

Commercial Law Reports Nigeria



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HEAD OFFICE

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ABUJA OFFICE

UAC Building (1st Floor)
Plot 272/273 CBD
Off Herbert Macaulay Way,
Abuja.

PORTHARCOURT OFFICE

3rd Floor, Shalom House
Plot F2AA, Abacha Road
GRA Phase 3.

Tel: 01-2133372, 08091112576

E-mail: info@clrndirect.com

Website: www.clrndirect.com

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All Correspondence to:

The Publishers:
Commercial Law Reports Nig. Limited
2nd Floor,
369, Borno Way,
Yaba
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OBA GABRIEL ADEKUNLE AROMOLARAN v. DR. (REV.) ROLAND OLAPADE AGORO

SUPREME COURT OF NIGERIA

5

SC.264/2003

FRIDAY 28TH NOVEMBER, 2014

(ONNOGHEN; GALADIMA; PETER - ODILI; AKA' AHS; KEKERE - EKUN, JJ.SC)

10

DEFAMATION - Libel - Claim will fail without evidence of publication.

DEFAMATION - Libel - Claimant must prove publication of defamatory matter about him to a third party.

15

EVIDENCE - Public Document - Only certified true copy of a public document is admissible as secondary evidence.

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EVIDENCE - Public Document - Private document kept in public record is a public document.

EVIDENCE - Documentary Evidence - Contents of a document must be proved by primary evidence by tendering the actual document except where the law permits secondary evidence.

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INTERPRETATION - Literal Rule - Where words in statute are clear and unambiguous court will not go on a voyage of discovery.

Facts:

30

The appellant is the paramount ruler of Ijesha land and the respondent was granted a chieftaincy under the appellant. The respondent stated that the relationship between the parties became sour when the appellant made some unsavoury comments about him. The respondent alleged that he was arrested and detained and upon being released was given a photocopy of a letter purportedly written by the appellant to the Military Governor of Oyo State that read as follows:

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40

"The certificate which he carries about now was forged and was not the certificate issued to him just as Olapade Agoro claims that he has B.Sc (Engineering) and MSc. (Engineering) when in actual fact he has never seen the inside of any university anywhere in the world. His academic credentials such as Certificate and Transcripts should be probed by the NSO and Interpol to establish their genuiness."

45

The respondent instituted legal proceedings against the appellant for libel.



At the trial the respondent tendered the letter purportedly written by the appellant to the Military Governor. The letter was admitted as Exhibit P7. The appellant denied authorship of Exhibit P7.

- 5 The respondent caused a *subpoena duces tecum ad testificandum* to issue on an official of the Oyo State Ministry of Chieftaincy Affairs, Governors' Office to attend court with a certified true copy of Exhibit P.7 and also to give evidence on same.

10 The Government Official who was *subpoenaed* by the respondent brought a document different from Exhibit P.7 which the trial court admitted as Exhibit P.1. The Government official was treated as a hostile witness because he tendered a document that ran contrary to the interest of the respondent.

15 The learned trial judge held that the photocopy tendered by the respondent was admissible and further found in favour of the respondent and awarded ₦2,500,000 (Two Million, Five Hundred Thousand Naira) to him as general damages.

Dissatisfied, the appellant appealed to the Court of Appeal which dismissed the appeal with costs. The appellant further appealed to the Supreme Court.

20

Held (*unanimously allowing the appeal*):

[1] ***Interpretation – Literal Rule – Where words in statute are clear and unambiguous court will not go on a voyage of discovery.***

25

I have observed that the fulcrum of the submission of the learned counsel for the respondent herein, is that Section 97 (2) (c) (now Section 102 of the Evidence Act 2011) should be construed to accommodate a situation where the original of a public document is lost, and cannot be found or destroyed and is no longer in existence.

30

I must say that the duty of the court is to interpret the words contained in the statute and not to go outside the clear words in searching of an interpretation which is convenient to the court or to the parties in the process of interpretation. The court will not embark on a voyage of discovery. Where a statute is clear and unambiguous, as in this case. This court will follow literal rule of interpretation where the provision of the statute is clear and no more. In the case of *Adewunmi v. A.G. Ekiti State* (2002) 2 NWLR (Pt. 751)474 WALI JSC said at page 512:

40

"In cases of statutory construction the court's authority is limited. Where the statutory language and legislative intent are clear and plain, the judicial inquiry terminates there. Under our jurisprudence the presumption is that ill-considered or unwise legislation will be corrected through democratic process. A court is not permitted

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to distort a statute's meaning in order to make it conform with Judge's own views of sound social policy."

(P. 14 lines 27 - 45; P. 15 line 1)

5 **[2] Evidence – Public Document – Only certified true copy of a public document is admissible as secondary evidence.**

10 Looking carefully at the provisions of Section 97(2) (c) of the Evidence Act Cap 112 Laws of the Federation of Nigeria 1990 (now Section 90(1)(c) Evidence Act 2011) and the foregoing decisions of this court based on the provisions, it is abundantly clear that the law has left no room to admit secondary evidence of a public document other than by tendering as Certified Copy of Exhibit 7. The language used in the section is free and clear from ambiguity and it must be construed according to its expressed intention. This is what I have done here. In the circumstance, I resolve this issue in favour of the appellant. **(P. 15 lines 8 - 15)**

PER ONNOGHEN, JSC:

20 To me, the provisions of Section 97(2)(c) *supra* is very clear and unambiguous. It says that no other kind of secondary evidence, such as photocopy of the original document is admissible as secondary evidence except a certified copy of the public document. The provision therefore admits of no exception whatsoever. It is only a certified copy of the public document or nothing else. It therefore does not matter whether the original public document cannot be found or has been destroyed.

25 In fact secondary evidence comes into play when the original or public document cannot be found, traced or has been destroyed. The law however provides that in the case of a public document, the only admissible secondary evidence of same is a certified copy and nothing else - see *Minister of Lands, Western Nigeria v. Dr. Azikiwe* (1969) All NLR 49 at 59; *Onobruhere v. Esigine* (1986) 1 NWLR (Pt. 19) 799; *Nzekwu v. Nzekwu* (1989) 2 NWLR (Pt. 104) 373 etc. **(P. 17 lines 24 - 36)**

35 **[3] Defamation – Libel – Claim will fail without evidence of publication.**

40 It is the contention of the appellant that the court below erred in law when it failed to reverse the ruling of the trial court on the role of 2nd PW who was summoned to produce the document not as a witness but was treated as a hostile one under Section 207, where there is nowhere on the record he made inconsistent statement. However, the court below impeached 2nd PW's credibility and opted/decided to rely on Exhibit p.7 which it held was admissible, a decision that I have resolved in the first issue against the respondent but in favour of the appellant, that in effect it was not



admissible in law. Really whether this issue if I may ask. It serves no purpose. In any event once Exhibit 7 is expunged for being inadmissible the whole case of the respondent's case collapses. Indeed it does, in view of my firm position on the issue of inadmissibility of Exhibit p.7.

