

9TH FEBRUARY 2018
JSCNLR VOL. 4

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**ADAOHA UGO-NGADI
AND
FEDERAL REPUBLIC OF NIGERIA**

SC. 516/2016

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

FRIDAY, 26TH JANUARY, 2018

BEFORE THEIR LORDSHIPS

MARYUKAEGO PETER-ODILI	JUSTICE, SUPREME COURT
KUMAI BAYANG AKAAHS	JUSTICE, SUPREME COURT
JOHN INYANG OKORO	JUSTICE, SUPREME COURT
PAULADAMU GALINJE	JUSTICE, SUPREME COURT
SIDI DAUDA BAGE	JUSTICE, SUPREME COURT

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STATUTE: Interpretation – S.272(1) of the CFRN 1999 – Extent and Import

WORDS AND PHRASES: 'Also' – Meaning.

Issues for Determination

- i. Having regard to the lower court's finding that the trial court breached the principle of fair hearing in striking down Section 19 of the Admiralty Jurisdiction Act (AJA), whether the lower court was not in grave error and so**

acted without jurisdiction when it thereafter failed to set aside the trial court's ruling of 10th October, 2014. (Ground 1).

- ii. Having regard to the clear provisions of Section 251 (1)(a), (g), (n), (s) and (3) of the Constitution, Section 8 (1) of the Federal High Court Act (FHC Act), Sections 1, 2, 19 and 25 of the AJA vis-à-vis the information preferred against the appellant at the trial court, as well as the evidence adduced by the prosecution, whether the lower court was not in grave error in holding that the trial court rightly assumed jurisdiction on the information dated 20th July, 2012. (Grounds 2, 3, 4, 5 and 6).**
- iii. Whether the lower court was not in error when it failed to be bound and to follow the decision of the honourable court in *George vs. FRN (2014) 5 NWLR (Pt. 1399) 1* and its own decision in *Okey Nwosu vs. FRN – Appeal No; CA/L/601/11* delivered on 21 November 2013 and *Akingbola vs FRN Appeal No: CA/L/490/14* delivered on 31 December 2014. (Ground 7).**

Facts of the Matter

The appellant herein and four (4) other accused persons were arraigned before the Lagos State High Court by the Economic and Financial Crimes Commission (EFCC) charged with obtaining properties by false pretences contrary to Section 1 of the Advance Fee Fraud and Other Fraud Related Offences Act, 2006 and conspiracy to forge documents, forgery, and uttering of false documents contrary to Section 516, 467 (3)(c) and 468 respectively of the Criminal Code Cap, C 17 Vol 2 Laws of Lagos State of Nigeria, 2003.

Appellant and the co-accused persons pleaded not guilty to the charge. In order to prove its case, the prosecution called twelve (12) witnesses and tendered seventy-one (71) documents which were admitted in evidence. At the close of the prosecution's case, a no case submission pursuant to Section 239 of the Administration of Criminal Justice, Law of Lagos State was made on behalf of the appellant, 2nd and 5th accused persons. In the no case submission, the appellant raised the issue of jurisdiction, contending that the evidence led shows that the charge relates to revenue of the Federal Government, Petroleum and Crude Oil products as well as admiralty matters, and that by virtue of the provisions of Section 251 of the 1999 Constitution, the High Court of Lagos State has no jurisdiction to entertain the case.

The respondent filed a counter affidavit accompanied by a written submission. In a reserved and considered ruling delivered on the 10th October, 2014 the trial court overruled

the no case submission and held that a *prima facie* case was sufficiently disclosed against the appellant. He was therefore called upon to enter his defence.

Dissatisfied with the ruling of the trial court, the appellant appealed to the Court of Appeal, Lagos Division. The appeal was heard and in a reserved judgment delivered on the 30th April, 2015 same was dismissed. The appellant is once again dissatisfied with the decision of the Court of Appeal. Being aggrieved she has brought this appeal to the Supreme Court.

In order to relieve the public of the high cost of petroleum products, the Federal, State and Local Governments came up with a scheme in which they contributed certain funds that was referred to as **Petroleum Support Fund** which fund was used to subsidize fuel import. Under the scheme, petrol is bought locally in Nigeria in the open market at a Government subsidised rate. The oil marketing companies, under licence to import petrol into Nigeria would bring in petrol from abroad, having purchased same at the international rate and then submit their claims to the Government for settlement. The amount paid by the Government is the difference in price between the international market rates which is always higher than the subsidised rate. The claim by the marketer under the Petroleum Support Fund is based on what is actually discharged at the tank farm and as verified by the officers of Petroleum Product Pricing Regulatory Authority (PPPRA), Department of Petroleum Resources (DPR), External auditors, the surveyor to the marketers involved, and the surveyor to the tank farm owner.

The respondent's case is that sometimes in 2011, it was observed that the subsidy being paid by the Government went up astronomically and this prompted the Minister of Petroleum Resources to forward a petition to Economic and Financial Crimes Commission (EFCC), urging it to carry out investigation into the operation of the Petroleum Support Fund otherwise known as fuel subsidy. The EFCC found in the course of its investigation that **Ontario Oil & Gas Nigeria Limited**, (the 5th accused at the lower court) was one of the companies licensed by Government to import petrol into the country. The appellant herein is a director in Ontario Oil & Gas Nigeria Limited and also a signatory to the account of the company. In 2010 the company was given allocation in the 3rd quarter to import fuel. It claimed that following the authorisation, it imported 19,327,460 litres of petrol and discharged same into the Integrated & Gas depot on the 7th July, 2010. During the 4th quarter of the same year the company in pursuance of the licence given to it to import petrol, claimed to have imported 19,523,892 litres of petrol which it discharged into **Obat Oil Storage Facilities in Apapa** between 14th and 15th November, 2010. Investigation conducted by the EFCC revealed that the company imported 12,470,706 and 10,146,594,73 litres of petrol for the 3rd and 4th quarters of 2010 respectively and the appellant and 1st accused person presented false documents which led to over payment of N340,178,111.24 (Three hundred and forty million, one hundred and seventy-eight thousand, one hundred and eleven naira twenty-four kobo) and N414,757,890,54 (four hundred and fourteen million, seven hundred and fifty-

seven thousand, eight hundred and ninety naira fifty-four kobo) as fuel subsidy by the Federal Government for 6,815,830.73 and 9,377,298 litres of petrol which were not imported. It was this discovery that gave rise to the arraignment of the appellant and other accused persons before the High Court of Lagos State.

Held: *(Unanimously dismissing the appeal)*

1. *Fundamental issue of jurisdiction and need to be decided first*

The second issue for determination of this appeal is challenging the jurisdiction of the Lagos State High Court before which the appellant is standing trial. Jurisdiction is the sole of adjudication and if the trial court has no jurisdiction to entertain a matter, an appellate court cannot assume jurisdiction over its proceedings that have been conducted without jurisdiction. Consequently it is always expedient to resolve any challenge to jurisdiction first before proceeding to resolve any other issue. See *Oloriode vs. Oyebi* (1984) 1 SCNLR 390; *Ezomo vs. Oyakhire* (1985) 1 NWLR (Pt. 2) 195; *Sofekun vs. Akinyemi* (1980) 5-7 SC 1; *A-G of Anambra State vs A-G Fed.* (1993) 6 NWLR (Pt. 302) 602. (*P23 Paras F – I*).

2. *The Federal High Court has only exclusive civil jurisdiction*

I wish to pause here in order to consider this brilliant academic argument by learned senior counsel which argument does not seem to fall in line with the decisions of this court regarding the provision of Section 251(3) of the Constitution. Unlike the State High Court which is a court of unlimited jurisdiction, the Federal High Court is a special court with limited, but exclusive jurisdiction clearly specified under Section 251(1)(a-s) of the Constitution. There is nowhere in the Constitution or any other enactment where it is stipulated that any suit in which a Federal Government Ministry, agency, functionary or parastatal is sued is justiciable only in the Federal High Court except those cases specified under Section 251 (1) (a-s) of the Constitution.

Section 251 (1) of the Constitution deals solely with civil matters in which the Federal High Court has exclusive jurisdiction. This is what the section says:

“Notwithstanding anything to the contrary contained in this Constitution and in addition to such other jurisdiction as may be conferred upon it by an Act of the National Assembly, the Federal High Court shall have and exercise jurisdiction to the exclusion

of any other court in civil causes and matters.....”

Per Peter Odili (JSC)

“Clearly this court has stated in definite terms the extent of criminal jurisdiction of the Federal High Court as its not being tampered with by the emergence of the 1999 Constitution and until the National Assembly enacts a penal enactment in future to confer exclusive jurisdiction on the Federal High Court, the State High Court will continue to exercise the jurisdiction entrusted to it in offences covered by State Laws. On the other hand the Federal High Court will keep to the limits prescribed for it in matters listed in section 7(1) of the Federal High Court Act or the Exclusive Legislative List of the Constitution. In determining the court with the requisite jurisdiction to entertain a criminal matter the court would always consider the nature of the charge rather than the transaction forming the subject matter of the charge or the documents attached as proof of evidence.

It needs to be said that the 1999 Constitution has not conferred exclusive criminal jurisdiction on the Federal High Court on various items listed in section 251(1) of the CFRN and until such a provision bestowing exclusivity of the jurisdiction to the Federal High Court, the State High Court can equally entertain matters either civil or criminal to which jurisdiction has been conferred by the National Assembly and in this section 251(1)(s) stipulates thus: “such other jurisdiction, civil or criminal and whether to the exclusion of any other court or not as may be conferred upon it by an act of National Assembly”.

(Pp 25; 41 Paras A–E; C–H).

3. *The extent of jurisdiction of State High Court, the construction of S. 272(1) of the CFRN 1999*

The jurisdiction of the State High Court is donated by Section 272 (1) of the Constitution, in the following words:

“Subject to the provision of Section 251 and other provisions of this constitution, the High Court of a State shall have jurisdiction

to hear and determine any civil proceedings in which the existence or extent of a legal right, power, duty, liability, privilege, interest, obligation or claim in issue or to hear and determine any criminal proceedings involving or relating to any penalty, forfeiture, punishment or other liability in respect of an offence committed by any person.”

Section 272 (1) of the Constitution is made subject to Section 251 and other provision of the constitution with respect to those items where the jurisdiction of the Federal High Court is exclusive. The section is also made subject to other provisions of the constitution where exclusive jurisdiction has been conferred on the Supreme Court, the Court of Appeal and Election Petition Tribunals.

In all other matters where exclusive jurisdiction has not been expressly assigned to any other courts, the State High Court has justification to hear and determine such matters.

(Pp 25 – 26 Paras F – D).

4. *Jurisdiction of State High Court to try federal offences*

Section 286 of CFRN provides thus “Jurisdiction of state court in respect of Federal Causes”. This is because the Constitution of the Federal Republic of Nigeria recognizes that the State High Court may be conferred with the power by an Act of the National Assembly to try Federal offences. This situation has been effectively explained in the case of A.G. Ondo State vs. A.G. Federation (2002) 9 NWLR (Pt. 772) 222 at 308 per Uwasi CJN as follows:

“The next point is whether the Attorney General of the Federation or any person authorized by the ICPC can lawfully initiate or authorize the initiation of criminal proceedings in any court in Ondo State in respect of offences created by the Act. The plaintiff’s contention is that the answer is in the negative if the answers to issues No.s. (i) and (ii) have been answered in the negative.

But I have held otherwise and so the opposite is the case. I therefore, hold that the criminal proceedings can be initiated in the court in Ondo State in accordance with the provisions of section 286 subsection (1) (b) of the Constitution such provides...

Federal offences is defined in section (3) thereof to mean “an offence contrary to the provisions of an Act of the National Assembly or any law having effect as if so enacted”. This decision was followed by the Supreme Court in *Olafisoye vs. FRN (2004) 4 NWLR (Pt. 864) 580*.

The word “any court in Nigeria” in section 174(1)(a) of the CFRN 1999 has stated that the Federal Attorney General can approach any court including the State High Court to initiate criminal proceedings in relation to Federal Offences. It follows that the appellant is not pushing a right interpretation to the effect that in any Federal Offence, only the Federal High Court has exclusive jurisdiction to entertain the matter.

Indeed the concurrent findings and conclusions of the two courts below are anchored on the facts available and sustained by the relevant laws and so there is no basis for any interference by this court. (Pp 41 – 42 Paras H – I).

5. *The interpretation and import of S.251(3) of the CFRN 1999*
Section 251 (3) provides as follows:

“The Federal High Court shall also have and exercise jurisdiction and powers in respect of criminal causes and matters in respect of which jurisdiction is conferred by subsection (1) of this section.”

The word 'exclusive' is clearly absent in Section 251 (3) of the Constitution. The word 'also' as used in subsection (3) of Section 251 of the Constitution is defined by Advanced Learner’s Dictionary to mean “in addition; too, or as well”. If the framers of the Constitution had intended that the Federal High Court should have exclusive jurisdiction in criminal matters involving the items listed under Section 251 (1)(a-s), they would have said so in clear terms. It is an established cardinal principle of interpretation that the words of a statute which are unambiguous must be given their ordinary grammatical meaning. It is not the function of the court to import words into the statute which do violence to the intent and meaning of the statutory provision. See *Edozie vs. Edozie & Ors (1998) 12 NWLR (Pt. 580) at 152; Egbe vs. Alhaji & Ors (1990) 21 NSCC (Pt. 1) 306 at 325; (1990) 1 NWLR (Pt. 128) 546 at 581.*

(P 26 Paras D – I).

6. *Principles of A-G Ondo State vs. A-G Federation & Ors.*

In **Attorney General of Ondo State vs. Attorney General of the Federation & Ors (2002) 6 S. C. (Pt. 1) 1**, the full court of the Supreme Court, laid to rest the question whether State High Courts have jurisdiction to hear and determine criminal offences created by National Assembly when it held:

“The Attorney General of the Federation derives his powers under Section 174 of the Constitution as an agency of the Federal Government. The law is well established that the court cannot control the manner he exercises his powers so conferred - nor can he be prevented from exercising his functions on the grounds that his jurisdiction does not extend to any particular state in Nigeria. Section 174 of the Constitution does not impose any such limitation.” See the *State vs Ilori (1983) 1 SC NLR 94*.

This court came to the conclusion that, by virtue of Section 174 (1) Section 286 (1)(b) of the 1999 Constitution, the Attorney-General of the Federation or any person authorized by the Independent Corrupt Practices Commission (ICPC), a Federal Government Agency, can lawfully initiate or authorize the initiation of criminal proceedings in any court other than a court martial in any State of the Federation in respect of offences created by the Corrupt Practices and other related offences Act, 2000. (P 27 Paras A–F).

7. *Jurisdiction of State and Federal High Courts in respect of Economic Crime Cases.*

Section 19 (1) of the Economic and Financial Crimes Commission Act 2004 provides that the Federal High Court or High Court of a State or the Federal Capital Territory has jurisdiction to try offenders under this Act. Subsection 3 of Section 19 of the EFCC Act provides as follows:

“The Chief judge of the Federal High Court or a High Court of a State or the High Court of the Federal Capital Territory Abuja, as the case may be, shall by order under his hand, designate a court or judge or such number of courts or judges as he shall deem appropriate to hear and determine all cases under this Act or other related offences arising under this Act.”

(Pp 27–28 Paras G–A)

Per Galinje (JSC)

By Section 7 (2)(b) and (f) of the same Act the Economic and Financial Crimes Commission shall be the coordinating agency for the enforcement of the provisions of the Advance Fee Fraud and other related offences Act 1995 and any other law or regulation relating to economic and financial crimes, including the Criminal Code and Penal Code. The appellant was arraigned before the Lagos State High Court for offences under the section of Advance Fee Fraud and other related offences and sections of the criminal code which the EFCC is empowered to coordinate the enforcement of their provisions.

By the provision of Section 251 (1) of the Constitution, the National Assembly notwithstanding anything to the contrary contained in the constitution conferred additional jurisdiction on the Federal High Court in respect of criminal matters which jurisdiction is not exclusive. There is nowhere in the constitution where the jurisdiction of State High Courts in respect of the Federal causes as provided by Section 286 (1)(a) has been removed. I am of the firm view that the Lagos State High Court has jurisdiction to hear and determine the charges for which the appellant was arraigned before it". (P 28 Paras B–F).

8. *The charge against the appellant has nothing to do with carriage by sea*
The charges against the appellant have nothing to do with carriage of goods by sea or petroleum products. Even though the charges mentioned the goods whose proceeds were obtained by false pretences and the documents in relation to the goods which were forged and uttered, there is no evidence that the offences in this case were committed when the goods were on board ship on the high sea. The petroleum product in respect of which the offences were alleged to have been committed had been discharged into various tank farms in Nigeria. This being so, admiralty jurisdiction had ended with the discharge of the petroleum product. See *Petro Jessica & Anor vs. Leventis Technical Co. Ltd* (1992) NWLR (Pt. 244) 675; *America International Inc. vs. Cheekay Traders Ltd* (1981) 5 SC 50. The charges against the appellant do not call for the invocation of admiralty jurisdiction of the Federal High Court. The appellant

was arraigned before the trial court for forging and uttering of documents and by so doing collected money from the Federal Government for goods that were not supplied. These charges have nothing to do with either petroleum products or revenue of the Federal Government of Nigeria. The mere fact that goods at one stage in their movement had a voyage on a ship does not give rise to admiralty jurisdiction. See *Texaco Overseas (Nig) UnLtd vs Pedmar Nig Ltd (2002) 13 NWLR (Pt. 785) 526.*

I agree with the lower court when it held that the trial court, that is the Lagos State High Court has jurisdiction to hear the case before it. (*Pp 28 – 29 Paras F – C*).

9. *Constituents of fair hearing*

The right to fair hearing is a constitutional right enshrined in Section 36 of the Constitution and it is very essential to the propagation of justice. The basic attributes of fair hearing include:

- (a) **That the court shall hear both sides not only in the case but also on all material issues in the case before reaching a decision which may be prejudicial to any party in the case;**
- (b) **That the court gives equal treatment, opportunity and consideration to all concerned;**
- (c) **That the proceedings be heard in public and all concerned shall be informed of and have access to such place of hearing; and**
- (d) **That having regard to all circumstances in every material decision in the case, justice must not only be done but must manifestly and undoubtedly be seen to have been done.**

See *Usani vs. Duke (2004) 7 NWLR (Pt. 871) 116; Fagbule vs. Rodrigues (2002) 7 NWLR (Pt. 765) 188; Adeniran vs NEPA (2002) 14 NWLR (Pt. 786) 30; Bamgboye vs. University of Ilorin (1999) 10 NWLR (Pt. 622) 290, (P 30 Paras C – I).*

10. *Whether there is breach of fair hearing depends on facts*

A breach of the right of fair hearing that will vitiate a trial and ultimately lead to the setting aside of the decision reached, will depend on the facts of the case. This court in *Magit vs. University of Agriculture Makurdi (2005) 19 NWLR (Pt. 959) 211 at 243 – 244* held:

“Fair hearing is not a cut-and-dry principle which parties can, in the abstract, always apply at their comfort and convenience. It is a principle which is based on the facts of the case before the court. Only the facts of the case can influence and determine the application or the inapplicability of the principle. The principle of fair hearing is helpless or completely dead outside the facts of the case.” See *Olowu vs. Nigeria Navy* (2011) 10 NWLR (Pt. 1279) 659.” (P 31 Paras B–D).

11. *Where error has not occasioned miscarriage of justice*

From the facts of this case, as I have alluded to earlier Admiralty Jurisdiction Act is inapplicable and reference to the striking down of its section 9 by the trial court *suo motu* without calling for further address, has no relevance to this case. I am also of the firm view that the decision of the lower court has not occasioned a miscarriage of justice. A wrongful admission of evidence or a wrongful consideration of an issue which is alien to the case under consideration cannot be a ground for reversal of a decision where it appears on appeal that such evidence or wrongful consideration of such issue cannot be reasonably be held to have affected the decision and that the decision would have been the same if such evidence had not been admitted and the consideration of the issue complained of had not been made. See *Ezeoke vs. Nwagbo* (1988) 1 NWLR (Pt. 72) 616, *Umeojiako vs Ezenamuo* (1990) 1 NWLR (Pt. 126 253; *Ayeni vs. Sowemimo* (1982) 5 SC 60.

The decision of the lower court in which it declared the striking down of Section 9 of the AJA as amounting to a breach of fair hearing has not affected the credibility of its judgment, and so I hold, the first issue for determination of this appeal is therefore resolved against the appellant. (P 31 Paras D–I).

12. *Application of Admiralty jurisdiction law*
Per Okoro (JSC)

“May I emphasize that once a cargo has been discharged from the vessel, carriage by sea and admiralty jurisdiction ends. The storage facilities in Lagos or any other city in Nigeria where the petroleum products were discharged into is not part of the high sea so as to make any offence arising from it to be an admiralty

matter. See Petro Jessica Enterprises Ltd & Anor vs. Leventis Technical Company Ltd (1992) LPELR-2915 (SC), Aluminum Manufacturing Co. Ltd vs. Nigeria Ports Authority (1987) 1 NWLR (Pt.51) 475.

It follows that the appellant who was standing trial before the High Court of Lagos State for forging and uttering documents through which he collected various sums of money from the Federal Government of Nigeria for petroleum products not imported, was properly arraigned before the said High Court. The charges have nothing to do with carriage of goods by sea or admiralty to which only the Federal High Court could have exclusive jurisdiction. I agree that Lagos State High Court has jurisdiction to entertain this matter. (P 44 Paras A–E).

13. *Where a counsel cites unreported case*

Where a counsel cites a case that has not been reported, he owes this court a duty to produce a copy of the judgment if he wants this court to rely on such authority. Where copies of the judgment are not produced, the court will have nothing to rely upon.

(P 32 Paras E – F).

14. *Principles in George vs. FRN*

However the facts in George vs. FRN (supra) are not at all fours with the instant case. George was charged for splitting of contracts, an offence not known to criminal law. This is what this court said:

“It is clear from the reproduced portion of Exhibit P3, as above, that it contains guidelines which forbids splitting of contracts by any officer. It stipulates that breach of same shall be met with disciplinary action. This may be in form of administrative action against an officer who breaches the rules. Disobeying Exhibit P3 is not made an offence by any Act of the National Assembly or law of a State House of Assembly or even the contents of Exhibit P3 itself. Even then disobedience of Exhibit P3 is nowhere penalized in a written law. Any conduct that must be sanctioned must be expressly stated in a written law to wit: an Act by the National Assembly. That is what Section 36 (12) of the 1999 Constitution

provides. Such conduct should not be left to conjecture. As well, it cannot be inferred by the court. It occurs to me that Section 203 of the Criminal Code is not in tune with the dictate of Section 36 (12) of the 1999 Constitution. That being the position, the charges filed under Section 203 of the said Code ostensibly for splitting contract in disobedience of lawful order by constituted authority cannot stand. Acts said to have constituted authority acts resulting in abuse of office are splitting of contract which were not offences known to law at the material time.”

The appellant Chief Bode along with others were alleged to have exceeded the limit set to their authority to award contracts and they contrived to bring the contract within their limits by splitting them while also inflating their prices. The same thing cannot be said about the instant case where the offences for which the appellant was arraigned before the trial court are offences created by the National Assembly and States and are properly codified.

(Pp 32–33 Paras F–F).

15. *The application of the doctrine of stare decisis*

The doctrine of stare decisis come to play when the facts of the previous case and the current one are the same. A court is not bound to follow the decision of the higher court when the facts are distinguishable. In the instant case I am of the firm view that the facts in *George vs. FRN* (supra) is not the same as the facts of the present case. The trial court and the Court of Appeal were right when they refused to be bound by the decision in *George vs. FRN* (supra). *(P 33 Paras G–H).*

16. *Need for counsel to observe the provisions of Court of Appeal Fast Track practice Directions*

This appeal is in the nature of interlocutory appeal. Paragraph 4(e) of the Court of Appeal; (Fast Track) Practice Directions 2014 provides that interlocutory appeals pertaining to or connected with corruption, Human trafficking, kidnaping and money laundry should be discouraged in the following words:

“Active case management includes discouraging interlocutory appeals and requiring the parties, except in the most deserving cases, to subsume their interlocutory matters under a final appeal

or under the substantive suit at the trial court.”

The High Court and the Court of Appeal are hereby called upon to observe and enforce the provisions of this practice direction in order to cut down the delay experienced in the hearing and disposal of corruption related cases. (Pp 33 – 34 Paras I–D).

17. *Per K. B. Akaahs (JSC):*

“It is urged on counsel particularly the learned senior counsel to fast track hearing and disposal of cases connected with corruption, human trafficking, kidnapping and money laundering by avoiding the temptation of filing interlocutory appeals that have the undesired effect of delaying the quick disposal of such cases. If counsel felt strongly that the evidence adduced is not sufficient to ground a conviction, they have an option to rest their case on that of the prosecution instead of going the whole gamut of contesting the refusal of the trial court to uphold the no-case submission up to the Supreme Court, the constitutional guarantee of the right of appeal notwithstanding. (P 43 Paras D – G).

Representation

MR. Y.A. KADIRI (ESQ) with Mr. C.O. Alaje for the appellant.

MR. ADEBISI ADENIYI (ESQ) for the respondent.

ADAMU GALINJE, (JSC) (Delivering the Lead Judgment): The appellant herein and four (4) other accused persons were arraigned before the Lagos State High Court by the Economic and Financial Crimes Commission (EFCC) charged with obtaining properties by false pretences contrary to **Section 1 of the Advance Fee Fraud and Other Fraud Related Offences Act, 2006** and conspiracy to forge documents, forgery, and uttering of false documents contrary to **Section 516, 467 (3)(c) and 468** respectively of the **Criminal Code Cap, C 17 Vol 2 Laws of Lagos State of Nigeria, 2003.**

Appellant and the co-accused persons pleaded not guilty to the charge. In order to prove its case, the prosecution called twelve (12) witnesses and tendered seventy-one (71) documents which were admitted in evidence. At the close of the prosecution's case, a no case submission pursuant to **Section 239 of the Administration of Criminal Justice, Law of**

Lagos State was made on behalf of the appellant, 2nd and 5th accused persons. In the no case submission, the appellant raised the issue of jurisdiction, contending that the evidence led shows that the charge relates to revenue of the Federal Government, petroleum and crude Oil products as well as admiralty matters, and that by virtue of the provisions of **Section 251** of the **1999 Constitution**, the High Court of Lagos State has no jurisdiction to entertain the case.

The respondent filed a counter affidavit accompanied by a written submission. In a reserved and considered ruling delivered on the 10th October, 2014 the trial court overruled the no case submission and held that a *prima facie* case was sufficiently disclosed against the appellant. He was therefore called upon to enter his defence.

Dissatisfied with the ruling of the trial court, the appellant appealed to the Court of Appeal, Lagos Division. The appeal was heard and in a reserved judgment delivered on the 30th April, 2015 same was dismissed. The appellant is once again dissatisfied with the decision of the Court of Appeal. Being aggrieved she has brought this appeal. Her notice of appeal dated 27th May, 2015 and filed on the 3rd of June, 2015 contains seven grounds of appeal. Parties filed and exchanged briefs of argument. The appellant's brief of argument, settled by Chief Wole Olanipekun (SAN) is dated and filed on the 27th November, 2015, but deemed properly filed on the 28th April, 2016. At page 3 paragraph 3.1 of the said brief of argument, three issues have been formulated for determination of this appeal. I reproduce them hereunder as follows:

- iv. **Having regard to the lower court's finding that the trial court breached the principle of fair hearing in striking down Section 19 of the Admiralty Jurisdiction Act (AJA), whether the lower court was not in grave error and so acted without jurisdiction when it thereafter failed to set aside the trial court's ruling of 10th October, 2014. (Ground 1).**
- v. **Having regard to the clear provisions of Section 251 (1)(a), (g), (n), (s) and (3) of the Constitution, Section 8 (1) of the Federal High Court Act (FHC Act), Sections 1, 2, 19 and 25 of the AJA vis-à-vis the information preferred against the appellant at the trial court, as well as the evidence adduced by the prosecution, whether the lower court was not in grave error in holding that the trial court rightly assumed jurisdiction on the information dated 20th July, 2012. (Grounds 2, 3, 4, 5 and 6).**
- vi. **Whether the lower court was not in error when it failed to be**

bound and to follow the decision of the honourable court in George vs FRN (2014) 5 NWLR (Pt. 1399) 1 and its own decision in Okey Nwosu vs. FRN – Appeal No; CA/L/601/11 delivered on 21 November 2013 and Akingbola vs FRN – Appeal No: CA/L/490/14 delivered on 31 December 2014. (Ground 7).

The respondent's brief of argument, settled by Rotimi Jacobs SAN is dated and filed on the 28th June, 2017, but deemed properly filed and served on the 11th October, 2017. Learned senior counsel submitted only one issue for determination of this appeal. It reads thus:

“Whether the Court of Appeal was not right in upholding the decision of the High Court of Lagos State that it had the jurisdiction to entertain the information contained in charge No. ID/115C/2012 bordering on the offences of obtaining money by false pretence under the Advance Fee Fraud and Other Related Offences Act 2006, forgery, uttering and conspiracy under Sections 467 and 468 of the Criminal Code Cap C17, volume 2 Laws of Lagos State, Nigeria 2003.”

The facts that gave rise to this appeal are simple and straight forward and they have been ably set out in the briefs of argument by learned senior counsel for the parties. I will do no more than to recount them in brief. In order to relieve the public of the high cost of petroleum products, the Federal, State and Local Governments came up with a scheme in which they contributed certain funds that was referred to as Petroleum Support Fund which fund was used to subsidise fuel import. Under the scheme, petrol is bought locally in Nigeria in the open market at a government subsidised rate. The oil marketing companies, under licence to import petrol into Nigeria would bring in petrol from abroad, having purchased same at the international rate and then submit their claims to the Government for settlement. The amount paid by the Government is the difference in price between the international market rates which is always higher than the subsidised rate. The claim by the marketer under the Petroleum Support Fund is based on what is actually discharged at the tank farm and as verified by the officers of Petroleum Product Pricing Regulatory Authority (PPPRA), Department of Petroleum Resources (DPR), External auditors, the surveyor to the marketers involved, and the surveyor to the tank farm owner.

The respondent's case is that sometimes in 2011, it was observed that the subsidy being paid by the Government went up astronomically and this prompted the Minister of Petroleum Resources to forward a petition to Economic and Financial Crimes Commission (EFCC), urging it to carry out investigation into the operation of the Petroleum Support Fund otherwise known as fuel subsidy. The EFCC found in the course of its investigation that

Ontario Oil & Gas Nigeria Limited, (the 5th accused at the lower court) was one of the companies licensed by Government to import petrol into the country. The appellant herein is a director in Ontario Oil & Gas Nigeria Limited (henceforth to be called company) and also a signatory to the account of the company. In 2010 the company was given allocation in the 3rd quarter to import fuel. It claimed that following the authorisation, it imported 19,327,460 litres of petrol and discharged same into the Integrated & Gas depot on the 7th July, 2010. During the 4th quarter of the same year the company in pursuance of the licence given to it to import petrol, claimed to have imported 19,523,892 litres of petrol which it discharged into Obat Oil Storage Facilities in Apapa between 14th and 15th November, 2010. Investigation conducted by the EFCC revealed that the company imported 12,470,706 and 10,146,594,73 litres of petrol for the 3rd and 4th quarters of 2010 respectively and the appellant and 1st accused person presented false documents which led to over payment of N340,178,111.24 (Three hundred and forty million, one hundred and seventy-eight thousand, one hundred and eleven naira twenty-four kobo) and N414,757,890,54 (four hundred and fourteen million, seven hundred and fifty-seven thousand, eight hundred and ninety naira fifty-four kobo) as fuel subsidy by the Federal Government for 6,815,830.73 and 9,377,298 litres of petrol which were not imported. It was this discovery that gave rise to the arraignment of the appellant and other accused persons before the High Court of Lagos State.

The second issue for determination of this appeal is challenging the jurisdiction of the Lagos State High Court before which the appellant is standing trial. Jurisdiction is the sole of adjudication and if the trial court has no jurisdiction to entertain a matter, an appellate court cannot assume jurisdiction over its proceedings that have been conducted without jurisdiction. Consequently it is always expedient to resolve any challenge to jurisdiction first before proceeding to resolve any other issue. See **Oloriode vs. Oyebi (1984) 1 SCNLR 390; Ezomo vs. Oyakhire (1985) 1 NWLR (Pt. 2) 195; Sofekun vs. Akinyemi (1980) 5-7 SC 1; A-G of Anambra State vs A-G Fed. (1993) 6 NWLR (Pt. 302) 602.**

Learned senior counsel for the appellant in his argument on the 2nd issue, submitted that Section 272 of the Constitution of the Federal Republic of Nigeria 1999 (*henceforth to be referred to as "the constitution"*) is made subject to the provisions of Section 251 of the Constitution and therefore Section 272 of the Constitution must be read in subordination to Section 251 of the Constitution. In aid learned senior counsel cited **Labiya vs. Anretiola (1999) 8 NWLR (Pt. 258) 139 at 163-164; Achebe vs. Nwosu (2003) FWLR (Pt. 136) 891 at 907.** Learned senior counsel made reference to Section 8(1) of the Federal High Court Act and submitted that the Section of the Federal High Court Act being a Federal enactment takes priority over any state legislation that purports to vest jurisdiction in the trial court. In a further argument, learned senior counsel submitted that the criminal jurisdiction of the Federal High Court under Section 251 (3) of the Constitution is a by-product of and tied inextricably to the jurisdiction conferred upon it under Section 251(1) of the Constitution. It is learned senior counsel's contention that if the jurisdiction under Section 251(3) of the

A Constitution is derivative of the jurisdiction under Section 251 (1) of the Constitution, which is exclusive jurisdiction, then the jurisdiction under Section 251 (3) of the Constitution must necessary be exclusive.

B Learned senior counsel went on to cite items 36,39,67 and 68 of the Exclusive Legislative list contained in the second schedule to the constitution which he says, when read together with the provisions of Section 251 (1) of the Constitution will show clearly that the framers of the constitution intended that the matters listed therein must in all cases, be Federal matters. Learned senior counsel went on to refer to Section 19 and 25 of the Admiralty Jurisdiction Act (AJA) and spent considerable amount of time setting out the list of the exhibits which were tendered at the trial court and submitted that a consideration of the foregoing leads to the conclusion that the subject matter of the information preferred before the trial court cannot be extricated from the provisions of Section 251 (1)(a),(g),(n) and (s) and Section 251 (3) of the Constitution, Section 8 (1) of the Federal High Court Act, Sections 1, 2, 19 and 25 of the Admiralty Jurisdiction Act (AJA).

C I wish to pause here in order to consider this brilliant academic argument by learned senior counsel which argument does not seem to fall in line with the decisions of this court regarding the provision of Section 251(3) of the Constitution. Unlike the State High Court which is a court of unlimited jurisdiction, the Federal High Court is a special court with limited, but exclusive jurisdiction clearly specified under Section 251(1)(a-s) of the Constitution. There is nowhere in the Constitution or any other enactment where it is stipulated that any suit in which a Federal Government Ministry, agency, functionary or parastatal is sued is justiciable only in the Federal High Court except those cases specified under Section 251 (1) (a-s) of the Constitution.

D Section 251 (1) of the Constitution deals solely with civil matters in which the Federal High Court has exclusive jurisdiction. This is what the section says:

E **“Notwithstanding anything to the contrary contained in this constitution and in addition to such other jurisdiction as may be conferred upon it by an Act of the National Assembly, the Federal High Court shall have and exercise jurisdiction to the exclusion of any other court in civil causes and matters.....”**

F The jurisdiction of the State High Court is donated by Section 272 (1) of the Constitution, in the following words:

G **“Subject to the provision of Section 251 and other provisions of this constitution, the High Court of a State shall have jurisdiction to hear**

A **and determine any civil proceedings in which the existence or extent of a legal right, power, duty, liability, privilege, interest, obligation or claim in issue or to hear and determine any criminal proceedings involving or relating to any penalty, forfeiture, punishment or other liability in respect of an offence committed by any person.”**

B
Section 272 (1) of the Constitution is made subject to Section 251 and other provisions of the constitution with respect to those items where the jurisdiction of the Federal High Court is exclusive. The section is also made subject to other provisions of the constitution where exclusive jurisdiction has been conferred on the Supreme Court, the Court of Appeal and Election Petition Tribunals.

C
In all other matters where exclusive jurisdiction has not been expressly assigned to any other courts, the State High Court has justification to hear and determine such matters. Section 251 (3) provides as follows:

“The Federal High Court shall also have and exercise jurisdiction and powers in respect of criminal causes and matters in respect of which jurisdiction is conferred by subsection (1) of this section.”

E
The word '*exclusive*' is clearly absent in Section 251 (3) of the Constitution. The word '*also*' as used in subsection (3) of Section 251 of the Constitution is defined by Advanced Learner's Dictionary to mean “**in addition; too, or as well**”. If the framers of the Constitution had intended that the Federal High Court should have exclusive jurisdiction in criminal matters involving the items listed under Section 251 (1)(a-s), they would have said so in clear terms. It is an established cardinal principle of interpretation that the words of a statute which are unambiguous must be given their ordinary grammatical meaning. It is not the function of the court to import words into the statute which do violence to the intent and meaning of the statutory provision. See **Edozie vs. Edozie & Ors (1998) 12 NWLR (Pt. 580) at 152; Egbe vs. Alhaji & Ors (1990) 21 NSCC (Pt. 1) 306 at 325; (1990) 1 NWLR (Pt. 128) 546 at 581.**

F
In **Attorney General of Ondo State vs. Attorney General of the Federation & Ors (2002) 6 S. C. (Pt. 1) 1**, the full court of the Supreme Court, laid to rest the question whether States High Courts have jurisdiction to hear and determine criminal offences created by National Assembly when it held:

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“The Attorney General of the Federation derives his powers under Section 174 of the Constitution as an agency of the Federal Government. The law is well established that the court cannot

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A control the manner he exercises his powers so conferred nor can he be prevented from exercising his functions on the grounds that his jurisdiction does not extend to any particular state in Nigeria. Section 174 of the Constitution does not impose any such limitation.” See the State vs Ilorin (1983) 1 SC NLR 94.

B

This court came to the conclusion that, by virtue of Section 174 (1) Section 286 (1)(b) of the 1999 Constitution, the Attorney-General of the Federation or any person authorized by the Independent Corrupt Practices Commission (ICPC), a Federal Government Agency, can lawfully initiate or authorize the initiation of criminal proceedings in any court other than a court martial in any State of the Federation in respect of offences created by the Corrupt Practices and other related offences Act, 2000.

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Section 19 (1) of the Economic and Financial Crimes Commission Act 2004 provides that the Federal High Court or High Court of a State or the Federal Capital Territory has jurisdiction to try offenders under this Act. Subsection 3 of Section 19 of the EFCC Act provides as follows:

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“The Chief judge of the Federal High Court or a High Court of a State or the High Court of the Federal Capital Territory Abuja, as the case may be, shall by order under his hand, designate a court or judge or such number of courts or judges as he shall deem appropriate to hear and determine all cases under this Act or other related offences arising under this Act.”

F

By Section 7 (2)(b) and (f) of the same Act the Economic and Financial Crimes Commission shall be the coordinating agency for the enforcement of the provision of the Advance Fee Fraud and other related offences Act 1995 and any other law or regulation relating to economic and financial crimes, including the Criminal Code and Penal Code. The appellant was arraigned before the Lagos State High Court for offences under the section of Advance Fee Fraud and other related offences and sections of the criminal code which the EFCC is empowered to coordinate the enforcement of their provisions.

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By the provision of Section 251 (1) of the Constitution, the National Assembly notwithstanding anything to the contrary contained in the constitution conferred additional jurisdiction on the Federal High Court in respect of criminal matters which jurisdiction is not exclusive. There is nowhere in the constitution where the jurisdiction of State High Courts in respect of the Federal cause as provided by Section 286 (1)(a) has been removed. I am of the firm view that the Lagos State High Court has jurisdiction to hear and determine the charges for which the appellant was arraigned before it.

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A The charges against the appellant have nothing to do with carriage of goods by sea or petroleum products. Even though the charges mentioned the goods whose proceeds were obtained by false pretences and the documents in relation to the goods which were forged and uttered, there is no evidence that the offences in this case were committed when the goods were on board ship on the high sea. The petroleum product

B in respect of which the offences were alleged to have been committed had been discharged into various tank farms in Nigeria. This being so, admiralty jurisdiction had ended with the discharge of the petroleum product. See **Petro Jessica & Anor vs. Leventist Technical Co. Ltd (1992) NWLR (Pt. 244) 675; America International Inc. vs. Cheekay Traders Ltd (1981) 5 SC 50**. The charges against the appellant do not

C call for the invocation of admiralty jurisdiction of the Federal High Court. The appellant was arraigned before the trial court for forging and uttering of documents and by so doing collected money from the Federal Government for goods that were not supplied. These charges have nothing to do with either petroleum products or revenue of the

D Federal Government of Nigeria. The mere fact that goods at one stage in their movement had a voyage on a ship does not give rise to admiralty jurisdiction. See **Texaco Overseas Petroleum Co. Ltd vs. Pedinar Nig Ltd (2002) 13 NWLR (Pt. 785) 526**.

E I agree with the lower court when it held that the trial court, that is the Lagos State High Court has jurisdiction to hear the case before it. This issue is resolved against the appellant.

On issue 1, learned senior counsel made reference to the lower court judgment at page 2166 of the printed record of this appeal, where it held:

F “Furthermore, this was done by the court, suo motu which violates the principle of fair hearing. See **Katto vs. CN (1991) 9 NWLR (Pt. 214) 126; Oloriode vs. Oyebiyi (1984) 5 SC 1 at 32-33; Ezemo vs. Oyakhire (1985) 2 SC 260 at 282; Oloba vs. Akeeja (1985) 3 NWLR (Pt. 84) 508 at 520**, counsel were not invited to address the court before the striking down was done. It was done from the 'blue' so to speak. Therefore it cannot be allowed to stand. In this regard, I set aside that part of the decision striking down Section 19 of the Admiralty Jurisdiction Act (AJA) 1991,” and submitted that such

G finding ought to have resulted in the setting aside of the entire decision of the trial court. According to the learned senior counsel, this court has been consistent in holding that once a breach of fair hearing is found in any proceedings/decision, the entire proceedings/decision becomes automatically vitiated and nullified

H by such breach, regardless of the actual consequences of the breach.

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A In aid learned senior counsel cited Danladi vs. Dangiri (2014) 11 SC 1 at 71 & 75; Olumesan vs. Ogundepo (1996) 2 NWLR (Pt. 433) 628 at 645; Idakwo vs. Ejiga (2002) 13 NWLR (Pt. 783) 156 at 165-166.

B I have held elsewhere in this judgment that the Admiralty Jurisdiction Act does not apply to case. The issue of striking down its Section 19 is irrelevant as far as this case is concerned.

The right to fair hearing is a constitutional right enshrined in Section 36 of the Constitution and it is very essential to the propagation of justice. The basic attribute of fair hearing include:

C

(a) That the court shall hear both sides not only in the case but also on all material issues in the case before reaching a decision which may be prejudiced to any party in the case;

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(b) That the court gives equal treatment, opportunity and consideration to all concerned;

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(c) That the proceedings be heard in public and all concerned shall be informed of and have access to such place of hearing; and

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(d) That having regard to all circumstances in every material decision in the case, justice must not only be done but must manifestly and undoubtedly be seen to have been done.

G See **Usani vs. Duke (2004) 7 NWLR (Pt. 871) 116; Fagbule vs. Podrigues (2002) 7 NWLR (Pt. 765) 188; Adeniran vs. NEPA (2002) 14 NWLR (Pt. 786) 30; Bamgboye vs. University of Ilorin (1999) 10 NWLR (Pt. 622) 290,**

A breach of the right of fair hearing that will vitiate a trial and ultimately lead to the setting aside of the decision reached, will depend on the facts of the case. This court in **Magit vs. University of Agriculture Makurdi (2005) 19 NWLR (Pt. 959) 211 at 243 – 244** held:

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“Fair hearing is not a cut and dry principle, which parties can in the abstract, always apply to their comfort and convenience. It is a principle which is based and must be based on the facts of the case before the court. Only the facts of the case can influence and

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- A** **determine the application or inapplicability of the principle. The principle of fair hearing is helpless or completely dead outside the facts of the case.” See *Olowu vs. Nigeria Navy* (2011) 10 NWLR (Pt. 1279) 659.”**
- B** From the facts of this case, as I have alluded to earlier Admiralty Jurisdiction Act is inapplicable and reference to the striking down of its section 9 by the trial court **suo motu** without calling for further address, has no relevance to this case. I am also of the firm view that the decision of the lower court has not occasioned a miscarriage of justice. A wrongful admission of evidence or a wrongful consideration of an issue which is alien to the case under consideration cannot be a ground for reversal of a decision where it appears on appeal that such evidence or wrongful consideration of such issue cannot be reasonably be held to have affected the decision and that the decision would have been the same if such evidence had not been admitted and the consideration of the issue complained of had not been made. See ***Ezeoke vs. Nwagbo* (1988) 1 NWLR (Pt. 72) 616, *Umeojiako vs Ezenamuo* (1990) 1 NWLR (Pt. 126 253; *Ayeni vs. Sowemino* (1982) 5 SC 60.**
- C** The decision of the lower court in which it declared the striking down of Section 9 of the AJA as amounting to a breach of fair hearing has not affected the credibility of its judgment, and so I hold, the first issue for determination of this appeal is therefore resolved against the appellant.
- D** On the third issue for determination of this appeal, learned senior counsel for the appellant submitted that the decision of the lower court, as well as that of the trial court which the lower court affirmed, are in breach of the age-long doctrine of stare decisis.
- E** In a further argument, learned senior counsel submitted that the Court of Appeal is not only bound by the decision of the Supreme Court, it is also bound by its decisions. Learned senior counsel gave four exceptions where the Court of Appeal is not bound by its previous decisions as enunciated in the English case of ***Young vs. Bristol Aeroplane Co. Ltd* (1994) 1 KB 718; 2 ALL ER 293** and ratified in a host of Nigerian cases and contended that the lower court did not distinguish the facts in *George vs. FRN* (supra) and the facts in ***Okey Nwosu vs. FRN* (2014) 1 BFLR 298** which it refused to follow. It is learned senior counsel’s further contention that the failure to follow the applicable judicial precedent by the High Court and the Court of Appeal renders their decisions invalid. *Okey Nwosu Vs. FRN* (supra) and *Akingbola vs. FRN* are decisions of the Court of Appeal. Learned senior counsel cited them in the brief as unreported. Where a counsel cites a case that has not been reported, he owes the court a duty to produce a copy of the judgment if he wants this court to rely on such authority. Where copies of the judgment are not produced, the court will have nothing to rely upon. The cases are yet to reach this court, as such I will refrain from commenting on them. However the facts in
- F**
- G**
- H**
- I**

A George vs. FRN (supra) are not at all fours with the instant case. George was charged for splitting of contracts, an offence not known to criminal law. This is what this court said:

B **“It is clear from the reproduced portion of Exhibit 3, as above, that it contains guidelines which forbids splitting of contracts by any officer. It stipulates that breach of same shall be met with disciplinary action. This may be in form of administrative action against an officer who breaches the rules. Disobeying Exhibit 3 is not made an offence by any Act of the National Assembly or law of a State House of Assembly or even the contents of Exhibit 3 itself. Even then disobedience of Exhibit 3 is nowhere penalised in a written law. Any conduct that must be sanctioned must be expressly stated in a written law to wit! An Act by the National Assembly. That is what Section 36 (12) of the 1999 Constitution provides. Such conduct should not be left to conjecture. As well, it cannot be inferred by the court. It occurs to me that Section 203 of the Criminal Code is not in tune with the dictate of Section 36 (12) of the 1999 Constitution. That being the position, the charges filed under Section 203 of the said code ostensibly for splitting contract in disobedience of lawful order by constituted authority cannot stand. Acts said to have constituted authority acts resulting in abuse of office are splitting of contract which were not known to law at the material time.”**

F The appellant **Chief Bode** along with others were alleged to have exceeded the limit set to their authority to award contracts and they contrived to bring the contract within their limits by splitting them while also inflating their prices. The same thing cannot be said about the instant case where the offences for which the appellant was arraigned before the trial court are offences created by the National Assembly and States and are properly codified.

G The doctrine of stare decisis come to play when the facts of the previous case and the current one are the same. A court is not bound to follow the decision of the higher court when the facts are distinguishable. In the instant case I am of the firm view that the facts in George vs. FRN (supra) is not the same as the facts of the present case. The trial court and the Court of Appeal were right when they refused to be bound by the decision in George vs. FRN (supra). This issue is resolved against the appellant and in favour of the respondent.

H This appeal is in the nature of interlocutory appeal. Paragraph 4(e) of the Court of Appeal; (Fast Track) Practice Directions 2014 provides that interlocutory appeals pertaining to or connected with corruption, Human trafficking, kidnaping and money

A laundry should be discouraged in the following words:

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

B

The High Court and the Court of Appeal are hereby called upon to observe and enforce the provision of this practice direction in order to cut down the delay experienced in the hearing and disposal of corruption related cases.

C

Now, having resolved the three issues submitted by the appellant for determination of this appeal against the appellant, this appeal shall be and it is hereby dismissed.

The appellant shall appear at the trial court for the conclusion of her trial.

D

Paul Adamu Galinje
Justice, Supreme Court

PETER-ODILI, (JSC): I agree with the judgment just delivered by my learned brother, Paul Adamu Galinje (JSC) and to register that support I shall make some comments.

E

This is an appeal against the judgment of the Court of Appeal Lagos Division or lower court or court below delivered on the 30th day of April, 2015 which affirmed the ruling of the learned trial judge of the High Court dated 10th October, 2014 that overruled the No case submission of the appellant and affirmed the jurisdiction of the High Court of Lagos State to try her for the offences for which she is being prosecuted before that court.

F

The background facts are well set out in the lead judgment and so there is no need to repeat them here except for when it is necessary to refer to any part of the facts.

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At the hearing on 1st November, 2017 learned counsel for the appellant Y.A. Kadiri Esq. adopted the brief of argument settled by Dr. Oladapo Olanipekun SAN, filed on 27th November, 2015 and deemed filed on 28th April, 2016. In the brief were three issues for determination which are as follows:

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- i. **Having regard to the lower court's findings that trial court breached the principle of fair hearing in striking down section 19 of the Admiralty Jurisdiction Act (AJA), whether the lower court was not in grave error and so acted without jurisdiction when it thereafter failed to set aside the trial court's ruling of October, 2014. (Ground 1).**

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- A** **ii. Having regard to the clear provisions of section 251(1)(a),(g),(n),(s) and (3) of the constitution, section 8(1) of the Federal High Court Act (FHC ACT), section 1, 2, 19 and 25 of the AJA viz-a-viz the information preferred against the appellant at the trial court, as well as the evidence adduced by the prosecution, whether the lower court was not in grave error in holding that the trial court rightly assumed jurisdiction on the information dated 20th July, 2012. (Grounds 2, 3, 4, 5 and 6).**
- B**
- C** **iii. Whether the lower court was not in error when it failed to be bound and to follow the decision of this honourable court in George vs. FRN (2014) 5 NWLR (Pt. 1399) 1 and its own decisions in Okey Nwosu vs. FRN – Appeal No: CA/L/601/11 delivered on 21st November 2013 and Akingbola vs. FRN – Appeal No: CA/L/490/14 delivered on 31st December 2014. (Ground 7).**
- D**

The appellant also filed a reply brief on the 28th October, 2017.

- E** Learned counsel for the respondent, Adebisi Adeniyi Esq. adopted the brief of argument of the respondent settled by Rotimi Jacobs SAN, filed on 28th June, 2017 and deemed filed on 11th October, 2017 and identified a sole issue as follows:

- F** **Whether the Court of Appeal was not right in upholding the decision of the High Court of Lagos State that it had the jurisdiction to entertain the information contained in charge No: ID/115C/2012 bordering on the offences of obtaining money by false pretence under the Advance Fee Fraud and Other Fraud Related Offences Act, 2006, forgery, uttering and conspiracy under section 467 and 468 of the Criminal Code Cap C17, Volume 2, Laws of Lagos State, Nigeria 2003.**
- G**

- H** The single issue as crafted by the respondent is sufficient for use in this appeal and I shall utilise it.

TREATMENT OF ISSUE

- I** **Whether the Court of Appeal was not right in upholding the**

A **decision of the High Court of Lagos State that it had the jurisdiction to entertain the information contained in charge No: ID/115C/2012 bordering on the offences of obtaining money by false pretence under the advance fee fraud and other fraud related offences Act, 2006, forgery, uttering and conspiracy under section 467 and 468 of the criminal Code Cap C17, Volume 2, Laws of Lagos State, Nigeria 2003.**

C Advancing the position of the appellant, learned counsel stated that an incident of the breach of fair hearing will invariably create and cast a substantial doubt over the entire proceedings as happened in the case in hand when the court below struck down section 19 of the Administration of Justice Act when counsel were not invited to address the court before the order. That this vitiated the entire proceedings as the jurisdiction of court was ousted thereby. He cited section 135 of the Evidence Act 2011; **State vs. D Oladotun (2011) 10 NWLR (Pt. 1256) 542 at 572; PDP vs. Sylva (2012) 13 NWLR (Pt. 1316) 85 at 152-153; Madukolu vs. NKemdiliu (1962) 1 ALL NLR (Pt. 4) 581 at 595 etc.**

E That the effect of section 251 of the Constitution of the Federal Republic of Nigeria 1999 has conferred criminal jurisdiction to the Federal High Court exclusively. He referred to section 19 and 25 of the Act, AJA for short.

F That the information preferred against the appellant at the trial court falls squarely within the provisions of section 251(1)(a),(g) and (1) of the CFRN as well as section 1, 2, 3 and 19 of the AJA and so the court below ought to have given effect to those provisions and held that the state trial High Court lacked jurisdiction to entertain the charges which should be within the exclusive domain of the Federal High Court.

G Learned counsel for the respondent contended that this court should uphold the concurrent findings of the two courts below to the effect that the information contained in charge No: ID/115C/2013 bordering on the offences of obtaining money by false pretence under the Advance Fee Fraud and Other Fraud Related Offences Act, 2006 forgery, uttering and conspiracy under section 467 and 468 of the Criminal Code Cap C17, Volume 2, Laws of Lagos State, Nigeria 2003 and that they were triable by the Lagos State High Court. He cited **Mandara vs. Attorney General of the Federation (1984) 1 SCNLR 311 at 330; A.G. Ondo State vs. A.G. Federation (2002) 9 NWLR (Pt. 772) 222 at 308, etc.**

I The appellant posits that the case before the court below as well as the High Court in which the information against the appellant bordered on the revenue of the Federal Government, PMS (a derivative of mines and minerals) and carriage of goods by sea is caught by the exclusive jurisdiction of the Federal High Court under section 251(1)(a),(g),(n) of the Constitution and sections 1, 2,3 and 19 of the Act.

A The respondent disagreed with that stance stating that the Court of Appeal was right in upholding the decision of the High Court of Lagos State that it had jurisdiction to entertain the information contained in the charge which bordered on the offences of obtaining money by false pretence under the Advance Fee Fraud and Other Related Offences Act, 2006, forgery, uttering and conspiracy under sections 24 and 468 of the Criminal Code Cap C17, Volume 2, Laws of Lagos State, Nigeria 2003.

B At the court of first instance the learned trial judge held thus:

C **“I am unable to hold the view that the matters herein are within the jurisdiction of the Federal High Court. It is simply a criminal matter on the offences committed on documents allegedly uttered, forged and false pretence under the State Criminal Code and not Federal.”**

D He followed the diction of Karibi-Whyte JSC in **Eze vs. FRN (1987) 1 NWLR (Pt. 51) 506**, which considered a similar presentation of documents allegedly uttered and forged under false pretences for the purposes of illegally collecting payment under section 419 of the Advance Fee Fraud and Other fraud Related Offences and the State Criminal Code which the Supreme Court held were clearly not under Federal High Court Act.

E In a case bearing similar facts as the one under review, this court per Ogunbiyi JSC in the case of **FRN vs. Okey Nwosu (2016) 17 NWLR (Pt. 1541) 226 at pp 304-305** stated as follows:

F **“The offence of stealing being alleged against the 1st respondent was created under the law enacted by the Lagos State House of Assembly, the same house could not have conferred jurisdiction on the Federal High Court but only conferred on the High Court of the State. The offence of stealing does not fall within items (a)-(s) listed in section 251 of the 1999 Constitution. The control of capital issue does not also fall within any of the items specifically listed in section 251(1) of the 1999 Constitution. Assuming that the offence of stealing falls within the items listed as (a)-(s) in section 251, that in itself would not confer exclusive jurisdiction on the Federal High Court to try criminal cases arising from such items. This is in view of section 251(3) and the phrase “The Federal High Court shall also have and exercise jurisdiction.” by section 251 (3) the Federal High Court shall also have jurisdiction along with other courts in criminal causes or matters but not an exclusive jurisdiction as was**

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A conferred on the Federal High Court in civil matters listed in subsection 1 of section 251 of the 1999 Constitution.... as rightly submitted by the appellant therefore, the learned justices of the Court of Appeal were in great error in holding that the High Court of Lagos State had no requisite jurisdiction to try the 1st respondent for the offence of stealing by conversion preferred against him under section 390 (7) of the Criminal Code Law of Lagos State, 2003”.

C Also, at page 304, Lordship Ogunbiyi (JSC) opined further:

D “In criminal law and administration of criminal justice, the determination of jurisdiction will be taken in the light of the enabling law setting out the jurisdiction viz-a-viz the charge preferred against the accused. Section 272 of the 1999 Constitution is also relevant. The charge before the court is what determines its jurisdiction. While section 251(1) of the Constitution confers exclusive jurisdiction in civil matters in respect of items listed as (a)-(s), section 251 (3) does not however confer exclusive jurisdiction on the Federal High Court in criminal causes and matters listed in subsection (1). By the use of the phrase, “the Federal High Court shall also have and exercise jurisdiction” can only mean that other courts apart from the Federal High Court can exercise jurisdiction also in respect of criminal matters relating to matters listed in section 251(1). The phrase “to the exclusion of any other court” is omitted deliberately. It is difficult in the circumstance to appreciate the reasoning of the Court of Appeal that what the respondents did with the proceeds of crime of stealing would divest the (High Court) of its jurisdiction to try the offence of stealing”.

Towing the same line of thought, Dattijo Muhammad (JSC) stated thus:

H “The jurisdiction of the trial court as spelt out under section 272 of the 1999 Constitution operates subject to the restriction placed on it by section 251(2) and (3) of the same Constitution. The latter subsection vests criminal jurisdiction in the Federal High Court regarding all the items for which the courts is conferred exclusive civil jurisdiction under section 251(1). *None of these items pertains simple stealing for which the*

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- A** *1st respondent stands at the trial court. He is not being charged for stealing shares. As learned senior counsel for the appellant further observed, and correctly too, the 1st respondent does not stand trial at the Federal High Court for the same offence of stealing preferred against him at the trial court. At the Federal High Court, he faces trial only for those offences for which, by virtue of the relevant items in the Exclusive Legislative List, the National Assembly had passed laws on. The lower court's judgment that the trial court has lost its jurisdiction to the Federal High Court on the basis of the latter's exclusive jurisdiction under section 251(1) of the 1999 Constitution is therefore, perverse. It is a decision that neither draws from the evidence on record nor from a correct construction of section 251(3) of the Constitution the lower court held the exclusive jurisdiction of the Federal High Court stems from. The truth is that stealing is a matter which falls within the Legislative competence of the Lagos State House of Assembly and having been legislated upon, the trial court retains the jurisdiction of trying the 1st respondent. See Daboh & Anor vs. State (1977) NSCC 309 at 321-322". See also Ehindero vs. FRN (2014) 10 NWLR (Pt. 1415) 281.*
- B**
- C**
- D**
- E** Clearly this court has stated in definite terms the extent of criminal jurisdiction of the Federal High Court as its not being tampered with by the emergence of the 1999 Constitution and until the National Assembly enacts a penal enactment in future to confer exclusive jurisdiction on the Federal High Court, the State High Court will continue to exercise the jurisdiction entrusted to it in offences covered by State Laws.
- F** On the other hand the Federal High Court will keep to the limits prescribed for it in matters listed in section 7(1) of the Federal High Court Act or the Exclusive Legislative List of the Constitution. In determining the court with the requisite jurisdiction to entertain a criminal matter the court would always consider the nature of the charge rather than the transaction forming the subject matter of the charge or the documents attached as proof of evidence.
- G**
- It needs to be said that the 1999 Constitution has not conferred exclusive criminal jurisdiction on the Federal High Court on various items listed in section 251(1) of the CFRN and until such a provision bestowing exclusivity of the jurisdiction to the Federal High Court, the State High Court can equally entertain matters either civil or criminal to which jurisdiction has been conferred by the National Assembly and in this section 251(1)(s) stipulates thus: **“such other jurisdiction, civil or criminal and whether to the exclusion of any other court or not as may be conferred upon it by an act of National Assembly”**.
- H**
- I** Section 286 of CFRN provides thus **“Jurisdiction of state court in respect of**

A Federal Causes". This is because the Constitution of the Federal Republic of Nigeria recognizes that the State High Court may be conferred with the power by an Act of the National Assembly to try Federal offences. This situation has been effectively explained in the case of **A.G. Ondo State vs. A.G. Federation (2002) 9 NWLR (Pt. 772) 222 at 308** per Uwasi CJN as follows:

B

"The next point is whether the Attorney General of the Federation or any person authorized by the ICPC can lawfully initiate or authorize the initiation of criminal proceedings in any court in Ondo State in respect of offences created by the Act. The plaintiff's contention is that the answer is in the negative if the answers to issues No.s. (i) and (ii) have been answered in the negative.

C

D

But I have held otherwise and so the opposite is the case. I therefore, hold that the criminal proceedings can be initiated in the court in Ondo State in accordance with the provisions of section 286 subsection (1) (b) of the Constitution which provides... Federal offences is defined in section (3) thereof to mean "an offence contrary to the provisions of an Act of the National Assembly or any law having effect as if so enacted". This decision was followed by the Supreme Court in **Olafisoye vs. FRN (2004) 4 NWLR (Pt. 864) 580.**

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The word **"any court in Nigeria"** in section 174(1)(a) of the CFRN 1999 has stated that the Federal Attorney General can approach any court including the State High Court to initiate criminal proceedings in relation to Federal Offences. It follows that the appellant is not pushing a right interpretation to the effect that in any Federal Offence, only the Federal High Court has exclusive jurisdiction to entertain the matter.

G

Indeed the concurrent findings and conclusion of the two courts below are anchored on the facts available and sustained by the relevant laws and so there is no basis for any interference by this court.

From the foregoing and the better reasoning in the lead judgment, I dismiss this appeal which is lacking in merit.

H

I abide by the consequential orders as made.

Mary Ukaego Peter-odili
Justice, Supreme Court

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BAYANG AKA' AHS, (JSC): I read before now the judgment of my learned brother, Galinje (JSC) that the appeal is lacking in merit. I entirely agree with him.

The arguments of learned senior counsel on the issue of jurisdiction though

A brilliantly presented cannot affect the outcome of this appeal. The trial court held that a prima facie case had been disclosed against the appellant requiring her to enter into her defence. This finding was affirmed by the court below. There is no reason whatsoever to interfere with this finding.

B It is urged on counsel particularly the learned senior counsel to fast track hearing and disposal of cases connected with corruption, human trafficking, kidnaping and money laundering by avoiding the temptation of filing interlocutory appeals that have the undesired effect of delaying the quick disposal of such cases. If counsel felt strongly that the evidence adduced is not sufficient to ground a conviction, they have an option to rest their cases on that of the prosecution instead of going the whole gamut of contesting the refusal of the trial court to uphold the no-case submission up to the Supreme Court, the constitutional guarantee of the right of appeal notwithstanding.

The appeal lacks merit and it is accordingly dismissed.

K. B. AKA’AHS
Justice, Supreme Court

D

INYANG OKORO, (JSC): I was obliged in advance a copy of the judgment of my learned brother, **Paul Adamu Galinje, (JSC)** just delivered. I am in complete agreement with his reasoning and conclusion that this appeal is devoid of merit and deserves an order of dismissal. My learned brother has admirably resolved the three issues submitted for the determination of this appeal. I adopt his views expressed in this judgment as mine.

E

F May I emphasize that once a cargo has been discharged from the vessel, carriage by sea and admiralty jurisdiction ends. The storage facilities in Lagos or any other city in Nigeria where the petroleum products were discharged into is not part of the high sea so as to make any offence arising from it to be an admiralty matter. See **Petro Jessica Enterprises Ltd & Anor vs. Leventis Technical Company Ltd (1992) LPELR-2915 (SC), Aluminum Manufacturing Co. Ltd vs. Nigeria Ports Authority (1987) 1 NWLR (Pt.51) 475.**

G

H It follows that the appellant who was standing trial before the High Court of Lagos State for forging and uttering documents through which he collected various sums of money from the Federal Government of Nigeria for petroleum products not imported, was properly arraigned before the said High Court. The charges have nothing to do with carriage of goods by sea or admiralty to which only the Federal High Court could have exclusive jurisdiction. I agree that Lagos State High Court has jurisdiction to entertain this matter.

I

Based on the above and the fuller reasons adumbrated in the lead judgment, I hold that this appeal lacks merit. It is hereby dismissed by me. Appellant shall return to the trial court for his trial to be concluded.

A

John Inyang Okoro
Justice, Supreme Court

B **DAUDA BAGE, (JSC):** I have had the benefit of reading in draft the lead judgment of my learned brother **Paul Adamu Galinje, JSC**, just delivered. I agree entirely with the reasoning and conclusion reached. The appeal is without merit and it is hereby dismissed. I abide by all the orders contained in the lead judgment.

Sidi Dauda Bage
Justice, Supreme Court

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1. ALH. MAROOF ADEKUNLE MAGBAGBEOLA
 2. MR. RAFIU LAWAL ODOMODE
 3. MR. ROTIMI ARAOYE
 4. CHIEF SAKAAILETE
 5. CHIEF OLABINTAN
 6. MR. AMINU GUARD
(for themselves and on behalf of warrant kingmakers)
 7. CHIEF DUNMOYE OYELEKE
 8. CHIEF OYEGBEMI ABIAWO
 9. CHIEF ADAM OPATUNBI
 10. CHIEF AMUSA MOJEIGBE OLAWIN
 11. CHIEF (MRS) DEBORAH OLUOKUN
(for themselves and on behalf of traditional Kingmakers of Olufon of Ifon Osun)
 12. PRINCE LASISI OLADOKUN
- AND
1. ALH. PRINCE MOROOF OLADIMEJI AKINTOLA
 2. THE EXECUTIVE GOVERNOR OF OSUN STATE
 3. THE ATTORNEY GENERAL OF OSUN STATE

SC. 275/2011

IN THE SUPREME COURT OF NIGERIA
HOLDEN AT ABUJA
FRIDAY, 12TH JANUARY, 2018

BEFORE THEIR LORDSHIPS

IBRAHIM TANKO MUHAMMAD
OLUKAYODE ARIWOOLA
KUMAI BAYANG AKA' AHS
AMINA ADAMU AUGIE
PAUL ADAMU GALINJE

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

CASE LAW: Principles in Owoseni vs. Faloye (2005) FWLR 220

COURT: Issues relating to preliminary objection – Approach of Court thereto – Need to be determined before considering substantive matters – Rationale.

COURT: Jurisdiction – Party instituted an action without complying with conditions precedent – Whether court has no jurisdiction to entertain.

COURT: Supreme Court – Power to amend judgment of lower Courts – Source – How exercised.

EQUITY: Where a party slept over his rights and did not apply for remedy timously as stipulated by law – Equity helps the vigilant and not the indolent – Relevant Considerations thereof.

JUDGMENT AND ORDERS: “Dismissal” – Nature, purport and significance

JUDGMENT AND ORDERS: “Dismissal” and 'Striking out' – Distinctions thereof when appropriate to make

PARTIES: Locus standi – Where a party lacks locus standi – Whether the court has no jurisdiction – Relationship between locus standi and jurisdiction.

PARTIES: Conditions precedent – Where a party institutes action without complying with conditions precedent in a relevant statute – Implication.

STATUTE: Section 20 of the Chieftaincy law of Osun State – Purport, relevance and imperatives.

WORDS AND PHRASES: 'In Lamine' – Meaning

WORDS AND PHRASES: 'Precedent' – Meaning

Issue for Determination

Whether the Court of Appeal is right in holding that the non-compliance with the provision of Section 20(1) and (2) by the respondent before coming to court did not rob the court of the jurisdiction to entertain the matter.

Facts of the matter

The Olumoyero Ruling House being one of the five Ruling Houses in respect of Olufon of Ifon-Osun Chifetaincy, is the Ruling House next entitled to present candidate to fill the vacancy created by the demise of Oba Olatoye Ilufoye Orisatoyinbo II, late Olufon of Ifon-Osun who passed on the 20th of August, 2007.

