear the appellant's case and the Court of Appeal was also wrong to affirm that decision. *(Pp 161 – 162 paras H – G)*

Per Ogunbiyi (JSC)

"The appellant's grouse is not that the party's primary election was not properly conducted or that the result of the primaries did not reflect the primaries held. Rather, her complaint is basically that her name was dropped by her political party after she had been nominated by the party. Hence the genesis of the action before the trial Federal High Court. The facts and all the claims related thereto, this appeal, are well spelt out in the lead judgment. I do not consider it necessary to repeat same.

The central issue to this appeal questions the jurisdiction of the Federal High Court to entertain the subject matter. In other words, whether the lower court was right when it affirmed the trial court which declined its jurisdiction to entertain the appellant's case?
It is pertinent to state that the two lower courts are concurrent in their decisions. The principle of law is well established that this court will not normally interfere with such a decision unless special circumstances are shown, such as violation of some principle of law, or procedure or where such findings are shown to be perverse or erroneous and a miscarriage of justice. *See* the cases of R Benkay Nigeria Ltd. Vs. Cadbury Nigeria Plc. (2012) All FWLR (Pt. 631) page 1450 at 1467; Ogundule Vs. Chief Olabode (1973) 2 SC 71;

Balogun Vs. Akanji (1988) 1 NWLR (Pt. 70) 301; Gbafe Vs. Gbafe (1996) 6 NWLR (Pt. 455) 417 at 436 and Adaku Amadi Vs. Edward Nwosu (1992) 5 NWLR (Pt. 241) 273." *(P 163 paras B – G)*

7. *The jurisdiction of the Federal High Court in pre-election matters is rooted in the Electoral Act 2010*

Central to this appeal is the case of Lokpobiri Vs. Ogola (2016) 3 NWLR (Pt. 1499) 328 wherein His Lordship Onnoghen, JSC (as he then was) had this to say on the jurisdiction of the Federal High Court in election cases.

> ***"To me it is erroneous to say that for the Federal High Court to entertain a pre-election matter, the main relief(s) must be shown to fall within the exclusive jurisdiction of the court because both jurisdictions are different. In a concurrent jurisdiction, if court "A" has jurisdiction to hear all the reliefs claimed, it necessarily follows that court "B" must have the same jurisdiction otherwise, it means giving something to someone with one hand and taking it away with the other hand. ..... In terms of election or election related matters, the jurisdiction of the Federal High Court to hear and entertain such matters is rooted in the relevant provisions of the Electoral Act, 2010 (as amended) earlier reproduced in this judgment. In respect of matters relating to post election jurisdiction of the court, see Section 251(4) of the 1999 Constitution, (as amended) also supra. If we insist on the jurisdiction of the Federal High Court on pre-election and/or post-election matters being exercisable only where the main claim(s) is/are within the exclusive jurisdiction of the Federal High Court, it will result in injustice on the litigants which is clearly not the intention of the legislature. It is therefore very clear that the concurrent jurisdiction conferred on the Federal High Court to hear and***

determine pre-election and even post-election matters is clearly outside the exclusive jurisdiction of the court under Section 251 of the 1999 Constitution (as amended) but in addition to the said exclusive jurisdiction and consequently subject to different considerations."

"It is therefore my considered opinion when the Federal High Court's pre-election jurisdiction is invoked, the parties claim(s) and relief(s) must be in conformity with the provisions of the Electoral Act, 2010 (as amended) not under the provisions of Section 251 of the 1999 Constitution, (as amended). In fact, INEC may be a nominal party or liable to an ancillary claim in a pre-election or post-election jurisdiction of the Federal High Court."

On the provision of Section 87(9) of the Electoral Act and also relying on the said foregoing authority of Lokpobiri Vs. Ogola (supra) it is firmly established that the Federal High Court has jurisdiction to hear a pre-election matter relating to non-compliance with the provision of Section 87 (4) of the Electoral Act 2010 (as amended). (The provisions of Section 87 (4) and (9) are reproduced in the lead judgment). *(Pp 163 – 165 paras G – B)*

Per Nweze (JSC)

"As it is well-established, this court is, always, loathe to interfere with concurrent decisions of lower courts, Woluchem Vs. Gudi (1981) 5 SC 291, 326; Ike Vs. Ugboaja (1993) 6 NWLR (Pt. 301) 539, 569; Chinwendu Vs. Mbamali (1980) 3-4 SC 31; Enang Vs. Adu (1981) 11-12 SC 25, 42; Nwadike Vs. Ibekwe (1987) 4 NWLR (Pt. 67) 718; Igwego Vs. Ezeugo (1992) 6 NWLR (Pt. 249) 561, 576; Lamai Vs. Orbih (1980) 5-7 SC 28.

However, where as in instant case, the said concurrent findings are unsound, that would be a ground for this court's intervention, Ogbu Vs. State (1992) 8 NWLR (Pt. 259) 255; Igago Vs. State (1999) 14 NWLR (Pt. 637) 1; Adeyemi Vs. The State (1991) 1 NWLR (Pt. 170) 679; Adeyeye Vs. The State (2013) LPELR 1991 (SC) 46; Akpabio Vs. State (1994) 7 NWLR (Pt. 359) 635; Ejikeme Vs. Okonkwo (1994) 8 NWLR (Pt. 362) 266.

Such is the situation in the instant appeal. The lower courts took erroneous views of the intendment and letters of Section 87 (9) of the Electoral Act, 2010 (as amended). As such, they came to the wrong conclusion that the Federal High Court was not clothed with the requisite jurisdiction to entertain this matter.

True, indeed, Section 87 (9) (supra) does not grant sundry interlopers the *carte* blanche to query party primaries, Anyanwu Vs. Ogunenwe (2014) 8 NWLR (Pt. 1410) 437; Uzodinma Vs. Izunaso (2011) 17 NWLR (Pt. 1275) 28; Emenike Vs. PDP (2012) 5 NWLR (Pt. 1294-555; Emeka Vs. Okadigbo (2012) 18 NWLR (Pt. 1331) 55. However, in the instant case, the appellant (as Plaintiff) claimed to have "... contested and polled a majority of votes cast in the primary election to elect the candidate of the (PDP) ...." In effect, she was a candidate in the said primary election of her party, the PDP. Being a candidate, therefore, her case came within Section 87 (9) (supra) which is intended to vouchsafe to actual applicants, like herself, who participated in their party primaries, the right to impugn the conduct of such primaries for non-compliance with the provisions of the Electoral Act and Guidelines of their parties, Emenike Vs. PDP (supra); Emeka Vs. Okadigbo (supra); Uzodinma Vs. Izunaso (supra); Anyanwu Vs. Ogunewe (supra). *(Pp 165 – 166 Paras E – D)*

Per Sanusi (JSC)

"Admittedly, courts have no jurisdiction to pugnose into issue of nomination of candidate for an election by a political party since it is within the powers of the political party to take care of that. However, courts are vested with limited jurisdiction by the provisions of Section 87(4) (b) (ii) (c) and subsection (1) of Section 87 of the Electoral Act 2010 (as amended) to assume jurisdiction if such primaries were not conducted by the proper authority of the political party e.g. State Committee of the party rather than the National Executive Committee of the party. For instance, if the primary election was not conducted by the National Executive Committee, any party aggrieved can seek redress in court for the upturning of the result of the primary election. *See* Emeka Vs. Okadigbo (2012) 18 NWLR (Pt. 1331) 55; Emenike Vs. PDP (2012) 5 NWLR (Pt. 1294) 555; Onuoha Vs. Okafor (1983) 2 SCNLR 244. But if a candidate took part in primary election organized by State Executive Committee of his party then he is deemed not to be a participant hence court will have no jurisdiction to inquire into his grievances.

Thus by virtue of the provisions of Section 87 (9) of Electoral Act 2010 (as amended), an aspirant can surely institute a pre-election action to complain that certain provision(s) of the Electoral Act 2010 (as amended) and the guideline of his political party was not complied with in the selection or nomination of the party's candidate. *See* Kolawole Vs. Folusho (2009) 8 NWLR (Pt. 1143) 338; Ardo Vs. Nyako (2014) 10 NWLR (Pt. 1416) 591 at 634-635; Zaranda Vs. Tilde (2008) 10 NWLR (Pt. 1014) 184. Now in this instant case, the appellant being a member of the 2nd respondent (PDP) having followed and crossed all the necessary hurdles and was allowed by her party the PDP, to participate as one of the candidates to contest the primary election conducted by the National Executive Committee of her party has no doubt qualified

as "an aspirant" at the said primary election. After the conduct of the election she emerged as winner of same but was substituted with another person i.e. 2nd respondent who did not win the said election. To my mind, she has the *locus standi* to approach the trial court to ventilate her grudges or complaints. The trial court on the other hand is clothed with jurisdiction in the light of the clear and unambiguous wordings of the provisions of Section 87 (9) of the Electoral Act 2010. It is wrong for the trial court to decline jurisdiction. Similarly the learned justice of the court below fell into same trap by finding that the trial court was bereft of jurisdiction.

I am not mindful of the concurrent findings of the two lower courts with regard to their declining of jurisdiction to hear and determine the appellant's complaints.

It is an age long principle of this court that this court is always hesitant to interfere or disturb the concurrent findings or decisions of two lower courts. *See* Igwego Vs. Ezeugo (1992) 6 NWLR (Pt. 249)561; Nwadike Vs. Ibekwe (1987) 4 NWLR (Pt. 67) 718; Enang Vs. Adu (1981) 11/12 SC 25 at 42.

Be that as it may, this court however reserves the right to disturb or interfere with concurrent finding of two lower courts if it finds such decisions to be perverse or there is misconception of the law. *See* Adeyeye Vs. The State (2013) LPELR 199 13 (SC) 46; Adeyemi Vs. The State (1991)1 NWLR (Pt. 170) 679; Ejikeme Vs Okonkwo (1994) 8 NWLR (Pt. 362) 266. *(Pp 167 – 168 parasD – H.)*

Nigerian cases cited in the Judgment

Adaku Amadi Vs. Edward Nwosu (1992) 5 NWLR (Pt. 241) 273;
Adesola Vs. Abideye (1999) 10-12 SC 109;
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Nwadike Vs. Ibekwe (1987) 4 NWLR (Pt. 67) 718;
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Ogbu Vs. State (1992) 8 NWLR (Pt. 259) 255;
Ogola Vs Lokpobiri (supra);
Ogundule Vs. Chief Olabode (1973) 2 SC 71;
Okereke Vs. James (2012) 16 NWLR (Pt. 1326) 339;

Onuoha Vs. Okafor (1983) 2 SCNLR 244;
Onuorah Vs. KRPC (2005) 6 NWLR (Pt. 921) 393;
Onyekwuluje Vs. Animashaun (1996) 3 NWLR (Pt. 439) 637;
PDP Vs. Sylva (2012) 13 NWLR (Pt. 1316) 85;
R Benkay Nigeria Ltd. Vs. Cadbury Nigeria Plc. (2012) All FWLR (Pt. 631) page 1450;
Raimi Vs. Akintoye (1986) 3 NWLR (Pt. 26) 97;
Salati Vs. Shehu (1986) 1 NWLR (Pt. 15) 198;
Shonekan Vs. Smith (1964) ALL NLR 168;
SPDCN Ltd. Vs. Amadi (2011) 14 NWLR (Pt. 1266) 157;
Tukur Vs. Government of Gongola State (1989) 4 NWLR (Pt. 117) 517; UTIH & Ors Vs. Onoyviwe & Ors (1991) 1 SCNJ 25; (1991) 1 NWLR (Pt. 166) 166;
Uwazurike Vs. A-G Federal (2007) 8 NWLR (Pt. 1035) 1;
Uzodinma Vs. Izunaso (2011) 17 NWLR (Pt. 1275) 28;
Uzodinma Vs. Izunaso (No. 20) (2011) 17 NWLR (Pt. 1275) 30;
Woluchem Vs. GUDI (1981) 5 SC 291, 326; and
Zaranda Vs. Tilde (2008) 10 NWLR (Pt. 1014) 184.

Nigerian Statutes cited in this Judgment
The Federal High Court Act Section 22 (2);
The 1979 Constitution of the Federal Republic of Nigeria Section 230(1)(a)(r) and (s);
The Electoral Act Section 87 (9);
The 1999 Constitution of the Federal Republic of Nigeria as amended Section 251(1)(c)(r) and (s);
The Electoral Act 2010 (as amended) Section 87(4) and Sections 35 and 36.

Representations
Mr. Chuma Oguejiofor with **A.T. Nwaka** for the appellant.
Mr. Etonike Ndigwe for the 1st respondent.
Sylvester Odili (Esq.) for the 2nd respondent.
Mr. C.B. Anyigo with **Julius Mba** for the 3rd respondent.

ADAMU GALINJE, JSC: (Delivering the Lead Judgment): The appellant herein was a candidate in the primary election of Peoples Democratic Party (PDP), which was conducted on the 7th December, 2014, for the selection of its candidate for House of Representative representing Aguata Federal Constituency of Anambra State. She and others including the 1st respondent herein contested the primary election. At the end of the primary election, the appellant who claimed to have won the said primary election started hearing rumour that it was the 1st respondent's name that the PDP was proposing to send to the Independent National Electoral Commission (INEC) as the candidate of the 2nd respondent. She conducted an investigation and found that the rumour was true. She therefore took out a writ of summons at the Federal High Court, Awka, in which she claimed the following relief:

A. A declaration of court that the plaintiff who had contested and polled a majority of 42 out of the 60 votes cast in the primary election to elect the candidate of the 2nd defendant to represent her in the National Assembly for Aguata Federal Constituency Anambra State is the proper person whose name should be forwarded by the aforementioned 2nd defendant to the 3rd defendant as its candidate in the 2015 general election and not the 1st defendant

B. A declaration of the court that the 2nd defendant's act in forwarding the 1st defendant's name to the 3rd defendant in the circumstances is invalid, ineffectual, null and void.

C. A declaration of court that the person entitled to contest in the election i.e. 2015 general election to elect the member to represent Aguata Federal

Constituency in the National Assembly is the plaintiff and so that wherever the name of the 1st defendant appears in the record of the 3rd defendant as the candidate of the 2nd defendant in the election, that the same be regarded as or deleted to make way for the name of the plaintiff.

D. A declaration of court that the plaintiff is the person entitled to campaign in the election and as it were participate in all stages of the election 2015 to elect the member representing Aguata Federal Constituency in the National Assembly of the Federal Republic of Nigeria.