5

PER ONNOGHEN, JSC:

Exhibit P7 is the foundation of the action for libel of the respondent particularly as it is needed to prove publication, the fundamental requirement of the law of defamation. Without publication there cannot be libel/slander.

10

Therefore without Exhibit P7, it is clear that the action for libel by the respondent cannot be proved and is liable to be dismissed.

15

PER PETER-ODILI, JSC:

The background above stated would have in its wake the fact that the cause of action is in libel and there arises the doubt or question as to whether there had been publication. This is so because Exhibit P7 not being admissible and having been wrongly admitted has suffered the fate of either being expunged or taken as discountenanced and non-existent the natural conclusion is that a claim in libel cannot be established without the offending words having been communicated to a third party. That is the basic ingredient of defamation as publication to a third party is of the very essence.

20

25

In this I seek refuge in the case of *Iwueke v. I.B.C.* (2005) 17 NWLR (Pt.955) 447 at 482 wherein this court held thus:

30

“For a plaintiff to succeed in libel, there must be proof by evidence of a third party of the effect of the alleged publication on him, i.e. the reaction of a third party to the publication. Afterwards, libel consists in the publication by the respondent, by means of printing, writing, pictures or the like signs of a matter defamatory to the plaintiff.”

35

It naturally flows that in this instance where the document in issue is not really before court and therefore no evidence that the offending words were made known to a third party, then the evidence of the plaintiff of suffering a lot of public disgrace which led to nervous breakdown and public scorn and being put before the whole world as a criminal have no effect since there is no foundation on which the purported injury can be built and assessed.

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(P. 15 lines 32 - 42; P. 17 line 45; P. 18 lines 1 - 5; P. 26 lines 14 - 38)



[4] ***Evidence – Documentary Evidence – Contents of a document must be proved by primary evidence by tendering the actual document except where the law permits secondary evidence.***

5 **PER ONNOGHEN, JSC:**

It is settled law that the contents of a document may be proved by either the primary or secondary evidence - see Section 93 of the Evidence Act 1990.

10

By primary evidence of the contents of a document we mean the document itself which is tendered for the inspection of the court so as to prove its contents - see Section 94(1) of the Evidence Act, 1990, etc.,.

15

Section 96 of the Evidence Act, 1990 provides that documents must be proved by primary evidence except in certain circumstance which are provided for in Section 97 of the said Act. **(P. 16 lines 22 - 31)**

20 [5]

Evidence – Public Document – Private document kept in public record is a public document.

PER ONNOGHEN, JSC:

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Exhibit P7 was addressed to the then Military Governor of Oyo State, Colonel Oladayo Popoola and therefore qualifies as a public document. **(P. 17 lines 13 - 14)**

PER AKA' AHS, JSC:

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...the lower court correctly overruled the learned trial Judge's finding that Exhibit P.7 was a private document by virtue of the fact it is a public record kept in Nigeria of a private document which comes within the meaning of Section 109(b) Evidence Act... **(P. 27 lines 20 - 23)**

35 [6]

Defamation – Libel – Claimant must prove publication of defamatory matter about him to a third party.

PER KEKERE-EKUN, JSC:

40

To succeed in an action for libel the plaintiff must prove the following:

i. Publication of the material complained of to some person other than the person of whom it is written;

45

ii. That the words complained of need not necessarily refer to him



by name but would be understood by reasonable people to refer to him; and

- 5 iii. That the publication is defamatory of the plaintiff.
 (P. 28 lines 23 - 32)

10 **GALADIMA, JSC (Delivering the lead Judgment):** This appeal is against the judgment of Court of Appeal, Ibadan Division, delivered on the 9th day of April, 2003, which confirmed the judgment of Oyo State High Court delivered on the 30th day of September, 1997.

15 The facts relevant to the case are simple. The respondent as plaintiff complained of a libelous publication against him by the appellant as defendant, in a letter dated 12th August, 1984 written and sent to the then Military Governor of Oyo State, Colonel Oladayo Popoola admitted as Exhibit "p7" at the trial, pleaded in paragraph 3 of the statement of claim dated 18th March, 1992. The pivot upon which the respondent rested his case reads thus:

20 *"The certificate which he carries about now was forged and was not the certificate issued to him just as Olapade Agoro claims that he has B.Sc (Engineering) and MSc. (Engineering) when in actual fact he has never seen the inside of any university anywhere in the world. His academic credentials such as Certificate and Transcripts should be probed by the NSO and Interpol to establish their genuiness."*

25 Both parties pleaded the said Exhibit P.7 and sought reliance on it at the trial. The respondent herein caused a *subpoena Duces Tecum Ad Testificandum* to issue on the official of the Oyo State Ministry of Chieftaincy Affairs Governors' office to come to court with a certified True copy of the Exhibit and also to give evidence on
30 same. Strange enough the 2nd witness of the plaintiff came with a different version of Exhibit P.7 which the trial court admitted as "Exhibit P.1". In view of the distasteful conduct of this witness, the respondent thought he was trying to suppress a vital documentary evidence which is germane and fundamental to his case. His counsel accordingly applied to the learned trial judge who gave his leave that the witness
35 be treated as hostile under section 207 of the Evidence Act now Section 231 of the amended 2011 Evidence Act.

40 The appellant did not give evidence in support of his pleading at the trial. It should be noted however, that right from onset he pleaded specifically at page 17 of his Further Amended Statement of Defence that Exhibit P.7 was a forgery.

45 The respondent's counsel proffered his address while the appellant's counsel declined to address the Court on the matter. In his judgment the learned trial judge granted the claim and awarded ₦2,500,000 (Two Million, Five Hundred Thousand Naira) general damages to the respondent. He also granted the injunction sought by the respondent.



Dissatisfied, the appellant appealed to the Court of Appeal Ibadan Division which dismissed the appeal with costs. Not satisfied with the judgment appellant has further appealed to this court.