The plaintiff and the 1st defendant were subsequently nominated by the Olumoyero Ruling House to fill the vacant stool in line with the dictates of the tradition. The names of the plaintiff and defendant were presented to the kingmakers to enable them perform all customary and traditional rites in making a choice among the two candidates that have the best potency of filling the vacant stool and acceptable to the generality of the people of Ifon-Osun.

In line with the tradition, the 12th defendant who is the head of Olumoyero family presented the plaintiff and 1st defendant to the traditional kingmakers for their assignment. The Kingmakers assignment involves consulting Ifa oracle to know who among the two is the best candidate for peace and tranquility of Ifon-Osun.

As at the time of presentation to the kingmakers, only two of the kingmakers were readily available hence, they could not form quorum to do the assignment within the time stipulated by law. The 13th and 14th defendants acting on this fact and according to the dictates of the law appointed warrant kingmakers to complement and conclude the process of screening which include consulting Ifa oracle.

The kingmakers concluded their assignment and forwarded the name of the 1st defendant to the appropriate authority which is the 13th and 14th defendants. A notice of this presentation was made known to all ruling houses in Ifon-Osun and on the 18th February, 2008, the name of the 1st respondent was approved and announced on all media both print and electronic as the new Olufon of Ifon-Osun.

The plaintiff, dissatisfied with the approval of the appointment of the 1st defendant instituted Suit No. **HOS/26/2008** on the 28th of March, 2008 which is the subject of this appeal. At the trial court, the 1st – 11th defendants raised a preliminary objection that the plaintiff having not complied with condition precedent the trial court has no jurisdiction. This objection was upheld. However the Court of Appeal thought otherwise. Thus, the defendants as appellants have appealed to the Supreme Court.

Held: (Unanimously allowing the appeal)

1. *Respondent slept over his rights and did not act timously as provided in the chief's law.*

By the provisions of Section 20 of the Chieftaincy Law of Osun State, specially,

Subsection (2) thereof, an unsuccessful party, who is aggrieved by the decision of the prescribed authority on a chieftaincy matter, or a Ruling House, is required to make representation to the Executive Council against such a decision within a period of 21 (twenty one) days.

From the above facts, it is clear that the kingmakers concluded their assignment and forwarded the name of the 1st defendant to the appropriate authority (13th and 14th defendants) notice of the presentation was made known to all Ruling Houses in Ifon-Osun and name of the 1st defendant approved and announced on media on 18th of February, 2008.

The plaintiff/respondent on the 28/3/2008 instituted a suit at the trial court with suit No. HOS/26/2008. Thus, from the date of presentation and announcement of the appointment of the 1st defendant the plaintiff/respondent went asleep for over one month without having a resort to the provision of Section 20 of the Osun State Chiefs Law. Equity, they say, helps the vigilant and not the indolent. (*Pp 65 – 66 Paras E – A*)

2. *The spirit of S.20 of the Chieftaincy law of Osun State*

The spirit of the law in Section 20 of the Chiefs Law (*supra*) is clear and from the facts revealed in this matter, the respondent being an unsuccessful candidate from the same Ruling House with the 1st appellant, falls within the purview of the persons who can take advantage of Section 20 of the Chiefs law. Equally, the Ruling House whose term it is to present a candidate for appointment as Olufon of Ifon-Osun chieftaincy to make presentation to the Osun State Executive Council for further action. Thus, both the unsuccessful candidate and the Ruling House are bound to comply with the provision of Section 20(2) of the Chiefs Law as regards making representation to the Executive Council in the manner prescribed that the appointment be set aside. The representation must, by the provision of the said law, be made within 21 days of the notification of such appointment. (*P 66 Paras B – D*).

3. *The respondent did not comply with a condition precedent*

It is vividly clear from the facts in this appeal that the respondent jettisoned the procedure as laid down by Section 20 of the said Chiefs law and went straight to court for remedy. The law is always not in support of such practice. What the law lays is that where there is a condition precedent as in Section 20 of the Chiefs Law herein; a party who complains that he is affected, he has to exhaust such a condition precedent before taking any further action or reaching to a court of

law. It must, for the avoidance of doubt, be clearly understood that, any condition which is described as “precedent” is one which must happen or be performed before some right dependent thereon accrues or some act performed. The administrative remedy provided in Section 20 of the Chiefs Law has not been complied with by the respondent and as rightly held by the trial court, the suit could not be competently decided by it until the administrative remedy has been exhausted. Mustapher, JSC (as he then was) (rtd.) in the case of *Owoseni vs. Faloye* (2005) FWLR 220 at 234, stated, *inter alia*.

“In my view, the Court of Appeal is perfectly right on the statement of the law to the effect that where a statute prescribes a legal line of action for the determination of an issue be it an administrative matter, chieftaincy matter, such as this or a matter of taxation, the aggrieved party must exhaust all the remedies in that law before going to court.” (underling supplied)

Oguntade, (JSC) (Rtd.) in the same case threw more light by continuing on same issue that:

“In relation to Chieftaincy matters, were such laws not in existence, the courts would be inundated with suits on Chieftaincy matters, given the bitterness with which chieftaincy disputes are pursued and the regularity with which such disputes occur.....

*Furthermore, where an aggrieved party has not resorted to the remedies statutorily available to him on the infringement of his alleged right by the prescribed authority, such a party has therefore not exhausted the remedies available to him and has in consequence not satisfied the preconditions for access to court. See: *Adesila vs. Abidoye* (supra) at pages 58. In the instant case, the respondent omitted to comply with the provisions which set out the procedural steps for venting his grievance and he therefore acted prematurely in instating (sic; instituting) his action in the lower court.” (underlining supplied for emphasis)*

The underlined statements by Oguntade, JSC (rtd.) in *Owoseni's* case (supra) depicts clearly the scenario in the present appeal.

(Pp 66–67 Paras E–H)

4. *No jurisdiction where party did not comply with condition precedent*
To this extent, I am in agreement with the learned counsel for the appellants that the provision of Section 20(2)(a) and (b) of the Chiefs Law of Osun state is not made as a cosmetic nor made only to add aesthetic value to the law, it is made by the law makers to be obeyed by all parties or authority. Therefore, where a Chieftaincy dispute, such as the one on hand, failure by a party to exhaust available remedies will oust the jurisdiction of the court to hear the matter. See: Okomalu vs. Akinbode (2006) 9 NWLR (Pt. 985) 338 at page 343. (Pp 67 – 68 Paras H–B.)

5. *Approach of court to the determination of preliminary objection*
It is important to note that what the trial court decided was only in respect of the preliminary objection raised by the 1st to 11th defendants/appellants. The trial court did not go into the merit of the main suit before it. That is the right position of the law that where there is a preliminary point of objection, it is always neater to decide that objection first before delving into the main suit/case/appeal. See: Odiase vs. Agho (1972) 1 All NLR (Pt. 1) 170; Fadiora vs. Gbadebo (1978) 3 SC 219.
My lords, the aim or purpose of a preliminary objection against a suit, an application or an appeal, is, if successful, to terminate the hearing of the matter under consideration *IN LIMINE* either partially or in toto. Accordingly, where competence of the matter is challenged, it is always better to determine same first before embarking to consider the said matter. Where the said matter is found to be incompetent that puts an end to it. See: Odiase vs. Agho (supra); Fadiora vs. Gbadebo (supra); Oloriode vs. Oyebi (1984) 1 SCNLR 390; Ndigwe vs. Nwude (1999) 11 NWLR (Pt. 626) 314. (P 68 Paras B–F).

6. *Court of Appeal decided an issue not part of the judgment of the trial court*
It is to be noted that the learned trial judge did not make any attempt in his ruling to interpret the provisions of Section 20 of Osun State's Chiefs Law. That of course, is a determination *IN LIMINE*. Black's Law Dictionary 5th edition, defines *IN LIMINE* as, “on or at the threshold, at the very beginning; preliminary.” Thus, if a matter is determined *IN LIMINE*, it means that it is determined preliminary, or at its very beginning or inception without further ado. A suit or appeal is determined *IN LIMINE* without the necessity of going through its merit or de-merit. The judge handling it thus has formed *prima*

facie opinion that the matter is not worth pursuing before him due to some debilitating factors such as lack of jurisdiction of the court before which the matter is pending, voidity of the subject matter; *RES JUDICATER* or the same matter is before another court (abuse of court process). It is thus, surprising, how the court below allowed itself to be drawn into an unnecessary argument on the interpretation of Section 20 of the Osun State's Chiefs Law. (P 69 Paras A – D)

Per I. T. Muhammad (JSC):

“Ordinarily, to concede to something “means to admit that something is true or correct, to admit defeat, although the conceiver may wish it were not true or it were otherwise. Thus, to my mind, arguments on the interpretation of Section 20 (including any part thereof), is a non-starter. The learned trial judge dismissed the suit, apparently because the 1st respondent did not exhaust the legal line of action the Osun State Chiefs Law prescribed, i.e. for the 1st respondent and or a Ruling House to make a representation to the Executive Council after the election of the appellant within 21 days. This was not done by either of the two. I repeat it, that it is the law to the effect that where a statute prescribes a legal line of action for the determination of an issue be it an administrative matter, Chieftaincy matter or a matter on taxation, the unsuccessful party must exhaust all the remedies in that law before heading to a court of law. I repeat the same citations as relied upon and quoted earlier. As the 1st respondent failed or neglected to follow the stipulation of the chiefs law of Osun State, he has no legal capacity to institute the proceedings in the trial court as the suit is constituted. Any court that may be approached for a remedy by the 1st respondent can easily and conveniently decline jurisdiction as done by the trial court. (P 70 Paras C – G)

7. *Distinction between 'striking out' and 'dismissal'*

Perhaps what needs to be clarified is whether it was the right consequential order, i.e. dismissal of the suit, made by the trial court. This, the court below, held was wrong. Instead of dismissal order of the suit, it would have been a

striking out order. I think the court below is correct on this point. Where a party lacks a right of action due to non-compliance with some procedural conditions precedent, it goes to the root of the jurisdiction of the trial court. Where a plaintiff has no *locus standi* a court is obliged to strike out his case without going into the merits of the suit. See: Senator Abraham Adesanya vs. President of the Federal Republic of Nigeria and Another (1981) 5 SC 112 at pp. 128 – 129; Ogunsanya vs. Dada (1992) 4 SCNJ 162 at p. 168; Buraimoh Olowole & Ors v. Simeon Oyebi & Ors (1984) 5 Sc 1.

The reason for the striking out of the suit and not dismissal is that the action has not been tried. See: Otapo vs. Sunmonu (1987) 2 NWLR (Pt. 58) 587. This court, in the case of RTEAN vs. NURTW (1992) 2 NWLR (Pt. 224) 381 at 391, per Babalakin, (JSC) (Rtd.) stated the reason in preference of a striking out order instead of a dismissal order:

“When a court holds that a plaintiff has no *locus standi* in respect of a claim, the consequential order to be made is striking out of such claim and not a dismissal of the claim. The rationale is that holding that a plaintiff has no *locus standi* goes to the jurisdiction of the court before which such an action is brought. When the question that a plaintiff has no *locus standi* to institute an action arises, all that is being said in effect is that the court before which such an action is brought cannot entertain the adjudication of such an action. The court cannot dismiss a claim, the merit of which it is not competent to inquire into. (Pp 70–71 Paraa G–F)

8. *The meaning and significance of a dismissed action*
A dismissal presumes that the court has looked into the claim and found it wanting in merits. But it can only so look into the claim if that claim falls within the court's jurisdiction. A dismissal postulates that the action was properly constituted.”

See further: Nigeria Airways vs. Lapite (1990) 7 NWLR (Pt. 163) 392 Oloriode vs. Oyebi (supra). In Adesokan vs. Adesenyi (1994) 6 SCNJ (Pt. 1) 123 at page 146, where this court reiterated the position of the law that:

“It is immaterial that pleadings have been completed and full trial conducted. At whatever stage the finding is made that the plaintiff lacks *locus standi* to maintain the action, the jurisdiction of the court to entertain the action is affected and the course of action open is to put an end to it by striking it out.... If the court

has no jurisdiction to adjudicate, it cannot dismiss the action.”

The suit giving rise to this appeal was on chieftaincy matter. Ordinarily, by the provision of the Constitution of the Federal Republic of Nigeria, Section 272(1) (as amended), a state High Court, such as the trial court, has jurisdiction to entertain any complaint therein. But where a person denies himself the capacity to sue, by refusing or neglecting to comply with a statutory stipulation such as that provided by Section 20(2) of the Osun State Chiefs Law, he lacks capacity to initiate an action before a court of law. Thus, he has no *locus standi* to sue. If he does, and an objection is taken by the other side, or the incapacity is raised *suo motu* by the trial court, the suit/action has to be struck out. This is what happened in this appeal.

One thing that remains is, although the court below noted that the trial court ought to have struck out the suit and not dismissal of it, the court below did not correct that error. Be that as it may, this court, under its general powers has the right to amend that order of dismissal made by the trial court to one of striking out the suit. See: *Ovenseri vs. Osagede* (1998) 7 SCNJ 188 at page 195. (Pp 71 - 72 Paras F – G.)

Representation

Kehinde Adesiyon for the appellants.

O. O. Ogungbade for 1st respondent with him; Toyese Owoade, O. Owotumi; Folashade Olanipekun and O. Adenipekun.

Dr. Surajudeen Ajibola Basiru (HAG, Osun State) for 2nd and 3rd respondents with him; Ambali Adisa (ACSC, MOJ, Osun State); Chidinma Odunze; O. O. Otemu and E.O. Oboli.

I. T. MUHAMMAD, (JSC) (Delivering the Lead Judgment): The issues for deliberation in this appeal as set out by the learned counsel for the appellants are as follows:

- 1) **“Whether the Court of Appeal, Akure Division rightly interpret (sic: interpreted) the provisions of Section 20(1) and (2) of the Chiefs Law Cap 25 of Osun State 2003 to mean that “whether the representation is made by an unsuccessful candidate or his ruling house *the representation is limited to allegation that the proper order of rotation has not been observed.* Ground 1 of the Notice of Appeal.**

- 2) **Whether the Court of Appeal is right in holding that the non-compliance with the provisions of Section 20(1) and (2) by the respondent before coming to court did not rob the court of the jurisdiction to entertain the matter. (Ground 1).**
- 3) **Whether the Justice (sic: Justices) of the Court of Appeal are right in law to save a patently defective ground of Appeal which complained both error of law and misdirection of facts. Ground 2 of the Notice of Appeal.**

Of the three (3) respondents, it is only the 1st respondent who filed an amended brief on the 5th of October, 2017 (deemed on 17th October, 2017) in which he set out two issues for determination, thus:

- 1) **“Whether the interpretation placed by the Court of Appeal on the provisions of Section 20 of the Chiefs Law of Osun State is sufficient to invalidate the judgment of the court, particular regard being had to its decision that the provisions of the said Section were inapplicable to the 1st respondent's case as pleaded in the Statement of Claim? Ground 1 of the Notice of Appeal.**
- 2) **Whether the Court of Appeal was not correct when it decided to entertain Ground 2 of the Appellant's Notice of Appeal which complained of error of law and misdirection at the same time and whether by the said decision any miscarriage of justice was occasioned to the appellant's herein? Ground 2 of the Notice of Appeal.”**

The background facts supporting this case as contained in the printed record of appeal placed before this court are that by an indorsed writ of summons, the 1st respondent herein, as plaintiff/claimant at the Osun State High Court of Justice, holden at Osogbo, (trial court) made some declaratory and other claims against the appellants (herein) as defendants at the trial court. The claims as per paragraph 24 of the Statement of Claim read as follows:

“24. WHEREOF the claimant's claim against the defendants is as

follows:

- i. Declaration that the presentation of candidates nominated by Olumoyero Ruling House, whose turn it is to present candidates to fill the vacancy in the Olufon of Ifon-Osun Chieftaincy by the head of Olufon Ruling Houses to the traditional kingmakers for consideration and consultation of Ifa Oracle to determine who has the best potency for the good of Ifon-Osun community is a condition precedent to the selection, appointment and approval of Olufon of Ifon-Osun.**
- ii. Declaration that the traditional kingmakers are enjoined and obliged to consult Ifa Oracle as to the candidate who has the best potency for the good of Ifon-Osun before selection and appointment of Olufon of Ifon-Osun could be made.**
- iii. Declaration that the purported selection and appointment of the 1st defendant by the 2nd – 6th defendants acting as warrant kingmakers and the purported approval of the 1st defendant as the Olufon of Ifon-Osun by 13th and 14th defendants are not in accordance with native law and custom of Ifon-Osun, fraudulent, null and void and of no effect whatsoever.**
- iv. An order setting aside the purported selection, appointment and approval of the 1st Defendant as the Olufon of Ifon-Osun.**
- v. An order restraining the 1st defendant from parading himself and further parading himself and/or performing the rights, privileges and functions of Olufon of Ifon-Osun.**
- vi. An order of court restraining the 13th – 14th defendants from recognizing or further recognising the 1st defendant as the Olufon of Ifon-Osun.**

At the commencement of proceedings at trial court, a notice of preliminary objection (PO)

A was filed by the learned counsel for the 1st – 11th defendants challenging the competence of the trial court to try the suit, praying the court to dismiss the suit on the grounds that the action was incompetent having not fulfilled the requisite condition(s) for its initiation or commencement and that the trial court lacked the requisite jurisdiction in law to entertain the action. The preliminary objection was supported by a 19 paragraph affidavit. In opposing the preliminary objection, learned counsel for the plaintiff filed a

B 13 paragraph counter-affidavit.

After considering the affidavit evidence in respect of the preliminary objection the trial court sustained the preliminary objection and accordingly, dismissed the suit.

C Dissatisfied with the trial court's decision, plaintiff appealed to the Court of Appeal, Akure (court below). The appeal was heard and judgment delivered on the 3rd of March, 2011, allowing the appeal.

Dissatisfied, appellants filed a notice of appeal to this court.

D Briefs were filed and exchanged by the respective parties. Issues as set out at the beginning of this judgment were incorporated in the said briefs of argument.

My lords, I think the only relevant issue in all the issues formulated by the parties, and upon which both parties are in *tandem*, is appellant issue No. 2 that is:

E **“Whether the Court of Appeal is right in holding that the non-compliance with the provision of Section 20(1) and (2) by the respondent before coming to court did not rob the court of the jurisdiction to entertain the matter.”**

F Now, Section 20 of the Chiefs Law of Osun State, 2003, provides as follows:

G **“20(1) Subject to the provision of this Section, the Executive Council may approve or set aside an appointment of a recognised chief. The Executive Council shall not approve or set aside an appointment within the period of twenty-one days after notification in accordance with Section 19 and during that period.**

- H**
- (a) an unsuccessful candidate; or**
 - (b) a ruling house in respect of the chieftaincy which alleges that the proper order of rotation has not been observed, may make representations to the Executive Council in the manner prescribed that the appointment be set aside.**

I **In determining whether to approve or set aside an appointment under this section the Executive Council may have regard to:**

- A**
- (a) **Whether the provisions of Section 15 and 16 haven(sic) complied with.**
- (b) **Whether any candidate was qualified or disqualified in accordance with the provisions of Section 14.**
- B**
- (c) **Whether the Customary law relating to the appointment has been complied with;**
- (d) **Whether the kingmakers, in the case of a ruling house Chieftaincy, had due regard to the ability, character or popular support of any candidate or;**
- C**
- (e) **Whether the appointment was obtained corruptly or by the undue influence of any person; and may, notwithstanding that it appears to it the appointment has been made in accordance with the provisions of this law, set aside an appointment if it is satisfied that it is in the interests of peace, order and good governance to do so.”**
- D**

In his submissions before this court, learned counsel for the appellants, stated, inter alia, that the court below failed to read the entire provisions of the sub-sections of Section 20 of the Chiefs Law together in concluding the way it did in its judgment and more worrisome is the interpretation they ascribed to Section 20, that it is not a condition precedent to instituting an action. The court below, he argued, did a summersault by holding otherwise, when it limited the application of the restriction to non-observance of order of rotation. The lower court, learned counsel argued, had no business tinkering with the express provisions of the law by importing into it what is not there or borrowing a delimiting phrase or clause from a Section and engrafting it on another. He submitted further, that the issue of the applicability of Section 20 of the Chiefs Law as to the ground of making representation to the Governor was never canvassed by any of the parties at the lower court. It was raised *suo motu* and none of the parties was given opportunity to be heard at the lower court. Learned counsel cited some cases in support: **Ajibore vs. Kilawole (1996) 10 NWLR (Pt. 476) 22 at 36; A-G. Leventist Nig. Plc vs. Akpu (2007) All FWLR (Pt. 388) 1028; Dakk Nig. Ltd. vs. Oil Mineral Producing Areas Dev. Commission (2007) All FWLR (Pt. 364) 204.**

H The 1st respondent in his amended brief of argument, drew attention of this court, in paragraph 1.02 of page 3 of the brief that:

“1.02 The Court of Appeal in its judgment held amongst others that non-compliance with the provisions of Section 20(2) by a person

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A aggrieved by the appointment of a Chief is not fatal as the said
B Section *does not provide a sanction*. The appellants herein have
made this finding the main thrust of this appeal. *We do not intend to
belabor your Lordships on the purport and interpretation of Section
20(2) of the Chiefs Law of Osun State. We concede that the Court of
Appeal was wrong in its interpretation of the law.*” (underlining for
emphasis)

C However, learned counsel for the 1st respondent went on to argue that the error of
interpretation (to which 1st respondent conceded) committed by the court below is
insufficient to invalidate its judgment because, the case of the 1st respondent as pleaded
in the Statement of Claim was such as made compliance with Section 20(2) of the Chiefs
Law inapplicable or unnecessary such as would require him to exhaust the
administrative remedy provided by the law before instituting his action.

D My lords, I would not have proceeded to say anything, any more, than “appeal is
allowed” by the concession of the 1st respondent as above, as Section 20 of the Chiefs
Law of Osun State is the *raison detre* of this appeal. But, to be more on the side of
caution, I will proceed to consider further submissions of the respective parties on issue
No. 2 by the appellant which is capable of determining the appeal. Permit me to start
E with the views expressed by the trial court where it stated as follows:

F “What is expected to be done in chieftaincy matters are elaborately
stated in the Chiefs law (supra). As a follow up to this point, the
powers and responsibilities of the 13th & 14th defendants are
fundamental. It is enough to say that he can set aside an
appointment if it is satisfied that it is in the interest of peace order
and good government.

G I have set out the submissions of learned counsel for the parties.
Leraned counsel for the objectors, Mr. Kehinde Adesiyan cited a
plethora of authorities to persuade the court in his argument. The
plank of his argument should not be lost. Plaintiffs ought to have
made representations and in additions there was nothing in the
H pleadings of the plaintiffs linking the 13th – 14th defendants. In other
words; there was no cause of action against them.

I In the case of *Owoseni vs. Faloye (2005) FWLR 220 at 234, Dahiru
Mustapher, JSC has this to say when considering a similar provision*

A in Ondo State.

B 'Now in my view, the court of Appeal is perfectly right on the statement of the law to the effect that where a statute prescribes a legal line of action for the determination of an issue be it an administrative matter, chieftaincy matter, such as this or a matter on a taxation, the aggrieved party must exhaust all the remedies in that law before going to court.'

C In similar vein, Oguntade, JSC at p. 224 was gracious enough to state the rationale behind the procedure. According to him:

D 'In relation to chieftaincy matters, were such laws not in existence, the courts would be inundated with suits on chieftaincy matters, given the bitterness with which chieftaincy disputes are pursued and the regularity with which such dispute occur.'

E The learned trial judge concluded that the chiefs law is not inconsistent with the provisions of the Constitution in so far as it laid down the requirements to be followed in Section 20(2) of the Chiefs Law (supra).

I am in perfect agreement with the trial court in its views.

F For a better comprehension of this matter, it is pertinent to bring out the facts more clearly. The Olumoyero Ruling House being one of the five ruling houses in respect of Olufon of Ifon-Osun Chifetaincy, is the ruling house next entitled to present candidate to fill the vacancy created by the demise of Oba Olatoye Ilufoye Orisatoyinbo II, late Olufon of Ifon-Osun who passed on the 20th of August, 2007.

G The plaintiff and the 1st defendant were subsequently nominated by the Olumoyero Ruling House to fill the vacant stool in line with the dictate of the tradition. The names of the plaintiff and defendant were presented to the kingmakers to enable them perform all customary and traditional rites in making a choice among the two candidates that have the best potency of filling the vacant stool and acceptable to the generality of the people of Ifon-Osun.

H In line with the tradition, the 12th defendant who is the Head of Olumoyero family presented the plaintiff and 1st defendant to the traditional kingmakers for their assignment. The Kingmakers assignment involves consulting Ifa oracle to know who among the two is the best candidates for peace and tranquility of Ifon-Osun.

I As at the time of presentation to the kingmakers, only two of the kingmakers were readily available hence, they could not form quorum to do the assignment within

A the time stipulated by law. The 13th and 14th defendants acting on this fact and according to the dictate of the law appointed warrant kingmakers to complement and conclude the process of screening which include consulting Ifa oracle.

B The kingmakers concluded their assignment and forwarded the name of the 1st defendant to the appropriate authority which is the 13th and 14th defendants. A notice of this presentation was made known to all ruling houses in Ifon-Osun and on the **18th February, 2008**, the name of the 1st respondent was approved and announced on all media both print and electronic as the new Olufon of Ifon-Osun.

C The plaintiff, dissatisfied with the approval of the appointment of the 1st defendant instituted Suit No. **HOS/26/2008** on the 28th of March, 2008 which is the subject of this appeal.

Upon service of the originating processes on the 1st to 12th defendants, a notice of preliminary objection along with entry of Conditional Appearance were filed challenging the competency of the suit and the court to entertain it.

D By the provisions of Section 20 of the Chieftaincy Law of Osun State, specially, Subsection (2) thereof, an unsuccessful party, who is aggrieved by the decision of the prescribed authority on a Chieftaincy matter, or a Ruling House, is required to make representation to the Executive Council against such a decision within a period of 21 (twenty one) days.

E From the above facts, it is clear that the kingmakers concluded their assignment and forwarded the name of the 1st defendant to the appropriate authority (13th and 14th defendants) notice of the presentation was made known to all Ruling Houses in Ifon-Osun and name of the 1st defendant approved and announced on media on 18th of February, 2008.

F The plaintiff/respondent on the 28/3/2008 instituted a suit at the trial court with suit No. **HOS/26/2008**. Thus, from the date of presentation and announcement of the appointment of the 1st defendant the plaintiff/respondent went asleep for over one month without having a resort to the provision of Section 20 of the Osun State Chiefs Law.

G Equity, they say, helps the vigilant and not the indolent.

The spirit of the law in Section 20 of the Chiefs Law (supra) is clear and from the facts revealed in this matter, the respondent being an unsuccessful candidate from the same Ruling House with the 1st appellant falls within the purview of the persons who can take advantage of Section 20 of the Chiefs law. Equally, the Ruling House whose turn it is to present a candidate for appointment as Olufon of Ifon-Osun chieftaincy to make presentation to the Osun state Executive Council for further action. Thus, both the unsuccessful candidate and the Ruling House are bound to comply with the provision of Section 20(2) of the Chiefs Law as regards making representation to the Executive

I Council in the manner prescribed that the appointment be set aside. The representation

A must, by the provision of the said law, be made within 21 days of the notification of such appointment.

It is vividly clear from the facts in this appeal that the respondent jettisoned the procedure as laid down by Section 20 of the said Chiefs law and went straight to court for remedy. The law is always not in support of such practice. What the law lays is that

B where there is a condition precedent as in Section 20 of the Chiefs Law herein; a party who complains that he is affected, he has to exhaust such a condition precedent before taking any further action or reaching to a court of law. It must, for the avoidance of doubt, be clearly understood that, any condition which is described as “precedent” is one
C which must happen or be performed before some right dependent thereon accrues or some act performed. The administrative remedy provided in Section 20 of the Chiefs Law has not been complied with by the respondent and as rightly held by the trial court, the suit could not be competently decided by it until the administrative remedy has been exhausted. Musdapher, JSC (as he then was) (rtd.) in the case of **Owoseni vs. Faloye**
D (2005) FWLR 220 at 234, stated, inter alia.

E **“In my view, the Court of Appeal is perfectly right on the statement of the law to the effect that where a statute prescribes a legal line of action for the determination of an issue be it an administrative matter, chieftaincy matter, such as this or a matter of taxation, the aggrieved party must exhaust all the remedies in that law before going to court.” (underling supplied)**

Oguntade, JSC (Rtd.) in the same case threw more light by continuing on same issue that:

F **“In relation to Chieftaincy matters, were such laws not in existence, the courts would be inundated with suits on Chieftaincy matters, given the bitterness with which chieftaincy disputes are pursued and the regularity with which such disputes occur.....”**

G **Furthermore, where an aggrieved party has not resorted to the remedies statutorily available to him on the infringement of his alleged right by the prescribed authority, such a party has therefore not exhausted the remedies available to him and has in consequence not satisfied the preconditions for access to court. See: *Adesila v. Abidoye* (supra) at pages 58. *In the instant case, the respondent omitted to comply with the provisions which set out the procedural steps for venting his grievance and he therefore acted prematurely in***

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A *instating (sic; instituting) his action in the lower court.” (underlining supplied for emphasis)*

B The underlined statements by Oguntade, JSC (rtd.) in Owoseni's case (supra) depicts clearly the scenario in the present appeal. To this extent, I am in agreement with the learned counsel for the appellants that the provision of Section 20(2)(a) and (b) of the Chiefs Law of Osun state is not made as a cosmetic nor made only to add aesthetic value to the law, it is made by the law makers to be obeyed by all parties or authority. Therefore, where is a Chieftaincy dispute, such as the one on hand, failure by a party to exhaust available remedies will oust the jurisdiction of the court to hear the matter. See: **C Okomale vs. Akinbode (2006) 9 NWLR (Pt. 985) 338 at page 343.**

D It is important to note that what the trial court decided was only in respect of the Preliminary Objection raised by the 1st to 11th defendants/appellants. The trial court did not go into the merit of the main suit before it. That is the right position of the law that where there is a Preliminary point of objection, it is always neater to decide that objection first before delving into the main suit/case/appeal. See: **Odiase vs. Agho (1972) 1 All NLR (Pt. 1) 170; Fadiora vs. Gbadebo (1978) 3 SC 219.**

E My lords, the aim or purpose of a preliminary objection against a suit, an application or an appeal, is, if successful, to terminate the hearing of the matter under consideration **IN LIMINE** with partially or in toto. Accordingly, where competence of the matter is challenged, it is always better to determine same first before embarking to consider the said matter. Where the said matter is found to be incompetent that puts an end to it. See: **Odiase vs. Agho (supra); Fadiora vs. Gbadebo (supra); Olorinde vs. Oyebi (1984) 1 SCNLR 390; Ndigwe vs. Nwude (1999) 11 NWLR (Pt. 626) 314.**

F The trial court decided this matter by considering the preliminary objection raised by the 1st to 11th defendants/appellants. I quote, herein below, text of the concluding part of the learned trial judge's Ruling:

G **“The Chiefs Law is not inconsistent with the provisions of the Constitution in so far as it laid down the requirements to be followed in Section 20(2) of the Chiefs Law (supra). I have carefully examined the entire application and of the firm view that the preliminary objection is sustained and the suit is accordingly dismissed.”**

H It is to be noted that the learned trial judge did not make any attempt in his ruling to interpret the provisions of Section 20 of Osun State's Chiefs Law. That of course, is a determination **IN LIMINE**. Black's Law Dictionary 5th edition, defines **IN LIMINE** as, “on or at the threshold at the very beginning; preliminary.” Thus, if a matter is

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A determined **IN LIMINE**, it means that it is determined preliminarily, or at its very beginning or inception without further ado. A suit or appeal is determined **IN LIMINE** without the necessity of going through its merit or de-merit. The judge handling it thus has formed **prima facie** opinion that the matter is not worth pursuing before him due to some debilitating factors such as lack of jurisdiction of the court before which the

B matter is pending, voidity of the subject matter. **RES JUDICATER** or the same matter is before another court (abuse of court process). It is thus, surprising, how the court below allowed itself to be drawn into an unnecessary argument on the interpretation of Section 20 of the Osun State's Chiefs Law.

C Granted that what the court below did was right, yet the learned counsel for the 1st respondent, as I stated earlier, conceded that the court below committed an error of interpretation of Section 20(2) of the Chiefs Law of Osun State. Learned counsel stated further:

D **“As stated earlier, we concede the above stated points. We agree as canvassed by the appellants that the representation envisaged by Section 20(2) of the Chiefs Law in respect of an unsuccessful candidate is not limited to the issue of whether the proper order of rotation amongst ruling families has been observed or not. Such a restriction is only applicable to a ruling family which desires to make a representation to the Executive Council.**

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F **We also agree that non-compliance with the procedure in Section 20(2) of the Chiefs Law or non-exhaustion of the administrative remedies contained in the said law is fatal to a suit which is filed without compliance with the said provision. Indeed, the holding of the Court of Appeal in this case runs contrary to several judicial authorities on this point.**

G **We refer to Okomalu vs. Akinbode (2006) 9 NWLR (Pt. 985)358; Awoyemi vs. Fasuan (2006) 13 NWLR (Pt. 996) 86.”**

H Ordinarily, “to concede to something “means to admit that something is true or correct, to admit defeat, although the conceiver may wish it were not true or it were otherwise. Thus, to my mind, arguments on the interpretation of Section 20 (including any part thereof), is a non-starter. The learned trial judge dismissed the suit, apparently because the 1st respondent did not exhaust the legal line of action the Osun State Chiefs Law prescribed, i.e. for the 1st respondent and or a Ruling House to make a representation to

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A the Executive Council after the election of the appellant within 21 days. This was not done by either of the two. I repeat it, that it is the law to the effect that where a statute prescribes a legal line of action for the determination of an issue be it an administrative matter, Chieftaincy matter or a matter on taxation, the unsuccessful party must exhaust all the remedies in that law before heading to a court of law. I repeat the same citations as

B relied upon and quoted earlier. As the 1st respondent failed or neglected to follow the stipulation of the chiefs law of Osun State, he has no legal capacity to institute the proceedings in the trial court as the suit is constituted. Any court that may be approached for a remedy by the 1st respondent can easily and conveniently decline jurisdiction as done by the trial court.

C Perhaps what needs to be clarified is whether it was the right consequential order, i.e. dismissal of the suit, made by the trial court. This, the court below, held was wrong. Instead of dismissal order of the suit, it would have been a striking out order. I think the court below is correct on this point. Where a party lacks a right of action due to

D non-compliance with some procedural conditions precedent, it goes to the root of the jurisdiction of the trial court. Where a plaintiff has no *locus standi* a court is obliged to strike out his case without going into the merits of the suit. See: **Senator Abraham Adesanya vs. President of the Federal Republic of Nigeria and Another (1981) 5 SC 112 at pp. 128 – 129; Ogunsanya vs. Dada (1992) 4 SCNJ 162 at p. 168; Buraimoh Olowole & Ors vs. Simeon Oyebi & Ors (1984) 5 S.C. 1.**

E The reason for the striking out of the suit and not dismissal is that the action has not been tried. See: **Otakpo vs. Sunmoun (1987) 2 NWLR (Pt. 58) 587. This court, in the case of RTEAN vs. NURTW (1992) 2 NWLR (Pt. 224) 381 at 391, per Babalakin, JSC (Rtd.) stated the reason in preference of a striking out order instead of a dismissal order:**

G **“When a court holds that a plaintiff has no *locus standi* in respect of a claim, the consequential order to be made is striking out of such claim and not a dismissal of the claim. The rationale is that holding that a plaintiff has no *locus standi* goes to the jurisdiction of the court before which such an action is brought. When the question that a plaintiff has no *locus standi* to institute an action arises, all that is being said in effect is that the court before which such an action is brought cannot entertain the adjudication of such an action. The court cannot dismiss a claim, the merit of which it is not competent to inquire into.**

I **A dismissal presumes that the court has looked into the claim and**

A found it wanting in merits. But it can only so look into the claim if that claim falls within the court's jurisdiction. A dismissal postulates that the action was properly constituted.”

B See further: *Nigeria Airways vs. Lapite (1990) 7 NWLR (Pt. 163) 392 Oloriode vs. Oyebi (supra). In Adesokan vs. Adesenyi (1994) 6 SCNJ (Pt. 1) 123 at page 146*, where this court reiterated the position of the law that:

C “It is immaterial that pleadings have been completed and full trial conducted. At whatever stage the finding is made that the plaintiff lacks *locus standi* to maintain the action, the jurisdiction of the court to entertain the action is affected and the course of action open is to put an end to it by striking it out.... If the court has no jurisdiction to adjudicate, it cannot dismiss the action.”

D The suit giving rise to this appeal was on Chieftaincy matter. Ordinarily, by the provision of the Constitution of the Federal Republic of Nigeria, Section 272(1) (as amended), a state High Court, such as the trial court, has jurisdiction to entertain any complaint therein. But where a person denies himself the capacity to sue, by refusing or neglecting to comply with a statutory stipulation such as that provided by Section 20(2) of the Osun State Chiefs Law, he lacks capacity to initiate an action before a court of law. Thus, he has no *locus standi* to sue. If he does, and an objection is taken by the other side, or the incapacity is raised *suo motu* by the trial court, the suit/action has to be struck out. This is what happened in this appeal.

E One thing that remains is, although the court below noted that the trial court ought to have struck out the suit and not dismissal of it, the court below did not correct that error. Be that as it may, this court, under its general powers has the right to amend that order of dismissal made by the trial court to one of striking out the suit. See: *Ovenseri vs. Osagede (1998) 7 SCNJ 188 at page 195*. Accordingly, this appeal is hereby allowed. I set aside the judgment of the court below except that portion which struck out the appeal. I restore the Ruling of the trial court delivered on the 30th day of March, 2009, with the amendment to the consequential order to now read.

F “I have carefully examined the entire application and of the firm view that the preliminary objection is sustained and the suit is accordingly *struck out*.”

G I do not find it necessary to delve into the remaining issues formulated by the parties as this issue (No. 2) now considered, has in my view, settled finally, all the issues in contention.

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A This is my judgment.

**Ibrahim Tanko Muhammad,
Justice, Supreme Court**

B **OLU ARIWOOLA, (JSC):** I had the privilege of reading in draft the lead judgment of my learned brother I.T Muhammad JSC just delivered. I agree entirely with the reasoning and conclusion that the appeal is meritorious and should be allowed.

I too will allow the appeal.

I abide by the consequential orders including the order on costs.

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**Olu Ariwoola
Justice, Supreme Court**

D **BAYANG AKA' AHS, (JSC):** I read before now the judgment of my learned brother, Ibrahim Tanko Muhammad JSC allowing the appeal and substituting an order striking out the appeal instead of the order dismissing it. I am in complete agreement with the reasoning and conclusion reached by my learned brother that the appeal should be allowed. The learned trial Judge hit the nail on the head when sustaining the preliminary objection on the competency of the suit held following **Owoseni vs. Faloye (2005) 14 NWLR (Pt. 946) 719** per Musdapher JSC (as he then was) at 740 held that

E “..... Where a statute prescribes a legal line of action for the determination of an issue, be it an administrative matter, chieftaincy matter, such as this or a matter for taxation, the aggrieved party must exhaust all the remedies in the law before going to court”. See: **Aribisala vs. Ogunyemi (2005) 6 NWLR (Pt. 921) 212.**

F Section 20(1),(2) and (3) of the Chiefs Law Cap 25 Laws of Osun State 2002 states:

“20(1) Subject to the provisions of this section the Governor may approve or set aside an appointment of a recognized chief.

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(2) The Governor shall approve or set aside an appointment within the period of twenty-one days after notification in accordance with section 19 and during that period,

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- (a) an unsuccessful candidate; or**
- (b) a ruling house in respect of the chieftaincy which alleges that the proper order of rotation has not been observed, may make representations to the Governor in the manner prescribed that the appointment be set aside.**

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(3) **In determining whether to approve or set aside an appointment under this section the Governor may have regard to**

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(a) **whether the provisions of section 15 or section 16 have been complied with;**

(b) **whether any candidate was qualified or disqualified in accordance with the provisions of section 14;**

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(c) **whether the customary law relating to the appointment has been complied with;**

(d) **whether the Kingmakers, in the case of ruling house chieftaincy, had due regard to the ability, character or popular support of any candidate; or**

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(e) **whether the appointment was obtained corruptly or by the undue influence of any person; and may, notwithstanding that it appears to him the appointment has been made in accordance with the provisions of this Law, set aside the appointment if he is satisfied that it is in the interest of peace, order and good government to do so”.**

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It is therefore a condition precedent that an aggrieved party before resorting to legal action must first make representation to the governor within 21 days of the appointment of the person forwarded to him by the Kingmakers as Olufon Ifon Osun. Since learned counsel for the respondent in this appeal conceded that the respondent (as plaintiff) in the trial court did not exhaust the remedies provided in section 20(2) of the Law before going to court, the jurisdiction has not been properly invoked and the action is liable to be struck out. See: **Madukolu v. Nkemdilim (1962) 2 SCNLR 341**. It is for this reason and the more exhaustive reasons contained in the leading judgment of my learned brother, Ibrahim Tanko Muhammad JSC that I also allowed the appeal and substituted the order striking out Suit No. HOS/26/2008 instead of dismissing it since it was not decided on the merits.

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K. B. AKAAHS
Justice, Supreme Court

ADAMU AUGIE, (JSC): I read in draft the lead Judgment delivered by my learned brother, I.T. Muhammad (JSC), and I agree with his reasoning and conclusion.

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He addressed all the Issues canvassed in the Appeal squarely, and I have nothing useful to add that would make any difference.

A I adopt the well-articulated reasoning in the lead Judgment, and allow the Appeal. I abide by the consequential Orders therein.

Amina Adamu Augie
Justice, Supreme Court

B ADAMU GALINJE, (JSC): I have had the preview before now the judgment just delivered by my learned brother I.T. MUHAMMAD (JSC) and I agree entirely with the reasoning contained therein and the conclusion arrived thereat.

C My learned brother has as usual thoroughly treated all the issues submitted for resolution of this appeal in such a way that I have no useful thing to add. For the same reasoning articulated in the lead judgment, which I adopt as mine, this appeal shall be and it is allowed. I endorse all the consequential orders made therein including order as to costs.

Paul Adamu Galinje
Justice, Supreme Court

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**AR SECURITY SOLUTION LIMITED
AND
ECONOMIC & FINANCIAL CRIMES COMMISSION**

SC. 696/2017

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

FRIDAY, 12TH JANUARY, 2018

BEFORE THEIR LORDSHIPS

MUSADATTIJO MUHAMMAD	JUSTICE, SUPREME COURT
KUMAI BAYANG AKA' AHS	JUSTICE, SUPREME COURT
CHIMA CENTUS NWEZE	JUSTICE, SUPREME COURT
EJEMBI EKO	JUSTICE, SUPREME COURT
SIDI DAUD BAGE	JUSTICE, SUPREME COURT

ACTION: Academic action – Nature and purport.

ACTION: Academic action – Nature of – Whether such action is not properly constituted.

APPEAL: Raising fresh issue on appeal – An issue that an action is academic in nature – Issue a jurisdictional question – Whether Supreme Court can entertain issue without leave.

COURT: Issue that a suit is academic in nature – Jurisdictional issue – Whether Supreme Court can entertain when not previously canvassed at the Court of Appeal.

COURT: Jurisdiction – The essence of court assuming jurisdiction – Whether court cannot properly assume jurisdiction where it will be an exercise in vain and useless – Relevant Considerations thereof.

COURT: Jurisdiction – Whether court has no jurisdiction to entertain an action that is academic in nature – Relevant considerations thereof.

JUDGMENT AND ORDERS: Order of Injunction – Whether not a remedy for an application to restrain a completed action – Relevant considerations.

Issue for Determination

Whether this appeal is not otiose, academic, destitute of any utilitarian value and therefore liable to be dismissed.

Facts of the Matter

This is an appeal against the judgment of the Court of Appeal, Abuja Division, in Appeal No. CA/A/306/2016, affirming the ruling of the Federal High Court sitting at Abuja. The ruling of the trial court dated 22nd April 2016 which the lower court's judgment delivered on 25th July 2017 affirmed arose in the course of proceedings in suit FHC/ABJ/CS/1054/2015.

The brief facts of the case that brought about the appeal are hereinunder supplied.

Following its Exparte Originating Summons dated 21st day of December 2015, the trial court granted the respondent leave to completely freeze the operation of accounts specified in Forms B of the schedule to the EFCC Act 2004 attached to the summons and further empowered the respondent to receive such information in respect of the frozen accounts from the managers of the banks and/or persons in whose control the designated accounts abide for six months.

Affected by the interim freezing order on its accounts with the Heritage Bank, the appellant applied that the trial court's order dated 25th January 2016 be set-aside. The appellant's application was refused and dismissed by the trial court.

Dissatisfied, the appellant appealed to the lower court on a notice containing five grounds filed on 4th May 2016. The dismissal of the appeal informs appellant's further appeal to this Court.

Held: *(Unanimously striking out appeal)*

1. *The nature of a plea that an action is academic*

The order of the trial court which affirmation by the lower court informs the instant appeal, see page 79 of the record of appeal, is dated 25th January 2016 and indeed has a six months lifespan. As submitted by learned respondent's counsel, the order has lapsed by 25th July 2016. The record of appeal further bears out learned respondent's counsel that the extant order freezing appellant's account is different from the order the appellant, by its appeal, wants set-aside. (P 85 Paras B–D)

2. *The essence of court assuming jurisdiction over a matter*

Ignoring these irrepressible facts by the appellant accounts for its dismal outing. A plea by a party that a court declines from assuming jurisdiction in respect of a matter, where it enjoys same, because doing so is academic and useless is akin to an objection that the court lacks jurisdiction in the first place. As correctly argued by learned respondent's counsel, a court does not proceed in vain. A court exercises its jurisdiction, where approached, in order to resolve a dispute, address an injury and provide relief. Where as in the instant case the exercise of the court's jurisdiction would not resolve any dispute and confer any relief arising from the injury occasioned by the dispute between the parties then, indeed, proceeding will be in vain and useless. Lacking in utility, assumption of jurisdiction in that situation should be avoided by the court. The court's proceedings and eventual decision no matter how well conducted and reasoned will come to naught being devoid of any essence to either party in the matter. Learned respondent counsel's reliance on the authorities he cited in support of his submissions is apposite. (P 85 Paras D–H)

3. *The meaning of academic suit*

In Dahiru and Anor vs. APC & Ors (2016) LPELR-42089 (SC), at page 25 the court indeed enthused as follows:

“A suit is academic where it is thereby theoretical, makes empty sound and of no practical utilitarian value to the plaintiff even if judgment is given in his favour. A suit is academic if it is not related to practical situation of human nature Once a suit no longer has live issue for determination such a suit can be said to be academic. *Courts should on no account in such an instance spend judicial time in academic exercise. Courts are to determine only live issues.*” (Underlining mine for emphasis). (Pp 85–86 Paras H–C)

4. *The meaning of academic suit.*

My learned brother Amina Augie (JSC) restated the principle more comprehensively in Ardo vs. INEC & Ors (2017) LPELR-41919 (SC) thus:

“An action becomes hypothetical or raises mere academic point when there is no live matter in it to be adjudicated upon or when its determination holds no practical or tangible value for making

a pronouncement upon it; it is otherwise an exercise in futility. *When an issue has become defunct, it does not require to be answered And leads to making bare legal postulations which the court should not indulge in: it is like the salt that has lost its seasoning. And like the salt in that terms, an academic issue or question does not relate to the live issues in the litigation because it is spent as it will not ensure any right or benefit on a successful party.*” (Italics mine for emphasis). (P 86 Paras C–G)

Per Dattijo Muhammed (JSC):

“The instant appeal unquestionably falls within the class of cases this Court in its seemingly endless decisions hold to be academic, hypothetical and defunct upon which any pronouncement would not confer any right or benefit to the appellant. This Court is duty bound to obey and enforce these decisions.

It is true as learned appellant's counsel submitted that the issue as raised and argued by learned respondent's counsel neither relates to the decision appealed against nor any of the grounds in the extant notice of appeal. It is again true that having not cross appealed the respondent is further restricted in the issue it distills as arising for the determination of the appeal. What is overriding though, is the very fact that in ignoring the issue so raised the court would be proceeding in vain as so far demonstrated. For the reasons adumbrated and the judicial authorities from which the reasons draw, respondent's objection as constituted in its 1st issue for the determination of the appeal is hereby sustained. In ensuring that the court does not proceed and pronounce in vain over an appeal that has become defunct, of no practical and utilitarian value, jurisdiction is hereby accordingly declined and the appeal struck out.

(Pp 86–87 Paras G–D)

5. *An order of injunction is not a remedy to restrain a completed act*
By a split decision of a majority of 3-2, this Court held in *Badejo vs. Federal*

Ministry of Education (1996) 8 NWLR (Pt. 464) 15 per Kutigi (JSC) (as he then was) that an order of injunction is not a remedy for an act which has already been carried out. It has the same effect as an application seeking injunction to restrain a completed action. See: Ilechukwu vs. Iwugo (1989) 2 NWLR (Pt. 101) 99; Uwaifo vs. Governor of Lagos State (2009) 1 NWLR (Pt.1122) 241. (P 87 Paras G–H)

Representation

AFAM OSIGWE, with him: Ikechukwu Odanwu, Ijeoma Nwosu, Ugonna Afiagwe and Gabriel Eneche, for the appellant.

BENJAMIN MANJI, with him; Chris Mshelia and D. N. Nkwap (Mrs), for the Respondent.

DATTIJO MUHAMMAD. (JSC) (Delivering the Lead Judgment): This is an appeal against the judgment of the Court of Appeal, Abuja Division, hereinafter referred to as the lower court, in Appeal No. CA/A/306/2016, affirming the ruling of the Federal High Court sitting at Abuja, hereinafter referred to as the trial court. The ruling of the trial court dated 22nd April 2016 which the lower court's judgment delivered on 25th July 2017 affirmed arose in the course of proceedings in suit FHC/ABJ/CS/1054/2015.

The brief facts of the case that brought about the appeal are hereinunder supplied.

Its notice of appeal which contains four grounds and spans pages 155-161 of the record was filed on the 15th day of August 2017.

At paragraph 3 of the appellant's brief settled by Mazi Afam Osigwe of counsel, the two issues distilled as arising for the determination of the appeal read:

- (i) **Whether the mere investigation and/or arrest of a person for an offence under Economic and Financial Crimes Commission Act discharges the Respondent from the burden of establishing there is prime facie evidence for the attachment or forfeiture of the person's property or assets.**
- (ii) **Whether the court below was right in affirming the trial court's decision temporarily freezing Appellant's accounts.**

The two issues distilled at page 5 of the respondent's brief settled by learned counsel Benjamin Lawan Manji Esq read:

- (i) **Whether this appeal is not otiose, academic, destitute of any utilitarian value and therefore liable to be dismissed.**

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- (ii) **Whether in the circumstances of this case, the lower court was right in affirming the decision of the trial court dismissing the appellant's application as lacking in merit. (Underlining mine for emphasis).**

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My lords, in my firm and considered view the determination of this appeal should commence with the resolution of the 1st issue distilled by the respondent for reasons that would eventually unfold. The appellant has reacted to the arguments proffered by the respondent on the issue in its reply brief.

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On the issue, learned respondent's counsel contends that the appeal being devoid of any utilitarian value is liable to be struck out. The order of the trial court the appellant urges this court to set-aside has a specific time frame after which it becomes dead. The order which was made on 25th January 2016, and has a six months time frame, submits learned respondent's counsel, expired on 25th day of July 2016. Any freezing of the accounts of the appellant beyond 25th July 2016, it is further submitted, is not on the basis of the order of the trial court now sought by the appellant to be set-aside. The appellant by this appeal, learned respondent's counsel contends, is urging this Court to set-aside an order that ceased to have effect since 25th July 2016, a period of well over a year.

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The accounts of the appellant remain frozen, submits learned respondent's counsel, not on the basis of the trial court's expired order of 25th January 2016 but by virtue of a subsequent order following the arraignment and trial of the appellant and its directors before a different judge for money laundering. Relying particularly on **Kubor & Anor vs. Dickson & Ors (2012) LPELR-9817 (SC)**, **Ardo vs. INEC & Ors (2017) LPELR-41919 (SC)** and **Dahiru & Anor vs. APC & Ors (2016) LPELR-42089 (SC)**, learned counsel urges that this Court declines jurisdiction the merit of the appeal notwithstanding. The determination of the appeal, it is concluded, will be a waste of the precious time of the court as same will serve no utilitarian and practical value even to the appellant. The court, it is submitted, is not an academic institution that answers academic questions. Further relying on **Adelaja vs. Alade (1999) 6 NWLR (Pt 608) 544**, **Okulate vs. Awosanya (2000) 2 NWLR (Pt. 646) 530** and **UBN Plc vs. Sepok (Nig) Ltd (1998) 12 NWLR (Pt 578) 439**, learned counsel urges that the appeal be struck out.

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Responding in the reply brief filed subsequent to the service of the respondent's brief on the appellant, learned appellant's counsel argues that respondent's 1st issue as well as arguments proffered thereon, being incompetent, be discontinued. The issue, it is submitted, never arose from the decision appealed against. The respondent

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A who has not cross-appealed, it is argued, cannot distill an issue that neither arises from the decision appealed against nor is related to any of the grounds of appeal. Citing the decisions in **Merchantile Bank of Nig Plc & 1 or Linus Nwodo (2005) 10-11 SCM 168, Owners, Mr. Gongola Hope vs. SC (Nig) Ltd (2007) 15 NWLR (Pt 1056) 189** and **Briggs vs. C.L.O.R.S.N (2005) 12 NWLR (Pt 938) 59** in support of his

B submissions, learned counsel urges that respondent's incompetent issue be discountenanced.

The issue the appeal raises, learned counsel submits in the alternative, is by no means a dead one as is contended by the respondent. The trial court had held in its

C ruling, it is submitted, that the mere arrest of the directors of the appellant absolves the respondent from the duty of establishing a prima facie case against the appellant before being granted an order freezing the latter's account. The decision still persists and cannot, further contends learned counsel, be said to be dead and academic. The basis for making the order freezing the appellant's account in the first place is what the appeal

D questions. Learned counsel insists that the issue being alive needs to be considered and resolved by the court. He so urges.

Now, the order of the trial court which affirmation by the lower court informs the instant appeal, see page 79 of the record of appeal, is dated 25th January 2016 and indeed has a six months lifespan. As submitted by learned respondent's counsel, the order has

E lapsed by 25th July 2016. The record of appeal further bears out learned respondent's counsel that the extant order freezing appellant's account is different from the order the appellant, by its appeal, wants set-aside.

Ignoring these irrepressible facts by the appellant accounts for its dismal outing.

F A plea by a party that a court declines from assuming jurisdiction in respect of a matter, where it enjoys same, because doing so is academic and useless is akin to an objection that the court lacks jurisdiction in the first place. As correctly argued by learned respondent's counsel, a court does not proceed in vain. A court exercises its jurisdiction, where approached, in order to resolve a dispute, address an injury and provide relief.

G Where as in the instant case the exercise of the court's jurisdiction would not resolve any dispute and confer any relief arising from the injury occasioned by the dispute between the parties then, indeed, proceeding will be in vain and useless. Lacking in utility, assumption of jurisdiction in that situation should be avoided by the court. The court's proceedings and eventual decision no matter how well conducted and reasoned

H will come to naught being devoid of any essence to either party in the matter. Learned respondent counsel's reliance on the authorities he cited in support of his submissions is apposite.

In **Dahiru and Anor vs. APC & Ors (2016) LPELR-42089 (SC)**, at page 25 the

I court indeed enthused as follows:

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“A suit is academic where it is thereby theoretical, makes empty sound and of no practical utilitarian value to the plaintiffs even if judgment is given in his favour. A suit is academic if it is not related to practical situation of human nature

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Once a suit no longer has live issue for determination such a suit can be said to be academic. *Courts should on no account in such an instance spend judicial time in academic exercise. Courts are to determine only live issues.*” (Italics mine for emphasis).

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My learned brother Amina Augie JSC restated the principle more comprehensively in **Ardo vs. INEC & ors (2017) LPELR-41919 (SC)** thus:

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“An action becomes hypothetical or raises mere academic point when there is no live matter in it to be adjudicated upon or when its determination holds no practical or tangible value for making a pronouncement upon it; it is otherwise an exercise in futility. *When an issue has become defunct, it does not require to be answered*

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***And leads to making bare legal postulations which the court should not indulge in: it is like the salt that has lost its seasoning. And like the salt in that terms, an academic issue or question does not relate to the live issues in the litigation because it is spent as it will not ensure any right or benefit on a successful party.*” (Italics mine for emphasis).**

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The instant appeal unquestionably falls within the class of cases this Court in its seemingly endless decisions hold to be academic, hypothetical and defunct upon which any pronouncement would not confer any right or benefit to the appellant. This Court is duty bound to obey and enforce these decisions.

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It is true as learned appellant's counsel submitted that the issue as raised and argued by learned respondent's counsel neither relates to the decision appealed against nor any of the grounds in the extant notice of appeal. It is again true that having not cross appealed the respondent is further restricted in the issue it distills as arising for the determination of the appeal. What is overriding though, is the very fact that in ignoring

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the issue so raised the court would be proceeding in vain as so far demonstrated. For the reasons adumbrated and the judicial authorities from which the reasons draw, respondent's objection as constituted in its 1st issue for the determination of the appeal is hereby sustained. In ensuring that the court does not proceed and pronounce in vain

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over an appeal that has become defunct, of no practical and utilitarian value, jurisdiction is hereby accordingly declined and the appeal struck out.

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Musa Dattijo Muhammad,
Justice, Supreme Court

BAYANG AKAAHS, (JSC): I was privileged to read before now the judgment of my learned brother, M.D. Muhammad (JSC) that this appeal is an exercise in futility and should be struck out. I am in complete agreement with his reasoning and conclusion.

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The appeal is predicated on an interim freezing order of the appellant's accounts made on 25 January, 2016 which was to last for six months. The order became spent by 25 July, 2016 before a subsequent one was made upon the arraignment and trial of the appellant and its directors before a different Judge for money laundering.

C

By a split decision of a majority of 3-2, this Court held in **Badejo vs. Federal Ministry of Education (1996) 8 NWLR (Pt. 464) 15** per Kutigi JSC (as he then was) that an order of injunction is not a remedy for an act which has already been carried out. It has the same effect as an application seeking injunction to restrain a completed action.

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See: **Ilechukwu vs. Iwugo (1989) 2 NWLR (Pt. 101) 99; Uwaifo vs. Governor of Lagos State (2009) 1 NWLR (Pt.1122) 241.**

It is for this reason and the other reasons adumbrated by my learned brother, M.D. Muhammad JSC in the leading judgment that I agreed to the striking out of the appeal.

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K. B. AKAAHS
Justice, Supreme Court

CENTUS NWEZE, (JSC): My Lord, Muhammad, JSC, obliged me with the draft of the leading judgment just delivered now. I agree with His Lordship that this appeal is, totally, devoid of merit and must be dismissed.

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Accordingly, I hereby enter an order dismissing it. Appeal dismissed.

Chima Centus Nweze
Justice, Supreme Court

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EJEMBI EKO, (JSC): I read in draft the Judgment just delivered by my learned brother, M.D. MUHAMMAD, (JSC). It represents all my views in the appeal. I hereby adopt it including the orders made therein.

For emphasis only: there is no live issue in the appeal. It is therefore academic, destitute of any utilitarian value. The appropriate order is one striking it out; and it is accordingly struck out.

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Ejembi Eko,
Justice, Supreme Court

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A DAUDA BAGE, (JSC): I have had the benefit of reading in draft the lead judgment of my learned brother Musa Dattijo Muhammad, JSC, just delivered. I agree entirely with the reasoning and conclusion reached. I do not have anything useful to add. I abide by all the orders contained in the lead Judgment. The appeal is hereby struck out.

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Sidi Dauda Bage,
Justice, Supreme Court

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**BASSEY DAVID UDO EYOP
AND
THE STATE**

SC. 211/2013

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

FRIDAY 19TH JANUARY, 2018

BEFORE THEIR LORDSHIPS

OLABODE RHODES-VIVOUR	JUSTICE, SUPREME COURT
MARY UKAEGO PETER-ODILI	JUSTICE, SUPREME COURT
CLARABATA OGUNBIYI	JUSTICE, SUPREME COURT
AMIRU SANUSI	JUSTICE, SUPREME COURT
SIDI DAUDABAGE	JUSTICE, SUPREME COURT

CRIMINAL LAW AND PROCEDURE: Appellant volunteered his confessional statement in Efik which was translated into English – Appellant testified in English – Whether the failure to tender the Efik version of his confessional statement has not occasioned a miscarriage of justice or rendered the English version inadmissible.

CRIMINAL LAW AND PROCEDURE: Guilt of accused person – How determined – Modes of proof thereof.

CRIMINAL LAW AND PROCEDURE: Proof – Murder – What prosecution must establish – Relevant principles thereof.

CRIMINAL LAW AND PROCEDURE: Statement of accused made in a language that was interpreted into English – The original statement in that language not tendered – No complaint by the accused – Whether the English version admissible – Relevant consideration thereof.

CRIMINAL LAW AND PROCEDURE: Where confessional statement is corroborated by other pieces of evidence – Attitude of court thereto.

EVIDENCE: Proof of Murder – What prosecution must establish.

EVIDENCE: Proof – Guilt of accused – How determined.

EVIDENCE: 'Admission' – Meaning – S. 28 of Evidence Act 2011 – Relevant consideration thereof.

EVIDENCE: Admissibility of confessional statement – Appellant's confessional statement in Efik was translated into English by PW4 – PW4 testified as the IPO – Translated statement was signed by the appellant without objection – Whether the English version is inadmissible on ground that the Efik version was not tendered.

EVIDENCE: Admission – When relevant – Conditions for its admissibility – Relevance in Criminal proceedings.

Evidence: Confessional Statement – Refraction by accused – Whether has any implication on standard of proof.

EVIDENCE: Confessional Statement – Significance and role in criminal proceedings.

EVIDENCE: Hearsay – Where statement made in Efik and translated into English – The Efik translator did not testify – Whether translated statement is in admissible as hearsay.

Issue for Determination

Whether the confessional statement that was made in Efik language and interpreted into English language by PW4 was qualified as a statement made in a different language and whether the prosecution was bound to tender the different versions of the statement before the trial court and Whether the doubts surrounding the making of the statement have affected its validity.

Facts of the Matter

This is an appeal against the judgment of the Court of Appeal sitting at Calabar Coram: Mohammed Lawal Garba, Uzo .I. Ndukwe Anyanwu, Joseph Tine Tur JJCA, delivered on the 6th day of December, 2012. The Court of Appeal upheld the decision of the Akampa Division of the Cross-River State High Court of 28th November, 2008 per B.T, Ebuta .J. convicting the appellant for the offence of murder contrary to Section 319(1), Criminal Code Laws of the Cross-River State of Nigeria, 2004.

The deceased who was appellant's wife went to the farm in the morning at Mangor, Oban in Akampa Local Government Area of Cross River State on the 17th day of April, 2003 and did not come back. The appellant informed the village head of the development. The village head constituted a search party to look for the deceased in her farm.

On getting to the farm the corpse of the deceased was found, the head was almost completely severed from the neck with a sharp object most probably a sharp knife. When the matter was transferred from the Akampa Police station to Police headquarters Calabar, the appellant confessed and gave a vivid account of how and why he killed the deceased. Consequently, he was convicted by the trial court. The appellant's appeal to the Court of Appeal Calabar was dismissed; he has now appealed to the Supreme Court.

Held: *(Unanimously dismissing the appeal)*

1. *How to prove the guilt of an accused*
It is now trite that the guilt of an accused person or the commission of a criminal offence can be proved in one of the following ways:
 1. **The confessional statement of the accused person(s).**
 2. **Evidence of eye-witness or direct evidence or**
 3. **Circumstantial evidence. See EMEKA vs. STATE (2001) 32 WRN 37; (2001) 6 SCNJ 259.**
(P 103 Paras B–D).

2. *What prosecution must establish in a murder charge*
What follows thereafter is that the law has provided that in order to prove a charge of murder the prosecution must successfully prove all the essential elements of the offence which are as follows:
 - (a). **That the victim is dead,**
 - (b). **That the death of the victim was caused by the unlawful act or omission of the accused;**
 - (c). **That the act or omission of the accused that resulted in the death of the deceased was intentional, and such an act that will either result in death or grievous bodily harm.**

In respect of the method of proving a criminal offence and in this instance, murder by the confession of the accused, Section 28 of the Evidence Act has

provided that a confession is an admission made at any time by a person charged with a crime stating or suggesting the inference that he committed the crime. Once it is established that the confession was freely and voluntarily made it is admissible in evidence and thereafter it is a piece of evidence that cannot be taken lightly since it has come from the accused person himself.

(Pp 103–104 Paras D–A).

3. *Confessional statement made in Efik was interpreted into English and tendered*
Getting back to the confessional statement, Exhibit '1' which the appellant is resiling from on the ground that he made the statement in Efik and what is tendered is in English and so the conditions on which the statement in English would be admitted are absent. Indeed it is desirable that an accused person's statement should be taken down in the exact words of the accused and if in a language from which an interpreter has interpreted to English without complaint, the statement is still admissible so long as it came out freely and voluntarily. See UDO vs. STATE (1964) 1 ALLNLR 21; IYUN vs. STATE (1965) 1 ALLNLR 203.

(Pp 107–108 Paras G–A).

4. *Statement made in Efik and interpreted into English is hearsay where interpreter did not testify*

However where the statement was made in Efik Language and interpreted into English Language by another person, the law is firm on the point that the interpreter must be called as witness in order for the statement in English language to be admissible in evidence. Where that interpreter is not called the English statement is regarded as hearsay evidence and therefore inadmissible. See R vs. Ogbuewu (1949) 12 WACA 483; FRN vs. Usman (2012) 3 MJSC (Pt. 1) 25 at 43; Shivero vs. State (1976) 3 SC 63.

The situation on ground belies the scenario stated above as it was PW4 who heard the statement as told by the appellant in the presence of a senior police Officer, though appellant spoke in Efik, PW4 recorded in English and the appellant signed after it was read over to him and he offered no protest. Again, there is a statement appellant made as complainant before his wife's corpse was discovered and it was recorded in English and admitted as Exhibit 5. (P 108 Paras A–E).

5. *Where appellant testified in English but complained that his statement in Efik was translated into English and admitted in evidence*

Then the clincher is the fact that appellant in testifying as DW1 in his defence did so in English language. All these lead to the conclusion that the appellant can speak and read in English and the confessional statement freely given and the issue of having the statement, Exhibit '1' jettisoned for reason of having been obtained in Efik and it is the translated version in English language that is tendered is not worthy of being taken seriously as clearly it is an afterthought.

The follow up is that Exhibit '1', the confessional statement is unequivocal leaving no reasonable doubt in the circumstances of the death of the deceased and that the appellant was fully responsible.

(P108 Paras E – G).

Per Sanusi (JSC):

“I must state here, that the controversy surrounding the confessional statement of the appellant (Exhibit I) is largely concerned with the fact that there was no eye witness account relied on by the prosecution at the accused/appellant's trial, hence the trial court allegedly relied on the admission of the commissioning of the offence by the appellant in Exhibit I. There is no dispute or sentiment raised by the parties at the proceedings at all in the trial court, with regard to the voluntariness of the statement. As stated earlier, the hue and cry or dust raised by the appellant on the admissibility of Exhibit I was solely on the fact that the appellant made that statement to the police in Efik language but same was interpreted by the IPO into English language.

Curiously, the learned appellant's counsel's stand point is that the lower court ought not have relied solely on the confessional statement of the appellant in affirming the judgment of the trial court even though the learned appellant's counsel conceded, rightly too, that a trial court can safely convict an accused person by reliance on confessional statement of an accused alone, if it was shown to have been made voluntarily by him. That notwithstanding, the learned counsel opined that a trial court can

not convict on a statement which is not admissible in evidence. The latter point, is the catch-phrase or crux of the appellant's counsel's borne of contention that Exhibit I was inadmissible evidence in the light of the alleged procedural defect of same for being recorded not in the actual language he made it (i.e. Efik language). It should however be noted, that evidence abound that the appellant speaks English language because, when he testified for his defence at the trial court, he did so in English language and not in Efik language. (P 112 Paras B–H).

6. *The significance of confessional statement*

There is no doubt that a confession of an accused person plays a vital role in the determination of his guilt and a trial court is by law, entitled to convict on the confession where it arrives at the conclusion that the confession was voluntarily made. See Okeke vs. State (2013) 15 NWLR (pt. 842) 25. (P 113 Paras C–D).