E. An order of injunction compelling the 2nd and 3rd defendants henceforth to treat the plaintiff as the candidate of the 2nd defendant in the election to elect the member of the National Assembly for Aguata Federal Constituency, Anambra State and the 3rd defendant to accord the said plaintiff the rights privileges and perquisites of a candidate for the 2nd defendant in the 2015 general election and for the Aguata Federal Constituency, Anambra State, including to campaign in the election as such candidate of the party.

Appellant's writ was filed along with her statement of claim. After filing the necessary papers, the three respondents herein, as defendants at the lower court, filed separate applications in which they raised objection to the jurisdiction of the Federal High Court. This objection was forcefully contested by the appellant. In its ruling, the trial court held:

> ***"The principal complaint of the plaintiff being that of unlawful substitution by her political party per se, not being a complaint directly against the*** *"validity of any executive or administrative action or decision by the Federal Government or any of its agencies,"* ***her suit ought not to have been instituted in this court in view of the provisions of Section 251 (1)(r) of the Constitution (supra). This court lacks the requisite jurisdiction to determine her suit. The 2nd defendant's preliminary objection therefore succeeds and the plaintiff's suit liable to be struck out. Before doing that however I should point out that having determined the second defendant's preliminary objection as I just did, there is no need to further indulge in any further determination of both the plaintiffs motion for interlocutory injunctions and the other motions of preliminary objections by the 1st and 3rd defendants. The suit is struck out."***

The appellant's appeal to the Court of Appeal, Enugu Division, was dismissed in a reserved and considered judgment which was delivered on the 6th of November, 2016.

The appeal herein is against the decision of the Court of Appeal, Enugu Division (henceforth to be known as the lower court). The appellant's notice of appeal, at pages 956 962 of the printed record of this appeal, undated, but filed on 26th November, 2015, contains six (6) grounds of appeal. Parties filed and exchanged briefs of argument. Mr. C. Chuma Oguejiofor, learned counsel for the appellant, initially submitted four issues for determination of this appeal. However, at the hearing of the appeal, learned counsel withdraws the 2nd issue for determination of the appeal. This issue and all the argument canvassed in support were accordingly struck out. In the main, three issues were spares by the appellant's learned counsel for the purpose of determining this appeal. I reproduce them hereunder as follows:

A

1. ***Whether the issue of transfer of the suit leading to this appeal from the trial court to the appropriate court that has jurisdiction to hear the case was part of the "ratio decidendi" of the judgment of trial Federal***

B

High Court and whether ground 2 in the notice and grounds of appeal of the appellant at the court below was in the circumstances incompetent."

C

2. ***Whether the sole issue for determination raised by the appellant of the court below was incompetent.***

D

3. ***Whether the court below was right in finding as it did that the trial Federal High Court lacks jurisdiction to hear the case based on the cases of Sylver Vs. PDP (supra) and KAKIH Vs. PDP (supra).***

E

Issue 1 is said to be distilled from ground 1 and 2 while issues 3 and 4 are distilled from grounds 3 and 5 respectively. The only ground of appeal from which no issue has been formulated is the 6th ground of appeal. It is deemed

F

abandoned and same is hereby struck out.

Mr. E. Ndigwe, learned counsel for the 1st respondent formulated two issues for determination of this appeal at page 3 of the 1st respondent's brief of argument. These issues read as follows:

G

1. ***Was the court below not right in its decision that the issues of whether the trial judge ought to have transferred the suit to the State High Court instead of***

H

striking same out was a fresh issue which requires leave of court to raise and argue on appeal.

2. ***Whether looking at the pleadings of the appellant and***

I

the issues joined by the parties on the preliminary objections, the court below was not right in upholding

A ***the decision of the trial court that the Federal High Court lacked the jurisdiction to entertain the appellant's suit.***

B For the 2nd respondent, Sylvester N. Odili Esq. of counsel who settled the 2nd respondent's brief of argument formulated three issues for determination of this appeal as follows:

C ***1. Whether the court below was right in holding that the appellant required leave of court to raise and argue the issue of failure of the trial court to transfer the suit to the court with jurisdiction.***

D ***2. Whether the court below was right when it declined to transfer the suit to the appropriate High Court of a state that has jurisdiction.***

E ***3. Whether the court below was right when it held that the Federal High Court lacks jurisdiction to hear the suit.***

F The first issue is said to be distilled from grounds 1, 2, 3 and 4 of the grounds of appeal, while issues 2 and 3 are distilled from grounds 6 and 5 respectively. Now, because the appellant did withdraw the 2nd issue which G was distilled from the 6th ground of appeal, that ground was deemed abandoned and was accordingly struck out. The 2nd respondent's issue 2 is distilled from a non existing ground of appeal, as such it is incompetent and liable to be struck out. Accordingly same is struck out.

H Mr. C. B. Anyigbo, learned counsel for the 3rd respondent issued a preliminary objection in the following terms:

1. Ground 6 of the appellant's grounds of appeal is
I ***incompetent and liable to be struck out in that the***

A ***complaint therein contained does not form part of the ratio decidendi of the judgment appealed against.***

2. Issue 2 of the appellant's issues for determination is
B ***incompetent and liable to be struck out in that:***
(a) It was distilled from the incompetent ground 6 of the grounds of appeal.
(b) Issue 2 and Issue 1 of the appellant's issues for
C ***determination emanated from the same Ground 2 of the grounds of appeal as well as other grounds and the said issue 2 is materially repetitive of issue 1 of the appellant's issues for***
D ***determination."***

Learned counsel argued the preliminary objection at pages 8 13 of the 3rd respondent's brief of argument and thereafter formulated two issues for
E determination of this appeal as follows:

"1. Whether the issue of transfer of the suit leading to this appeal from the trial court to the appropriate court
F ***that has jurisdiction to hear the case was part of the "ratio decidendi" of the judgment of trial Federal High Court and whether Ground 2 in the notice and grounds of appeal of the appellant at the court below***
G ***was in the circumstances incompetent.***

2. Whether the issue of the transfer of the suit from the trial Federal High Court to the appropriate court that
H ***has jurisdiction to hear it was a fresh issue that did not arise from the decision of the learned trial (sic) Federal High Court and whether the court below was right in finding as it did that the suit cannot be***
I ***transferred from the trial court to the appropriate court with jurisdiction to hear the case."***

Issue 1 is said to be distilled from the 1st and 2nd grounds of appeal, while the 2nd issue is distilled from the 2nd, 4th and 6th grounds of appeal which has been struck out.

The appellant filed a reply brief to the 2nd respondent's brief of argument in answer to the preliminary objection issued by the said 2nd Respondent on the 26th May, 2016, which was withdrawn and struck out when this appeal came up for hearing on the 18th January, 2017.

Learned counsel for the appellant, also filed a reply brief to the 3rd respondent's brief of argument on 31st May, 2016 in which he set out the reply to the argument in support of the 3rd respondent's preliminary objection.

The 3rd respondent issued a preliminary objection to the competence of certain aspect of the appeal. It is settled that where a preliminary objection is raised to the competence of an appeal, the objection has to be determined first. *See* **Onyekwuluje Vs. Animashaun (1996) 3 NWLR (Pt. 439) 637; Nwazurike Vs. A-G Federal (2007) 8 NWLR (Pt. 1035) 1; SPDCN Ltd. Vs. Amadi (2011) 14 NWLR (Pt. 1266) 157; FBN Plc. Vs. T.S.A. Ind. Ltd. (2010) 15 NWLR (Pt. 1216) 247; Okereke Vs. James (2012) 16 NWLR (Pt. 1326) 339.**

The 3rd respondent's objection to the 6th ground of appeal has been overtaken by the striking out of the said ground of appeal by this court. Also the 2nd issue for determination of this appeal was withdrawn by the learned counsel for the appellant when this appeal came up for hearing and same was accordingly struck out. Learned counsel for the 3rd respondent's argument in respect of the objection to the 6th ground of appeal and the 2nd issue for determination of this appeal is no longer relevant and deserves no consideration by this court, since doing so will amount to an academic exercise. Now with the striking out of the 2nd issue, the 1st issue for determination can now be accommodated by the 1st and 2nd grounds of appeal. I find the preliminary objection irrelevant and same is accordingly struck out.

Having thus disposed of the preliminary objection, I will proceed to consider the main appeal. All the issues formulated by parties in the

determination of this appeal are similar. These issues have been set out elsewhere in this judgment. I have read through the record of this appeal and the briefs of argument filed by the respective parties. I am of the firm view that the only issue calling for the determination of this appeal is whether the lower court has no jurisdiction to hear this case and that the question of the failure of the trial court to transfer the case after declining jurisdiction to appropriate court was a fresh issue that required leave to raise it on appeal. I will like to consider the later part of the issue by me which concerns the question of transfer of the case by the trial court first before I proceed to determine whether the trial court had jurisdiction to hear this case.

Throughout the proceedings at the trial court, the issue of transferring the appellant's case to the FCT or State High Courts was never raised and considered. Learned counsel for the appellant submitted that the decision not to transfer the case though not expressly pronounced upon by the learned trial judge, still forms part of the *'ratio decidendi'* of the decision of the trial court. Learned counsel cited in aid the authorities in **Calabar Coop Ltd. & 2 Ors Vs. Ekpo (2008) 1-2 SC 229 at 252; Akpan Vs. Bob & Ors. (2010) 4-7 SC (Pt. 11) 94-95; Adesola Vs. Abideye (1999) 10-12 SC 109; Katto Vs. CBN (1991) 11-12 SC 176; (1991) 9 NWLR (Pt. 214) 126 AT 147** and contended that Section 22(2) of the Federal High Court Act, CAP F 12 Laws of the Federation of Nigeria 2004 being a mandatory provision of statute, ought to have been applied by the trial court and that the failure of the trial court to pronounce on it does not exclude its provision from the *'ratio decidendi'* of the trial court Learned counsel urged this court to hold that the lower court was wrong in striking out the 2nd ground of appeal before it on the ground that it contained fresh issues which required its leave before raising them. At page 910 paragraph 3 of the record of appeal, the lower court held.

> ***"Furthermore, it is unarguable that the issue of transfer of the suit raised in ground 2 under consideration is a fresh issue which cannot be raised for the first time on appeal to this court, without the leave of the court sought and***

obtained by the appellant."

The appellant admitted in his brief of argument that the issue of transfer of the suit raised in ground 2 was never raised and considered by the trial court. However his argument that the issue of transfer of the matter formed part of the decision of the trial court is hinged on the mandatory nature of Section 22 (2) of the Federal High Court Act. This to me sounds ridiculous. In this country, we operate the adversary system. The major feature of this system is the passive and inactive role of the judge in the presentation of cases in court. The judge is at best an attentive listener to all that is said on both sides, since he is not an investigator. He speaks mainly to deliver judgments. This passive role of the judge emphasizes the active role of counsel for the parties who must place before the judge all the materials required for proper justice delivery. Indeed where parties have failed to raise issues and cites authorities in support for the consideration of the trial judge, they cannot suddenly raise those issues that were not raised at the trial on appeal and blame the trial court for failure to raise them. The law is settled that an appellant will not be allowed to raise on appeal a question which was not raised or tried or considered by the trial court, except where the question involves substantial points of law, substantive or procedural and it is plain that no further evidence could have been adduced which would affect the decision on them, the court will allow the question to be raised and the points taken in order to prevent an obvious miscarriage of justice. *See* **Apene Vs. Barclay Bank of Nigeria & Anor (1977) 11 NSCC 29; Shonekan Vs. Smith (1964) ALL NLR 168; Ogba Vs. Onwuzo (2005) 14 NWLR (Pt. 945) 331 at 344; Enang Vs. Adu (1981) 11-12 SC 25; Ezekude Vs. Odogwu (2002) 8 NWLR (Pt. 784) 366; Salaji Vs. Shehu (1986) 1 NWLR (Pt. 15) 198; Raimi Vs. Akintoye (1986) 3 NWLR (Pt. 26) 97.**

It is very clear that, by the expression that the court will allow, is a strong directive that the leave of the court must be sought and obtained before any fresh issue of law whether substantive or procedural will be raised on appeal. The only exception to this rule is when the fresh issue concerns the jurisdiction of the lower court, a party raising it needs no leave

of the court, in the instant case, since both parties have admitted that the issue of transfer of this case was not raised and considered at the lower court, the appellant as of necessity required leave to raise it at the lower court as the issue of transfer of a case was not raised and considered at the lower court, the appellant as of necessity required leave to raise it at the lower court as the issue of transfer of a case has nothing to do with the jurisdiction of the lower court. The lower court in my view rightly stuck out the 2nd ground of appeal before it as it complained about the non-transfer of the case by the trial court. For avoidance of doubt the 2nd ground of appeal before the lower court without its particulars is reproduced thus:

"The learned trial judge erred in law when he had proceeded to strike out the case instead of transferring the case to the court that he felt had jurisdiction to hear the case."

The next question is whether the lower court has the jurisdiction to hear and determine this case? The issue of jurisdiction was raised in the 1st ground of appeal at the lower court. The only issue that was canvassed at the lower court was formulated from the competent ground 1 and the incompetent ground 2 which was rightly struck out by the lower court. Although the lower court struck out that issue for being incompetent and dismissed the appeal, it nonetheless went on to consider the issue of jurisdiction on its merit, since it is not the final court. I think this is commendable, as the question of jurisdiction can even be raised verbally and even by the court suo motu at any stage of the proceeding. The fact that a competent ground of appeal is lumped with an incompetent ground in an issue for determination will not constitute a ground for ignoring the jurisdictional question. This is so because jurisdiction is the soul of any action. *See* **UTIH & Ors Vs. Onoyviwe & Ors (1991) 1 SCNJ 25; (1991) 1 NWLR (Pt. 166) 166.**

The learned justices of the lower court in a lead judgment delivered by T. S. Yakubu JCA, and concurred by Pemu and Agim, JCA, painstakingly construed the submissions of learned counsel for the parties and examined the decisions of this court in **KAKIH Vs. PDP (2014) 15**

NWLR (Pt. 1430) 374; PDP Vs. Sylva (2012) 13 NWLR (Pt. 1316) 85 at 138 and **Lokpobiri Vs. Ogola (2016) 3 NWLR (Pt. 1499) 328 at 366** and came to conclusion that the Federal High Court has no jurisdiction to hear this case in the following words:

> ***"I am afraid, I cannot take a contrary decision or stand different from that taken in Ogola Vs Lokpobiri (supra) appellant's relief 5E targeted at the 3rd respondent is ancillary and dependent on the principal reliefs 5$-5D targeted at the 1st and 2nd respondents. Therefore the learned trial judge was quite right when he commendably followed the apex court's decisions in PDP Vs. Sylva (supra) and KAKIH Vs. PDP (supra) and declined jurisdiction to entertain the appellant's claim."***

Learned counsel for the appellant disagrees with the decision of the lower court and argued that by the decision of this court in **Lokpobiri Vs. Ogoala** (supra), the Federal High Court has concurrent jurisdiction with the FCT and States High Court in pre-election matters which concern party primaries even if the claims or reliefs made against the electoral body are merely ancillary to the principal claims. Learned counsel finally urged this court to set aside the decision of the lower court and replace it with a finding that the Federal High Court has jurisdiction to hear the **SUIT NO: FHC/AWK/CS/271/2014** which it struck out.