- 5 His Further Amended Notice of Appeal containing 12 grounds was deemed filed on 30/9/2014. In his Further Amended brief of argument deemed filed on 30/9/2014, he distilled the following six issues for determination:

10 “3.01. *Whether the judgment of the Court of Appeal can be allowed to stand in the face of the obvious conflict with the decision of the Supreme Court in the case of Araka v. Egbue reported in (2003) 17 N.W.L.R (Pt 843) and other decided cases where it has been held that only certified copy of a public document is admissible as secondary evidence as provided for by Section 97 (2) of Evidence Act of 1990. Covers Grounds 1, 2 & 3.*

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 3.02. *Whether the Court of Appeal is not in error by not allowing an expert to determine the genuineness of the signature on the two documents as required by Section 100 of the Evidence Act instead of resorting to a telephone directory which is inconclusive and the authenticity of the document is in the issue. Covers grounds 4, 5 and 6.*

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 3.03. *Whether the lower Court was in error when it affirmed the hasty proceedings of the trial Court Cover ground 7.*

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 3.04. *Whether the lower Court was right in holding that Exhibit P7, and uncertified photocopy of a public document, was admissible in evidence and based its decision on the document Covers grounds 8, 10, 11.*

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 3.05. *Whether the lower Court was right in upholding the judgment of the trial Court finding the Appellant liable in damages for libel notwithstanding the absence before the Court of the very document which they held could alone found action in defamation, Cover Ground 9.*

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 3.06. *Whether on the materials on the record of appeal the lower Court was right in confirming the damages of ₦2,500,000 awarded by the trial Court. Covers Ground 12.”*

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On his part the respondent submitted the following five issues for determination:

45 “(i) *Whether or not Exhibit P7 was properly admitted by the trial court as evidence of the document which the appellant on*



*subpoena **Duces Tecum and Ad Testificadum** refused to produce as the publication of the libel complained of by the respondent in this case which decision the lower court affirmed and/or upheld? (Covers grounds 2, 8, 9, 10 and 11).*

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(ii) Whether the right of the appellant to fair hearing and fair trial in this case has been infringed upon by the decision in the judgment of the trial Court which was affirmed by the lower court? (Covers ground 7).

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(iii) Whether the burden of proof of publication with regards to defamation (the subject matter of this case) was not discharged by the respondent judging from the decision of the lower Court? (Covers ground 6).

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(iv) Whether it is proper in law for the lower Court in view of the quality and quantity of uncontroverted evidence in this case to uphold the findings of facts made by the trial Court on the ₦2,500,000.00 general damages awarded against the appellant? (Covers ground 12).

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(v) Whether the burden of proof placed on the respondent by law that Exhibit P1 was a forgery as pleaded by him was discharged in accordance with the decision of the lower Court (Covers 1, 3, 4 & 5).”

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In response to the appellant’s brief of argument the respondent filed his brief in which he raised a preliminary objection challenging the competence of grounds 1, 2, 3, 5, 7, 8, 9, 10, 11 of the Notice of Appeal.

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The appellant on his part filed a Reply brief of argument drawing the attention of this court to some obvious flaws inherent in the respondent’s preliminary objection. Noticing this on 30/9/2014 when this appeal came up for hearing learned counsel for the respondent Adekola Olawoye Esq., sought to withdraw the preliminary objection argued in paragraphs 3.01 - 3.12 of the brief.

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Accordingly those paragraphs were struck out. That notwithstanding the appellant in his Reply brief deemed filed on 30/9/2014, addressed other issues raised by the respondent in his issues 1, 3 and 4.

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At the hearing of this appeal learned counsel for the appellant and respondent both adopted their respective briefs of argument. Without further amplifications on the issues, learned counsel for the appellant has urged us to allow the appeal. Whilst the learned counsel for the respondent urged otherwise; he urged that appeal be dismissed for lacking in merit.

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I have carefully considered the issues formulated by the parties. Those issues distilled by the appellant are considered apt and can adequately resolve the appeal. However, their issues are unnecessarily proliferated and arguments on them boring and repetitive. Issues 1 and 4 can be considered together. These issues touch on what is germane or fundamental to the respondent's case at the trial.

It is the submission of the learned counsel for the appellant that Section 97(1) (a) and (ii) of the Evidence Act, 2004 (now 90(1) (c), Evidence Act 2011) only provides for the admissibility of a public document when it is duly certified. It does not create any exception to the type of secondary evidence that is admissible. That the fact that the original has been lost or destroyed does not give the court power to admit a photocopy which is not certified. That the reasons advanced by the courts below for the admission of Exhibit P.7 are not in compliance with the provisions of evidence.

Learned counsel for the respondent has noted that the pith and substance of the complaint of the appellant on this issue is the decision of lower court that although Exhibit P.7 is a public document, it is admissible without being certified in compliance with the said now Section 104 of the Evidence Act.

It is conceded that before a public document is admissible in any proceeding a copy of the documents must be certified. The learned counsel has however submitted that in the circumstance of this case the respondent was frustrated by the refusal of 2nd P.W. to produce the appellant's actual letter which contained the libelous words against the respondent, upon which issues have been joined by both parties to this case; that the respondent had no other means provided by law through which he could obtain a Certified True Copy of the said letter than to tender the photocopy given him by the men of the then Nigerian Security Organisation (NSO). It is his submission that having regard to the findings of the lower court on Exhibit 7 at pp. 248 - 249 of the record it was practically impossible for the respondent to obtain the certified copy of the said Exhibit P7 from the office of the then Military Governor of Oyo State. It is further submitted that after the respondent had caused a *Writ of Subpoena Duces Tecum and the Ad Testificandum* to issue on both the office of the Military Governor and the Director of the Nigerian Security Organisation, where the photocopy the respondent tendered was given to him, and both offices having failed to produce the certified copy, the respondent has satisfied the requirements of the law as far as obtaining the certified copy of Exhibit P.7 is concerned; therefore the decision of the lower Court that under S.97(a) (i) and (ii) of the Evidence Act, Exhibit P.7 is admissible correct, equitable, sound and justifiable in law. That having regard to the facts and circumstances of this instant case, they are dissimilar and distinguishable from the facts in *Araka v. Egbue* (2009) 17 NWLR (Pt. 848) 1 at 18.

Learned counsel further relied on the case of *Agha v. IGP* (1997) 10 NWLR (Pt.527) 317 and submitted that the Court of Appeal gave approval to the admissibility of



secondary evidence in a similar circumstance like the instant case. Relying further on the cases of *Fawehimi v. NBA (No.2)* (1989) 2 NWLR (Pt. 105) 558 at 650, *Ogbe v. Sade* (2009) 12 SC (Pt. III) 37 at 71 and *Okotie-Eboh v. Manager* (2005) All FWLR (Pt. 241) 277 at 317, he submitted that in the resolution of disputes by courts every proposition must have factual base.

It is finally urged on this court to uphold the decision of the court below which is correct in the circumstance and not perverse and has not occasioned miscarriage of justice; that to decide otherwise would lead to injustice.