7. *Whether retraction of a voluntary confessional statement does not effect admissibility*

It is trite law that mere retraction of a voluntary confessional statement by an accused does not render it inadmissible, worthless or useless in determining the guilt of an accused. See Silas Ikpo vs. The State (1996) NILR 59; Idowu vs. State (2000) 7 SC (Pt. II) 50. It is settled law that there are three methods/modes of proving a crime by the prosecution. These methods include the followings:

- (1) **Through eye witness account on the commission of the offence by the accused person.**
- (2) **Through confessional statement voluntarily made by the accused person admitting the commission of the offence charged;**
- (3) **Through circumstantial evidence pointing solely on the accused person as the one responsible and to no one else.**

See **Emeka vs. State (2001)6 SCNJ 259.**

In this instant case, as I posited above, the prosecution relied on the confessional statement of the appellant to prove the charge against him wherein, the appellant unequivocally admitted the offence of killing his wife as per his Exhibit I as rightly found by the trial court and as affirmed by the lower court which said finding in my view, cannot be assailed. It seems to me that the

revelation in Exhibit I had duly established the three ingredients of murder, contrary to Section 319(1) of the Criminal Code which includes the under mentioned ingredients, namely:

- (a) That death of a human being was caused;**
- (b) That the death of the victim was as a result of the unlawful act or omission of the accused person.**
- © That the act or omission of the accused was what resulted in the death of the deceased and same was done intentionally or with knowledge that such act or omission will result in the death of the victim or cause him grievous bodily harm. (Pp 113 – 114 Paras D – C).**

8. *Confessional statement corroborated by other pieces of evidence*

Closely looking at the contents of the confessional statement, Exhibit I, vis a vis the testimonies of PW1, PW2 and PW3 leaves one with no doubt and would convince oneself that the appellant was responsible in the commission of the offence charged as found by the two lower courts. The evidence, as could be gathered from the testimonies of PW1, 2 and 3, had offered some corroborative pieces of evidence supporting the confessional statement of the appellant, such as description of injuries inflicted on the deceased person/victim as revealed by those witnesses which are also in tanderem with what the appellant had admitted in his Exhibit I.

Similarly, evidence abound that Pw1, 2 and 3 had heard the appellant admitting the murder of his wife. Also the prosecution tendered Exhibit 2, the matchet used in dastardly murdering the victim which was also tendered without any objection.

(P 114 Paras D – G).

Per Sanusi (JSC):

“The learned counsel for the appellant raised a lot of dust on the fact that he made his statement in Efik language, whereas the confessional statement tendered as one made by him was recorded in English language and no interpreter was called by the prosecution to testify on same hence the confessional statement according to him was inadmissible as it amounts to

hearsay evidence. It is worthy to note however, that when the appellant was taken to a superior police officer (SPO) though he spoke Efik and PW4 recorded it in English language, yet the appellant did not object or raise such issue before he signed it. Also evidence abound that in the previous statements made by the appellant earlier, especially when he initially lodged complaint to the police on the missing of his wife before the recovery of her body and before he made Exhibit I, such statements were made and recorded by him in English language and not in Efik language. Similarly, while testifying for his defence as DW1, he did so in English language and not through any interpreter. Considering this scenario, one can conclude that there was no miscarriage of justice occasioned to the appellant by recording his statement (i.e Exhibit I) in English language.

Thus, in the light of the aforesaid, I do not share the appellant's counsel's view that Exhibit I was wrongly admitted in evidence by the trial court. The learned trial judge was correct in admitting the said statement and by relying, or acting on it. The lower court was also correct in rejecting the request of the appellant's counsel to expunge it from the record and declare it inadmissible. To my mind, that request of the appellant's counsel for its expunging from record is uncalled for and mere afterthought in the light of all that I have posited above. The said exhibit was voluntarily made by the appellant and it was direct, clear, unambiguous, positive and could therefore be and was rightly relied on by the two lower courts. See *Akinmoju vs. The State* (2000)4 SC (Pt.I) 64; *FRN vs. Iweka* (2011) 11-12 SC (Pt. I) 109; *Bright vs. State* (2012) 1 SC (Pt. 11) 47; *Adesina vs. The State* (2012) 6 SC (Pt. III) 114. (Pp 114 – 115 Paras G – F)

Representations

F.O. Onyebueke for the Appellant.

Joseph Oshie Abang, A.G. Cross-River State for the Respondent and with him are: Greg Okem DPP, Eteh Olabode (Mrs) State Counsel 1, Godwin Onah, State Counsel 1, Richard Akpanke, State Counsel 1.

PETER-ODILI, (JSC) (Delivering the Lead judgment): This is an appeal against the

judgment of the Court of Appeal sitting at Calabar Coram: Mohammed Lawal Garba, Uzo .I. Ndukwe Anyanwu, Joseph Tine Tur JJCA, delivered on the 6th day of December, 2012. The Court of Appeal or court below or lower court upheld the decision of the Akampa Division of the Cross-River State High Court of 28th November, 2008 per B.T, Ebuta .J. convicting the appellant for the offence of murder contrary to Section 319(1), Laws of the Cross-River State of Nigeria, 2004.

FACTS BRIEFLY STATED

The deceased who was appellant's wife went to the farm in the morning at Mangor, Oban in Akampa Local Government Area of Cross River State on the 17th day of April, 2003 and did not come back. The appellant informed the village head of the development. The village head constituted a search party to look for the deceased in her farm.

On getting to the farm the corpse of the deceased was found, the head was almost completely severed from the neck with a sharp object most probably a sharp knife. When the matter was transferred from the Akampa Police station to Police headquarters Calabar, the appellant confessed and gave a vivid account of how and why he killed the deceased. The appellant's appeal to the Court of Appeal Calabar was dismissed; he has now appeal to this apex court.

Chief F.O. Onyebueke of counsel for the appellant on the 26th October, 2017 date of hearing adopted his brief of argument filed on 14th May, 2013 and in it was distilled a sole issue, viz:

Whether the confessional statement that was made in Efik language and interpreted into English language by PW4 was qualified as a statement made in a different language and whether the prosecution was bound to tender the different versions of the statement before the trial court and whether the doubts surrounding the making of the statement have affected its validity.

Learned counsel for the respondent Joseph Oshie Abang, Attorney-General of Cross-River State adopted the brief of argument of the respondent settled by Attah Ochinke Esq. the Attorney General of Cross-River State at the time the brief was filed on 16th August, 2013. He adopted the issue as formulated by the appellant.

The sole issue is apt and I shall utilise it for the determination of this appeal.

SOLE ISSUE

Whether the confessional statement that was made in Efik Language and interpreted into English Language by PW4 was qualified as a statement made in a different Language and whether the prosecution was bound to tender the different versions of the statement before the trial court and whether the doubts surrounding the making of the statement has affected its validity.

Canvassing the position of the appellant, learned counsel contended that the court below relied solely on confessional statement of the appellant in affirming the decision of the court of first instance. That even though the court can convict on only the confessional statement that was voluntarily made which is true even though the court cannot convict upon a statement that is not admissible in evidence. He stated that the defence counsel objected to the admissibility of EXHIBIT "1" but the learned trial judge over-ruled the objection, that the statement interpreted into English version ought to have been tendered notwithstanding that it was written by the investigating police officer. That the failure to tender that native version of the statement cast a doubt as to the authenticity of the admitted confessional statement and this doubt should be resolved in favour of the accused appellant. He cited **AKPAN vs. STATE (1986) 4 C.A (Pt. 11) 105; NWOSU vs. STATE (2003) FWLR (Pt. 153) 271 at 282; KALU vs. STATE (1988) 4 NWLR (Pt. 90) 503.**

For the respondent, learned counsel stated that the statement of the appellant EXHIBIT "1" is therefore unequivocal and leaves no doubt reasonable in the circumstances of the death of the deceased, that the appellant was fully responsible for the death. That the High Court was right in relying on the exhibit to find that it was the mindful act of the appellant that caused the death of the deceased. The learned Attorney General contended that the language in which the statement was made by an accused and its translation by the recorder in another language is not material so long as the statement was freely and voluntarily made by him.

That the law is settled that the guilt of an accused person or the commission of a criminal offence can be proved by one of the following:

- (a) **The Confessional statement of the accused person(s).**
- (b) **Evidence of eye-witness(es) or direct evidence or**
- (c) **Circumstantial evidence, He cited Emeka vs. State (2001) 32 WRN 37; (2001) 6 SCNJ 259.**

Also, learned counsel for the respondent submitted that to prove a charge of murder, the prosecution must successfully prove all the following elements of the offence:

- (a) **That the victim is dead;**
- (b) **That the death of the victim was caused by the unlawful act or**

- A** **omission of the accused**
(c) That the act or omission of the accused that resulted in the death of the deceased was intentional, and such an act was such that will either result in death or grievous bodily harm. He referred to IGABELE vs. STATE (2005) 1 NCC 59 at 63.

B
For the respondent, learned counsel further contended that the confession met the conditions under **Section 28** of Evidence Act and the conviction based on that confessional statement was correct. He cited **BASSEY vs. THE STATE (2012) 3-4 MJSC 177 at 194-196, 125.**

C The contending stand point must be stated thus:

D **For the appellant, that the appellant made a statement to the police in Efik which the police recorded in English and read over to the appellant in English Language without interpretation from Efik into English. That in spite of the objection to the admissibility of the statement at the trial court with the investigating police officer who testified as PW4 proffering conflicting evidence in respect of that statement which was admitted as Exhibit “1”.**

E **In the case of the respondent, the respondent contends that the appeal lacks merit as the concurrent findings and judgments of the two courts below are borne out of the record and nothing has happened upon which this apex court can upturn, interfere with or change what those lower courts had done.**

G To place the matter in perspective, the accused appellant was charged for the offence of murder contrary to **Section 319(1)** of the Criminal Code Cap 31 Vol 11 Laws of Cross-River State of Nigeria, 2004 it is now trite that the guilt of an accused person or the commission of a criminal offence can be proved in one of the following ways:

- H** **4. The confessional statement of the accused person(s).**
5. Evidence of eye-witness or direct evidence or
6. Circumstantial evidence see EMEKA vs. STATE (2001) 32 WRN 37; (2001) 6 SCNJ 259.

I What follows thereafter is that the law has provided that in order to prove a charge of murder the prosecution must successfully prove all the essential elements of the offence

A which are as follows:

- (a) **That the victim is dead,**
- (b) **That the death of the victim was caused by the unlawful act**

B **or omission of the accused;**

- (c) **That the act or omission of the accused that resulted in the death of the deceased was intentional, and such an act that will either result in death or grievous bodily harm.**

C In respect of the method of proving a criminal offence and in this instance, murder by the confession of the accused. **Section 28** of the Evidence Act has provided that a confession is an admission made at any time by a person charged with a crime stating or suggesting the inference that he committed the crime. Once it is established that the confession was freely and voluntarily made it is admissible in evidence and thereafter it is a piece of evidence that cannot be taken lightly since it has come from the accused person himself.

D

The Court of Appeal in its findings had this to say:

E **“From the records of the evidence presented at the trial of the appellant by the prosecution, their case was entirely predicated on the confessional statement attributed to him and admitted in evidence as EXHIBIT “1”. I have read the said exhibit which appears at pages 82-84 of the record of appeal and it contains an admission by the appellant as the maker, stating and suggesting the inference that he committed the offence he was charged with i.e. the murder of his wife Eno Udo Etukudo. The exhibit is therefore a confession as defined under the Evidence Act. The confession along with the evidence of other witnesses, including the oral evidence of the appellant all undoubtedly, show that the deceased Eno Udo Etukudo had died or is dead. There was no dispute about the death of the said Eno throughout the trial and so the death had been proved beyond reasonable doubt.”**

H

This is a concurrent finding of the offence of murder. I shall refer to the judgment of the court below where the court stated thus:

I **“Since the evidence of PW1, PW2, and PW3 used as circumstantial evidence in proof of the second element of the offence relates only to**

A and entirely predicated on the assertion that the appellant indeed admitted or confessed to the commission of the offence as contained in EXHIBIT “1”. I now turn to that statement”.

B The appellant had raised the point at the court below that the prosecution failed to tender the statement of the appellant made on 18th of April, 2003 wherein he denied committing the offence of murder alleged against him and the prosecution rather tendered the confessional statement made on the 27th April, 2003 and admitted as EXHIBIT “1”. To this grouse the court below handled effectively and I shall quote it in existensio as follows:

C “It may be remembered that one of the complaints by the learned counsel for the appellant under his issue for determination is that the appellant had made two statements to the police in respect of the offence he was charged with; the 1st on the 18th of April, 2003 and the 2nd on the 27th of April, 2003. That in the 1st statement, the appellant did not admit the commission of the offence and that the prosecution did not tender it in evidence. It was his contention that the prosecution could not pick and choose which of the statements to tender in evidence since that are in conflict and that it was under a duty to tender all in evidence with which he was charged whether such statements are in the accused favour or not. It is the legal duty of the prosecution to tender all relevant evidence that was gathered or obtained during the investigation of an offence with which a person is accused and tried for before a court of law whether or not such evidence was in favour of the accused person. See DANDARE vs. STATE (1967) NMLR 56; OGUDDO vs. STATE (2012) 12 (Pt. 1) 108, 140”.

G Lawal Garba JCA who anchored the judgment stated on as follows:

H “In this regard, it must be remembered that the primary duty of the state in criminal trials is not to secure a conviction against an accused person at all cost or by all means but to ensure that people who commit offences punishable under our penal laws are brought to justice to answer for their crimes or take full responsibility for their actions. The prosecution should therefore not be seen to withhold evidence of whatever nature which is directly relevant and material in determination of whether an accused person was guilty of the offence he

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A was charged with, because it would be favourable to him. As seen above
learned counsel had said that the statement made by the appellant on
B 18th April, 2003 to the police was not tendered in evidence by the
prosecution at the trial. I have observed that the prosecution had on the
8th August, 2003; the day when PW1 testified at the trial, filed a notice of
additional evidence on which was listed as item 3, the statement by the
appellant as the complainant, at the Oban Police dated the 18th of April,
2003. During his evidence in Chief, the appellant had said that on the
18th of April, 2003 when the body of the deceased was found he was
C asked to report the matter to the police. Police received the report and
the police came. It is the police at Oban Police Station”.

The lower court went on further to state as follows:

D “Under cross-examination, the appellant had stated that “I went and
reported the matter at Oban Police.” The statement of the appellant as
complainant, made on 18th of April, 2003 at the Oban Police Station was
tendered during cross-examination of the appellant and admitted in
evidence as EXHIBIT '5'. In his entire testimony, the appellant did not
E say that he made any other statement to the police on the 18th of April,
2003 in respect of the offence he was charged with. PW4; the Police
Investigating Officer at State CID, Calabar had maintained under
cross-examination that the appellant was the complaint in the case
before he then became the accused person. So the only statement made
F by the appellant to the police in respect of the death of his wife, on the
18th of April, 2003, was as a complainant. That statement was stated
above was tendered and admitted in evidence as EXHIBIT '5' and so
one wonders which other statement the learned counsel has accused the
G prosecution of not tendering at the trial of the appellant. There was no
such other statement made by the appellant on the 18th of April, 2003”.

The appellant had urged the court to reject the confessional statement as it did not meet
the standard for admissibility at the trial court, just as at the two courts below, the
H accused sought to retract his confession, EXHIBIT “1”. The learned trial judge had
found that the confession is true as it disclosed facts which pointed to its veracity. That
the events disclosed in that statement were in agreement with the evidence as adduced
by the prosecution witnesses including the description of the injuries on the body of
I deceased as stated by the accused appellant under cross-examination. Also thrown up is

A that the accused had the opportunity to commit the said offence.

Also is in evidence as stated by PW1, PW2 and PW3 that they heard the appellant admitting the killing of his wife and this investigating police officer before he was taken before a senior police officer to make what is contained in Exhibit '1'. Again

B the matchet Exhibit 2 which is the weapon of offence was tendered without objection and the injuries as described by the appellant consistent with what would be inflicted by Exhibit 2 which caused the death of the deceased.

Getting back to the confessional statement, Exhibit '1' which the appellant is resiling from on the ground that he made the statement in Efik and what is tendered is in English and so the conditions on which the statement in English would be admitted are absent. Indeed it is desirable that an accused person's statement should be taken down in the exact words of the accused and if in a language from which an interpreter has interpreted to English without complaint, the statement is still admissible so long as it came out freely and voluntarily. See **UDO vs. STATE (1964) 1 ALL NLR 21; IYUN**

D vs. STATE (1965) 1 ALL NLR 203.

However where the statement was made in Efik Language and interpreted into English Language by another person, the law is firm on the point that the interpreter must be called as witness in order for the statement in English language to be admissible in evidence. Where that interpreter is not called the English statement is regarded as hearsay evidence and therefore inadmissible. See **R vs. Ogbuewu (1949) 12 WACA 483; FRN vs. Usman (2012) 3 MJSC (Pt. 1) 25 at 43; Shivero vs. State (1976) 3 SC 63.**

F The situation on ground belies the scenario stated above as it was PW4 who heard the statement as told by the appellant in the presence of a senior police Officer, though appellant spoke in Efik, PW4 recorded in English and the appellant signed after it was read over to him and he offered no protest. Again, there is a statement appellant made as complainant before his wife's corpse was discovered and it was recorded in English and admitted as Exhibit 5. Then the clincher is the fact that appellant in

G testifying as DW1 in his defence did so in English language. All these lead to the conclusion that the appellant can speak and read in English and the confessional statement freely given and the issue of having the statement, Exhibit '1' jettisoned for reason of having been obtained in Efik and it is the translated version in English language that is tendered is not worthy of being taken seriously as clearly it is an

H afterthought.

The follow up is that Exhibit '1', the confessional statement is unequivocal leaving no reasonable doubt in the circumstances of the death of the deceased and that the appellant was fully responsible. In fact the court below following in the path of the trial High Court, dealt with the matter effectively and I quote once again thus:

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“The last of the essential elements of murder is that the acts of the appellant were done with the intention or at least knowledge that death or grievous bodily injuries were the probable consequence.

B

The unassailed evidence before the High Court was that the deceased's neck and head had cuts from a sharp weapon which the appellant had confessed to be a matchet used by him in the commission of the offence and which he produced to the police and was tendered in evidence. The head and neck of a human being are undoubtedly very delicate and sensitive parts of the body that any blow which causes injury to them would ordinarily be very serious and grievous. A deliberate blow to the head and neck of a human being by another with a matchet would reasonably result in grievous harm or injuries to the body instantly and is probable to cause death especially when delivered by a healthy middle aged (50 years old) man as the appellant. The evidence of the witnesses that the neck of the deceased was cut “almost to completion” or completely leaves no doubt as to the amount of force with which the blow was delivered by the appellant. The law is settled that every person is presumed to intend the natural consequence of his acts and so where by an lawful act, he causes another person grievous bodily injuries which led to the death of that person, he is presumed to have intended to kill that person and would be guilty of the murder irrespective of his intention. See *Ajidahun vs. State* (1991) 9 NWLR (213) 33 at 44; *Audu vs. State* 7 NWLR (820) 516; *Ahmed vs. State* (1999) 7 NWLR (612) 641. By the use of a matchet to deal forceful blows to the neck and head of the deceased, the appellant undoubtedly knew and intended to inflict and cause her death or at least very grievous bodily injury or harm that were probable to cause such death. The facts and evidence of the witnesses and the appellant leave no reasonable doubt about the issue. I am, in the above circumstances, in agreement with the High Court that the acts of the appellant were done with the knowledge and/or intention of causing the death of the deceased or causing her such grievous bodily harm or injuries probable to cause her death”.

C**D****E****F****G****H****I**

There is really nothing to add or subtract from what the court below did in giving the concurrent findings and conclusion as the court of trial and there is no basis for any

A interference by this court. Therefore this appeal lacks merit and it is hereby dismissed. I uphold the decision of the Court of Appeal in its affirmation of the judgment and orders of the trial High Court.

Appeal is dismissed.

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Mary Ukaego Peter-Odili
Justice, Supreme Court

RHODES-VIVOUR, (JSC): I have had the privilege of a preview of the leading judgment which has just been read by my learned brother, Peter-Odili JSC. I am in complete agreement that concurrent findings of the two courts below are correct and I do not intend to add more to the points canvassed in the said leading judgment of my learned brother.

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Olabode Rhodes-Vivour
Justice, Supreme Court

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BATA OGUNBIYI, (JSC): I have had the advantage of reading in draft the lead judgment of my brother **Mary Ukaego Peter-Odili, JSC** and I concur that the appeal is devoid of any merit and I also dismiss same in terms of the lead judgment.

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Appeal is dismissed.

Clara Bata Ogunbiyi
Justice, Supreme Court

AMIRU SANUSI, (JSC): This appeal emanates from the decision of the Court of Appeal, Calabar Division (the lower or court below), delivered on 6th December, 2012 which dismissed the appellant's appeal against the judgment of the Cross River State, High Court (the trial court) delivered on 28th November, 2008.

F

The appellant was accused of murder of his own wife, contrary to Section 319 (1) of the Criminal Code, Law of Cross River State of Nigeria 2004. The facts giving rise to this appeal have been adequately stated in the lead judgment and need to re-statement here, but suffice it to say that the appellant was alleged to have almost cut the head of his wife and her corpse was found in her farm by a search party.

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When arraigned before the trial High court, the accused/appellant pleaded not guilty to the charge of murder and his trial went on in earnest. The prosecution called three witnesses in proof of its case and tendered some exhibits.

H

The accused now appellant, testified in his own defence without tendering any exhibits. During the trial, the prosecution sought to tender a confessional statement made by the accused/appellant, but the learned defence counsel objected, on the ground that the statement was inadmissible because same was made in Efik language but

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A interpreted into English language by PW4, the investigating police officer. The trial judge overruled the objection and admitted its as Exhibit I. The trial court at the end of the proceedings, found the accused/appellant guilty of the offence charged, convicted and sentenced him to death. Dissatisfied with his conviction and sentence by the trial court, the appellant unsuccessfully appealed to the lower court. Further disenchanted with the judgment of the lower court affirming the trial court's judgment, the appellant now appeals to this court.

B The common ground of both parties on the relevant issue calling for determination of this appeal is centered on the confessional statement of the accused/appellant (Exh. I). Both parties proposed the under mentioned lone issue for the determination of this appeal namely,

C

“Whether the confessional statement made in Efik language and interpreted into English language by PW4 was qualified as a statement made in a different language and whether the prosecution was bound to tender the different version of the statement before the trial court and whether the doubt surrounding the making of the statement has affected its validity”.

D

E I must state here, that the controversy surrounding the confessional statement of the appellant (Exhibit I) is largely concerned with the fact that there was no eye witness account relied on by the prosecution at the accused/appellant's trial, hence the trial court allegedly relied on the admission of the commissioning of the offence by the appellant in Exhibit I. There is no dispute or sentiment raised by the parties at the proceedings at all in the trial court, with regard to the voluntariness of the statement. As stated earlier, the hue and cry or dust raised by the appellant on the admissibility of Exhibit I was solely on the fact that the appellant made that statement to the police in Efik language but same was interpreted by the IPO into English language.

F

G Curiously, the learned appellant's counsel's stand point is that the lower court ought not have relied solely on the confessional statement of the appellant in affirming the judgment of the trial court even though the learned appellant's counsel conceded, rightly too, that a trial court can safely convict an accused person by reliance on confessional statement of an accused alone, if it was shown to have been made voluntarily by him. That notwithstanding, the learned counsel opined that a trial court cannot convict on a statement which is not admissible in evidence. The latter point, is the catch-phrase or crux of the appellant's counsel's borne of contention that Exhibit I was inadmissible evidence in the light of the alleged procedural defect of same for being recorded not in the actual language he made it (i.e. Efik language). It should however be

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A noted, that evidence abound that the appellant speaks English language because, when he testified for his defence at the trial court, he did so in English language and not in Efik language. I will come to that later.

B On the other hand, the learned Attorney General of Cross River State of learned counsel for respondent, obviously took a contrary view on that in that, his stance is that the language in which the statement was made and its translation by the recorder in another language is not material, once it is shown as in this instant case, that the accused/appellant made it freely and voluntarily. His other contention is that the trial court was right to have relied on the exhibit in convicting the appellant of the offence charged. The prosecution is therefore entitled to rely on admissions made by the accused in order to make the proof of its case easier. See **Abasi vs. The State (1992) 8 NWLR (pt. 260) 383; Haruna vs. A.G of the Federation (2012) 3 SC (pt. IV) 40.**

C There is no doubt that a confession of an accused person plays a vital role in the determination of his guilt and a trial court is by law, entitled to convict on the confession where it arrives at the conclusion that the confession was voluntarily made. See **Okeke vs. State (2013) 15 NWLR (pt. 842) 25.** It is trite law that mere retraction of a voluntary confessional statement by an accused does not render it inadmissible, worthless or useless in determining the guilt of an accused. See **Silas Ikpo vs. The State (1996) NILR 59; Idowu vs. State (2000) 7 SC (Pt. II) 50.** It is settled law that there are three methods/modes of proving a crime by the prosecution. These methods include the followings:

- D**
- E**
- (1) Through eye witness account on the commission of the offence by the accused person.**
 - (2) Through confessional statement voluntarily made by the accused person admitting the commission of the offence charged;**
 - (3) Through circumstantial evidence pointing solely on the accused person as the one responsible and to no one else.**
- F**
- G**

See **Emeka vs. State (2001)6 SCNJ 259.**

H In this instant case, as I posited above, the prosecution relied on the confessional statement of the appellant to prove the charge against him wherein, the appellant unequivocally admitted the offence of killing his wife as per his Exhibit I as rightly found by the trial court and as affirmed by the lower court which said finding in my view, cannot be assailed. It seems to me that the revelation in Exhibit I had duly established the three ingredients of murder, contrary to Section 319(1) of the Criminal Code which includes the under mentioned ingredients, namely:

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- (a) **That death of a human being was caused;**
- (b) **That the death of the victim was as a result of the unlawful act or omission of the accused person.**

B

- (c) **That the act or omission of the accused was what resulted in the death of the deceased and same was done intentionally or with knowledge that such act or omission will result in the death of the victim or cause him grievous bodily harm.**

C Closely looking at the contents of the confessional statement, Exhibit I, vis a vis the testimonies of PW1, PW2 and PW3 leaves one with no doubt and would convince oneself that the appellant was responsible in the commission of the offence charged as found by the two lower courts. The evidence, as could be gathered from the testimonies of PW1, 2 and 3, had offered some corroborative pieces of evidence supporting the confessional statement of the appellant, such as description of injuries inflicted on the deceased person/victim as revealed by those witnesses which are also in tandem with what the appellant had admitted in his Exhibit I.

E Similarly, evidence abound that PW 1, 2 and 3 had heard the appellant admitting the murder of his wife. Also the prosecution tendered Exhibit 2, the matchet used in dastardly murdering the victim which was also tendered without any objection.

F The learned counsel for the appellant raised a lot of dust on the fact that he made his statement in Efik language, whereas the confessional statement tendered as one made by him was recorded in English language and no interpreter was called by the prosecution to testify on same hence the confessional statement according to him was inadmissible as it amounts to hearsay evidence. It is worthy to note however, that when the appellant was taken to a superior police officer (IPO) though he spoke Efik and PW4 recorded it in English language, yet the appellant did not object or raise such issue before he signed it. Also evidence abound that in the previous statements made by the appellant earlier, especially when he initially lodged complaint to the police on the missing of his wife before the recovery of her body and before he made Exhibit I, such statements were made and recorded by him in English language and not in Efik language. Similarly, while testifying for his defence as DW1, he did so in English language and not through any interpreter. Considering this scenario, one can conclude that there was no miscarriage of justice occasioned to the appellant by recording his statement (i.e Exhibit I) in English language.

H Thus, in the light of the aforesaid, I do not share the appellant's counsel's view that Exhibit I was wrongly admitted in evidence by the trial court. The learned trial judge was correct in admitting the said statement and by relying, or acting on it. The

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A lower court was also correct in rejecting the request of the appellant's counsel to expunge it from the record and declare it inadmissible. To my mind, that request of the appellant's counsel for its expunging from record is uncalled for and mere afterthought in the light of all that I have posited above. The said exhibit was voluntarily made by the appellant and it was direct, clear, unambiguous, positive and could therefore be and was rightly relied on by the two lower courts. See **Akinmoju vs. The State (2000)4 SC (Pt.I) 64; FRN vs. Iweka (2011) 11-12 SC (Pt. I) 109; Bright vs. State (2012) 1 SC (Pt. 11) 47; Adesina vs. The State (2012) 6 SC (Pt. III) 114.**

C Finally, for the fuller and more detailed reasoning in the lead judgment of my learned brother Mary Odili JSC, the conclusion of which I unhesitatingly endorse and adopt as mine, I too find this appeal to be unmeritorious. It fails and is accordingly dismissed by me. I also affirm the judgment of the lower court delivered on 6th December, 2012 which also affirmed the judgment of the trial High Court delivered on 28th November, 2008. Appeal dismissed.

D **Amiru Sanusi**
Justice, Supreme Court

E **DAUDA BAGE, (JSC):** I have had the benefit of reading in draft the lead Judgment of my learned brother Mary Ukaego Peter-Odili (JSC), just delivered. I agree entirely with the reasoning and conclusion reached. I do not have anything useful to add. The appeal lacks merit, and it is accordingly dismissed by me. I abide by all the orders contained in the lead judgment.

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

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1. **CHUKWUDINNALIMUO**
 2. **NWEKE UYAMADU**
 3. **EDWIN OKOLO**
 4. **OKOLO EZEAFULUKWE**
- AND**
1. **SUNDAY ELODUMUO**
 2. **DENNIS OBI**
 3. **SAMUEL UZOKWU**

SC. 278/2005

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

FRIDAY, 12TH JANUARY, 2018

BEFORE THEIR LORDSHIPS

**IBRAHIM TANKO MUHAMMAD
OLUKAYODE ARIWOOLA
KUMAI BAYANGAKA' AHS
AMINA ADAMU AUGIE
PAUL ADAMU GALINJE**

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

ACTION: What determines an action – Merit of case and existing law when cause of action arose

*CASE LAW: Principles in **Okafor vs. Nweke (2007) 10 NWLR (Pt. 1043) 521** – Relevant Considerations thereof.*

COURT: Jurisdiction – Fundamental nature of – Need to be determined as a preliminary issue – Rationale.

COURT: Record of appeal – Whether court is bound by record of appeal transmitted from the lower court – Relevant considerations thereof.

LEGAL PRACTITIONERS: Signing of a legal process by a law firm instead of a legal practitioner – Whether it affects jurisdiction of court to entertain such process – Effect of lack of Jurisdiction on court.

LEGAL PRACTITIONERS: Signing of process – Where writ of summons was not signed by any known person – The claim attached signed by a law firm – Whether originating process valid in the circumstance.

LEGAL PRACTITIONERS: Signing or filing of processes – Where a process was signed or filed by a law firm – Whether such a process is competent.

PRACTICE AND PROCEDURE: Deliberations of court – Whether not proper to be based on sentiments rather than justice.

STATUTE: Legal Practitioners Act 1962 – Sections 2(1) and 19 Imperatives Legal Practitioners – Action filed 46 yrs ago – Originating processes did not comply with Ss 2(1) and 19 of Legal Practitioners Act 1962 – Applicable law when the cause of action arose – Whether action was not competently commenced.

Issue for Determination

Whether the decision of this court in Okafor vs. Nweke (2007) 10 NWLR (Pt. 1043) 521, which touches on jurisdiction, applies in this Appeal based on an action that commenced 46 years ago.

Facts of the Matter

By a writ of summons issued at the Onitsha Judicial Division of High Court of East Central State of the Federation in **July 1971**, the respondents, who were the plaintiffs, claimed as follows:

- (a) Declaration of title to all that piece or parcel of land known and called “ÚZO IRU” situate at Oraifite
- (b) £100 [Pounds] being damages for trespass.
- (c) Perpetual Injunction restraining the defendants, their servants and agents from further acts of trespass on the said land.

At the trial, the respondents called eight witnesses. They relied upon traditional evidence, acts of ownership and possession and the ownership of adjacent lands in support of their said claims.

The appellants, who were defendants, called six witnesses. They also claimed that the land belongs to them, however, they did not file any counter-claim in respect of the land in

dispute.

At the end of trial the court gave judgment in favour of the plaintiffs. The defendants appeal to the Court of Appeal was not successful hence this further appeal to the Supreme Court. At the Supreme Court the appellants raised the issue that the writ of summons filed 46 years ago was void for non compliance with the Legal Practitioners Act of 1962.

Held: *(Unanimously allowing the appeal)*

1. *Fundamental nature of jurisdiction and the need to be determined first in trial proceedings*

It is a settled law that jurisdiction is the life wire of every litigation before a court of law. It is the lifeblood too, therefore, a court of law must go into the issue first before any other issue. This is because if the court has no jurisdiction, the proceedings, however ably and well conducted, will be a nullity *ab initio* See *Abiola & Sons Bottling Co. vs. F.C.M.B, (2013) 10 NWLR (Pt. 1363) 501 SC* and *Ani vs. Nna (1996) 4 NWLR (Pt. 440) 101. (P 128 Paras E–F).*

2. *What determines how a case is determined*

To start with, each case is determined on its own merits in accordance with the law existing when the cause of action arose *Mustapha vs. Gov., Lagos State (1987) 2 NWLR (Pt. 58) 539. Sections 2 (1) and 19 of the said Legal Practitioners Act, 1962 are similar to Sections 2(1) and 24 of the Legal Practitioners Act, Cap. 207, Laws of the Federation of Nigeria, 1990, considered by this court in *Okafor vs. Nweke (supra)*, decided in 2007. (P 131 Paras F–H.)*

3. *The principle decided in *Okafor vs. Nweke**

In the said *Okafor vs. Nweke (supra)*, the originating processes were signed by a law firm, and this court categorically said that:

The combined effect of the above provisions is that for a person to be qualified to practice as a legal practitioner he must have his name in the roll, otherwise, he cannot engage in any form of legal practice in Nigeria. Since J.H.C. Okolo, SAN & Co is not a legal practitioner recognized by the law, it follows that the said J.H.C. Okolo, SAN & Co cannot legally sign and/or file any process in the Courts and as such the Motion on Notice Notice of Cross-Appeal and brief of

argument are incompetent in law particularly as the said firm of J.H.C, Okolo, SAN & Co is not a registered legal practitioner. (P 132 Paras B – E).

4. *A law firm cannot validly sign/file processes*

This court reiterated this position that a law firm “cannot legally sign and/or file any process in the Courts”; and any such process signed by a law firm is “incompetent in law” in many other cases, including FBN vs. Maiwada (*supra*), where Fabiyi, JSC, stated:

The decision in Okafor vs. Nweke was based on a substantive law – an Act of the National Assembly i.e. the Legal Practitioners Act. It is not based on Rules of Court. According to Oguntade, JSC at page 534 of the Judgment in Okafor vs. Nweke

“It would have been quite another matter if what is in issue is a mere compliance with Court Rules.”

Let me say it bluntly that where the provisions of an Act like the Legal Practitioners Act is at play, as herein, provisions of Rules of Court, which are subject to the law, must take the side line. (Pp 132 – 133 Paras F – A).

5. *An originating process may be issued by the plaintiff or his legal practitioner*

The “present Rules” referred to by the respondents is the Anambra State High Court (Civil Procedure) Rules, 2006, and “originating process” is defined in Order 1 Rule 2 as “any process by which a Suit is initiated”. The 2006 High Court Rules require that it be signed by the plaintiff himself or his legal practitioner, which is generally the case – See Okpe vs. Fan Milk (*supra*), wherein this court per I.T. Muhammad JSC, explained that:

Rules of Court and practice mandate that for a Notice of Appeal to be valid, it has to be signed by the Appellant himself or his legal practitioner. Thus, the requirement of such Court Rules, and in fact the Legal Practitioner's Act is that generally, it is a legal practitioner called to the Nigerian Bar and whose name appears in the Roll of Legal Practitioners, who may issue Court processes, including originating processes such as a notice of appeal. (Pp

134–135 Paras G–B).

6. *The originating process was not signed by a legal practitioner or any known person*

That was it; the writ of summons ended with a mere “Sgd. ???” no name and no designation. There was nothing to indicate, who signed the writ of summons, whether a judge, magistrate or other officer empowered to sign summonses, as stipulated in Order 2 Rule 1 of the High Court Rules of Eastern Nigeria, 1963. The writ of summons also referred to “copy of Claim overleaf”. The 6-paragraph CLAIM is at page 2 of the record and it was signed by “EZEBILO UMEADI & IKEJIANI, Plaintiffs’ Solicitors”. (P 135–136 Paras H–B).

Per Augie (JSC):

“Obviously, in the circumstances of this case, it is not possible to put the Legal Practitioners Act, 1962 and 1963 High Court Rules into neat little compartments, and keep them entirely separate.

There is no indication of who signed the writ, and this court cannot take the word of the respondents that it was signed by “a judge of the High Court. It is settled law that appellate courts are bound by the record of the proceedings before, and cannot depart therefrom – Sommer vs. FHA (1992) LPELR-3103 (SC).

See also SLB Consortium Ltd vs. NNPC (2016) 9 NWLR (Pt. 1252) 317, wherein this court made it very clear that – “once it cannot be said, who signed the process, it is incurably bad”. A signature identifies a document as an act of a particular person and without a signature, the document cannot pass as the act of such an unnamed person; it is, therefore, completely useless – Tsalibawa vs. Habiba (1991) 2 NWLR (Pt. 174) 461 at 480.

In addition, it is apparent that the CLAIM attached to the writ of summons was part and parcel of the writ of summons. As I pointed out earlier, under the 1963 Rules, a plaintiff states his claim in a general form or delivers to the registrar particulars, which give a defendant sufficient information of its details, and it

is based thereon that the writ is prepared, signed and issued.

What can be clearer than that? The respondents' claims against the appellants, which were inserted into the writ of summons, were obtained from the respondents' CLAIM attached thereto. In effect, the writ of summons could not have been prepared, signed and issued without particulars derived from the CLAIM. So, the writ of summons itself is inextricably tied to the CLAIM, and any defect in the CLAIM must affect the writ of summons.

The CLAIM was signed by “EZEBILO UMEADI & IKEJIANI”, a law firm, and on the authority of Okafor vs. Nweke (*supra*), and other decided cases of this Court, the said CLAIM signed by a law firm is incompetent in law, and it is, therefore, a nullity. (Pp 136–137; 138 Paras G–D; A–C).

7. *Court should not base its proceedings on sentiments*

As much as I sympathize with the respondents in this case that was filed in July 1971, over 46 years ago, I agree with the appellants that sentiments have no place in judicial deliberations – See Ezeugo vs. Ohanyere (1978) NSCC (Vol. 11) 449, where Obaseki, JSC, added “for if it [i.e. sentiments] did, our task would be definitely more difficult and less beneficial to the society”.

The appellants are right that this is a matter of jurisdiction. A Suit must be initiated by due process of the law, and without any feature that prevents a court from exercising its jurisdiction, as decided by this court in Madukolu vs. Nkemdilim (*supra*).

In this case, there is nothing that can alleviate the situation, the respondents have found themselves. This is a court of law; a court bound by the record transmitted from the lower courts, a court that cannot be swayed by sentiments, and a court that must rise above the miasma of despair and act according to law, particularly when an issue touches on jurisdiction, as in this case. (Pp 138–139 Paras G–B).

8. *The fundamental nature of jurisdiction*

Jurisdiction is described as the pillar upon which the entire case stands, and once it is shown that a court lacks jurisdiction, the foundation of the case is not only shaken, the case crumbles. In effect, there is no case before the court for adjudication – See Okolo & Anor vs. Union Bank (2004) 3 NWLR (Pt. 859) 87,

and Ministry of W. & T., Adamawa State vs. Yakubu (2013) 6 NWLR (Pt. 1351) 481, where this court aptly observed that:

The fatal effect of the signing of an originating process by a law firm is that the entire Suit was incompetent *ab initio*. It was dead at the point of filing. This highlights the painful realities that confronts a litigant when counsel fails to sign processes as stipulated by law. The originating process, as in this case, is fundamentally defective and incompetent. It is inchoate (and) legally non-existent.

In this case, the originating processes filed at the trial Court were defective and incompetent. The trial was, therefore, a nullity.
(P 139 Paras C – G).

Representation

Doyin Rhodes-Vivour, (Esq.), **with**
Anthony Onwaeze, (Esq.),
Thomas Ojo, (Esq.),
K. O. Ajana, (Esq.), **and**
T. K. Salawu, (Esq.),
For the **Appellants**

Prof. Ilochi A. Okafor, (SAN), **with**
C. J. Azoro, (Esq.),
For the **Respondents**

ADAMU AUGIE, (JSC.) (Delivering the Lead Judgment): By a writ of summons issued at the Onitsha Judicial Division of High Court of East Central State of the Federation in July 1971, the respondents, who were the plaintiffs, claimed as follows:

- (a) Declaration of title to all that piece or parcel of land known and called ‘ÚZO IRU’ situate at Oraifite**
- (b) #100 [Pounds] being damages for trespass.**
- (c) Perpetual Injunction restraining the defendants, their servants and agents from further acts of trespass on the said land.**

At the trial, the respondents called eight witnesses. They relied upon traditional evidence,

acts of ownership and possession and the ownership of adjacent lands in support of their said claims.

The appellants, who were defendants, called six witnesses. They also claimed that the land belongs to them, however, they did not file any counter-claim in respect of the land in dispute.

In his judgment of 19/7/1997, the learned trial Judge, Keazor, J, found the traditional history of the respondents more reliable than that of the appellants, and concluded as follows:

Placed side by side with each other, the evidence of the plaintiffs definitely tilts the balance on the imaginary scale in favour of the plaintiffs. I hold that they have proved their case.

Dissatisfied, the appellants appealed to the Court of Appeal and from the grounds of appeal filed, they formulated eleven issues for determination. The respondents formulated seven issues, and submitted further that the *“Appellants' issues 3-8 does not arise from ground 12 or any other ground”*; furthermore, that:

Appellant's Issues 3-9 and 3-10 are co-related within Ground 13, which complained that the learned trial Judge failed to make a definite and categorical finding that the Plaintiffs failed to prove acts of possession or ownership of adjacent lands as claimed by them. Accordingly, said Issues 3-9 and 3-10 are moot and academic, as those aggrieved thereby are the plaintiffs, not the appellants, who had not suffered any prejudice. It is the plaintiffs, who ought to complain and appeal and not the defendants/appellants.

In its Judgment delivered on 12/5/2003, the Court of Appeal held that appellants' Issue 8 does not arise from ground 12, and struck out the said issue with all the arguments in support.

The Court of Appeal did not stop there; it also struck out issues 9 and 10 and determined the appeal on the remaining issues Nos 1, 2, 3, 4, 5, 6, 7, and 11. At the end of the day, it resolved the said issues against the appellants. It, therefore, dismissed their appeal and affirmed the trial court's decision.

Dissatisfied, appellants appealed to this court with a notice of appeal that they amended, and the amended notice of appeal contains 16 grounds of appeal. They formulated four issues i.e.:

- (1) **Whether the originating claim filed in the name of the firm “EZEBILO UMEADI & IKEJANI” is not incompetent, which**

A incompetence rendered the proceedings of the courts below null and void?

B (2) Whether their lordships of the court below did not act without jurisdiction in striking out issues 8 and 9 of the appellants' brief of argument when there was no preliminary objection before the court and whether in any event issues as formulated are incompetent?

C (3) Whether plaintiffs proved their case for declaration of title?

D (4) Whether in the face of contradictions in testimony of witnesses on material facts, the plaintiffs are entitled to declaration of title to land?

The Respondents also formulated four issues for determination:

E (a) Whether this suit filed in 1971 is incompetent by virtue of the Particulars of Claim dated 16/7/71 signed by EZEBILO UMEADI & IKEJANI, Solicitors to the plaintiffs.

F (b) Whether their Lordships of the Court below had jurisdiction to strike out issues 8 and 9 of the appellants Brief - - when there was no preliminary objection before the court and whether in any event those issues as formulated were incompetent.

G (c) Whether respondents proved their case for declaration of title?

H (d) Whether there are contradictions in the testimony of the respondents' witnesses on material facts, which should disentitle them to declaration of title to land.

The first issues formulated by both parties raises the question of whether the decision of this court in *Okafor vs. Nweke (2007) 10 NWLR (Pt. 1043) 521*, which touches on jurisdiction, applies in this appeal based on an action that commenced 46 years ago.

I It is a settled law that jurisdiction is the life wire of every litigation before a court

A of law. It is the lifeblood too, therefore, a court of law must go into the issue first before any other issue. This is because if the court has no jurisdiction, the proceedings, however ably and well conducted, will be a nullity *ab initio* – see **Abiola & Sons Bottling Co. vs. F.C.M.B. (2013) 10 NWLR (Pt. 1363) 501 SC** and **Ani vs. Nna (1996) 4 NWLR (Pt. 440) 101**.

B In this case, the appellants cited Sections 2(1) and 19 of the Legal Practitioners Act, 1962, which was the law in existence at the time of filing the claim in 1971, and argued that it is clear that it was “*Ezebilo Umeadi & Ikejiani*”, a firm that filed the claim; but it is only a legal practitioner, who is competent to sign a legal process, and a process signed in the name of a firm is a nullity and cannot be used to activate the jurisdiction of the Court.

C Furthermore, that the person whose signature is subscribed on the claim is unknown, and it is not known whether the person is a legal practitioner admitted to practice law in Nigeria; and so, the originating claim filed on **16/7/71** is a nullity – **D Oketade vs. Adewunmi (2010) 8 NWLR (Pt. 1195) 63, FBN. vs. Maiwada (2013) 5 NWLR (Pt 1348) 444, Okafor vs. Nweke (supra)** cited.

E The respondents, however, submitted that this fresh issue “*comes after the Suit had crossed several streams and climbed several hills to get to the climax of our court system*”, and that “*no doubt it is the last straw clutched in desperation to succeed*”.

F They asked whether the facts in this appeal are on all fours with the facts, which founded the decisions in all the cases from **Okafor vs. Nweke (supra)**, and submitted that appellants only relied upon the **Legal Practitioners Act, 1962** with no reference to the **High Court Rules of Eastern Region, 1963** applicable then, which are different from the present Rules that has made vast changes in procedures, including as to commencement of Suits.

G They cited Order 2, Rule 1; Order 3, Rule 1, 3 & 4 of the **High Court Rules of Eastern Nigeria, 1963**, and argued that Order 3, Rule 1 did not require that a claim must be signed by a plaintiff or his legal practitioner; that Order 1, Rule 2 defined a solicitor to include any legal practitioner but Order 3, Rule 3 did not use *plaintiff or his Solicitor*” but instead used “*plaintiff or his agent*”, which meant that under the 1963 Rules, an agent was wider in meaning than a solicitor or a legal practitioner, and this scenario explains the impatience of this court in **Ogbuanyinya & Ors vs. Okudo & Ors (1990) 4 NWLR (Pt. 146) 551 SC**; and that as important as the issuance of a writ was under the 1963 Rules, even the failure of the Judge to sign it was not considered fatal, citing **Saude vs. Abdullahi (1989) 4 NWLR (Pt. 116) 387 SC**.

H They further argued that it was only a writ signed or issued by a non-recognized authority that was invalid – **Nzenwanne vs. Igwe (1976) 1 All NLR (Pt. 1) 76, Uttah vs. Independence Brewery (1974) 1 All NLR (Pt. 1) 497, Okwuosa vs. Okwuosa**

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A (1974) 1 *All NLR (Pt. 1)* 496, **Ike vs. Nzekwe** (1975) 1 *All NLR (Pt. 1)* 17, **Ifegbu vs. Ukaefu** (1971) 1 *ECCLR* 184, and that

B No case has held that an application (e.g. particulars of claim) for a writ of summons made and subsequently issued as required by law by a Judge, registrar or other authorized person in accordance with the old 1963 Rules made the suit thereby void and all proceedings thereon a nullity. More so, as it was not mandatory that only a plaintiff or his legal practitioner must sign the application. Even more so, when the law allowed an oral application. The issuance of a writ of summons commenced a suit. Thus, even if [their] claim was irregular, which is not conceded, there was already a valid suit. This explains why a statement of claim superseded a writ of summons, not the particulars of claim. It is sheer technicality to look before the issue of the writ. **Shuaibu vs. Muazu** (2007) 7 *NWLR (Pt. 1033)* 271; **Igwe Uzor & Sons vs. Onwuzor** (2007) 4 *NWLR (Pt. 1024)* 303. Furthermore, that the rationale of **Okafor vs. Nweke** (*supra*), and cases that followed it were based on the document in issue, being only a document that must be signed by the plaintiff or his legal practitioner – **FBN. vs. Maiwada** (*supra*); that in the cases following **Okafor vs. Nweke** (*supra*), which they enumerated in their brief [14 cases numbered as (a) to (n)], the document was an originating process, writ of summons, notice of appeal, etc.; and that the appellants carry the burden of establishing facts, which show that the conditions stipulated under the old rules were not complied with, but they failed to establish such facts.

E The appellants, however, submitted in their reply brief that this issues is a matter of jurisdiction since a suit must be initiated by due process of the law and there must not be any feature in the case which prevents a court from exercising its jurisdiction, citing **Madukolu vs. Nkemdilim** (1962) 2 *SCNLR* 341; that the respondents' arguments demonstrate a misconception of their contention that it was a law firm that filed the claim contrary to the legal practitioners Act; that it is the said Act that determines who a legal practitioner is and not the provisions of High Court Rules of Eastern Nigeria, 1963; that provisions of Rules of Court cannot take precedence over substantive provisions of that Act; and whatever was provided in the rules must take a bow to the superior provisions of that Act, citing **FBN vs. Maiwada** (*supra*).

G They further argued that there is nothing on the face of the writ of summons at page 1 of the record to indicate that it was signed by a Judge or a legal practitioner; that a mere signature without subscribing the name of the person, who signed same, makes the respondents' case worse, because it is not known, who signed the process; that it is apparent that the writ issued on 16/7/71 was issued on the basis of the claim filed on same 16/7/71, therefore, the claim having been filed in the name of “*Ezebilo Umeadi & Ikejiani*”, it is a nullity and not a legal process that can serve as foundation for issuance of a writ of summons, citing **Adefulu vs. Okulaja** (1996) 9 *NWLR (Pt. 475)* 668 @ 693.

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A They further submitted that the claim filed in the name of “*Ezebilo Umeadi & Ikejiani*”, being a nullity for infringing the said provisions of Sections 2(1) and 19 of the Legal Practitioners Act, the writ of summons filed on the basis of the claim is a nullity, more so that the writ of summons incorporated reliefs sought in the claim filed in the name of “*Ezebilo Umeadi & Ikejiani*”, and that what remains is for this court to apply the law as enunciated in the numerous cases decided by this Court to the effect that a legal process filed in the name of the firm is, indeed, a nullity.

B As to the respondents' argument that the onus of proof lies on them, the appellants countered that having regard to their complaint of the breach of the said Legal Practitioners Act, 1962, the provisions of the rules of court has no relevance; and that the onus of proving compliance, if any, is on the respondents, who made the positive assertion that they had complied with the requirements of the said Legal Practitioners Act of 1962, citing **Odom vs. P.D.P. (2015) 6 NWLR (Pt. 1456) P. 527@560 – 563**.

C To start with, each case is determined on its own merits in accordance with the law existing when the cause of action arose **Mustapha vs. Gov., Lagos State (1987) 2 NWLR (Pt. 58) 539**. Section 2 (1) and 19 of the said Legal Practitioners Act, 1962 are similar to Section 2(1) and 24 of the Legal Practitioners Act, Cap. 207, Laws of the Federation of Nigeria, 1990, considered by this court in **Okafor vs. Nweke (supra)**, decided in 2007.

E Section 2(1) of the two Acts provides that “*subject to the provisions of this Act, a person shall be entitled to practice as barrister and solicitor if, and only if, his name is on the roll*”; and Section 19 of the 1962 Act & Section 24 of the current Act says:

F **“Legal Practitioner” means a person entitled in accordance with the provisions of this Act to practice as a barrister or solicitor, either generally or for the purposes of any particular office or proceedings.**

In the said **Okafor vs. Nweke (supra)**, the originating processes were signed by a law firm, and this court categorically said that:

G **The combined effect of the above provisions is that for a person to be qualified to practice as a legal practitioner he must have his name in the roll, otherwise, he cannot engage in any form of legal practice in Nigeria. Since J.H.C. Okolo, SAN & Co is not a legal practitioner recognized by the law, it follows that the said J.H.C. Okolo, SAN & Co cannot legally sign and/or file any process in the Courts and as such the Motion on Notice Notice of Cross-Appeal and brief of argument are incompetent in law particularly as the said firm of**

H **J.H.C, Okolo, SAN & Co is not a registered legal practitioner.**

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A

This court reiterated this position that a law firm “cannot legally sign and/or file any process in the Courts”; and any such process signed by a law firm is “incompetent in law” in many other cases, including **FBN vs. Maiwada** (*supra*), where Fabiyi, JSC, stated:

B

The decision in Okafor vs. Nweke was based on a substantive law – an Act of the National Assembly i.e. the Legal Practitioners Act. It is not based on Rules of Court. According to Oguntade, JSC at page 534 of the judgment in Okafor vs. Nweke

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“It would have been quite another matter if what is in issue is a mere compliance with Court Rules.”

D

Let me say it bluntly that where the provisions of an Act like the Legal Practitioners Act is at play, as herein, provisions of Rules of Court, which are subject to the law, must take the side line.

E

In this case, the respondents argued that the appellants made no reference to the High Court Rules of Eastern Region, 1963, which “*are starkly different from the present Rules*”, particularly Order 2 Rule 1 of the said High Court Rules, which stipulates that:

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Every suit shall be commenced by a writ of summons signed by a Judge, Magistrate or other officer empowered to sign summonses. The writ of summons shall be issued by the Registrar or other officer of the Court empowered to issue summonses on application. The application shall ordinarily be made in writing but the Registrar or other officer as aforesaid where an applicant for a writ of summons is illiterate may dispense with a written application and instead himself record full particulars of the oral application made and on that record a writ of summons may be prepared, signed and issued.

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They also referred to Order 3 Rule 1 (1), (3) & (4) that says:

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(1) It shall be sufficient for the plaintiff to state his claim in his application for the writ of summons briefly in a general form, but he may deliver to the registrar at the time of making the application for the writ of summons, particulars of his claim in any form which shall give the defendant

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A reasonably sufficient information as to the details thereof.

(3) Any judge or other officer empowered to sign writs of summons may, in his discretion, refuse to sign any writ of summons until the Plaintiff shall have delivered to the Registrar such particulars and duplicate. Provided that where the Plaintiff is illiterate and unable to furnish particulars in writing, the particulars and duplicates thereof shall be prepared by the Registrar from the dictation of the plaintiff.

B

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(4) The registrar shall annex the particulars to the writ of summons and shall annex a duplicate thereof to each copy of the summons for service.

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So, under the said 1963 High Court Rules, the writ of summons, by which a Suit is commenced, is signed by a Judge, Magistrate or other officer empowered to sign it. The application is usually made in writing; but an illiterate applicant is allowed to make an oral application, which the registrar or other officer may record, and on that record, the writ is then prepared, signed and issued.

E

It is sufficient under the said Rules for the plaintiff to state his claim briefly in a general form or deliver to the registrar the particulars of his claim in any form, which gives the defendant “*reasonably sufficient information as to the details thereof*”; and the Judge or other officer may refuse to sign a writ of summons until a plaintiff delivers to the registrar such particulars of claim.

F

The “*present Rules*” referred to by the respondents is the Anambra State High Court (Civil Procedure) Rules, 2006, and “*originating process*” is defined in Order 1 Rule 2 as “*an process by which a Suit is initiated*”. The 2006 High Court Rules require that it be signed by the plaintiff himself or his legal practitioner, which is generally the case – see **Okpe vs. Fan Milk** (*supra*), wherein this court per I.T. Muhammad JSC, explained that:

G

Rules of Court and practice mandate that for a Notice of Appeal to be valid, it has to be signed by the Appellant himself or his legal practitioner. Thus, the requirement of such Court Rules, and in fact the Legal Practitioner's Act is that generally, it is a legal practitioner called to the Nigerian Bar and whose name appears in the Roll of Legal Practitioners, who may issue Court processes, including originating processes such as a notice of appeal.

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In this case, the writ of summons at page 1 of the record reads:

SUIT NO. 01/122/71

B

Between Obunike Eqwuatu & 2 Ors	Plaintiffs
And Chukwuji Nnalimuo & 5 Ors	Defendants
Chukwuji Nnalimuo & 5 Ors., C/o St. John's Catholic Mission, Akwukwu Town	

C

Your (sic) are hereby commanded in the State's name to attend this Court at Onitsha on Monday, the 23rd of August, 1971 at 9 o'clock in the forenoon to answer a Suit by Obunike Eqwuatu & 2 Ors. of Umunakwa Quarter, Ifite Village, Oraifite Town

D

The Plaintiffs' claim against the Defendants as follows:
(a) Declaration of title etc.
(b) E100 damages for trespass.
(c) Perpetual injunction restraining the Defendants etc.
(See copy of claim overleaf)

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Issued at Onitsha the 16th day of July, 1971.

Sgd. ? ? ?".

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That was it; the writ of summons ended with a mere "**Sgd. ???**" no name and no designation. There was nothing to indicate, who signed the writ of summons, whether a Judge, Magistrate or other officer empowered to sign summonses, as stipulated in Order 2 Rule 1 of the High Court Rules of Eastern Nigeria, 1963. The writ of summons also referred to "*copy of Claim overleaf*". The 6-paragraph **CLAIM** is at page 2 of the record and it was signed by "**EZEBILO UMEADI & IKEJIANI, Plaintiffs' Solicitors**".

G

The appellants attacked both writ of summons and **CLAIM**. They contend that the said writ is a nullity because the person, who has signed it, is unknown; and that the **CLAIM**, which is the basis upon which the writ was issued, is also a nullity because it was signed by a law firm in breach of the Legal Practitioners Act.

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The respondents' position, however, is that the appellants' contention cannot stand in the face of the said High Court Rules. They argued that the originating process under the 1963 Rules was the writ of summons "*signed by a Judge of the High Court*", which contained reliefs sought, not particulars of claim; and that:

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The sheer truth is that under the old Rules, particulars of claim was

A significantly of less importance that a writ of summons and was only a matter of form to which technicality was abhorred. We, therefore, urge the Supreme Court to reject Issue No. 1, both as a matter of law and of judicial policy as upholding it will be tantamount to injecting great instability in the legal process.

B

Obviously, in the circumstances of this case, it is not possible to put the Legal Practitioners Act, 1962 and 1963 High Court Rules into neat little compartments, and keep them entirely separate.

C There is no indication of who signed the writ, and this court cannot take the word of the respondents that it was signed by “a Judge of the High Court. It is settled law that appellate courts are bound by the record of the proceedings before it, and cannot depart therefrom – **Sommer vs. FHA (1992) LPELR-3103 (SC)**.

D See also **SLB Consortium Ltd vs. NNPC (2016) 9 NWLR (Pt. 1252) 317**, wherein this court made it very clear that – “once it cannot be said, who signed the process, it is incurably bad”. A signature identifies a document as an act of a particular person and without a signature, the document cannot pass as the act of such an unnamed person; it is, therefore, completely useless – **Tsalibawa vs. Habiba (1991) 2 NWLR (Pt. 174) 461 at 480**.

E In addition, it is apparent that the **CLAIM** attached to the writ of summons was part and parcel of the writ of summons. As I pointed out earlier, under the 1963 Rules, a plaintiff states his claim in a general form or delivers to the registrar particulars, which gives a defendant sufficient information of its details, and it is based thereon that the writ is prepared, signed and issued.

F In other words, a writ of summons is prepared on the basis of the claim, as stated by the plaintiff, before it is actually signed. In this case, it was clearly stated in paragraph 6 of the **CLAIM**:

G **The Plaintiffs on the above premises claim against the Defendants, jointly and severally, as follows**

- H**
- (a) Declaration of title to all that piece or parcel of land known and called ÚZO IRU” situate at Oraifite, the annual value of which is #10 (Pounds).**
 - (b) #100 (Pounds) being damages for trespass.**
 - (c) Perpetual Injunction restraining Defendants, their servants and agents from further acts of trespass on the said land.**

I The claims were incorporated in the Writ of Summons as follows:

A

The plaintiffs' claim against the defendant as follows:

(a) Declaration of title etc.

(b) £100 damages for trespass.

(c) Perpetual injunction restraining the defendants etc.

B

What can be clearer than that? The respondents' claims against the appellants, which were inserted into the writ of summons, were obtained from the respondents' **CLAIM** attached thereto. In effect, the writ of summons could not have been prepared, signed and issued without particulars derived from the **CLAIM**. So, the writ of summons itself is inextricably tied to the **CLAIM**, and any defect in the **CLAIM** must affect the writ of summons.

C

The **CLAIM** was signed by “*EZEBILO UMEADI & IKEJIANI*”, a law firm, and on the authority of **Okafor vs. Nweke** (*supra*), and other decided cases of this Court, the said **CLAIM** signed by a law firm is incompetent in law, and it is, therefore, a nullity.

D

The respondents urged this Court to proceed with caution in deciding whether **Okafor vs. Nweke** (*supra*) applied since:

E

The issue of ownership will not be settled thereby if the Suit is struck out and a new suit on account of limitation bar may not be permissible, leaving the issue of ownership undecided. The parties will forever be condemned to physically fight or resort to other self-help to use the land in dispute.

F

But the appellants contend that this is an unnecessary appeal to sentiment, which has no place in our law; that the court decides issues submitted to it, not what will happen after it has done so; therefore, sentiments cannot be the basis of any adjudication, citing **Total Plc. vs. Onuoha (2011) 11 NWLR (Pt. 725) 634**.

G

As much as I sympathize with the respondents in this case that was filed in July 1971, over 46 years ago, I agree with the appellants that sentiments have no place in judicial deliberations see **Ezeugo vs. Ohanyere (1978) NSCC (Vol. 11) 449**, where Obaseki, JSC, added “*for if it [i.e. sentiments] did, our task would be definitely more difficult and less beneficial to the society*”.

H

The appellants are right that this is a matter of jurisdiction. A Suit must be initiated by due process of the law, and without any feature that prevents a court from exercising its jurisdiction, as decided by this court in **Madukolu vs. Nkemdilim (supra)**.

I

In this case, there is nothing that can alleviate the situation, the respondents have

A found themselves. This is a court of law; a court bound by the record transmitted from the lower courts, a court that cannot be swayed by sentiments, and a court that must rise above the miasma of despair and act according to law, particularly when an issue touches on jurisdiction, as in this case.

B Jurisdiction is described as the pillar upon which the entire case stands, and once it is shown that a court lacks jurisdiction, the foundation of the case is not only shaken, the case crumbles. In effect, there is no case before the court for adjudication – see **Okolo & Anor vs. Union Bank (2004) 3 NWLR (Pt. 859) 87, and Ministry of W. & T., Adamawa State vs. Yakubu (2013) 6 NWLR (Pt. 1351) 481**, where this court aptly observed that:

C

The fatal effect of the signing of an originating process by a law firm is that the entire Suit was incompetent *ab initio*. It was dead at the point of filing. This highlights the painful realities that confronts a litigant when counsel fails to sign processes as stipulated by law. The originating process, as in this case, is fundamentally defective and incompetent. It is inchoate (and) legally non-existent.

D

E In this case, the originating processes filed at the trial Court were defective and incompetent. The trial was, therefore, a nullity.

Thus, it is not necessary to look into the other Issues raised. The Suit filed by the Respondents at the trial Court is struck out. I make no order as to costs.

Amina Adamu Augie
Justice, Supreme Court

F

I.T. MUHAMMAD, (JSC): My learned brother, Augie, (JSC), dismissed this appeal for lacking in merit. I was opportune to see the reasons before now for dismissing the appeal. I entirely agree and adopt the reasoning process. I, too, find no merit in the appeal which I equally dismiss. I abide by consequential orders made in the leading judgment.

G

Ibrahim Tanko Muhammad,
Justice, Supreme Court

H **OLU ARIWOOLA, (JSC):** I had the privilege of reading in draft the lead judgment of my learned brother **Amina Augie, JSC** just delivered. I agree entirely with the reasoning and conclusion that the appeal is lacking in merit and should be struck out. I too will strike out the appeal.

I

Appeal struck out.

A

Olu Ariwoola
Justice, Supreme Court

B

BAYANGAKA' AHS, (JSC): I read the leading judgment of my learned brother, Augie (JSC) wherein the competence of the originating process was raised leading to the striking out of the suit. It is quite unfortunate that the suit filed since 1971 which is 46 years at the time the appeal was argued cannot be resolved in any other way. As pointed out by my Lord, Augie JSC neither was the Writ of Summons signed by a Judge, Magistrate or other officer empowered to sign summonses nor was the claim accompanying the Writ signed by a legal practitioner. In the circumstances the Originating Process is incurably defective and per force the suit must be struck out. I cannot but agree with this stance. I equally strike out the suit and make no order on costs.

C

D

K. B. AKA' AHS
Justice, Supreme Court

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

E

My learned brother has exhaustively dealt with the issues submitted for determination of this appeal. I have nothing useful to add. For the same reason, I find the suit filed at the trial court incompetent and same is accordingly struck out. I abide by the order on costs.

F

Paul Adamu Galinje
Justice, Supreme Court

G

H

I

**CHUKWUEMEKA AGUBA
AND
FEDERAL REPUBLIC OF NIGERIA**

SC. 597/2014

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

FRIDAY, 12TH JANUARY, 2018

BEFORE THEIR LORDSHIPS

MUSADATTIJO MUHAMMAD	JUSTICE, SUPREME COURT
KUMAI BAYANG AKA' AHS	JUSTICE, SUPREME COURT
CHIMA CENTUS NWEZE	JUSTICE, SUPREME COURT
EJEMBIEKO	JUSTICE, SUPREME COURT
SIDI DAUD BAGE	JUSTICE, SUPREME COURT

APPEAL: Concurrent findings – Onus on appellant – How discharged.

APPEAL: Formulation of issues for determination – Whether an issue cannot be properly formulated where there is no ground of Appeal on the point or where there is an incompetent ground.

APPEAL: Raising of fresh issue at the Supreme Court – Or. 6 Rule 5(1)(b) of the Supreme Court Rules 1985 – Obligations on appellant who intends to raise fresh issues – Relevant considerations.

*CASE LAW: Principles in **Osoba vs. The Queen (1961) 1 SCNLR** – No distinction between mens rea in stealing and obtaining by false pretences.*

CRIMINAL LAW: Elements of obtaining money by false pretences – Relevant considerations.

CRIMINAL LAW: Mens rea – Whether there is no distinction in mens rea to defraud under S.1(1)(a) of the Advance Fee Fraud and other Fraud Related Offences Act and mens rea to steal under the Criminal Code.

JUDGMENT ORDERS: Imposition of sentence under S. 1 (3) of the Advance Fee Fraud and other Related offences Act – Discretionary nature of – Whether an appellate court can intervene therewith.

WORDS AND PHRASES: 'With intent to defraud' – Meaning

Issues for Determination

- (a) Whether the Respondent has proven count two (2) on the charge sheet beyond reasonable doubt to warrant the appeal court affirming the decision and or judgment of the trial court?**
- (b) Whether the appeal court was right to affirm the 10 years Conviction of the trial court and also ordering the convict to pay to the victim the sum he received fraudulently from the victim i.e, Seven Million, Five Hundred Thousand Naira (N7,500,000.00) less the sum the appellant had already paid to the victim as evidenced on Exhibits J1-4 bank deposit slips.**

Facts of the Matter

The appellant became aware that the owner, in law, of the five bedroom property at No. 7, Ahonore Close, Uselu Benin-City had put the property in the market for sale. The appellant sought to know the selling price. The price was fixed at N7,000,000.00. The appellant then informed the complainant of these facts. To assure the complainant that the property owner had good title to the property, the appellant collected photocopies of the title deeds and passed them to the complainant (the PW.1). The PW.1, convinced, gave the appellant the sum of N7,500,000.00 for the appellant to conclude the transaction and execute the deed of conveyance. The extra N500,000.00 was to take care of the lawyer's fee and the property Agent's commission. The appellant caused a lawyer to prepare the deed of conveyance and paid the lawyer N150,000.00 the fee for the preparation of the deed of conveyance. The agent who represented the property owner was paid N350,000.00 as commission by the appellant. Out of the purchase price fixed at N7,000,000.00 (which sum the appellant had since collected from the PW.1) the appellant made a part payment of N3,800,000.00 to the property owner. At these payments photocopies of the title documents were passed to the complainant through his mother. This move was apparently to assure the complainant that the transaction was on course and bona fide. Believing that he had fully completed and concluded the transaction, the complainant (PW.1) sought formal transfer of title to the

property to him. The appellant became evasive and was no longer forthcoming.