For the 1st respondent, it is argued that the appellant's claim at the trial court is not a challenge to the conduct or outcome of the primaries and it is therefore not within the jurisdiction of the Federal High Court. In a further argument, learned counsel submitted that the main claim in this suit is not against the Federal Government or any of its agencies and as such the court below was right in the light of the decision in **KAKIH Vs. PDP** in upholding the decision of the Federal High Court. Finally, learned counsel urged this court to dismiss the appeal.

Learned counsel for the 2nd respondent submitted that this court did not overrule the decision in **PDP Vs. Sylva (supra)** and **KAKIH Vs. PDP**

in its decision in **Lokpobiri Vs. Ogola (supra).** He further submitted that the lower court was right in relying on the authority in **KAKIH Vs. PDP** to hold that the trial court lacked jurisdiction to entertain the appellant's suit. Finally, learned counsel urged this court to uphold the decision of the lower court.

For the 3rd respondent, the two issue formulated for the determination of this appeal, which I have reproduced elsewhere in this judgment, are both directed at the issue of the transfer of the suit from the trial court, which I have already resolved when I considered the first leg of the sole issue formulated by me for determination of this appeal. I therefore do not need to repeat myself on the issues formulated by the 3rd respondent.

The decision in **Lokpobiri Vs. Ogola** (supra) was delivered after the decisions in **PDP Vs. Sylva (supra)** and **KAKIH Vs. PDP**. This court, apart from correcting the defect in the decisions of the lower court, has the onerous responsibility of correcting itself, since it is the Apex Court and there is no other court to which its errors can be submitted for correction. It follows therefore where its later decisions are at variance with its previous decisions, it means that the previous decision have been overruled to the extent of the variation. Learned counsel for the respondents in this appeal seems to have paid more attention to the previous decisions of this court which seems to be at variance with the latest decision in **Lokpobiri Vs. Ogola (supra).** This I think is a wrong posture and ought to be discouraged. The decision in **Lokpobiri Vs. Ogola (supra) is** very clear, and that is that the Federal High Court have jurisdiction in respect of the matters provided for under Section 87(9) of the Electoral Act, 2010.

The jurisdiction of the Federal High Court or any court at all is determined by the nature of the claim before the court and not the parties. In **NEPA Vs. Edegbenro & Ors (2002) 18 NWLR (Pt. 798) 79,** the respondents were employees of the appellant, NEPA. Following an industrial action embarked upon by the employees of the appellant including the respondents, the respondent's appointments were terminated. The respondents instituted various suits against the appellant which were consolidated. It was contended at the High Court that the High Court had no jurisdiction to entertain the case since NEPA was an agent of the Federal

Government. Reference was made to Section 230(1)(a)(r) and (s) of the 1979 Constitution of the Federal Republic of Nigeria as amended by Decree 107 of 1993, which is in pari material with Section 251(1)(c)(r) and (s) of the 1999 Constitution of the Federal Republic of Nigeria as amended. High Court overruled the objection on jurisdiction. The appeal to the Court of Appeal was dismissed. On further appeal to this court, it was held:

> ***"It is not in dispute that the defendant NEPA is a Federal Government Agency, the two courts below made a finding of fact to this effect and this has not been challenged by the plaintiffs. It is also not disputed that the cause of action in this matter arose out of the administrative action or decision of the defendant.....***
>
> ***A careful reading of paragraphs (9) (R) and (S) reveals that the intention of the law makers was to take away from the jurisdiction of the State High Court and confer same exclusively on the Federal High Court actions in which the Federal Government or any of its agencies is a party."***

In a later decision of this court in **Onuorah Vs. KRPC (2006) 6 NWLR (Pt. 921) 393,** where it was contended before this court that the Kaduna Refinery and Petrochemical Company (KRPC) being a subsidiary of NNPC, which in turn is an organ of the Federal Government and therefore the Federal High Court had jurisdiction to entertain the appellants suit, it was held that the trial Federal High Court lacked jurisdiction to entertain the appellant's suit because it was based on simple contract and that only a State High Court has jurisdiction to entertain such claim. The court further held that when the jurisdiction of a court over a suit is challenged the court is entitled to consider the plaintiffs claim before it in order to decide whether it has jurisdiction to entertain it *See* **Izenkwe Vs. Nnadozie (1953) 74 WACA 361; Adeyemi Vs. Opeyemi (1976) 9-10 SC 31; Tukur Vs. Government of Gongola State (1989) 4 NWLR (Pt. 177) 517; A-G Kwara State Vs. Olawale (1993) 1 NWLR (Pt. 272) 645; Isaac**

Obiuweubi Vs. CBN (2011) LPELR 2185.

The law at the moment is that it is the claim of the appellant that determines the jurisdiction of the court before which the action is pending. In the instant case, the claims of the appellant before the lower court did not attack the conduct of the primary election in which he participated. According to the evidence available, the appellant's quarrel was with the PDP that refused to send his name to the 3rd respondent, but sent the name of the 1st respondent who according to him did not win the primary election. The appellant has clearly admitted that the primary election was successfully conducted and the result announced wherewith he polled a majority of 42 out of the 60 votes cast in the primary election to elect the candidate of the 2nd respondent.

Section 87(9) of the Electoral Act 2010 provides as follows:

> ***"Notwithstanding the provisions of this Act or Rules of the political parties an aspirant who complains that any of the provisions of this Act and the guidelines of a political party has not been complied with in the selection or nomination of a candidate of a political party for election, may apply to the Federal High Court or the High Court of a State or FCT, for redress."***

Section 87(4) of the Electoral Act 2010 (as amended) provides as follows:

> ***"A political party that adopts the system of indirect primaries for the choice of its candidate shall adopt the procedure outlined below:***
>
> ***(c) In the case of nomination to the position of a candidate to the senate, House of Representative and State House of Assembly, a political party shall, where it intends to sponsor candidates:***
>
> ***(i) Hold special congresses in the Senatorial District, Federal Constituency and the State***

Assembly Constituency, respectively, with delegates voting for each of the aspirants in designated centre on specified dates, and

(ii) The aspirant with the highest number of votes at the end of voting shall be declared the winner of the primaries of the party and the aspirant's name shall be forwarded to the commission as the candidate of the party"

The provision of Section 87 of the Electoral Act 2010 as reproduced above are very clear and hold no ambiguity that will require any interpretation. It is mandatory for political parties to forward only names of the candidates who win their primaries. This is clearly a provision of Electoral Act which is justiciable under Section 87(9) of the Electoral Act. In **Uzodinma Vs. Izunaso (No. 20) (2011 17 NWLR (Pt. 1275) 30 at 60 paragraph B.E,** this court, per Rhodes-Vivour, JSC. Said:

"The nomination of a candidate to contest an election is the sole responsibility of the political party concerned. The courts do not have jurisdiction to decide who should be sponsored by any political party as its candidate in an election. But where the political party nominates a candidate for an election contrary to its own constitution and guidelines; a dissatisfied candidate has every right to approach the court for redress. In such a situation, the courts have jurisdiction to examine and interpret relevant legislations to see if the political party complied fully with legislation on the issue of nomination. The courts will never allow a political party to act arbitrarily or as it likes. Political party must obey their own constitution and once this is done there would be orderliness, and this would be good for politics and the country."

The only instance where the name of a candidate other than the candidate that won the primary will be forwarded to INEC, is where the candidate that won the election withdraws his candidature by notice in writing signed by him and delivered by himself to the political party that nominated him for the election, or where he dies before his name is submitted to INEC or after the name has been submitted and before the elections. *See* **Sections 35 and 36 of the Electoral Act 2010.** These substitutions must follow due process.

In the instant case, the complaint is that Section 87(4)(c)(i)(ii) was not complied with. This complaint falls squarely within the provision of Section 87(9) of the Electoral Act, which I have reproduced elsewhere in this judgment. The Federal High Court has the requisite jurisdiction to hear and determine this case. The lower court was therefore wrong when it affirmed the decision of the Federal High Court, Awka.

For all I have said, the sole issue identified by me is resolved in favour of the appellant and against the respondents. In the result this appeal shall be, and it is hereby allowed. The cost of prosecuting this appeal is assessed at N300,000.00 against the 1st and 2nd respondents and in favour of the appellant. It is also ordered that the trial proceeds forth with at the Federal High Court, Awka.

Paul Adamu Galinje
Justice, Supreme Court

RHODES-VIVOUR, JSC: I have had the advantage of reading in draft the leading judgment of my learned brother **GALINJE JSC.** I agree with his Lordship in his conclusions that both courts were wrong in finding that the Federal High Court lacks jurisdiction to hear the appellant's case.

In view of the importance of the jurisdiction point in particular I add a few words of mine. The full facts and circumstances have already been set out in the leading judgment and need not be repeated. I must, though observe that the appellant won the primaries of his party but her name was not forwarded to INEC as his party's candidate. He filed an action in court asking for five reliefs. It can be seen that her main claim/reliefs are about the party not forwarding his name to INEC as the party's candidate for the Aguata Federal Constituency. The simple issue is:

A ***"Whether the Federal High Court has jurisdiction to determine the case."***

Section 87(9) of the Electoral Act states as follows:

B

(9) 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
C ***political party has not been complied with in the selection or nomination of a candidate of a political party for election, may apply to the Federal High Court or the High Court of a State or FCT, for redress.***

D

While Section 87 (4) (c) (ii) of the Electoral Act states that:

(4) A political party that adopts the system of indirect
E ***primaries for the choice of its candidate shall adopt the procedure outlined below:***
(c) in the case of nomination to the position of a candidate to the Senate, House of
F ***Representatives and State House of Assembly, a political party shall, where it intends to sponsor candidates:***
(ii) the aspirant with the highest number of
G ***votes at the end of voting shall be declared the winner of the primaries of the party and the aspirant's name shall be forwarded to the Commission as the***
H ***candidate of the party;***

By virtue of Section 87 (4) (c) (ii) of the Electoral Act, the 2nd respondent was wrong not to have forwarded the name of the appellant to INEC. Since
I the appellant complains that Section 87 (4) (c) (ii) of the Electoral Act was not complied with by the 2nd respondent in the selection or nomination of its

A candidate for the House of Representatives elections the appellant can file an action to seek redress in the Federal High Court, or a High Court of a State or High Court of the Federal Capital Abuja, as provided by section 87 (9) of the Electoral Act. *See* **Gbileve Vs. Addingi (2014) 16 NWLR (Pt.**
B **1433) paragraph 394.**

Section 251 (i) of the Constitution reads:

> ***251 (i) Notwithstanding anything to the contrary***
> C ***contained in this Constitution and in addition to such other jurisdiction as may be conferred upon it by an Act of the National Assembly, the Federal High Court shall have and exercise jurisdiction to the exclusion of***
> D ***any court in civil causes and matters:-***

The Federal High Court has exclusive jurisdiction to the exclusion of any other court for the items listed under subsection (a) (s) of Section 251 of the
E Constitution. Indeed section 87 (9) of the Electoral Act is an added jurisdiction conferred by the National Assembly on the Federal High court to hear actions from an aspirant who complains that any of the provisions of this Act (in this case Section 87 (4) (2) (ii) was not complied with in the
F selection or nomination of the 2nd respondents candidate for the House of Representatives election. It is blindingly clear that the Federal High Court has jurisdiction to hear the appellant's case. The trial court was wrong to decline jurisdiction to hear the appellant's case and the Court of Appeal was
G also wrong to affirm that decision.

It is for these brief reasons as well as the detailed reasoning in the leading judgment that I too allow this appeal, abide by the order on costs, and it is hereby directed that trial proceeds forthwith.

H **Olabode Rhodes-Vivour**
Justice, Supreme Court

BATA OGUNBIYI, JSC: I read in draft the lead judgment just delivered
I by my learned brother **GALINJE, JSC.** I agree that the appeal has merit and should be allowed.

The appellant, after having won the primary election had expected to have been the flag bearer of her party (PDP) and that her name should have been forwarded to INEC in such capacity, for the Aguata Federal Constituency election.

The appellant's grouse is not that the party's primary election was not properly conducted or that the result of the primaries did not reflect the primaries held. Rather, her complaint is basically that her name was dropped by her political party after she had been nominated by the party. Hence the genesis of the action before the trial Federal High Court. The facts and all the claims related thereto, this appeal, are well spelt out in the lead judgment. I do not consider it necessary to repeat same.

The central issue to this appeal questions the jurisdiction of the Federal High Court to entertain the subject matter. In other words, whether the lower court was right when it affirmed the trial court which declined its jurisdiction to entertain the appellants' case?

It is pertinent to state that the two lower courts are concurrent in their decisions. The principle of law is well established that this court will not normally interfere with such a decision unless special circumstances are shown, such as violation of some principle of law, or procedure or where such findings are shown to be perverse or erroneous and a miscarriage of justice. *See the cases of* **R Benkay Nigeria Ltd. Vs. Cadbury Nigeria Plc. (2012) All FWLR (Pt. 631) page 1450 at 1467; Ogundule Vs. Chief Olabode (1973) 2 SC 71; Balogun Vs. Akani (1988) 1 NWLR (Pt. 70) 301; Gbafe Vs. Gbafe (1996) 6 NWLR (Pt. 455) 417 at 436** and **Adaku Amadi Vs. Edward Nwosu (1992) 5 NWLR (Pt. 241) 273.**

Central to this appeal is the case of **Lokpobiri Vs. Ogola (2016) 3 NWLR (Pt. 1499) 328** wherein his Lordship Onnoghen, JSC (as he then was) had this to say on the jurisdiction of the Federal High Court in election cases.