It is the contention of the appellant that the suit was fought on the basis that the original of Exhibit p.7 has been in existence and if it was uncertified photocopy that would be inadmissible in evidence.

In his Further Amended Statement of Defence paragraph 15 the Appellant avers thus:

“15. The defendant avers that his letter dated 12-12-84 addressed and delivered to Governor of the then Oyo State form part of the official records of the state, defendant will rely on oral or documentary evidence to show that the letter is inadmissible in evidence.”

At page 248 of the records the court below held as follows:

“To further prove his point the plaintiff tendered Exhibit 7 which he claimed was only a photo copy of the original document given to him by security officials in the course of his interrogation and detention. It is not a Certified True Copy. Was it properly admitted in evidence. That is the key question. There are, in my view two reasons why I consider the document properly admitted. The first relates to the evidence that Exhibit 7 was the very document given to him by Government or Security Personnel. While it does not purport to be the very original document sent to, and received and acted upon by the Military Governor of Oyo State, it nevertheless is the exact document that was given to him by the security personnel from that perspective it is on original and therefore admissible. This was one of the grounds upon which the learned trial judge admitted the document and I think he was right to so hold.”

On this same page the court gave second reason as the document being the best documentary evidence, because it is the very letter presented to the Military Governor of Oyo State or a certified True copy of it while the court below correctly held at page 249 of the records that it is only Certified True Copy of public document that is admissible in evidence, it erred when it held that;

“But in this case it was practically impossible for the plaintiff to obtain a



Certified True Copy of the document since the original appears to have been destroyed or lost or hidden by those in possession or control over it.”

5 The court below admitted Exhibit p.7 under S.97 (a) (i) and (ii) and (c) of the then Evidence Act as Secondary evidence of the existence and contents of actual defamatory letter received and acted upon by the then Military Governor of Oyo State.

10 Section 97 (i) (e) provides:

“(i). *Secondary evidence may be given of the existence condition or contents of a document in the following cases.*

15 (e). *When the original is a public document within the meaning of section 109 of this Act.*

Subsection 2(c) provides:

20 (2). *The secondary evidence admissible in respect of original documents referred to in the several paragraphs of subsection (1) of this section is as follows:*

25 (c). *In paragraph (e) or (f) a certified copy of the document but no other kind of secondary evidence, is admissible.”*

30 There is no exception provided in the kind of secondary evidence of a public document, admissible other than a Certified True Copy. The fact that the original has been lost or destroyed does not give the court any power to admit a photocopy, which is not certified. The plausible reasons advanced by the court below for the admission of Exhibit 7 are not in compliance with the relevant evidence law dealing with the matter.

35 I shall take time to explain the foregoing points in a number of decisions of this court. In *Araka v. Agbue* (supra), relied upon by both parties, the appellant as plaintiff filed an action claiming the sum of 10 million as damages for libel against the respondent in a letter dated 10/9/1984, written by the respondent concerning the appellant and in the way of his office as Chief fudge of Anambra State.

40 By their pleadings the parties joined issues and the matter went to trial. Appellant opened his case by calling one K. N. Udoh, a legal practitioner as his first witness. He testified that he was representing the principal secretary to the Governor of Enugu State who was subpoenaed to tender documents in court. After saying that the original letter dated 10/9/1984 addressed to Military Governor of Anambra State could not be found, witness tendered a photocopy of the letter through

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counsel for the appellant. Counsel for the respondent objected on the ground that the letter being a public document can only be admitted in evidence, if it is certified true copy of the original as required by *Section 96 (i) (e) and (2) (c) of Evidence Act Cap 62 Laws of the Federation of Nigeria and Lagos, 1958 now Section 97 (i) (e) and 2(c) of the Evidence Act 1990.*

The learned trial judge overruled the objection and held that the original of the letter dated 10/9/1984 having been lost, any secondary evidence of the lost document is admissible under Section 96(i) (c) and 96 (2) (a) of the Evidence Act.

Dissatisfied, the respondent, as appellant approached the Court of Appeal. That court reversed the decision of the learned trial Judge Uwaifo, JCA (as he then was) had this to say at pp. 170 and 171 of the report:

"I see nothing contrary to any canon of interpretation to insist on what the law says in Section 97 (2) (c) of the Evidence Act that as far as a public document is concerned, the secondary evidence is a certified copy of the document, but no other kind of secondary evidence.

This is bound to be so from the plain language. Any other provision in the said Act which makes any secondary evidence of a lost document admissible must be interpreted not to include a public document so as not to derogate from its special provision."

Further dissatisfied with this decision, the appellant filed the appeal to this court. The issue formulated for determination was as follows:

"Whether, in a case where the original of a public document is lost and cannot be found or where such document has been destroyed and is no longer in existence, any secondary evidence of such document (other than a Certified True Copy thereof) is admissible in evidence."

Appellant formulated the following issue in the alternative:

"Whether the provision of Section 97(2) (c) is applicable in a case where the original of a public document is lost and cannot be found of where such document has been destroyed and is no longer in existence."

It is noted that the contents of the two issues formulated by the appellant are similar. The second issue formulated in the alternative merely introduces the applicable section which makes it more exact. I think it is the respondent's issue in that case that is more direct. It runs thus.

"Whether the Court of Appeal was right in holding that under Section 97 (2) (2) (c) of the Evidence Act relating to tendering in evidence of a public



document the only admissible evidence regarding such is the Certified Copy of such document and no other kind of secondary evidence.”

5 After careful consideration of the issue formulated for determination by the parties this court *per* TOBI JSC at page 18 of the report held as follows:

10 *“It is clear from the provision of Section 97 (2) (c) that the only acceptable secondary evidence of a public document is a Certified Copy of document. The subsection has put the position precisely concisely and beyond speculation or conjecture by the words “but no other kind of secondary evidence is admissible.”*

15 The foregoing provisions have been interpreted by the courts in so many decisions. In *Minister of Lands Western Nigeria v. Dr. Azikiwe* (1969) 1 All NLR 49, COKER JSC had this to say at page 59.

20 *“We have already pointed out that the original of the document exhibit 2 is a public document and indeed it is so within the meaning of Section 108 of the Evidence Act Section 96(2) of the Evidence Act prescribes the type of secondary evidence which may be given in the several cases therein set out and section 96(2)(c) provides as follows:*

25 *“96(2) The secondary evidence admissible in respect of the original document referred to in the several paragraph of subsection (1) is as follows:*

(d). in paragraph (e) or (f) certified copy of the document, but no other kind of secondary evidence, is admissible.