However, unknown to the property owner and the complainant (PW.1) the appellant had diverted the remaining N3,200,000.00 to finance the Local Government Elections he was a candidate in. In spite of his assurance to the complainant the appellant did not conclude the transaction for the title in the property to pass to the complainant. The transaction was thus frustrated. The balance of N3,200,000.00 remaining to be paid to the property owner to conclude the transaction had been converted by the appellant to his own use, that is his election expenses. The complainant (PW.1) felt or realised that he had been deceived by the false pretence of the appellant. He then made formal complaint to the EFCC.

On this fact that the appellant was charged, tried and convicted for obtaining the complainant's money by false pretence contrary to Section 1(1)(a) of the Advance Fee Fraud and Other Related Offences Act, 2006. The offence is punishable under Section 1(3) of the same Act.

The appellant was tried and convicted on a two count charge alleging conspiracy to obtain money by false pretence and obtaining the sum of N7,500,000.00 from Emmanuel Agbongiague under a false pretence that he would use the said sum to purchase a five bedroom property situate and lying at No. 7 Ahonore Close, Uselu Benin-City for the said Emmanuel Agbongiague. Both offences are punishable under Section 1(3) of the Advance Fee Fraud and other Related Offences Act, 2006. His conviction and sentence for conspiracy to obtain money by false pretence were, on his appeal, set aside by the Court of Appeal, Benin Division. However, his conviction and sentence for obtaining by false pretence were affirmed by the said Court of Appeal hence this further appeal to the Supreme Court.

Held: *(Unanimously dismissing the appeal)*

1. *The nature of false pretences*

It is submitted, correctly, for the appellant that the following facts are not in doubt. That is:

- i. **that there existed a property to be sold to the complainant (PW.1) situate at No. 3, Omoaghae Close, Off Osaretin Asemota Street, Uselu, Benin-City.**
- ii. **That upon the existence of the said property, the appellant paid N3,800,000.00 out of the agreed sum of N7,000,000.00 to the property owner.**
- iii. **That due to the fact that the appellant, on behalf of the**

complainant (PW.1), did not make full and final payment for the purchase of the said property, the ownership and or transfer of title did not pass to the complainant (PW.1).

The operative representation to the PW.1 by the appellant in this case includes the fact of the existence of the property to be sold. The appellant informed the PW.1 that the property was going to be sold for N7,500,000.00 (which included solicitors fee and agent's commission) and that if the amount was released to him, and it was subsequently paid by him the property would become his. The PW.1 believed the appellant and acting on that representation he (the PW.1) released the sum of N7,500,000.00 which, at the time the PW.1 gave the appellant the money, was enough for the transaction to be completed and concluded. However, the intervening conduct of the appellant, by which he converted the balance of N3,200,000.00 to his own use was the proximate reason the transaction was frustrated uncompleted and not concluded. (Pp 158 – 159 Paras D – C).

2. *No distinction between mens rea to steal and one to defraud under S. 1(1)(a) of Advanced Fee Fraud Act (supra)*

I cannot see the distinction being made by the appellant between the guilty mind or the *mens rea* of the offence created by Section 1(1)(a) of the Advance Fee Fraud and Other Fraud Related Offences Act, that is: with intent to defraud, and theft, under the Criminal Code Act. The House of Lords in the English case: WELDHAM vs. DPP (1960) 44 Cr.APP. RC 124 had cause to interpret the phrase with intent to defraud. The question in that case was: whether an intent to defraud was confined to an intent to cause or take the risk of causing pecuniary loss to another. The House, as reported in Archbold: Criminal Pleading, Evidence & Practice 40th ed. p. 959 paragraph 1444, decided that it was not so confined; and that “to defraud” is to “act to the prejudice of another's right”. It is, therefore, enough if anyone may be prejudiced in anyway by the fraud. (Pp 159 – 160 Paras F – A).

3. *Principles in Osoba vs. The Queen*

In the OSOBA's case, also reported as OSOBA vs. THE QUEEN (1961) 1 SCNLR 6, Brett, F.J. had stated that the question whether the fraudulent conversion, an active ingredient in obtaining by false pretences, amounted to stealing under any other statute was unnecessary. For the offence of stealing the

intent is to keep the chattel unlawfully from its owner. In obtaining by false pretences the intent is to convert or embezzle the thing obtained by false pretences. In both cases the intent is to act to the prejudice of another's right. Thus, the admission by the appellant that his conduct amounted to stealing is also the admission that he acted to the prejudice of the PW.1's right. By withholding and converting to his own use part of the N7,500,000.00 the PW.1 gave him to pay for the property, in order that the title to the said would pass eventually to the PW.1 as the new owner, the appellant had clearly manifested the intent to defraud the PW.1. He clearly acted to the prejudice of the PW.1. The transaction the said sum of N7,500,000.00 was given to the appellant for was in consequence not completed and concluded. It was frustrated. (P 160 Paras A–E).

4. *Elements of obtaining money by false pretences*

The appellant's counsel has drawn our attention to ONWUDIWE vs. FRN (2006) ALL FWLR (pt. 319) 774 at 779 – 780 and ODIAMA vs. FRN (2008) ALL FWLR (pt. 439) 436 at 447 which set out the elements of obtaining money under false pretences as follows:

- i. There is pretence;**
- ii. The pretence emanated from the accused person;**
- iii. The pretence is false;**
- iv. The accused person knew of the falsity of the pretence, or he did not believe in its truth;**
- v. The accused had intent to defraud the person he made the false representation to;**
- vi. The thing obtained or converted is capable of being stolen;**
- vii. The victim was induced by the false representation to transfer his whole interest in the personal property to the accused person.**

The appellant and respondent are *ad idem* on the ingredients constituting the offence of obtaining by false pretences. It is certainly not in dispute between them that the appellant had represented himself as being very efficient in property dealings; that through him the PW.1 could conveniently buy a real property; and that he was in contact with several property owners desiring to sell their property. It is also not in dispute that the appellant convinced the PW.1

to part with the sum of N7,500,000.00 to the appellant “purportedly to purchase a residential building in Benin City” for the PW.1. This piece of evidence coming from the PW.1 was neither challenged nor discredited. The two courts below found so as a fact in their concurrent decisions. (Pp 160–161 Paras E–C).

5. *Sufficient evidence to defraud the PW1.*

I had earlier in this judgment found, as the courts below also concurrently found, that to the prejudice of the PW.1 the appellant, after the initial payments of N800,000.00 and N3,000,000.00 vide Exhibits 1 & 2 (totaling N3,800,000.00) to the property owner, made no further payment to the property owner. He admitted that after paying the lawyer N150,000.00 and paying commission of N350,000.00 to the property agent (a total of N500,000.00) in addition to the N3,800,000.00 paid to the property owner he still had the PW.1's N3,200,000.00 out of the N7,500,000.00 he received from the PW.1 to pay for the property. The appellant admitted converting this N3,200,000.00 to his own use. That is to fund his political campaigns, which clearly was not to actualize the purpose he had received the money from the PW.1. By this admission, and from the principle established in WELDHAM vs. DPP (supra), the intent to defraud the PW.1 by the appellant is established. There is manifest intent of the appellant to cause or to take the risk of causing pecuniary loss to the PW.1. The admitted fraudulent act or conduct of the appellant was done clearly to the prejudice of the PW.1's right.

(P161 Paras C–G).

Per Eko (JSC):

“The appellant had with him the PW.1's N3,200,000.00 to pay the property owner as the outstanding balance due to complete and conclude the transaction for the property to be conveyed to the PW.1. The only reason the appellant had, for not paying the property owner the balance of N3,200,000.00, was clearly his admitted criminal intent to divert the fund to his political campaigns, which malfeasance he did to the utter prejudice of the PW.1's right.

The appellant's cross-examination by Edobor, Esq. at page 82 of the record reveals, *inter alia*, that the actual purchase price of the

property was N7,000,000.00 and that the additional N500,000.00 was for agent's commission and the lawyer's fee, and further that he received a total of N7,500,000.00 from the PW.1. He was further led to admitting that the PW.1 had “paid all” he needed to pay for the property to be conveyed to him and that the PW.1 “has no balance to pay before he is put into possession of the property”. He was untruthful in his assurances that upon his receipt of the N7,500,000.00 from the PW.1 title in the property would pass to the PW.1 from the property owner”.

(Pp 161–162 Paras H–C).

6. *The concurrent findings of two courts*

The two courts below were right in their concurrent findings of fact that the appellant, intending to defraud the PW.1 had induced him to transfer his interest in his money totaling N7,500,000.00 for the purchase of a property; the transaction which, by his own act of fraudulent conversion of the balance of N3,200,000.00 due and payable to the property owner, he had actively frustrated. The combination of these facts leaves no reasonable tribunal in doubt that the appellant did not, himself, believe in the truth of the representation, or his pretence, to the PW.1 that upon the PW.1 transferring to him (the appellant) N7,000,000.00 plus N500,000.00 as solicitor fee and agent's commission a property behind his (appellant's) house would be bought for and conveyed to him (the PW.1) by the appellant. *(P 162 Paras D–F).*

Per Eko (JSC):

“The two courts below in their concurrent findings found that

- i. It was the appellant who actually lured the PW.1 into the transaction for the purchase of the property in question, as can be seen from the PW.1's evidence at page 22 of the record.**
- ii. The appellant unequivocally admitted that in furtherance of the transaction he received from the PW.1 a total of N7,500,000.00 representing the alleged purchase price of N7,000,000.00 and N500,000.00 representing the solicitor's fee for drafting the deed of conveyance and the**

agent's fee.

- iii. **The appellant paid the property owner N3,800,000.00, leaving N3,200,000.00 as outstanding balance. He deliberately refused to inform the property owner that he had received from the PW.1 the said sum of N3,200,000.00. He also refused to inform the PW.1 that he had not paid the property owner in full. On the contrary, he kept the PW.1 believing that he had completed and concluded the transaction.**
- iv. **To the prejudice of the PW.1 the appellant decided to fraudulently embezzle or convert to his own use the said sum of N3,200,000.00, which sum in his own admission he used to fund his political campaigns, and thus frustrated the conveyance of the title for which he had received money in full from the PW.1.**
- v. **The appellant had betrayed the trust faithfully reposed in him by the PW.1.**
- vi. **At the material time the appellant fraudulently converted the PW.1's N3,200,000.00 and diverted it to his election campaigns he knew, very well, that the property owner would not deliver possession of the property to the PW.1 without the payment of the balance of N3,200,000.00. The appellant had also deliberately kept the property owner in the dark about the fact that he had actually received from the PW.1 the said balance of N3,200,000.00. He had also deceived to believing that the transaction was a done.**

On this set of facts the lower court affirmed the trial court's findings of fact on which it convicted the appellant for obtaining by false pretences. I have no cause to intervene and disturb the concurrent findings of fact by the two courts below.” (Pp 162 – 164 Paras G – A).

7. *How to displace concurrent findings*
The appellant has not shown either that the concurrent findings were perverse or that they have occasioned a mischief of justice to him. It is now trite in our appellate jurisprudence that is only on these grounds, as I had articulated above, that this Court intervenes to disturb concurrent findings made by the trial and intermediate courts. I agree with the respondent's counsel, on the authority of NKEBISI vs. THE STATE (2010) 5 NWLR (pt. 1188) 471; AFOLALU vs. THE STATE (2010) 16 NWLR (pt. 1220) 584, that the concurrent findings of the two lower courts, having been drawn from the evidence on the record, and not in breach of any known principle of law, cannot be set aside. (P 164 Paras A–D).

8. *Prosecution has discharged onus of proof*
The prosecution, through credible evidence, had proved beyond reasonable doubt that the appellant committed the offence of obtaining by false pretences. His confessional statements in Exhibits G & H, together with the admissions contained in his testimony at the trial court leave no doubt that the guilt of the appellant was established beyond reasonable doubt. The conviction of the appellant by the trial court for the offence of obtaining by false pretence, affirmed by the lower court, is proper. I also affirm it. (P 164 Paras D–F).

9. *Discretionary nature of sentencing*
The trial court, upon the allocutus of the convict/appellant, exercised its discretion in fixing the term of imprisonment. It was enjoined by the enabling provisions in Section 1(3) of the Advance Fee Fraud and Other Related Offences Act, 2006 to impose term of imprisonment between mandatory minimum of 7 years imprisonment and a maximum of 20 years imprisonment. It therefore lies within the trial court's judicial discretion to impose any mandatory term of imprisonment between 7 and 20 years. The only situation or circumstance the appellate court interferes with the exercise of this judicial discretion, as rightly submitted on behalf of the appellant, is when the trial court failed to apply the right principles of law. For this ADEYEYE & ANOR vs. THE STATE (1968) 1 ALL NLR 239; OLAWOYIN & ORS. vs. C.O.P (1962) 2 ALL NLR 77 HC were cited. (Pp 164–165 Paras H–B).

10. *Where an issue is raised for the first time without leave*

Upon my painstaking perusal of the record of appeal vis-à-vis this issue formulated for the determination of the appeal, apparently from ground 3 of the grounds of appeal at pages 219-220 of the record, I notice that this is a fresh issue being raised for the first time in this Court without leave of court. The issue was not raised in the appellant's appeal at the lower court. The said ground 3 as couched, shorn of its particulars, reads thus:

The learned trial (sic) Judges erred in law when they affirm (sic) the 10 years (ten years) conviction of the trial court and asking the appellant to pay to the victim the sum of N7.5 million less than the sum he already paid.

This issue never arose before the learned Justices of the lower court. It was only in the consequential orders that the lower court, having dismissed the appellant's appeal, on whether he was properly convicted for the offence of obtaining by false pretences, affirmed the conviction and sentence for that offence.

Ground 3 of the grounds of appeal from which the learned appellant's counsel has formulated the second issue for the determination of this appeal has raised a fresh issue. In the practice of appeal courts issues that are fresh and not brought and decided before the lower court are not entertained. In this Court, in particular, no such fresh issue or point shall be entertained without leave of the court first sought and obtained. OFORLETE vs. THE STATE (2000) 7 SC (pt. 1) 80; (2000) 12 NWLR (Pt. 681) 415. The attitude of appellate courts to raising fresh issues on appeal is not new. It has been with the appeal courts for long, as can be seen from ABINABINA vs. ENYIMADU (1953) 12 WACA 171; DJUKPAN vs. ORUVUYOVBE (1967) 1 ALLNLR 134.

(Pp 165–166 Paras D–B).

11. *The import of Or. 6 Rule 5(1) (b) of the Supreme Court Rules*
Order 6 Rule 5 (1)(b) of the Supreme Court Rules, 1985, as amended, enjoins the appellant who intends, in the course of hearing the appeal, to introduce a new point not taken in the court below to seek leave to introduce the new point.

The appellant did not seek any leave to raise this fresh issue in this Court. He did not also raise this issue at the lower court. He has not sought any leave to raise this issue for the first time in this Court. The issue cannot therefore be considered in this appeal. It is accordingly disregarded. (P 166 Paras B–D).

12. *Where there is no ground of appeal issue cannot be validly raised therefrom*
The respondent, as the prosecutor, did not cross-appeal the order of the lower court discharging and acquitting the appellant for the offence of conspiracy under Section 8(a) of the Advance Fee Fraud and Other Related Offences Act, 2006. The appellant also did not, in any ground of appeal, raise it.

The respondent's issue 2 reads: whether the Court of Appeal was right when it discharged and acquitted the appellant on the charge of conspiracy to obtain money by false pretence. An issue for determination of the appeal, since appeals in this court are heard or argued on issues, must flow directly from the grounds of appeal. They cannot be raised anyhow and from nowhere. Issues are, therefore, incompetent if they are raised nowhere and not directly from grounds of appeal. IHEANACHO vs. EJIOGU (1995) 4 NWLR (pt. 389) 324; LORI vs. AKUKALIA (1998) 12 NWLR (pt. 579) 592. Respondent's issue 2, having been raised from no where, is incompetent. It is accordingly struck out. (P 166 Paras D–H).

Representation

E.E. Eraikhuemen, (Esq.), for the Appellant.

Ifeanyi Agwu, (Esq.), Legal Officer of EFCC, for the Respondent.

EJEMBI EKO, (JSC) (Delivering the Lead Judgment): The appellant was tried and convicted on a two count charge alleging conspiracy to obtain money by false pretence and obtaining the sum of N7,500,000.00 from Emmanuel Agbongiague under a false pretence that he would use the said sum to purchase a five bedroom property situate and lying at No. 7 Ahonore Close, Uselu Benin-City for the said Emmanuel Agbongiague. Both offences are punishable under Section 1(3) of the Advance Fee Fraud and other Related Offences Act, 2006. His conviction and sentence for conspiracy to obtain money by false pretence were, on his appeal, set aside by the Court of Appeal, Benin Division. However, his conviction and sentence for obtaining by false pretence were affirmed by the said Court of Appeal (the lower court); hence this further appeal.

The summary of the facts on which the appellant was prosecuted and convicted runs, thus – The appellant became aware that the owner, in law, of the five bedroom property at No. 7, Ahonore Close, Uselu Benin-City had put the property in the market for sale. The appellant sought to know the selling price. The price was fixed at N7,000,000.00. The appellant then informed the complainant of these facts. To assure the complainant that the property owner had good title to the property, the appellant collected photocopies of the title deeds and passed them to the complainant (the PW.1). The PW.1, convinced, gave the appellant the sum of N7,500,000.00 for the appellant to conclude the transaction and execute

the deed of conveyance. The extra N500,000.00 was to take care of the lawyer's fee and the property Agent's commission. The appellant caused a Lawyer to prepare the Deed of Conveyance and paid the Lawyer N150,000.00 the fee for the preparation of the Deed of Conveyance. The agent who represented the property owner was paid N350,000.00 as commission by the appellant. Out of the purchase price fixed at N7,000,000.00 (which sum the appellant had since collected from the PW.1) the appellant made a part payment of N3,800,000.00 to the property owner. At these payments photocopies of the title documents were passed to the complainant through his mother. This move was apparently to assure the complainant that the transaction was on course and bona fide. Believing that he had fully completed and concluded the transaction, the complainant (PW.1) sought formal transfer of title to the property to him. The appellant became evasive and was no longer forthcoming.

However, unknown to the property owner and the complainant (PW.1) the appellant had diverted the remaining N3,200,000.00 to finance the Local Government Elections he was a candidate in. In spite of his assurance to the complainant the appellant did not conclude the transaction for the title in the property to pass to the complainant. The transaction was thus frustrated. The balance of N3,200,000.00 remaining to be paid to the property owner to conclude the transaction had been converted by the appellant to his own use, that is his election expenses. The complainant (PW.1) felt or realised that he had been deceived by the false pretence of the appellant. He then made formal complaint to the EFCC.

On this fact that the appellant was charged, tried and convicted for obtaining the complainant's money by false pretence contrary to Section 1(1)(a) of the Advance Fee Fraud and Other Related Offences Act, 2006. The offence is punishable under Section 1(3) of the same Act.

The provisions of subsection (1)(a) & (3) of Section 1 of the Advance Fee Fraud and other Related Offences Act, 2006 are as follows:

1. (1) **Notwithstanding anything contained in any other enactment or law, any person *who by any false pretence and with intent to defraud***
 - (a) **obtains from any other person, in Nigeria or in any other country, for himself or any other person;**
 - (b) **any property whether or not the property is obtained or its delivery is induced through the medium of a contract induced by the false pretence, commits an offence**
- (3) **Any person who commits an offence under sub-Section (1) of this Section is liable on conviction to imprisonment**

for a term of not more than 20 years and not less than 7 years without option of fine.

The appellant was tried and convicted for conspiracy to obtain property by false pretences and obtaining money, the property, from the PW.1 by false pretences. His further appeal to this Court is against the decision of the Lower Court affirming his conviction and sentence for obtaining by false pretences.

The two issues formulated for the determination of this appeal by the appellant are:

- (a) **Whether the Respondent has proven count two (2) on the charge sheet beyond reasonable doubt to warrant the appeal court affirming the decision and or judgment of the trial court?**
- (b) **Whether the appeal court was right to affirm the 10 years *Conviction* of the trial court and also ordering the convict to pay to the victim the sum he received fraudulently from the victim i.e, Seven Million, Five Hundred Thousand Naira (N7,500,000.00) less the sum the appellant had already paid to the victim as evidenced on Exhibits J1-4 bank deposit slips.**

It is argued for the appellant that, going by the definition of **false pretence** either in Section 418 of the Criminal Code Act Cap (38 LFN 2006 (Sic 2004) and the Advance Fee Fraud and Other Related Offence Act (AFFORA), 2006 that the – **false pretence** – denotes a deliberate and conscious effort on the part of the person making the representation *ab initio* to create a false or a situation which is untrue and which he (the person) making the representation knew to be false and not Acts or conducts which are remote incidental to the making of such representation.

The question that necessarily follows this point is; what is the operative representation?

It is submitted, correctly, for the appellant that the following facts are not in doubt.

That is:

- i. **that there existed a property to be sold to the complainant (PW.1) situate at No. 9 Ahonore Close, Off Osaretin Asemota Street, Uselu, Benin-City.**
- ii. **That upon the existence of the said property, the appellant paid N3,800,000.00 out of the agreed sum of N7,000,000.00 to the property owner.**
- iii. **That due to the fact that the appellant, on behalf of the**

A **complainant (PW.1), did not make full and final payment for the purchase of the said property, the ownership and or transfer of title did not pass to the complainant (PW.1).**

B The operative representation to the PW.1 by the appellant in this case includes the fact of the existence of the property to be sold. The appellant informed the PW.1 that the property was going to be sold for N7,500,000.00 (which included solicitors fee and agent's commission) and that if the amount was released to him, and it was subsequently paid by him the property would become his. The PW.1 believed the appellant and acting on that representation he (the PW.1) released the sum of N7,500,000.00 which, at the time the PW.1 gave the appellant the money, was enough for the transaction to be completed and concluded. However, the intervening conduct of the appellant, by which he converted the balance of N3,200,000.00 to his own use was the proximate reason the transaction was frustrated uncompleted and not concluded.

D The appellant seems to admit that conduct of converting the money to his own use was criminal. In paragraph 4.07 of the appellant's brief, it is submitted that:

E **The appellant could have been sued for *stealing* the sum used by him to contest for Local Government Election against the intents and purposes for which the sum was released. (And) that for the appellant using the said amount for his personal use and benefit, the offence committed is one of stealing and not of the fake pretence. We rely (on) the Supreme Court authority in the QUEEN vs. OSOBA(1961)ALLNLR1 SC.**

G I cannot see the distinction being made by the appellant between the guilty mind or the *mens rea* of the offence created by Section 1(1)(a) of the Advance Fee Fraud and Other Related Offence Act, that is: **with intent to defraud**, and theft, under the Criminal Code Act. The House of Lords in the English case: **WELDHAM vs. DPP (1960) 44 Cr. APP. RC 124** had cause to interpret the phrase **with intent to defraud**. The question in that case was: whether an intent to defraud was confined to an intent to cause or take the risk of causing pecuniary loss to another. The House, as reported in Archbold: Criminal Pleading, Evidence & Practice 40th ed, p. 959 paragraph 1444, decided that it was not so confined; and that “to defraud” is to “act to the prejudice of another's right”. It is, therefore, enough if anyone may be prejudiced in anyway by the fraud.

H In the OSOBA case, also reported as **OSOBA vs. THE QUEEN (1961) 1 SCNLR 6, Brett, F.J.** had stated that the question whether the fraudulent conversion, an active ingredient in obtaining by false pretences, amounted to stealing under any other

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A statute was unnecessary. For the offence of stealing the intent is to keep the chattel unlawfully from its owner. In obtaining by false pretences the intent is to convert or embezzle the thing obtained by false pretences. In both cases the intent is to act to the prejudice of another's right. Thus, the admission by the appellant that his conduct amounted to stealing is also the admission that he acted to the prejudice of the PW.1's right. By withholding and converting to his own use part of the N7,500,000.00 the PW.1 gave him to pay for the property, in order that the title to the said would pass eventually to the PW.1 as the new owner, the appellant had clearly manifested the intent to defraud the PW.1. He clearly acted to the prejudice of the PW.1. The transaction the said sum of N7,500,000.00 was given to the appellant for was in consequence not completed and concluded. It was frustrated.

B The appellant's counsel has drawn our attention to **ONWUDIWE vs. FRN (2006) ALL FWLR (pt. 319) 774 at 779 – 780** and **ODIAMA vs. FRN (2008) ALL FWLR (pt. 439) 436 at 447** which set out the elements of obtaining money under false pretences as follows:

- C**
- i. There is pretence;**
 - ii. The pretence emanated from the accused person;**
 - iii. The pretence is false;**
 - E iv. The accused person knew of the falsity of the pretence, or he did not believe in its truth;**
 - v. The accused had intent to defraud the person he made the false representation to;**
 - F vi. The thing obtained or converted is capable of being stolen;**
 - vii. The victim was induced by the false representation to transfer his whole interest in the personal property to the accused person.**

G The appellant and respondent are *ad idem* on the ingredients constituting the offence of obtaining by false pretences. It is certainly not in dispute between them that the Appellant had represented himself as being very efficient in property dealings; that through him the PW.1 could conveniently buy a real property; and that he was in contact with several property owners desiring to sell their property. It is also not in dispute that the appellant convinced the PW.1 to part with the sum of N7,500,000.00 to the appellant “purportedly to purchase a residential building in Benin City” for the PW.1. This piece of evidence coming from the PW.1 was neither challenged nor discredited. The two courts below found so as a fact in their concurrent decisions.

H I had earlier in this judgment found, as the courts below also concurrently found,

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A that to the prejudice of the PW.1 the appellant, after the initial payments of N800,000.00 and N3,000,000.00 vide Exhibits 1 & 2 (totaling N3,800,000.00) to the property owner, made no further payment to the property owner. He admitted that after paying the Lawyer N150,000.00 and paying commission of N350,000.00 to the property agent (a total of N500,000.00) in addition to the N3,800,000.00 paid to the property owner he still had the PW.1's N3,200,000.00 out of the N7,500,000.00 he received from the PW.1 to pay for the property. The appellant admitted converting this N3,200,000.00 to his own use. That is to fund his political campaigns, which clearly was not to actualize the purpose he had received the money from the PW.1. By this admission, and from the principle established in **WELDHAM vs. DPP (supra)**, the intent to defraud the PW.1 by the appellant is established. There is manifest intent of the appellant to cause or to take the risk of causing pecuniary loss to the PW.1. The admitted fraudulent act or conduct of the appellant was done clearly to the prejudice of the PW.1's right.

The appellant had with him the PW.1's N3,200,000.00 to pay the property owner as the outstanding balance due to complete and concluded the transaction for the property to be conveyed to the PW.1. The only reason the appellant had, for not paying the property owner the balance of N3,200,000.00, was clearly his admitted criminal intent to divert the fund to his political campaigns, which malfeasance he did to the utter prejudice of the PW.1's right.

E The appellant's cross-examination by Edobor, Esq. at page 82 of the record reveals, *inter alia*, that the actual purchase price of the property was N7,000,000.00 and that the additional N500,000.00 was for agent's commission and the Lawyer's fee, and further that he received a total of N7,500,000.00 from the PW.1. He was further led to admitting that the PW.1 had "paid all" he needed to pay for the property to be conveyed to him and that the PW.1 "has no balance to pay before he is put into possession of the property". He was untruthful in his assurances that upon his receipt of the N7,500,000.00 from the PW.1 title in the property would pass to the PW.1 from the property owner.

G The two courts below were right in their concurrent findings of fact that the appellant, intending to defraud the PW.1 had induced him to transfer his interest in his money totaling N7,500,000.00 for the purchase of a property; the transaction which, by his own act of fraudulent conversion of the balance of N3,200,000.00 due and payable to the property owner, he had actively frustrated. The combination of these facts leaves no reasonable tribunal in doubt that the appellant did not, himself, believe in the truth of the representation, or his pretence, to the PW.1 that upon the PW.1 transferring to him (the appellant) N7,000,000.00 plus N500,000.00 as solicitor fee and agent's commission a property behind his (appellant's) house would be bought for and conveyed to him (the PW.1) by the appellant.

- A** The two courts below in their concurrent findings found that:
- B** i. **It was the appellant who actually lured the PW.1 into the transaction for the purchase of the property in question, as can be seen from the PW.1's evidence at page 22 of the record.**
- C** ii. **The appellant unequivocally admitted that in furtherance of the transaction he received from the PW.1 a total of N7,500,000.00 representing the alleged purchase price of N7,000,000.00 and N500,000.00 representing the solicitor's fee for drafting the deed of conveyance and the agent's fee.**
- D** iii. **The appellant paid the property owner N3,800,000.00, leaving N3,200,000.00 as outstanding balance. He deliberately refused to inform the property owner that he had received from the PW.1 the said sum of N3,200,000.00. He also refused to inform the PW.1 that he had not paid the property owner in full. On the contrary, he kept the PW.1 believing that he had completed and concluded the transaction.**
- E**
- F** iv. **To the prejudice of the PW.1 the appellant decided to fraudulently embezzle or convert to his own use the said sum of N3,200,000.00, which sum in his own admission he used to fund his political campaigns, and thus frustrated the conveyance of the title for which he had received money in full from the PW.1.**
- G**
- v. **The appellant had betrayed the trust faithfully reposed in him by the PW.1.**
- H**
- vi. **At the material time the appellant fraudulently converted the PW.1's N3,200,000.00 and diverted it to his election campaigns he knew, very well, that the property owner would not deliver possession of the property to the PW.1 without the payment of the balance of N3,200,000.00. The**
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- A** **Appellant had also deliberately kept the property owner in the dark about the fact that he had actually received from the PW.1 the said balance of N3,200,000.00. He had also deceived to believing that the transaction was a done**
- B** On this set of facts the Lower court affirmed the trial court's findings of fact on which it convicted the appellant for obtaining by false pretences. I have no cause to intervene and disturb the concurrent findings of fact by the two courts below. The appellant has not shown either that the concurrent findings were perverse or that they have occasioned a mischief of justice to him. It is now trite in our appellate jurisprudence that is only on
- C** these grounds, as I had articulated above, that this Court intervenes to disturb concurrent findings made by the trial and intermediate courts. I agree with the respondent's counsel, on the authority of **NKEBISI vs. THE STATE (2010) 5 NWLR (pt. 1188) 471; AFOLABI vs. THE STATE (2010) 16 NWLR (pt. 1220) 584**, that the concurrent findings of the two lower courts, having been drawn from the evidence on the record, and not in breach of any known principle of law, cannot be set aside.
- D** The prosecution, through credible evidence, had proved beyond reasonable doubt that the appellant committed the offence of obtaining by false pretences. His confessional statements in Exhibits G & H, together with the admissions contained in
- E** his testimony at the trial court leave no doubt that the guilt of the Appellant was established beyond reasonable doubt. The conviction of the Appellant by the trial court for the offence of obtaining by false pretence, affirmed by the lower court, is proper. I also affirm it.
- The appellant was sentenced to 10 years imprisonment without option of fine.
- F** In addition, the appellant was ordered to pay to the victim, the PW.1, the sum of money he recovered fraudulently from the victim (the PW.1) less the sum of money he had already paid to him, the PW.1, as evidenced by Exhibit J J4, the bank deposit slips. The question, raised as an issue on this, is: whether the Lower court was right in affirming the 10 years imprisonment and the order for restitution?
- G** The trial court, upon the allocutus of the convict/appellant, exercised its discretion in fixing the term of imprisonment. It was enjoined by the enabling provisions in Section 1(3) of the Advance Fee Fraud and Other Related Offences Act, 2006 to impose term of imprisonment between mandatory minimum of 7 years imprisonment and a maximum of 20 years imprisonment. It therefore lies within the
- H** trial court's judicial discretion to impose any mandatory term of imprisonment between 7 and 20 years. The only situation or circumstance the appellate court interferes with the exercise of this judicial discretion, as rightly submitted on behalf of the appellant, is when the trial court failed to apply the right principles of law. For this **ADEYEYE &**
- I** **ANOR vs. THE STATE (1968) 1 ALL NLR 239;OLAWOYIN & ORS. vs. C.O.P**

A (1962) 2 ALLNLR 77 HC were cited.

Still on the sentence, appellant's counsel submits, on the authority of **EKPO vs. THE STATE (1982) 1 NCR 34** that it is desirable for the trial Judge, in exercise of his judicial discretion, to give reasons for the sentence imposed.

B Upon my painstaking perusal of the record of appeal vis-à-vis this issue formulated for the determination of the appeal, apparently from ground 3 of the grounds of appeal at pages 219-220 of the record, I notice that this is a fresh issue being raised for the first time in this Court without leave of court. The issue was not raised in the appellant's appeal at the lower court. The said Ground 3 as couched, shorn of its particulars, reads thus:

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The learned trial (sic) judges erred in law when they affirm (sic) the 10 years (ten years) conviction of the trial court and asking the appellant to pay to the victim the sum of N7.5 million less than the sum he already paid.

D

This issue never arose before the learned justices of the lower court. It was only in the consequential orders that the lower court, having dismissed the Appellant's appeal, on whether he was properly convicted for the offence of obtaining by false pretences, affirmed the conviction and sentence for that offence.

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Ground 3 of the grounds of appeal from which the learned appellant's counsel has formulated the second issue for the determination of this appeal has raised a fresh issue. In the practice of appeal courts issues that are fresh and not brought and decided before the lower court are not entertained. In this Court, in particular, no such fresh issue or point shall be entertained without leave of the court first sought and obtained. **OFORLETE vs. THE STATE (2000) 7 SC (pt. 1) 80; (2000) 12 NWLR (Pt. 681) 415.** The attitude of appellate courts to raising fresh issues on appeal is not new. It has been with the appeal courts for long, as can be seen from **ABINABINA vs. ENYIMADU (1953) 12 WACA 171; DJUKPAN vs. ORUVUYOVBE (1967) 1 ALL NLR 134.**

F Order 6 Rule 5 (1)(b) of the Supreme Court Rules, 1985, as amended, enjoins the appellant who intends, in the course of hearing the appeal, to introduce a new point not taken in the court below to seek leave to introduce the new point.

G

The appellant did not seek any leave to raise this fresh issue in this Court. He did not also raise this issue at the lower court. He has not sought any leave to raise this issue for the first time in this Court. The issue cannot therefore be considered in this appeal. It is accordingly disregarded.

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The respondent, as the prosecutor, did not cross-appeal the order of the lower court discharging and acquitting the appellant for the offence of conspiracy under

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A Section 8(a) of the Advance Fee Fraud and Other Related Offences Act, 2006. The Appellant also did not, in any ground of appeal, raise it.

The Respondent's issue 2 reads: whether the Court of Appeal was right when it discharged and acquitted the appellant on the charge of conspiracy to obtain money by false pretence. An issue for determination of the appeal, since appeals in this Court are

B heard or argued on issues, must flow directly from the grounds of appeal. They cannot be raised any how and from nowhere. Issues are, therefore, incompetent if they are raised nowhere and not directly from grounds of appeal. **IHEANACHO vs. EJIOGU (1995) 4 NWLR (pt. 389) 324; LORI vs. AKUKALIA (1998) 12 NWLR (pt. 579)**

C **592**. Respondent's issue 2, having been raised from no where, is incompetent. It is accordingly struck out.

There is no substance in this appeal and it is accordingly dismissed. The decision of the lower court in the appeal **No. CA/B/350/2013** affirming the conviction and sentence of the appellant for the offence of obtaining by false pretences is also

D affirmed.

Appeal dismissed.

Ejembi Eko,
Justice, Supreme Court

E **BAYANG AKA' AHS, (JSC):** I read before now the judgment of my learned brother, Eko JSC dismissing the appeal as lacking in merit. The concurrent findings of the two lower courts which are not perverse with the admission by the appellant that he converted N3,200,000.00 out of the N7,500,000.00 the complainant paid for the house,

F to fund his political campaigns rendered the appeal devoid of any merits whatsoever. In the circumstances the appeal is dismissed for totally lacking any merit.

K. B. AKA AHS
Justice, Supreme Court

G **DAUDA BAGE, (JSC):** I have had the benefit of reading in draft the lead Judgment of my learned brother Ejembi Eko, JSC, just delivered. I agree entirely with the reasoning and conclusion reached. I do not have anything to add. The appeal lacks merit and it is accordingly dismissed by me.

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Sidi Dauda Bage,
Justice, Supreme Court.

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**DESTRA INVESTMENTS LTD
AND
1. FEDERAL REPUBLIC OF NIGERIA
2. CHIEF OLISAMETUH**

SC. 451/2017

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

FRIDAY, 12TH JANUARY, 2018

BEFORE THEIR LORDSHIPS

MUSADATTIJO MUHAMMAD	JUSTICE, SUPREME COURT
KUMAI BAYANGAKA' AHS	JUSTICE, SUPREME COURT
CHIMACENTUS NWEZE	JUSTICE, SUPREME COURT
EJEMBI EKO	JUSTICE, SUPREME COURT
DAUDASIDI BAGE	JUSTICE, SUPREME COURT

APPEAL: Ground of appeal challenging the exercise of discretion – Nature of – Whether requiring leave to appeal to the Court of Appeal – Relevant Considerations thereof.

COURT: Jurisdiction of Federal High Court – Where claim before the court does not involve breach of contract – Consideration of provision to S.251(1) of the Constitution of Federal Republic of Nigeria 1999 (as amended).

CRIMINAL LAW AND PROCEDURE: Preliminary objection – Whether can in all cases stop court from proceeding with the substantive trial – Relevant considerations thereof.

CRIMINAL LAW AND PROCEDURE: Where court adjourned ruling on a preliminary objection to the time of delivery judgment in the substantive case – Propriety thereof.

JUDGMENT AND ORDERS: Ruling on preliminary objection adjourned to the time of delivery of final judgment – Propriety – Section 396(2) of Administration of Criminal Justice Act – Purport and Imperatives.

Issues for Determination

1. Whether the court below was right in holding that a Judge is free to adopt any method that suited him in the determination of the preliminary objection on jurisdiction including deferring the ruling on the preliminary objection on jurisdiction to be considered along with the substantive issues and that such decision to defer the ruling did not occasion any injustice to the appellant as the appellant has not shown any injury suffered by deferring the matter.
2. Whether the court below was right in striking out the appeal on the ground that the grounds of appeal question an interlocutory decision on the exercise of discretion of the trial court which are at best grounds of mixed law and fact which require leave and as no leave was sought and obtained, the grounds of appeal are incompetent.
3. Whether the appellant has not been denied its right of fair hearing, thus occasioning a miscarriage of justice, when the court below raised, suo motu, the issue of the incompetence of the grounds of appeal, decided on it and indeed struck out the appeal based on that issue without affording the parties including the appellant the opportunity to address it on that issue.
4. Whether the court below has not misapprehended the charge and issue before it when it held that the Federal High Court has jurisdiction to try the appellant of the offences of Money Laundering when the issue before the court below is whether the trial court has jurisdiction to receive evidence in proof of simple contract award which is an ingredient of counts 1 and 2 of the charge which the prosecution must prove to sustain the counts.
5. Whether the court below was right when it held that there is nothing wrong in considering the preliminary objection with the substantive issue at the delivery of judgment as the law allows applications to be taken along with the substantive case.

Facts of the Matter

The appellant and 2nd respondent were arraigned before the Federal High Court sitting in Abuja in Charge No. FHC/ABJ/CR/05/2016 for the offences of money laundering contrary to Sections 1, 15(2)(d)(6) and 17(b) of the Money Laundering (Prohibition) Act 2011 (as amended). The case proceeded to trial and the prosecution called eight witnesses who were cross-examined by the defence before closing its case. Both the appellant and the 2nd respondent made a no case submission which was dismissed by the trial court and they

commenced their defence before filing the preliminary objection challenging the jurisdiction of the court to entertain counts 1 and 2 of the Charge on the ground that the counts contain, as one of their ingredients, the issue of award of contract for which the Federal High Court has no jurisdiction to receive evidence in proof thereof. After listening to the arguments of counsel the learned trial Judge decided to defer the ruling on the preliminary objection to be considered along with the substantive issue at the time of delivery of judgment. The appellant was dissatisfied with the decision and appealed against it via a notice of appeal dated the 27th day of April, 2016 which was filed on 29th day of April, 2016. The Court of Appeal, Abuja Division suo motu struck out the appeal on 10th May, 2017 without hearing the address of the parties. The lower court held that the appeal is an interlocutory decision of the trial court on exercise of discretion, the grounds of which are at best grounds of mixed law and fact for which leave to appeal before the notice is filed and since no leave was obtained before filing, the appeal is incompetent. The Court further held that if the appeal is competent, the Federal High Court has jurisdiction over money laundering offences and there was nothing wrong in the trial court considering the preliminary objection with the substantive issues at the delivery of judgment as the law allows applications to be taken along with the substantive case. The appellant being dissatisfied with the ruling has further appealed to the Supreme Court.

Held: *(Unanimously dismissing the appeal)*

1. *Preliminary objection cannot stop court with proceeding with substantive trial.*
This appeal is most unnecessary as it seeks to question the exercise of discretion by the learned trial Judge who decided to deal with the preliminary objection alongside the substantive case which charged the appellant and the 2nd respondent (who was 1st accused) with the offence of money laundering. After the no case submission was overruled, the appellant and the 2nd respondent entered their defence by calling DW1. As shown in the record the matter was adjourned for cross examination by 2nd defendant's counsel and instead of proceeding with the cross-examination on the adjourned date, the 2nd defendant (now appellant) filed the preliminary objection challenging the Court's jurisdiction to entertain counts 1 and 2 of the charge. I totally agree with the reply given by learned counsel for the 1st respondent to the effect that the application could not stop the court from proceeding with the substantive trial since Section 396(2) of the Administration of Criminal Justice Act, 2015 allows for a consideration of any objection to be done at the time of delivery of judgment in the substantive case. (Pp 179–180 Paras F–A)

2. *The nature and purport of S.396(2) of ACJA*
The section provides:

“396(2)After the plea has been taken, the defendant may raise any objection to the validity of the charge or the information at any time before judgment provided that such objection shall only be considered along with the substantive issues and a ruling thereon made at the time of delivery of judgment”.

This provision allows for speedy trial of cases and is meant to obviate the difficulties often encountered by trial Judges who are most often bogged down by interlocutory appeals filed by defence counsel in order to stultify proceedings and if possible truncate trials of accused persons. (P 180 Paras B – E)

3. *Import of S.396 (2) ACJA 2015*

The lower court upheld the contention of the prosecutor, the respondent thereat, that the appellant needed to have first sought and obtained leave before filing the interlocutory appeal challenging the exercise by the trial court of its discretion to defer ruling on the apparently mischievous application designed merely to slow the pace of the trial. The lower court had correctly ruled that the interlocutory appeal was incompetent and struck it out. On the merits, the lower court further held that there was nothing wrong in the trial court considering the preliminary objection with the substantive issues in the trial in the final judgment of the trial court. This further appeal, completely unnecessary and frivolous, is a gross abuse of court's process in view of the unambiguous provisions of Section 396(2) of the Administration of Criminal Justice Act, 2015. The learned Senior counsel for the appellant should have been more circumspect in not only associating himself with the appeal in the first place but pursuing it further to the apex court.

For the records, Section 396(2) of ACJA, 2015 provides:

After the plea has been taken, the defendant may raise any objection to the validity of the charge or the information at any time before judgment *provided that any such objection shall only be considered along with the substantive issues and ruling thereon made at the delivery of judgment.*

The proviso to Section 396(2) ACJA offers statutory backing justifying the stance of the trial court. In my firm view, the trial court and Court of Appeal were right. The misconception of the appellant's counsel in this appeal is conspicuous. The course embarked upon by the appellant does not seem intended to further the course of justice, particularly speedy trial that Section 396(2) ACJA and Section 36(1) of the Constitution are all about.

(P 183 Paras A–H)

4. *The case does not involve breach of contract*

Learned Senior counsel argued rather forcefully that the court below was in error when it held that a trial Judge is free to adopt any method that suited him in the determination of an application challenging the jurisdiction of the court since the Supreme Court has laid down the principle that where the issue of jurisdiction is raised it must be decided upon first before the court can proceed. The submission by learned senior counsel that the issue of jurisdiction is involved and so must be resolved first is not quite true. The case before the court did not involve a dispute over breach of contract so as to bring the matter under the purview of the proviso to Section 251(1) of the Constitution of the Federal Republic of Nigeria 1999 (as amended) which stipulates that:

“Provided that nothing in the provisions of paragraphs (p), (q) and (r) of this subsection shall prevent a person from seeking redress against the Federal Government or any of its agencies in an action for damages, injunction or specific performance where the action is based on any enactment, law or equity”.

(Pp 180–181 Paras E–A)

5. *A ground of appeal on exercise of discretion must be by leave*

The lower court was right when it found that the decision of the trial court is a discretionary one and an appeal querying an interlocutory decision on exercise of discretion must be by leave which was not sought before it was filed notwithstanding the fact that it took the point suo motu without inviting counsel to address it on the point. No miscarriage of justice has been occasioned by this action of resolving the issue suo motu. The appeal is incompetent and liable to be struck out. There is no merit in this appeal and it is accordingly dismissed. (P

181 Paras A–C)

6. *A ground of appeal on discretion of court requires leave*

Surely, the lower court was right in its decision that the trial court's decision was a discretionary one. It has long been settled that any ground of appeal which challenges an interlocutory decision of a court predicated on exercise of discretion is, at best, a ground of mixed law and fact, *FBN Plc. vs. Abraham* (2008) 18 NWLR (Pt. 1118) 172; *Williams vs. Mokwe* [2005] 14 NWLR (Pt. 945) 249.

Such a ground, no doubt, requires leave; hence, failure to obtain leave in such circumstances renders any such appeal incompetent, *Nalsa and Team Associates vs. NNPC* [1991] 8 NWLR (pt. 212) 652; *S.P.D.C. (Nig) Ltd vs. Katad (Nig) Ltd* [2006] 1 NWLR (Pt. 960) 198; *Alamiyeseigha vs. C.J.N* [2005] 1 NWLR (pt. 906) 60. The appeal would, therefore, be liable to be struck out, *Din vs. A.-G. Federation* [1988] 4 NWLR (Pt. 87) 147; *Adamu vs. Ikharo* [1988] 4 NWLR (Pt. 89) 474; *A-G. Oyo State vs. Fairlakes Hotels Ltd.* [1988] 5 NWLR (pt. 92) 1; *Odekilekun vs. Hassan* [1997] 12 NWLR (pt. 531) 56; *N.E.R.D.C. vs. Gonze (Nig.) Ltd.* [2000] 9 NWLR (Pt. 673) 532; *UBN Plc vs. Sogunro* [2006] 16 NWLR (pt. 1006) 504; *Anachebe vs. Ijeoma* [2014] 14 NWLR (pt. 1426) 168; *Allanah and Ors vs. Kpolokwu and Ors* (2016) LPELR – 40724 (SC) 34; C-F. (Pp 181–182 Paras G–D)

Per Akaahs (JSC):

“The appeal is a storm in a tea cup. Learned senior counsel should expend his energies and knowledge of the law in ensuring the orderly development of society through strict adherence to the rule of law and where a person or company has been accused of an infraction of the law, the duty that the senior counsel owes by the privileges bestowed on him is to help the accused person/company to clear their names through due legal process and not seek to create the impression that his duty is to erect road blocks to frustrate justice from running its course. (P p 181 Paras C–E)

Representation

Chief Tochukwu Onwugbufor (SAN) for the Appellant. Appears with Ogochukwu Onwugbufor.

Sylvanus Tahir (Esq.) with Messrs Ben Ubi, Richard Dauda, Funke Durojaiye (Esq.) and Aisha Ibrahim (Esq.) for 1st Respondent.

Emeka Etiaba (SAN) with Joy Etiaba (Esq.) for 2nd Respondent.

BAYANG AKA’AHS. (JSC) (Delivering the Lead Judgment): The appellant and 2nd respondent were arraigned before the Federal High Court sitting in Abuja in Charge No. FHC/ABJ/CR/05/2016 for the offences of Money Laundering contrary to sections 1, 15(2)(d)(6) and 17(b) of the Money Laundering (Prohibition) Act 2011 (as amended). The case proceeded to trial and the prosecution called eight witnesses who were cross-examined by the defence before closing its case. Both the appellant and the 2nd respondent made a no case submission which was dismissed by the trial court and they commenced their defence before filing the preliminary objection challenging the jurisdiction of the court to entertain counts 1 and 2 of the Charge on the ground that the counts contain, as one of their ingredients, the issue of award of contract for which the Federal High Court has no jurisdiction to receive evidence in proof thereof. After listening to the arguments of counsel the learned trial Judge decided to defer the ruling on the preliminary objection to be considered along with the substantive issue at the time of delivery of judgment. The appellant was dissatisfied with the decision and appealed against it via a notice of appeal dated the 27 day of April, 2016 which was filed on 29th day of April, 2016. The Court of Appeal, Abuja Division suo motu struck out the appeal on 10th May, 2017 without hearing the address of the parties. The lower court held that the appeal is an interlocutory decision of the trial court on exercise of discretion, the grounds of which are at best grounds of mixed law and fact for which leave to appeal before the notice is filed and since no leave was obtained before filing, the appeal is incompetent. The Court further held that if the appeal is competent, the Federal High Court has jurisdiction over money laundering offences and there was nothing wrong in the trial court considering the preliminary objection with the substantive issues at the delivery of judgment as the law allows applications to be taken along with the substantive case.

Chief Tochukwu Onwugbufor SAN appearing for the appellant donated the following five issues for determination of the appeal viz:

- 3.01 Whether the court below was right in holding that a Judge is free to adopt any method that suited him in the determination of the preliminary objection on jurisdiction including deferring the ruling on the preliminary objection on jurisdiction to be considered along with the substantive issues and that such decision to defer the ruling did not occasion any injustice to the**

appellant as the appellant has not shown any injury suffered by deferring the matter.

- 3.02 Whether the court below was right in striking out the appeal on the ground that the grounds of appeal question an interlocutory decision on the exercise of discretion of the trial court which are at best grounds of mixed law and fact which require leave and as no leave was sought and obtained, the grounds of appeal are incompetent.**
- 3.03 Whether the appellant has not been denied its right of fair hearing, thus occasioning a miscarriage of justice, when the court below raised, suo motu, the issue of the incompetence of the grounds of appeal, decided on it and indeed struck out the appeal based on that issue without affording the parties including the appellant the opportunity to address it on that issue.**
- 3.04 Whether the court below has not misapprehended the charge and issue before it when it held that the Federal High Court has jurisdiction to try the appellant of the offences of Money Laundering when the issue before the court below is whether the trial court has jurisdiction to receive evidence in proof of simple contract award which is an ingredient of counts 1 and 2 of the charge which the prosecution must prove to sustain the counts.**
- 3.05 Whether the court below was right when it held that there is nothing wrong in considering the preliminary objection with the substantive issue at the delivery of judgment as the law allows applications to be taken along with the substantive case.**

On receipt of the respondent's brief he filed the appellant's reply brief on 17th October, 2017 and it was deemed filed on 18th October, 2017, the day oral arguments of the appeal were taken.

The 1st respondent was represented by Sylvanus Tahir Esq. who formulated three issues for determination as follows:

- 1. Whether the learned Justices of the Court of Appeal were not correct/right in upholding the ruling of the trial court to the effect**

A that the Appellant's preliminary objection to the jurisdiction of the trial court to try counts 1 and 2 of the charge is preserved and will be considered along with the substantive issues and ruling delivered at the time of delivery of the judgment and doing so did not occasion any injustice to the appellant. Relates to grounds 1 and 5.

B

C 2. Whether the learned Justices of the Court of Appeal were not at liberty to raise *suo motu* a point of law, to wit: the issue of the incompetence of the appellant's appeal, which touched on the court's jurisdiction to determine the appeal and though, parties were not heard, same fell within the exception on the duty on court to hear parties on issues raised *suo motu* and in this case, it did not amount to a denial of fair hearing to either of the parties. Relates to grounds 2 and 3.

D

E 3. Whether the learned Justices of the Court of Appeal were not correct/right in holding that the trial court had the requisite jurisdiction under section 20 of the Money Laundering (Prohibition) Act, 2011 to try counts 1 and 2 of the charge, preferred against the Appellant, being offences of money laundering contrary to sections 15(2)(d) and 15(2)(b) respectively of the Money Laundering (Prohibition) Act, 2011 (as amended) in 2012. Relates to ground 4.

F The 2nd respondent did not file any brief since he is standing trial along with the appellant for the offences charged.

G This appeal is most unnecessary as it seeks to question the exercise of discretion by the learned trial Judge who decided to deal with the preliminary objection alongside the substantive case which charged the appellant and the 2nd respondent (who was 1st accused) with the offence of money laundering. After the no case submission was overruled, the appellant and the 2nd respondent entered their defence by calling DW1. As shown in the record the matter was adjourned for cross examination by 2nd defendant's counsel and instead of proceeding with the cross-examination on the adjourned date, the

H 2nd defendant (now appellant) filed the preliminary objection challenging the Court's jurisdiction to entertain counts 1 and 2 of the charge. I totally agree with the reply given by learned counsel for the 1st respondent to the effect that the application could not stop the court from proceeding with the substantive trial since section 396(2) of the

I

A Administration of Criminal Justice Act, 2015 allows for a consideration of any objection to be done at the time of delivery of judgment in the substantive case. The section provides:

B **“396(2) After the plea has been taken, the defendant may raise any objection to the validity of the charge or the information at any time before judgment provided that such objection shall only be considered along with the substantive issues and a ruling thereon made at the time of delivery of judgment”.**

C

This provision allows for speedy trial of cases and is meant to obviate the difficulties often encountered by trial Judges who are most often bogged down by interlocutory appeals filed by defence counsel in order to stultify proceedings and if possible truncate trials of accused persons.

D Learned Senior counsel argued rather forcefully that the Court below was in error when it held that a trial Judge is free to adopt any method that suited him in the determination of an application challenging the jurisdiction of the court since the Supreme Court has laid down the principle that where the issue of jurisdiction is raised it must be decided upon first before the court can proceed. The submission by learned Senior counsel that the issue of jurisdiction is involved and so must be resolved first is not quite true. The case before the Court did not involve a dispute over breach of contract so as to bring the matter under the purview of the proviso to section 251(1) of the Constitution of the Federal Republic of Nigeria 1999 (as amended) which stipulates that:

E

F

G **“Provided that nothing in the provisions of paragraphs (p), (q) and (r) of this subsection shall prevent a person from seeking redress against the Federal Government or any of its agencies in an action for damages, injunction or specific performance where the action is based on any enactment, law or equity”.**

H The lower court was right when it found that the decision of the trial court is a discretionary one and an appeal querying an interlocutory decision on exercise of discretion must be by leave which was not sought before it was filed notwithstanding the fact that it took the point **suo motu** without inviting counsel to address it on the point. No miscarriage of justice has been occasioned by this action of resolving the issue **suo motu**.

I The appeal is incompetent and liable to be struck out. There is no merit in this

A appeal and it is accordingly dismissed.

The appeal is a storm in a tea cup. Learned senior counsel should expend his energies and knowledge of the law in ensuring the orderly development of society through strict adherence to the rule of law and where a person or company has been accused of an infraction of the law, the duty that the senior counsel owes by the privileges bestowed on him is to help the accused person/company to clear their names through due legal process and not seek to create the impression that his duty is to erect road blocks to frustrate justice from running its course.

B

The case is remitted to the Federal High Court sitting in Abuja for a speedy completion of the trial in the substantive case.

C

K. B. AKAHHS
Justice, Supreme Court

D **CENTUS NWEZE, (JSC):** My Lord, Aka'ahs, JSC, obliged me with the draft of the leading judgment just delivered now. I agree with His Lordship that this appeal is, totally, devoid of merit.

E

Surely, the lower court was right in its decision that the trial court's decision was a discretionary one. It has long been settled that any ground of appeal which challenges an interlocutory decision of a court predicated on exercise of discretion is, at best, a ground of mixed law and fact, *FBN Plc. vs. Abraham* (2008) 18 NWLR (Pt. 1118) 172; *Williams vs. Mokwe* [2005] 14 NWLR (Pt. 945) 249.

F

Such a ground, no doubt, requires leave; hence, failure to obtain leave in such circumstances renders any such appeal incompetent, **Nalsa and Team Associates vs. NNPC [1991] 8 NWLR (pt. 212) 652; S.P.D.C. (Nig) Ltd vs. Katad (Nig) Ltd [2006] 1 NWLR (Pt. 960) 198; Alamieyeseigha vs. C.J.N [2005] 1 NWLR (pt. 900) 60.** The appeal would, therefore, be liable to be struck out, **Din vs. A.-G. Federation [1988] 4 NWLR (Pt. 87) 147; Adamu vs. Ikharo [1988] 4 NWLR (Pt. 89) 474; A-G. Oyo State vs. Fairlakes Hotels Ltd. [1988] 5 NWLR (pt. 92) 1; Odekilekun vs. Hassan [1997] 12 NWLR (pt. 531) 56; N.E.R.D.C. vs. Gonze (Nig.) Ltd. [2000] 9 NWLR (Pt. 673) 532; UBN Plc vs. Songuro [2006] 16 NWLR (pt. 1006) 504; Anaechibe vs. Ijeoma [2014] 14 NWLR (pt. 1426) 168; Allanah and Ors vs. Kpolokwu and Ors (2016) LPELR – 40724 (SC) 34; C-F.**

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It is for these, and the more detailed, reasons in the leading judgment that I, too, hold the view that this appeal is unmeritorious. I abide by the consequential orders in the leading judgment.

Chima Centus Nweze
Justice, Supreme Court

I

A EJEMBI EKO, (JSC): The trial court, in exercise of its undoubted discretion, had decided to deal with the preliminary objection. In the final judgment the Preliminary objection was brought by the appellant herein through its counsel, Chief Tochukwu Onwugbufor, SAN, after the trial court had dismissed its no case submission. The defence had commenced before the notice of preliminary objection, challenging the jurisdiction, was raised. The trial court, in its wisdom, thought it wiser and more expeditious that the points raised in the preliminary objection should be considered in the final judgment. It took into consideration the point in the proceedings at which the preliminary was raised. Purporting to be irked by the trial court's exercise of discretion to defer ruling on the preliminary objection, the appellant lodged his appeal against the interlocutory decision on an issue that is purely discretionary. The appellant did not seek leave to lodge this interlocutory appeal to the lower court.

The lower court upheld the contention of the prosecutor, the respondent thereat, that the appellant needed to have first sought and obtained leave before filing the interlocutory appeal challenging the exercise by the trial court of its discretion to defer ruling on the apparently mischievous application designed merely to slow the pace of the trial. The lower court had correctly ruled that the interlocutory appeal was incompetent and struck it out. On the merits, the lower court further held that there was nothing wrong in the trial court considering the preliminary objection with the substantive issues in the trial in the final judgment of the trial court. This further appeal, completely unnecessary and frivolous, is a gross abuse of court's process in view of the unambiguous provisions of Section 396(2) of the Administration of Criminal Justice Act, 2015. The learned Senior counsel for the appellant should have been more circumspect in not only associating himself with the appeal in the first place but pursuing it further to the apex court.

For the records, Section 396(2) of ACJA, 2015 provides:

G **After the plea has been taken, the defendant may raise any objection to the validity of the charge or the information at any time before judgment provided that any such objection shall only be considered along with the substantive issues and ruling thereon made at the delivery of judgment.**

H The proviso to Section 396(2) ACJA offers statutory backing justifying the stance of the trial court. In my firm view, the trial court and Court of Appeal were right. The misconception of the appellant's counsel in this appeal is conspicuous. The course embarked upon by the appellant does not seem intended to further the course of justice, particularly speedy trial that Section 396(2) ACJA and Section 36(1) of the Constitution

A are all about.

My learned brother, K.B. AKA' AHS, **JSC**, had availed me the draft of the lead Judgment in this appeal. I hereby adopt it, including the orders made therein. The appeal is frivolous and it is hereby dismissed in its entirety. The case, as ordered in the lead judgment, is remitted to the trial court for continuation and conclusion, and shall be

B given accelerated hearing.

Ejembi Eko,
Justice, Supreme Court

C DAUDA BAGE, (JSC): I have had the benefit of reading in draft the lead Judgment of my learned brother Kumai Bayang Akaahs, JSC, just delivered. I agree entirely with the reasoning and conclusion reached. I do not have anything useful to add. There is no merit in this appeal and it's accordingly dismissed. I abide by all the orders contained in the lead judgment.

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

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1. **E. A. MALARI – DECEASED**
2. **AKOMA DUDU**
3. **TSUKU MONE**
4. **OMAGBEMI MAGI**
5. **SAMSON JEDE**
6. **PAUL EDEDE**
7. **ALFRED BOMELE**
8. **OLARAJA EVENUBERU EMAMI**
9. **P. A. AGBEKUKU MONE**
10. **SCOTT LORI**
11. **STEPHEN OJULU**

*(For themselves and on behalf of
Ubeji Community in Warri South
Local Government Area)*

12. **BENSON OLUWE**
13. **JAMES KAKA**
14. **MODE AKOMA**
15. **EMMANUEL AJUYAH**
16. **ORITSEGBUBEMI TSUKU**
17. **EYESAN ONUWAJE**
18. **ANDREW JOLOMI**
19. **FELIX EREMUSELE**
20. **VICTOR OGBITSE**

*(Joined by Order of Court, made
on 3/06/2003)*

AND

DR. RICHMOND SISAN LEIGH

SC.113/2013

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

FRIDAY 12TH JANUARY, 2018

BEFORE THEIR LORDSHIPS

**IBRAHIM TANKO MUHAMMAD
OLUKAYODE ARIWOOLA**

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

**KUMAI BAYANG AKA' AHS
AMINA ADAMU AUGIE
PAUL ADAMU GALINJE**

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

APPEAL: Extension of time to appeal – Whether long delay will not defeat an application for extension of time – Onus on applicant to justify the long delay – Relevance of affidavit evidence thereto.

APPEAL: Ground of appeal – Nature of – Whether a ground of appeal complaining of lack of fair hearing is not similar to a ground complaining of lack of jurisdiction of a trial court.

APPEAL: Time of appeal to the Supreme Court – S.27(2) of the Supreme Court Act, 2004 – Imperatives.

COURT: Application for extension of time – Duties of court thereto – How discharged.

COURT: Supreme Court – Nature of Final appellate Court of Federal Republic of Nigeria – S.235 of the Constitution of Federal Republic of Nigeria 1999 (as amended)

COURT: Supreme Court – Power to extend time – Relevant provisions relating thereto – Section 27 Supreme Court Act 2004 – Or. 2 Rule 31 Supreme Court Rules – Relevant considerations thereof.

LEGAL PRACTITIONERS: Application for extension of time – Reason for delay – Illness of counsel – Whether cannot be adduced as a sufficient reason where there are other counsel in the law firm.

LEGAL PRACTITIONERS: Application for extension of time – Reasons for delay – Mistake of counsel – Whether the same as ineptitude or complete ignorance or malfeasance shown by counsel.

PARTIES: Application for extension of time – Cause of delay – Need to be explained in the affidavit evidence.

PARTIES: Application for extension of time – Need for party to comply with all relevant laws and rules – Relevant principles thereof.

PARTIES: Application for extension of time – Requirements – Obligation on party – Necessary documents to be annexed.

PARTIES: Application for extension of time – Where sickness is the cause for delay – Party must adduce convincing affidavit evidence.

PARTIES: Representative action – Indisposition of one of parties representing – Other ones can continue with and perform any assignment carried by the unavailable party.

PRACTICE AND PROCEDURE: Application for extension of time – Conditions stipulated thereof – Or. 2 Rule 31 Supreme Court Rules – Imperatives.

PRACTICE AND PROCEDURE: Application for extension of time to appeal – Proposed grounds of appeal – Nature and characteristics that will sustain application.

PRACTICE AND PROCEDURE: Application for extension of time to appeal – Conditions necessary – Whether conditions must co-exist before an application is granted – Relevant considerations thereof.

PRACTICE AND PROCEDURE: Proof – Where facts alleged are not specifically denied – Presumption thereof.

Issues for Determination

- 1. Whether the appellants/applicants have placed sufficient/material evidence via their affidavit evidence to warrant this Hon. Court to exercise its discretion in their favour.**
- 2. Whether the appellants/applicants proposed grounds of appeal *PRIMA FACIE* show good cause why the appeal should be heard.**

Facts of the Matter

By a motion on notice filed on the 25th day of May 2017, the applicants ask the Supreme Court for the grant of the following reliefs:

- 1) **AN ORDER of this Hon. Court extending the time within which the appellants/applicants may seek leave to appeal on grounds of facts and/or mixed law and facts against the interlocutory ruling of the Court of Appeal, Benin Division delivered on the 13th February, 2012 in Appeal No. CA/B/23m/2010. E. A. Malari & 19 Ors vs. Dr. Richmond Sisan Leigh which ruling dismissed the appellants/applicants motion which seeks extension of time within which they may appeal against the judgment of the trial High Court delivered on the 5th May, 2006.**
- 2) **AN ORDER of this Hon. Court granting appellants/_applicants leave to appeal on grounds of facts and/or mixed law and facts against the interlocutory ruling of the Court of Appeal, Benin Division delivered on 13th February, 2012 in Appeal No. CA/B/23m/2010 dismissing the appellants' application for extension of time within which they may appeal.**
- 3) **AN ORDER of this Hon. Court extending the time within which the appellants/applicants may appeal against the ruling of the Court of Appeal, Benin Division delivered on 13th February, 2012 in Appeal No. CA/B/23m/2010 dismissing the appellants application for extension of time within which they may appeal.**
- 4) **AN ORDER striking out the names of E. A. Malari (Deceased), Olaraja Evenuberu Emami (Deceased) and Pa Agbekuku Mone (Deceased) who are 1st, 8th and 9th appellants/applicants respectively in this appeal.**

In moving the motion, learned counsel for the applicants, Mr. Erhabor stated that the motion is predicated on six (6) grounds and supported by a thirty (30) paragraphs affidavit, sworn to by one Chukwudi Nzediegwu. He also filed several further or further and better affidavits in support. He attached along with the affidavits several exhibits. Learned counsel filed a list of additional authorities. He filed a written (brief) address in support of the motion. He adopted

and relied on all the paragraphs of the affidavits in support and the written address. He urged the Supreme Court to grant the motion.

Held: *(Unanimously dismissing the application)*

1. *Power of the Supreme Court to extend time*

It is an established practice in the Supreme Court, for quite long, supported by law and Rules of Practice, for the court to extend or enlarge time for the doing of anything. Section 27 of the Supreme Court Act, 1960, as amended, now contained in Caption of the Laws of the Federation, 2004, provides:

“The Supreme Court may extend the period prescribed in Subsection(2) of this Section.”

Subsection (2) of Section 27 is the Section that stipulates for the prescribed periods for giving notice of appeal or notice of application for leave to appeal (the latter part thereof being defined by the Supreme Court Rules of 1985 (as amended) to amount to an appeal. Further, Order 2 Rule 31(1) of the Supreme Court Rules, stipulates:

“The court may enlarge the time provided by these rules for the doing of anything to which these Rules apply...” *(Pp 211 – 212 Paras F–A).*

2. *Supreme Court is the final appellate court of the country*

Supreme Court is essentially the final appellate court of the Federal Republic of Nigeria from where no further appeal(s) lies to any court or body. I feel comforted by the provision of Section 235 of the Constitution of the Federal Republic of Nigeria, 1999, as amended.

“Without prejudice to the powers of the President or of the Governor of a state with respect to prerogative of mercy, *no appeal shall lie to any other body or person from any determination of the Supreme Court.*” *(Italics for emphasis)*

Civil and Criminal appeals go to the Supreme Court from the decisions of Court of Appeal and or, other tribunals. Appeals in civil or criminal matters may come in two forms: (a) interlocutory and or (b) final decisions. In each of the two forms, appeals on civil matters have determined periods within which to be initiated to the Supreme Court. In criminal matters too, time within which to appeal has been provided. (P 212 Paras B–F).

3. *Time within which to appeal to the Supreme Court.*
The law and Rules (set out above) are very clear on that. Section 27 of the Act provides:

“(2) The periods prescribed for giving of *Notice of Appeal* or *Notice of Application for leave to appeal* are:

- a) **in an appeal in a *civil case*, *FOURTEEN DAYS* in an appeal against an *INTERLOCUTORY decision* and *THREE MONTHS* in an appeal against a *FINAL* decision.**
 b) **in an appeal in a *criminal case*, *THIRTY DAYS* from the date of the decision appealed against.” (underlining and italics for emphasis)**

I do not find it necessary to go into the academics of which appeal is as of right and or, which should be initiated by leave of court. The Constitution is very clear on that (Section 233(2) thereof).

(Pp 212–213 Paras F–B).

4. *Narrative of facts showing undue delay*

Both learned counsel for the respective parties agreed that the Benin Division of the Court of Appeal (court below herein), delivered a ruling in Appeal No. CA/B/23M/2010, between E. A. Malari & 19 Ors vs. Dr. Richmond Sisan Leigh, on the 13th day of February, 2012 in which the court below dismissed the applicants application for extension of time within which to apply for leave to appeal against the judgment of the Delta State High Court, holden at Warri (trial court), in suit No. W/18/2001 delivered on the 5th day of May, 2006.