> ***"To me it is erroneous to say that for the Federal High Court to entertain a pre-election matter, the main relief(s) must be shown to fall within the exclusive jurisdiction of the court because both jurisdictions are different. In a concurrent***

A ***jurisdiction, if court "A" has jurisdiction to hear all the reliefs claimed, it necessarily follows that court "B" must have the same jurisdiction otherwise, it means giving something to someone with one hand and taking it away with***
B ***the other hand ..... In terms of election or election related matters the jurisdiction of the Federal High Court to hear and entertain such matter is rooted in the relevant provisions of the Electoral Act, 2010 (as amended) earlier***
C ***reproduced in this judgment. In respect of matters relating to post election jurisdiction of the court, see Section 251(4) of the 1999 Constitution, (as amended) also supra. If we insist on the jurisdiction of the Federal High Court on pre-election***
D ***and/or post-election matters being exercisable only where the main claim(s) is/are within the exclusive jurisdiction of the Federal High Court, it will result in injustice on the litigants which is clearly not the intention of the legislature.***
E ***It is therefore very clear that the concurrent jurisdiction conferred on the Federal High Court to hear and determine pre-election and even post-election matter is clearly outside the exclusive jurisdiction of the court under Section 251 of***
F ***the 1999 Constitution (as amended) but in addition to the exclusive jurisdiction and consequently subject to different considerations."***

G ***"It is therefore my considered opinion when the Federal High Court's pre-election jurisdiction is invoked, the parties claim(s) and relief(s) must be in conformity with the provisions of the Electoral Act, 2010 (as amended) not under***
H ***the provisions of Section 251 of the 1999 Constitution, (as amended). In fact, INEC may be a nominal party or liable to an ancillary claim in a pre-election or post-election jurisdiction of the Federal High Court."***

I

On the provision of Section 87(9) of the Electoral Act and also relying on the said foregoing authority of **Lokpobiri Vs. Ogola (supra)** it is firmly established that the Federal High Court has jurisdiction to hear a pre-election matter relating to non-compliance with the provision of Section 87 (4) of the Electoral Act 2010 (as amended). (The provisions of Section 87 (4) and (9) are reproduced in the lead judgment).

With the few words of mine and especially relying on the reasonings and conclusions arrived at in the lead judgment, I also allow the appeal in terms of the orders made in the lead judgment. I further award costs of N300,000.00 against the 1st and 2nd respondents in favour of the appellant.

Clara Bata Ogunbiyi
Justice, Supreme Court

CENTUS NWEZE, JSC: My Lord, Galinje JSC, obliged me with the draft of the leading judgment just delivered now, I, entirely, agree with His Lordship that this appeal ought to be allowed.

As it is well-established, this court is, always, loathe to interfere with concurrent decisions of lower courts, **Woluchem Vs. Gudi (1981) 5 SC 291, 326; Ike Vs. Ugboaja (1993) 6 NWLR (Pt. 301) 539, 569; Chinwendu Vs. Mbamali (1980) 3-4 SC 31; Enang Vs. Adu (1981) 11-12 SC 25, 42; Nwadike Vs. Ibekwe (1987) 4 NWLR (Pt. 67) 718; Igwego Vs. Ezeugo (1992) 6 NWLR (Pt. 249) 561, 576; Lamai Vs. Orbih (1980) 5-7 SC 28.**

However, where as in instant case, the said concurrent findings are unsound, that would be a ground for this court's intervention, **Ogbu Vs. State (1992) 8 NWLR (Pt. 295) 255; Igago Vs. State (1999) 14 NWLR (Pt. 637) 1; Adeyemi Vs. The State (1991) 1 NWLR (Pt. 170) 679; Adeyeye Vs. The State (2013) LPELR 1991 (SC) 46; Akpabo Vs. State (1994) 7 NWLR (Pt. 359) 635; Ejikeme Vs. Okonkwo (1994) 8 NWLR (Pt. 362) 266.**

Such is the situation in the instant appeal. The lower courts took erroneous views of the intendment and letters of Section 87 (9) of the Electoral Act, 2010 (as amended). As such, they came to the wrong conclusion that the Federal High Court was not clothed with the requisite

jurisdiction to entertain this matter.

True, indeed, Section 87 (9) (supra) does not grant sundry interlopers the *carte* blanche to query party primaries, **Anyanwu Vs. Ogunewe (2014) 8 NWLR (Pt. 1410) 437; Uzodinma Vs. Izunaso (2011) 17 NWLR (Pt. 1275) 28; Emenike Vs. PDP (2012) 12 NWLR (Pt. 1315) 556; Emeka Vs. Okadigbo (2012) 18 NWLR (Pt. 1331) 55.**

However, in the instant case, the appellant (as Plaintiff) claimed to have "... contested and polled a majority of votes cast in the primary election to elect the candidate of the (PDP) ...." In effect, she was a candidate in the said primary election of her party, the PDP. Being a candidate, therefore, her case came within Section 87 (9) (supra) which is intended to vouchsafe to actual applicants, like herself, who participated in their party primaries, the right to impugn the conduct of such primaries for non-compliance with the provisions of the Electoral Act and Guidelines of their parties, **Emenike Vs. PDP (supra); Emeka Vs. Okadigbo (supra); Uzodinma Vs. Izunaso (supra); Anyanwu Vs. Ogunewe (supra).**

It is for these, and the more detailed, reasons in the leading judgment that I, too, shall enter an order upturning the conclusion of the lower court. This must be so for the Federal High Court is clothed with jurisdiction in this matter. Appeal allowed, I abide by the consequential orders in the leading judgment.

Chima Centus Nweze
Justice, Supreme Court

AMIRU SANUSI, JSC: The judgment just delivered by my learned brother Galinje JSC was made available to me before now. Having perused same I agree with his reason and the conclusion he arrived at that this appeal has merit and ought to be allowed in view of the misconception of the Court of Appeal (the lower court) that the trial court, (that is to say the Federal High Court) lacks jurisdiction to hear and determine the appeal.

I shall however advance below few comments in support of the lead judgment on the issue of jurisdiction canvassed by the learned counsel for the parties in this appeal especially with regard to the provision of Section 87 of the Electoral Act 2010 as amended.

From the facts of this case as gleaned from the record, it is clear that the appellant as plaintiff, took a writ of summons at the trial court complaining that she and the first respondent contested primary election organized by their party the PDP (2nd respondent) in their constituency along with others. At the conclusion of the primary election, the appellant claimed that she won the said election, but her party sent the name of the second respondent as its candidate instead of her name being the winner of the said primary election. That attitude of her party triggered her to institute the action claiming a catalogue of declaratory and injunctive reliefs as set out in the lead judgment. The trial court found against her and struck out her suit. She then unsuccessfully appealed to the lower court which agreed with the trial court that the trial court lacked jurisdiction to inquire and determine her (appellant's) complaint in view of the provisions of Section 87 (9) of the Electoral Act, as amended. She then further appealed to this court.

Admittedly, courts have no jurisdiction to pugnose into issue of nomination of candidate for an election by a political party since it is within the powers of the political party to take care of that. However, courts are vested with limited jurisdiction by the provisions of Section 87(4) (b) (ii) (c) and subsection (1) of Section 87 of the Electoral Act 2010 (as amended) to assume jurisdiction if such primaries were not conducted by the proper authority of the political party e.g. State Committee of the party rather than the National Executive Committee of the party. For instance, if the primary election was not conducted by the National Executive Committee, any party aggrieved can seek redress in court for the upturning of the result of the primary election. *See* **Emeka Vs. Okadigbo (2012) 18 NWLR (Pt. 1316) 55; Emenike Vs. PDP (2012) 12 NWLR (Pt. 1315) 556; Onuoha Vs. Okafor (1983) 2 SCNLR 244.** But if a candidate took part in primary election organized by State Executive Committee of his party then he is deemed not to be a participant hence court will have no jurisdiction to inquire into his grievances.

Thus by virtue of the provisions of Section 87 (9) of Electoral Act 2010 (as amended), an aspirant can surely instituted a pre-election action to complain that certain provision(s) of the Electoral Act 2010 (as amended) and the guideline of his political party was not complied with in the

selection or nomination of the party's candidate. *See* **Kolawole Vs. Folunsho (2009) 8 NWLR (Pt. 143) 338; Ardo Vs. Nyako (2014) 10 NWLR (Pt. 1416) 591 at 634-635; Zaranda Vs. Tilde (2008) 10 NWLR (Pt. 1014) 184.** Now in this instant case, the appellant being a member of the 2nd respondent (PDP) having followed and crossed all the necessary hurdles and was allowed by her party the PDP, to participate as one of the candidates to contest the primary election conducted by the National Executive Committee of her party has no doubt qualified as "an aspirant" at the said primary election. After the conduct of the election she emerged as winner of same but was substituted with another person i.e. 2nd respondent who did not win the said election. To my mind, she has the *locus standi* to approach the trial court to ventilate her grudges or complaints. The trial court on the other hand is clothed with jurisdiction in the light of the clear and unambiguous wordings of the provisions of Section 87 (9) of the Electoral Act 2010. It is wrong for the trial court to decline jurisdiction. Similarly the learned justice of the court below fell into same trap by finding that the trial court was bereft of jurisdiction.

I am not mindful of the concurrent findings of the two lower courts with regard to their declining of jurisdiction to hear and determine the appellant's complaints.

It is an age long principle of this court that this court is always hesitant to interfere or disturb the concurrent findings or decisions of two lower courts. *See* **Igwego Vs. Ezeugo (1992) 6 NWLR (Pt. 249)561; Nwadike Vs. Ibekwe (1987) 4 NWLR (Pt. 67) 718; Enang Vs. Adu (1981) 11/12 SC 25 AT 42.**

Be that as it may, this court however reserves the right to disturb or interfere with concurrent finding of two lower courts if it finds such decisions to be perverse or there is misconception of the law. *See* **Adeyeye Vs. The State (2013) LPELR 199 13 (SC) 46; Adeyemi Vs The State (1991) NWLR (Pt. 170) 679; Ejikeme Vs Okonkwo (1994) 8 NWLR (Pt. 362) 266.** In the instant appeal, the two lower courts have wrongly misinterpreted or misconceived the purport and application of the provisions of Section 87 (9) of the Electoral Act 2010 (as amended) and had arrived at an erroneous conclusion that the trial court lacked jurisdiction to

entertain and determine the action filed by the appellant as plaintiff at the lower court.

That is therefore a clear example of a case that this court should interfere with and disturb the findings of the two lower courts' by setting aside the judgment of the lower court.

Thus, with these few comments and for the detailed reasoning and conclusion in the lead judgment of my noble lord Galinje JSC, I too will allow this appeal.

Appeal allowed.

Amiru Sanusi
Justice, Supreme Court

MUSA NATSAHA
AND
THE STATE

SC. 651/2013

IN THE SUPREME COURT OF NIGERIA
HOLDEN AT ABUJA

FRIDAY, 28TH APRIL 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**

APPEAL: Issues for determination – Proliferation thereof – Impropriety thereof – Whether appeals are not won on the number of issues or grounds of appeal.

CRIMINAL LAW AND PROCEDURE: Rape – Ingredients thereof – How established – Onus on prosecution.

CRIMINAL LAW: Defences – Alibi – When properly raised – Whether crumbles in the face of stronger evidence fixing accused at the scene – Relevant considerations

CRIMINAL LAW: Defences – Consent to rape – Whether a child under – 14 years of age is incapable of giving consent to sexual intercourse under the Penal Code.

CRIMINAL LAW AND PROCEDURE: Rape – Requirement of corroboration

– Nature of corroboration required – S. 209(1) of Evidence Act.

EVIDENCE: Admissibility – Relevancy – Distinction between admissibility and weight to be attached to admitted exhibit

EVIDENCE: Corroboration – Rape cases – Meaning – Principle in ***Edwin Ezigbo Vs The State (2012) LPELR – 7855 SC***

EVIDENCE: Corroborative evidence – Purport and import thereof.

PRACTICE AND PROCEDURE: Evaluation of evidence and ascription of probative value – Whether the duty of the trial court – When does an appellate court interfere conditions thereof.

STATUTE: Penal Code Law – SS 39(c) and 282 (1) (e) thereof – Nature, import and imperatives.

Issues for Determination

1. ***Whether the Court of Appeal was right on the conclusion regarding the rules of inconsistency, discrepancy and contradictions in the evidence of the prosecutrix rightly accepted the written statement allegedly written by the accused (Exhibit A) before the police and hold that the evidence of PW1 was sufficiently corroborated in this case. (Ground II XI).***

2. ***Whether the lower court was right to hold that the prosecutrix has proved the case of rape against the accused beyond reasonable doubt. (Grounds I, XII & XIV).***

3. ***Whether the lower court was right to hold that the duty to prove alibi is on the accused person. (Ground XIII) and***

4. Whether there was no breach of fair hearing when the lower court failed to pronounce on the appeal against sentence made by the trial court against the accused. (Ground XV).

Facts of the Matter

This is an appeal against the decision of the Court of Appeal, Kaduna Division in appeal No. CA/K/149/C/2012, delivered on 8th January 2013, affirming appellant's conviction and sentence by the Kano State High Court, for the offence of rape contrary to Section 283 of the Penal Code. A brief summary of the facts on which the appeal revolves is given below.

To prove the offence against the appellant, the prosecution called three witnesses and tendered three exhibits. The three witnesses called by the prosecution are PW1, the prosecutrix, PW2 the victim's father and PW3, Corporal Faruk Ahmed, the police investigation officer through whom exhibit A, appellant's Extra-judicial confessional statement, Exhibit B, the hospital registration card of the prosecutrix and Exhibit C, the medical report issued by the hospital after examining the prosecutrix, were tendered. All the exhibits were tendered and admitted without objection.

The appellant, without calling any other witness, testified on his own behalf.

The trial court in a considered judgment, dated 30th March 2012, convicted the appellant as charged and sentenced him to a ten-year term of imprisonment.

Dissatisfied with the trial court's decision, the appellant appealed to the Court of Appeal, which dismissed the appeal hence this further appeal to the Supreme Court.