30 *The combined effect of the subsections is that in the case of public documents the only type of secondary evidence permissible is a certified true copy of the document and none other. The document now marked exhibit 2 is not a certified true copy but a Photostat copy and it is therefore inadmissible as secondary evidence of a public document which it purports to be. There was no objection to its admissibility when it was produced but it is not within the competence of parties to a case to admit by consent or otherwise a document which by law, is inadmissible.”*

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40 In *Onobruchere v. Esigine* (1986) 1 NWLR (Pt. 19), 799 the appellants challenged Exhibits E, E1 and E2, which were uncertified copies of the original documents of official Record (including judgments). This Court held that unless duly certified the Exhibits were inadmissible as they were copies official records.

45 In his leading judgment, OPUTA JSC (of blessed memory) said at page 808 thus:



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“Exhibit E will be admissible under Section 93 (1) of Evidence Act if it is original. The court below did not admit exhibit E as an original document Exhibit E itself ex facie testifies to the existence of the original in court record book. Even if Exhibit E was admissible under Section 95(2) (c) it should be a certified copy of the original in court record book. Whether one proceeds under Section 96(2) (c) or Section 110 or 111 of the Evidence Act, exhibit E has to be certified to be admissible as secondary evidence. It was no so certified. Exhibit E was therefore wrongly admitted.

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If these two judgments are to be tendered, Section 131(1) of the Evidence Act makes the record book itself the primary evidence. Failing to produce the primary evidence, a party relying on Exhibits E1 and E2 will at least tender admissible secondary evidence will necessarily be certified true copies. Exhibits E1 and E2 do not purport to be certified true copies. They were therefore wrongly admitted... Exhibits E, E1 and E2 were plainly inadmissible and the court below was in error in holding that they were rightly admitted.”

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Similarly, in *Nzekwu v. Nzekwu* (1989) 2 NWLR (Pt. 104) 373 this court held that a judgment of a court being a public document within the meaning of that expression of Section 108 of the Evidence Act and because of the combined effect of Section 96(1) (e) and (2) (c) of the Evidence Act 1958 the secondary evidence admissible in respect of the original document constituting the proceedings and Judgment of a court is a certified true copy of the document but no other kind of secondary

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evidence. I have observed that the fulcrum of the submission of the learned counsel for the respondent herein, is that Section 97 (2) (c) (now Section 102 of the Evidence Act 2011) should be construed to accommodate a situation where the original of a public document is lost, and cannot be found or destroyed and is no longer in

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existence. I must say that the duty of the court is to interpret the words contained in the statute and not to go outside the clear words in searching of an interpretation which is convenient to the court or to the parties in the process of interpretation. The court will not embark on a voyage of discovery. Where a statute is clear and unambiguous, as in this case. This court will follow literal rule of interpretation where the provision of the statute is clear and no more. In the case of *Adewunmi v. A.G. Ekiti State* (2002) 2 NWLR (Pt. 751) 474 WALI JSC said at page 512:

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“In cases of statutory construction the court’s authority is limited. Where the statutory language and legislative intent are clear and plain, the judicial inquiry terminates there. Under our jurisprudence the presumption is that ill-considered or unwise legislation will be corrected through democratic process. A court is not permitted to distort a statute’s meaning in order to



make it conform with Judge's own views of sound social policy."

See further *Garba v. Federal Civil Service Commission* (1988) 1 NWLR (Pt. 71); *Niger Progress Ltd v. N.E.L. Corp.* (1989) 3 NWLR (Pt. 107) 68; *Ojokolobo v. Alamu* (1987) 3 NWLR (Pt. 61) 377; *Savannah Bank v. Ajilo* (1957) 2 NWLR (Pt 57) 421 and *Adisa Oyinwola* (2000) 10 NWLR (Pt. 674) 116.

Looking carefully at the provisions of Section 97 (2) (c) of the Evidence Act Cap 112 Laws of the Federation of Nigeria 1990 (now Section 90(1) (c) Evidence Act 2011) and the foregoing decisions of this court based on the provisions, it is abundantly clear that the law has left no room to admit secondary evidence of a public document other than by tendering as Certified Copy of Exhibit 7. The language used in the section is free and clear from ambiguity and it must be construed according to its expressed intention. This is what I have done here. In the circumstance, I resolve this issue in favour of the appellant.

Next to be considered is the appellant's issue 2, which covers grounds 4, 5, and 6 of the grounds of appeal. This is respondent's issue No.5. The complaint of the appellant is that the court below failed to resolve which of the two letters was authentic; is it p.1 or p.7. At the trial one Lawrence Oyelade Oyeniran, a senior officer of the Military Administrator's Office, Oshogbo who was 2 PW had been subpoenaed to tender the letter of 12/12/84, from the defendant to the Military Governor of Oyo State, tendered Exhibit p.1 in evidence. It is noted however, that in the writ of summons and in paragraph 3 of the statement of claim, the plaintiff/respondent herein pleaded the letter dated 12/12/84 allegedly written by the appellant to the Military Governor of Oyo State and it contained the defamatory matter in issue. In the statement of defence, the defendant admitted writing a letter but disputed contents of the said letter as set out in paragraph 3 of the statement of claim and that he would contest the genuineness of the contents of the letter on the ground that same was a forgery.

It is the contention of the appellant that the court below erred in law when it failed to reverse the ruling of the trial court on the role of 2nd PW who was summoned to produce the document not as a witness but was treated as a hostile one under Section 207, where there is nowhere on the record he made inconsistent statement. However, the court below impeached 2nd PW's credibility and opted/decided to rely on Exhibit p.7 which it held was admissible, a decision that I have resolved in the first issue against the respondent but in favour of the appellant, that in effect it was not admissible in law. Really whether this issue if I may ask. It serves no purpose. In any event once Exhibit 7 is expunged for being inadmissible the whole case of the respondent's case collapses. Indeed it does, in view of my firm position on the issue of inadmissibility of Exhibit p.7.

Issues 5 and 6 are supposedly based on the respondent's firm belief that the lower court was right in upholding the judgment of the trial court, which found the



appellant liable for libel, notwithstanding the inadmissibility of the very document. (i.e. Exhibit p.7) which was held to be quite vital to found respondents action in defamation. Similarly the award of ₦2,500,000 damages in this case would have been naturally the reward for respondent's fruit of success in this case. Having not
5 succeeded he cannot reap the fruit.

On the whole I hold that the appeal has merits and is accordingly allowed. The judgment of Court of Appeal delivered on 9th day of April, 2013 is hereby set aside. I make no order as to costs.

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ONNOGHEN, JSC: I have had the benefit of reading in draft the lead judgment of my learned brother, GALADIMA, JSC just delivered.

I agree with his reasoning and conclusion that the appeal has merit and should be
15 allowed.