In the narratives, according to the learned counsel for the applicants, the appellants/applicants were not satisfied with the trial court's judgment of 5/5/2006 in the suit referred to above. They subsequently, applied to the trial

court on 7/5/08 (a little over two years from the date of judgment) to set aside its judgment on the 11th of June, 2009, the trial court refused to set aside its judgment. Dissatisfied with the ruling of the trial court of 11/6/2009, the applicants appealed to the court below vide a notice of appeal dated 25/6/2009. On the 5/2/2010, the appellants/applicants filed a motion before the court below seeking for extension of time within which they may appeal against the judgment of the trial court of 5/5/2006. On the 13/2/2012, the courts below delivered its ruling dismissing the appellants/applicants' application for extension of time within which to appeal. (P 213 Paras B–G).

Per I.T Muhammad (JSC):

“My lords, above, among others, are salient facts presented by both sides to this application. Ruling appealed against was delivered by the court below on the 13/2/2012. This application was filed in this court on the 25/5/2017. There is certainly a delay of almost five years, three months and twelve days. Although length of time between a judgment/ruling delivered and a date an appeal was filed against it may not always be a very strong factor against grant of extension of time to appeal, what is upper most, however, is the reason or reasons given by an applicant to justify the delay occasioned. This court can only be convinced through the affidavit evidence placed by the applicants that there are good and substantial reasons which occasioned the delay”. (P 216 Paras E–G).

5. *Party who applies for extension of time must comply with the relevant law and rules. It is now beyond any peradventure in the legal circle in this country that for the grant of an application for enlargement/extension of time within which to appeal or within which (where necessary) to seek leave to appeal and its (the latter's) other concomitant/ complimentary reliefs i.e. for leave to appeal and for extension of time within which to appeal the courts especially this court, have/has made it abundantly clear that the applicant must comply with the requirements of law, rules of court and practice. In other words:*
 - (a) **Where a person who intends to appeal has not, for some reasons, filed his appeal within the time prescribed by law/Rules of court then he has to seek for extension of time**

to comply with the stipulations of those Laws/Rules of court.

- (b) Where an appeal is by Constitutional provision, to be initiated by leave of court and the time within which to seek for that leave has elapsed, then a person has to apply for:**
- i. Extension of time within which to seek leave to appeal.**
 - ii. leave to appeal and;**
 - iii. extension of time within which to appeal/file a notice of appeal**

Reliefs (b)(i) - (iii) are what are generally referred to as (“the three legged prayers”, “tripod prayers “or” “trinity prayers”).
(Pp 238 – 239 Paras D – B).

Per I.T Muhammad (JSC):

“In each of the above instances, the provisions of the law/rules of court, to be sent out anon, must be complied with. These are:

(A) Section 27(2) of the Supreme Court Act which provides as follows:

‘27(2) The periods prescribed for giving of notice of appeal or notice of application for leave to appeal are’

- (a) In an appeal in a civil case, *fourteen days* in an appeal against an *interlocutory decision* and *three months* in an appeal against a *final decision***
- (b) in an appeal in a criminal case *thirty days* from the date of the decision appealed against.**

- 4. The Supreme Court *may extend* the period prescribed in subsection (2) of this section.” (Underling supplied for emphasis)**

Order 2 Rule 31 of the Supreme Court Rules provides:

“31(1) The court *may* enlarge the period provided by these Rules for doing of anything to which these Rules apply

(2) Every application for an enlargement of time in which to apply or in which to apply for leave to appeal *shall be supported by an affidavit setting forth good and substantial reasons* for the failure to appeal or to apply for leave to appeal within the prescribed period.

There shall be exhibit or annexed to such affidavit.

- a. a copy of the judgment from which it is intended to appeal;**
- b. a copy of other proceedings necessary to support the complaints against the judgment**
- c. grounds of appeal which **PRIMA FACIE** show good cause why the appeal should be heard.” (underlining for emphasis)**

(Pp 239 – 240 Paras B – D)

6. *Time for appealing*

Thus, by the above provisions, if there shall be any appeal on:

- i. Final decision of the Court of Appeal in a civil matter to this court, that appeal shall (must) be filed by the prospective appellant within three (3) months from the date of decision;**
- ii. an interlocutory decision of the Court of Appeal in a civil matter to this court that appeal shall (must) be filed by the prospective appellant within fourteen days from the date of the decision appealed against.**
- iii. in an appeal from the decision of the Court of Appeal in criminal matters (cases) to this court, the prospective appellant shall (must) file his appeal within a period of thirty days from the date of the decision by Court of Appeal.**

The applicants in this motion say that their intended appeal is a civil one and is from a final decision/ruling of the Court of Appeal (page 129, paragraphs 4.01 of the applicant's address). The appeal is caught up by the last lab of Section 27(2)(a) of the Supreme Court Act. That is, that appeal ought to have been filed within three months from the date of Court of Appeal's ruling of 13th February, 2012. Further, the learned counsel for the applicants stated that the grounds of appeal do not involve questions of law alone and this necessitates applicants' resort to section 233(3) of the Constitution (page 129, 4.02 page 130 of learned counsel written address).

(Pp 240 – 241 Paras E – C)

7. *Conditions stipulated for an application for extension of time*

The conditions stipulated by Order 2 Rule 31 of the Rules are that:

- (a) **the applicant(s) shall (must) furnish the court with affidavit evidence which sets out *good and substantial* reasons for the failure to appeal or to apply for leave to appeal within the prescribed period as per Order 2 Rule 31(2) of the rules of this court;**
- (b) **the appellant(s) shall (must) show that he has *grounds of appeal* which *PRIMA FACIE* show *good cause* why the appeal should be heard. In other words, he has arguable grounds of appeal. *(P 241 Paras C – F)*.**

8. *The duties of court in an application for extension of time*

It is then the duty of the court to examine, evaluate or assess the affidavit evidence and any necessary exhibits such as the notice of appeal which contains the proposed grounds of appeal attached to affidavit in support with a view to taking a decision on whether to grant or refuse the reliefs sought by the applicant(s). This necessarily involves exercise of judicial and judicious discretion of the court. See RE-Adewunmi & Ors (1988) 3 NWLR (Pt. 82) 483; Co-operative & Commerce Bank (Nig.) Ltd. vs. Emeka Ogwuru (1993) 3 NWLR (Pt. 284) 630.

The reasons given by the applicants in their affidavit evidence can be

broadly classified as follows:

- i. sickness of 2nd applicant, Mr. Akoma Dudu and of an erstwhile counsel Mr. Don O. Ogho who was handling the matter for the applicants.**
- ii. inadvertence, error or mistake of counsel and;**
- iii. other reasons considered (perceived) by the applicants to be good and substantial i.e. *good* and *substantial* reasons.**

(Pp 241 – 242 Paras F – B)

Per I. T. Muhammad (JSC):

“On the first condition, it is my belief, my lords, that even the ordinary man on the street knows what is good. In ordinary usage, it connotes a high standard or quality which is opposite to bad or poor. Anything good in law is something which is valid, sufficient, effectual, unobjectionable, sound and or responsible. Thus, an application for extension of time within which to appeal or within which to seek leave to appeal is not granted as a matter of course. To be entitled to the indulgence of the court, an applicant(s) must advance cogent, credible and convincing reasons for the delay. See *Bank of Baroda vs. Mercantile Bank (1987) 3 NWLR (Pt.60) 233. (P 242 Paras C–E).*

9. *Party needs to explain in his affidavit his delay*

Thus, the first time the applicants approached a counsel (E. T. Edema, Esq.,) was, presumably, in the month of February, 2008, or to be more precise on the 18th of February, 2008. This is because the date of briefing the learned counsel (although it was said to be “immediately” after becoming aware of the judgment) has been shrouded in mystery by the applicants. It is however very clear that there was a period of over two years, not from the date of delivery of the judgment by the trial court, but from the date applicants claimed to become aware of the judgment. There was certainly non-chalance and inaptitude from the applicants. There was tardiness. There is no explanation by the applicants in their affidavit evidence on this inaptitude and tardiness. *(P 245 Paras C–E).*

10. *The issue of sickness was not proved*

On the sickness of the 2nd applicant, Mr. Akoma Dudu, it is to be noted that it was deposed to in the affidavit evidence, by the applicants paragraph 8 that he was sick and was referred by his doctor on the 12th of November, 2011 to the University of Benin Teaching Hospital, Benin City. There is nothing to support that fact or assertion. It is my belief that in an age of scientific and technological developments, and where transactions, especially relating to human health are conducted in most cases literary, it is difficult for anybody to believe that no referral letter, certificate or document is issued by the doctor or Medical Officer who referred the patient to another hospital/doctor for further medical attention. (P 245 Paras F–H).

11. *Facts not specifically denied are deemed accepted*

My lords, I took time to cross-check all the further affidavits in support filed by the applicants, I could not locate specific denials on the above facts averred to by the respondent. In law such averments are taken to be correct, valid and admissible. See: Adesanoye vs. Adewole (2000) 9 NWLR (Pt. 671) 127; Orianzi vs. A-G Rivers State & Ors (2017) 271 LRNC 150. (P 247 Paras E–F).

Per I. T. Muhammad (JSC)

“Parties to a civil matter should know that where they prosecute or defend a matter in a representative capacity, as is the case with the applicants, they have every right to assign anyone of them to step into the shoes of the one who handles their litigation, where, if exigencies demand, for instance, sickness or other debilitating factors, the latter is unable to proceed with the assignment given to him by those he represents. Equally, it is foolhardy for a counsel representing a party, where it is shown that he has other qualified counsel in his firm to claim that the matter he is handling in court cannot go on because he is sick. It is even more dangerous where a party or litigant insists that only a particular counsel from a law firm that must handle his matter in court although he has the constitutional right to have a counsel of his choice. What of it, God forbids, that counsel dies or is permanently indisposed? This, I believe is one of the few instances where a party must take a quick, effective and

spontaneous decision in relation to the way and bear the consequence of the inaptitude, negligence or any act of God befalling his chosen counsel. Mistake, inadvertence and sickness of counsel should always be distinguishable from ineptitude, complete ignorance or malfeasance exhibited by counsel.

(Pp 247 – 248 Paras F – B).

12. *An arguable ground of appeal does not mean a ground that will succeed at the end of the appeal.*

The second condition of Order 2 R 31 is for the proposed grounds of appeal to be prima facie, arguable, giving such good grounds why the appeal should be heard. It is not the business of the court at this point in time to form an idea on the success of the grounds of appeal or not, but whether prima facie, arguable. See: University of Lagos vs. Olaniyan (supra); Ibodo vs. Enarofia (1980) 5 – 7 SC 42; Obikoya vs. Wema Bank (supra); Egba vs. Onogun (1972) 1 All NLR (Pt. 1) 95; Ojukwu vs. Gov. Lagos State (1985) 2 NWLR (Pt. 10) 806. (P 248 Paras B – D).

Per I. T. Muhammad (JSC):

“My lords, it is trite law that for a proposed ground of appeal to show good cause why the appeal should be heard, it has been held in legion of authorities that such a ground should inter alia:

- (a) raise substantial issue of facts or law for the consideration of the court;**
- (b) cannot just be dismissed with a mere wave of the hand or totally lacking in substance;**
- (c) evoke serious debate about the correctness of the decision of the court below;**
- (d) tax the intellect and reasoning faculties of the appeal judge**
- (e) and not be frivolous.**

See: Obikoya vs. Wema Bank Ltd. (1989) 1 NWLR (Pt. 96) 157; Ibodo vs. Enarofia (1980) 5 – 7 SC 12; University of Lagos vs. Olaniyan (1985) 1 NWLR (Pt. 1) 156; Kotoye vs. Seraki (1995) 5 NWLR (Pt. 395) 256; Yesufu vs. Co-operative Bank Ltd. (1989) 3 NWLR (Pt. 110) 483; Doherty vs. Doherty (1964) 1 All NLR 299; Lamai vs. Orbih (1980) 5 – 7 SC 28. (P...p 249 – 250 Paras D – A).

Per I. T. Muhammad (JSC):

It is alleged in the purported grounds of appeal (particularly (a) thereof) that grounds 1 and 2 of the appellants proposed grounds of appeal in the notice of appeal annexed to the affidavit in support of the motion on notice before the court below questioned the jurisdiction of the trial High Court to entertain the suit. It was further argued that the court below ought to have granted the application as jurisdiction was a strong point in that application as it was never too late to appeal against a judgment given without jurisdiction and as the question of jurisdiction is a constitutional issue which can be raised at any stage of a proceeding even for the first time in the Supreme Court. Of course, that is the law. But is it true that there was an issue of jurisdiction raised before the court below? The proposed grounds of appeal before the court below, speak eloquently and in no uncertain terms in answer to the above question: (P 251 Paras B–E).

13. *Lack of fair hearing is not the same as lack of jurisdiction*

The complaints on the proposed grounds of appeal before the court below, as they appear to me, have nothing to do with jurisdiction of the trial court. They were mainly premised on lack of fair hearing. Although a constitutional issue, lack of fair hearing in a proceeding of a court is not same with issue of jurisdiction. Jurisdiction of a court or tribunal and lack of fair hearing or trial by a court or tribunal, to me, are two different and independent issues, although each may lead to nullity of a decision taken by a court or tribunal which is in contravention of any of the two issues. Thus, issue of jurisdiction as raised by the learned counsel for the applicants is nowhere to be found both in the court below and in this court. The two fundamental requirements for the grant of this application still remain to be satisfied conjunctively, i.e good and substantial reasons for the delay and grounds of appeal which prima facie show good cause why the appeal should be heard. I already have made a finding that there are no substantial reasons to explain away the delay. It is my finding, equally, with the proposed grounds of appeal that they do not appear to me to provide the required arguable grounds of appeal which prima facie give good cause why the appeal should be heard. (P 254 Paras C–H).

14. *Conditions for granting an application for extension of time to appeal must co-exist*
It is the trite position of the law that for an application of this nature to be granted, the two conditions or requirements of the law as espoused above i.e good and substantial reasons which explain away the delay and arguable grounds of appeal which prima facie give good cause why the appeal should be heard must co-exist. There is a plethora of decided authorities among which are: Holman Bros Nig. Ltd. vs. Kigo (Nig.) Ltd (1980) 8 – 11 SC 43; Williams vs. Hope Rising Voluntary Funds Society (1982) 1 – 2 SC 70; University of Lagos vs. Olaniyan (1985) 1 NWLR (Pt. 1) 156; In Re-Adewunmi (1988) 3 NWLR (Pt. 83) 483; Iroegbu vs. Okwordu (1990) 6 NWLR (Pt. 159) 643; Okafor vs. Bendel Newspaper Corporation (1991) 7 NWLR (pt.206) 651; corporation and commerce Bank vs. Ogwuru (1993) 3 NWLR (Pt. 284) 630; Isiaka vs. Ogundimu (2006) 13 NWLR (Pt. 997) 401; E. F. P. Co Ltd vs. NDIC (2007) 9 NWLR (Pt. 1039) 216; Braithwaite vs. Dalhatu (2016) 13 NWLR (Pt. 1528) 32; just to mention a few. (Pp 254–255 Paras H–C).

Per K. B. Akaahs (JSC):

“The applicants were economical with the truth. They have brought this application mala fide as Mr. Malari (now deceased) to their knowledge, had applied to collect the balance of the purchase money which the respondent paid on the land. The application was made over two years after the judgment of the trial court was granted. It is the same judgment which they sought to set aside which was refused that is the subject of this application. The so called issues of jurisdiction contained in the proposed notice of appeal are a complete sham. The whole application is an attempt by the applicants to use the instrumentality of the courts to frustrate the order of the trial court granting an order of specific performance in favour of the respondent to enable him take possession of the land which he legitimately acquired from them and in respect of which they collected his money”. (P 256 Paras B–E).

Per Augie (JSC):

“The applicants did not furnish “good and substantial reasons” for their failure to appeal within the prescribed period; and they failed to show “good cause” why the appeal should be heard in the first place.

The grounds of appeal required in applications of this nature are to show good cause why an appeal should be heard; not why an appeal should be allowed – see *Obikoya vs. Wema Bank Ltd. (1989) 1 NWLR (Pt. 96) 157 at 178*, wherein this court per *Obaseki, JSC*, explained:

The grounds of appeal required to be exhibited are only to show why the appeal should be *heard*. The Rule does not require the grounds to show why the *appeal should be allowed*. Although in both cases, the grounds of appeal should be substantial, the certainty required in the latter case does not necessarily need to be present in the former case. A ground showing good cause why an appeal should be heard is a ground, which raised substantial issues of fact or law for the consideration of the court. It is a ground, which cannot be dismissed with a wave of the hand or totally lacking in substance. It is a ground, which evokes a serious debate as to the correctness of the decision of the court below. It is a ground, which taxes the intellect and reasoning faculties of the appeal judges. It is a ground, which is not frivolous.

In this case, looking at the grounds of appeal filed against the backdrop of what is required, the rationale for refusing this application is clear. (*P 257 Paras A–G*).

Representations

H. G. Erhabor for appellants/applicants with him; D.O: Egho, Esq.
Patrick Oganwu for the respondent.

I. T. MUHAMMAD (JSC) (Delivering the lead judgement): By a motion on notice filed on the 25th day of May 2017, (simply referred to herein as “the motion”) the applicants ask this court for the grant of the following reliefs:

- 1) **AN ORDER of this Hon. Court extending the time within which the appellants/applicants may seek leave to appeal on grounds of facts and/or mixed law and facts against the interlocutory ruling of the Court of Appeal, Benin Division delivered on the 13th February, 2012 in Appeal No. CA/B/23m/2010. E. A. Malari & 19 Ors Vs. Dr. Richmond Sisan Leigh which ruling dismissed the appellants/ applicants motion which seeks extension of time within which they may appeal against the judgment of the trial High Court delivered on the 5th May, 2006.**
- 2) **AN ORDER of this Hon. Court granting appellants/ applicants leave to appeal on grounds of facts and/or mixed law and facts against the interlocutory ruling of the Court of Appeal, Benin Division delivered on 13th February, 2012 in Appeal No. CA/B/23m/2010 dismissing the appellants' application for extension of time within which they may appeal.**
- 3) **AN ORDER of this Hon. Court extending the time within which the appellants/applicants may appeal against the ruling of the Court of Appeal, Benin Division delivered on 13th February, 2012 in Appeal No. CA/B/23m/2010 dismissing the appellants application for extension of time within which they may appeal.**
- 4) **AN ORDER striking out the names of E. A. Malari (Deceased), Olaraja Evenuberu Emami (Deceased) and Pa Agbekuku Mone (Deceased) who are 1st, 8th and 9th appellants/applicants respectively in this appeal.**

In moving the motion, learned counsel for the applicants, Mr. Erhabor stated that the motion is predicated on six(6) grounds and supported by a thirty (30) paragraphs affidavit, sworn to by one Chukwudi Nzediegwu. He also filed several further or further and better affidavits in support. He attached along with the affidavits several exhibits. Learned counsel filed a list of additional authorities. He filed a written (brief) address in support of the motion. He adopted and relied on all the paragraphs of the affidavits in support and the written address. He urged this court to grant the motion.

In opposing the motion, learned counsel for the respondent, Mr. Patrick Oganwu stated that he filed a counter affidavit sworn to by one Dr. Richmond Sisan Leigh; several

further counter affidavits all with attachments as exhibits. He filed a written address in opposition to the motion. Learned counsel relied on all the averments in the counter affidavits and adopted the written address. He urged this court to refuse the motion.

In the written address filed, learned counsel for the applicants argued the motion through issues which he formulated, thus:

1. **Whether there was compliance with Sections(sic) 233(3) of the 1999 Constitution and Order 2 Rule 28(4) of the Supreme Court Rules.**
2. **What is required of an applicant applying to the Supreme Court for enlargement/extension of time within which to appeal(?)**

After setting out the Constitutional Provisions; the Supreme Court Act as contained in Cap S15. LFN, 2004 and the Supreme Court Rules, pursuant to which the motion was brought, the learned counsel submitted on issue one that an application for leave to appeal is an appeal and that by the provisions of Section 27(2)(a) of the Supreme Court Act, the applicants had three months to appeal against the decision of the Court of Appeal. The applicants, he stated, filed their initial application for leave to appeal in the Court of Appeal on 23rd March, 2012. Learned counsel submitted that as at 26/3/2013 when the erstwhile counsel filed his application for leave to appeal to the Supreme Court, the Court of Appeal no longer had jurisdiction to grant the applicants leave to appeal. Consequently, it was impossible or impracticable for the applicants to go before the Court of Appeal seeking leave to appeal over ten months after the 14th of May, 2012. By virtue of subsection (4) of Section 27 of the Supreme Court Act, this court may extend the period of 3 months stipulated in Section 27(2)(a) supra. Further, by virtue of Section 233(3) of the Constitution of the Federal Republic of Nigeria, 1999 and Order 2 Rule 28(4) of the Supreme Court Rules, 2004, this application ought to have been brought before the Court of Appeal after which it can be filed at the Supreme court. This was not possible due to inadvertent error of counsel for the applicants in the year 2012. He cited several cases in support including: **Afribank (Nig.) Plc vs. Akwara (2006) 5 NWLR (Pt.974) 619 at page 637 D - G; Akinpelu vs. Adegboro (2008) 10 NWLR (Pt.1096) 531 at page 555 F - G; Nwora vs. Nwabueze (2011) 15 NWLR (Pt.1271) 467 at page 505 D - E.**

Learned counsel for the applicants made further submissions that in addition to the inadvertence of counsel and that there was an omission from the Court of Appeal Register to issue hearing notice timeously. He submitted that he relied on the depositions as per paragraphs 4(b),(c),(e), (f), 5 - 14; 18 - 24 of the supporting affidavit. He urged that the courts will not visit the sins of counsel on their clients. He urged further that the reasons

given for the delay be adjudged to be credible and reasonable.

Arguing his second issue (issue two), learned counsel for the applicants stated that in an application for extension of time within which to appeal, the courts have for long settled the principle governing same and that is, the applicant is required to show:

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

He cited Order 2 Rule 31(2) of the Supreme Court Rules; **Alagbe vs. Abimbola & Ors (1978) 2 SC 39**; **Chief Yesufu vs. Corporate Bank Ltd (1989) 3 NWLR (Pt.110) 483**, in support. Learned counsel went further to re-state that the good reasons for the delay in appealing on time and *prima facie* arguable grounds of appeal must co-exist to earn the applicant the favour of court's order to appeal out of time. Learned counsel for the applicants was very emphatic in citing the exception to the general rule guiding the application that in view of the settled principle of law that a litigant should not be punished for the mistake or inadvertence of his counsel, an application for extension of time to appeal ought to be granted if the court is satisfied that the failure to appeal within the period prescribed by law was due to the true and genuine mistake or error of judgment of counsel, otherwise, it will be up to the respondent to show in what respect he would be prejudiced if the application is granted. He relied on the cases of **Iroegbu vs. Okwordu (1990) 6 NWLR (Pt.159) 634**; **Imegwu vs. DPP & Ors (2013) 2 SCM 81 (2013) 9 NWLR (Pt.1359) 347**, reported as **Imegwu vs. Okolocha**); **Nwora vs. Nwabueze (supra)**; **Adeyemi vs. Y. R. S. Ike Oluwa & Sons (1993) 8 NWLR (Pt.309) 27 at p.42 paras D - G**; and many others. Learned counsel referred this court to paragraphs 4(b), (c), (f), 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 18, 19, 20, 22, 23, and 24 of the affidavit in support.

As for the second condition of the rule learned counsel for the applicants submitted that it is settled law that in determining the strength of substantiality of the grounds of appeal the applicant need not show that these grounds must succeed on appeal. Rather, the applicant is merely required to show that they are arguable. He cited the cases of **Obikoya vs. Wema Bank Ltd (1989) 1 NWLR (Pt.96) 157 at page 178**; **Holman Brothers (Nig.) Ltd vs. Kigo (Nig.) Ltd. (1980) 8 - 11 SC 43 at pages 6263**; **Ibodo vs. Enarofia (1980) 5 - 7 SC 42**, among others.

Learned counsel argued that in the copy of the proposed notice of appeal which contains the grounds of appeal, the applicants raised some legal issues such as lack of jurisdiction of the trial court. It was therefore wrong for the court below to consider the length of time before the application was brought and that it lacked jurisdiction to have dismissed the appeal on the ground that the affidavit of counsel was of little or no evidential

value. He relied on the principle that length of time is irrelevant where a judgment is given without jurisdiction and it can never be too late to appeal against it as the reason for the delay ceases to be a relevant factor. He referred to the case of **Ukwu vs. Bunge (1997) 8 NWLR (Pt.518) 527 at 541 - 542 pages G - A; Import-Export vs. Jozebson Industries Ltd. (1988) 3 NWLR (Pt.83.429; Timitimi vs. Amabebe (1953) 14 WACA 379**, among others. Learned counsel argued further that it is a wrong exercise of discretion for the court below to consider only one leg of Order 7 Rule 10(2) of the Court of Appeal Rules 2011, to decide the application on that alone. He cited in support the case of **Re: Adewunmi & Ors (1988) 3 NWLR (Pt.83) 483 at pages 497 and 501 paragraphs B - C and E**. Learned counsel finally urged this court to exercise its discretion in favour of the applicants as the affidavit and documentary evidence placed before the court reveal that the applicants have satisfied the two conditions. He urged this court to grant the applicants leave to appeal against the ruling of the court below dated 13th February, 2012.

Learned counsel for the respondent, in his (brief) written address in opposition to the motion, after laying the foundation giving rise to this appeal, framed two issues for consideration by this court, viz:

3. **Whether the appellants/applicants have placed sufficient/material evidence via their affidavit evidence to warrant this Hon. court to exercise its discretion in their favour.**
4. **Whether the appellants/applicants proposed grounds of appeal *PRIMA FACIE* show good cause why the appeal should be heard.**

It is learned counsel's submission on issue 1(one) that the applicants have not placed sufficient material evidence via their affidavit evidence to warrant this court exercise its discretion in their favour. He urged that the reliefs sought by the applicants are equitable in nature and discretionary which discretion must be exercised judicially and judiciously.

Learned counsel for the respondent challenged the applicants that they did not come with clean hands and that their supporting affidavit is riddled with falsehood. Learned counsel referred to paragraphs 8, 9 and 11 of the said supporting affidavit and the respondent's counter affidavit particularly, paragraphs 27, 28 and 29 and Exhibit "LL" attached to the counter affidavit. Learned counsel submitted that there are some inadvertences of counsel that cannot be visited on a litigant such as, in this application, erroneous belief of counsel as to the court in which to file a process; substantive and procedural incompetence, which amounts to ignorance of the law, which is not an excuse even for a layman, moreso of a counsel. He argued that the applicants have not placed sufficient materials for their inordinate delay in bringing their application.

- A** On his issue 2(two) learned counsel for the respondent submitted that the proposed grounds of appeal are bereft of any good cause why the appeal should be heard. He stated that the learned justices of the court below fully considered the 2(two) legs of Order 7 Rule 10(2) of the Court of Appeal Rules, 2011. The court below evaluated the affidavit evidence placed before it before coming to a decision that the applicants were dilatory in their approach to judgment of the trial court. Furthermore, the court below found that by Exhibit “CC” that the applicants had already reaped fruit of the judgment of the trial court by collecting the sum of N700,000.00 awarded by the trial court. The applicants cannot be said to have a recondite grounds of appeal.
- B** Learned counsel submitted that a dilatory applicant is not entitled to a prayer for extension of time to appeal. He cited the case of **Ukwu & Ors Vs. Bunge (1997) 8 NWLR (Pt.518) 527**. He argued that the authorities cited by the learned counsel for the applicants in his brief in support of the application are inapplicable as the peculiar facts of this application are not in all fours with the cases cited by him in support of the application. He urged this court to refuse the prayers sought by the applicants and resolve the two issues in favour of the respondent and against the applicants.

My lords, in treating this application, I will lay more emphasis on the issues formulated by the learned counsel for the respondent, which are not, in my view, dissimilar with the 2nd issue (issue 2) of the applicants' issues. If there is need, I shall touch the first issue (issue 1) by the applicants.

- E** It is an established practice in the Supreme Court, for quite long, supported by law and Rules of Practice, for the court to extend or enlarge time for the doing of anything. Section 27 of the Supreme Court Act, 1960, as amended, now contained in Caption of the Laws of the Federation, 2004, provides:
- F**

“4. The Supreme Court may extend the period prescribed in Subsection(2) of this Section.”

- G** Subsection (2) of Section 27 is the Section that stipulates for the prescribed periods for giving notice of appeal or notice of application for leave to appeal (the latter part thereof being defined by the Supreme Court Rules of 1985 (as amended) to amount to an appeal. Further, Order 2 Rule 31(1) of the Supreme Court Rules, stipulates:

- H** **“The court may enlarge the time provided by these rules for the doing of anything to which these Rules apply....”**

- I** Supreme Court is essentially the final appellate court of the Federal Republic of Nigeria from where no further appeal(s) lies to any court or body. I feel comforted by the

A provision of Section 235 of the Constitution of the Federal Republic of Nigeria, 1999, as amended.

B **“Without prejudice to the powers of the President or of the Governor of a state with respect to prerogative of mercy, *no appeal shall lie to any other body or person from any determination of the Supreme Court.*” (Underlining for emphasis)**

C Civil and Criminal appeals go to the Supreme Court from the decisions of Court of Appeal and or, other tribunals. Appeals in civil or criminal matters may come in two forms: (a) interlocutory and or (b) final decisions. In each of the two forms, appeal on civil matters have determined periods within which to be initiated to the Supreme Court. In criminal matters too, time within which to appeal has been provided. The law and Rules (set out above) are very clear on that. Section 27 of the Act provides:

D **“(2) The periods prescribed for giving of *Notice of Appeal* or *Notice of Application for leave to appeal* are:**

E (c) **in an appeal in a *civil case*, *FOURTEEN DAYS* in an appeal against an *INTERLOCUTORY decision* and *THREE MONTHS* in an appeal against a *FINAL decision*.**

F (d) **in an appeal in a *criminal case*, *THIRTY DAYS* from the date of the decision appealed against.” (underlining and italics for emphasis)**

G I do not find it necessary to go into the academics of which appeal is as of right and or, which should be initiated by leave of court. The Constitution is very clear on that (Section 233(2) thereof).

H But, my lords, why this application? Both learned counsel for the respective parties agreed that the Benin Division of the Court of Appeal (court below herein), delivered a ruling in Appeal No. CA/B/23M/2010, between E. A. Malari & 19 Ors vs. Dr. Richmond Sisan Leigh, on the 13th day of February, 2012 in which the court below dismissed the applicants application for extension of time within which to apply for leave to appeal against the judgment of the Delta State High Court, holden at Warri (trial court), in suit No. W/18/2001 delivered on the 5th day of May, 2006.

I In the narratives, according to the learned counsel for the applicants, the appellants/applicants were not satisfied with the trial court's judgment of 5/5/2006 in the

A suit referred to above. They subsequently, applied to the trial court on 7/5/08 (a little over two years from the date of judgment) to set aside its judgment on the 11th of June, 2009, the trial court refused to set aside its judgment. Dissatisfied with the ruling of the trial court of 11/6/2009, the applicants appealed to the court below vide a notice of appeal dated 25/6/2009. On the 5/2/2010, the appellants/applicants filed a motion before the court below seeking for extension of time within which they may appeal against the judgment of the trial court of 5/5/2006. On the 13/2/2012, the court below delivered its ruling dismissing the appellants/applicants' application for extension of time within which to appeal. In his written address before this court, learned counsel for the applicants captured vividly what he said happened which is better told in his own words viz:

D **“1.05 Further aggrieved with the ruling of the Court of Appeal, Benin Division, the appellants/applicants through their solicitor, Messrs Don O. Egho & Co applied to the court below for a certified true copy of the ruling on 16/2/2012, which was three (3) days after the ruling was delivered. A copy of the said letter is marked “Exhibit J” in the supporting affidavit. It is instructive to note that the said ruling was made available to the solicitors of the appellants/applicants after several visits to the Registry of the Court of Appeal on 5/3/2012.**

F **1.06 The Solicitors to the appellants/applicants filed their application to seek leave to appeal on ground of facts and/or mixed law and facts on 23/3/2012 within the period prescribed by statue.**

G **1.07 Thereafter solicitors to the appellants/ applicants filed a Motion on the 26/3/2013 at the Supreme Court in Appeal No. SC.113/2013, : E. A. Malari & 19 Ors Vs. 'Dr. Richmond Sisan Leigh seeking for extension of time within which to appeal on grounds of facts and/or mixed law and facts.**

H **1.08 Subsequently, the appellants/applicants briefed the law firm of Ken E. Mozia (SAN) & Co. to take over the appeal on 7/5/2015.**

I

- A** **1.09** **On perusal of the application filed on 26/3/2013, we discovered there was need to prepare a new process in order to bring out all the issues in controversy in this appeal and thereafter apply to this Hon. court to withdraw the application dated 26/3/2013.**
- B**
- 1.10** **On 12/5/2015 the application filed on 26/3/2013 was withdrawn and consequently struck out. We thereafter filed another application on 11/5/2015 which we shall also apply to this Hon. court to withdraw.**
- C**
- 1.11** **The proposed grounds of appeal seek to raise issues of mixed law and fact and leave of this Hon. court is required for the grounds to be filed and relied on.**
- D**
- 1.12** **The 1st, 8th and 9th respondents died during the pendency of this appeal. Leave of this court is also required to delete or strike out their names as parties in this appeal.**
- E**
- 1.13** **We also respectfully opine that the proposed grounds of appeal seek to raise substantial issues for consideration.”**
- F** In his narration, learned counsel for the respondent in his written address before this court, gave a different picture all together. He stated that consequent upon the aforesaid judgment, the appellants/applicants vide E. A. Malari (now deceased) brought an application unto the trial court on behalf of the appellants/applicants to be allowed to collect the judgment sum of N700,000 which the respondent deposited at the Registry of
- G** the trial court pursuant to an order of court in that behalf. This application of E. A. Malari who was the first defendant at the trial court was brought 20 months after the judgment was delivered. The trial court granted that application vide Exhibit “DD” attached to the counter affidavit of the respondent. Learned counsel for the respondent stated further that after more than two years of the delivery of the trial court's judgment,
- H** the applicants brought an application seeking the trial court to set aside its judgment of 5/5/2006; staying the execution of that judgment pending hearing and determination of the application and for an order setting aside and or vacating the said judgment. On the 11/06/2009, the trial court refused to grant the prayers sought by the
- I** appellants/applicants. Appellants/applicants appealed against that refusal which appeal

A has not been pursued at the Court of Appeal and was pending. Consequent upon the refusal by the trial court, the respondent initiated steps to take possession of the land the subject matter of the said judgment.

B Learned counsel for the respondent stated further that, in order to forestall the respondent from reaping the fruits of the subsisting judgment of the trial court, the appellants/applicants rushed to the court below to file an application for the tripod prayer: for extension of time to seek leave; for leave and for extension of time to appeal against the judgment of the trial court of 5/5/2006 in the suit referred to earlier and for another relief for stay of execution of the trial court's said judgment. At the hearing of the application, the appellants/applicants abandoned prayers a, b and d, leaving only prayer c. On the 13/2/12, the court below delivered its Ruling refusing the remaining prayer by the appellants/applicants. The present application stems from that Ruling of the court below of 13/2/12.

C My lords, above, among others, are salient facts presented by both sides to this application. Ruling appealed against was delivered by the court below on the 13/2/2015. This application was filed in this court on the 25/5/2017. There is certainly a delay of almost five years, three months and twelve days. Although length of time between a judgment/ruling delivered and a date an appeal was filed against it may not always be a very strong factor against grant of extension of time to appeal, what is upper most, however, is the reason or reasons given by an applicant to justify the delay occasioned. This court can only be convinced through the affidavit evidence placed by the applicants that there are good and substantial reasons which occasioned the delay.

D Learned counsel relied on the depositions made by Mr. Nzediegwu in paragraphs: 4(b), 4(c), 4(e), 4(f), 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 18, 19, 20, 22, 23 and 24 of his affidavit in support and referred this court to same. Let me X-ray these depositions:

E **“4. That on the 28th November, 2016 about 12:00p.m. I was informed by Don O. Egho, Esq. of counsel to the appellants/applicants in the court below in this matter in our office at Plot 87A, Okoro-Otun Avenue, off Ikpokpan Road, GRA Benin city of the following facts and I verily believe him as follows:**

H **(b) That on the 13th day of February, 2012 the court below delivered its ruling dismissing the appellants/applicants application for extension of time to seek leave to appeal etc. A copy of the ruling is annexed herewith and marked as “Exhibit 1”**

I **(c) That the appellants/applicants aggrieved with the**

- A** **18.** **That I am informed by Harold Erhabor, Esq. of counsel and I verily believe him that he filed an application on 11th day of May, 2015, in this appeal. The said application will also be withdrawn. A copy of the said motion on notice is attached hereto and marked as “Exhibit M”.**
- B**
- C** **19.** **That I am also informed by Harold Erhabor, Esq. and I verily believe him that grounds 1 and 2 contained in the proposed notice of appeal dated 5/2/2010 filed in the court below borders on the jurisdiction of the High Court to entertain the plaintiff’s claim. See Exhibit H attached to this application.**
- D** **20.** **That the aforesaid counsel also informed me and I verily believe him that the Court of Appeal only considered the reasons for the delay in bringing the application by the appellants/applicants and it did not consider the proposed grounds of appeal. The proposed grounds of appeal were attached to the affidavit sworn to by the appellants/applicants and attached to the motion on notice dated 5/2/2010.**
- E**
- F** **22.** **That Harold Erhabor, Esq of counsel informed me and I verily believe him that there is need to withdraw the application filed on 11/5/2015 at the Supreme Court and file a fresh one in order to fully determine the issues in controversy in this appeal.**
- G** **23.** **That Harold Erhabor, Esq. informed me and I verily believe him that the delay in filing this appeal was not deliberate but due to ill health of counsel, and 2nd applicant, oversight, inadvertence mistake and omission of counsel.**
- H** **24.** **That the grounds of appeal which the appellants solicitors Harold Erhabor, Esq. will *prima facie* show good cause why the appeal should be heard notwithstanding that the period prescribed by law has expired is attached to this motion and marked “Exhibit N”.**
- I**

A

In his written address referred to earlier, learned counsel for the respondent, after emphatically denying almost all the depositions in the affidavit in support of the applicants' motion on notice, submitted as follows:

B

“The appellants/applicants' supporting affidavit is riddled with falsehood with the sole aim of pulling a wool in the eyes of the court.”

C

In the counter affidavit filed on 09/08/17, sworn to by the respondent, the respondent deposed to the following facts, among others:

D

“1. That I have read the said 30 paragraph affidavit in conjunction with my solicitors and I verily understood same.

E

2. That paragraphs 3, 4, 5, 6, 7, 8, 9, 10,11, 12 and 20 of the affidavit in support of the application dated 25th day of May, 2017 are tissues of falsehood made to mislead the court.

F

3. That in further reply to the averments in paragraphs 3, 4, 5, 6, 7, 8, 9, 10,11, 12 and 20 of the affidavit that are denied, I stated as follows:

G

(a) That prior to the death of the 1st appellant/ applicant, he is in conjunction with 2nd 20th appellants/applicants were represented by the same counsel.

H

(b) That I bought a piece/parcel of land measuring seven (7) acres from the 1st set of appellants/ applicants community for N1,680,000.00 (one million, six hundred and eighty thousand naira only).

I

(c) That I took out a writ of summons against the 1st set of appellants/applicants on the 6th day of January, 2001, when the 1st set of appellants/ applicants failed to perfect the sale.

(d) That on the 3rd day of June, 2003 by an order of court, the 2nd set of appellants/applicants were joined as defendants by the trial court.

(e) That on the 8th day of April, 2004, E. O. Ekpoko, Esq. entered appearance for the appellants/ applicants

- A** and filed their joint statement of defence.
- (f)** That on the 20th day of June, 2005 E. O. Ekpoko, Esq. withdrew as counsel to the appellants/ applicants where upon the trial court ordered that hearing notice be served on each of the appellants/applicants.
- B**
- (g)** That the trial court further issued the same order on the 10th day of October, 2005 as averred in paragraph (f) above.
- C**
- (h)** That consequent upon the facts deposed to in paragraphs (f) and (g) above, the bailiff of the trial court effected service of the hearing notice on the following appellants/applicants 1st, 2nd, 3rd, 6th, 8th, 9th, 12th, 14th, 15th, 16th, 17th, 18th, 19th, and 20th.
- D**
- (i)** That the 4th, 5th, 7th, 10th and 11th appellants/ applicants evaded service.
- (j)** That on the 20th of February, 2006, my solicitors brought an application unto the trial court ordering that hearing notice be pasted on the “Ogwa” that is the Town Hall of Ubeji Town.
- E**
- (k)** That on the 13th day of April, 2006 after several hearing notices were issued and served on both sets of appellants/applicants the matter was heard with the respondent/ respondent testifying on his own behalf.
- F**
- (l)** That after the evidence-in-chief of the respondent/ respondent, the trial court further ordered that hearing notice should be issued and served on the defendants by pasting same on the wall of the Town Hall at Ubeji.
- G**
- (m)** That on the 5th day of May, 2006, Hon. Justice A. P. E. Awala (of blessed memory) of the High Court of Justice, Warri, Delta State (as he then was) gave judgment in favour after address by my counsel on the 2nd day of May, 2006.
- H**
- (n)** That on the 17th day of February, 2007, my solicitors wrote to the Chairman of the 1st set of appellants/applicants community to come and collect
- I**

- A** the said judgment sum of N700,000.00 but they refused. A copy of the said letter is hereby attached and marked as Exhibit “AA”.
- B** (o) That consequent upon this refusal as averred above, my solicitors brought an application at the trial court asking the Hon. court to direct that the judgment sum be paid into the registry of the trial court, which said application was granted. A copy of the said Enrolment of Order is hereby attached and marked as Exhibit “BB”.
- C** (p) That on the 15th day of January, 2008 about 20 (twenty) months after the judgment was delivered the 1st set of appellants/applicants brought an application at the trial court through their counsel L. U. Unokesan, Esq. (of blessed memory) praying the trial court to order the release of the said judgment sum of N700,000.00 in the custody of the Assistant Chief Registrar, High Court Registry, Warri to the 1st set of appellants/applicants (Mr. Emmanuel Malari of blessed memory) who was the General Secretary of the Community for himself and on behalf of the 1st set of appellants/applicants. A copy of the said application is hereto attached and marked as Exhibit “CC”.
- D**
- E**
- F** (q) That the trial court granted the application and that the document now shown to me and marked as Exhibit “DD” is the record of proceedings of the 23rd day of January, 2008.
- G** (r) That pursuant to the above order of court, Emmanuel Malari brought an application to the Assistant Chief Registrar to collect the said judgment sum of N700,000.00 (seven hundred thousand naira) being the balance for the sale of seven (7) acres of land at Ubeji for himself and on behalf of the 1st set of defendants. A certified true copy of the said application is attached and marked as Exhibit “EE”.
- H**
- I** (S) That on the 24th day of January, 2008 Emmanuel

- A** **90s.**
- B** **10. That after more than two (2) years after the trial court gave judgment in my favour, the appellants/applicants brought an application at the trial court seeking orders of court to wit:**
- C** **(a) An Order extending time within which the appellants/applicants shall apply to this court to set aside its judgment delivered on the 5th day of May, 2006.**
- D** **(b) An Order staying execution and/or further execution of the judgment of this Hon. Court delivered on the 5th day of May, 2006 pending the hearing and determination of this application.**
- E** **(c) An Order setting aside and/or vacating the judgment of this Hon. court delivered on the 5th day of May, 2006.**
- F** **11. That the trial court in a well-considered ruling delivered on the 11th day of June, 2009 refused granting the prayers sought by the appellants/ applicants.**
- G** **12. That upon refusal of the said application by the trial court the appellants/applicants filed an appeal against the Ruling of the trial court.**
- H** **13. That the appellants/applicants have since abandoned the said appeal.**
- I** **14. That upon the refusal of the said application by the trial court, the respondent/respondent started taking steps to take possession of the land the subject matter of the said judgment.**
- I** **15. That to forestall me from reaping the fruits of the subsisting judgment of the trial court, the appellants/applicants rushed to the Court of Appeal, Benin City to file an application seeking the following orders of court to wit:**
- I** **(a) AN Order granting extension of time within which the defendants/appellants/applicants shall apply for**

- A** leave to appeal to the Court of Appeal, Benin City against the judgment of Hon. Justice A. P. E. Awala (as he then was) of the High Court of Justice, Warri, Delta State delivered on the 5th day of May, 2006 in Suit No. *W/18/2001: Dr. Richmond Sisan Leigh Vs. E. A. Malari 19 Ors.*
- B**
- C** (b) AN Order granting leave to the Defendants/appellants/applicants shall apply for leave to appeal to the Court of Appeal, Benin City against the judgment of Hon. Justice A. P. E. Awala (as he then was) of the High Court of Justice, Warri, Delta State delivered on the 5th day of May, 2006 in Suit No. *W/18/2001: Dr. Richmond Sisan Leigh Vs. E. A. Malari 19 Ors* on the grounds of mixed law and facts and facts only as shown on the proposed affidavit in support of this motion.
- D** (c) An Order staying execution of the aforesaid judgment pending the hearing and determination of the appeal to be filed against the judgment.
- E**
- F** 16. That at the hearing of the appellants/applicants motion, the applicants abandoned prayers 17(a), 17(b) and 17(c) voluntarily, leaving only prayer 17(c). That the court below did not instruct the applicants to withdraw prayers 17(a), 17(b) and 17(d).
- G** 17. That the Court of Appeal, Benin Judicial Division in a well considered ruling delivered on the 13th day of February, 2012 refused granting the remaining prayers sought by the appellants/applicants.
- H** 18. That the ruling of the Court of Appeal is hereto attached and marked as Exhibit “KK”.
- I** 19. That more than ten (10) years after the trial court gave judgment in my favour the appellants/ applicants did not take step(s) to appeal the judgment of the trial court.

- A** **29.** **That in order to forestall the proceeding at the Supreme**
- B**
- C**
- D**
- E**
- F**
- G**
- H** **30.** **That in order to further forestall the proceeding at the**
- I**
- a)** **An Order of this Hon. court extending the time within**
which the appellants/applicants may seek to appeal
on grounds of facts and/or mixed law and facts
against the interlocutory ruling of the Court of
Appeal, Benin Judicial Division delivered on the 13th
day of February, 2012 in appeal No. *CA/B/23M/2012*
***E. A. Malari & 19 Ors vs. Richmond Sisan Leigh* which**
ruling dismissed the appellants/ applicants motion
seeks extension of time within which they may appeal
against the judgment of the trial High Court
delivered on the 5th day of May, 2006.
- b)** **An Order of this honourable court granting**
appellants/applicants leave to appeal on grounds of
facts and/or mixed law and facts against the
interlocutory ruling of the Court of Appeal, Benin
Division delivered on the 13th February, 2012 in
Appeal No. *CA/B/23m/2010* dismissing the
appellants' application for extension of time within
which they may appeal.
- c)** **An Order of this hon. court extending the time within**
which the appellants/applicants may appeal the
ruling of the Court of Appeal, Benin Division
delivered on 13th February, 2012 appellants
application for extension of time within which they
may appeal.
- d)** **An Order striking out the names of E. A. Malari**
(deceased) Olaraja Evenuberu Emami (deceased)
and Pa Agbekuku Mone (deceased) who are
appellants/applicants respectively in this appeal.
- a.** **An Order of this hon. court extending the time within**
which the appellants/applicants may seek leave to

- A** appeal against the ruling of the Court of Appeal, Benin Division delivered on the 13th February, 2012 in appeal No. *CA/B/23m/2010: E. A. Malari & 19 Ors Vs. Dr. Richmond Sisan Leigh* dismissing the applicants' application for extension of time within which they may appeal.
- B**
- C** b. An Order of this hon. court granting the applicants leave to appeal against the ruling of the Court of Appeal, Benin Division delivered on 13th February, 2012 in appeal No. *CA/B/23m/2010: E.A. Malari & 19 Ors Vs. Dr. Richmond Sisan Leigh* dismissing the applicants' application for extension of time within which they may appeal.
- D** c. An Order of this hon. court extending time within which the applicants may appeal against the ruling of the Court of Appeal, Benin Division delivered on 13th February, 2012 in appeal No. *CA/B/23m/2010: E. A. Malari & 19 Ors Vs. Dr. Richmond Sisan Leigh* dismissing the applicants' application for extension of time within which they may appeal.
- E**
- F** d. An order of this hon. court granting the applicants' extension of time within which to apply for leave to appeal against the ruling of the Court of Appeal, Benin Division delivered on 13th February, 2012 *E.A. Malari & 19 Ors Vs. Dr. Richmond Sisan Leigh* on grounds of facts and/or mixed laws and facts.
- G** e. An order of this hon. court granting the applicants leave to appeal against the ruling of the Court of Appeal, Benin Division delivered on 13th February, 2012 *E.A Malari & 19 Ors Vs. Dr. Richmond Sisan Leigh* on the grounds of facts and/or mixed law and facts.
- H** f. An order striking out the names of E.A.Malari (deceased) Olaraja Evenuberu Emami (deceased) and pa Agbekuku Mone (deceased) who are 1st, 8th and 9th appellants/ applicants respectively in this appeal.
- I**

A **31. That I know as a fact that it is not only the 1st, 8th and 9th appellants/applicants that are deceased. That the 6th appellant/applicant is also deceased as per the appellants/applicants Exhibit "G' attached to the affidavit in support.**

B **32. That the delisting of the 1st appellant/applicant is the main motive of prayer 6 on their motion paper dated 8/5/2017 and filed on the 25/5/2017.**

C **33. That my solicitors Messrs Patrick Oganwu & Associates inform me and verily believe that the appellants/applicants have nothing to appeal against, since they have collected the judgment sum and executed a Deed of Conveyance in my favour.**

D **34. That I am informed by my solicitors Messrs Patrick Oganwu & Associates and I verily believe that the appellants/applicants have not placed facts different from the ones placed by them at the Court of Appeal to warrant the grant of the prayers contained in their motion paper.**

E **35. That my said solicitors Messrs Patrick Oganwu & Associates further inform me and I verily believe that this application is an abuse of court process and brought in bad faith to forestall me from reaping the fruits of the subsisting judgment of the trial court.**

F **36. That it is in these circumstances that I depose to this counter affidavit conscientiously believing the contents to be true and correct and in stiff opposition to the prayers being sought as per motion Paper filed on the 25th day of May, 2017."**

H **In the further and better affidavit particularly one filed on 12/10/17, the applicants denied almost all the facts deposed to by the respondent in this Counter Affidavit and deposed to the following:**

I **1. That on the 9th of October, 2017 about 12.00p.m. I was**

- A** informed by Harold Erhabor, Esq. of counsel in the law firm of Ken E.Mozia (SAN) & Co. Counsel to the appellants/applicants in this matter, in our office at Plot 87A, Okoro-Otun Avenue, Off Ikpokpan Road, G.R.A, Benin City of the following facts and I verily believe him as follows:
- B** a. That he has seen and read the respondent's Counter Affidavit filed on 9/8/17 in opposition to appellants/applicants motion on notice filed on 25/5/17 as well as the exhibits annexed thereto and the
- C** b. That the deposition of Dr. Richmond Sisan Leigh in the Counter Affidavit are untrue or replete with half truth as they do not represent the true position of the matter before this hon. court.
- D** c. That the respondent's deposition in his Counter Affidavit is grossly inaccurate misconceived and calculated to mislead this hon. court.
- E** d. That the depositions made in paragraphs 5(f), 5(g), 5(h), 5(i), 5(k), 5(l), 5(n), 5(o), 5(p), 5(q), 5(r) and 5(s) of the Affidavit in support are false, untrue and misleading.
- F** e. That contrary to the deposition in paragraphs 5(p) 5(s) of the Counter Affidavit the appellants/applicants did not authorize Emmanuel Malari to collect the sum of N700,000.00 (seven hundred thousand naira) in the custody of the Assistant Chief Registrar, High Court of Justice, Warri on behalf of the 1st set of appellants/applicants.
- G** f. That contrary to the deposition in paragraph 5(s) of the Counter Affidavit, the purported receipt marked Exhibit "FF" was witnessed by E.P. Fregene a solicitor in the law firm of Patrick Oganwu & Associates, counsel to the respondent and not L.U.Unokesan, Esq. who was alleged to have been the solicitor to the E.A.Malari.
- H** g. That the contents of the deposition in paragraphs
- I** 5(k) 5(s) of the Counter Affidavit are illogical based

- A** on falsehood and confused reasoning as evidenced by respondent's Exhibits “EE” and “FF”.
- B** h. That contrary to the deposition in paragraph 5(r) of the Counter Affidavit, the content of Exhibit “DD” annexed thereto is a blatant falsehood and a forgery as there is no body or existing lawyer by name N. U. Unokesan, Esq.
- C** i. That contrary to the content of Exhibit “DD” the alleged counsel to the 1st set of the appellants/applicant is L.U. Unekesan of blessed memory.
- D** j. That the alleged counsel L.U. Unekesan of blessed memory, solicitors to the plaintiff, i.e. Dr. Richmond Sisan Leigh claimed to have moved motion on notice filed on 15/1/2008 on the 23/1/2008 which was taken and granted same day. See Exhibit “DD” of the respondent attached to the Counter Affidavit. In the affidavit in support, Emmanuel Malari was referred to as the 1st plaintiff/applicant.
- E** k. That on the following day i.e. 24/1/2008, the said E.A. Malari applied to the ACR in writing to collect the sum of N700,000.00 (seven hundred thousand naira) without annexing the Enrolment of court order of 23/1/2008 to the said application which was witnessed by E.P Fregene, Esq. who appeared with Patrick Oganwu, Esq. on 23/1/2008 of counsel to the respondent. See Exhibits “DD”, “EE” and “FF” of the respondent annexed to the Counter Affidavit.
- F**
- G** l. That in further reply to the deposition in paragraph 5(r) of the Counter Affidavit, the appellants/applicants aver that the said E.P.Fregene, Esq. of Patrick Oganwu & Co. moved the application dated 24/10/2007 and filed on the 25/10/2007 praying the trial High Court for an order directing the plaintiff/applicant to pay into the Registry of the High Court the sum of N700,000.00 (seven hundred
- H**
- I**

- A** **b)** **Where an appeal is by Constitutional provision, to be initiated by leave of court and the time within which to seek for that leave has elapsed, then a person has to apply for:**
- B** **i.** **Extension of time within which to seek leave to appeal.**
- B** **ii.** **leave to appeal and;**
- B** **iii.** **extension of time within which to appeal/file a notice of appeal**

C Reliefs (b)(i) - (iii) are what are generally referred to as (“the three legged prayers”, “tripod prayers “or” “trinity prayers”).

In each of the above instances, the provisions of the law/rules of court, to be sent out anon, must be complied with. These are:

D **(A)** **Section 27(2) of the Supreme Court Act which provides as follows:**

'27(2) The periods prescribed for giving of *notice of appeal or notice of application for leave to appeal are*

- E** **a)** **In an appeal in a civil case, *fourteen days* in an appeal against an *interlocutory decision* and *three months* in an appeal against a *final decision***
- F** **b)** **in an appeal in a criminal case *thirty days* from the date of the decision appealed against.**

F **4.** **The Supreme Court *may extend* the period prescribed in subsection (2) of this section.”(Underling supplied for emphasis)**

G Order 2 Rule 31 of the Supreme Court Rules provides:

“31(1) The court *may enlarge* the period provided by these Rules for doing of anything to which these Rules apply

H **(2)** **Every application for an enlargement of time in which to apply or in which to apply for leave to appeal *shall be supported by an affidavit setting forth good and substantial reasons* for the failure to appeal or to apply for leave to appeal**

I **within the prescribed period.**

A

There shall be exhibit or annexed to such affidavit.

B

- a. a copy of the judgment from which it is intended to appeal;
- b. a copy of other proceedings necessary to support the complaints against the judgment
- c. grounds of appeal which *PRIMA FACIE* show *good cause* why the appeal should be heard.”(underlining for emphasis)

C

Thus, by the above provisions, if there shall be any appeal on:

D

- i. Final decision of the Court of Appeal in a civil matter to this court, that appeal shall (must) be filed by the prospective appellant within *three (3) months* from the date of decision;
- ii. an interlocutory decision of the Court of Appeal in a civil matter to this court that appeal shall (must) be filed by the prospective appellant within *fourteen days* from the date of the decision appealed against.

E

- iii. in an appeal from the decision of the Court of Appeal in criminal matters (cases) to this court, the prospective appellant shall (must) file his appeal within a period of *thirty days* from the date of the decision by Court of Appeal.

F

The applicants in this motion say that their intended appeal is a civil one and is from a final decision/ruling of the Court of Appeal (page 129, paragraphs 4.01 of the applicant's address). The appeal is caught up by the last lab of Section 27(2)(a) of the Supreme Court Act. That is, that appeal ought to have been filed within three months from the date of Court of Appeal's Ruling of 13th February, 2012. Further, the learned

G

counsel for the applicants stated that the grounds of appeal do not involve questions of law alone and this necessitates applicants' resort to section 233(3) of the Constitution (page 129, 4.02 – page 130 of learned counsel written address).

The conditions stipulated by Order 2 Rule 31 of the Rules are that:

H

- a) the applicant(s) shall (must) furnish the court with affidavit evidence which sets out *good and substantial* reasons for the failure to appeal or to apply for leave to appeal within the prescribed period as per Order 2 Rule 31(2) of the Rules of this court;

I

A **b) the appellant(s) shall (must) show that he has *grounds of appeal* which *PRIMA FACIE* show good cause why the appeal should be heard. In other words, he has arguable grounds of appeal.**

B It is then the duty of the court to examine, evaluate or assess the affidavit evidence and any necessary exhibits such as the notice of appeal which contains the proposed grounds of appeal attached to affidavit in support with view to taking a decision on whether to grant or refuse the reliefs sought by the applicant(s). This necessarily involves exercise of judicial and judicious discretion of the court. See **RE-Adewumi & Ors (1988) 3 NWLR (Pt. 82) 483; Co-operative & Commerce Bank (Nig.) Ltd. vs. Emeka Ogwuru (1993) 3 NWLR (Pt. 284) 630.**

The reasons given by the applicants in their affidavit evidence can be broadly classified as follows:

D **i. sickness of 2nd applicant, Mr. Akoma Dudu and of an erstwhile counsel Mr. Don O. Ogho who was handling the matter for the applicant.**

E **ii. inadvertence, error or mistake of counsel and;**

E **iii. other reasons considered (perceived) by the applicants to be good and substantial i.e. *good* and *substantial* reasons**

F On the first condition, it is my belief, my lords, that even the ordinary man on the street knows what is good. In ordinary usage, it connotes a high standard or quality which is opposite to bad or poor. Anything good in law is something which is valid, sufficient, effectual, unobjectionable, sound and or responsible. Thus, an application for extension of time within which to appeal or within which to seek leave to appeal is not granted as a matter of course. To be entitled to the indulgence of the court, an applicant(s) must advance cogent, credible and convincing reasons for the delay. See **Bank of Baroda Vs. Mercantile Bank (1987) 3 NWLR (Pt.60) 233.**

On the sickness of the 2nd applicant as a reason, the affidavit evidence by the applicants, avers to the following facts:

H **I. “8. That I am informed by the aforementioned *applicant* that he fell sick shortly before the hearing of the appeal in the Court of Appeal on 16/11/2011. That he was referred by his doctor on 12th day of November, 2011 to the University of Benin Teaching Hospital Benin city but his relatives decided to take him to a hideout where he could be treated**

I

A by a Native Doctor. That he was in confinement for a period of one year and two months. That he was *unable* during the time *to get in touch with their counsel* who did not know his whereabouts.

B **II.** That I am informed by the aforementioned 2nd applicant that he was eventually discharged from the Native Doctors Clinic on 20th day of March, 2013 by which date time to appeal has expired on 14/5/2012.” (Underlining for emphasis)

C

On the sickness of the erstwhile learned counsel for the applicants, Mr. Don O. Egho, the deponent to the facts in the affidavit evidence averred as follows:

D “4. That on the 28th day of November, 2016 about 12.00 p.m. I was informed by Don O. Egbo, Esq. of counsel to the appellants/applicants in the court below in this matter in our office at Plot 87A, Okono-Otun Avenue, Off Kpokpan Road, GRA, Benin City of the following facts and I verily believe him as follows:

E

(a) That an application for leave to appeal dated 23rd of March, 2012 was accordingly filed at the Court of Appeal, Benin Division. A copy of the said application is attached hereto and marked “Exhibit K”.

F

(b) That since filing the appeal he has been in *very poor health* and constantly been receiving medical treatment.”

G

(c) That I am informed by the aforementioned applicant and I verily believe him that the failure to apply for leave to appeal within the period prescribed by statute against the ruling of the court below dated 13/2/2012 was also due to *indisposition of their erstwhile solicitor Don O. Egho, Esq. who was involved in a motor accident on his way to the Court of Appeal, Benin City on the date the ruling was delivered and consequently hospitalized.*” (underlining for emphasis)

H

I

A From the affidavit evidence, the decision/ruling of the court below sought to be appealed against was delivered on the 13th day of February, 2012 (paragraph 4(b) of the affidavit in support; paragraph 19 of the respondent's Counter Affidavit filed on 09/08/17). That ruling refused the applicants extension of time to seek leave to appeal

B the judgment of the trial court which was delivered on *5th May, 2006* against the applicants and in favour of the respondent.

The first attempt (effort) made by the applicants to apply for extension of time to seek leave to appeal against the said judgment of the trial court of 5/5/2006, was in 2010.

C Paragraph 3(m) of the affidavit in support states:

“That the appellants/applicants being dissatisfied with the judgment of the Delta State High Court delivered on 13/2/2012 filed an application on 5/2/2010 before the Court of Appeal, Benin Division in appeal No. CA/B/23m/2010: E. A. Malari & 19 Ors Vs. Dr. Richmond Sisan Leigh seeking for extension of time to apply for leave to appeal, leave to appeal and extension of time to file notice of appeal. A copy of the said motion on notice with the supporting affidavit, documents and exhibits are annexed hereto and are collectively marked as Exhibit H.”

D

E

Looking at the dates given in the averment above, something is wrong or fishy. The dates do not correspond.

F Again, it is in evidence that after the delivery of the trial court's judgment, the applicants claimed that they only became aware of the said judgment on the 18th day of February, 2008, when Writs of Possession were served on the property owners and or third parties on the land in dispute (paragraphs 3(h) and (i) of the affidavit in support). In paragraph 3(j) the deponent averred:

G

“(j) That the appellants/applicants immediately briefed one E. T. Edema, Esq., who advised them to apply to the trial High court to set aside the judgment.”

H Thus, the first time the applicants approached a counsel (E. T. Edema, Esq.,) was, presumably, in the month of February, 2008, or to be more precise on the 18th of February, 2008. This is because the date of briefing the learned counsel (although it was said to be “immediately” after becoming aware of the judgment) has been shrouded in

I mystery by the applicants. It is however very clear that there was a period of over two

A years, not from the date of delivery of the judgment by the trial court, but from the date applicants claimed to become aware of the judgment. There was certainly non-chalance and inaptitude from the applicants. There was tardiness. There is no explanation by the applicant in their affidavit evidence on this inaptitude and tardiness.

B On the sickness of the 2nd applicant, Mr. Akoma Dudu, it is to be noted that it was deposed to in the affidavit evidence, by the applicants paragraph 8 that he was sick and was referred by his Doctor on the 12th of November, 2011 to the University of Benin Teaching Hospital, Benin City. There is nothing to support that fact or assertion. It is my belief that in an age of scientific and technological developments, and where transactions, especially relating to human health are conducted in most cases literary, it is difficult for anybody to believe that no referral letter, certificate or document is issued by the Doctor or Medical Officer who referred the patient to another hospital/Doctor for further medical attention. Part of the same reason is the claim of indisposition of the applicants' erstwhile counsel, Don O. Egho, Esq., who was said to have been involved in a motor accident on his way to Court of Appeal, Benin on the date Ruling was delivered and he was hospitalized.

D In his Counter Affidavit of 09/08/17, the respondent made a categorical denial on these sicknesses and averred as follows:

E **”27. That in specific respond(sic) to paragraphs 8 and 9 of the appellants/applicants averments in the affidavit in support of their motion, I know as a fact that the 2nd appellant was not sick at any time.**

F **28. That I know as a fact that this matter is a representative action and that other appellants/ applicants were well and of sound health.**

G **29. That I know as a fact that Don O. Egho runs a firm of Legal Practitioners: and that there are other lawyers in the Law Firm as per Exhibit “LL” hereto attached.”**

H In his argument in this written address (brief) in support of the motion, learned counsel for the respondent submitted:

I **“In that said paragraph 8, the appellants/applicants' deponent averred that Akoma Dudu - 2nd applicant was sick. It is worthy of**

A note that he made mention of the fact that the 2nd applicant “was referred by his doctor on the 12th of November, 2011 to the University of Benin Teaching Hospital, Benin City” but failed to attaché and/or annex a copy of the said referral letter in his affidavit to confirm the truth of the said paragraph.

B We submit that a referral made by a medical doctor is always documented for the referral hospital/clinic to act upon, assuming but not conceding that the 2nd appellant/applicant was sick. Failure of the 2nd appellant/applicant to attach the said referral letter is a fatal to their assertion. We therefore urge my lords to discountenance the same assertion.

C Similarly, the averment in paragraph 9 of the appellants/ applicants supporting affidavit did not hold any water as the same counsel whom the appellants/ applicants averred had an accident on the day the Ruling of the Court of Appeal was delivered i.e 13/2/2012 and was hospitalized, applied for the certified true copy of the said Ruling timeously via his letter dated 16th of February, 2012, 3 days after the Ruling was delivered. Where their lies the inadvertence of counsel? Question begging for answer.”

D My lords, I took time to cross-check all the further affidavits in support filed by the applicants, I could not locate specific denials on the above facts averred to by the respondent. In law such averments are taken to be correct, valid and admissible. See: **Adesanoye vs. Adewole (2000) 9 NWLR (Pt. 671) 145; Orianzi vs. A-G Rivers State & Ors (2017) 271 LRNC 150.**

E Parties to a civil matter should know that where they prosecute or defend a matter in a representative capacity, as is the case with the applicants, they have every right to assign anyone of them to step into the shoes of the one who handles their litigation, where, if exigencies demand, for instance, sickness or other debilitating factors, the latter is unable to proceed with the assignment given to him by those he represents. Equally, it is foolhardy for a counsel representing a party, where it is shown that he has other qualified counsel in his firm to claim that the matter he is handling in court cannot go on because he is sick. It is even more dangerous where a party or litigant insists that only a particular counsel from a law firm that must handle his matter in court although he has the constitutional right to have a counsel of his choice. What of it, God forbids, that counsel dies or is permanently indisposed? This, I believe is one of the few

A instances where a party must take a quick, effective and spontaneous decision in relation to the way and bear the consequence of the inaptitude, negligence or any act of God befalling his chosen counsel. Mistake, inadvertence and sickness of counsel should always be distinguishable from ineptitude, complete ignorance or malfeasance exhibited by counsel.

B The second condition of Order 2 R 3 is for the proposed grounds of appeal to be *prima facie*, arguable, giving such good grounds why the appeal should be heard. It is not the business of the court at this point in time to form an idea on the success of the grounds of appeal or not, but whether *prima facie*, arguable. See: **University of Lagos vs. Olaniyan (supra); Ibodo vs. Enarofia (1980) 5 – 7 SC 42; Obikoya vs. Wema Bank (supra); Egba vs. Onogun (1972) 1 All NLR (Pt. 1) 95; Ojukwu vs. Gov. Lagos State (1985) 2 NWLR (Pt. 10) 806.**

The affidavit evidence in support of the application states:

D “24. That the grounds of appeal which the appellants' solicitors Harold Erhabor, Esq., say will *prima facie* show good cause why the appeal should be heard notwithstanding that the period prescribed by law has expired is (sic) attached to this motion and marked Exhibit N.”

E 25. That the appellants/applicants are interested in prosecuting this appeal and Harold Erhabor, Esq., of counsel informed me in our office at Plot 87A, Okoro- Otun Avenue, off Ikpokpan Road, GRA, Benin City by 10.00a.m. on 7/5/2015 and I verily believe him that substantial and arguable points of law are sought to be raised in the proposed grounds of appeal as contained in the proposed notice of appeal.”

The respondent, on the other hand, averred as follows:

G “35. That my solicitors Messrs Patrick Oganwu & Associates informed me and I verily believe that the appellants/applicants have nothing to appeal against, since they have collected the judgment sum and executed a deed of conveyance in my favour.