Held: *(Unanimously dismissing the appeal)*

1. Appellant's issues are prolix

It must outrightly be observed that the four issues the appellant distilled from his fifteen grounds of appeal are prolix. Indeed most of them are unnecessary and uncalled for. This court has repeatedly

frowned at this practice and still views it as poor advocacy. The success of an appeal, the court has held in very many of its decisions, neither depends on the number of grounds of appeal nor the issues formulated from the grounds. In addition to the competence of the two, their substantiality is even more overriding. ***See*** **G.K.F. Investment Nigeria Ltd Vs. Nigeria Communications Plc (2009) LPELR-1294 (SC) and Kupoluyi Vs. Philips (2001) 13 NWLR (Pt 731) 736.**

The instant appeal questions the lower court's affirmation of the trial court's findings of fact, impression of the witnesses and the credibility attached to the witnesses, the court's entire evaluation of evidence leading to the conviction and imposition of and the nature of prison term on the appellant. Certainly, the appellant does not require the fifteen grounds of appeal and the four issues to make bare his grudges and succeed in the appeal. ***See*** **Sossa Vs. Fokpo (2001) 1 NWLR (Pt. 693) 16 and Ogbuanyinya & 3 Ors Vs. Okudo & Ors(No 2) (1990) 4 NWLR (Pt 146) 551 at 556.** *(P 193 – 194 paras G – C)*

2. *The ingredients required to be proved in order to establish the offence of rape*

There are indeed many concessions that cannot be denied learned appellant's counsel. I entirely agree with him, and learned respondent's counsel does not begrudge the point, that to establish the offence of rape for which the appellant is convicted, the four ingredients to be proved are:

(I) That the appellant intentionally had sexual intercourse with PW1, the prosecutrix.

(II) That the sexual intercourse was without the consent of PW1.

(III) That PW1, at the time of the sexual intercourse, was not appellant's wife and

(IV) That there was penetration. ***See*** **Affor Lucky Vs.**

The State (2016) LPELR-40541 (SC), POSU & Anor

(V) The State (supra) and Kazeem Popoola Vs. The State (2013) LPELR-20973 (SC).

The aggregate implication of these ingredients is that the appellant is only guilty of the offence of rape if the concurrent findings to that effect by the two courts below are based on evidence that the appellant knowingly had sexual intercourse with PW1, without her consent. *(P 194 paras C – I)*

3. The import and imperatives of SS 39(c) and 282 (1) (e) of the Penal Code

From the record of this appeal, PW1, appellant's victim, was three years at the time of the rape which fact necessitates reminding the learned appellant's counsel the import of the clear and unambiguous words that constitute Section 39(c) and more particularly Section 282(1)(e) of the Penal Code. The Sections provide:

"39 (c) A consent is not such a consent as is intended by any section of this Penal Code, if the consent is given
(d) by a person who is under fourteen years of age."
"282(1) A man is said to commit rape who, save in the case referred to in subsection (2), has sexual intercourse with a woman in any of the following circumstances-
(e) with or without her consent, when she is under fourteen years of age or of unsound mind."

From the foregoing, PW1 is incapable of giving valid consent to any act of sexual intercourse under scrutiny pursuant to Section 283 of the Penal Code. It is sufficient under the law to convict the appellant on evidence that establishes sexual intercourse only between the two. Proof of PW1's consent being irrelevant is unnecessary. The finding

of the trial court at page 76 of the record and the lower court's affirmation of the finding on the point at page 167 remain unassailable.

Again, to some extent, the appellant is right. Section 209 (3) truly provides as follows:

> ***"209(3)A person shall not be liable to be convicted for an offence unless the testimony admitted by virtue of subsection (1) of this section and given on behalf of the prosecution is corroborated by some other material evidence in support of such testimony implicating the defendant."*** **(Underlining supplied for emphasis).**

The contention of learned appellant's counsel is not only that the foregoing provision has made corroboration to PW1's evidence in the matter a necessity. He further argues that PW1's ambivalent evidence on the fact of the penetration of her vagina by appellant's penis is suspect, unreliable and unavailing to the respondent in proof of the most relevant ingredient of rape. *(Pp 194 – 196 paras I – D)*

4. The evaluation of evidence is the primary duty of the trial court

It must be restated that the evaluation of evidence and assumption of probative value to such evidence are the preserve of the trial court that had the opportunity of hearing and assessing the evidence and the demeanour of the witnesses. The lower court and indeed this Court interferes only where an appellant shows clearly that the trial court did not, in the discharge of its primary duty of evaluating the evidence it received, bring to bear the advantage it had of seeing and assessing the witnesses. Having not done that in the instant case, appellant's complaints against the inference of the two courts on this particular issue accordingly fails. ***See*** **Mogaji Vs. Odofin (1978)4 S.C. 1, Eseme Eyibo Vs. Mr. Dan Abia & Ors (2012) LPELR-20607 (SC) and Dakat Vs. Dashe (1997) 12 NWLR (Pt 531) 46.**
(P 198 paras A – C)

5. The purport of a corroborative evidence

Now, let me restate what a corroborative evidence is. It is evidence independent of that which it strengthens and discloses not only the commission of an offence but equally links or tends to link the accused with the commission of the offence. It is, put differently, evidence which confirms in some material particular not only that the crime has been committed but, addedly, that it is the accused who committed it. Corroborative evidence may be direct or circumstantial. In whatever form it comes, the court must ensure that the corroborating evidence is not only independent of the main evidence. It seeks to corroborate but also supports the main evidence by rendering the story of the latter implicating the accused more probable in some material particular. ***See*** **Omisade & Ors Vs. The Queen (1964) 1 ALL NLR 233 at 253; Okabichi Vs. State (1975) 9 SC. 124; Mbele Vs. State (1990) 4 NWLR (pt 145) 484 and The State Vs. James Gwangwan (2015) LPELR-24837 (SC).**
(P 199 Paras D – G)

6. The meaning of corroboration in terms of rape

In Edwin Ezigbo Vs. The State (2012) LPELR-7855 (SC). This Court per Onnoghen JSC (as he then was now CJN) held as follows:

> ***"Corroboration in respect of the offence of rape is evidence which tends to show that the story of the prosecutrix that the accused committed the crime is true."***

In the instant case, the concurrent findings of the two courts below that the evidence of PW2 and PW3 and more particularly exhibit A, the extra-judicial confessional statement of the appellant, exhibits B and C the hospital registration card and medical report of PW1, the prosecutrix, constitute such corroboration cannot be faulted. I equally agree with learned respondent's counsel that neither the testimonies of the witnesses nor the documentary evidence are inconsistent in themselves or contradictory to any evidence outside their respective beings. *(Pp 199 – 200 Paras G – B)*

7. *Appellant did not raise alibi timeously or furnished details*
Appellant's further claim that the two courts are wrong in their findings on the alibi the appellant raised, given exhibit A, his confession that situated him at the scene and time of the offence for which he is convicted, equally crumbles. That apart, as rightly found by the two courts, the appellant neither raised the defence timorously nor furnished the particulars of those he said he was with at the farm at the time relevant to the rape he committed. In any event, the defence of alibi crumbles in the face of stronger evidence which, in the case at hand, PW1's testimony and exhibit A, appellant confessional statement are. *See* Obiode Vs. The State (1970) 1 ALL NLR 36; Chukwu Vs. State (1996) 7 NWLR (Pt 463) 686; Ani Vs. State (2009) 16 NWLR (Pt. 1168) 443 and **Alhaji Musa Sani Vs. The State (2015) LPELR-24818 (SC).** *(P 200 Paras B – F)*

8. *What determines admissibility is relevance but there is a distinction between admissibility and weight to be attached*
Finally, learned appellant counsel's submission that the reliance of the two courts on exhibit A, appellant's confessional statement inspite of his plea of *non-est factum* has occasioned miscarriage of justice cannot be taken seriously. Learned counsel has conceded to and the record of appeal has disclosed the fact that exhibit A on being tendered, was admitted in evidence without any objection by the appellant who was represented by counsel. The test for the admissibility of any evidence remains its relevance to the issue at hand. *See* ACB Ltd. Vs. Gwagwada (1994) 5 NWLR (Pt 342) 25 and Dr. Imoro Kubor and Anor Vs. Hon. Seriake Henry Dickson &Ors (2012) LPELR-9817 (SC). In law, it must be accepted, a clear distinction exist between the question whether a particular evidence is admissible and the question of its probative value or the weight to be attached on it. The fact that evidence, oral or documentary, is admissible does not mean that it has any probative value or weight at all. But once it is found to be of value the court may rely on the evidence to arrive at an enduring decision. *See* Gbafe Vs. Gbafe (1996) 6 NWLR (Pt 455) 417. *(Pp 200 – 201 Paras F – A)*

Per M.D. Muhammed

"I cannot agree more with the lower court's foregoing findings on the issue. I am only to add that even in the domain of civil litigation where the plea of *non est factum* appears to hold more sway, the law remains sacrosanct that in the absence of fraud or duress the signature of a person on a document is evidence of the fact that he is either the author of the content of the document above his signature or that the contents were brought to his attention before appending his signature. The application of these principles would have left the appellant in the quandary anyway. *See* Yadis Nigeria Ltd. Vs. Great Nigeria Insurance Company Ltd. (2001) 11 NWLR (Pt 725) 529.

Practitioners must be reminded of this court's stand on instances such as in the instant case when in Shurumo Vs. The State (2001) 196 LRCN 199 it opined thus:

> **"*When a counsel stands by and allows exhibits to sail smoothly through to become evidence without an eyelid, then it becomes obvious that the counsel is comfortable with the evidence and see no reason why he should challenge its admission."***

And that in Emoga Vs. The State (1997) 7 SCNJ 518 the court per Onu JSC had also said:

> ***"It will not be in the interest of the society to allow a man who has confessed to his crime to walk out of court a freeman simply because he has a change of mind. The whole trial will be a mockery …. It would be dangerous to apply the principle of extra judicial confession of the accused person as it would open a flood gate of retracing all statements made by accused persons before the police officer."*** **(Underlining supplied for emphasis).**

In the instant case, therefore, it does not lie in the mouth of learned appellant's counsel who has represented the appellant all through his sojourn, and allowed exhibit A to be admitted in evidence without objection, to now say that the statement be discarded as same is devoid of any probative value." *(Pp 202 – 203 paras B – B)*

9. *Prosecution has proved charge beyond reasonable doubt*
All that I have so far tried to say is that the respondent herein has discharged the burden the law places on it to establish the charge against the appellant beyond reasonable doubt. The two courts below are right to have so found and accordingly convicted the appellant as charged. I find no feature in the concurrent findings of the two courts that vitiates their decisions. Not even the complaint on the sentence imposed on the appellant that has not been demonstrated, by this appeal, to have occasioned a miscarriage of justice. *(P 203 .paras C – D)*

10. *The ingredients of rape*
The ingredients of the offence of rape or unlawful carnal knowledge are as follows:

a. That the accused had sexual intercourse with the prosecutrix.

b. That the act of sexual intercourse was done without her consent or that the consent was obtained by fraud, force, threat, intimidation, deceit or impersonation.

c. That the prosecutrix was not the wife of the accused.

d. That the accused had the *men rea,* the intention to have sexual intercourse with the prosecutrix without her consent or that the accused acted recklessly, not caring whether the prosecutrix consented or not.

e. That there was penetration.

The most important and essential ingredient of the offence is penetration. The court will deem that sexual intercourse is complete upon proof of penetration of the penis into the vagina. Any or even the slightest penetration will be sufficient to constitute the act of sexual intercourse. *See* Posu Vs. The State (2011) ALL FWLR (Pt. 565)) 234 @ 250 B-E; Jegede Vs. The State (2001) 14 NWLR (Pt. 733) 264; Ogunbayo Vs. The State (2007) ALL FWLR (Pt. 365) 408.
(Pp 204 – 205 Paras D – B)

11. Under the Penal Code a child under 14 years cannot give consent
It is important to note that under the Penal Code a child who is under the age of 14 years is incapable of giving consent. *See* Section 39(c) and 282 (1) (e) of the Code. *See also* Shuaibu Isa Vs. Kano State (2016) LPELR 400 11 (SC). Therefore, once it is proved that the accused person had sexual intercourse or unlawful carnal knowledge of a girl under the age of 14 years, he is guilty of rape.

At the time she testified, PW1 was seven years old. She gave cogent and credible evidence as to what took place on the day of the incident. She gave a detailed account of what transpired, how she reported to her father, PW2 who in turn reported the matter to the Police, and how she was taken to hospital and examined by a doctor. In spite of her tender age, the trial court found her to be a credible and convincing witness. Taking advantage of her young age, learned counsel for the appellant tried to discredit her testimony under cross-examination by asking whether it was the appellant's finger or his penis that was inserted into her vagina. She replied that she did not know the difference. However, under re-examination, she was emphatic that it was his penis and not his finger that was inserted into her vagina. The purpose of re-examination is to clear up any ambiguity that may have arisen as a result of cross-examination. Learned counsel for the prosecution properly made use of this opportunity of re-examination in this case. *(P 205 paras B – G)*

12. Requirement for independent evidence as corroborative evidence of rape

With regard to the offence of rape, the courts have always looked for some independent evidence to show that the account of the prosecutrix is true i.e., that the offence was committed and that it was committed by the accused person. *See* Posu Vs. The State (supra). This is particularly pertinent in this case where the prosecutrix was a child of tender age. Notwithstanding the fact that the court had satisfied itself that she understood the duty of speaking the truth as required by Section 209 (1) of the Evidence Act, 2011, by virtue of Section 209 (3) of the Act, her evidence required corroboration. Depending on the facts of the case, where the accused person denies the charge, some of the corroborative evidence may include but not limited to:

(a) Medical evidence showing injury to the private part or other parts of the prosecutrix's body which may have been occasioned in a struggle; or

(b) Semen stains on her clothes or the clothes of the accused or on the place where the offence is alleged to have been committed.

***See* Posu Vs. The State (supra); Afor Lucky Vs. The State (2016) LPELR 40541 (SC); Isa Vs. Kano State (supra).**

In the instant case, the trial court took into account not only the credible evidence given by PW1, but also the evidence of her father, PW2, who though not an eye witness, testified as to how he examined his daughter and found sperm on her after she reported the incident to him and his report to the Police. The court also took into account the evidence of PW3 (the IPO) who recovered the trousers of the appellant with fresh sperm on them and the medical report, Exhibit C wherein the doctor who examined PW1 stated that bruises were seen around her pelvic area; that examination of the vagina revealed a permeable hymen and "an impression of rape was ascertained." The court also relied on the appellant's confessional statement, which he attempted to retract at the trial. The statement was admitted without objection. He identified his signature written in Arabic language although he claimed that he did not understand

the English language in which it was written. In other words, that it was not his statement. The facts contained therein tally substantially with PW1's account. The retraction of a confessional statement at the trial does not render it inadmissible. The plea of *non est factum* was not made out. The court was entitled to rely on the statement along with the other credible evidence before it. *See* Ubierho Vs. The State (2005) 5 NWLR (Pt. 919) 644; Yesufu Vs. The State (1976) 10 SC 307; Alarape Vs. The State (2001) 5 NWLR (Pt. 705) 79.