The main issue that calls for determination in the appeal is whether by the provisions of Section 97(2) of the Evidence Act 1990 any other secondary evidence of a public document other than a certified copy of the original is admissible in evidence
20 in a proceeding.

It is settled law that the contents of a document may be proved by either the primary or secondary evidence - see Section 93 of the Evidence Act 1990.

25 By primary evidence of the contents of a document we mean the document itself which is tendered for the inspection of the court so as to prove its contents - see Section 94(1) of the Evidence Act, 1990, etc.,

30 Section 96 of the Evidence Act, 1990 provides that documents must be proved by primary evidence except in certain circumstance which are provided for in Section 97 of the said Act. These exceptions are stated as follows:

“(1) *Secondary evidence may be given of the existence, condition or contents of a document in the following cases:*

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(a) *When the original is shown or appears to be in the possessions or power –*

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(i) *of the person against whom the document is sought to be proved, or*

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(ii) *of any person legally bound to produce it and when, after the notice mentioned in section 98 of this Act, such person does not produce it;.....*



(e) *When the original is a public document within the meaning of Section 109 of this Act*

5 (2) *The secondary evidence admissible in respect of the original documents referred to in the several paragraphs of subsection (1) of this section is as follows –*

(c) *in paragraph (e) or (f) a certified copy of the document, but no other kind of secondary evidence, is admissible.”*

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The action giving rise to this appeal is founded on libel arising from a publication of a document which was tendered and admitted at the trial and marked as exhibit P.7. Exhibit P7 was addressed to the then Military Governor of Oyo State, Colonel Oladayo Popoola and therefore qualifies as a public document. However, exhibit P.7 is a photocopy of the original letter/document sent to the said Military Governor, not a certified copy of same as required by the provisions of Section 97(2) (c) of the Evidence Act, 1990 reproduced supra.

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The question is whether a photocopy of the original public document is as good as a certified copy of same for the purposes of admissibility in evidence as secondary evidence of the original. The lower courts have held that it is but appellant is contending the contrary.

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To me, the provisions of Section 97(2) (c) supra is very clear and unambiguous. It says that no other kind of secondary evidence, such as photocopy of the original document is admissible as secondary evidence except a certified copy of the public document. The provision therefore admits of no exception whatsoever. It is only a certified copy of the public document or nothing else. It therefore does not matter whether the original public document cannot be found or has been destroyed.

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In fact secondary evidence comes into play when the original or public document cannot be found, traced or has been destroyed. The law however provides that in the case of a public document, the only admissible secondary evidence of same is a certified copy and nothing else - see *Minister of Lands, Western Nigeria v. Dr. Azikiwe* (1969) All NLR 49 at 59; *Onobruchere v. Esigine* (1986) 1 NWLR (Pt.19) 799; *Nzekwu v. Nzekwu* (1989) 2 NWLR (Pt.104) 373 etc.

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In the circumstance and, having regard to the state of the law applicable to the facts of this case, it is my view that Exhibit P7, though admitted without objection is clearly inadmissible in law and consequently liable to be expunged from the record by an appellate court and since the lower court failed to act accordingly, it is the duty of this Court to so expunge exhibit P.7 from the record which I accordingly hereby order.

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45 Exhibit P7 is the foundation of the action for libel of the respondent particularly as



it is needed to prove publication, the fundamental requirement of the law of defamation. Without publication there cannot be libel/slander.

5 Therefore without Exhibit P7, it is clear that the action for libel by the respondent cannot be proved and is liable to be dismissed.

10 It is for the above reasons and the more detailed reasons contained in the lead judgment of my learned brother, GALADIMA, JSC that I too find merit in the appeal and consequently allow same.

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

15 Appeal allowed.

PETER-ODILI, JSC: I am in total agreement with the judgment just delivered by my learned brother, Suleiman Galadima, JSC.

20 This is an appeal against the decision of the Court of Appeal Ibadan Division delivered on the 9th day of April, 2003 which confirmed the decision of P. O. Aderemi J. (as he then was) delivered on the 30th day of September 1997 in which the learned trial Judge of Oyo State awarded the sum of ₦2,500,000.00 (Two Million, Five Hundred Thousand Naira) as damages for the libelous publication made by the defendant against the plaintiff.

25 **FACTS RELEVANT TO THE APPEAL**

30 The defendant now appellant is the paramount ruler of Ijeshaland and made the plaintiff now respondent a Chief and issued him a certificate to that effect.

35 From the account of the respondent the relationship between the parties became sour when the respondent made some unsavoury comments about the appellant in the Newspaper. The respondent went further that the appellant withdraw the Chieftaincy Certificate he issued to him. At the trial the respondent tendered a letter that was purportedly written by the appellant to the then Military Governor of Oyo State. The contents thereof were denied by the appellant but which letter was admitted in evidence.

40 The Government Official who was on *subpoena* by the respondent was treated as a hostile witness because he tendered a document that ran contrary to the interest of the respondent. The respondent tendered photocopies of his academic certificates.

45 On his own side, the appellant did not give evidence and the learned trial Judge closed the case and adjourned. The trial Judge was transferred from Ibadan Judicial



Division but came back to complete the hearing of the proceedings and delivered judgment. The appellant did not give evidence in support of his pleadings because the trial court ruled that he was wasting the time of the court by his frequent requests for adjournment. The appellant denied the authorship of Exhibit P7 which
5 contained the words complained of by the respondent and Exhibit P1 that the appellant admitted, he wrote was described as a forgery. The trial court listened to the address of counsel to the respondent and gave judgment in favour of the respondent. The appellant appealed to the Court of Appeal which affirmed the decision of the trial court hence this appeal to the Supreme Court.

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On the 30th September, 2014 date of hearing learned counsel for the appellant, Michael F. Lana Esq. adopted the Further Amended Brief of Argument of the appellant settled by himself, filed on 16/9/14 and deemed filed on 30/9/14. He also adopted a Reply Brief filed on 16/9/14.

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Learned counsel for the appellant identified six issues for determination which are stated hereunder, viz:

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1. **Whether the judgment of the Court of Appeal can be allowed to stand in the face of the obvious conflict with the decision of the Supreme Court in the case of *Araka v. Egbue* reported in (2003) 17 NWLR (Pt. 843) and other decided cases where it has been held that only certified copy of a public document is admissible as secondary evidence as provided for by section 97 (2) of Evidence Act of 1990. (Covers Grounds 1, 2 & 3).**

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2. **Whether the Court of Appeal is not in error by not allowing an expert to determine the genuineness of the signature on the two documents as required by Section 100 of the Evidence Act instead of resorting to a telephone directory which is inconclusive and the authenticity of the document is in issue (Covers Grounds 4, 5 & 6)**

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3. **Whether the lower court was in error when it affirmed the hasty proceedings of the trial court. (Covers Ground 7).**

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4. **Whether the lower court was right in holding that Exhibit P7, an uncertified photocopy of a public document was admissible in evidence and based its decision on the document. (Covers Grounds 8, 10, 11).**

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5. **Whether the lower court was right in upholding the judgment of the trial court finding the appellant liable in damages for libel notwithstanding the absence before the**



court of the very document which they held could alone found action in defamation. (Covers Ground 9).