H 36. That I am informed by my solicitor Messrs Patrick Oganwu & Associates and I verily believe that the appellants/applicants have not placed facts different from

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A **the ones placed by them at the Court of Appeal to warrant the grant of the prayers contained in their motion paper.”**

My lords, it is trite law that for a proposed ground of appeal to show good cause why the appeal should be heard, it has been held in legion of authorities that such a ground should

B inter alia:

- a)** **raise substantial issue of facts or law for the consideration of the court;**
- C** **b)** **cannot just be dismissed with a mere wave of the hand or totally lacking in substance;**
- c)** **evoke serious debate about the correctness of the decision of the court below;**
- d)** **tax the intellect and reasoning faculties of the appeal judge**
- D** **e)** **and not be frivolous.**

See: **Obikoya vs. Wema Bank Ltd. (1989) 1 NWLR (Pt. 96) 157; Ibedo vs. Enarofia (1980) 5 – 7 SC 12; University of Lagos vs. Olaniyan (1985) 1 NWLR (Pt. 1) 156; Kotoye vs. Seraki (1995) 5 NWLR (Pt. 395) 256; Yesufu vs. Co-operative Bank Ltd. (1989) 3 NWLR (Pt. 110) 483; Doherty vs. Doherty (1964) 1 All NLR 299; Lamai vs. Orbih (1980) 5 – 7 SC 28.**

E

The proposed grounds of appeal exhibited in paragraph 24 of the Affidavit in support of the motion on notice as Exhibit “N” are four (4) in number. Proposed ground of appeal No. 3, shorn of the quoted text of the judgment of the court below reads as follows:

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“3. The learned justices of the Court of Appeal erred in law and came to a wrong decision which is perverse when they held thus:

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PARTICULAR OF ERROR

H

a) **Grounds 1 and 2 of the appellant's proposed grounds of appeal in the notice of appeal which was annexed to the affidavit in support of the motion questions the jurisdiction of the trial High court to entertain the suit.**

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b) **in any application for extension of time which to apply for leave to appeal where, a proposed ground complains of**

- A** jurisdiction, it would not be necessary to inquire whether there were good and substantial reasons for failure to appeal within the prescribed time.
- B** c) Once the issue of jurisdiction is raised, the length of time before the application is brought is irrelevant if the judgment sought to be appealed against was given without jurisdiction.
- d) Since jurisdiction is a strong point in the application before the Court of Appeal the application ought to be granted as it is never too late to appeal against a judgment given without jurisdiction.
- C** e) The question of jurisdiction is a constitutional issue which may be raised at any stage of a proceeding even for the first time in the Supreme Court.”
- D**

E It is alleged in the purported grounds of appeal (particularly (a) thereof) that grounds 1 and 2 of the appellants proposed grounds of appeal in the notice of appeal annexed to the affidavit in support of the motion on notice before the court below questioned the jurisdiction of the trial High Court to entertain the suit. It was further argued that the court below ought to have granted the application as jurisdiction was a strong point in that application as it was never too late to appeal against a judgment given without jurisdiction and as the question of jurisdiction is a constitutional issue which can be raised at any stage of a proceeding even for the first time in the Supreme Court. Of course, that is the law. But is it true that there was an issue of jurisdiction raised before the court below? The proposed grounds of appeal before the court below, speak eloquently and in no uncertain terms in answer to the above question:

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G “**FOUNDATIONS OF APPEAL**
GROUND ONE

H The learned trial judge erred in law he held that “As I stated earlier in this ruling, fair hearing is for the protection of all parties to a case, the plaintiff and defendant alike... the conduct of the defendants/ applicants from the circumstances and facts of this case has been such that they are not worthy of the sympathetic consideration by the court or the court exercising its discretion in their favour.

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A

PARTICULARS OF ERROR IN LAW

B

1) **The 2nd – 20th defendants /applicants/appellants and their counsel E.O. Ekpoko, Esq., were last in court on the day the said E.O. Ekpoko withdraw from the matter.**

C

2) **The defendants/applicants/appellants did not attend court thereafter because the plaintiff/ respondent/ respondent told them that he will withdraw the matter from the court.**

D

3) **The defendants/applicants/appellants were not notified of the proceedings that took place in the trial court on 13th day of April, 2006 when the plaintiff/respondent/ respondent testified in-chief.**

E

4) **At the end of the plaintiff/respondent/ respondent's evidence in-chief on 13th April, 2006, the 2nd – 20th defendants/applicants/ appellants were not given the opportunity to cross examine and/or defend the matter despite the fact that they filed a statement of defence dated 17th May, 2004 therein.**

F

5) **On 13th day of April, 2006 at the close of the plaintiff/respondent/respondent case, the matter was adjourned to 2nd May, 2006 for Address by the plaintiff's counsel Mr. Patrick Oganwu.**

G

6) **Despite particulars 1 to 5 supra, the trial court in the absence of the 2nd –20th defendants/applicants/ appellants delivered judgment/decision/order against the said appellants on 5th day of May, 2006.**

H

7) **consequently, the whole proceedings including the judgment/order made by the trial court on 5th day of May, 2006 was in violate breach of the principles and tenets of fair hearing and was null and void and of no efficacy.**

I

- A** **8) The error in particulars 1, 2, 3, 4, 5, 6, and 7 supra occasioned a gigantic denial of fair hearing.**

GROUND TWO

- B** **The learned trial court erred in law in failing to observe that it was impossible in the peculiar circumstances of this case to have refused the application to set aside the judgment of the trial court dated 5th day of May, 2006 vide an application filed by the 2nd – 20th defendants/applicants/ appellants to set aside same.**
- C**

PARTICULARS OF ERRORS OF LAW

- D** **1) Repeat, adopt and rely on particulars of error in support of ground 1 supra.**
- E** **2) The trial court delivered its judgment on 5th May, 2006 in absence of the 2nd – 20th defendants/applicants/ appellants without ordering hearing notice of the judgment to be issued and served on them and rendering the judgment null and void.**
- F** **3) Consequently the 2nd – 20th defendants/applicants/ appellants were denied their fundamental right of fair hearing, guaranteed every citizen by the 1999 Constitution.**

GROUND THREE

- G** **The Ruling/Order/Decision is against the weight of evidence.**

FURTHER AND ADDITIONAL grounds of appeal will be filed on receipt of the record of appeal.”

- H** The complaints on the proposed grounds of appeal before the court below, as they appear to me, have nothing to do with jurisdiction of the trial court. They were mainly premised on lack of fair hearing. Although a constitutional issue, lack of fair hearing in a proceeding of a court is not same with issue of jurisdiction. Jurisdiction of a court or tribunal and lack of fair hearing or trial by a court of tribunal, to me, are two different and independent issues, although each may lead to nullity of a decision taken
- I**

A by a court or tribunal which is in contravention of any of the two issues. Thus, issue of jurisdiction as raised by the learned counsel for the applicants is nowhere to be found both in the court below and in this court. The two fundamental requirements for the grant of this application still remain to be satisfied conjunctively, i.e good and substantial reasons for the delay and grounds of appeal which *prima facie* show good cause why the appeal should be heard. I already have made a finding that there are no substantial reasons to explain away the delay. It is my finding, equally, with the proposed grounds of appeal that they do not appear to me to provide the required arguable grounds of appeal which *prima facie* give good cause why the appeal should be heard.

C It is the trite position of the law that for an application of this nature to be granted, the two conditions or requirements of the law as espoused above i.e good and substantial reasons which explain away the delay and arguable grounds of appeal which *prima facie* give good cause why the appeal should be heard must co-exist. There is a plethora of decided authorities among which are: **Holman Bros Nig. Ltd. vs. Kigo (Nig.) Ltd (1980) 8 – 11 SC 43; Williams vs. Hope Rising Voluntary Funds Society (1982) 1 – 2 SC 70; University of Lagos vs. Olaniyan (1985) 1 NWLR (Pt. 1) 156; In Re-Adewumi (1988) 3 NWLR (Pt. 83) 483; Iroegbu vs. Okwordu (1990) 6 NWLR (Pt. 159) 643; Okafor vs. Bendel Newspaper Corporation (1991) 7 NWLR (pt.206) 651; Corporation and Commerce Bank vs. Ogwuru (1993) 3 NWLR (Pt. 284) 630; Isiaka vs. Ogundimu (2006) 13 NWLR (Pt. 997) 401; E. F. P. Co Ltd vs. NDIC (2007) 9 NWLR (Pt. 1039) 216; Braithwaite vs. Dalhatu (2016) 13 NWLR (Pt. 1528) 32; just to mention a few.**

Again, it was further argued by the learned counsel for the respondent that:

F “The proposed grounds of appeal it thus goes without saying that one cannot eat one's cake and have it again. Where the fruits of a judgment have been enjoyed by a successful party, it will be unreasonable and unconscionable for that parties to seek to lodge any complaint against the judgment as he is deemed to have been satisfied with the result of that judgment and may, thus, have no recondite grounds of appeal which *prima facie* show good cause for his appeal to be heard.”

H In the final analysis, I find no merit in this appeal. I refuse all the reliefs asked by the applicants and the appeal is hereby dismissed. Applicants are to pay respondent N500,000.00 (Five Hundred Thousand Naira) costs.

**Ibrahim Tanko Muhammad,
Justice, Supreme Court.**

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OLU ARIWOOLA, (JSC): I had the privilege of reading in draft the lead RULING of my learned brother **I.T. Muhammad, JSC** just delivered. I agree entirely with the reasoning and conclusion that the application is lacking in merit and should be refused. I too will dismiss the application.

B

Application is dismissed.

Olu Ariwoola
Justice, Supreme Court

C

BAYANG AKAAHS (JSC): I read before now the Ruling of my learned brother, I.T. Muhammad JSC dismissing the application. I entirely agree with him. The applicants were economical with the truth. They have brought this application mala fide as Mr. Malari (now deceased) to their knowledge, had applied to collect the balance of the purchase money which the respondent paid on the land. The application was made over

D

two years after the judgment of the trial court was granted. It is the same judgment which they sought to set aside which was refused that is the subject of this application.

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The so called issues of jurisdiction contained in the proposed notice of appeal are a complete sham. The whole application is an attempt by the applicants to use the instrumentality of the courts to frustrate the order of the trial court granting an order of specific performance in favour of the respondent to enable him take possession of the land which he legitimately acquired from them and in respect of which they collected his money.

F

The application is totally devoid of merit and it is accordingly dismissed. I abide by the order of costs awarding N500,000.00 in favour of the respondent against the applicant.

G

Application is dismissed.

K. B. AKAAHS
Justice, Supreme Court

H

ADAMU AUGIE, (JSC): I had a preview of the lead Ruling just delivered by my learned brother, I. T. Muhammad, JSC, and I agree with him that this application filed on 12/5/2017 totally lacks merit and must be dismissed accordingly.

I

The applicants did not furnish “good and substantial reasons” for their failure to appeal within the prescribed period; and they failed to show “good cause” why the appeal should be heard in the first place.

The grounds of appeal required in applications of this nature are to show good cause why an appeal should be heard; not why an appeal should be allowed – see

A **Obikoya vs. Wema Bank Ltd. (1989) 1 NWLR (Pt. 96) 157 at 178**, wherein this court per Obaseki, JSC, explained:

B **The grounds of appeal required to be exhibited are only to show why the appeal should be *heard*. The Rule does not require the grounds to show why the *appeal should be allowed*. Although in both cases, the grounds of appeal should be substantial, the certainty required in the latter case does not necessarily need to be present in the former case. A ground showing good cause why an appeal should be heard is a ground, which raised substantial issues of fact or law for the consideration of the court. It is a ground, which cannot be dismissed with a wave of the hand or totally lacking in substance. It is a ground, which evokes a serious debate as to the correctness of the decision of the court below. It is a ground, which taxes the intellect and reasoning faculties of the appeal judges. It is a ground, which is not frivolous.**

E In this case, looking at the grounds of appeal filed against the backdrop of what is required, the rationale for refusing this application is clear. It is without hesitation that I also dismiss this application. I also abide by the consequential Orders in the lead judgment, including costs.

F ***Amina Adamu Augie,
Justice, Supreme Court***

ADAMU GALINJE, (JSC): I have had a preview before now of reading the ruling just delivered by my learned brother, I.T. Muhammad JSC and I agree with the reasoning contained therein and the conclusion arrived thereat.

G My learned brother has as usual, thoroughly treated all the questions submitted for determination of the applicants' application filed on the 25th of May 2017. I have nothing to add to the well articulated ruling of my learned brother which I adopt as mine. For the same reasoning as enunciated in the lead ruling I too dismiss the application and endorse all the consequential orders made therein including order as to costs.

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

I

**E.B. UKIRI
AND
ECONOMIC AND FINANCIAL CRIMES COMMISSION
SC.867/2016**

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

FRIDAY, 26TH JANUARY, 2018

BEFORE THEIR LORDSHIPS

**MARYUKAEGO PETER ODILI
CLARA BATA OGUNBIYI
AMIRU SANUSIAUGIE
AMINA ADAMU
SIDIDAUDA BAGE**

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

APPEAL: Compilation of record – Time within which to compile record – Whether it was not wrong for a party to have compiled and transmitted record statutorily without awaiting for the expiration of sixty days allowed to the registrar

APPEAL: Compilation of record – Where appellant compiles an irregular and incomplete record – Whether jurisdiction of court to hear the appeal is affected thereof.

APPEAL: Compilation of record of appeal – Requirement of certification – Failure to comply – Effect.

*CASE LAW: Principles in **Garuba vs. Omokhodion (2011) 14 NWLR (Pt. 1269) 145.***

COURT: Jurisdiction – Whether court has the requisite jurisdiction to entertain an appeal with irregular and incomplete record of appeal – Relevant considerations thereto.

EVIDENCE: Proof – Averments in affidavit not specifically denied – Implication – Whether burden of proving that fact has not been discharged.

JUDGMENT AND ORDERS: Unusable record of appeal – Where the record of appeal compiled by the appellant is unusable – Proper order to make in the circumstance.

PARTIES: Compilation of record of appeal – Compilation of a regular and relevant record of proceedings – Duty on party.

Issue for Determination

- 1. Whether this honourable court can use the record of appeal transmitted by the appellant/respondent to this honourable court in view of the fact that the said records contain documents not used at all at the lower courts and documents that are different in contents from what was filed and used at the lower courts.**
- 2. Whether this honourable court can use the record of appeal transmitted by the appellant/respondent to this honourable court in view of the uncertified process purportedly filed at the Court of Appeal.**

Facts of the Matter

This first motion was filed on the 10th march, 2017 wherein the appellant/applicant seeks an order of this court setting the appeal for hearing on the appellant's brief of argument alone, the respondent having willfully neglected to file and serve the respondent's brief of argument.

The grounds for this application are:

- a) The time within which to file and serve the respondent's brief as required by the 2013 practice directions of the supreme court has lapsed**
- b) This appeal involves the economic and financial crimes commission whose appeals are to enjoy expedited hearing in this honourable court.**

The application is supported by a six (6) paragraph affidavit deposed to by Okparaki, Legal Practitioner in the law firm of E.B. Ukiri & Co.

The appellant's brief of argument in the appeal was filed on 19/10/2013.

The respondent filed a counter affidavit deposed to by Chinedu Ogbu, detective with the respondent. It is a counter affidavit of 14 paragraphs.

The respondent, Economic and Financial Crimes Commission (EFCC) filed a motion on 11/5/2017 praying for the following orders:

- a) An Order setting aside the record of appeal compiled by the appellant.**
- b) An Order compelling the Registrar of the Court of Appeal to come up with the authentic record of appeal.**
- c) And for such other Order or Orders as the honourable court may deem**

fit to make in the circumstances.

The grounds upon which this later motion is brought are that the record as compiled and transmitted by the appellant/applicant has significant omissions. That the record as compiled and transmitted have significant errors and the fact of these errors are shown in the appellant's brief of argument which cited the correct record of appeal. The application is supported by a 19 paragraphs affidavit deposed to by Ogbu, a detective of the applicant. The appellant/respondent himself deposed to a 19 paragraph counter affidavit filed on 19/10/2017.

On the 1st November, 2017 this court adjourned the two motions for hearing to the 8th November, 2017 and the counsel on either side to file written addresses.

Held: *(Unanimously striking out the appeal).*

1. *Record completed by appellant contains irregularities*

A consideration of the affidavit evidence shows that some of the documents contained in the record of appeal are different from what were filed and used in the two courts below and cannot be relied upon herein. Also some documents used in the lower courts are of a different content compared to what was compiled and transmitted to this court by the appellant. Again of note is that some of the documents filed and used at the Court of Appeal are not certified.

(P 280 Paras B–D)

2. *Specific instances of irregularities in the record of proceedings*

In fact getting into specifics, paragraph 14 of the supporting affidavit to this motion and the further and better affidavit found on pages 236 – 238 of the record of appeal transmitted by the appellant is not a 12 paragraph affidavit as contained in pages 236 – 238 of the record of appeal transmitted by the appellant, rather it is a 62 paragraph affidavit as shown in Exhibit 3 which the Court of Appeal ordered the Federal High Court to come up with for use in the determination of the appeal at the court below.

Also shown up in paragraph 15 of the applicant's affidavit in support is a 12 paragraph affidavit as shown in page 488 – 491 of the authentic record of appeal (Exhibit EFCC 3) attached to the applicant's affidavit to this motion and not a 62 paragraph affidavit as found in pages 239 – 250 of the record of appeal transmitted to this court by the appellant. To be noted again is that pages 222 – 233, 388 – 389 of the record of appeal were documents never filed and used at

the lower courts and were also not certified by the lower courts. See paragraph 16 of supporting affidavit. Then several pages of different processes contained in the record of appeal were omitted as shown in paragraph 12 of supporting affidavit. There are numerous documents as seen in pages 402 432 – 462, 463 – 479 and 480 – 504 of the said record not certified as true copies. (P 280 Paras D– I).

3. *Where the record of appeal is irregular and incomplete the court lacks jurisdiction*
The same scenario goes on and on and so it is easy for this court to come to the conclusion that these are strange and extraneous documents not to talk of incompleteness of the process i.e. the records of appeal have drained this court of the jurisdiction to entertain the appeal. Assuming one is to be persuaded to go on to the Appeal, the question that would naturally crop up, is with what record is the court to utilize in the venture, just like an artisan setting out in the creation of an artifact or furniture without the necessary tools or implements. See Orugbo vs. UNA (2002) FWLR (pt. 127) 1024, Shari vs. Anumakyes (2015) ALL FWLR (Pt.773) 1898 at 1903 – 1904. (Pp 280–281 Paras I– C)
4. *The principles in Garuba vs. Omolhodion*
This court had held in the case of Garuba vs. Omokhodion (2011) 14 NWLR (Pt. 1269) 145 thus:

“A record of appeal/proceeding has to be duly and properly compiled to guarantee as to its correctness; and it must be meticulously checked and compared vis-à-vis that original process/documents filed in the matter as well as the proceedings of court.

A record of appeal/proceeding having been duly compiled has to be authenticated and certified as prescribed by law.

This honourable court has also laid down as precedent, the fate to befall such uncertified record/proceeding of appeal in the case of Federal Airports Authority of Nigeria vs. Wamal Express Service (Nig) Ltd. (2011) 8 NWLR (Pt. 1249) at page 219, particularly at page 236 – 237, where this honourable court, having quoted the

provision of Section 111(1) of the Evidence Act on certification of public documents held thus by per Mohammed JSC:

“Vol. 11 of the record of appeal in this appeal lacks all the requirements stipulated by the Evidence Act, it has not been done in conformity with the Evidence Act. It is difficult for the court to rely on such uncertified public documents. Vol. II of the record of appeal is hereby discountenanced” (Pp 281 – 282 Paras C – A)

5. *Where averments in affidavit are not denied.*

It is to be stated that it is now well settled in Law that any averment in an affidavit which has not been clearly, explicitly and directly denied is deemed admitted. That being the case, it is seen that the appellant/respondent did not deny in any manner the inclusion of uncertified processes never used in the courts below nor deny the fact that even the processes used at the lower court are not the same in content as those compiled and transmitted by him to this court. There is no denial in any part of the counter affidavit of the appellant/respondent that the processes purportedly filed at the Court of Appeal including the judgment of the court below which is the base of the appeal is equally uncertified. (P 282 Paras B – D)

6. *Apparent errors in the affidavit*

Paragraph 14 of the supporting affidavit shows that respondent/applicant's further and better affidavit as seen on pages 236 – 238 of the record of appeal is not a 12 paragraph affidavit as contained in the said pages 236 – 238 of the record of appeal transmitted by the appellant rather it is a 62 paragraph affidavit as shown in Exhibit EFCC 3, which is the authentic record of appeal used in the appeal at the Court of Appeal. Again at paragraph 15 of the same affidavit in support is a 12 paragraph affidavit as shown in pages 488 – 491 of the authentic record of appeal (Exhibit EFCC 3) attached to applicant's affidavit to this motion and not a 62 paragraph affidavit as found in pages 239 – 250 of the record of appeal.

Also of note is that pages 1 – 2 of the authentic record of appeal ordered and used by the Court of Appeal, the originating summons upon which the order of forfeiture which the appellant seeks to set aside by this appeal is based is a two paged document and not a single page document found on page 1 of the record of appeal in question. Again there are other missing aspects of the transmitted document for which there is no need to go one after the other.

(P 282 Paras D–H)

7. *It was wrong for the appellant to have transmitted record before the expiration of 60 days statutorily allowed to the Registrar*

I need to bring to the fore also that the appellant did not wait for the 60 days given by the Court of Appeal to the registrar of that court to transmit a compiled record and within 20 days filing the notice of appeal sent in his version of the compiled record of appeal. The explanation for this fast forwarding by the appellant has not been accorded this court, thus leading to the conclusion that a serious breach or infraction has occurred. Therefore taking that aspect alongside the missing documents and the incomplete documentation not to talk of the uncertification of documents that must be certified, there is nothing else to say than that the record being incomplete is not utilizable and has to be discountenanced. (Pp 282–283 Paras H–B).

8. *Failure to deny material averments amount to admission*

The appellant having not denied those facts it is very safe to say he admitted the assertions by the applicant. I am following in the path earlier laid by this court in Lawson-Jack vs. SPDC Nig. Ltd. (2002) 7 SC (Pt. 11) 112, The Reg. Trustees of National Association of Community Health Practitioners of Nigeria & Ors. (2008) 7 SCNJ 348; Garba vs. Ummuani (2014) ALL FWLR (Pt.722) 1715 at 1740. (P283 Paras B–D)

9. *Appeal will be struck out where record of appeal is unusable*

The bottom line in this application and the submissions for and against it, is that the record of appeal as compiled and transmitted by the appellant is unusable and there is no redemption in sight. That being so the option open to this court is to strike out the appeal. (P 283 Paras D–E)

Representation

Eko Ejembi Eko for appellant/applicant/respondent

A. Olatunji for respondent/applicant and with her is **O. Oyediran**.

PETER-ODILI, (JSC) (Delivering the Lead Judgment): This first motion was filed on the 10th march, 2017 wherein the appellant/applicant seeks an order of this court setting the appeal for hearing on the appellant's brief of argument alone, the respondent having willfully neglected to file and serve the respondent's brief of argument.

The grounds for this application are:

- a) **The time within which to file and serve the respondent's brief as required by the 2013 practice directions of the supreme court has lapsed**
- b) **This appeal involves the economic and financial crimes commission whose appeals are to enjoy expedited hearing in this honourable court.**

The application is supported by a six (6) paragraph affidavit deposed to by Okparaki, Legal Practitioner in the law firm of E.B. Ukiri & Co.

The appellant's brief of argument in the appeal was filed on 19/10/2013.

The respondent filed a counter affidavit deposed to by Chinedu Ogbu, detective with the respondent. It is a counter affidavit of 14 paragraphs.

The respondent, Economic and Financial Crimes Commission (EFCC) filed a motion on 11/5/2017 praying for the following orders:

- a) **An Order setting aside the record of appeal compiled by the appellant.**
- b) **An Order compelling the Registrar of the Court of Appeal to come up with the authentic record of appeal.**
- c) **And for such other Order or Orders as the honourable court may deem fit to make in the circumstances.**

The grounds upon which this later motion is brought are that the record as compiled and transmitted by the appellant/applicant has significant omissions. That the record as compiled and transmitted have significant errors and the fact of these errors are shown in the appellant's brief of argument which cited the correct record of appeal. The application is supported by a 19 paragraphs affidavit deposed to by Ogbu, a detective of the applicant. The appellant/respondent himself deposed to a 19 paragraph counter affidavit filed on 19/10/2017.

On the 1st November, 2017 this court adjourned the two motions for hearing to the 8th November, 2017 and the counsel on either side to file written addresses.

Canvassing for the favourable consideration for the application learned counsel A. Olatunji Esq. going along applicant's written address filed on 3/11/2017 submitted that their supporting affidavit of 19 paragraphs and attached exhibits marked EFCC 1,2,3,4 and 4a. He stated that the appellant/ respondent by himself compiled and transmitted the record of appeal to this court on the 18th October, 2016 21 days after he filed the notice of appeal which

A was filed on 29th day of September, 2016. That some of the documents in the record are not a true reflection of what was filed and used at the lower courts and some of those used at the Court of Appeal are not certified at all. He referred to some relevant paragraphs of the supporting affidavit. That even at the Court of Appeal a challenge was thrown at the record transmitted to that court as not reflecting that transpired at the **B** Federal High Court. That the authentic record of appeal transmitted to the Court of Appeal and used therein is attached as Exhibit EFCC 3.

Learned counsel had for ease of reference crafted two issues for determination which are thus:

C

1. Whether this honourable court can use the record of appeal transmitted by the appellant/respondent to this honourable court in view of the fact that the said records contain documents not used at all at the lower courts and documents that are different in content from what was filed and used at the lower courts.

D

2. Whether this honourable court can use the record of appeal transmitted by the appellant/respondent to this honourable court in view of the uncertified process purportedly filed at the Court of Appeal.

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The appellant/respondent adopted his written address filed on 7/11/2017 in which he **F** distilled a single issue as follows:

What is the remedy available in law to a respondent who is not satisfied with the completeness or accuracy of the record of appeal compiled and transmitted by the appellant.

G

I shall utilize the issues as formulated by the applicant and I shall do so altogether.

ISSUES 1 & 2

H

1. Whether this honorable court can use the record of appeal transmitted by the appellant/respondent to this honourable court in view of the fact that the said records contain documents not used at all at the lower courts and documents that are different in content from what was filed and used at the lower courts.

I

2. Whether this honourable court can use the record of appeal transmitted by

A the appellant/respondent to this honourable court in view of the uncertified process purportedly filed at the court of appeal.

B For the applicant, learned counsel contended that the grouse of the applicant over the record of appeal compiled and transmitted to this court by the appellant/respondent are based on the fact that the documents therein do not represent what took place in the courts below. That the situation is so gross that no supplementary record can meet the gaps that have now occurred by reason of this substantially fake record. That these strange and extraneous documents have drained this court of the jurisdiction to enter into the appeal. Also that some of the documents from the court of appeal lacks certification. He cited **Orugbo vs. UNA (2002) FWLR (pt. 127) 1024; Shari vs. Anumakye (2015) ALL FWLR (PT.773) 1898 at 1903 – 1904; Garuba vs. Omokhodion (2011) 14 NWLR (pt.1269) 145; Federal Airports Authority of Nigeria vs. Wamal Express Services (Nig) Ltd (2011) 8 NWLR (Pt 1249) 219 at 236 – 237 etc.**

D Learned counsel for the applicant further submitted that the anomalies applicant is challenging in the record of appeal transmitted by the appellant/respondent featured in the record of appeal compiled and transmitted by the appellant from the Federal High Court to the Court of Appeal and the court below laid to rest the issues pertaining thereto upon a motion therein challenging the record which is herein as Exhibit EFCC 1 by ordering the registrar of the Federal High Court to come up with the authentic record of appeal and instead of doing that, the appellant proceeded to compile and transmit to this court by himself 20 days after filling his notice of appeal without waiting for the registrar's 60 days to expire. He cited **Garba vs. Ummuani (2014) ALL FWLR (Pt. 722) 1715 at 1740.**

E Learned counsel for the appellant now respondent in the motion along the lines of this written address contended that the registrar of court below is not a party to this appeal and cannot apply for extension of time to compile and transmit records of appeal and so appellant acted within the Rules of Court to compile and transmit the said record. He referred to 7 Order Rule 7 (2) of the practice direction of 2013; **P. Michael & Ors vs. Bank of the North (2015) 12 NWLR (pt. 1473) 370 at 402 & 413.** That if dissatisfied with what has been sent forth the respondent applicant had the right to compile and transmit additional record of appeal.

H I shall set out the salient paragraphs of the supporting affidavit to the motion which are thus:

I I, Chinedu Ogbu, adult, male, Christian and a Nigerian citizen of No. 6a Olumeni Street, Old G.R.A Port Harcourt, do hereby make oath and state as

- A** follows:
- B** 1. That I am a detective with the Economic and Financial Crimes Commission (EFCC) and a member of the team of operative assigned to investigate the complaint that gave rise to this appeal by virtue of which I derived the facts deposed herein.
 - C** 2. That I have the authority and consent of the respondent/applicant to depose to this affidavit from facts within course of my investigation.
 - D** 3. That the judgment of the Court of Appeal in this matter was delivered on the 14th day of July, 2016.
 - E** 4. That the respondent/applicant was served with the record of appeal compiled by the applicant on the 21st day of October, 2016.
 - F** 5. That the record of appeal compiled and transmitted by the appellant has some material errors, omissions and documents which do not form part of the record at the lower courts.
 - G** 6. That the respondent/applicant wishes to rely on the accurate record of this appeal
 - H** 7. That the respondent/applicant on 14/2/2014, being the respondent at the lower court (Court of Appeal) challenged the record compiled and transmitted to the Court of Appeal by the appellant by filing a motion challenging the record, an affidavit in support, and attaching as Exhibits EFCC 1 is the motion on notice challenging the record at the court of appeal, together with accompanying affidavit only, without the exhibits.
 - I** 8. That on the 15th day of April, 2014 the motion of the respondent/applicant, challenging the record of appeal at the Court of Appeal was heard and the court held that the

- A** record transmitted by the appellant should be sent back to the Registrar of the Federal High Court for it to come up with an “authentic record” for the appeal within 30 days. Attached as Exhibit EFCC 2 is a certified true copy of the minutes of the Court of Appeal for the 15th day of April, 2014 and order of the court made on the same day.
- B**
- C** 9. That the Federal High Court eventually transmitted the authentic record of appeal on the 5th day of December, 2014, outside the 30 days stipulated by the Court of Appeal. A copy of the authentic record of appeal transmitted by the Federal High Court to the Court of Appeal is hereby attached and marked as Exhibit EFCC 3.
- D** 10. That due to the delay in transmitting the authentic record by the Federal High Court, the respondent/ applicant, on the 8th day of December, 2014 filed a motion on notice at the Court of Appeal praying the Court of Appeal for an extension of time within which the Federal High Court can transmit the authentic record of appeal and also deeming the already transmitted record of appeal by the Federal High Court as the authentic record of appeal. The said motion was granted as prayed and the record compiled by the Federal High Court and transmitted on the 5th day of December, 2014 was deemed to be the authentic record of appeal. Attached as Exhibits EFCC 4 and EFCC 4a respectively is the said motion of 8th December, 2014 by the respondent/applicant and certified true copy of the minute of proceedings of the Court of Appeal on the 29th day of April, 2015.
- E**
- F**
- G**
- H** 11. That the record of appeal transmitted by the appellant to this honorable court has some substantial errors already corrected by the authentic record of appeal and other fresh errors.
- I** 12. That pages 2, 55, 56, 57, 58, 63, 64, 65, 84, 126, 127, 128, 134, 45, 147, 149, 151, 153, 155, 159, 161, 165, 167, 170,

A 173,175,77,179, 181,184, 196, 197, 198, 207, 208-, 462, 467-, 485, 491, 499, 542, 582, 596604, 669, 698730, 762 and 763 of the authentic record of appeal (Exhibit EFCC 3) were omitted in the appellant's record of appeal which he transmitted to the Supreme Court.

B

13. That the omitted pages of authentic record of appeal (Exhibit EFCC 3) are important for a just determination of this appeal.

C

14. That the “respondent/applicant's Further and Better Affidavit” found on page 583 at 595 of the authentic record of appeal (Exhibit EFCC 3) is a 62 paragraph affidavit and not a 12 paragraph affidavit as found in pages 236 – 238 of the record transmitted to the supreme court by the applicant,

D

15. That the “affidavit in support of motion dated the 4th day of December, 2012” found on page 488 – 491 of the authentic record of appeal (Exhibit EFCC 3) is a 12 paragraph affidavit and not a 62 paragraph affidavit as found on pages 239 – 250 of the record of appeal compiled and transmitted to this honorable court by the appellant.

E

16. That pages 222 – 233, 388 – 389 were never used in this matter at the Federal High Court and at the Court of Appeal at all and pages were not certified at all by the lower court.

F

17. That it is necessary for this honourable court to use the authentic record of appeal in determining this appeal.

G

18. That it is in the interest of justice that this application be granted.

Reacting against those averments of the applicant, the appellant's counter affidavits are stated hereunder, viz:

H

I I, Emonena Ukiri male, Christian, Legal Practitioner, Nigeria citizen of full

A age of plot 8 Mission Avenues off Odili, Trans Amadi, Port Harcourt, make oath and state as follows:

1. That I am the appellant in this appeal. The facts I dispose in this affidavit are within my personal knowledge

B .
2. That I have read and understood the respondent's motion on notice and the affidavit in support thereof. Paragraphs 1, 2, 5 – 19 of the said affidavit are untrue and I hereby deny them.

C **3.** That in further denial of the aforesaid affidavit I state as follows:

D **(i)** It is not true that the deponent was assigned to investigate any complaint which gave rise to this appeal on the contrary this appeal did not arise from any complaint against the appellant and the aforesaid deponent who played no role or part in the proceedings in the Court of Appeal and was not even present throughout the proceedings giving rise to this appeal, has no personal knowledge about the facts to which he had falsely deposed nor was he involved in the investigation of any complaint at or during the proceedings in the Court of Appeal, from which this appeal had risen.

E **(ii)** I am also aware that the deponent to the respondent's/applicant's strange affidavit, who is no legal practitioner and does not work in the legal department of the respondent, has not read or seen the record of appeal compiled, transmitted and upon which this appeal was entered. It is absolutely untrue that the record of appeal is incomplete and incorrect.

F **(iii)** On the contrary, the record I compiled and transmitted is complete and sufficient for the resolution/determination of my complaint against the decision of the Court of Appeal. I have since filed and served on the respondent the appellant's brief of argument, relying on the said record since October 2016 – a period of more than one year ago. The respondent has failed and/neglected to file its brief of

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- A** argument in response to my brief. I have already filed and served on the respondent a motion to hear this appeal on my brief of argument alone.
- B** (iv) I am aware that the respondent was at liberty to compile and transmit for its use any record/document necessary for its brief of argument as additional record under the rules of this honourable court within specified number of days from 21th October 2016 when the record of appeal and the appellant's brief of argument were served on the
- C** respondent
- D** (v) I am aware that the time allowed for the respondent to file additional record of appeal under the Rules/Practice Directions of the honourable court has lapsed. The prayers sought by the respondent/applicant in its motion are unknown to Law and the rule of this honourable court. The Registrar of the unnamed division of the Court of
- E** Appeal against whom the second relief is sought is also not a party to this appeal.
- F** 4. That I am aware that it is Mrs. A. Olatunji who has been misusing her position in the respondent to harass and intimidate me in her bid to settle personnel scores with me that has invented the respondent's unknown application to this honourable court for the sole purpose of delaying the hearing of this appeal to perpetuate the forfeiture of N11.175m, the subject matter of this appeal, which fund I derived from the judgment given in my favor in suit No. PHC/156/2008 against UBA Plc by the High Court of Rivers State in 2008.
- G**
- H** 5. That the said Mrs. Olatunji had used the same strategy to frustrate the expeditious hearing and determination of my appeal in the Court of Appeal and thereby perpetrated the respondent's illegal seizure of my aforesaid personal funds from 2008 till date, even though the dispute with my former client over my earned legal fees had been resolved and did
- I**

A not relate to the sum of N11.175m which was paid to me as judgment debt by the defendant (UBA plc) in suit No PHC. 156/2008 bank draft issued in my name, seven years after the dispute with my former client, as shown in the record of appeal.

B

C

6. That Mrs. A Olatunji is aware that the respondent's Headquarters has entered into terms of settlement with me in suit No. FHC/ABJ/CS/280/2008 which I had filed to challenge Mrs. Olatunji's misuse of the respondent to harass and intimidate me. In the terms of settlement entered as the consent judgment of the Federal High Court, it was held, amongst others, that:

D

The plaintiff having been charged and absolved from all liabilities by the decision in suit No PHC/1082/2008 and the 1st defendant having indicated in those proceedings that it was no longer interested in the complaint of the plaintiff's former client, Chief Samuel O. Onowighose, the 1st defendant is estopped from taking any other steps prejudicial to the plaintiff and contrary to the tenor of the aforesaid subsisting judgment of the High Court of River State.

E

F

7. That the 1st defendant referred to in the above consent judgment is the respondent/applicant. The respondent's Mrs. Olatunji has constantly oppose every attempt made by the respondent to release my illegally seized N11.175m, contending that the matter is subjudice in the appellate courts even though the illegal seizure of my funds was done during the pendency of the litigation (FAC/ABJ/CS/280/2008).

G

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8. That the sole purpose of the respondent's motion is to frustrate the release of the sum of N11.175m which is my personnel fund, to me by frustrating the expeditious determination of this appeal. I know that the respondent's

I

A motion was brought in absolute bad faith and is a deliberate delay tactics, aimed at subjecting my family and I to untold financial hardship and torture/trauma.

B 9. That I know that the respondent's only remedy against alleged incompleteness and inaccuracy of record appeal, is for the respondent to compile and transmit additional record of appeal, file its brief of argument pointing out in the brief the alleged inaccuracies in the record of appeal

C 10. It is in the interest of justice to dismiss the respondent's motion and set down this appeal for hearing on the appellant's brief of argument alone. The appellant's brief of argument was served on the respondent over a year ago. The respondent has not challenged the appellant's brief of argument at all.

D

The applicant filed a further affidavit on 23/10/2017 by the same deponent as the supporting affidavit and the relevant paragraphs are thus:

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1. That I have the authority and consent of the respondent/applicant to depose to this affidavit from facts within my knowledge and information I received in the course of my investigation.

F

2. That I have seen and read the applicant/ respondent's counter affidavit filed on the 19th day of October, 2017, the content of which are not true and are hereby denied.

G

3. That the respondent/applicant denies paragraphs 2 to 11 of the appellant/respondent's counter affidavit as though they were set out individually and denied seriatim.

H

4. That contrary to the denied averments in the appellant/ respondent's counter affidavit, the respondent/ applicant wishes to state as follows:

I

a) That the record of appeal transmitted by the appellant/ respondent to this honourable court does

- A** not reflect the true content of what was filed and used at the lower courts.
- B** b) That the funds forfeited in the interim, referred to in paragraphs 4,5,7 and 8 of the appellant/respondent's counter affidavit, are funds stolen by the applicant and laundered in a web of financial transactions for which he is presently standing trial in charge number FHC/PH/247C/2012 at the Federal High Court, Port Harcourt Judicial Division.
- C** c) That I know as a fact that there was/is no settlement entered into by the respondent/ applicant's headquarters or any of its offices as described in paragraphs 6 and 7 of the appellant/applicant's counter affidavit or at all.
- D** d) That I know as a fact that this matter arose from a complaint written against the appellant/ respondent which was investigated by the respondent/applicant and for which the appellant/applicant is now standing criminal trial in charge number FHC/PH/247C/2012.
- E**
- F** 5. That A. Olatunji informed me on the 20th day of October, 2017 at her office at No. 6a Olumeni Street, Old GRA Port Harcourt at about 3:30pm and I verily believe her as follows:
- G** a. That she has no personal relationship whatsoever with the appellant/respondent and does not know him in any other capacity other than as a suspect and thereafter, an accused person in charge No. FHC/PH/247C/2012.
- H** b. That she is not aware of any settlement entered into by the respondent/applicant's headquarters or any of its offices as described in paragraphs 6 and 7 of the appellant/ applicant's counter affidavit or at all.
- I** c. That there has been attempt on the part of the respondent/applicant to release the forfeited funds to the appellant/ respondent as described in paragraph 7 of the appellant/ respondent's counter affidavit or at

A **all.**

The two sides of the divide show, the appellant/respondent positing that the lapses in the record of appeal already compiled and transmitted are no big deal as the option open to the applicant is the compilation and transmission of additional or supplementary records to fill whatever gaps. The respondent's answer to that is that what is complained about in the record already in are too grave to be so easily rectified as the appellant is suggesting and that the situation translates to a drastic action to be taken by the court.

B A consideration of the affidavit evidence shows that some of the documents contained in the record of appeal are different from what were filed and used in the two courts below and cannot be relied upon herein. Also some documents used in the lower courts are of a different content compared to what was compiled and transmitted to this court by the appellant. Again of note is that some of the documents filed are used at the Court of Appeal are not certified.

C In fact getting into specifics, paragraph 14 of the supporting affidavit to this motion and the further and better affidavit found on pages 236 – 238 of the record of appeal transmitted by the appellant is not a 12 paragraph affidavit as contained in pages 236 – 238 of the record of appeal transmitted by the appellant, rather it is a 62 paragraph affidavit as shown in Exhibit 3 which the Court of Appeal ordered the Federal High Court to come up with for use in the determination of the appeal at the court below.

D Also shown up in paragraph 15 of the applicant's affidavit in support is a 12 paragraph affidavit as shown in page 488 – 491 of the authentic record of appeal (Exhibit EFCC 3) attached to the applicant's affidavit to this motion and not a 62 paragraph affidavit as found in pages 239 – 250 of the record of appeal transmitted to this court by the appellant. To be noted again is that page 222 – 233, 388 – 389 of the record of appeal were documents never filed and used at the lower courts and were also not certified by the lower courts. See paragraph 16 of supporting affidavit. Then several pages of different processes contained in the record of appeal were omitted as shown in paragraph 12 of supporting affidavit. There are numerous documents as seen in page 402 – 432 – 462, 463 – 479 and 480 – 504 of the said record not certified as true copies. The same scenario goes on and on and so it is easy for this court to come to the conclusion that these are strange and extraneous documents not to talk of incompleteness of the process i.e. the record of appeal have drained this court of the jurisdiction to entertain the appeal. Assuming one is to be persuaded to go on to the Appeal, the question that would naturally crop up, is with what record is the court to utilize in the venture, just like an artisan setting out in the creation of an artifact or furniture without the necessary tools or implements. *See Orugbo vs. UNA (2002) FWLR (pt. 127) 1024, Shari vs. Anumakyes (2015) ALL FWLR (Pt.773) 1898 at 1903 – 1904.*

A This court had held in the case of **Garuba vs. Omokhodion (2011) 14 NWLR (Pt. 1269) 145** thus:

B **“A record of appeal/proceeding has to be duly and properly compiled to guarantee as to its correctness; and it must be meticulously checked and compared vis-à-vis that original process/documents filed in the matter as well as the proceedings of court.**

C **A record of appeal/proceeding having been duly compiled has to be authenticated and certified as prescribed by law.**

D **This honourable court has also laid down as precedent, the fate to befall such uncertified record/proceeding of appeal in the case of Federal Airports Authority of Nigeria vs. Wamal Express Service (Nig) Ltd. (2011) 8 NWLR (Pt. 1249) at page 219, particularly at page 236 – 237, where this honourable court, having quoted the provision of Section 111(1) of the Evidence Act on certification of public documents held thus by per Mohammed JSC:**

E **“Vol. 11 of the record of appeal in this appeal lacks all the requirements stipulated by the Evidence Act, it has not been done in conformity with the Evidence Act. It is difficult for the court to rely on such uncertified public documents. Vol. II of the record of appeal is hereby discountenanced”**

G It is to be stated that it is now well settled in Law that any averment in an affidavit which has not been clearly, explicitly and directly denied is deemed admitted. That being the case, it is seen that the appellant/respondent did not deny in any manner the inclusion of uncertified processes never used in the courts below nor deny the fact that even the processes used at the lower court are not the same in content as those compiled and transmitted by him to this court. There is no denial in any part of the counter affidavit of the appellant/respondent that the processes purportedly filed at the Court of appeal including the judgment of the court below which is the base of the Appeal is equally uncertified.

H Paragraph 14 of the supporting affidavit shows that respondent/ applicant's further and better affidavit as seen on pages 236 – 238 of the record of appeal is not a 12 paragraph affidavit as contained in the said pages 236 – 238 of the record of appeal

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A transmitted by the appellant rather it is a 62 paragraph affidavit as shown in Exhibit EFCC 3, which is the authentic record of appeal used in the appeal at the Court of Appeal. Again at paragraph 15 of the same affidavit in support is a 12 paragraph affidavit as shown in pages 488 – 491 of the authentic record of appeal (Exhibit EFCC 3) attached to applicant's affidavit to this motion and not a 62 paragraph affidavit as found in pages 239 – 250 of the record of appeal.

B Also of note is that pages 1 – 2 of the authentic record of appeal ordered and used by the Court of Appeal, the originating summons upon which the order of forfeiture which the appellant seeks to set aside by this appeal is based is a two paged documents and not a single page document found on page 1 of the record of appeal in question.

C Again there are other missing aspects of the transmitted document for which there is no need to go one after the other.

I need to bring to the fore also that the appellant did not wait for the 60 days given by the Court of Appeal to the registrar of that court to transmit a compiled record and within 20 days filing the notice of appeal sent in his version of the compiled record of appeal. The explanation for this fast forwarding by the appellant has not been accorded this court, thus leading to the conclusion that a serious breach or infraction has occurred. Therefore taking that aspect alongside the missing documents and the incomplete documentation not to talk of the uncertification of documents that must be certified,

D there is nothing else to say than that the record being incomplete is not utilizable and has to be discountenanced. The appellant having not denied those facts it is very safe to say he admitted the assertions by the applicant. I am following in the path earlier laid by this court in **Lawson-Jack vs. SPDC Nig. Ltd. (2002) 7 SC (Pt. 11) 112, The Reg. Trustees of National Association of Community Health Practitioners of Nigeria & Ors. (2008) 7 SCNJ 348; Garba vs. Ummuani (2014) ALLFWLR (Pt.722) 1715 at 1740.**

E The bottom line in this application and the submissions for and against it, is that the record of appeal as compiled and transmitted by the appellant is unusable and there is no redemption in sight. That being so the option open to this court is to strike out the appeal.

F

G It follows that the application which I earlier stated at the beginning in which the appellant prays for the appeal to be heard on his appellant's brief alone is a non starter as there really cannot be an appeal without a record of appeal from which a consideration will be made.

H This appeal is incomplete from the foregoing and I strike it out. I make no order as to costs.

Mary Ukaego Peter- Odili
Justice, Supreme Court

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A BATA OGUNBIYI, (JSC): I read in draft the ruling of my learned brother **Peter Odili**, JSC just delivered. I agree with the conclusion and reasoning's arrived thereat and make orders in terms of same.

Clara Bata Ogunbiyi
Justice, Supreme Court

B

AMIRU SANUSI, (JSC): Having perused the ruling just delivered by my learned brother **Mary Peter - Odili (JSC)** before now, I must say that his lordship had ably addressed all salient issues calling for determination in this application. The reasoning she advanced in the lead ruling and the conclusion arrived at are agreeable to me. I have nothing to add hence I endorse and abide by the consequential order made therein.

Amiru Sanusi
Justice, Supreme Court

D ADAMU AUGIE, (JSC): I had a preview of the lead ruling delivered by my learned brother - **Peter Odili**, JSC. For the above reasons and the details ones set out in the judgment I too feel that the option opened to this court is to strike out the appeal. I abide by the consequential order therein contained; inclusive of that relating to cost.

E

Amina Adamu Augie,
Justice, Supreme Court

DAUDA BAGE, (JSC): I have had the benefit of reading in draft the lead judgment of my learned brother **Mary Ukaego Peter Odili**, JSC, just delivered. I agree entirely with the reasoning and conclusion reached. I do not have anything useful to add. I abide by all the orders contained in the lead judgment.

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Sidi Dauda Bage,
Justice, Supreme Court

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**ELF PETROLEUM NIGERIA LIMITED
AND**

- 1. DANIEL C. UMAH**
- 2. UCHE N. FINEBOY**
- 3. PROMISE U. EJAH**
- 4. ANDREW ORDU**
- 5. ISAAC M. DIBIA**

**(For themselves and on behalf of members
of the 5 (five Villages of Obite Community in
Onelga, Rivers State)**

SC. 344/2008

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

FRIDAY 19TH JANUARY, 2018

BEFORE THEIR LORDSHIPS

OLABODE RHODES-VIVOUR	JUSTICE, SUPREME COURT
MARY UKAEGO PETER-ODILI	JUSTICE, SUPREME COURT
CLARA BATA OGUNBIYI	JUSTICE, SUPREME COURT
AMIRU SANUSI	JUSTICE, SUPREME COURT
SIDI DAUDA BAGE	JUSTICE, SUPREME COURT

ACTION: Representative action – Conditions necessary thereto – Relevant considerations thereof.

ACTION: Representative action – Opposition thereto – Intra and inter group opposition – Members of the same group can validly challenge representation – Whether members of another group cannot properly challenge representation outside their group.

APPEAL: Concurrent findings – Attitude of Supreme Court thereto

APPEAL: Ground of appeal – Where a ground of law has no particulars – Whether such a ground is incompetent – Or. 8 Rule 2(2) of Supreme Court Rules 1985 (as amended) – Relevant considerations thereof.

*CASE LAW: Principles in **Bank of Baroda vs. Iyalabani Co. Ltd (2002) 13 NWLR (Pt 785) 551.***

CASE LAW: Principles in Nduka vs. Ezenwaku – Relevant considerations thereof.

CONSTITUTIONAL LAW: Payment of compensation – Compulsory acquisition of property – Whether government is not liable to pay compensation – Where property is compulsorily acquired – S. 44(1) (a) and (b) of 1999 constitution of Nigeria – Relevant considerations.

COURT: Award of general damages – Approach of court thereto – Guiding principles.

COURT: Award of general damages – Discretionary nature thereof – Need not be specifically pleaded.

COURT: Evaluation of evidence – Opinion on credibility – Primary role of trial court – Whether an appellate court will not interfere – Whether there are exceptions thereto – Relevant principles.

COURT: Exercise of discretion – Attitude of appellate court thereto – Relevant principles.

JUDGMENT AND ORDERS: Order of representative capacity – Appellant argues that the order was improperly made – No appeal against the said order – Whether order remains valid and subsisting – Appropriate procedure for challenging a representative order of court.

PARTIES: Challenge of authority to sue – Notice of preliminary objection – Party who wishes to challenge authority to sue should file a preliminary objection – Whether the filing of defence for this purpose is not cognizable.

PRACTICE AND PROCEDURE: Proof in civil cases – General principle that a plaintiff will succeed on the strength of his case – Whether the plaintiff can take advantage of the weakness of the defence – Relevant considerations.

STATUTE: S.44(1) of CFRN 1999 – Scope, significance and imperatives.

Issues for Determination

- (1) Were the learned justices right in law in holding that the pleadings and evidence held by the land in dispute was acquired by the Government?**
- (2) Were the learned Justices right to affirm the judgment and award made by the learned trial judge in favour of respondents:**
 - (i) whose entitlement thereto was not proved?**
 - (ii) who had received and acknowledged the compensation paid as full and final payment?**
 - (iii) whose claim was not proved?**
 - (iv) who did not plead and prove transfer of customary right of occupancy or interest in land to appellant?**
 - (v) whose transfer of respondents' interest in land to appellant?**
- (3) Were the learned justices right to affirm a judgment and an award of damages made to members of a non juristic villages and on the basis and evidence that the land is owned by members of 5 families when:**
 - (i) the action is incompetent and void ab initio?**
 - (ii) evidence did not support claim by five villages?**

Facts of the Matter

The respondents filed suit No. FHC/PH/152/97 at the Federal High Court Port Harcourt on the 26/5/97 in a representative capacity for themselves and on behalf of members of the 5 family units or villages that constitute the Obite Community in Ogba/Egbema/Ndoni Local Government Area of River State claiming amongst other reliefs the sum of N2.5 billion representing compensation for the acquisition of the respondents' land measuring approximately 28.685 hectares (286.840sq meters) by the appellant company for the establishment of a Gas plant at Obite Community in the Ogba/Egbema/Ndoni Local Government Area of River State.

The respondents as plaintiffs in the trial court called 3 witnesses and tendered Exhibit 1 i.e. Bill of Demand; Exhibit 2 their Solicitors letters of demand to the appellant dated 2/4/97; Exhibit 3 a and 3b photographs and negative; Exhibit 4A and 4B receipts of payment made by the appellant to Umu-Orakwokra family and close their case on 2/11/2000.

The appellant as defendant also called 3 witnesses and tendered Exhibits 6, 7, 8, 9, 10, 11, 12, 12a, 12, 13a, 14, 15 and 15a.

On the 8/4/2005, a reserved judgment was delivered in favour of the respondents in the sum of N25,000,000.00 (Twenty Five Million Naira). On an appeal to the court below, Ilorin Division a reserved judgment was also delivered on the 13th day of July, 2006 which

affirmed the judgment of the Federal High Court Ilorin of the sum of N25,000,000.00 (Twenty Five Million Naira), with costs assessed at N10,000.00 against the appellant.

Held: *(Unanimously dismissing the appeal)*

1. *A ground of law without particulars of error or misdirection is incompetent*
Ground 1 of the additional grounds of appeal complained of is reproduced hereunder as follows:

1. **The learned Justices erred in law in not considering and determining Issue No. 3 validly raised by appellant and thereby denied appellant fair hearing on the appeal in that Issue No. 3 raised the question as to whether on the pleadings and evidence, plaintiffs were entitled to the judgment given them?**

Order 8 Rule 2(2) of the Rules of this court provides thus:

“If the grounds of appeal allege misdirection or error in law, the particulars and the nature of the misdirection or error shall be clearly stated”.

See the case of Global Transport Oceanico & Anor. vs. Free Enterprise Nigeria Limited (supra). As rightly submitted and argued on behalf of the respondents, the use of the word “shall” in the rules of court makes it mandatory and not merely directory that the particulars of error or misdirection in law in the ground of appeal must be stated.

For all intents and purposes and without having to belabor the issue, the objection raised by the respondents learned counsel has merit and I hereby make an order striking out ground 1 of the additional grounds of appeal as well as Issue No. 3 on the amended brief of argument of the appellant and the argument thereof as it is not supported by any particulars. (P312 Paras A–G)

2. *Compensation on acquisition of property constitutionally guaranteed*

It is pertinent to state that this court by its decision in the case of Provost Lagos State College of Education & Ors. vs. Kolawole Edun & Ors. 2004 6 NWLR (PT. 870) PAGE 476 AT 509 decided that the Government has the constitutional right to acquire compulsory property on payment of compensation by virtue of section 40 of the 1979 Constitution, now section 44(1), (a) & (b) of the 1999 Constitution.

By logical extension and deduction therefore, it holds right to say that where property including land is acquired compulsorily by Government and surely oil companies, such as in the present case, the payment of adequate compensation is obvious and imperative.

The supremacy of the Constitution over any other law, be it Land Use and Petroleum Act etc have never been in doubt. It is well pronounced in section 1(1) and (3) of the 1979 Constitution and same also under the 1999 Constitution of the Federal Republic of Nigeria.

As rightly submitted by the respondents' learned counsel therefore, the right to own property by an individual and indeed family or community is well entrenched in the 1979 Constitution. The right to own property carries with it the right to dispose also of the said property. It is not logical therefore that the appellant in this case should acquire the land of the respondents without paying adequate compensation to them. Reference is squarely provided for in the case of Kukayi & Ors vs. Aino (1990) 10 NWLR (pt. 624) p. 233 at 645. See also ELF Pet. Nig. Ltd. vs. Daniel Umah & 4 Ors under reference supra. (Pp 314 – 315 Paras H – E)

3. *Constitutional right to be paid compensation for compulsory acquisition*
Furthermore and for purpose of re-asserting the right accruing to the respondents, I will seek to relate to section 44(1) of the 1999 Constitution which reproduction states as follows:

- “(1) No moveable property or any interest in an immovable property shall be taken possession of compulsorily and no right over or interest in any such property shall be acquired compulsorily in any part of Nigeria except in the manner and for the purposes prescribed by a law that, among other things,**
- (a) Requires the prompt payment of compensation therefore and**
 - (b) Gives to any person claiming such compensation a**

right of access for the determination of his interest in the property and the amount of compensation to a court of law or tribunal or body having jurisdiction in that part of Nigeria”.

The foregoing constitutional provision is mandatory and not merely directory and could not have been waived by the respondents. It also pertains to the general public of Nigeria. See the decision of this court in Menakaya vs. Menakaya 2001 91 LRCN pg 2958 at 2996 HI.

(Pp 315–316 Paras E–C)

Per Ogunbiyi (JSC):

“It is pertinent to read from the foregoing section again that no movable property or any interest in immovable property shall be taken possession of compensation. See Kukayi vs. Adesina (1999) 10 NWLR (pt. 624) 63 at 65.

It is revealed on the record that the appellant throughout its 21 paragraph statement of defence and even in evidence before the court did not state or say that the respondents land was compulsorily acquired for any public purpose and no notice of any public acquisition was pleaded and tendered at the trial; rather the appellant gave evidence that it is a multinational oil and gas company operating the Obite Gas Plant on Respondents' land. As rightly argued and submitted by the learned counsel for the respondents, the appellant's counsel cannot be right to say that the respondents never merited the payment of compensation by the appellant.

Therefore, the lower court cannot be wrong when it affirmed the judgment of the trial court.” (Pp 316–317 Paras F–B)

4. *There is no limitations placed on the appellants not to pay compensation*

I seek to emphasize further that a limitation has not been imposed on the appellant by any law not to pay compensation for the land acquired. This is more so especially when regard is had to the mandatory provisions of section 40(1) of the 1979 Constitution, which is impairi materia with section 44(1) of the 1999 Constitution of the Federal Republic of Nigeria, now extant.

The appellant having paid the respondents the sum of N1,995,718.50k

for surface rights for the crops, economic trees and structures damaged on the respondents' land as admitted by DW3 in his evidence in chief and under cross-examination, cannot now be heard that the respondents are not entitled to compensation for the land acquired. Any adherence to the appellant's submission is to give way to technicality as against justice. See the case of Nneji vs. Chukwu (1988) 3 NWLR (pt. 81) 184. (P 317 Paras B – E)

5. *Principles of proof in civil cases*

The general rule is well restated that the plaintiff should succeed on the strength of his own case. However, it is also in point that a plaintiff can take advantage of the weakness of the defence. See the view held by this court in the case of Akinola & Anor. vs. Olowu & 2 Ors. 1962 1 All NLRs (pt. 2) pg. 224.

As rightly submitted by the respondents' learned counsel, their case cannot be said to be founded on the Tort of trespass as the appellant's senior counsel would want this court to believe. In other words, the argument by the appellant that the fulcrum of the respondents' case is tied to trespass is totally misleading and also misconceived.

On the totality of the 1st issue herein, the lower court was right in endorsing the sum of N25,000,000.00 awarded by the trial court based on the constitutional and legal position adumbrated. The said issue is resolved against the appellant, and I also affirm the decision reached by the court below. (Pp 317 – 318 Paras E – A)

6. *Guiding principles as award of general damages*

As rightly stated by the respondents' counsel, the main thrust of the plaintiffs/respondents' claim is founded on the payment of compensation for their land acquired by the defendant/appellant for its Gas Plant operation and the enforcement of their Bill of Demand dated the 16th day of September, 1996 which was presented to the appellant for implementation and enforcement.

I seek to state that, as revealed on the respondents' pleadings, their claim was hinged and founded on General Damages which should leave the trial court with the unfettered discretion to decide what adequate award it should make in favour of the respondents based on what is reasonable, fair and just, considering the nature and circumstances of the respondents' case. It is only reasonable of course that the factors to be considered for the award of damages must be the antecedent of the fact that the respondents' land acquired was an agricultural land and was used also for fishing purposes. All these are borne out clearly on the pleadings.

It is also significant to bear in mind that the future use of the land cannot possibly revert to the original user. This is more so when the evidence of DW3 is taken into account where he said that he would not know when the defendant/appellant would vacate the land of the plaintiffs/respondents. (Pp 321 – 322 Paras G – C)

7. *Award of general damages is discretionary*

It is an established principle of law that in cases where a party is demanding for or claiming general damages, the court awards same at its discretion. See the decided cases of Akinterinwa vs. Oladunjoye (2000) 1 NWLR (pt. 659) 93 at 115; UBN Plc vs. Ikwe (2000) 3 NWLR (pt. 648) 223 at 237; Yolaye Amayi vs. A. REC Ltd. (1990) 4 NWLR (pt. 145) 422 @ 451 and Osuji Vs Isiocha (1989) 3 NWLR (pt. 111) 623 @ 640.

The claim which the respondents are making for compensation is for the use of the respondents' land in Obite Community in the Ogba/Egbema/Ndoni Local Government Area of Rivers State of Nigeria. The appellant by its own evidence through DW3 one Chibuzor Ugwuoha said that the land Use Act forbids the appellant from payment of compensation for acquisition. This is therefore in confirmation to the provision of section 44(1) of the 1999 Constitution of the Federal Republic of Nigeria. It is also in consonance with the principle of UBI JUS UBI REMEDIUM, that the trial court awarded N25,000,000.00 to the respondents which was affirmed by the court below.

It is pertinent to re-iterate herein that in the award of General Damages, a wide spread power is given to the court comparable to the exercise of discretion of the Court. It is enormous and therefore far-reaching and contrary to the contention held by the appellant herein. The measure of general damages is awarded to assuage such a loss, which flows naturally from the defendant's act. It needs not be specifically pleaded. It suffices if it is generally averred. They are presumed to be the direct and probable consequence of that complained of. (Pp 322 – 323 Paras D – A)

8. *General damages are incapable of exact calculation*

Unlike special damages, it is generally incapable of exact calculation. See the following authorities of:-Federal Mortgage Finance Ltd vs. Hope Effiong Ekpo (2004) 2 NWLR (pt. 865) 100 at 132, Dumez vs. Ogboli (1972) 2 SC 196 and Wasa vs. Kalia (1978) 3 SC 21. (P 323 Paras A – B)

Per Ogunbiyi (JSC):

“Contrary to the contention held by the learned counsel for the appellant thereof, the respondents, as rightly submitted on their behalf, knew what they wanted from the trial court which was rightly affirmed by the court below. In other words, the general damages (compensation) which was duly pleaded and awarded in the sum of N25 million. The judicial discretion of the trial court in awarding the said damages was, I hold rightly not disturbed by the court below or interfered with. The discretion was exercised both judiciously and judicially taking into consideration the facts and circumstances of the respondents' case.

(P 323 Paras B–D)

9. *An appellate court will not interfere in the exercise of judicial discretion where judicially and judiciously exercised.*

It is trite law that judicial discretion is not questioned by an appellate court when it is not exercised wrongly or perversely. The trial court awarded the sum of N25 million by reliance on the authorities of Kukoyi vs. Aino and Ogunleye vs. Oni (supra) also on section 44(1) of the 1999 Constitution which is impair materia with section 40(1) of the 1979 Constitution. After all, the sum of N25 million damages awarded the respondents is only 1% of the total claim of N2.5 Billion. As rightly questioned by the learned counsel for the respondents, thereof, is it fair and equitable both in law and in equity to say that the discretion of the trial court in awarding such sum was unwarranted injudicious and unjustifiable in the circumstance? This is bearing in mind the vast hectares of the respondents' land acquired by the appellant for a matter done over 8 years before judgment? The answer is certainly in the negative, without mincing my words.(P 323 Paras E–H)

10. *Where an order of representative capacity is not challenged it remains valid and subsisting*

It is pertinent to say again that there has not been any motion to set aside or an appeal against the order to sue in a representative capacity made on the 7th August, 1997. It therefore remains sacrosanct, valid and subsisting. See the case of Osuala vs. Osuala 1995 3 SCNJ 60. The only way the defendant/appellant

could have successfully challenged the capacity of the plaintiffs/respondents to initiate the suit precipitating into this final appeal would have been by way of preliminary objection without filing a statement of defence and thereafter calling evidence.

The order made on 7th August, 1997 cannot now be challenged in this court for the 1st time for purpose of side tracking the lower court as sought to do by the appellant. See the case of Anabaronye & Ors. vs. Nelso Nwakaibe (1997) 1 NWLR (pt. 482) 374 at page 382 wherein this court held and said:

“The matters mentioned above which were raised as issues or questions were being raised for the first time in this court; they were not raised in the courts below. The authority of a person to bring a representative action can be challenged by way of preliminary objection on notice and not by way of defence”. (P 327 Paras B–F)

11. *The principle in Nduka vs. Ezenwaku*

The appellant's counsel has amongst other authorities relied heavily on the Court of Appeal decision in the case of Nduka vs. Ezenwaku (supra) on his amended brief of argument to argue that the respondents are not juristic personalities to initiate the suit leading to appeal and thus the trial court had no jurisdiction to entertain and determine the respondents case.

As rightly submitted and well analyzed by the learned counsel for the respondents, the principle in that case is most inappropriate to the circumstance of the appeal herein and does not in any material respect aid the appellant's case.

In other words and putting it differently, in Nduka vs. Ezenwaku's case (supra), the issue of absence of the word “MEMBERS” from the case came up at the address stage when plaintiffs applied to amend the name of the plaintiffs by prefixing Ezenwaku family with the word Members to make the suit have life and flesh which is not the position in the case under consideration.

In the appeal herein, the particulars of claim, pleading and evidence of the respondents through PW1, Mr. Promise U. Ujah at the trial court have already and clearly shown that the respondents on record represented the members of the 5 families namely Umuijere, Umu-Eke, Umuoru-Kwokra, Umu-Nkweke and UmuNgwu that constitute the Obite Community in Ogba/Egbema/Ndoni Local Government Area of Rivers State. (See page 45 of the Record of Appeal) whereby the plaintiffs/respondents witness, PW1 supra,

gave in evidence at page 76 of the record that: “We sometimes called these families Villages.”

As rightly submitted by the respondents' counsel, his clients are and therefore juristic personalities to sue and represent members of their 5 families/villages making up the Obite Community. Throughout the record of appeal from the trial court to this court, the word “MEMBERS” is aptly reflected on the particulars of claim and right through to the judgment to this court. The trial court, I hold had jurisdiction to entertain and determine the case of the respondents herein as properly constituted. Contrary to the submission by the appellant's learned counsel therefore, the court below was right to have affirmed the judgment of the trial court as it did. (Pp 327 – 328 Paras G – G)

12. *The party who can properly challenge representative capacity*

Again in the case of Nduka vs. Ezenwaku under reference (supra) and closely relied upon by appellant's counsel at pages 30 – 31 of the amended appellant's brief of argument on the juristic personality of the respondents which effectively relates to the respondents' capacity to sue, the lower court said thus:

“The opposition which will justify challenge of authority of the representation of a group to sue or defend in a particular capacity must be an opposition coming from a section of the group. It must be an intra dissention within the group and not inter dissention between two groups which have diametrically opposed interest in the matter before the court.”

I seek to restate affirmatively that none of the respondents and those represented is opposed to the respondents' capacity or authority to represent them. (Pp 328 – 329 Paras G – C)

13. *Conditions necessary to constitute a representative action*

In the case of Shell Petroleum Dev. Company Nigeria Limited vs. Amadi under reference supra, the issue of legal personality of the plaintiffs/respondents was raised on appeal before the Court of Appeal. Their Lordships relied on the decision of this court in Yusuf vs. Akindipe (2000) FWLR (pt. 5) 709, (2000) 8 NWLR (pt. 669) 376 at 386 wherein it was held by this court that:

That since the respondents on record, claim the right to the reliefs

sought for themselves and in a representative capacity and that since the group or class of persons they sought to represent are easily identifiable and have common interest and purpose they could sue in that capacity.

Per Ogunbiyi (JSC):

As submitted rightly on behalf of the respondents, the members of the five families/villages that constitute the Obite Community in the Ogba/Egbema/Ndoni Local Government Area of Rivers State are easily identifiable and have a common purpose i.e. the land owned together which was compulsorily acquired by the appellant.

The law is trite when a group/class of persons sought to be represented in a suit are easily identifiable and have common purpose as in the instant case, they can institute a suit in a representative capacity to seek remedy in a court of law.

It is in evidence that the respondents on record represented the members of the 5 families (villages) that constitute the Obite Community and have common interest in the land compulsorily acquired by the appellant and therefore have the authority to institute the suit for themselves as juristic persons on behalf of the members of the 5 families (villages) that constitute the Obite Community. (Pp 329–330 Paras C–A)

Per Ogunbiyi JSC:

“Again, for purpose of driving the point home further in the case of Alhaji Raimi Akanji Yusuf & Ors vs. Alhaji Akindipe & Ors (supra), this court made pronouncements severally on this issue of juristic personality of a plaintiff to sue. In recounting certain excerpts of the pronouncements it was emphasized that the group or class of persons sought to be represented if identified easily and have common purpose, will suffice a representative capacity.