I am of the considered view that the trial court fully utilized the opportunity of seeing and hearing the witnesses testify and made findings fully supported by the evidence on record. The evidence of these witnesses was not discredited under cross-examination. Learned counsel for the appellant has failed to satisfy me that there was any material inconsistency in the evidence led by the prosecution or that the findings of the trial court, upheld by the lower court were perverse in any way. The court below did a thorough job, which cannot be faulted. *(Pp 205 – 207 paras G – C)*

Per Eko (JSC)

"There is no doubt that the PW.1, the prosecutrix, was a child when she was allegedly raped and when she testified. Her evidence needed to be corroborated as a matter of Law. See Section 209(3) of the Evidence Act, 2011. The corroborating evidence is nothing but that other evidence that confirms the evidence that needs to be corroborated. It has to be an independent testimony that confirms the principal evidence. *See* Nwambe Vs. The State (1995) 3 NWLR (Pt. 384) 385. The corroborating evidence should be one that does not itself, require to be corroborated either as a matter of law or of practice. For rape, corroboration is an evidence that tends to show that the story of the prosecutrix that she was raped by the accused is true. *See* Edwin Ezigbo Vs. The State (2012) LPELR-7855 SC.

In the instant case, the learned trial Judge found the evidence of the PWW.1, which impressed him as "sharp, alert, intelligent in spite of the rigorous cross-examination" and her tender age of 7 years, was corroborated by the evidence of the PW2, PW3 the confessional

statement of the appellant himself, Exhibit A and the medical report, Exhibit C.

In Exhibit A the appellant admitted that he had carnal knowledge of the PW.1 who, then, was 3 years old. The PW2, upon the complaint of the PW.1 that she was raped by the appellant, physically examined her and found sperm deposited on PW.1's vagina. The PW.2 was not discredited by cross-examination. The PW.3, the investigating Police Officer, testified that the appellant confessed to him that he raped the PW.1. The PW.3 recovered the appellant's trousers that had fresh sperm on it. The medical report, Exhibit C, also confirms bruises on PW.1's vagina which are indicative of the admitted carnal knowledge of the PW.1 by the appellant. The concurrent findings that the appellant raped the PW.1 cannot, therefore, be faulted.

Appellant's counsel's contention that Exhibit A is unreliable does not impress me. The appellant admitted that he appended his signature on Exhibit A in Arabic alphabet. He claimed that he could not read or write in the English Language Exhibit A was recorded. It was not suggested that the PW.3 who recorded the statement in Exhibit A, did not understand the language of the appellant. The statement was tendered and admitted without any objection, albeit feeble. When the PW.3 testified he was also not discredited. The plea of Exhibit A being *non est factum* was just a mere lame afterthought. It was rejected outrightly and correctly in my view."
(Pp 207 – 208 Paras E – F)

Per Baje (JSC)

"The essential and most important ingredient of the offence of rape is penetration and unless penetration is proved, the prosecution cannot said to have prove its case beyond reasonable doubt. *See* Edet Okon Vs. The State (2001) 7 SC (Pt.11) 146.

Penetration however slight is sufficient and it is not necessary to prove any injury or the rupture of the hymen to constitute the crime of rape. *See also* Okoyomon Vs. The State (1972) 1 NWLR 292, Jos

N. A Police Vs. Allah Na Gani (1968) NMCR 8, Igbine Vs The State (1997) 9 NWLR (Pt. 519) 101.

In the instant case, PW2 in his testimony which was not discredited by cross examination, stated that upon the complaint of the PW1 that she was raped by the appellant, he examined her and found sperm deposited on PW1's vagina.

In addition to that, the appellant, in Exhibit A has admitted that he had carnal knowledge of the PW1. It is a trite law that an accused person can be convicted on his confession alone. A voluntary confession of guilt by an accused is sufficient to warrant conviction without corroborative evidence if it is direct, positive, duly made and satisfactorily proved. *See* Sule Vs. The State (2009) 4 NCC 456, Amanchukwu Vs. FRN (2009) 4 NCC 58" *(Pp 208 – 209 Paras H – E)*

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Okeyamor Vs. State (2005) 1 NCC 499;
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Yadis Nigeria Ltd. Vs. Great Nigeria Insurance Company Ltd. (2001) 11 NWLR (Pt 725) 529;
Yesufu Vs. The State (1976)10 SC 307.

Nigerian statutes cited in this Judgment
1999 Constitution Section 30(6);
Evidence Act CAP E 14 LFN 2011 Section 209(1) & (3);
Penal Code Sections 282(1)(e); 39(c); and 283.

Representations
Nureini Jimoh, with him**: Abdulrahman Muhammad, M.L. Garba, O.F. Osasuna, Fengak O. Gokir, Onwubiko Barbara (Miss) Ramatu Alhassan** and **M.Y. Mathew** for the appellant.

Salisa H. Danjidda ASS. DPP with him: **Zubarda A. Yau PSC** and **Aminu M. Kawu SSC**, for the respondent.

DATTIJO MUHAMMAD, JSC (Delivering the Lead Judgment): This is an appeal against the decision of the Court of Appeal, Kaduna Division, hereinafter referred to as the lower court, in appeal No. CA/K/149/C/2012, delivered on 8th January 2013, affirming appellant's conviction and sentence by the Kano State High Court, hereinafter referred to as the trial court, for the offence of rape contrary to Section 283 of the Penal Code. A brief summary of the facts on which the appeal revolves is given below.

To prove the offence against the appellant, the prosecution called three witnesses and tendered three exhibits. The three witnesses called by the prosecution are PW1, the prosecutrix, PW2 the victim's father and PW3, Corporal Faruk Ahmed, the police investigation officer through whom exhibit A, appellant's extra-judicial confessional statement, exhibit B, the hospital registration card of the prosecutrix and exhibit C, the medical report issued by the hospital after examining the prosecutric, were tendered. All the exhibits were tendered and admitted without objection.

The appellant, without calling any other witness, testified on his own behalf.

The trial court in a considered judgment, dated 30th March 2012, convicted the appellant as charged and sentenced him to a ten-year term of imprisonment.

Dissatisfied with the trial court's decision, the appellant appealed to the lower court on a notice filed on 21st May 2015 containing nineteen grounds. The dismissal of his appeal on 8th January 2013 informs the instant appeal to this court on fifteen grounds filed on 16th January 2013.

At the hearing of the appeal parties, on identifying their respective briefs filed and exchanged earlier, adopted same as their arguments for and against the appeal. The four issues distilled in the appellant's brief settled by Nureni Jimoh Esq., Read:

> **"1.** ***Whether the Court of Appeal was right on the conclusion regarding the rules of inconsistency, discrepancy and contradictions in the evidence of the***

A ***prosecutrix rightly accepted the written statement allegedly written by the accused (Exhibit A) before the police and hold that the evidence of PW1 was sufficiently corroborated in this case. (Ground II***
B ***XI).***

2. Whether the lower court was right to hold that the prosecutrix has proved the case of rape against the
C ***accused beyond reasonable doubt. (Grounds I, XII & XIV).***

3. Whether the lower court was right to hold that the duty
D ***to prove alibi is on the accused person. (Ground XIII) and***

4. Whether there was no breach of fair hearing when the
E ***lower court failed to pronounce on the appeal against sentence made by the trial court against the accused. (Ground XV).”***

F The similar but more concise and clearer issues formulated at page 5 of the respondent's brief read:

“(1) ***Whether the inconsistency rule is applicable to the***
G ***case of the appellant.***

(2) Whether the prosecution has proved its case beyond reasonable doubt.

H

(3) Whether the court below was right to have affirmed the decision of the trial lower court that the defence of alibi put up by the appellant was belated.

I

A ***(4) Whether failure of the court below to make pronouncement on the issue of the sentence of the appellant with hard labour is a breach of fair hearing."***

B

Appellant's arguments on his first issue are three pronged. Firstly, it is contended, the evidence of the three prosecution witnesses are inconsistent in themselves and contradictory against each other such that no reasonable C tribunal would rely on them to convict an accused person. It is glaring from PW1's evidence in chief at page 13 lines 3 to 5 and under cross examination at page 14 lines 9 to 14 of the record of appeal that the prosecutrix is not certain as to whether it was his penis or finger that the appellant inserted D into her vagina. A conviction under Section 283 of the Penal Code, it is submitted, endures only on proof of penetration of the appellant's penis into PW1's vagina. The absence of clear evidence establishing this fact, argues learned counsel, is fatal to appellant's conviction.

E The testimonies of PW2 and PW3, learned appellant's counsel further contends, are not any helpful to the prosecution. The bruises and sperm PW2 testified to have seen in PW1's private part remain unlinked to the appellant. There is no scientific report establishing the fact of the sperm F spotted on PW1's private parts as being the same trace found on a trouser recovered from the house of the appellant and that the very sperm is that of the appellant. Exhibit C, the medical report following the doctor's examination of PW1, only establishes bruises around PW1's private part G and the rupture of her hymen. Again, it is argued, the document does not link the appellant with either the bruises and, most importantly, the rapture of PW1's hymen.

Lastly, even though no objection was raised against the admissibility H of exhibit A, appellant's extra-judicial confessional statement, it is further argued, appellant's challenge that the statement was not recorded in a language he understands and that he did not sign the said statement makes the statement suspect and unreliable. Concluding on the 1st issue, learned I counsel submits that by **Section 209(1) & (3) of the Evidence Act CAP E 14 LFN 2011**, the unsworn evidence of PW1, a child, requires

corroboration. The lower court is wrong to have affirmed the decision of the trial court in breach of this statutory requirement. Relying inter-alia on **Jegede Vs. The State 14 NWLR (Pt 733) 264, Abogede Vs.The State (1996) 5 NWLR (Pt 448) 270 9 SC 1, Asanya Vs. State (1991) 22 NSCC (Pt 1) 412 at 421** and **Owei Vs. The State (1985) 4 SC 1 at 27,** learned appellant's counsel urges that the issue be resolved against the respondent and the decision of the two courts below based on the faulty evidence be set-aside.

On the 1st issue, learned respondent's counsel submits that learned appellant's counsel is unable to know the difference between inconsistency and contradiction in the evidence of the prosecution's witnesses. The inconsistency rule, it is contended, relates to the evidence of a witness in court which contradicts or is inconsistent with the previous statement of the witness whether sworn or unsworn. None of the previous statements of the three prosecution witnesses, learned respondent's counsel submits, is inconsistent with their testimony at trial. Besides, it is submitted, as a fresh issue raised without leave of the court, the issue of inconsistency and or contradiction, being incompetent, it is urged, be discountenanced.

Further arguing the issue, learned respondent's counsel submits that PW1, inspite of her tender age, remained resolute in her evidence. The seeming confusion in her evidence under cross examination, it is argued, was put aright on re-examination. Relying on the cases of **Eke Vs. State (2011) 3 NWLR (Pt 1235) 589** and **Jerry IkuePenikan Vs. The State (2011) NWLR (Pt 1221) 449,** learned counsel submits that there is nothing contradictory either inter or intra the evidence of the three witnesses to disentitle any court to rely on this evidence. Even if there are contradictions in the evidence of the witnesses, it is submitted, they are not material to warrant allowing the appeal because of the contradictions. Beyond the testimony of PW1 there is exhibit A appellant's statement and exhibits B and C, it is further submitted, both courts rightly relied on to convict the appellant. Appellant's contention under the 1st issue being unavailing, learned respondent's counsel submits, should be discountenanced.

A On the 2nd issue, learned appellant's counsel refers to the decision of this court in **Posu Vs. The State (2011) ALL FWLR (Pt 565) 234 at 250** and contends that in the instant case the respondent has not proved the offence of rape contrary to Section 283 of the Penal Code. The concurrent B findings of the two courts below, it is submitted, cannot be sustained. Relying further on **Afolalu Vs. State (2010) ALL FWLR (Pt 528) 812 at 828** and **The State Vs. Danjuma (1997) 5 NWLR (Pt 506) 512,** learned counsel submits that the respondent whose burden it is to prove all the C ingredients of the offence beyond reasonable doubt has not discharged the burden. In particular, it is argued, the respondent who has not established the fact of penetration of appellant's penis into PW1's vagina cannot, in law, be held to have established the offence of rape against the appellant. The D decisions, *inter alia,* in **Ogunbayo Vs. State (2007) ALL FWLR (Pt 365) 408;Okeyamor Vs. State (2005) 1 NCC 499** and **Jegede Vs. The State (supra),**submits learned respondent's counsel, entitle this court to interfere with the perverse findings of the two courts below. Commending the E authorities to the court, learned counsel urges that the court resolves the issue in appellant's favour and allow the appeal.

In response, learned counsel to the respondent refers to the dicta of Oputa JSC in **Mufutau Bakare Vs. State (1987) 1 NSCC 267 at 272** and F Section 282(1) of the Penal Code which defines the offence of rape and submits that all the ingredients of the offence have been proved by the prosecution in the case at hand. The evidence of PW1 is corroborated. The testimony of PW2 and exhibits A and C, on the authority of **Idris Rabiu Vs.** G **State (2005) 1 NCC 578,** provide the statutory corroboration necessary in establishing appellant's guilt under Section 283 of the Penal Code. Indeed, exhibit A, the confessional statement of the appellant, notwithstanding appellant's plea of *non-est-factum*, does ground the appellant's conviction. H The most important requirement of the law, admissibility of the document, having been met, nothing disentitles the two courts from relying on the statement to found his guilt. The decisions in **Edhigere Vs. State (1996) 3 NWLR (Pt 464) 1** and **Emmanuel Nwanyebonyi Vs. State (1994) 5** I **NWLR (Pt 343) 138** learned respondent's counsel submits, clearly supports their position on the corroboration the testimonies of PW2 and

A exhibit A provide. Further relying on **Solola Vs. State (2005) ALL FWLR (Pt 269) 1751,** which counsel distinguished from **Olalekan Vs. State, (supra)** it is submitted that appellant's guilt has manifestly been established.

B On the 3rd issue, learned appellant's counsel submits that the two lower courts are wrong to have relied on exhibit A in situating the appellant at the scene of the rape. The appellant, it is argued, has maintained that he neither reads nor write in English language, the language in which exhibit A C is recorded. Evidence has not been led, it is further argued, to show that exhibit A was translated and read to the appellant in Hausa language that he understands. The appellant, it is argued, in his evidence in chief did raise the defence timeously. The non consideration of the plea constitutes a D breach of his right under Section 30(6) of the 1999 Constitution. Referring the court to **Garba Vs. State (1999) 11 NWLR (Pt 627) 427 at 439; Adisa Vs. State (1991) 1 NWLR (Pt 168) 490 at 508 and Onyegbu Vs. State (1995) 4 NWLR (Pt 391)510,** learned appellant's counsel urges that the E wrong concurrent findings of the two courts on appellant's alibi be set-aside on resolving the issue in appellant's favour.