- 5 **6. Whether on the materials on the record of appeal the lower court was right in confirming the damages of ₦2,500,000.00 awarded by the trial court. (Cover Grounds 12).**

10 For the respondent, learned counsel, Adekola Olawoye Esq. adopted the Amended respondents Brief filed on 7/6/13 and deemed filed on 30/9/14. He raised five issues for determination which are as follows:

- 15 (i) **Whether or not Exhibit P7 was properly admitted by the trial court as evidence of the document which the appellant on *subpoena Duces Tecum and Ad Testificandum* refused to produce as the publication of the libel complained of by the respondent in this case which decision the lower court affirmed and/or upheld? (Covers Grounds 2, 8, 9, 10 & 11).**
- 20 (ii) **Whether the right of the appellant to fair hearing and fair hearing In this case has been infringed upon by the decision in the judgment of the trial court which was affirmed by the lower court? (Covers Ground 12).**
- 25 (iii) **Whether the burden of proof placed on the respondent by law that Exhibit P1 was a forgery as pleaded by him was discharged in accordance with the decision of the lower court. (Covers Grounds 1, 3, 4 & 5)**

30 I see the 5th issue for determination as crafted by the appellant, adequate to settle the matter in contention in this appeal and I shall utilise it in resolving the question posed.

ISSUE 5

- 35 **Whether the lower court was right in upholding the judgment of the trial Court finding the appellant liable in damages for libel notwithstanding the absence before the court of the very document which they held could alone found action in defamation.**

40 Mr. Lana of counsel for the appellant submitted that the Evidence Act does not create any exception to the type of secondary evidence of a public document that is admissible as only a certified copy of such a public document is the admissible one. That the fact that the original has been lost or destroyed does not give the court power to admit a photocopy which is not certified. That the reasons advanced

45 for the admission of Exhibit P7 is not in compliance with the provisions of the



statute. He referred to Section 97 (2) of the Evidence Act; *Araka v. Egbue* (2003) 17 NWLR (Pt. 848) 1 at 18; *Fawehinmi v. I.G.P* (2000) 7 NWLR (Pt. 665) 481 at 524 at 525; *Daniel v. Adaji* (1998) 11 NWLR (Pt. 574) 525 at 528; *Onyali v. Okpala* (2001) 1 NWLR (Pt. 594) 282 at 303; *Witt & Busch Ltd v. Good & Trust Inv. Ltd* (2004) 8 NWLR (Pt.874) 179 at 202.

It was further submitted for the appellant that there were contradictory dates proffered by the respondent as to when the offending letter was written that is 12th August 1984 in the writ of offending letter was written that is 12th August 1984 in the Writ of summons and 12th day of December 1994 in the statement of claim. That it has to be said that in a line of decided cases ordinary words in a statute should be complied with and so there is no necessity to look for avenue to make uncertified documents admissible. He cited; *Adisa v. Oyinwola* (2000) FWLR (Pt. 8) 1349; *Aqua Limited v. Ondo State Sport Council* (1983) 10 - 11 SC 31; *Adewumi v Attorney - General of Ekiti State* (2000) 2 NWLR (Pt. 751) 474 at 512; *Minister of Local Government Eastern Nigeria v. D. O. Akpagu* (1964) 1 All NLR 211; *Olowu v. Abolori* (1993) 5 NWLR (Pt. 293) 255 at 275.

Michael Lana Esq. contended that if a handwriting expert has been sought, he would have saved the judgment of the minor error of the PW4 and the issue as to which of the two letters is authentic and the veracity would have been proved beyond doubt. That using a telephone directory to determine the authenticity or otherwise of Exhibit P1 is inconclusive having regard to the fact that it is the content of the Exhibit that is in issue not the telephone number. He relied on *Omoniyi v. Sodeinde* (2013) 13 NWLR (Pt. 836) 53 at 64; *Fatuade v. Onwoamanam* (1990) 2 NWLR (Pt. 132) 322 at 332; *The Queen v. Omisade & 17 Ors* (1962) NMLR 67 at 85; *State v. Gwonto* (2000) FWLR (Pt. 30) 2583 at 2610; Section 207 of the Evidence Act on hostile witness.

Going further learned counsel for the appellant stated that the appellant was not allowed to state his case by shifting the date of judgment backwards by 23 days which denied the appellant the opportunity of fair hearing. That this was contrary to the High Court Civil Procedure Rules of Oyo State 1988 which provides that any of the parties can make application to re-open his case and the opportunity was foreclosed by the shifting of date of that trial court judgment. He cited *Menkiti v. Menkiti* (2000) FWLR (Pt. 2) 293 at 305; *Osia v. Edjekpo* (2000) 10 NWLR (Pt. 720) 233 at 248; *I.I.G. (Nig) Ltd v. Alao* (1990) 3 NWLR (Pt. 141) 773 at 780.

For the appellant was submitted that this court has to exclude and discountenance a document unlawfully received in evidence even though counsel at the trial court did not object to its going into evidence. That the lower court was clearly wrong in holding that Exhibit 7 which was merely a photocopy of a public document was admissible in evidence notwithstanding its non-certification. He referred to *Dagaci of Dere v. Dagaci of Ebwa* (2006) 7 NWLR (Pt. 979) 382 at 424 - 425; *Minister of Lands Western Nig. v. Azikiwe* (1969) 1 All NLR 4 at 59; *Onobruchere v. Esagine*



(1986) 1 NWLR (Pt. 19) 799 at 808.

5 Also contended for the appellant is that defamation is all about publication of a defamatory matter about a person to a third party and where that publication is not made there can be no libel or slander. This being because it is not what the plaintiff think about himself but what a third party thinks of him as regards his reputation. He cited *Iwueke v. IBC* (2005) 17 NWLR (Pt. 955) 447 at 482; *Concord Press Ltd v. Asaolu* (1999) 10 NWLR (Pt. 621) 123 at 136.