The respondents herein like in the foregoing authority, are easily identifiable and have common purpose as the members of the 5

families (villages) that constituted Obite Community in Ogba/'Egbema/Ndoni Local Government Area of River State whose lands were compulsorily acquired by the appellant. They are therefore juristic persons at law, so also are the other members of the families sometime called villages who donated their power to the named respondents on record to fight their cause for them. (P 330 Paras A–D)

14. *The principles in Bank of Barada vs. Iyalabani Co. Ltd*

In the course of his submission also the appellant's counsel cited and relied on the case of Bank of Barada vs. Iyalabani Co. Ltd. (2002) 13 NWLR (pt. 785) 551 at 592. As rightly submitted by the respondents' counsel, that case under reference is not relevant or applicable to the present case herein.

In that case for instance, this court allowed the appellant Bank's appeal on the ground that the issues of legal personality of the appellant bank cannot be determined in limine without evidence being led. In the appeal herein before us, the respondents have led credible evidence showing that the suit was for themselves and on behalf of the members of the 5(five) villages constituting the Obite Community in Ogba/Egbema/Ndoni Local Government Area of Rivers State. I will re-iterate again that the respondents' witness, Mr. Promise U. Ejah, while giving evidence as PW1, at the trial court never found any difficulty in saying that “we sometimes called these families villages.” This was done after the witness (who incidentally is the 3rd plaintiff/respondent on record) had taken pains to enumerate the five families before the trial court as enumerated earlier in the course of this judgment.

The 5 persons who sued the defendant/appellant are natural persons authorized by the members of these 5 villages that constitute the Obite Community, an identifiable entity to sue.

In Shell Petroleum Development Company Nigeria Limited vs. Chief T. Edamkue & Ors. (2009) All FWLR (pt. 489) 407 at 429, this court held that “A person has the right to protect his family's interest in a property or title and can sue for himself and or on behalf of his family in a representative capacity.” (Emphasis is supplied).

(Pp 330–331 Paras E–C)

15. *Appellant's contentions are based on mere technicalities and not on substance*

The contentions put forward by the learned counsel for the appellant, I hold are mere technicalities and not substance of the appeal. See the case of Nneji vs.

Chukwu (1988) NWLR (pt. 81) 184 at 196 and Oluigbo vs. Umeh (2004) 6 NWLR (pt. 870) 621 at 647.

The challenge of the plaintiffs/respondents to sue in a representative capacity for themselves and on behalf of the members of the 5 villages does not lie in the mouth of the defendant/appellant who has nothing to share in the victory of the plaintiffs/respondents. This is in view of the settled law held by this court that a defendant/appellant cannot challenge the capacity of the plaintiffs/respondents. See the decision delivered on Friday 10th day of July, 2009 in the case of Shell Petroleum Dev. Company (Nig) Ltd. vs. Chief Tigbara Edamkue & Ors. (under reference supra) at page 430 wherein it held that:

“Once the plaintiff/plaintiffs expressed on a writ or statement of claim that the action was brought in a representative capacity as appears in the two (2) consolidated suits in the instant case it is/was prima facie, though not conclusive evidence of authority by his/their group, family or community to sue in that capacity. It is only a member of that group, family or community who can dispute, intervene or challenge the proper representation or the capacity in which the plaintiff/plaintiffs sued. It will be futile for a defendant who is not one of those the plaintiff/plaintiffs purport to represent to challenge his/their said authority, for or because, if the plaintiff/plaintiffs case be dismissed, such dismissal can never affect the defendant adversely.

Following from the foregoing authority, it is obvious that the contention of the learned senior counsel, that there were/are no juristic persons before that trial court up to this court or that a family or community cannot sue as in the instant case, is unfounded in law. The said issue is, in the circumstance, resolved also against the appellant. (Pp 331 – 332 Paras C – C)

Per Ogunbiyi (JSC):

“The appellant's counsel, as rightly submitted on behalf of the respondents, was merely academic in his argument and which has no legal foundation in our jurisprudence. See the case of Awosanya vs. Okulate (2000) 2 NWLR (pt. 646) 530.

In other words, and contrary to the submission by the appellant's

counsel, the court below had properly appraised and considered germane issues to determine the appeal before arriving at its conclusions and judgment delivered on 13/7/2006. Hence the lower court was therefore right in law to have affirmed the award of N25,000,000.00 by the trial court as General Damages in favour of plaintiffs/respondents which same is also affirmed by me.

With all the issues resolved against the appellant, the totality of this appeal is that it lacks any merit. I hereby dismiss same and affirm the judgment of the lower court which endorsed that of the trial court. I also award costs of N2,000,000.00 (Two Million Naira) in favour of the respondents against the appellant.” (P 332 Paras C – G)

16. *No justification to disturb concurrent findings*

A call on this court to interfere in those findings which were well founded is a call in futility as there would be nothing on which this court would place such interference. See Balogun vs. Akanji (2005) 10 NWLR (pt 933) 394 at 415; Obilaso Anabaronye & Ors vs. Nelso Nwakaihe (1997) 1 NWLR (pt. 482) 374 at 383; Okolo vs. Uzoka (1978) 4 SC 77; Fashanu vs. Adekoya (1974) 1 All NLR (pt. 1) 35; Ebla vs. Ogodo (1984) 1 SC NLR 371; Ajayi vs. Jolaosho (2004) 2 NWLR (pt. 856) 89 at 97.93; Odulaja vs. Haddad (1973) 11 SC 357; Incar vs. Benson (1975) 3 SC 117.

Indeed considering all that is before the court, there is nothing in which the concurrent findings of the two courts below could be upset and so in line with the fuller and better reasoning in the lead judgment, I see no merit in this appeal which I also dismiss.

(P 340 Paras D – G)

Per Sanusi (JSC):

“It is noted by me, that in this appeal there exist concurrent findings of both the trial Federal High Court (the trial court) and the Court of Appeal (the lower court) both of which favoured the present respondents. I wish to restate the attitude of this court of refraining from interfering or disturbing concurrent findings of two lower courts excepts on special or exceptional circumstances.

In the case of Ebolor vs. Osayende (1992) 7 SCNJ 217 or (1992) NWLR (pt. 249) 524 this court had this to say, per Nnaemeka-Agu JSC (of blessed memory):

“This brings me to the question of concurrent findings on the point by the two lower courts. This court usually approaches such findings from the premises that following from the fact that making of findings on primary facts is a matter pre-eminently within the province of the court of trial which has the opportunity of seeing and hearing the witnesses testify, a judge's conclusion on the facts is presumed to be correct. So, that presumption must be displaced by the person seeking to upset the judgment on facts”.

The same learned jurist also in the case of Kenneth Ogoala vs. The State (1991) 2 NWLR (pt. 176) 509 or (1991) 3 SCNJ 61 or (1991) 3 SC 80. Also stated thus:

It is settled that where there is sufficient evidence to support concurrent findings of fact by two lower courts, such findings should not be disturbed unless there is a substantial error apparent on the record. That is, the findings have been shown to be perverse, or some miscarriage of justice or some material violation of some principle of law or of procedure is shown”.
(Pp 341 – 342 Paras A – A)

17. *The role of evaluating evidence belongs to the trial court.*

It must be stressed here that an appellant court does not have the power to substitute its own views for those of trial court, especially when the issue relates to credibility of witnesses, since it is the trial court only that had this opportunity of seeing, hearing and observing the demeanor of such witness or witnesses who testified before him. See Bamgboye vs. University of Ilorin & Anor (1999) 10 NWLR (pt. 622) 290. In this instant appeal, it has not been shown by the appellant that the findings of the lower courts are perverse or that there was misconception or misapplication of law. This court therefore lacks the justification to interfere with or disturb the findings of the two courts below in this appeal. (P 342 Paras A – D)

Representation

CHIEF T. J. O. OKPOKO (SAN) for the Appellant appearing with *C.A. Ajuyah (SAN)* and *Nnenka Ntiaidem, Esq.*

CHIEF F. A. ENEAWAJI for the Respondent

BATA OBUNBIYI, (JSC) (Delivering the Lead Judgment): The Appellant herein was the defendant in suit No. FHC/PH/CS/152/97 filed at the Federal High Court, Port Harcourt in Rivers State. The respondents herein as plaintiffs in the trial court and respondents also in the court below for themselves and on behalf of the members of the 5 (five villages that constitute the obite community in Ogba Egbema Ndoni L.G.A of Rivers State of Nigeria initiated the aforesaid suit (supra) against the appellant as defendant therein and claiming the following reliefs:

- (a) **The sum of N2,500,000.000.00 (Two Billion, Five Hundred Million Naira) only being and representing compensation for the acquisition of the plaintiffs communities, vast area of land measuring approximately 28.684 hectares (about 286.840 square meters) by the Defendant company for the establishment of a GAS PLANT at OBITE COMMUNITY in the Ogba/Egbema/Ndomi Local Government Area of Rivers State of Nigeria.**
- (b) **That the Defendant Company implements the contents of the Plaintiffs' bill of demand dated September 15th 1996 already pleaded in paragraph 6 of the Statement of claim.**
- (c) **That the Defendant company be committed in a written undertaking that it would always offer gainful employment opportunities to the indigenes of the five (5) smaller communities (villages that constitute the overall OBITE LARGER Community”.**

Judgment was entered on the 18th day of April 2005 by the trial court in the sum of N25 Million Naira in favour of the Respondents which judgment was affirmed on appeal by the court below on 13th day of July, 2006. Against the said judgment of the court below, the appellant has brought this present appeal founded on 3 original Grounds of Appeal. By the leave of this court granted on the 23rd November, 2009, four additional Grounds of Appeal were filed by the appellant.

SUMMARY OF RELEVANT FACTS

The respondents filed suit No. FHC/PH/152/97 at the Federal High Court Port Harcourt on the 26/5/97 in a representative capacity for themselves and on behalf of members of the 5 family units or villages that constitute the Obite Community in Ogba/Egbema/Ndomi Local Government Area of River State claiming amongst other reliefs the sum of N2.5 billion representing compensation for the acquisition of the respondents' land measuring approximately 28.685 hectares (286.840sq meters) by the appellant company for the establishment of a Gas plant at Obite Community in the Ogba/Egbema/Ndomi Local Government Area of River State.

The respondents as plaintiffs in the trial court called 3 witnesses and tendered Exhibit 1 i.e. Bill of Demand; Exhibit 2 their Solicitors letters of demand to the appellant dated 2/4/97; Exhibit 3 a and 3b photographs and negative; Exhibit 4A and 4B receipts of payment made by the appellant to Umu-Orakwokra family and close their case on 2/11/2000.

The appellant as defendant also called 3 witnesses and tendered Exhibits 6, 7, 8, 9, 10, 11, 12, 12a, 12, 13a, 14, 15 and 15a.

On the 8/4/2005, a reserved judgment was delivered in favour of the respondents in the sum of N25,000,000.00 (Twenty Five Million Naira). On an appeal to the court below, Ilorin Division a reserved judgment was also delivered on the 13th day of July, 2006 which affirmed the judgment of the Federal High Court Ilorin of the sum of N25,000,000.00 (Twenty Five Million Naira), with costs assessed at N10,000.00 against the appellant.

By notice of appeal dated the 12th day of September, 2006 and filed on the 29th day of September, 2006, the appellant has now appealed to this court on three grounds. By the leave of this court sought and obtained on 23rd November, 2009, the appellant again filed 4 additional grounds of appeal thus making 7 with the 7th ground of appeal canvassing the issue of jurisdiction of the trial court and the Court of Appeal on the footing that the plaintiffs now respondents are non-juristic persons and that they do not represent the members of the 5 (five) villages or families that constituted Obite Community of Ogba/Egbema/Ndomi Local Government Area of Rivers State of Nigeria.

In compliance with Rules of this Court, briefs were filed on behalf of the parties:

- 1. The amended appellant's brief argument was settled by one C. A. Ajuyah, Esq. SAN and filed on the 28/8/2017 but deemed filed properly on the 24/10/17.**
- 2. The respondents' amended brief of argument was settled by one F. N. Ogbu (Mrs) and filed on 17/19/17 but deemed as properly filed also on the 24/10/17.**

- 3. An amended appellant's reply brief of argument, which was settled also by his said counsel, was filed on the 20/10/2017 but deemed properly filed on the same date 24/10/17.**

On the said same date, the 24/10/17, at the hearing of the appeal herein, both counsel adopted and relied on their respective briefs of argument. While the learned senior counsel for the appellant urged in favour of allowing the appeal, on behalf of the respondents, their counsel submitted that the appeal be dismissed for want of merit.

At pages 10 and 11 of the appellant's amended brief of argument the issues for determination are four fold as follows:

- (1) Were the learned justices right in law in holding that the pleadings and evidence held by the land in dispute was acquired by the Government?**
- (2) Were the learned justices right to affirm the judgment and award made by the learned trial judge in favour of respondents:**
 - (i) whose entitlement thereto was not proved?**
 - (ii) who had received and acknowledged the compensation paid as full and final payment?**
 - (iii) whose claim was not proved?**
 - (iv) who did not plead and prove transfer of customary right of occupancy or interest in land to appellant?**
 - (v) whose transfer of respondents' interest in land to appellant?**
- (3) Were the learned justices right to affirm a judgment and an award of damages made to members of a non juristic villages and on the basis and evidence that the land is owned by members of 5 families when:**
 - (i) the action is incompetent and void ab initio?**
 - (ii) evidence did not support claim by five villages?**

It is pertinent to say also that the four issues were founded on the 7 Grounds of appeal with ground 1 inclusive of the additional grounds of appeal.

From the respondents' amended brief of argument, five issues are raised for determination and are contained at pages 3 and 4 as follows:

ISSUE 1

Where the provisions of the Land Use Act, ACP 202 LFN, 1990, the Oil Pipe lines Act or Petroleum Act could override the mandatory provisions of the 1979 or 1999 Constitutions of the Federal Republic of Nigeria providing for payment of adequate compensation to the respondent for the land acquired by the appellant.

ISSUE 2

Where from the state of the pleadings and the evidence led before the trial court and the court below, the claim of the respondents could not be said to be founded on general damages i.e. compensation as to leaving the trial court with an unfettered discretion to decide on what award to make in the circumstance of the case which award was affirmed by the court below.

ISSUE 3

Whether this honourable court can set aside the concurrent findings of fact of the trial court and the court below when the appellant has not shown that such concurrent findings are perverse, unsound, contrary to established principle of law and has occasioned any miscarriage of justice against the appellant.

ISSUE 4

Whether the court below was duty bound to consider and determine all the 3 issues raised and formulated by the appellant especially when the consideration and determination of 2 out of the 3 issues successfully and fully determined the controversies between the parties.

ISSUE 5

Whether the challenge of the legal personality of the plaintiffs/respondents before this honourable court is proper in law, the respondents having sued for themselves and on behalf of the members of the 5 villages constituting the Obite Community.

As a pre-requisite consideration, the respondents' counsel curiously observed that the 1st ground of appeal in the additional grounds of appeal on page 7 of the appellant's brief of argument, which the appellant has argued as issue No. 3 on pages 24-29 of its amended brief of argument in paragraphs 2.6, 2.6.1-2.6.2.4, has no particulars of error in law supplied by the appellant. The counsel urges as a result that the court should discountenance and strike out ground 1 of the additional grounds of appeal, also issue No. 3 for absence of particulars. The learned counsel to buttress his submission, cites the case of *Global Transport Oceanico & Anor. vs. Free Enterprise Nigeria Limited 2001 5 NSCQR PC 487 or 2001 5 NWLR (pt. 706) pg. 426 at 437-438*; also Order 8 Rule 2(2) of the Rules of this Court as amended in 1999.

In response to the objection raised by the respondents, the appellant by its amended

reply brief argues the contention as untenable; that the said ground of appeal is competent and that no one can be misled on the complaint in the ground. Issue No. 3 counsel submits is born out of that competent ground. He cites in support the case of *Atuyeye & Ors. Ashamu (1987) 1 NWLR (pt. 49) 267 at 282 pper Oputa, JSC.*

RESOLUTION

Ground 1 of the additional grounds of appeal complained of is reproduced hereunder as follows:

1. **The learned Justices erred in law in not considering and determining Issue No. 3 validly raised by appellant and thereby denied appellant fair hearing on the appeal in that Issue No. 3 raised the question as to whether on the pleadings and evidence, plaintiffs were entitled to the judgment given them?**

Order 8 Rule 2(2) of the Rules of this court provides thus:

“If the grounds of appeal allege misdirection or error in law, the particulars and the nature of the misdirection or error shall be clearly stated”.

See the case of **Global Transport Oceanico & Anor. vs. Free Enterprise Nigeria Limited (supra)**. AS rightly submitted and argued on behalf of the respondents, the use of the word “**shall**” in the rules of court makes it mandatory and not merely directory that the particulars of error or misdirection in law in the ground of appeal must be stated.

For all intents and purposes and without having to belabor the issue, the objection raised by the respondents learned counsel has merit and I hereby make an order striking out ground 1 of the additional grounds of appeal as well as Issue No. 3 on the amended brief argument of the appellant and the argument thereof as it is not supported by any particulars.

For the purpose of reconciling the issue formulated by the parties, the appellant herein, and the respondents are agreeable on their 1st issues, in respect of appellant's issue 2, same has sub-summed respondents' Issues 2 and 3, while appellant's Issue 4 is agreeable also with the respondents' Issue 5.

ISSUE 1

Were the learned justice right in law in holding that the pleadings and evidence led by the appellant are to the effect that the land in dispute was acquired by the Government.

The appellant's counsel submitted extensively on the 1st issue by re-stating emphatically that it is not the appellant's case and its witnesses did not also give evidence that

A the land on which its gas plant was sited was at any time acquired by the Government, that the acquisition of the said land by Government was not in issue, that the learned Justices wrongly attributed to appellant matters it did not plead and evidence which its witnesses did not give. The learned counsel was emphatic that the misdirection committed of justice. The counsel in summary urged that the issue should be resolved in favour of the appellant.

B In response to the argument advanced on behalf of the appellant, the learned counsel for the respondent related copiously to the following provisions of section 28(1), 28(3), (b), (2) or any other section of the Land Use Act LFN 1990 now LFN 2004, the Petroleum Act, 1990 now 2004 LFN and the Oil Pipelines Act, 1990 now 2004 LFN.

C The foregoing provisions, counsel contends, have been the bedrock of the appellant's case from trial court to the Supreme Court that same cannot override the clear and mandatory provisions of sections 1(1) & (3) and 40 of the 1979 Constitution now section 44(1), (a) & (b) of the 1999 Constitution of the Federal Republic of Nigeria on the payment of compensation (Damages) to the respondents for their land acquired by the appellant for its multinational Gas plant operation at Obite Community in the Ogba/Egbema/Ndoni Local Government Area of Rivers State. He cites in support, the case of **ELF PET Nig. Ltd vs. Daniel Umah & 4 Ors (2007) 1 NWLR (pt. 1014) 44 at 67**; also the decision of this court in **Ogunleye vs. Oni (1990) 2 NWLR (pt. 135) 745 AT 773**. Several other authorities were cited by the learned counsel who urges against resolving the issue in favour of the appellant.

F RESOLUTION OF ISSUE 1

The crux of appellant's grudge had to do with the pronouncement made by their Lordships at the lower court wherein they held at page 254 of the records and said:

G **“The pleadings and evidence led by the appellant are to the effect that the land in dispute was acquired by the Government and that the appellant is the owner of Oil Mining Licence 58, by virtue of Section 2 of the Petroleum Act (supra) entitles them to take the benefits of the provisions of the 1st schedule of the said Petroleum Act. That being the case, the appellant has a duty to prove under Section 135 of the Evidence Act that the land in dispute had in fact been acquired by the government and the respondent were entitled to compensation for surface rights only”.**

I Following from the foregoing pronouncement, by the learned Justice of the lower court

A the appellant's counsel submits they were in great error when they gravely misdirected themselves both on the facts and on the law. The counsel related specifically to their 21 paragraph statement of defence at pages 69 to 70 of the records of appeal which, he submits shows clearly that appellant never pleaded what their Lordships attributed to; that the appellant did not mention the word government and did not assert that it owns

B OML 58; that it did not also plead compulsory acquisition of land by the Government nor did any of the witnesses attested to such, that the lower court used the error committed and thus putting on the appellant the burden of proving a compulsory acquisition of land which is not in issue. He cites the case of **Chidiak vs Laguda (1964) NMLR 123.**

C It is pertinent to state that this court by its decision in the case of **Provost Lagos State Colege of Education & Ors. vs. Kolawole Edun & Ors. 2004 6 NWLR (PT. 870) PAGE 476 AT 509** decided that the Government has the constitutional right to acquire compulsory property on payment of compensation by virtue of section 40 of the 1979 Constitution, now section 44(1), (a) & (b) of the 1999 Constitution.

D By logical extension and deduction therefore, it holds right to say that where property including land is acquired compulsorily by Government and surely oil companies, such as in the present case, the payment of adequate compensation is obvious and imperative.

E The supremacy of the Constitution over any other law, be it Land Use and Petroleum Act etc have never been in doubt. It is well pronounced in section 1(1) and (3) of the 1979 Constitution and same also under the 1999 Constitution of the Federal Republic of Nigeria.

F As rightly submitted by the respondents' learned counsel therefore, the right to own property by an individual and indeed family or community is well entrenched in the 1979 Constitution. The right to own property carries with it the right to dispose also of the said property. It is not logical therefore that the appellant in this case should acquire the land of the respondents without paying adequate compensation to them. Reference is squarely provided for in the case of **Kukayi & Ors vs. Aino (1990) 10 NWLR (pt. 624) p. 233 at 645.** See also **ELF Pet. Nig. Ltd. vs. Daniel Umah & 4 Ors** under reference supra.

G Furthermore and for purpose of re-asserting the right accruing to the respondents, I will seek to relate to section 44(1) of the 1999 Constitution which reproduction states as follows:

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“(1) No moveable property or any interest in an immovable property shall be taken possession of compulsorily and no right over or interest in any such property shall be acquired

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A **compulsory in any part of Nigeria except in the manner and for the purposes prescribed by a law that, among other things.**

(c) Requires the prompt payment of compensation therefore and

B **(d) Gives to any person claiming such compensation a right of access for the determination of his interest in the property and the amount of compensation to a court of law or tribunal or body having jurisdiction in that part of Nigeria”.**

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The foregoing constitutional provision is mandatory and not merely directory and could not have been waived by the respondents. It also pertains to the general public of Nigeria. See the decision of this court in **Menakaya vs. Menakaya 2001 91 LRCN pg 2958 at 2996 HI.**

D

In interpreting section 44(1) of the constitution and also re-stating its mandatory nature, their Lordships at the Court of Appeal had this to say at pages 17 and 18 of their judgment.

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“The provisions of the said section (supra) are self explanatory and one does not need any aid to interpret same. To acquire movable property or interest in any immovable property payment of compensation must be made and that any person claiming such compensation has unlimited access to a court of law or tribunal or body having jurisdiction in that part of Nigeria”.

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It is pertinent to read from the foregoing section again that no movable property or any interest in immovable property shall be taken possession of without compensation. See **Kukayi vs. Adesina (1999) 10 NWLR (pt. 624) 63 at 65.**

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It is revealed on the record that the appellant throughout its 21 paragraph statement of defence and even in evidence before the court did not state or say that the respondents land was compulsorily acquired for any public purpose and no notice of any public acquisition was pleaded and tendered at the trial; rather the appellant gave evidence that it is a multinational oil and gas company operating the Obite Gas Plant on respondents' land. As rightly argued and submitted by the learned counsel for the respondents, the appellant's counsel cannot be right to say that the respondents never merited the payment of compensation by the appellant.

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Therefore, the lower court cannot be wrong when it affirmed the judgment of the

A trial court.

I seek to emphasize further that a limitation has not been imposed on the appellant by any law not to pay compensation for the land acquire. This is more so especially when regard is had to the mandatory provisions of section 40(1) of the 1979 Constitution, which is **impair material** with section 44(1) of the 1999 Constitution of the Federal Republic of Nigeria, now extant”.

B The appellant having paid the respondents the sum of N1,995,718.50k for surface rights for the crops, economic trees and structures damaged on the respondents' land as admitted by DW3 in his evidence in chief and under cross-examination, cannot now be heard that the respondents are not entitled to compensation for the land acquired. Any adherence to the appellant's submission is to give way to technicality as against justice. See the case of **Nneji vs. Chukwu (1988) 3 NWLR (pt. 81) 184**.

C The general rule is well restated that the plaintiff should succeed on the strength of his own case. However, it is also in point that a plaintiff can take advantage of the weakness of the defence. See the view held by this court in the case of **Akinola & Anor. vs. Olowu & 2 Ors. 1962 1 All NLRS (pt. 2) pg. 224**.

D As rightly submitted by the respondents' learned counsel, their case cannot be said to be founded on the Tort of trespass as the appellant's senior counsel would want this court to believe. In other words, the argument by the appellant that the fulcrum of the respondents' case is tied to trespass is totally misleading and also misconceived.

E On the totality of the 1st issue herein, the lower court was right in endorsing the sum of N25,000,000.00 awarded by the trial court based on the constitutional and legal position adumbrated. The said issue is resolved against the appellant, and I also affirm the decision reached by the court below.

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ISSUE 2

Were the learned Justices right to affirm the judgment and award made by the trial judge in favour of respondents:

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- (i) **Whose entitlement thereto was not proved?**
- (ii) **Who had received and acknowledged the compensation paid as full and final payment?**

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- (iii) **Whose claim was not proved?**
- (iv) **Who did not plead and prove transfer of customary right of occupancy or interest in land to appellant?**

- (v) **Transfer of respondent's interest in land to appellant was not in issue?**

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- A** It is submitted by the appellant's counsel that the judgment and the award of N25 million for respondents' interest in the land transferred to the appellant is legally and wholly untenable when the transfer of customary Right of Occupancy or interest in land by respondents to the appellant was not in issue and no evidence of any such transfer was given by any witness or found in the entire judgment. The respondents' counsel did not
- B** in their pleadings base their claim on any transfer of interest in land to appellant. Counsel submits further that the judgment given on the basis of a case which respondents did not make in their pleadings or even in their evidence is legally untenable; that the learned justices were wrong to affirm such judgment when
- C** respondents did not prove their entitlement thereto.

It is trite, counsel argues, that a claimant must prove his entitlement to a relief before he can be awarded the damages claimed in the action; that a court of law is not a "*Father Christmas*" who goes about dishing out presents to every person who comes his way. Counsel cites in support the case of **Ekpenyong & Ors vs. Inyan E. Eyong**

- D** (1975) 2 SC 71 @ 81-82 and **International Nig. Limited vs. Engr. David Nwachukwu** (2004) 13 NWLR (pt. 891) @ 564-5.

The learned counsel submits also that the Rules of Court (Order 13 Rule 4) Federal High Court Rules require pleadings to contain all material facts a claimant relies on and to set out at the end of the statement of claim and the specific relief or remedy

E sought on the basis of these material averments. Reliefs claimed in an action, counsel argues, are no substitutes for the material facts, which alone, constitute the basis for claiming the relief. Counsel cites the case of **Chinda vs. Amadi** (2003) FWLR (pt. 145) 696 at 701 a Court of Appeal decision.

- F** Counsel submits with emphasis, that the relief claimed is predicated on an alleged acquisition of respondents' land. To be entitled to the N25 million awards, it is incumbent on the plaintiffs to prove acquisition of their land as pleaded; that appellant's evidence both oral and documentary attest to the fact that compensation was paid by them (appellant).

- G** Counsel re-iterates further that the respondents did not plead trespass in this case, also that both lower courts held that there was no compulsory acquisition by Government. Furthermore, that the issues joined in this case did not relate to transfer of interest in land by respondents to appellant. Therefore, an award made by the trial Judge based on purported transfer of respondents' interest in land, and approved by the lower
- H** court is entirely erroneous a respondents' claim on the proceedings was not predicated on any alleged acquisition of claimants' interest.

Counsel submits further that, where the parties have by their pleadings joined issues, the duty of the trial judge is to proceed to the trial of the issues so joined and to resolve same Counsel cites the decision of this court in the case of **Imana vs. Robinson**

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A (1979) ANR 1 @ 9 per Aniagolu, JSC.

The learned trial judge, counsel submits, did not resolve the issue as to whether appellant entered the land without consent or authority of respondents; that the award made was thus not predicated on trespass on which the parties joined issues; that having joined issue on trespass therefore, the trial judge is not entitled to enter judgment for the

B respondents on the basis that respondents' customary Right of Occupancy or interest in the land has been transferred to appellant. Counsel cites the case of SPDC vs. Abedi (1974) All NLR 1.

On the award of N25 million made by the trial judge, counsel argues that
C Damages cannot in law be validly awarded unless claimant's entitle is first established that the award was predicated on alleged transfer of customary Right of Occupancy or interest in land by respondents to appellant – when respondents made no such claim on their pleadings

D The award counsel submits was based on a case which the learned trial judge himself made out for the respondents who did not make for themselves; that the learned Justice of the lower court, had no reason to affirm the judgment and the award made by the learned trial judge in the circumstances shown under this issue.**E Counsel, for all intents and purposes, held a firm impression that the learned justices of the lower court did not give consideration to the crucial matters before affirming the erroneous judgment of the award of N25 million. This, he submits had occasioned a grave misdirection on the part of the justices, and their decision to affirm the award is fundamentally flawed. The learned counsel urges that the issue should be resolved in favour of the appeal herein.****F In response to the appellant's 2nd issue, the respondents' counsel submits that the appellant has not shown that the concurrent findings of facts by the two lower courts on the payment of N25,000,000.00 as General Damages (Compensation) which is 1% of the total claim of N25 Billion in favour of the respondents is either outrageous, perverse, unsound and against any known principles of law or has occasioned any miscarriage of****G justice against the appellant, who has continued to use the respondents' land without knowing when to vacate. The respondents, counsel submits have proved their case that they are entitled to the award made by the trial court and affirmed by he court below on the 13th July, 2006. The court below, counsel argues was legally right and justified when it affirmed the award of N25,000,000.00 General Damages in favour of the plaintiffs/respondents made by the trail court. The learned counsel urges that the issue be resolved against the appellant.****H RESOLUTION OF ISSUE 2****I The said issue relates to respondents' claim before the trial court at paragraph 15(a) of their amended statement of claim. As plaintiffs, their claims against the defendant are**

A hereby reproduced as follows:

- B** “(i) **The sum of 2.5b (two billion, five hundred million naira) being and representing compensation for the acquisition of the plaintiffs' communities vast area of land measuring approximately 28.684 hectares (about 286.840 square meters) by the defendant's company for the establishment of a Gas Plant of the defendant's/ appellant's company at Obite.**
- C** (ii) **That the defendant company implement the contents of a bill of demand, dated September, 16th 1996 already presented to the defendant company by its host communities being represented by the plaintiffs on record.**
- D** (iii) **That the defendant be committed in a written undertaking that it would always offer gainful employment opportunities to the indigenes of the five (5) smaller communities (villages) that constitute the overall Obite Community”.**

E As rightly stated by the respondents' counsel, the main thrust of the plaintiffs/respondents' claim is founded on the payment of compensation for their land acquired by the defendant/appellant for its Gas Plant operation and the enforcement of their Bill of Demand dated the 16th day of September, 1996 which was presented to the appellant for implementation and enforcement.

F I seek to state that, as revealed on the respondents' pleadings, their claim was hinged and founded on General Damages which should leave the trial court with the unfettered discretion to decide what adequate award it should make in favour of the respondents based on what is reasonable, fair and just, considering the nature and circumstances of the respondents' case. It is only reasonable of course that the factors to be considered for the award of damages must be the antecedent of the fact that the respondents' land acquired was an agricultural land and was used also for fishing purposes. All these are borne out clearly on the pleadings.

G It is also significant to bear in mind that the future use of the land cannot possibly revert to the original user. This is more so when the evidence of DW3 is taken into account where he said that he would not know when the defendant/appellant would vacate the land of the plaintiffs/respondents.

H It is an established principle of law that in cases where a party is demanding for or claiming general damages, the court awards same at its discretion. See the decided

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A cases of **Akinterinwa vs. Oladunjoye (2000) 1 NWLR (pt. 659) 93 at 115; VBN Plc vs. Ikwe (2000) 3 NWLR (pt. 646) 223 at 237; Yolaye Amayi vs. A. REC Ltd. (1990) 4 NWLR (pt. 145) 422 @ 451 and Osuji vs Isiocha (1989) 3 NWLR (pt. 111) 623 @ 640.**

B The claim which the respondents are making for compensation is for the use of the respondents' land in Obite Community in the Ogba/Egbema/Ndoni Local Government Area of Rivers State of Nigeria the appellant by its own evidence through DW3 one Chibuzor Ugwuoha said that the land Use Act forbids the appellant from payment of compensation for acquisition. This is therefore in confirmation to the provision of section 44(1) of the 1999 Constitution of the Federal Republic of Nigeria. It is also in consonance with the principle of **UBI JUS UBI REMEDIUM**, that the trial court awarded N25,000,000.00 to the respondents which was affirmed by the court below.

D It is pertinent to re-iterate herein that in the award of General Damages, a wide spread power is given to the court comparable to the exercise of discretion of the court. It is enormous and therefore far-reaching and contrary to the contention held by the appellant herein. The measure of general damages is awarded to assuage such a loss, which flows naturally from the defendant's act. It needs not be specifically pleaded. It suffices if it is generally averred. They are presumed to be the direct and probable consequence of that complained of.

E Unlike special damages, it is generally incapable of exact calculation. See the following authorities of:-**Federal Mortgage Finance Ltd vs. Hope Effiong Ekpo (2004) 2 NWLR (pt. 865) 100 at 132, Dumez vs. Ogboli (1972) 2 SC 196 and Wasa Vs. Kalia (1978) 3 SC 21.**

F Contrary to the contention held by the learned counsel for the appellant thereof, the respondents, as rightly submitted on their behalf, knew what they wanted from the trial court which was rightly affirmed by the court below. In other words, the general damages (compensation) which was duly pleaded and awarded in the sum of N25 million. The judicial discretion of the trial court in awarding the said damages was, I hold rightly not disturbed by the court below or interfered with. The discretion was exercised both judiciously and judicially taking into consideration the facts and circumstances of the respondents' case.

G It is trite law that judicial discretion is not questioned by an appellate court when it is not exercised wrongly or perversely. The trial court awarded the sum of N25 million by reliance on the authorities of **Kukoyi vs. Aino and Ogunleye vs. Oni (supra)** also on section 44(1) of the 1999 Constitution which *impair material* with section 40(1) of the 1979 Constitution. Afterall, the sum of N25 million damages awarded the respondents is only 1% of the total claim of N2.5 Billion. As rightly questioned by the

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A learned counsel for the respondents, thereof, is it fair and equitable both in law and in equity to say that the discretion of the trial court in awarding such sum was unwarranted injudicious and unjustifiable in the circumstance? This is bearing in mind the vast hectares of the respondents' land acquired by the appellant for a matter done over 8 years before judgment? The answer is certainly in the negative, without mincing my words.

B The said issue No. 2 is in the circumstance also resolved against the appellant. The 4th and the last issue formulated by the appellant is in tandem to the respondents' 5th issue, wherein the appellant posed the following question:

C **Were the learned Justices right to affirm a judgment and an award of damages made to members of a non-juristic villages and on the basis and evidence that the land is owned by members of 5 families when:**

- (i) the action is incompetent and void ab initio?**
- (ii) Evidence did not support claim by five village?**

D The learned counsel for the appellant contends that the notion that this action is incompetent and therefore robs the trial court of the jurisdiction in this case is totally different from the issue as argued in the court below. It is, counsel argued, based on the lack of legal capacity on the part of the respondents to sue or be sued in the first place.

E It is the submission of counsel that in this action the plaintiffs are the 5(five) villages that constitute Obite Community represented by the five named plaintiffs on records that to constitute a competent and valid legal action, the suit must be instituted by or on behalf of a juristic person; that the 5 villages that constitute Obit Community are not juristic persons and are not known to law. Consequently that they can neither sue nor be sued in a court of law.

F The learned counsel cites a number of decided cases to support his contention inclusive of **Fawehinmi vs. Nigerian Bar Association (No. 2) 1989 2 NWLR (pt. 105) 558 @ 596 SC** decision. Also the case of **Nduka vs. Ezenwaku (2001) 6 NWLR (PT. 709) 494 CA** decision which is of a persuasive authority. A further authority is the case of **Bank of Baroda vs. Iyalabani Co. Ltd (2002) 13 NWLR (PT. 785) pages 551 at 592 SC** decision and **Macfoy vs. UAC (1962) AC 152** on a void action resulting into a nullity.

G In final conclusion, the learned counsel emphasized strongly that the real plaintiffs in the case were 5 villages that constitute Obite Community. The 5 villages' which remained unnamed in both courts below and as endorsed on the processes. "5 villages of Obite Community" are not juristic persons who cannot sue or be sued.

H It is contended by learned counsel further that an action in the name of a non-juristic person is incompetent and void and no court of law has jurisdiction to adjudicate

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A and void and no court of law has jurisdiction to adjudicate on an incompetent suit; that the learned justices were wrong to affirm a judgment delivered by the learned trial judge without jurisdiction and in an incompetent action, that the award affirmed by the learned justices is untenable in law.

B In response to the 4th issue raised by the counsel for the appellant the respondents' counsel submits that the said issue as canvassed is misconceived in law and in fact. Counsel contends without mincing words that the issue of the capacity of the plaintiffs/respondents to sue in representative capacity had been fore closed.

C Counsel submits further that the issue of jurisdiction raised by appellant's counsel with regard to the juristic personality of the plaintiffs/respondents in its appellant's amended brief of argument on pages 29 to 35 thereof, is rather a subtle way of seeking a reversal of the order of the court of first instance made on the 7th day of August, 1997. That the case of **Nduka vs. Ezenwaku (supra)** relied upon heavily by the appellant's counsel is most inappropriate in the circumstance of this appeal.

D The learned counsel contends further that on the legal personality or juristic personality of the respondents to sue, which the learned Senior Advocate had argued in his amended appellant's brief of argument, counsel submits that arguments is misconceived. He cites in support the case of **Shell Petroleum Development Company Nigeria Limited vs. Amadi 2011 All FWLR (pt. 604) 80 at 104**, wherein the issue of the legal personality of the plaintiffs/respondents was raised on appeal before their Lordships at the Court of Appeal Port Harcourt Division.

E On the totality of the submission on behalf of the respondents, counsel seeks to show that his clients on record and members of the 5 village otherwise called families namely Umuijere, Umu-Eke, Umuoru-Kwokri, Umu-Nkweke and Umu-Ngwu that constitute the Obite Community in Ogba/Egbema/Ndoni Local Government Area of Rives State are juristic personalities that initiated the suit leading to this present appeal and thus the Federal High Court of Nigeria have and properly assumed and exercised jurisdiction over the action of the plaintiffs/respondents.

F The court below, counsel submits was legally right and justified to have affirmed the judgment of the trial court as same have not been legally faulted.

RESOLUTION OF THE ISSUE

G The resolution of issue 3 seeks to answer the question whether the challenge of the legal personality of the plaintiff/respondents before this court is proper in law, the respondents having sued for themselves and on behalf of the members of the 5 villages constituting the Obite Community.

H The issue raises the fundamental question as to the competence of this action **ab**
I **initi** as well as to whether the award made in this case is an award in favour of the parties

A to this action.

The resolution of this issue would necessitate a quick reference made to the record of appeal at page 13 specifically. On the 7th August, 97 pursuant to a motion ex parte for leave to sue the defendant in a representative capacity, by one Dr George on behalf of the plaintiffs/now respondents while one J.B. Lockie of counsel represented

B the defence, the Federal High Court Port Harcourt Division made the following order per **O. Aina (Judge)**:

C **“Court – It is hereby ordered as prayed. The plaintiffs on record are hereby granted leave to prosecute this matter in a representative capacity”.**

Noted also the affidavit in support of the motion ex-parte praying for leave to sue the defendant in a representative capacity wherein, the **Authority to institute legal and or defend legal actions(s) against or by the ELF Petroleum (Nigeria) Ltd. And or any other company(ies) or person(s) in respect of the vast area of land situate at Obite, acquired by elf Petroleum (Nig) Ltd. at pages 9-11 of the Record of Appeal is marked as Exhibit DCU. Paragraph 6 of the affidavit at page 8 is also relevant.**

D It is pertinent to say again that there had not been any motion to set aside or an appeal against the order to sue in a representative capacity made on the 7th August, 1997. It therefore remains sacrosanct, valid and subsisting. See the case of **Osuala vs. Osuala 1995 3 SCNJ 60**. The only way the defendant/appellant could have successfully challenged the capacity of the plaintiffs/respondents to initiate the suit precipitating into this final appeal would have been by way of preliminary objection without filing a statement of defence and thereafter calling evidence.

E The order made on 7th August, 1997 cannot now be challenged in this court for the 1st time for purpose of side tracking the lower court as sought to do by the appellant. See the case of **Anabaronye & Ors. vs. Nelso Nwakaibe (1997) 1 NWLR (pt. 482) 374 at page 382** wherein this court held and said:

H **“The mattes mentioned above which were raised as issues or questions were being raised for the first time in this court; they were not raised in the courts below. The authority of a person to bring a representative action can be challenged by way of preliminary objection on notice and not by way of defence”.**

I The appellant's counsel has amongst other authorities relied heavily on the Court of Appeal decision in the case of **Nduka vs. Ezenwaku (supra)** on his amended brief of

A argument to argue that the respondents are not juristic personalities to initiate the suit leading to appeal and thus the trial court had no jurisdiction to entertain and determine the respondent case.

As rightly submitted and well analyzed by the learned counsel for the respondents, the principle in that case is most inappropriate to the circumstance of the appeal herein and does not in any material respect aid the appellant's case.

B In other words and putting it differently, in **Nduka vs. Ezenwaku case (supra)**, the issue of absence of the word **“MEMBERS”** from the case came up at the address stage when plaintiffs applied to amend the name of the plaintiffs by prefixing Ezenwaku family with the word Members to make the suit have life and flesh which is not the position in the case under consideration.

In the appeal herein, the particulars of claim, pleading and evidence of the respondents through PW1, Mr. Promise U. Ujah at the trial court have already and clearly shown that the respondents on record represented the members of the 5 families namely Umuijere, Umu-Eke, Umuoru-Kwokra, Umu-Nkweke and UmuNgwu that constitute the Obite Community in Ogba/Egbema/Ndoni Local Government Area of Rivers State. (See page 45 of the Record of Appeal) whereby the plaintiffs/respondents witness, PW1 supra, gave in evidence at page 76 of the record that: **“We sometimes called these families Villages.”**

E As rightly submitted by the respondents' counsel, his clients are and therefore juristic personalities to sue and represent members of their 5 families/villages making up the Obite Community. Throughout the record of appeal from the trial court to this court, the word **“MEMBMER”** is aptly reflected on the particulars of claim and right through to the judgment to this court. The trial court, I hold had jurisdiction to entertain and determine the case of the respondents herein as properly constituted. Contrary to the submission by the appellant's learned counsel therefore, the court below was right to have affirmed the judgment of the trial court as it did.

F Again in the case of **Nduka vs. Ezenwaku** under reference (supra) and closely relied upon by appellant's counsel at page 31-31 of the amended appellant's brief of argument on the juristic personality of the respondents which effectively relates to the respondents' capacity to sue, the lower court said thus:

H **“The opposition which will justify challenge of authority of the representation of a group to sue or defend in a particular capacity must be an opposition coming from a section of the group. It must be an intra dissention within the group and not inter dissention between two groups which have diametrically opposed interest in the matter before the court.”**

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I seek to restate affirmatively that none of the respondents and those represented is opposed to the respondents' capacity or authority to represent them.

B In the case of **Shell Petroleum Dev. Company Nigeria Limited vs. Amadi** under reference supra, the issue of legal personality of the plaintiffs/respondents was raised on appeal before the Court of Appeal. Their Lordships relief on the decision of this court in **Yusuf vs. Akindipe (2000) FWLR (pt. 5) 709, (2000) 8 NWLR (pt. 669) 376 at 386** wherein it was held by this court that:-

C That since the respondents on record, claim the right to the reliefs sought for themselves and in a representative capacity and that since the group or class of persons they sought to represent are easily identifiable and have common interest and purpose they could sue in that capacity.

D As submitted rightly on behalf of the respondents, the members of the five families/villages that constitute the Obite Community in the Ogba/Egbema/Ndoni Local Government Area of Rivers State are easily identifiable and have a common purpose i.e. the land owned together which was compulsorily acquired by the appellant.

The law is trite that when a group class of persons sought to be represented in a suit are easily identifiable and have common purpose as in the instant case, they can institute a suit in a representative capacity to seek remedy in a court of law.

E It is in evidence that the respondents on record represented the members of the 5 families (villages) that constitute the Obite Community and have common interest in the land compulsorily acquired by the appellant and therefore have the authority to institute the suit for themselves as juristic persons on behalf of the members of the 5 families (villages) that constitute the Obite Community.

F Again and for purpose of driving the point home further in the case of **Alhaji Raimi Akanji Yusuf & Ors vs. Alhaji Akindipe & Ors (supra)**, this court made pronouncements severally on this issue of juristic personality of a plaintiff to sue. In recounting certain excerpts of the pronouncements it was emphasized that the group or class of persons sought to be represented if identified easily and have common purpose, will suffice a representative capacity.

G The respondents herein like in the foregoing authority, are easily identifiable and have common purpose as the members of the 5 families (villages) that constituted Obite Community in Ogba/Egbema/Ndoni Local Government Area of River State whose lands were compulsorily acquired by the appellant. They are therefore juristic persons at law, so also are the other members of the families sometime called villages who donated their power to the named respondents on record to fight their cause for them.

H In the course of his submission also the appellant's counsel cited and relied on

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A the case of **Bank of Barada vs. Iyalabani Co. Ltd. (2002) 13 NWLR (pt. 785) 551 at 592**. As rightly submitted by the respondents' counsel, that case under reference is not relevant or applicable to the present case herein.

B In that case for instance, this court allowed the appellant Bank's appeal on the ground that the issues of legal personality of the appellant bank cannot be determined in limine without evidence being led. In the appeal herein before us, the respondents have led credible evidence showing that the suit was for themselves and on behalf of the members of the 5(five) villages constituting the Obite Community in Ogba/Egbema/Ndoni Local Government Area of Rivers State. I will re-iterate again that the respondents' witness, Mr. Promise U. Ejah, while giving evidence as PW1, at the trial court never found any difficulty in saying that **“we sometimes called these families villages.”** This was done after the witness (who incidentally is the 3rd plaintiff/respondent on record) had taken pains to enumerate the five families before the trial court as enumerated earlier in the course of this judgment.

D The 5 persons who sued the defendant/appellant are natural persons authorized by the members of these 5 villages that constitute the Obite Community, on identifiable entity to sue.

E In **Shell Petroleum Development Company Nigeria Limited Vs. Chief T. Edamkue & Ors. (2009) All FWLR (pt. 489) 407 at 429**, this court held that **“A person has the right to protect his family's interest in a property or title and can sue for himself and or on behalf of his family in a representative capacity.”** (Emphasis is supplied).

F The contentions put forward by the learned counsel for the appellant, I hold are mere technicalities and not substance of the appeal. See the case of **Nneji vs. Chukwu (1988) NWLR (pt. 81) 184 at 196 and Oluigbo vs. Umeh (2004) 6 NWLR (pt. 870) 621 at 647**.

G The challenge of the plaintiffs/respondents to sue in a representative capacity for themselves and on behalf of the members of the 5 villages does not lie in the mouth of the defendant/appellant who has nothing to share in the victory of the plaintiff/respondents. This is in view of the settled laws held by this court that a defendant/appellant cannot challenge the capacity of the plaintiffs/respondents. See the decision delivered on Friday 10th day of July, 2009 in the case of **Shell Petroleum Dev. Company (Nig) Ltd. vs. Chief Tigbara Edamkue & Ors. (under reference supra) at page 430** wherein it held that:

I **“Once the plaintiff/plaintiffs expressed on a writ or statement of claim that the action was brought in a representative capacity as appear in the two (2) consolidated suits in the instant case it is/was**

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PETER-ODILI, (JSC): I agree with the judgment just delivered by my learned brother, Clara Bata Ogunbiyi JSC and to underscore that support I shall make some remarks.

The respondents herein as plaintiffs in the trial court and respondents in the court below for themselves and on behalf of the members of the five villages that constitute the Obite Community in Ogba/Egbema/Ndoni Local Government Area of Rivers State of Nigeria initiated suit No. FHC/PH/152/97 against the appellant as defendant therein claiming amongst other reliefs the sum of N2.5 Billion as compensation for the land acquired by the appellant at Obite Community.

The trial court on 18th of April, 2005 entered judgment in favour of the respondents in the sum of N2.5 Million naira which judgment was affirmed by the Court of Appeal or court below on the 13th of July, 2006 and in dissatisfaction, the appellant has come before the Supreme Court to ventilate its grievance.

The background facts have been well set out in the lead judgment and there is no point repeating them save for when the occasion demands a reference to any part thereof.

On the 24th day of October, 2017 date of hearing, learned counsel for the appellant, T. J. O. Okpoko SAN adopted the amended brief of argument settled by C. A. Ajuyah SAN, filed on the 28th August, 2017 and deemed filed on 28th of October 2017. In it were identified the following issues for determination, viz:

F ISSUE No. 1

Were the learned Justice right in law in holding that the pleadings and evidence led by the appellant are to the effect that the land in dispute was acquired by the Government?

G ISSUES NO. 2

Were the learned justice right to affirm the judgment and award made by the trial judge in favour of respondent

- H**
- (i) Whose entitlement hereto was not proved?**
 - (ii) Who had received and acknowledged the compensation paid as full and final payment?**
 - (iii) Whose claim was not proved?**
 - (iv) Who did not plead and prove transfer of customary right**

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A what award to make in the circumstance of the case which award was affirmed by the court below.

ISSUES NO. 3

B Whether this Honourable court can set aside the concurrent findings of fact of the trial court and the court below when the appellant has not shown that such concurrent findings are perverse, unsound, contrary to establish principle of law and has occasioned any miscarriage of justice against the appellant.

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ISSUES NO. 4

D Whether the court below was duty bound to consider and determine all the 3 issues raised and formulated by the appellant especially when the consideration and determination of 2 out of the 3 issues are successfully and fully determined by the controversies between the parties.

E **ISSUES NO. 5**

F Whether the challenge of the legal personality of the plaintiffs/respondents before this Honourable court is proper in law, the respondents having sued for themselves and on behalf of the members of the village constituting the Obite Community.

I shall make us of the Issue No. 3 as drafted by the respondents and it is thus:

G **ISSUES NO. 3**

H Whether this Honourable court can set aside the concurrent findings of fact of the trial court and the court below when the appellant has not shown that such concurrent findings are perverse, unsound, contrary to established principle of law and has occasioned any miscarriage of justice against the appellant.

Learned counsel for the appellant contended that the quality of evidence and pleadings of respondents were so poor that they could not sustain the claim made.

I That the issues of liability of appellant were not resolved by the learned trial

A judge before making his judgment and award is patent on the record. That the trial judge made the decision without considering and resolving the issues joined by the parties in their pleadings in such circumstance as to present a judgment against the weight of evidence, a situation warranting the interference of this court. He cited **Bayol vs. Ahemba (1999) 10 NWLR (pt. 623) 381 at 392-393.**

B For the respondents, learned counsel submitted that there being no perversity or miscarriage of justice in reaching the concurrent findings in the two lower courts, there is no basis for this court to interfere or upset those findings and conclusions. He referred to **Balogun vs. Akanji (2005) 10 NWLR (PT. 933) 394 at 415; Obilaso Anabaronye & Ors vs. Nelso Nwakaihe (1997) 1 NWLR (pt. 482) 374 at 383 etc.**

C He stated further that throughout the evidence of the defendant/appellant and the submissions of counsel for the appellant there is no where it was shown that the concurrent findings and conclusion of the two courts below were perverse. He cited **Gbadamosi vs. Dairo (2007) 2 NWLR (pt. 1021) 282.**

D The appellant's grouse is anchored on the court of Appeal not considering and making a pronouncement on their issue No. 3 which it alleged properly and validly raised before that court. That the failure to so consider the issue led the court to a wrong conclusion and decision in dismissing appellant's appeal and thereby necessitating the intervention of the Apex court to set the records right.

E The respondents disagree with the standpoint of the appellant contending that there is no basis for this court to upset the concurrent findings of fact of the two courts below.

F In tackling the diverse positions on either side I am guided by the policy stance of this court frowning at any interference with the concurrent findings of fact of the trial court and the appellate court especially where such findings are not perverse and have not occasioned any miscarriage of justice. The said Issue 3 at the court below is thus:

G **“3. Whether in view of the poor quality of the pleadings and evidence tendered by the respondents, their case ought to have been dismissed as lacking in merit by the trial court rather than finding in their favour”.**

H The court below as anchored by Tijani Abdullahi JCA dispatched the Issue 3 as follows:

I **“This issue, like the previous one is also resolved against the appellant in favour of the respondents. Having come to this conclusion, it will be an exercise in futility to give consideration to Issue No. 3 formulated by the appellant's counsel”.**

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The conclusion of the court below is supported by what the court had done earlier in its findings and I shall quote thus:

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“It is the submission of learned senior counsel that in the instant case the compensation payable, if any, on the land is the last rent in the year of revocation. The respondent having failed to prove the last rent cannot resort to judge's discretion when they have abdicated their duty and failed to discharge the onus of proof placed on them by law. He urged us to allow the appeal in its entirety and set aside the decision of the trial court.

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Now, the crucial point for consideration on the onset on this issue is the type of damages the respondents are entitled to. Are they entitled to special or general damages? If special damage, for them to succeed, they must specifically and strictly prove their claim. Whereas if it is general damage they need not to prove specially the loss they suffered. It is trite that general damages are damages which the jury may give when the judge cannot point any measure by which they are to be assessed except on opinion and judgment of a reasonable man. See the case of A. G. OF Oyo State & Anor vs. Fair Lakes Hotels Limited & Anor. (1989) 5 NWLR (pt. 121) 255 at 278. Having disposed of the type of proof needed to prove the two types of damages, I can now consider the all important question as to whether, on the evidence adduced by both sides, the respondent's loss is within the realm of general or special damages”.

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The court below stated on further as follows:

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“It is instructive to note that I have held elsewhere in this judgment that the land of the respondents was not compulsorily acquired for any public purpose and that being the case, they are entitle to be compensated in accordance with Section 44(1) of the Constitution of the Federal Republic of Nigeria. I am of the firm view that the loss suffered by the respondents was within the realm of general damages and that they need not specifically prove the loss they suffered. All the cases and authorities cited and relied by the learned senior counsel are not opposite to the case at hand. Since they are all

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A based on special damages.

B On the amount, awarded by the court below, learned senior counsel urged us to set it aside because the trial judge himself was at ease as to the basis of the award of N25 million. With due respect to the learned senior counsel, it is settled in a long line of decided authorities that general damages are the kind of damages which the law presumes to flow from the wrong complained of. They are such as the court will award in the circumstances of a case in the absence of any yardstick with which to assess the award except by presuming the ordinary expectations of a reasonable man. See the case of **UBN Plc Ikwe (2000) 3 NWLR (pt. 646) 223 AT 237, Yalaju Amaye vs. A.R.E.C. Ltd. (1990) 4 NWLR (pt. 145) 422 at 45-451”**.

D From the clarity of the pronouncement of the Court of Appeal, it was really unnecessary to continue in the consideration of the remaining Issue 3 as it would have served no useful purpose. In short it would have been a complete waste of valuable time as the dispute between the parties on appeal before the court below had been effectively rested.

E Therefore a call on this court to interfere in those findings which were well founded is a call in futility as there would be nothing on which this court would place such interference. See **Balogun vs. Akanji (2005) 10 NWLR (pt 933) 394 at 415; Obilaso Anabaronye & Ors vs. Nelso Nwakaihe (1997) 1 NWLR (pt. 482) 374 at 383; Okolo vs. Uzoka (1978) 4 SC 77; Fashanu Vs. Adekoya (1974) 1 All NLR (pt. 1) 35; Ebla vs. Ogodo (1984) 1 SC NLR 371; Ajayi vs. Jolaosho (2004) 2 NWLR (pt. 856) 89 at 97.93; Odulaja vs. Haddad (1973) 11 SC 357; Incar vs. Benson (1975) 3 SC 117.**

F Indeed considering all that is before the court, there is nothing in which the concurrent findings of the two courts below could be upset and so in line with the fuller and better reasoning in the lead judgment, I see no merit in this appeal which I also dismiss

I abide by the consequential orders made.

Mary Ukaego Peter-odili
Justice, Supreme Court

H **AMIRU SANUSI, (JSC):** I had the advantage of reading before now, the judgment prepared and delivered by my learned brother Clara Bata Ogunbiyi JSC. I am in entire agreement with the reasoning and the conclusion arrived at therein, that this appeal is devoid of any merit and ought to be dismissed.

I It is noted by me, that in this appeal there exist concurrent findings of both the

A trial Federal High Court (the trial court) and the Court of Appeal (the lower court) both of which favoured the present respondents. I wish to restate the attitude of this court respondents. I wish to restate the attitude of this court of refraining from interfering or disturbing concurrent findings of two lower courts excepts on special or exceptional circumstances.

B In the case of **Ebolor vs. Osayende (1992) 7 SCNJ 217 or (1992) NWLR (pt. 249) 524** this court had this to say, per Nnaemeka-Agu JSC (of blessed memory):

C **“This brings me to the question of concurrent findings on the point by the two lower courts. This court usually approaches such findings from the premises that following from the fact that making of findings on primary facts is a matter pre-eminently within the province of the court of trial which has the opportunity of seeing and hearing the witnesses testify, a judge's conclusion on the facts is presumed to be correct. So, that presumption must be displaced by the person seeking to upset the judgment on facts”.**

D The same learned jurist also in the case of **Kenneth Ogoala vs. The State (1991) 2 NWLR (pt. 176) 509 or (1991) 3 SCNJ 61 or (1991) 3 SC 80**. Also stated thus:

E **It is settled that where there is sufficient evidence to support concurrent findings of fact by two lower courts, such findings should not be disturbed unless there is a substantial error apparent on the record. That is, the findings have been shown to be perverse, or some miscarriage of justice or some material violation of some principle of law or of procedure is shown”.**

F It must be stressed here that an appellant court does not have the power to substitute its own views for those of trial court, especially when the issue relates to credibility of witnesses, since it is the trial court only that had this opportunity of seeing, hearing and observing the demeanor of such witness or witnesses who testified before him. See **Bangboye vs. University of Ilorin & Anor (1999) 10 NWLR (pt. 622) 290**. In this instant appeal, it has not been shown by the appellant that the findings of the lower courts are perverse or that there was misconception or misapplication of law. This court therefore lacks the justification to interfere with or disturb the findings of the two courts below in this appeal.

G On the whole, for the fuller and more detailed reasoning contained in the lead judgment and as ably and painstakingly marshaled in the leading judgment of my noble

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A lord Ogunbiyi JSC, and the conclusion which I entirely agree with and adopt as mine I also hereby dismiss this appeal for being meritless. In doing so, I also abide by the order on costs made in the lead judgment
Appeal dismissed.

B **Amiru Sanusi**
Justice, Supreme Court

DAUDA BAGE, (JSC): I have had the benefit of reading in draft the lead judgment of my learned brother Clara Bata Ogunbiyi, JSC, just delivered. I agree entirely with the reasoning and conclusion reached. The appeal lacks merit, and it is accordingly dismissed by me.

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

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**ENDURANCE MATTHEW
AND
THE STATE**

SC. 321/2013

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

FRIDAY 26TH JANUARY, 2018

BEFORE THEIR LORDSHIPS

**MUSADATTIJO MUHAMMAD
K. B. AKAHHS
JOHN INYANG OKORO
CHIMACENTUS NWEZE
EJEMBI EKO**

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

APPEAL: Concurrent findings – Attitude of Supreme Court thereto – When can interfere – Relevant principles.

COURT: Admissibility of evidence – Where evidence is positive and not challenged or controverted by any other evidence – Duty on court to rely on such evidence.

CRIMINAL LAW AND PROCEDURE: Murder – Elements – Onus on prosecution to prove – How discharged.

EVIDENCE: Admissibility – Oral confessional statement – Whether admissible – Relevant considerations.

EVIDENCE: Admissibility – Retracted confessional statement – Principles relevant thereto.

EVIDENCE: Oral confessional statement – Objection thereto – Need to be challenged by cross examination – Failure thereof – Implications.

EVIDENCE: Voluntary confessional statement – Oral or written – Nature and relevance in

proof of accused.

Issue for Determination

Whether on the totality of the evidence adduced on record the lower court was right in affirming the judgment of the trial court which found the appellant guilty as charged?

Facts of the Matter

On January 24, 2007, the appellant (as accused person) was arraigned before the High Court of Delta State, Ughelli Division, for the offence of murder punishable under Section 319(1) of the Criminal Code, Cap 48, Vol II, 1976 Laws of Bendel State, applicable to Delta State.

Upon his not guilty plea, the case went to trial. The prosecution's case was woven around the testimonies of three witnesses. Exhibit A was the statement which the accused person (now, appellant) volunteered at the police station. The thrust of the case against the appellant was that, on January 26, 2006, at Ekrenhavwe Village, she threw her one-month old baby, Omonefe Oviefe, into a well where she drowned.

The accused person's challenge to the voluntariness of Exhibit 'A' prompted a trial within-trial wherein the judge, Ohwo, J (as he then was), finding in favour of its voluntariness, admitted it in evidence. Believing the testimony of PW1 and Exhibit 'A', the learned trial judge convicted the accused person and sentenced her to death by hanging. She appeal to the Court of Appeal, Benin Division, being dismissed, she further appealed to the Supreme Court.

Held: *(unanimously dismissing the appeal)*

1. *The constituents or elements of murder which prosecution must prove.*
As this court held in *Tajudeen Iliyasu vs. The State* (2015) LPELR - 24403 – (SC) 25; B-G:

The three constitutive elements or ingredients of the offence which must be proved in order to secure a conviction under this section have been, generously, outlined in case law, *Maigari vs. State* (2013) 6 - 7 MJSC (Pt 11) 109, 125, citing *Ochemeje vs. The State* (2008) SCNJ 143; *Daniel vs. The State* (1991) 8 NWLR (Pt. 4430) 715; *Obudu vs. State* (1999) 6 NWLR (Pt 1980) 433; *Gira vs. State* (1996) 4 NWLR (Pt. 428) 1, 125.

Under the said section, the prosecution is obliged to prove: (1) that the deceased died; (2) that his/her death was caused by the accused; (3) that she/he intended to either kill the victim or cause her/him grievous bodily harm.

Both counsel for the appellant and the respondent are *aid idem* on the fact that the prosecution proved the first ingredient. Thus, only the second and

third ingredients are being disputed by the appellant. (Pp 360–361 Paras E–B)

2. *The relevance and admissibility of oral confessional statement*

With profound respect, this submission betrays counsel's misconception of the potency of oral admissions or confessions. In the first place, as established in *Jua vs. The State* (2010) LPELR-1637 (SC), just as a written confession, an oral confession of an accused person is admissible in evidence. both species of evidence constitute the strongest evidence of guilt on the part of the accused person, *Akpa vs. State* (2008) 14 NWLR (Pt. 1106) 72. At page 95 of the report, the court maintained that:

Confession in criminal procedure, like admission in civil procedure, is the strongest, evidence of guilt on the part of an accused. It is stronger than the evidence of an eye witness because the evidence, borrowing the daily axiom, comes out from the mouth of the horse, who is the accused person. What better evidence than he knows or knew what he did and he says or said it in court. Is there need for any further proof? I think not. (Pp 363–364 Paras G–A)

3. *The nature and relevance of a voluntary confessional statement*

In effect, a voluntary confessional statement, whether oral or written, is an admission of guilt by an accused person. It is, thus, a relevant fact, although, admissible against its maker only, *Arogundare vs. The State* (2009) 6 NWLR (Pt. 1136) 165, 174-175; [2009] 1-2 SC (pt 11) 24, 30-31. Thus, where it is proved, as in the instant case, an oral confession of the accused person would be sufficient to sustain his conviction, *Arogundare vs. The State* (supra); *Adio and Anor vs. The State* (1986) 2 NWLR (Pt. 24) 581.

Such is its potency that such an admission, made at any time by a person charged with an offence (even if before it had been decided to formally charge him with committing a crime without administering a caution, suggesting that he committed the offence) is a relevant fact against him, *Arogundare vs. The State* (supra); *Onungwa vs. The State* [1976] 1 SC (Reprint) 74; [1976] NSCC (Vol.10) 27; *Akinmoju vs. The State* [2000] 4 SC (Pt.1) 64; [2000] 6 NWLR (Pt. 662) 608.

A conviction could, therefore, be secured against an accused person on the strength of such a confession to the crime for which he is charged; *Arogundare vs. The State* (supra); *Sule vs. State* [2009] 17 NWLR (Pt. 1169) 33;

Jua vs. State (supra); Omogu vs. FRN [2008] 9 NWLR (Pt. 1085) 38; Shalla vs. State [2007] 18 NWLR (Pt. 1066) 240. (P 364 Paras B–F)

4. *Where party failed to challenge the evidence of oral confession by cross examination.*

At page 9 of the appellant's brief, it was contended that “since the alleged oral confession of the appellant to PW1 is inadmissible in law, it is of no moment that that piece of evidence was not specifically contradicted under cross examination.” With respect; this cannot be true. In fact, just as in this case, in *Arogundare vs. The State (supra)*, such a submission was equally, canvassed. This court did not find any merit in the said submission. The court took the view that the testimony of PW5, as to what the appellant in the case, told him was positive and direct a direct evidence of what the appellant said or confessed to PW5 which was narrated to the court in the presence of the appellant who failed to challenge it as to either the making of the statement attributable to him or the truth of its contents, *Arogundare vs. The State (supra)* 24; C-G.

As in the *Arogundare* case (supra) 23-24; G-A, the appellant's counsel in the instant case, failed to cross-examine PW1 at all. The submission that it was of no moment that the said evidence was not challenged in cross-examination cannot, therefore, be sustainable. (Pp 364–365 Paras G–B)

5. Court to believe evidence not contradicted or controverted
In *Modupe vs. The State* [1988] 9 SCNJ 1, 4-5, this court explained that:

Normally a trial court, that had the opportunity of seeing the witnesses, hearing them and watching their demeanour, enjoys the special privilege of believing or disbelieving their evidence. But belief or disbelief becomes an issue when and only when there are two conflicting versions of an essential fact. When there is only one version of an essential fact and that version is not patently and obviously improbable, a trial court is not left with any option than to believe that which has not been controverted or contradicted in any way. To reject [a] positive assertion Without any contrary evidence at all either in cross-examination or in rebuttal seems to be much more than a trial court is allowed to do. To base such a rejection on the subjective estimation of the

trial judge looks quite arbitrary, nay dangerous. It looks as though the trial judge converted himself into a witness, gave evidence, and then preferred his own evidence to that of the appellant. Put as bluntly as this, one can then appreciate the danger involved in a trial judge preferring his own estimation, which is not evidence, and which was not based on any evidence, to a positive assertion which has not in the least been contradicted or controverted. [Italics supplied for emphasis]

In the instant case, learned counsel for the appellant, just as was done in *Arogundare vs. The State* (supra), contended that “PW1's evidence on this point amounts to hearsay evidence which is inadmissible in law ...” In dismissing this sort of argument in *Arogundare vs. The State* (supra), this court held that “the submission of the learned counsel for the appellant that the evidence of PW5 is hearsay is totally misconceived. PW5 gave direct evidence of what the appellant told him confessing to a seirous offence before the trial court in the presence of the appellant and *his counsel who for reasons best known to them failed to challenge it*. The confession is so graphic and vivid that its veracity is not in doubt,” *Arogundare vs. The State* (supra) per Ogebe, JSC at page 13; A-C. (Pp 365 – 366 Paras B – C)

6. *Principles relevant to the admissibility of retracted confessional statement*
Citing *Ismail vs. State* (supra), the learned counsel for the appellant would appear to have entertained the hope that the appellant's retraction of her confession would avail her. Regrettably, this submission is unsustainable. As this court held in *Ilyasu vs. State* (supra):

.... a retraction or denial of a confessional statement ... does not affect its admissibility. This has long been settled in the very old cases of *R. vs. Sapele and Anor* (1952) 2 FSC 74; *R. vs. Itule* (1961) All NLR 462; the relatively old decisions of *Ikpassa vs. The State* [1981] 9 SC 7; *Akpan vs. State* (1992) LPELR – 381 (SC) 36; *Osakwe vs. State* [1994] 2 SCNJ 57; *Nwangbunu vs. The State* [1994] 2 NWLR (pt 327) 380; *Bature vs. State* [1994] 1 NWLR (pt 320) 267; *Eragna and Ors vs. The Ag, Bendel* (1994) LPELR-(SC) 30; *Idowu vs. State* [1996] 11 NWLR (Pt. 574) 354; as well as the more recent decisions of *Silas Sule vs. State* (2009) LPELR-3125

(SC) 28 – 30, G-B; FRN vs. Iweka (2011) LPELR – 9350 (SC) 53; Oseni vs. The State (2012) LPELR-7833 (SC) 22-23.