On the 3rd issue, learned respondent's counsel submits that appellant's defence of alibi was not investigated because of the insufficient F facts he gave the prosecution. The facts which constitute the plea, it is contended, must be given to the prosecution to enable full investigation into the plea. Appellant's plea of *non est factum,* learned respondent's counsel contends, does not render exhibit A inadmissible. It touches on the weight G to be attached to it an issue the trial court rightly determined at the end of trial. The appellant, argues learned respondent's counsel, must fail in his purported plea of alibi raised in the course of his evidence at trial. Relying to **Ikemson Vs. State (1989) 3 NWLR (Pt. 110) 455 and Adio Vs. State** H **(1986) 3 NWLR (Pt 31) 714,** learned counsel submits that the lower court's findings on appellant's alibi which cannot be faulted be affirmed.

On their 4th issue, learned appellant's counsel submits that appellant's complaint against the sentence of ten years imposed by the trial court was I not considered by the court below. Having raised the issue, the appellate court has the corresponding duty of considering the issue so raised and

A pronounce on it. Failure to consider the issue raised has occasioned miscarriage of justice. This court, learned counsel submits, is empowered to reduce the sentence. Reliance is placed on **Onyekwulumnee Vs. Ndulne (1997) 7 NWLR (Pt 512) 750; Mohammed Vs. Nigerian Army (1998) 7**
B **NWLR (Pt 557) 232, Ukwunneyi Vs. State** and **Ogidi Vs. COP (1960) 5 FSC 251 at 256-257.**

Further relying on **The State Vs. Hassan Audu (1972) 7 NSCC 436 at 437 and Owen Vs. Eyo (1962) 1 ALL NLR 515 at 528-9** and **Adeyeye**
C **Vs. State (1968) ALL NLR 239,** learned appellant's counsel insists that given the ten year imprisonment term with hard labour the trial court imposed and affirmed by the lower court a sentence which is unknown to law, the necessity of an intervention by this court needs no further stress.

D For all the lapses cited in the judgments of the two courts, learned appellant's counsel urges that the appeal be allowed.

Responding on the 4th issues, learned respondent's counsel submits that lower court only has a duty of considering and pronouncing only on
E issues properly raised before it. In the case at hand, the lower court is under no obligation to consider other issues posed apart from the proof of appellant's guilt beyond reasonable doubt. The non consideration of the sentence passed on the appellant by the lower court, it is submitted, is a
F mere irregularity which does not vitiate the findings of both courts below. Referring to **Onochie Vs. Odogoru (2006) ALL FWLR (Pt 317) 544 and 7up Bottling Co. Ltd.& 2 Ors Vs. Abiola & Sons Bottling Co. (2001) 13 NWLR (Pt 730) 469,**learned counsel to the respondent urges that we
G consider the lapses as an irregularity without more.

On the whole, the appeal, he prays, be dismissed. It must outrightly be observed that the four issues the appellant distilled from his fifteen grounds of appeal are prolix. Indeed most of them are unnecessary and
H uncalled for. This court has repeatedly frowned at this practice and still views it as poor advocacy. The success of an appeal, the court has held in very many of its decisions, neither depends on the number of grounds of appeal nor the issues formulated from the grounds. In addition to the
I competence of the two, their substantiality is even more overriding. *See* **G.K.F. Investment Nigeria Ltd Vs. Nigeria Communications Plc (2009)**

LPELR-1294 (SC) and **Kupoluyi Vs. Philips (2001) 13 NWLR (Pt 731) 736.**

The instant appeal questions the lower court's affirmation of the trial court's findings of fact, impression of the witnesses and the credibility attached to the witnesses, the court's entire evaluation of evidence leading to the conviction and imposition of and the nature of prison term on the appellant. Certainly, the appellant does not require the fifteen grounds of appeal and the four issues to make bare his grudges and succeed in the appeal. *See* **Sossa Vs. Fokpo (2001) 1 NWLR (Pt. 693) 16** and **Ogbuanyinya & 3 Ors Vs. Okudo & Ors(No 2) (1990) 4 NWLR (Pt 146) 551 at 556.**

There are indeed many concessions that cannot be denied learned appellant's counsel. I entirely agree with him, and learned respondent's counsel does not begrudge the point, that to establish the offence of rape for which the appellant is convicted, the four ingredients to be proved are:-

(V) That the appellant intentionally had sexual intercourse with PW1, the prosecutrix.

(VI) That the sexual intercourse was without the consent of Pw1.

(VII) That PW1, at the time of the sexual intercourse, was not appellant's wife and

(VIII) That there was penetration. *See* **Affor Lucky Vs. The State (2016) LPELR-40541 (SC), POSU &Anor**

(V) The State (supra) and **Kazeem Popoola Vs. The State (2013) LPELR-20973 (SC).**

The aggregate implication of these ingredients is that the appellant is only guilty of the offence of rape if the concurrent findings to that effect by the two courts below are based on evidence that the appellant knowingly had sexual intercourse with PW1, without her consent. From the record of this

appeal, PW1, appellant's victim, was three years at the time of the rape which fact necessitates reminding the learned appellant's counsel the import of the clear and unambiguous words that constitute Section 39(c) and more particularly Section 282(1)(e) of the Penal Code. The Sections provide:

> ***"39 (c) A consent is not such a consent as is intended by any section of this Penal Code, if the consent is given***
>
> ***(d) by a person who is under fourteen years of age."***
> ***"282(1) A man is said to commit rape who, save in the case referred to in subsection (2), has sexual intercourse with a woman in any of the following circumstances***
>
> ***(e) with or without her consent, when she is under fourteen years of age or of unsound mind."***

From the foregoing, PW1 is incapable of giving valid consent to any act of sexual intercourse under scrutiny pursuant to Section 283 of the Penal Code. It is sufficient under the law to convict the appellant on evidence that establishes sexual intercourse only between the two. Proof of PW1's consent being irrelevant is unnecessary. The finding of the trial court at page 76 of the record and the lower court's affirmation of the finding on the point at page 167 remain unassailable.

The appellant's added vehemence is that the "penetration" of his penis into PW1's vagina, easily the most important ingredient of the offence of rape, has not been established and the findings of the two courts on that fact, therefore, is perverse. Furthermore, the evidence of PW1 on the vital ingredient of the offence if at all extant, the appellant contends, does not constitute sufficient proof of the crucial ingredient. Her testimony requires corroboration. Appellant's extra judicial confessional statement cannot, on the face of his plea of *non-est-factum,* it is further submitted, provide the required corroboration.

A Again, to some extent, the appellant is right. Section 209 (3) truly provides as follows:

> ***"209(3)A person shall not be liable to be convicted for an***
> B ***offence unless the testimony admitted by virtue of subsection (1) of this section and given on behalf of the prosecution is corroborated by some other material evidence in support of such testimony implicating the***
> C ***defendant."*** (Underlining supplied for emphasis).

The contention of learned appellant's counsel is not only that the foregoing provision has made corroboration to PW1's evidence in the matter a
D necessity. He further argues that PW1's ambivalent evidence on the fact of the penetration of her vagina by appellant's penis is suspect, unreliable and unavailing to the respondent in proof of the most relevant ingredient of rape. To what extent are these postulations correct?

E The relevant portion of PW1's testimony is at pages 13-15 of the record of appeal. In her evidence in chief PW1 stated as follows:

> ***"I know the accused person Musa Natsaha. I can't recall the***
> F ***date when this incident happened but I know what happened to me. The accused raped me. On that day, the accused saw me outside so he called me. He asked me to go and buy Kosai (bean cake) for him. It was in the morning in his shop at***
> G ***bakinkasuwa (market frontage)). Then when I bought the bean cake and I brought it to him at his shop so the accused gave me one bean cake. I ate the been cake. I know the accused even before the incident as he is our neighbour.***
> H ***Between his house and mine are 3 houses. Then after I ate the bean cake, the accused then removed my clothes and pant. Then he laid me down and laid on top of me. Then he put his penis inside my vagina. I was crying as I felt pains so***
> I ***after he left me and he put something mucus on my vagina I was still crying so I went home and I told my father. I told my***

A ***father what the accused Musa Natsaha did to me in his shop. So my father reported the matter to the police. The police examined me and saw what happened to me. So I was taken to hospital by the police. At the hospital I was examined by a***
B ***doctor and I was cleaned up and treated."***

Under cross examination PW1 at page 14 of the record stated thus:

C ***"…The accused laid on top of me and put either his finger or penis. I don't know the difference between his fingers and his penis."***

D Being re-examined, PW1 testified as follows:

"He inserted his penis into my vagina not his finger."

E On the foregoing evidence, the trial court proceeded at pages 75-76 of the record as follows:

"The purpose of re-examination is for the witness to clear
F ***any ambiguity that might have arisen during cross-examination.***

…… However, in spite of the tender years of PW1 (which was
G ***7 years) at the time of her testimony, PW1 was sharp, alert, intelligent and answers all the questions put to her by the defence. Counsel rationally and inspite of the rigorous cross examination and attempt to confuse her by the defence, her***
H ***evidence was direct, credible and of probative value. PW1 was categorical that the accused inserted his penis into her vagina and she felt pains therefore she cries all the way to her house."***

I

It must be restated that the evaluation of evidence and assumption of probative value to such evidence are the preserve of the trial court that had the opportunity of hearing and assessing the evidence and the demeanour of the witnesses. The lower court and indeed this Court interferes only where an appellant shows clearly that the trial court did not, in the discharge of its primary duty of evaluating the evidence it received, bring to bear the advantage it had of seeing and assessing the witnesses. Having not done that in the instant case, appellant's complaints against the inference of the two courtson this particular issue accordingly fails. *See* **Mogaji Vs. Odofin (1978)4 S.C. 1, Eseme Eyibo Vs. Mr. Dan Abia & Ors (2012) LPELR-20607 (SC)** and **Dakat Vs. Dashe (1997) 12 NWLR (Pt 531) 46.**

In what evidence if any, it may now be enquired, did the lower court find corroboration to the testimony of PW1? The answer to this question starts with the finding of the trial court in that regard at pages 77-83 of the record *inter-alia* as follows:

> ***"The evidence of PW1 was corroborated by the testimony of PW2 who has stated that when PW1 told him what happened to her he physically examined her and saw sperm deposited all over her vagina PW3 also stated that the accused gave a confessional statement which he recorded …. he took the accused to the scene of the crime (where) he recovered a trouser with fresh sperms on it which he took and registered it as an exhibit."***

The court continued thus:

> ***"The evidence of PW1, was further corroborated by the confessional statement of the accused exhibit A. in exhibit A the accused narrated the same story of calling PW1 a 3 years (sic) old and giving her bean cake thereafter had carnal knowledge of her ……the evidence of PW1 was further corroborated by exhibit B and C … Exhibit B and C clearly stated that PW1 was raped."***

The lower court's affirmation of the foregoing trial court's finding *inter-alia* at page 181 of the record reads:

> ***"The learned trial judge was right when she held that exhibits A, B and C are corroborative evidence of the testimony of PW1 on the issue of penetration …..***
>
> ***The evidence of the appellant that he gave N6,000 to the police so that they could release him is corroborative evidence of PW1 that he, indeed, committed the offence of rape against PW1 and I so hold."***

Now, let me restate what a corroborative evidence is. It is evidence independent of that which it strengthens and discloses not only the commission of an offence but equally links or tends to link the accused with the commission of the offence. It is, put differently, evidence which confirms in some material particular not only that the crime has been committed but, addedly, that it is the accused who committed it. Corroborative evidence may be direct or circumstantial. In whatever form it comes, the court must ensure that the corroborating evidence is not only independent of the main evidence. It seeks to corroborate but also supports the main evidence by rendering the story of the latter implicating the accused more probable in some material particular. *See* **Omisade & Ors Vs. The Queen (1964) 1 ALL NLR 233 at 253; Okabichi Vs. State (1975) 3 Sc.; Mbele Vs. State (1990) 4 NWLR (pt 145) 488** and **The State Vs. James Gwangwan (2015) LPELR-24837 (SC).** In **Edwin Ezigbo Vs. The State (2012) LPELR-7855 (SC).** This Court per Onnoghen JSC (as he then was now CJN) held as follows:

> ***"Corroboration in respect of the offence of rape is evidence which tends to show that the story of the prosecutrix that the accused committed the crime is true."***

In the instant case, the concurrent findings of the two courts below that the evidence of PW2 and PW3 and more particularly exhibit A, the extra-judicial confessional statement of the appellant, Exhibits B and C the hospital registration card and medical report of PW1, the prosecutrix, constitute such corroboration cannot be faulted. I equally agree with learned respondent's counsel that neither the testimonies of the witnesses nor the documentary evidence are inconsistent in themselves or contradictory to any evidence outside their respective beings. Appellant's further claim that the two courts are wrong in their findings on the alibi the appellant raised, given exhibit A, his confession that situated him at the scene and time of the offence for which he is convicted, equally crumbles. That apart, as rightly found by the two courts, the appellant neither raised the defence timorously nor furnished the particulars of those he said he was with at the farm at the time relevant to the rape he committed. In any event, the defence of alibi crumbles in the face of stronger evidence which, in the case at hand, PW1's testimony and exhibit A, appellant confessional statement are. *See* **Obiode Vs. The State (1970) 1 ALL NLR 35; Chukwu Vs. State (1996) 7 NWLR (Pt 463) 686; Ani Vs. State (2009) 14 NWLR (Pt. 1168) 445** and **Alhaji Musa Sani Vs. The State (2015) LPELR-24818 (SC).**

Finally, learned appellant counsel's submission that the reliance of the two courts on exhibit A, appellant's confessional statement inspite of his plea of *non-est factum* has occasioned miscarriage of justice cannot be taken seriously. Learned counsel has conceded to and the record of appeal has disclosed the fact that exhibit A on being tendered, was admitted in evidence without any objection by the appellant who was represented by counsel. The test for the admissibility of any evidence remains its relevance to the issue at hand. *See* **ACB Ltd. Vs. Gwagwada (1994) 5 NWLR (Pt 342) 25 and Dr. Imoro Kubor and Anor Vs. Hon. Seriake Henry Dickson &Ors (2012) LPELR-9817 (SC).** In law, it must be accepted, a clear distinction exist between the question whether a particular evidence is admissible and the question of its probative value or the weight to be attached on it. The fact that evidence, oral or documentary, is admissible does not mean that it has any probative value or weight at all.