Per Nweze (JSC):

Surely, in the Anglo-Nigerian accusatorial criminal justice system, an accused person is taken to intend the consequences of his voluntary act when he foresees that it would probably happen, whether he desires it or not, *Hyam vs. DPP* [1974] 2 All ER 41. Hence, the requisite intent for the offence of murder would be found where a person, who does the act which kills knows that it is highly probable that he would cause death or grievous bodily harm, *Segun Akinlolu vs. State* (2015) LPELR – 25986 – (SC) 19; A-D.

My Lords, against the above sordid background, as found by the trial court-affirmed by the lower court, I see no justification for disturbing the concurrent findings of the lower courts in the absence of any proof of their perversity or proof that they have led to miscarriage of justice, *Musa vs. The State* (2013) LPELR-19932 (SC); *Onwudiwe vs. FRN* [2006] 10 NWLR (Pt. 988) 382.

In all, I find no merit in this appeal. Accordingly, I hereby enter an order dismissing it. I affirm the concurrent findings of the lower court and uphold the conviction of, and sentence on, the appellant. Appeal dismissed. (Pp 366–367 Paras C–H)

7. *Prosecution proved beyond doubt the elements of the offence*

The prosecution led evidence to show that the appellant is the mother of the one month old baby, Omenefe Oviefe who was thrown into the well on 26th January, 2006 and in consequence the child got drowned and died. PW1 testified that he heard the appellant when she said that she threw the baby into the well because the father of the baby rejected the child. The prosecution therefore proved beyond reasonable doubt that:

- (a) the baby died**
- (b) the baby's death was caused by the act of the accused/appellant and;**

- (c) **the accused/appellant intended to cause the death of the child by drowning and;**
- (d) **it was the natural consequence of the appellant's act that caused the death of the deceased.**

Both the trial court and the court below made concurrent findings of fact which cannot be disturbed. (Pp 368 – 369 Paras G – C)

8. *Attitude of the Supreme Court on concurrent findings*
It is trite that where there are concurrent findings of facts by the trial court and the Court of Appeal, this court does not, in practice, disturb such concurrent findings unless they have been shown to be perverse. See Sobakin vs. The State (1981) 5 SC 75, Dan Awaza Bashaya & Ors vs. The State (1998) LPELR-755 (SC), (1998) 5 NWLR (Pt. 550) 351, Sunday vs. The State (2017) LPELR-42259 (SC), Ehimiyein vs. The State (2016) LPELR-40841 (SC). In the instant case, the appellant has not shown these findings to be perverse at all. (Pp 369 – 370 Paras H – A)
9. *Admissibility of retracted confessional statement*
On the issue of the confessional statement of the appellant which she tried to retract, the law is well settled that mere retraction of a voluntary confessional statement by an accused person does not render it inadmissible or worthless and untrue in considering his guilt. If the confessional statement is satisfactorily proved, a conviction founded on it, without more, will be sustained by an appellate court. See Idowu vs. The State (2000) FWLR (Pt. 16) 2672 at 2702, Ogudu vs. The State (2011) LPELR-860 (SC), (2011) 18 NWLR (pt. 1278) 1. Where however, there is a retraction of a confessional statement, the court ought to, as much as possible, look for other evidence outside the confessional statement to corroborate the said retracted confessional statement in order to affirm that the confessional statement is true. In this case, the evidence of PW1 and PW2 corroborated the confessional statements. See Adamu Saliu vs. The State (2014) 12 NWLR (pt. 1420) 65, (2014) LPELR-22998 (SC), Ejinima vs. State (1991) LPELR-1067 (SC). (P 370 Paras A – E)
10. *Element of a murder charge*
Per Ejembi Eko (JSC):

Learned counsel for both the appellant and respondent are in

agreement that in a murder charge, from established authorities, the prosecution must prove that:

- i. a human being died**
- ii. the death was caused by the act of the accused person and**
- iii. the accused intended either to kill the victim or cause him/her grievous hurt.**

In this case, the prosecution and the defence are ad idem that Omonefe Oviefe, a one-month old human being died. They are, however, not in agreement that it was the appellant who caused the death of the said Omonefe Oviefe, and that it was not proved that the appellant intentionally caused the death of the said Omonefe Oviefe.

The concurrent findings of fact, based on the legal evidence available at the trial, including the confession of the appellant, are that it has been established beyond reasonable doubt that:-

- i. the Omonefe Oviefe a human being, died;**
- ii. the death of Omonefe Oviefe was caused by the appellant; and**
- iii. the appellant intentionally threw deceased into the well where the deceased drowned and died.**

The concurrent findings are not perverse nor unreasonable. The appellant has not established that the findings occasion any miscarriage of justice. They do not. (P 371 Paras B–I)

11. *Where oral confessional statement was not challenged*

The PW1 heard the appellant give her confession, tearfully, that she threw the one-month old baby, Omonefe Oviefe into the well. The well had water. She made this confession when the corpse of baby Omonefe Oviefe, having drowned, was found floating lifelessly in the well. The only reason the appellant gave, in the presence of the PW1, for throwing the baby into the well was that the father of the baby rejected the child. This damaging evidence was neither challenged nor contradicted. Thus facts not disputed, challenged or contradicted are taken as established and that the person, against whom the said facts are given does intend that the facts be taken as true.

I think, and do hold, that the two courts below are right in their interpretation or conclusion that the appellant, throwing a one-month old child into the well with water intended to cause the death of the child by drowning.

The two courts were right in their concurrent findings and conclusions that the appellant, by throwing the child into the well with water therein, intended the natural consequence that the death of the child by drowning.

The appellant has not shown any good cause to warrant our interfering with the concurrent findings of facts by the two courts below. She has not shown any good cause why her appeal should be allowed. (P 372 Paras A–E)

Representation

Ayo Asala for the appellant; with him, E.M Odje and Ayo Makinde.

Peter Mrakpor, Hon AG, Delta State, for the respondent; with him, B.L. Adigwe, D.A.S MOJ, Delta State and O.F Enmuo, Director Appeals, MOJ, Delta State.

CENTUS NWEZE, (JSC) (Delivering the Lead judgment): On January 24, 2007, the appellant (as accused person) was arraigned before the High Court of Delta State, Ughelli Division, for the offence of murder punishable under Section 319(1) of the Criminal Code, Cap 48, Vol II, 1976 Laws of Bendel State, applicable to Delta State.

Upon his not guilty plea, the case went to trial. The prosecution's case was woven around the testimonies of three witnesses. Exhibit A was the statement which the accused person (now, appellant) volunteered at the police station. The thrust of the case against the appellant was that, on January 26, 2006, at Ekrenhavwe Village, she threw her one-month old baby, Omonefe Oviefe, into a well where she drowned.

The accused person's challenge to the voluntariness of Exhibit 'A' prompted a trial-within-trial wherein the judge, Ohwo, J (as he then was), finding in favour of its voluntariness, admitted it in evidence. Believing the testimony of PW1 and Exhibit 'A', the learned trial judge convicted the accused person and sentenced her to death by hanging. Her appeal to the Court of Appeal, Benin Division, being dismissed, she further appealed to this court. She framed only one issue for the determination of her appeal. The said issue was couched thus:

Whether having regard to the totality of the evidence from the record, the lower court was right in upholding the decision of the trial court that the prosecution proved the charge of murder against the appellant beyond reasonable doubt.

The respondent framed the same issue more elegantly in these words:

Whether on the totality of the evidence adduced on record the lower court was right in affirming the judgment of the trial court which found the appellant guilty as charged?

Against this background, this appeal would be determined in terms of the respondent's phraseology.

ARGUMENTS ON THE SOLE ISSUE

APPELLANT'S CONTENTION

At the hearing of this appeal on November 2, 2017, Ayo Asala, counsel for the appellant, adopted the brief of argument filed on August 8, 2013. He re-iterated the settled essential ingredients for the proof of the offence of murder. He cited **Mbang vs. The State (2007) All FWLR (Pt. 372) 1863; Uwaogbe vs. State (2008) All FWLR (pt. 419) 425**. In his submission, where one of the ingredients is tainted with some doubt, the charge must fail, *Yaki vs. State (2008) All FWLR (pt. 440) 618*.

He pointed out that only the second and third elements were hotly disputed. He claimed that neither of the three witnesses for the prosecution gave a direct eye witness account of the appellant's act being responsible for the death of the deceased person, that is, the act of throwing of the deceased person, the accused person's child into the well. He referred to pages 78 to 79 of the record for the trial court's reliance on the evidence of PW1 in holding that the appellant was responsible for the death of the deceased person. He, equally, referred to page 142 of the record for the lower court's affirmation of the admissibility of the appellant's oral confession.

He impugned the concurrent findings of the lower courts on the admissibility of the said confession. He referred to the testimony of PW1, at page 50 of the record, to demonstrate that the said witness was not present when the deceased person was thrown into the well. He dismissed this witness's testimony as hearsay, section 37 and 38 of the **Evidence Act and Utteh vs. The State (1992) 2 NWLR (pt 223) 257**. In this submission, since the said oral confession of the appellant to PW1 is inadmissible in law, it was of no moment that it was not contradicted in cross examination, **Ikaria vs. The State (2013) All FWLR (Pt. 671) 1463**.

He cited page 50 of the record to show that the appellant challenged the evidence of PW1 in cross examination. He maintained that there was no independent evidence which tended to confirm the evidence of PW1 that the appellant threw her child into the well. Even Exhibit A, in his submission, did not support the evidence of PW1.

He submitted that, where an accused person was alleged to have made a confessional statement, whether oral or in writing, which was retracted, such statement ought to be corroborated before reliance could be placed on it, **Ismail vs. The State (2008) All FWLR (pt 434) 1567**. He pointed out that the evidence of PW1 and Exhibit A were not corroborated. He maintained that Exhibit A was inconsistent with the evidence of PW1, citing **Edoho vs. State (2010) All FWLR (Pt. 530) 1262**.

He contended that the finding of the trial court, page 80 of the record, and the lower

court's affirmation thereof, pages 143-146 of the record, were misplaced in law. He pointed out that the lower court should have concerned itself with the question whether there was anything outside Exhibit A which confirmed the story that the appellant killed the child, the deceased person. According to him, the lower court shouldn't have affirmed the trial court's decision. In this submission, the fact that an accused person told lies in respect of a charge against him or her does not amount to an admission of guilt, **Muka vs. State (1999) 1 ACLR 141**.

He explained that the trial court was so much influenced by its observation that the appellant lies that it referred to the appellant as a liar, pages 79 and 80 of the record. He maintained that the trial court ought to have looked for corroborative evidence outside the testimonies of PW1, PW3 and Exhibit A before concluding as it did on pages 82 – 83 of the record. He contended that the testimonies of PW1 and PW3, as they relate to the alleged confession of the appellant, required corroboration. He, therefore, invited the court to hold that it was wrong to use the same testimonies of PW1 and PW3 to corroborate the evidence tending to show that the appellant was the person who threw the deceased into the well. He noted that a corroborative evidence must be an independent evidence from the evidence to be corroborated, **State vs. Mbele (1990) 4 NWLR (Pt. 145) 484; (1999) 2 LRCNCC 17, 34**.

Against the above background, he argued that the lower court, wrongly, upheld the trial court's reliance on the testimony of PW2, the Medical Doctor, as corroborative evidence. In his submission, PW2's evidence was only relevant as to the cause of death and not as to who was responsible for the death of the deceased person. He urged the court to hold that the prosecution failed to prove the essential ingredients of the offence charged.

RESPONDENTS' SUBMISSIONS

On his part, Peter Mrakpor, learned AG, Delta State, for the respondent, adopted the amended respondent's brief deemed, properly, filed on November 1, 2017. He drew attention to the finding of the trial court at pages 22-23 of the record. He, equally, invited the court's attention to pages 84 and 86 for the trial court's findings on the second and third ingredients of the offence which the prosecution proved.

He explained that, in this appeal, the appellant is contesting the reasoning behind the learned trial judge's findings on the second and third ingredients of the offence of murder. In his submission, the challenge here deals with the power of the court to evaluate evidence and ascribe probative value, being primary functions of the trial court, **Ogunzee vs. The State (1998) 5 NWLR (pt. 551) 521, 557; Oladipo vs. Moba LGA (2010) 5 NWLR (Pt. 1186) 1117, 150 – 151**.

On the lower court's findings on the oral and written confessional statement of the appellant, he drew attention to page 77-78 of the record. He pointed out that the lower court, rightly, affirmed the trial court's findings that the appellant did not challenge the evidence of

the oral confession which the PW1 gave. He re-iterated the settled position that the appropriate time to challenge the voluntary nature of a statement it is sought to be tendered. It is immaterial whether the confession is oral or written, **Arogundade vs. State (2009) 169 LRCN 17; Akpa vs. The State (2010) 8 LRCNCC 71; Alarape vs. State (2001) 84 LRCN 600.**

Learned counsel averred that neither the appellant nor his counsel challenged the voluntary nature of the evidence of the oral confession which the PW1 gave. In effect, the fact of its retraction in the appellant's defence would not prevent the court from acting on it, **Edamine vs. State (1996) 4 NWLR (sic) 375; Odeh vs. State (2008) All FWLR (pt 424) 1590, 1618.** He drew attention to pages 142-143 of the record for the lower court's affirmation of the findings of the trial court. He urged the court to dismiss the challenge on the finding of the lower court, **Arogundare vs. State (supra).**

On the written confessional statement, he submitted that Exhibit A is confessional in nature, citing page 82 of the record for the trial court's response to the suggestion that the appellant's friend threw the deceased in the well. he maintained that the inconsistency rule is inapplicable to the confessional statement of an accused person **Egboghonome vs. State (1993) 7 NWLR (Pt. 306) 383.**

On the issue of corroboration of the appellant's confession, he submitted that the trial court was right when it found corroboration of the said confession in the evidence of PW1 and PW2. He maintained that a confessional statement, which is direct, positive and unequivocal as to the admission of the guilt of an accused person, is enough to ground his conviction notwithstanding the fact that she resiled from it. However, it is only desirable to ensure that other ascertained facts, consistent with the *confessional* statement, abound before convicting her. **Musa vs. The State (2013) LPELR – 19932 (SC); Alarape vs. State (2001) 5 NWLR (Pt. 705) 79; Hassa vs. State (2001) 15 NWLR (pt. 735) 184; Edamine vs. State (1996) 3 NWLR (pt. 438) 530, 536.**

He, further, referred to the finding of the trial court at pages 80-83 of the record. He pointed out that the PW1 and PW3 were independent witnesses and they corroborated the confessional statements of the appellant. In effect, the trial court convicted the appellant based on his un-contradicted confessional statements and the corroborative evidence of PW1 and PW3.

He observed that this court does not make a habit of interfering with concurrent findings so long as they are supported by legally-admissible evidence; they are not perverse and have not led to a miscarriage of justice, **Peter Iliya Azabade vs. The State (2014) LPELR 23017 (SC); Habibu Musa vs. The State (2013) LPELR-19932 (SC).**

RESOLUTION OF THE ISSUE

As shown at the outset of this judgment, the appellant was arraigned before the High Court of

A Delta State, Ughelli Judicial Division for the offence of murder punishable under Section 319 (1) of the Criminal Code, Cap 48, Vol. Ii, 1976 Laws of Bendel State, applicable to Delta State.

As this court held in **Tajudeen Iiyasu vs. The State (2015) LPELR - 24403 (SC) 25; B-G:**

B

The three constitutive elements or ingredients of the offence which must be proved in order to secure a conviction under this section have been, generously, outlined in case law, Maigari vs. State (2013) 6 - 7 MJSC (Pt 11) 109, 125, citing Ochemeje vs. The State (2008) SCNJ 143; Daniel vs. The State (1991) 8 NWLR (Pt. 4430) 715; Obudu vs. State (1999) 6 NWLR (Pt 1980) 433; Gira vs. State (1996) 4 NWLR (Pt. 428) 1, 125.

C

D Under the said section, the prosecution is obliged to prove: (1) that the deceased died; (2) that his/her death was caused by the accused; (3) that she/he intended to either kill the victim or cause her/him grievous bodily harm.

E

Both counsel for the appellant and the respondent are *aid idem* on the fact that the prosecution proved the first ingredient. Thus, only the second and third ingredients are being disputed by the appellant. As shown above, the lower courts, concurrently, found in favour of the proof of these ingredients. Essentially, the judgment of the trial court, affirmed by the lower court, was woven around the oral confession, and exhibit A, which the appellant volunteered. Listen to the findings of the trial court: findings,

F

approvingly, affirmed by the lower court:

G

Now the act of the accused [person] which caused the death of the deceased [person] was the throwing of the deceased [person] into a well which caused her to drown. Obviously, any person who throws a baby aged about one month as in the present case into a well of water must have intended to cause the death of the baby or cause it grievous harm and I hold that the issue of grievous harm will arise only if the baby is rescued almost immediately on being thrown into the water. I have no difficulty therefore in arriving at the conclusion that the act of the accused [person] in causing the death of the deceased [person] was done intentionally with knowledge that death or grievous bodily harm was its probable consequence [page 84; italics supplied for emphasis].

H

I

A Prior to this finding, the trial court had explained that:

None of the witnesses for the prosecution who testified before me gave direct eye-witness evidence on the act of the accused [person] causing death of the deceased [person] which in this case (from the facts) is the throwing of the deceased [person] into the well. The PW1 (Friday Etinagbedia) who arrived the scene not long after the incident testified that when he arrived the scene at Ekreerhavwe village, he saw the accused [person] and some other persons who 'held' the accused.' On the arrival of PW1 at the scene, they all proceeded to the well where the corpse of the baby (deceased) was in. the PW1 then testified thus in respect of the conduct of the accused [person] at the scene.

D Accused admitted she was the one who threw the baby into the well. the reason the accused [person] gave is (sic) my presence and to my hearing was that the father of the child rejected the child hence she threw the child into the well.

E The witness had earlier testified that at the scene the accused [person] was crying and pleading for forgiveness. *Under cross examination, this evidence of the PW1 touching on the confession of the accused [person] at the scene was never challenged.* [pages 77-78; italics supplied for emphasis]

F The lower court, in affirming the above findings, held as follows:

The circumstances of the said oral confessional statement of the appellant in the present appeal is quite unique. The PW1 in his evidence in chief stated that, on his arrival at the village, he met (sic) the appellant was held by some people. Again he was told of the appellant having thrown lher baby into the well. He, the appellant, and the others present moved to the well, where he saw the baby right inside the well lifeless. The appellant was brought before the elders, who mandated him to lodge a formal report to the police. It was at this stage that the appellant started crying. *She confession having thrown her baby into the well but was asking for forgiveness. No question was put in cross-examination on this evidence in chief.* [Italics supplied]. This court has no reason to disturb the interpretation given by the trial court that the appellant actually

- A** made the confession as postulated by PW1. If the appellant did not make such confession, she should have briefed her counsel at the earliest opportunity who would then have challenged such evidence. her denial of the confession on (sic) defence is an afterthought. This court is in one with the trial court that no other interpretation can be given to this oral confession other than the appellant made it. *In the given circumstance, although the PW1 did not see with his eyes the act of the appellant throwing the baby into the well, the entire circumstances as narrated above makes (sic) what would appear to be inadmissible, to be admissible in court.* This court has no reason to disturb the decision of the trial court in placing reliance of this oral confessional statement of the appellant at its decision. [Italics supplied by the lower court]
- B**
- C**
- D** Learned counsel for the appellant impugned the above affirmation of the trial court's findings as wrong in law. In his submission, the PW1 was not present when the deceased person was throw into the well. put differently, he took the view that the oral confession of the appellant was inadmissible.
- E** With profound respect, this submission betrays counsel's misconception of the potency of oral admissions or confessions. In the first place, as established in *Jua vs. The State (2010) LPELR-1637 (SC)*, just as a written confession, an oral confession of an accused person is admissible in evidence. both species of evidence constitute the strongest evidence of guilt on the part of the accused person, *Akpa vs. State (2008) 14 NWLR (Pt. 1106) 72*. At page 95 of the report, the court maintained that:
- F** Confession in criminal procedure, like admission in civil procedure, is the strongest, evidence of guilt on the part of an accused. It is stronger than the evidence of an eye witness because the evidence, borrowing the daily axiom, comes out from the mouth of the horse, who is the accused person. What better evidence that? He knows or
- G** knew what he did and he says or said it in court. Is there need for any further proof? I think not.
- In effect, a voluntary confessional statement, whether oral or written, is an admission of guilt by an accused person. It is, thus, a relevant fact, although, admissible against its maker only, *Arogundare vs. The State (2009) 6 NWLR (Pt. 1136) 165, 174-175; [2009] 1-2 SC (pt 11) 24, 30-31*. Thus, where it is proved, as in the instant case, an oral confession of the accused person would be sufficient to sustain his conviction, *Arogundare vs. The State (supra); Adio and Anor vs. The State (1986) 2 NWLR (Pt. 24) 581*.
- H**
- I** Such is its potency that such an admission, made at any time by a person charged

A with an offence (even if before it had been decided to formally charged him with committing a crime without administering a caution, suggesting that he committed the offence), is a relevant fact against him, **Arogundare vs. The State (supra)**; **Onungwa vs. The State [1976] 1 SC (Reprint) 74; [1976] NSCC (Vol.10) 27; Akinmoju vs. The State [2000] 4 SC (Pt.1) 64; [2000] 6 NWLR (Pt. 662) 608.**

B A conviction could, therefore, be secured against an accused person on the strength of such a confession to the crime for which he is charged; **Arogundare vs. The State (supra)**; **Sule vs. State [2009] 17 NWLR (Pt. 1169) 33; Jua vs. State (supra); Omogu vs. FRN [2008] 9 NWLR (Pt. 1085) 38; Shalla vs. State [2007] 18 NWLR (Pt. 1066) 240.**

C At page 9 of the appellant's brief, it was contended that “since the alleged oral confession of the appellant to PW1 is inadmissible in law, it is of no moment that that piece of evidence was not specifically contradicted under cross examination.” With respect; this cannot be true. In fact, just as in this case, in **Arogundare vs. The State (supra)**, such a submission was equally, canvassed. This court did not find any merit in the said submission. The court took the view that the testimony of PW5, as to what the appellant in the case, told him was positive and direct a direct evidence of what the appellant said or confessed to PW5 which was narrated to the court in the presence of the appellant who failed to truth of its contents, **Arogundare vs. The State (supra) 24; C-G.**

E As in the *Arogundare* case (supra) 23-24; G-A, the appellant's counsel in the instant case, failed to cross-examine PW1 at all. The submission that it was of no moment that the said evidence was not challenged in cross-examination cannot, therefore, be sustainable. In **Modupe vs. The State [1988] 9 SCNJ 1, 4-5**, this court explained that:

G **Normally a trial court, that had the opportunity of seeing the witnesses, hearing them and watching their demeanour, enjoys the special privilege of believing or disbelieving their evidence. *But belief or disbelief becomes an issue when and only when there are two conflicting versions of an essential fact.* When there is only one version of an essential fact and that version is not patently and obviously improbable, a trial court is not left with any option than to believe that which has not been controverted or contradicted in any way. To reject [a] positive assertion Without any contrary evidence at all – either in cross-examination or in rebuttal – seems to be much more than a trial court is allowed to do. To base such a rejection on the subjective estimation of the trial judge looks quite arbitrary, nay**

- A** **dangerous. It looks as though the trial judge converted himself into a witness, gave evidence, and then preferred his own evidence to that of the appellant. Put as bluntly as this, one can then appreciate the danger involved in a trial judge preferring his own estimation, which is nor evidence, and which was not based on any evidence, to a positive assertion *which has not in the least been contradicted or controverted.* [Italics supplied for emphasis]**
- B**

- In the instant case, learned counsel for the appellant, just as was done in **Arogundare vs. The State (supra)**, contended that “PW1's evidence on this point amounts to hearsay evidence which is inadmissible in law ...” In dismissing this sort of argument in **Arogundare vs. The State (supra)**, this court held that “the submission of the learned counsel for the appellant that the evidence of PW5 is hearsay is totally misconceived. PW5 gave direct evidence of what the appellant told him confessing to a serous offence before the trial court in the presence of the appellant and *his counsel who for reasons best known to them failed to challenge it.* The confession is so graphic and vivid that its veracity is not in doubt,” **Arogundare vs. The State (supra) per Ogebe, JSC at page 13; A-C.**
- C**
- D**

- E** Citing **Ismail vs. State (supra)**, the learned counsel for the appellant would appear to have entertained the hope that the appellant's retraction of her confession would avail her. Regrettably, this submission is unsustainable. As this court held in **Iliyasu vs. State (supra)**:

- F** a retraction or denial of a confessional statement ... does not affect its admissibility. This has long been settled in the very old cases of **R. vs. Sapele and Anor (1952) 2 FSC 74; R. vs Itule (1961) All NLR 462; the relatively old decisions of Ikpassa vs. The State [1981] 9 SC 7; Akpan vs. State (1992) LPELR – 381 (SC) 36; Osakwe vs. State [1994] 2 SCNJ 57; Nwangbunu vs. The State [1994] 2 NWLR (pt 327) 380; Bature vs. State [1994] 1 NWLR (pt 320) 267; Eragna and Ors vs. The Ag, Bendel (1994) LPELR-(SC) 30; Idowu vs. State [1996] 11 NWLR (Pt. 574) 354; as well as the more recent decisions of Silas Sule vs. State (2009) LPELR-3125 (SC) 28 30, G-B; FRN vs. Iweka (2011) LPELR 9350 (SC) 53; Oseni vs. The State (2012) LPELR-7833 (SC) 22-23.**
- G**
- H**

At the risk of re-iteration, I reproduce the findings of the trial court here- findings duly affirmed by the lower court:

- I** **Now the act of the accused [person] which caused the death of the**

A deceased [person] was the throwing of the deceased [person] into a well which caused her to drown. Obviously, any person who throws a baby aged about one month as in the present case into a well of water *must have intended to cause the death of the baby or cause it grievous harm and*

B I hold that the issue of grievous harm will arise only if the baby is rescued almost immediately on being thrown into the water. I have no difficulty therefore in arriving at the conclusion that *the act of the accused [person] in causing the death of the deceased [person] was done intentionally with knowledge that death or grievous bodily harm was its probable consequence.*

C [page 84; italics supplied for emphasis]

Surely, in the Anglo-Nigerian accusatorial criminal justice system, an accused person is taken to intend the consequences of his voluntary act when he foresees that it would probably happen, whether he desires it or not, **Hyam vs. DPP [1974] 2 All ER 41.** Hence, the requisite intent for the offence of murder would be found where a person, who does the act which kills knows that it is highly probable that he would cause death or grievous bodily harm, **Segun Akinlolu vs. State (2015) LPELR – 25986 – (SC) 19; A-D.**

E My Lords, against the above sordid background, as found by the trial court-affirmed by the lower court, I see no justification for disturbing the concurrent findings of the lower courts in the absence of any proof of their perversity or proof that they have led to miscarriage of justice, **Musa vs. The State (2013) LPELR-19932 (SC); Onwudiwe vs. FRN [2006] 10 NWLR (Pt. 988) 382.**

F In all, I find no merit in this appeal. Accordingly, I hereby enter an order dismissing it. I affirm the concurrent findings of the lower court and uphold the conviction of, and sentence on, the appellant. Appeal dismissed.

Chima Centus Nweze
Justice, Supreme Court

G **DATTIJO MUHAMMAD, (JSC):** Having read in draft the very lucid lead judgment of my learned brother **CHIMA CENTUS NWEZE JSC** just delivered, I entirely agree with the reasoning and conclusion therein that the appeal being devoid of merit be dismissed.

H The appellant was tried and convicted for the murder of Omonefe Oviefe, a one month old baby, by the Delta State High Court. it is not in doubt that baby Omonefe Oviefe, a human being, has died and that the death of the deceased ensued from the act of the appellant. The evidence particularly of PW1 entitles any reasonable tribunal to conclude, contrary to what the appellant argues, that she had intended to murder the

I

A deceased. The appellant deliberately drowned her baby, according to her, because the father of the baby had denied and rejected the baby. I am not aware of any jurisdiction, certainly not ours, where these facts constitute the defence the appellant assert they are. The concurrent findings of the two courts below that the appellant had indeed murdered a human being and convicting her as charged, having not been shown to detract from the evidence before the former and the evidence on record accessed by the latter remain unassailable. See **Agbo vs. The State (2006) LPELR-242 (SC) and Shurumo vs. The State (2010) LPELR-3069 (SC)**.

C It is for the foregoing and the more detailed reasons outlined in the lead judgment that I also dismiss the appeal and affirm the judgment of the court below.

Musa Dattijo Muhammad,
Justice, Supreme Court

D **BAYANG AKAAHS, (JSC):** I read before now the judgment of my learned brother, Nweze JSC. I agree with him that the appeal lacks merit.

E The prosecution led evidence to show that the appellant is the mother of the one month old baby, Omenefe Oviefe who was thrown into the well on 26th January, 2006 and in consequence the child got drowned and died. PW1 testified that he heard the appellant when she said that she threw the baby into the well because the father of the baby rejected the child. The prosecution therefore proved beyond reasonable doubt that

(a) **the baby died**

(b) **the baby's death was caused by the act of the accused/appellant and;**

F (c) **the accused/appellant intended to cause the death of the child by drowning and;**

(d) **it was the natural consequence of the appellant's act that caused the death of the deceased.**

G Both the trial court and the court below made concurrent findings of fact which cannot be disturbed. The appeal therefore lacks merit and it is accordingly dismissed.

K. B. AKAAHS
Justice, Supreme Court

H **INYANG OKORO, (JSC):** I read before now the judgment of my learned brother **Chima Centus Nweze, JSC**, just delivered with which I am in agreement that this appeal lacks merit and ought to be dismissed. One issue was formulated for the determination of this appeal to wit: *Whether having regard to the totality of the evidence from the record, the lower court was right in upholding the decision of the*

I

A *trial court that the prosecution proved the charge of murder against the appellant beyond reasonable doubt?*

Simply put, the case against the appellant is that on 26th January, 2006, at a village called Ekrenhauwe, Delta State she threw her one month old baby, Omonefe Oviefe, into a well where she drowned. Based on the evidence of PW1, PW2 and her

B confessional statement, the learned trial judge convicted and sentenced her to death. Her appeal to the Court of Appeal was dismissed. There is thus a concurrent finding of the two courts below that the appellant and none else committed the offence.

C It is trite that where there are concurrent findings of facts by the trial court and the Court of Appeal, this court does not, in practice, disturb such concurrent findings unless they have been shown to be perverse. See **Sobakin vs. The State (1981) 5 SC 75, Dan Awaza Bashaya & Ors vs. The State (1998) LPELR-755 (SC), (1998) 5 NWLR (Pt. 550) 351, Sunday vs. The State (2017) LPELR-42259 (SC), Ehimiyein vs. The State (2016) LPELR-40841 (SC)**. In the instant case, the appellant has not shown these

D findings to be perverse at all.

On the issue of the confessional statement of the appellant which she tried to retract, the law is well settled that mere retraction of a voluntary confessional statement by an accused person does not render it inadmissible or worthless and untrue in considering his guilt. If the confessional statement is satisfactorily proved, a conviction

E founded on it, without more, will be sustained by an appellate court. see **Idowu vs. The State (2000) FWLR (Pt. 16) 2672 at 2702, Ogudu vs. The State (2011) LPELR-860 (SC), (2011) 18 NWLR (pt. 1278) 1**. Where however, there is a retraction of a confessional statement, the court ought to, as much as possible, look for other evidence

F outside the confessional statement to corroborate the said retracted confessional statement in order to affirm that the confessional statement is true. In this case, the evidence of PW1 and PW2 corroborated the confessional statements. See **Adamu Saliu vs. The State (2014) 12 NWLR (pt. 1420) 65, (2014) LPELR-22998 (SC), Ejinima vs. State (1991) LPELR-1067 (SC)**.

G I have no hesitation in agreeing with my learned brother that the two courts below were right that the prosecution proved the charge of murder against the appellant beyond reasonable doubt. This appeal, as it stands, is devoid of merit and is accordingly dismissed. I affirm the judgment of the lower court.

H Appeal dismissed.

John Inyang Okoro
Justice, Supreme Court

I **EJEMBI EKO, (JSC):** It was alleged that the appellant committed the murder of her one-month old baby, Omonefe Oviefe, by throwing it into a water bearing well on 26th

A January, 2006 where the child drowned and died. The trial was conducted by the High Court of Delta State. She was subsequently convicted and sentenced for murder. Her appeal to the Court of Appeal was unsuccessful. The Court of Appeal (the lower court), dismissing her appeal, affirmed the appellant's convicted and sentence by the trial court.

B My learned brother C.C. Nweze, JSC availed me before now the draft of the judgment just delivered by him in this further appeal. I am empathically in agreement with his analysis and conclusions. I hereby adopt the judgment.

Learned counsel for both the appellant and respondent are in agreement that in a murder charge, from established authorities, the prosecution must prove that

C

- i. a human being died**
- ii. the death was caused by the act of the accused person and**
- iii. the accused intended either to kill the victim or cause him/her grievous hurt.**

D

In this case, the prosecution and the defence are *ad idem* that Omonefe Oviefe, a one-month old human being died. They are, however, not in agreement that it was the appellant who caused the death of the said Omonefe Oviefe, and that it was not proved that the appellant intentionally caused the death of the said Omonefe Oviefe.

E

The concurrent findings of fact, based on the legal evidence available at the trial, including the confession of the appellant, are that it has been established beyond reasonable doubt that:

F

- i. the Omonefe Oviefe a human being, died;**
- ii. the death of Omonefe Oviefe was caused by the appellant;**
- and**
- iii. the appellant intentionally threw deceased into the well where the deceased drowned and died.**

G

The concurrent findings are not perverse nor unreasonable. The appellant has not established that the findings occasion any miscarriage of justice. They do not.

H The Pw1 heard the appellant give her confession, tearfully, that she threw the one-month old baby, Omonefe Oviefe into the well. The well had water. She made this confession when the corpse of baby Omonefe Oviefe, having drowned, was found floating lifelessly in the well. The only reason the appellant gave, in the presence of the PW1, for throwing the baby into the well was that the father of the baby rejected the child. This damaging evidence was neither challenged nor contradicted. Thus facts not

I disputed, challenged or contradicted are taken as established and that the person,

A against whom the said facts are given does intend that the facts be taken as true.

I think, and do hold, that the two courts below are right in their interpretation or conclusion that the appellant, throwing a one-month old child into the well with water intended to cause the death of the child by drowning. The two courts were right in their concurrent findings and conclusions that the appellant, by throwing the child into the

B well with water therein, intended the natural consequence that the death of the child by drowning.

The appellant has not shown any good cause to warrant our interfering with the concurrent findings of facts by the two courts below. She has not shown any good cause why her appeal should be allowed.

C I therefore align myself with the lead judgment of my learned brother, C.C. NWEZE, JSC in dismissing this appeal and affirming the concurrent findings that the prosecution had proved, beyond reasonable doubt, the guilt of the appellant for her alleged murder of Omonefe Oviefe appeal dismissed.

D **Ejembi Eko**
Justice, Supreme Court

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**ENL CONSORTIUM LIMITED
AND
SHAMBILAT SHELTER (NIG.) LTD**

SC. 40/2015

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

FRIDAY 26TH JANUARY, 2018

BEFORE THEIR LORDSHIPS

MARY UKAEGO PETER-ODILI	JUSTICE, SUPREME COURT
KUMAI BAYANG AKAHHS	JUSTICE, SUPREME COURT
AMINA ADAMU AUGIE	JUSTICE, SUPREME COURT
PAUL ADAMU GALINJE	JUSTICE, SUPREME COURT
SIDI DAUDA BAGE	JUSTICE, SUPREME COURT

*APPEAL: Filing of appellant's brief – Failure to comply thereto – Power of court to strike out appeal – Whether cannot be exercised **suo motu** by court – Relevant principles thereto.*

CONSTITUTIONAL LAW: Fair hearing – Fundamental nature – Whether absence of fair hearing affects court's jurisdiction – Relevant considerations thereof.

COURT: Dismissal of appeal for failure to file appellant's brief – Court not having full grasp of facts before exercising power – Whether dismissal order cannot be sustained.

COURT: Dismissal of appeal – Or. 18 Rule 10(1) of Court of Appeal Rules 2011 – Power to dismiss appeal for failure to file appellant's brief – Whether not exercisable on a date not fixed for the hearing of the appeal.

PRACTICE AND PROCEDURE: Date of hearing of appeal – Where court heard and dismissed an appeal on a date fixed for hearing of motion – Whether procedure amounts to a breach of right of fair hearing.

RULES OF COURT: Dismissal of appeal for failure to file brief – Or. 18 Rule 10(1) of Court

of Appeal Rules 2011 – Relevant considerations thereof.

SERVICE: Hearing Notice – Failure to serve where required – Whether affects court's jurisdiction.

SERVICE: Service of hearing notice – Principles thereof – Need to be situated to facts of a given case.

Issues for Determination

- 1. Whether or not the appellant was denied fair hearing by the lower court.**
- 2. Whether their Lordships of the lower court had the requisite jurisdiction and powers to dismiss the appeal which they so did in the circumstances of the appeal.**

Facts of the Matter

The appellant herein was the appellant before the lower court. Its appeal to the lower court was against the ruling of the FCT High Court delivered on the 7th August 2014 in which the arbitral award of N249,620,2986 made by Chief J.K. Gadzama, (SAN) in favour of the respondent was recognized. Pending along with the appeal was a motion which was filed by the appellant. When the appeal came up for the first time on the 3rd of December 2014, the lower court was informed that the appellant was served through phone call on the 1st of December 2014 and its counsel was not in court. Learned counsel applied that the motion dated 5th September 2014 and filed on the 9th September 2014 be struck out for want of diligent prosecution. The Court of Appeal struck out the motion as prayed and further struck out the entire appeal based on Or. 18 Rule 10(1) CAR 2011. There was no application from the respondent before the court exercised this latter power. Being dissatisfied the appellant has appealed to the Supreme Court.

Held: *(Unanimously allowing the appeal)*

- Fundamental nature of fair hearing as it relates to court's jurisdiction*
It is to be stated at the risk of repetition that fair hearing or the lack thereof is fundamental to the competence of a court's proceedings and the jurisdiction of the court itself. Therefore the facts that a party who ought to be placed on notice of an impending proceedings in court and is not so notified the proceedings are thereby for that lack jeopardized and the fall out is that the court's jurisdiction cannot be ignited or activated.

This does not mean that a party would be allowed to play hide and seek as an artful dodger from notice of process or hearing notice all in an attempt to plead non service so as to scale through the huddle of attending to the hearing, delay the proceedings and thereby obtain a cheap victory. The courts have built in dispute certain mechanisms whereby the parties must come out in the open to make their cases with their cards on the table and not cunningly or craftily. This has made the court come up with its legal principle that when an appellant has been given ample opportunity or chance to present the appeal before the lower court, he skips court, he does so at his own peril and would bear the result of the game he has played and cannot invoke his right of fair hearing in court as a party who seeks fair hearing in court must also be fair in litigation to the adverse party and to the proceedings. See *Inakoju & Anor vs. Adeleke & 3 Ors (2007) 29 NSC QR (Pt. 11) 958 at 979. (P 388 Paras C–H).*

2. *Principles of service of hearing notice are relevant in relation to the facts of a given case*

The applying principle in the matter of service of hearing notice and whether the principle of fair hearing has been adhered to cannot be operated without situating to a given case like the one at hand. In the case in this instance on the 3rd December, 2014, the case at the lower court was for the hearing of motion No: CA/A/520/M/2014 and not for the hearing of Appeal No. CA/A/520/2014, therefore the hearing notice and the appellant being in the know would not change the situation.

Again to be stated is that as at 19th of September, 2014 appellant had compiled and transmitted the record of appeal in the ex-parte decision against him delivered on the 7th of August, 2014 and the case came up before the lower court for the first time ever on the 3rd of December 2014. Therefore the court below erred when it applied the provisions of the Court of Appeal direction, 2013 in dismissing the appeal as the circumstances for such application did not exist. (Pp 388–389 Paras H–C).

3. *A court cannot properly hear an appeal on a date fixed for motion*

This court has at numerous occasions stated that a court cannot hear an appeal on a date fixed for hearing of a motion without the consent of both parties and the court. This is in tune with the principle of fair hearing as a party must be heard before a matter concerning him is determined. Stated differently, even though a party is aware of a motion that is not the same as being put on notice for

a hearing of an appeal that is not slated for a given date. Therefore when on the date for hearing of a motion, the court set on a journey of taking on the appeal without a party being aware of the latter position and with his consent, the jurisdiction of the court is invoked in futility and all that takes place would come to naught. See General Electric Co. vs. Adande (2012) 16 NWLR (Pt. 1327) 593 at 605; Assams vs. Ararume (2016) 1 NWLR (Pt. 1493) 368 at 388-389; Ominyi vs Alabi (2015) 6 NWLR (Pt. 1456) at 572-596; Section 36 (1) of the 1999 Constitution of the Federal Republic of Nigeria; Judicial Service Commission, Cross Rivers State vs Young (2013) 1 NWLR (Pt. 1364) 25-26. (P 389 Paras C–G).

4. *Requirement of service by phone call*

The point has to be made that the phone call mode of service would ordinarily be of good service so long as the party is provided the notice at least 48 hours before the scheduled court date. The regularity of service is no longer jettisoned because it was made electronically as the current rules of court have ensured. See Order 2(c)i of the Court of Appeal, 2013 rules. (P 389 Paras G–H).

5. *Importance of service of hearing notice*

Service of hearing notice on the appellant is a pre-condition to the existence of jurisdiction of the court below as it is basic to the invocation of jurisdiction of the court. The flip side of the coin is that non-service of hearing notice therefore robs the court of jurisdiction to hear and determine the matter and any order made thereby against the party who should have been served with the hearing notice becomes null and void. I rely on Otobaimere vs. Akporehe (2004) 14 NWLR (Pt. 894) 591 at 614; FBN PLC vs. TSA Ind. Ltd (2015) 11 NWLR (Pt. 1470) 346 at 357; Guda vs. Kitta (1999) 12 NWLR (Pt. 629) 21. (Pp 389 – 390 Paras H–B).

6. *Where court makes a dismissal order based on a mistaken view point*

The facts and circumstances prevailing in this case showed that the court below did not have the full grasp of the case before them in ruling and dismissing the appeal as they operated with the erroneous belief that the record of appeal was transmitted from the trial court registry as at the 2nd of September, 2014. Whereas, a supplementary record was transmitted by the appellant as far back as the 19th September, 2014. The court below clearly was ambushed by what the

learned justices perceived to be the true state of affairs and so could not have considered the issues properly raised by the parties before them and so the conclusions reached stemmed from a mistaken view point which cannot be sustained. See *Udengwu vs. Uzuegbu* (2003) 7 SC 64 at 69, *Kalio vs. Woluchem* (1985) 1 NWLR (Pt. 4) 610 at 622. (Pp 390 Paras B–E).

7. *Consideration of Or. 18 Rule 10(2) CAR 2011*
Per K. B. Akaahs

“Although the appellant failed to file its brief within 45 days after the receipt of the record, by Order 18 Rule 10(2) of the Court of Appeal Rules, that did not extinguish its appeal. The respondent was required to bring an application for the dismissal of the appeal, where the appellant failed to file the brief within time and did not take steps to ask for extension of time within which to file the brief. See Order 18 Rule 10(1) of the rules which provides:

“18 Rule 10(1) Where the appellant fails to file his brief within the time provided for in Rule 2 of this Order, or within the time as extended by the court, the respondent may apply to the court for the appeal to be dismissed for want of prosecution”.

Even though the appellant was absent from court on 3 December, 2014 together with its counsel and there was evidence that the appellant had been notified on 1 December, 2014 of the matter coming up on 3 December, 2014, the business of the court was to hear the pending motion. And since learned counsel was not around to move the application, the court rightly struck out the application on the application of learned counsel to the respondent. The further step taken by the court to suo motu dismiss the appeal for failure to file the appellant's brief was wrong. Even if learned counsel for the respondent applied orally for the dismissal of the appeal, the court still had to decide whether it was proper to grant such application without hearing from the appellant. Since the court below dismissed the appeal without a prompting from the respondent's counsel, there is failure by the court to accord the appellant fair hearing and therefore the appeal per force must be allowed”.

(P 391 Paras A–H).

8. *Per Galinje (JSC):*

Order 18 Rule 2 of the Court of Appeal Rules provides that the appellant shall within forty-five days of the receipt of the record of appeal from the court below file in the court a written brief, being a succinct statement of his argument in the appeal. Order 18 Rule 10(1) of the same rules provides as follows:

“Where an appellant fails to file his brief within the time provided for in Rule 2 of this order, or within the time as extended by the court, the respondent may apply to the court for the appeal to be dismissed for want of prosecution.....”

Order 18 Rule 10(1) of the Court of Appeal Rules is very clear. An appellant's appeal could be dismissed for failure to file a brief of argument if the respondent applies to the court for the appeal to be dismissed. Learned counsel for the respondent did not make an application for the dismissal of the appeal.

From the available record, that was the first time the appeal came up before the court. The major feature of Order 18 Rule 10(1) of the Court of Appeal Rules is the passive and inactive role of the bench which emphasizes or promotes the active role of counsel in the presentation of the cases for their respective parties. Learned counsel for the respondent was required to apply, if he wished, for the appeal to be dismissed. He only applied for the motion to be dismissed. It was therefore not his desire to have the appeal dismissed at that stage. See *Godwin Josiah vs. The State* (1985) 1 SC. 406 at 443.

Even if the respondent had asked for the appeal to be dismissed at that stage, since same was being mentioned for the first time, the lower court would have been reluctant to do so. For a dismissal of an action or appeal in limine is the most punitive relief that a court can grant to a defendant/respondent against a plaintiff/appellant. There must be a legal basis for such a request and a corresponding legal basis for granting it. See *Inakoju vs. Adeleke* (2007) 4 NWLR (Pt. 1025) 427.” (Pp 393–394 Paras B– A).

Representation

B. J. Akomolafe for the appellant and with him is **I.E. Oyatoye**.

M. A. Nunghe for respondent and with him is **Sylvester Ogbelu**.

PETER-ODILI, (JSC) (Delivering the Lead Judgment): This is an appeal from the decision of the Court of Appeal or court below on 3rd December, 2014 from Coram: Abubakar Jega Abdulkadir, Tinuade Akomalafe – Wilson and Joseph E. Ekanem JJCA of the Abuja Division in which the court below dismissed the appeal from the ruling of the High Court of the Federal Capital Territory on 7th August, 2014 per Valentine B. Ashi J in which the High Court recognised the Arbitral Award made by the sole arbitrator, Chief J.K. Gadzama SAN wherein the appellant was made liable to pay the sum of two hundred and forty-nine million, six hundred and twenty thousand, two hundred and ninety eight Naira, sixteen kobo (N249,620,298.16) only to the respondent.

FACTS RELEVANT TO THE APPEAL

It is not disputed that both parties were all represented at all material times before the sole arbitrator Chief J.K. Gadzama (SAN) during the arbitral proceedings and before the trial court save when the said trial court on the 7th day of August, 2014 recognized the arbitral award and in the same proceedings granted leave to the respondent, to enforce the award by virtue of the nature of the ex-parte application in Motion No. M/6696/2014.

That instead of timeously approaching the trial court under the relevant Sections 29, 31 and 32 of the Arbitration and Conciliation Act Cap A 18 LFN, the appellant anxiously elected to appeal to the lower court on the 4th September 2014.

The appellant filed many applications which included applications on originating summons between the same parties and the same subject suit No. FCT/HC/CV/2291/14 dated and filed on 2nd of September, 2014.

There was also a motion for stay of execution in the trial court between the parties on the same subject matter in suit No. FCT/HC/2096/2014, Motion N. M/6641/2014.

That in the lower court there was also a Motion No. M/6696/2014 in Appeal No. CA/A/520/2014.

That despite the decision of the lower court on 3rd December, 2014, some of the above, particularly 2.05 and 2.06 are still pending in the trial Federal Capital Territory High Court and are not abated in spite of this Appeal.

The appellant's counsel was informed on the 1st of December 2014 of his appeal slated to come on the 3rd of December, 2014.

Further, that the narration of the appellant from paragraph 2.05 of his brief of argument deemed properly filed and served on the 7th of February 2017 which is anchored on the appellant's counter-affidavit to the affidavit of service of Mr. Emmanuel (the bailiff) as

contained on pages 182-184 of the records amount to nothing, other than a concocted, falsification and exposition of the lack of diligence of the appellant.

That in paragraph 5 of the appellant's counsel counter-affidavit, it is claimed that counsel went to settle records in the case between **“DR. J.O. ABALAKA vs. THE PRESIDENT OF THE FEDERAL REPUBLIC OF NIGERIA & 2 ORS”**.

In the Federal High Court Makurdi, Benue State, out of “the jurisdiction of the Court”.

That the appellant's counsel went all the way to obtain a printout of his telephone conversation with the bailiff which is commendable but leaves a lot of missing links in his deposition that questions his integrity, professionalism, and ethical conduct when he failed, refused, and neglected to attach the cause list of the Federal High Court or invitation that is relevant to the settlement of the records.

That there is nothing whatsoever that shows that he attended any legal duties or business at the Federal High Court, Makurdi, Benue State on either 1st, 2nd or 3rd December, 2014 besides the fact that a Federal High Court in judicial stare decisis and hierarchy is not concurrent or higher in hierarchy to a Court of Appeal.

That in furtherance of the above, counsel in utmost disrespect to the lower court and not according premium to the matter which he claimed he did not know, did not call back the bailiff to clarify which of his matters was coming up (assuming he was driving) after he arrived Makurdi, a journey of not more than four hours.

That counsel, in deliberately avoiding and ignoring the bailiff's telephone call (hearing notice) “outside the jurisdiction of the court” did not deem it fit to call either the appellant or any of its staff or junior counsel in chambers to attend court on that day.

Whereas from the records of the lower court, the motion was struck out as he was not there to move it, the appeal was suo motu dismissed beyond his absence, because there was no brief of argument, neither was there an application for extension of time to file one. In other words, his, or anyone's presence would not have saved the day because their Lordships acted correctly and within the scope of the rules of Court of Appeal.

That the said counter affidavit at page 182 of the records, only has attached the call history of the telephone conversation without any court process regarding the so called record of the case of **DR. J.O. ABALAKA vs. PRESIDENT OF THE FEDERAL REPUBLIC OF NIGERIA** as deposed in paragraph 5 of the said counter affidavit.

On the 1st day of November, 2017 date of hearing, learned counsel for the appellant, J.B. Akomolafe Esq. adopted the appellants brief of argument filed on 9/5/2016 and deemed filed on 7/2/17. In it were identified three issues for determination which are as follows:

- 1. Whether or not the phone call of the bailiff of the lower court (Mr. Emmanuel) to the cell phone number 0803-722-6932 of B.J. Akomolafe, counsel to the appellant, precisely at 18.44 hours on**

- A** **Monday the 1st day of December, 2014 suffices as adequate notice of the proceedings of the 3rd December, 2014 for the appellant. (Ground 1 of notice of appeal).**
- B** **2. Whether or not the appellant was not denied the hearing of its Appeal No. CA/A/520/2014 when the substantive appeal was dismissed on the day fixed for the hearing of its Motion No. CA/A/520/M/2014. (Grounds 2 and 3 of the notice of appeal).**
- C** **3. Whether or not the lower court had full grasp of the facts and processes before the court when it held that “we note that the record of appeal was transmitted to this court on 02/09/2014 till date the appellant has failed to file its brief of argument and has not applied for extension of time to file his brief of argument, accordingly this appeal is dismissed for want of prosecution under Order 18 Rule 10 (2) of the Court of Appeal Rules, 2011” whereas supplementary record of the appeal was shown at page 173 of the record to have been transmitted on the 19th September, 2014. (Ground 4 of the notice of appeal).**
- D**
- E**

M. A. Nunghe Esq, learned counsel for the respondent adopted its brief of argument filed on 14/3/2017 and in it were raised two issues for determination which are thus:

- F**
- 1. Whether or not the appellant was denied fair hearing by the lower court.**
 - 2. Whether their Lordships of the lower court had the requisite jurisdiction and powers to dismiss the appeal which they so did in the circumstances of the appeal.**
- G**

I see the issues as formulated by the respondent as simple and apt for the use of the court in the consideration of this appeal and I shall use them.

H **ISSUES 1 AND 2**

- i. Whether or not the appellant was denied fair hearing by the court.**

I

A ii. Whether their Lordships of the lower court had the requisite jurisdiction and powers to dismiss the appeal which they so did in the circumstances of appeal.

B Learned counsel for the appellant contended that a phone call of the bailiff of the lower court (Mr. Emmanuel) to the cell phone number 0803-722-6932 of B.J Akomolafe, counsel to the appellant precisely at 18.44 hours on Monday, 1st day of December 2014 was grossly inadequate as notice of the proceedings of 3rd December, 2014. That under the Court of Appeal Practice Direction, 2013 the provisions of Order 1 Rules i & ii states
C that this practice direction shall save to the extent and as may otherwise be ordered by the President Court of Appeal, pursuant to section 248 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended), apply to:

- D**
- i. All criminal appeals relating to the offence of terrorism, rape, kidnapping, corruption, money laundering and human trafficking.**
 - ii. Interlocutory appeals challenging the ruling of the court below on an interlocutory application.**

E That under section 2 (c) (i) of the same practice direction the rules made under the practice direction shall apply to all criminal cases which fall under the category of offences listed above as well as interlocutory appeals to which the appeal under discourse does not fall.

F It was submitted for the appellant that serving of hearing notice on the appellant herein is a pre-condition to the exercise of jurisdiction of the lower court and this was not done before the case of the appellant was dismissed. The cases of **Otabaimere vs. Akpovehe (2004) 14 NWLR (Pt. 894) 591 at 614; FBN PLC vs. TSA Ind. Ltd (2015) 11 NWLR (Pt. 1470) 346 at 357; Guda vs. Kitta (1999) 12 NWLR (Pt. 629) 21.**

G Mr. Akomolafe of counsel for the appellant contended that on the 3rd December, 2014 the case at the lower court was for the hearing of motion No: CA/A/520/M/2014 and not for the hearing of Appeal No: CA/A/520/2014 and so the matter not having been fixed for hearing of the appeal the court below erred to have suo motu dismissed the appeal of the appellant as the fair hearing right of the appellant was compromised. He cited **Federal Electric Co vs. Akande (2012) 16 NWLR (Pt.1377) 593 at 605; Assam vs. Ararume (2016) 1 NWLR (pt. 1456) 572 at 593-594.**

H That the proceedings of the lower court of 3rd December, 2014 in Appeal No: CA/A/520/2014 wherein the appellant's substantive appeal was dismissed a nullity. He referred to **Udengwu vs Uzuegbu (2003) 7 SC 64 at 69; Kalio vs. Woluchen (1985) 1**

I

A NWLR (Pt. 4) 610 at 622.

Learned counsel for the respondent, M.A. Nunghe Esq. contended that what is in issue is whether the conduct of the proceedings of the 3rd day December 2014 accords with the relevant laws and rules of the court and that the answer is yes. He cited **Odessa vs. FRN (No. 2) (2005) 10 NWLR (Pt. 934) 528 at 556.**

B That the appellant had notice and acknowledged service and did nothing, a situation that was a self-inflicted act in which he cannot turn around and accuse the court below of denying him fair hearing. He referred to **Inakoju & Anor vs. Adeleke & 3 Ors (2007) 29 NSC QR (Pt. 11) 958 at 979; News Watch Communications Ltd vs. Atta (2006) 4 SC (Pt. 11) 114 at 140-141.**

C That in dismissing the appeal the court below acted under Order 18 Rule 10 of the Court of Appeal, 2011 and also Order 18 Rules 2 & 4.

For the respondent, Mr. Nunghe stated that the attendance of counsel or appellant could not have changed the situation since there was nothing before the court as the neither supplementary records nor brief of argument filed within time and there was no motion for extension of time. He cited **Williams & Ors vs. Hope Rising Voluntary Funds Society (1982) 12 NSC 36; Ibigbami vs Military Governor Ekiti State (2004) 4 NWLR (Pt. 863) 243 at 250.**

E That appellant failed to take advantage of order 19 Rule 4 of the Court of Appeal Rules 2011 wherein it would have approached that court to review that order dismissing the appeal on 3rd December, 2016. He cited **Intra Motors (Nig) Plc vs. Akinloye (2001) 6 NWLR (Pt. 708) 61 at 79; Chieshe vs. NICON Hotels Ltd (2007) All FWLR (Pt. 388) 1152 at 1162; Abah vs. Jabusco (Nig) Ltd (2008) 3 NWLR (Pt. 1075) 526 at 546.**

F Appellant's position in brief is that this court exercised its discretion to set aside the decision obtained by the respondent at the lower court when the court was misled into giving the decision dismissing the appeal of the appellant.

The respondent's stand is that the appeal should be dismissed because appellant was not denied fair hearing from the proceedings as the appellant chose to keep away from the Court of Appeal on the day of hearing.

G At the proceedings of 3rd December, 2014 the registrar of court had reported to the court thus:

H **“The appellant has been served with hearing notice against today through phone call to his counsel on record B.J. Akomolafe on the 1st of December, 2014 and cell No. 0803-722-6922”.**

I The appellant admitted the above facts in his counter-affidavit to the affidavit of service of Mr. Emmanuel (the bailiff) wherein he deposed.

A

“It is true that a bailiff of this honourable court named Mr. Emmanuel put a call through to my cell phone on Monday, the 1st day of December 2014 precisely by 18:44 hrs, that is 16 minutes to 7pm to inform me that one of my cases would be coming up at this court

B

(The call history of my Nokia phone on Monday December 2014 is hereby attached as exhibit “A”)”.

C

The Court of Appeal had reacted to the information above stated on the service of process on the appellant to which service the appellant admitted in his counter affidavit above referred to and it is as follows:

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“We note that the records of appeal were transmitted to the court on the 2nd of September, 2014, till the said date, the appellant has failed to file his brief of argument and has not applied for extension of time to file his brief of argument, accordingly his appeal is dismissed for want of prosecution under order 18 rule 10 (2) of the Court of Appeal Rules 2011”.

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It is to be stated at the risk of repetition that fair hearing or the lack thereof is fundamental to the competence of a court's proceedings and the jurisdiction of the court itself. Therefore the facts that a party who ought to be placed on notice of an impending proceedings in court and is not so notified the proceedings are thereby for that lack jeopardized and the fall out is that the court's jurisdiction cannot be ignited or activated.

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This does not mean that a party would be allowed to play hide and seek as an artful dodger from notice of process or hearing notice all in an attempt to plead non service so as to scale through the huddle of attending to the hearing, delay the proceedings and thereby obtain a cheap victory. The courts have built in dispute setting mechanisms whereby the parties must come out in the open to make their cases with their cards on the table and not cunningly or craftily. This has made the court come up with its legal principle that when an appellant has been given ample opportunity or chance to present the appeal before the lower court, he skips court, he does so at his own peril and would bear the result of the game he has played and cannot invoke his right of fair hearing in court as a party who seeks fair hearing in court must also be fair in litigation to the adverse party and to the proceedings. See **Inakoju & Anor vs. Adeleke & 3 Ors (2007) 29 NSC QR (Pt. 11) 958 at 979.**

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The applying principle in the matter of service of hearing notice and whether the principle of fair hearing has been adhered to cannot be operated without situating to a

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A given case like the one at hand. In the case in this instance on the 3rd December, 2014, the case at the lower court was for the hearing of motion No: **CA/A/520/M/2014** and not for the hearing of Appeal No. **CA/A/520/2014**, therefore the hearing notice and the appellant being in the know would not change the situation.

B Again to be stated is that as at 19th of September, 2014 appellant had compiled and transmitted the record of appeal in the ex-parte decision against his delivered on the 7th of August, 2014 and the case came up before the lower court for the first time ever on the 3rd of December 2014. Therefore the court below erred when it applied the provisions of the Court of Appeal direction, 2013 in dismissing the appeal as the circumstances for such application did not exist.

C This court has at numerous occasions stated that a court cannot hear an appeal on a date fixed for hearing of a motion without the consent of both parties and the court. This is in tune with the principle of fair hearing as a party must be heard before a matter concerning him is determined. Stated differently, even though a party is aware of a motion that is not the same as being put on notice for a hearing of an appeal that is not slated for a given date. Therefore when on the date for hearing of a motion, the court set on a journey of taking on the appeal without a party being aware of the latter position and with his consent, the jurisdiction of the court is invoked in futility and all that takes place would come to naught. See **General Electric Co. vs. Adande (2012) 16 NWLR (Pt. 1327) 593 at 605; Assam vs. Ararume (2016) 1 NWLR (Pt. 1493) 368 at 388-389; Ominyi vs Alabi (2015) 6 NWLR (Pt. 1456) at 593-594; Section 36 (1) of the 1999 Constitution of the Federal Republic of Nigeria; Judicial Service Commission, Cross Rivers State vs. Young (2013) 1 NWLR (Pt. 1364) 25-26.**

D The point has to be made that the phone call mode of service would ordinarily be of good service so long as the party is provided the notice at least 48 hours before the scheduled court date. The regularity of service is no longer jettisoned because it was made electronically as the current rules of court have ensured. See Order 2(c)i of the Court of Appeal, 2013 Rules.

E Service of hearing notice on the appellant is a pre-condition to the existence of jurisdiction of the court below as it is basic to the invocation of jurisdiction of the court. The flip side of the coin is that non-service of hearing notice therefore robs the court of jurisdiction to hear and determine the matter and any order made thereby against the party who should have been served with the hearing notice becomes null and void. I rely on **Otabaimere vs. Akporehe (2004) 14 NWLR (Pt. 894) 591 at 614; FBN PLC vs. TSA Ind. Ltd (2015) 11 NWLR (Pt. 1470) 346 at 357; Guda vs. Kitta (1999) 12 NWLR (Pt. 629) 21.**

F The facts and circumstances prevailing in this case showed that the court below did not have the full grasp of the case before them in ruling and dismissing the appeal as

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A they operated with the erroneous belief that the record of appeal was transmitted from the trial court registry as at the 2nd of September, 2014. Whereas, a supplementary record was not transmitted by the appellant as far back as the 19th September, 2014. The court below clearly was ambushed by what the learned justices perceived to be the true state of affairs and so could not have considered the issues properly raised by the parties before them and so the conclusions reached stemmed from a mistaken view point which cannot be sustained. See **Udengwu vs. Uzuegbu (2003) 7 SC 64 at 69, Kalio vs. Woluchem (1985) 1 NWLR (Pt. 4) 610 at 622.**

C The conclusion as I am labouring to reach based on the foregoing is that this is an appeal with merit and I see no other option than to allow the appeal. Appeal is allowed as I set aside the judgment and orders of the Court of Appeal.

I remit this appeal back to the President of the Court of Appeal for re-assignment to another panel of justices other than the members that handled the earlier one for a rehearing of the appeal on the merit from the trial High Court.

D **Mary Ukaego Peter-Odili**
Justice, Supreme Court

BAYANG AKA' AHS, (JSC): I read before now the leading judgment of my learned brother, Mary Peter-Odili JSC allowing the appeal. I agree with it.

E Although the appellant failed to file its brief within 45 days after the receipt of the record, by Order 18 Rule 10(2) of the Court of Appeal Rules, that did not extinguish its appeal. The respondent was required to bring an application for the dismissal of the appeal, where the appellant failed to file the brief within time and did not take steps to ask for extension of time within which to file the brief. See Order 18 Rule 10(1) of the rules which provides:

G **“18 Rule 10(1) Where the appellant fails to file his brief within the time provided for in Rule 2 of this Order, or within the time as extended by the court, the respondent may apply to the court for the appeal to be dismissed for want of prosecution”.**

H Even though the appellant was absent from court on 3 December, 2014 together with its counsel and there was evidence that the appellant had been notified on 1 December, 2014 of the matter coming up on 3 December, 2014, the business of the court was to hear the pending motion. And since learned counsel was not around to move the application, **I** the court rightly struck out the application on the application of learned counsel to the

A respondent. The further step taken by the court to suo motu dismiss the appeal for failure to file the appellant's brief was wrong. Even if learned counsel for the respondent applied orally for the dismissal of the appeal, the court still had to decide whether it was proper to grant such application without hearing from the appellant. Since the court below dismissed the appeal without a prompting from the respondent's counsel, there is failure by the court to accord the appellant fair hearing and therefore the appeal per force must be allowed.

For this reason and the fuller reasons contained in the judgment of my learned brother, Mary Peter-Odili JSC, I find merit in the appeal and it is accordingly allowed.

C The appeal is remitted to the Court of Appeal, Abuja for hearing. If any Justices who heard the matter on 3 December, 2014 are still serving in the Abuja Division, they should excuse themselves from hearing the appeal.

K. B. AKAAHS
Justice, Supreme Court

D **ADAMU AUGIE, (JSC):** I have had a preview of the judgment just handed out by my learned brother – Peter Odili, JSC. I agree with the reasons therein advanced to arrive at the conclusion that the appeal be remitted back to the President of the Court of Appeal for rehearing.

E **Amina Adamu Augie**
Justice, Supreme Court

F **ADAMU GALINJE, (JSC):** I have had the advantage of reading in draft the judgment just delivered by my learned brother Mary Peter-Odili JSC and I agree with the reasoning contained therein and the conclusion arrived thereat. The appellant herein was the appellant before the lower court. Its appeal to the lower court was against the ruling of the FCT High Court delivered on the 7th August 2014 in which the arbitral award of N249,620,2986 made by Chief J.K. Gadzama, (SAN) in favour of the respondent was recognized. Pending along with the appeal was a motion which was filed by the appellant. When the appeal came up for the first time on the 3rd of December 2014, the lower court was informed that the appellant was served through phone call on the 1st of December 2014 and its counsel was not in court. Learned counsel applied that the motion dated 5th September 2014 and filed on the 9th September 2014 be struck out for want of diligent prosecution. The lower court rightly in my view struck out the motion paper.

Thereafter the lower court *suo motu* dismissed the appeal on the ground that the appellant failed to file its brief of argument as the time to do had expired.

I According to the record before this court, the appeal that was dismissed by the lower court was entered in that court on the 2nd of September 2014. Clearly, as at 3rd of

A December 2014, the time within which the appellant was required to file its brief of argument had expired.

Order 18 Rule 2 of the Court of Appeal Rules provides that the appellant shall within forty-five days of the receipt of the record of appeal from the court below file in the court a written brief, being a succinct statement of his argument in the appeal. Order

B 18 Rule 10(1) of the same rules provides as follows:

“Where an appellant fails to file his brief within the time provided for in Rule 2 of this order, or within the time as extended by the court, the respondent may apply to the court for the appeal to be dismissed for want of prosecution.....”

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Order 18 Rule 10(1) of the Court of Appeal Rule is very clear. An appellant's appeal could be dismissed for failure to file a brief of argument if the respondent applies to the court for the appeal to be dismissed. Learned counsel for the respondent did not make an application for the dismissal of the appeal.

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From the available record, that was the first time the appeal came up before the court. The major feature of Order 18 Rule 10(1) of the Court of Appeal Rules is the passive and inactive role of the Bench which emphasizes or promotes the active role of counsel in the presentation of the cases for their respective parties. Learned counsel for the respondent was required to apply, if he wished, for the appeal to be dismissed. He only applied for the motion to be dismissed. It was therefore not his desire to have the appeal dismissed at that stage. See **Godwin Josiah vs. The State (1985) 1 SC. 406 at 443.**

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Even if the respondent had asked for the appeal to be dismissed at that stage, since same was being mentioned for the first time, the lower court would have been reluctant to do so. For a dismissal of an action or appeal in limine is the most punitive relief that a court can grant to a defendant/respondent against a plaintiff/appellant.

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There must be a legal basis for such a request and a corresponding legal basis for granting it. See **Inakoju vs. Adeleke (2007) 4 NWLR (Pt. 1025) 427.**

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For these few words and the fuller reasoning in the lead judgment, this appeal shall be and it is hereby allowed by me as well. I abide by all the consequential orders made in the said lead judgment including order as to costs.

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

DAUDA BAGE, (JSC): I have had the benefit of reading in draft the lead judgment of my learned brother **Mary Ukaego Peter-Odili, JSC**, just delivered. I agree entirely

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A with the reasoning and conclusion reached. I do not have anything useful to add. The appeal is meritorious and it is hereby allowed. I abide by all the orders contained in the lead judgment.

Sidi Dauda Bage,
Justice, Supreme Court

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