A But once it is found to be of value the court may rely on the evidence to arrive at an enduring decision. *See* **Gbafe Vs. Gbafe (1996) 6 NWLR (Pt 455) 417.**

At pages 176-177 of the record of appeal, the lower court held in
B relation to appellant's plea of *non-est factum inter-alia* as follows:

> ***"On the issue of the statement, exhibit A, it is the contention of the appellant that he did not make the statement because***
> C ***learned counsel for him had raised the defence of non est factum when the statement was being tendered in evidence ……..***
>
> D ***Thereafter the statement was admitted in evidence and marked as exhibit A. The appellant did not say anything in elaboration of his plea of non est factum. In effect, exhibit A was admitted in evidence without objection…..Learned***
> E ***counsel did not offer an explanation when he pleaded non est factum to enable both the prosecution and the trial court know what the defence was up to. It looks like an attempt to spring a surprise. When the appellant gave evidence on oath,***
> F ***he did not deny making exhibit A. all he said on his statement was that the police took his statement and when confronted by his counsel with exhibit A, he said:***
>
> G ***"I only know the Arabic alphabets. I can't read the English, letters in exhibit A'***
>
> ***…. This has not contradicted the evidence of PW3 who***
> H ***testified to the effect that the appellant signed exhibit A by writing his name in Arabic. There is nothing in the testimony of the appellant suggested of the plea of non est factum. This plea appellant's counsel in respect of which the appellant was***
> I ***either nor previously or not properly tutored ……...since the submission of counsel is not evidence,***

A ***I hold that the appellant made a statement to the police and since he identified the 'Arabic alphabets' which PW3 said he had inscribed, I believe that the statement is none other than exhibit A……"*** (Underlining supplied for emphasis).

B

I cannot agree more with the lower court's foregoing findings on the issue. I am only to add that even in the domain of civil litigation where the plea of *non est factum* appears to hold more sway, the law remains sacrosanct that
C in the absence of fraud or duress the signature of a person on a document is evidence of the fact that he is either the author of the content of the document above his signature or that the contents were brought to his attention before appending his signature. The application of these
D principles would have left the appellant in the quandary anyway. *See* **Yadia Nigeria Ltd. Vs.Great Nigeria Insurance Company Ltd. (2001) 11 NWLR (Pt 725) 529.**

Practitioners must be reminded of this court's stand on instances such
E as in the instant case when in **Shurumo Vs. The State (2001) 196 LRCN 199**it opined thus:

"When a counsel stands by and allows exhibits to sail
F ***smoothly through to become evidence without an eyelid, then it becomes obvious that the counsel is comfortable with the evidence and see no reason why he should challenge its admission."***

G

And that in **Emoga Vs. The State (1997) 7 SCNJ 518** the court per Onu JSC had also said:

H ***"It will not be in the interest of the society to allow a man who has confessed to his crime to walk out of court a freeman simply because he has a change of mind. The whole trial will be a mockery …. <u>It would be dangerous to apply the</u>***
I ***<u>principle of extra judicial confession of the accused person as it would open a flood gate of retracing all statements made</u>***

by accused persons before the police officer." (Underlining supplied for emphasis).

In the instant case, therefore, it does not lie in the mouth of learned appellant's counsel who has represented the appellant all through his sojourn, and allowed exhibit A to be admitted in evidence without objection, to now say that the statement be discarded as same is devoid of any probative value.

All that I have so far tried to say is that the respondent herein has discharged the burden the law places on it to establish the charge against the appellant beyond reasonable doubt. The two courts below are right to have so found and accordingly convicted the appellant as charged. I find no feature in the concurrent findings of the two courts that vitiates their decisions. Not even the complaint on the sentence imposed on the appellant that has not been demonstrated, by this appeal, to have occasioned a miscarriage of justice.

In sum, the appeal is unmeritorious. I dismiss same in further affirming his conviction and sentence by the lower court.

Musa Dattijo Muhammad,
Justice, Supreme Court

NKANU ONNOGHEN, (CJN): I have had the privilege of reading in draft the Lead Judgment of my learned brother **MUSA D. MUHAMMAD,** JSC just delivered.

I agree with his reasoning and conclusion that the appeal is devoid of merit and should consequently be dismissed.

I therefore order accordingly and affirm the Judgment of the lower court. Appeal dismissed.

Walter Samuel Nkanu Onnoghen
Chief Justice Of Nigeria

KEKERE-EKUN, (JSC): The appellant herein was charged before the High Court of Kano State for the rape of a 3-year old girl contrary to Section 283 of the Penal Code. He pleaded not guilty to the offence. Three

witnesses testified for the prosecution. Exhibits were tendered. The appellant testified on his own behalf and called no other witness. At the conclusion of the trial, he was found guilty as charged, convicted and sentenced to 10 years imprisonment with hard labour. His appeal to the Kano Division of the Court of Appeal (the lower court) was dismissed on 30/3/2012. He is still dissatisfied and has further appealed to this court.

I have had the benefit of reading in draft the judgment of my learned brother, M.D. Muhammad, JSC just delivered. He has exhaustively considered and ably resolved all the issues in contention in the appeal. I agree with him that the appeal lacks merit and deserves to be dismissed.

Although learned counsel for the appellant formulated 4 issues for determination, the real issue is whether the court below was right in affirming the finding of the trial court that the prosecution proved its case beyond reasonable doubt.

The ingredients of the offence of rape or unlawful carnal knowledge are as follows:

f. That the accused had sexual intercourse with the prosecutrix.

g. That the act of sexual intercourse was done without her consent or that the consent was obtained by fraud, force, threat, intimidation, deceit or impersonation.

h. That the prosecutrix was not the wife of the accused.

i. That the accused had the *men rea,* the intention to have sexual intercourse with the prosecutrix without her consent or that the accused acted recklessly, not caring whether the prosecutrix consented or not.

j. That there was penetration.

A The most important and essential ingredient of the offence is penetration. The court will deem that sexual intercourse is complete upon proof of penetration of the penis into the vagina. Any or even the slightest penetration will be sufficient to constitute the act of sexual intercourse. *See*
B **Posu Vs. The State (2011) ALL FWLR (Pt. 565)) 234 @ 250 B-E; Jegede Vs. The State (2001) 14 NWLR (Pt. 733) 264; Ogunbayo Vs. The State (2007) ALL FWLR (Pt. 365) 408.**

It is important to note that under the Penal Code a child who is under
C the age of 14 years is incapable of giving consent. *See* Section 39(c) and 282 (1) (e) of the Code. *See also* **Shuaibu Isa Vs. Kano State (2016) LPELR 400 11 (SC).** Therefore, once it is proved that the accused person had sexual intercourse or unlawful carnal knowledge of a girl under the age
D of 14 years, he is guilty of rape.

At the time she testified, PW1 was seven years old. She gave cogent and credible evidence as to what took place on the day of the incident. She gave a detailed account of what transpired, how she reported to her father,
E PW2 who in turn reported the matter to the Police, and how she was taken to hospital and examined by a doctor. In spite of her tender age, the trial court found her to be a credible and convincing witness. Taking advantage of her young age, learned counsel for the appellant tried to discredit her testimony
F under cross-examination by asking whether it was the appellant's finger or his penis that was inserted into her vagina. She replied that she did not know the difference. However, under re-examination, she was emphatic that it was his penis and not his finger that was inserted into her vagina. The
G purpose of re-examination is to clear up any ambiguity that may have arisen as a result of cross-examination. Learned counsel for the prosecution properly made use of this opportunity of re-examination in this case.

With regard to the offence of rape, the courts have always looked for
H some independent evidence to show that the account of the prosecutrix is true i.e., that the offence was committed and that it was committed by the accused person. *See* **Posu Vs. The State (supra).** This is particularly pertinent in this case where the prosecutrix was a child of tender age.
I Notwithstanding the fact that the court had satisfied itself that she understood the duty of speaking the truth as required by Section 209 (1) of

A the Evidence Act, 2011, by virtue of Section 209 (3) of the Act, her evidence required corroboration. Depending on the facts of the case, where the accused person denies the charge, some of the corroborative evidence may include but not limited to:

B

(a) Medical evidence showing injury to the private part or other parts of the prosecutrix's body which may have been occasioned in a struggle; or

C **(b) Semen stains on her clothes or the clothes of the accused or on the place where the offence is alleged to have been committed.**

D *See* **Posu Vs. The State (supra); Afor Lucky Vs. The State (2016) LPELR 40541 (SC); Isa Vs. Kano State (supra).**

In the instant case, the trial court took into account not only the credible evidence given by PW1, but also the evidence of her father, PW2, E who though not an eye witness, testified as to how he examined his daughter and found sperm on her after she reported the incident to him and his report to the Police. The court also took into account the evidence of PW3 (the IPO) who recovered the trousers of the appellant with fresh sperm F on them and the medical report, Exhibit C wherein the doctor who examined PW1 stated that bruises were seen around her pelvic area; that examination of the vagina revealed a permeable hymen and "an impression of rape was ascertained." The court also relied on the appellant's G confessional statement, which he attempted to retract at the trial. The statement was admitted without objection. He identified his signature written in Arabic language although he claimed that he did not understand the English language in which it was written. In other words, that it was not H his statement. The facts contained therein tally substantially with PW1's account. The retraction of a confessional statement at the trial does not render it inadmissible. The plea of *non est factum* was not made out. The court was entitled to rely on the statement along with the other credible I evidence before it. *See* **Ubierho Vs. The State (2005) 5 NWLR (Pt. 919) 644; Yesufu Vs. The State (1976) 6 SC 167; Alarape Vs. The State (2001)**

5 NWLR (Pt. 705) 79.

I am of the considered view that the trial court fully utilized the opportunity of seeing and hearing the witnesses testify and made findings fully supported by the evidence on record. The evidence of these witnesses was not discredited under cross-examination. Learned counsel for the appellant has failed to satisfy me that there was any material inconsistency in the evidence led by the prosecution or that the findings of the trial court, upheld by the lower court were perverse in any way. The court below did a thorough job, which cannot be faulted.

For these and the more elaborate reasons stated in the lead judgment, I also find the appeal to be lacking in merit. It is accordingly dismissed.

The judgment of the lower court is affirmed.

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

EJEMBI EKO, (JSC): I read in draft the judgment just delivered in this appeal by my learned brother, MUSA DATTIJO MUHAMMAD, JSC. The Judgment represents all I need to say in the appeal. It represents my views and I hereby adopt it.

There is no doubt that the PW.1, the prosecutrix, was a child when she was allegedly raped and when she testified. Her evidence needed to be corroborated as a matter of Law. See Section 209(3) of the Evidence Act, 2011. The corroborating evidence is nothing but that other evidence that confirms the evidence that needs to be corroborated. It has to be an independent testimony that confirms the principal evidence. *See* **Nwambe Vs. The State (1995) 3 SCNJ 77 at 97.** The corroborating evidence should be one that does not itself, require to be corroborated either as a matter of law or of practice. For rape, corroboration is an evidence that tends to show that the story of the prosecutrix that she was raped by the accused is true. *See* **Edwin Ezigbo Vs. The State (2012) LPELR-7855 SC.**

In the instant case, the learned trial Judge found the evidence of the PWW.1, which impressed him as "sharp, alert, intelligent in spite of the rigorous cross-examination" and her tender age of 7 years, was corroborated by the evidence of the PW2, PW3 the confessional statement

of the appellant himself, Exhibit A and the medical report, Exhibit C.

In Exhibit A the appellant admitted that he had carnal knowledge of the PW.1 who, then, was 3 years old. The PW2, upon the complaint of the PW.1 that she was raped by the appellant, physically examined her and found sperm deposited on PW.1's vagina. The PW.2 was not discredited by cross-examination. The PW.3, the investigating Police Officer, testified that the appellant confessed to him that he raped the PW.1. The PW.3 recovered the appellant's trousers that had fresh sperm on it. The medical report, Exhibit C, also confirms bruises on PW.1's vagina which are indicative of the admitted carnal knowledge of the PW.1 by the appellant. The concurrent findings that the appellant raped the PW.1 cannot, therefore, be faulted.

Appellant's counsel's contention that Exhibit A is unreliable does not impress me. The appellant admitted that he appended his signature on Exhibit A in Arabic alphabet. He claimed that he could not read or write in the English Language Exhibit A was recorded. It was not suggested that the PW.3 who recorded the statement in Exhibit A, did not understand the language of the appellant. The statement was tendered and admitted without any objection, albeit feeble. When the PW.3 testified he was also not discredited. The plea of Exhibit A being *non est factum* was just a mere lame afterthought. It was rejected outrightly and correctly in my view.

I cannot fault the concurrent findings of fact that the appellant raped the PW.1, whose evidence was abundantly corroborated to warrant the conviction of the appellant for rape. The appeal lacking in substance is hereby dismissed. The decision of the lower court affirming the conviction and sentence of the appellant is hereby affirmed.

Ejembi Eko
Justice, Supreme Court

DAUDA BAGE, (JSC): My lord, Musa Dattijo Muhammad, JSC availed me with a copy of the Judgment just delivered, for which I am in complete agreement with. I will add a few words of my own in total support. The essential and most important ingredient of the offence of rape is penetration and unless penetration is proved, the prosecution cannot said to have prove

its case beyond reasonable doubt. *See* **Edet Okon Vs. The State (2001) 7 SCNJ 291**.

Penetration however slight is sufficient and it is not necessary to prove any injury or the rupture of the hymen to constitute the crime of rape. *See also* **Okoyomon Vs. The State (1972) 1 NWLR 292, Jos N. A Police Vs. Allah Na Gani (1968) NMCR 8, Igbine Vs The State (1997) 9 NWLR (Pt. 519) 101.**

In the instant case, PW2 in his testimony which was not discredited by cross examination, stated that upon the complaint of the PW1 that she was raped by the appellant, he examined her and found sperm deposited on PW1's vagina.

In addition to that, the appellant, in Exhibit A has admitted that he had carnal knowledge of the PW1. It is a trite law that an accused person can be convicted on his confession alone. A voluntary confession of guilt by an accused is sufficient to warrant conviction without corroborative evidence if it is direct, positive, duly made and satisfactorily proved. *See* **Sule Vs. The State (2009) 4 NCC 456, Amanchukwu Vs. FRN (2009) 4 NCC 58 Amoshima Vs. The State (2009) 4 NCC 280.**

For the more detailed reasoning contained in the Lead Judgment. I too find no merit in this appeal and it is accordingly dismissed by me. The Judgment of the Lower Court is hereby affirmed.

Appeal dismissed.

Sidi Dauda Bage
Justice, Supreme Court