10 For the respondent, Mr. Adekola Olawoye reacted by saying that before a public document is admissible in any court proceedings a copy of the document must be certified but such certification connotes that the original of the document is in the custody of the official upon whom Section 111 now 201 of the Evidence Act 2011 places the duty of certification. He stated that having been frustrated by the
15 refusal of PW2 to produce the appellant's actual letter which contained the said libelous words upon which issues had been joined by both parties to this case and going by the averments in the pleadings particularity paragraphs 15 and 17 of the appellants pleadings, the respondent had no other means provided by law through which he could obtain a Certified True copy of the said letter than to
20 tender the photocopy given him by the men of the then Nigerian Security Organisation (NSO) which is Exhibit P7 in line with the averment in paragraph 5 of the Statement of Claim. He referred to *Buhari v. Obasanjo* (2005) All FWLR (Pt.273) 1 at 76.

25 It was further submitted for the respondent that the decision of the lower court is right not perverse and has not occasioned a miscarriage of justice as far as the admission of Exhibit P7 in this case is concerned. He cited *Okotie-Eboh v. Manager* (2005) All FWLR (P. 241) 277 at 317; *Broad Bank Nig. Ltd. v. Olayiwola & Sons Ltd & Anor.* (2005) All FWL (Pt. 251) 236 at 246 etc.

30 Mr. Olawoye of [counsel] contended that the learned trial judge exercised the discretion on the application for adjournment judicially and judiciously. He cited *Oyekanmi v. NEPA* (2000) 15 NWLR (Pt. 690) 414 at 438 - 439.

35 That the appellant as in this case who refused or neglected to present his case for determination cannot complain of a denial of fair hearing. He referred to *Oyeyipo v. Oyinloye* (1967) NWLR (Pt. 50) 356 at 359 etc.

40 Learned counsel for the respondent said the findings of fact of the two courts below showed without doubt that the publication of the said defamatory letter i.e. Exhibit p7 was overwhelmingly proved by the respondent which said findings of fact are not perverse and this court should not interfere with same. He referred to *Globe Fishing Industries Ltd v. Coker* (1995) 7 NWLR (Pt. 152) 265 at 297; *Ogbe v. Asade* (2009) 12 SC (Pt. III) 37 at 66. That a defendant who was given an
45 opportunity by the courts to defend a case and refused to and/or failed to do so is



deemed to have abandoned his pleadings in the case and is bound to the evidence put forward by the plaintiff and the claim must be dealt with on the evidence as it stands which is deemed admitted by the defendant. He cited *Omoregbe v. Lawani* (1980) 3 - 1 SC 108 at 118; *Imana v. Robinson* (1979) 3 – 4 SC 1; *Ndulue & Anor v. Ojjakor & Ors* (2013) 1 - 2 SC (Pt. II) 1 at 112. Etc.

He said the law allows a trial court to form its opinion on the genuineness or otherwise of a signature in any document exhibited before it without relying on the evidence of a handwriting expert once he compares the two documents before him and he believes that one of them is genuine.

He cited *UTB v. Awan Zigana Ent. Ltd* (1994) 6 NWLR (Pt.348) 56 at 77; *Tomtec (Nig.) Ltd. v. F.H.A.* (2009) 12 SC (Pt.III) 162 at 188 - 189.

Mr. Michael Lana of counsel for the appellant in reply on point of law said there is no exception provided in the Evidence Act, Section 97(1) on the kind of secondary evidence of a public document admissible other than a Certified True Copy. That neither counsel nor court is permitted to read into a statute what the lawmakers did not put there. He relied on *NNPC v. Famfa Oil Ltd* (2012) 17 NWLR (Pt.1328) 148; *Kubor v. Dickson* (2013) 4 NWLR (Pt.1345) 534 at 593.

That Exhibit P7 being a public document that was not certified is inadmissible no matter the circumstances surrounding and should have been expunged from the Records. He cited *Akinduro v. Alaya* (2007) 15 NWLR (Pt.1057) 312 at 388.

Further contended is that there was no proof of the publication of the offending material to someone other than the claimant which translates to the failure of the case of the plaintiff/respondent. He cited *Nsirim v. Nsirim* (1990) 3 NWLR (Pt.138) 285; *Anate v. Sanusi* (2001) 11 NWLR (Pt. 725) 542; *Ajakaiye v. Okondeji* (1972) 1 SC 92.

Having set out the summary of the two opposing positions of the parties which can be stated to be, for the appellant that in the light of the settled situation of the law that only a certified true copy of a public document is admissible in law, the lower court erred in law when it held a photocopy of a public document admissible and in it containing the libel sued upon. While on the side of the respondent is that the appellant failed to show any special or exceptional circumstances in the case to compel this court to upset the findings of fact of the court below in its concurrent judgment relating to the admissibility of Exhibit P7.

From the above a recapture of the foundation of this case may be useful at least for a refreshing of the mind and what is really the contest between the parties. In the Statement of Claim of the plaintiff/respondent paragraph 3 is thus stated:

Para 3 “The plaintiff avers that on or about the 12th day of December



1984, the defendant willfully and maliciously wrote and published or caused to be written and published the following words contained in a typewritten letter which are defamatory to the plaintiff.

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The Certificate which he carries about now was forged and was not the certificate issued to him just as Olapade Agoro claims that he has B.Sc (Engineering) and M.Sc (Engineering) when in actual fact he has never seen the inside of any University anywhere in the world. His academic credentials such as Certificate and Transcripts should be probed by the NSO and Interpol to establish their genuineness”

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The defendants/appellant’s reply being as follows:

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Paragraph 16 “The defendant would contend at the hearing of the case that the occasion necessitating the reply as contained in his letter dated 12th December, 1984 render the comments contained therein to be fair, justified and privileged. Defendant will at the trial found on his said letter and it pleaded.”

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Paragraph 17 “The defendant disputes the contents set out in paragraph 3 of the Statement of Claim and would contest the genuineness of the letter in possession of the plaintiff which is not from proper custody and further avers that any purported letter which contained the words set out in paragraph 3 of the Statement of Claim is a forgery in that the defendant never wrote such a letter, such a letter could not have emanated from a proper custody and defendant would insist on an original copy of such in proof of the genuineness of such letter if existing”.

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From the Records spanning from the trial court and the Court of Appeal is that the area of the dispute is indeed very narrow and that is the admissibility or not of Exhibit P7 which is a public document, a photocopy and not certified. The court below treated it thus:

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“And having regard to the evidence of the plaintiff that Exhibit P7 though uncertified, was the exact photocopy of the original document given to him by the security personnel, its relevance to the facts in issue was firmly established. Against this background, it is my view that the plaintiff was at liberty to make resort to Section 97(a)(i) and (i) and (c) of the Evidence Act to tender Exhibit P7 as secondary evidence of the existence and contents of the actual

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defamatory letter received and acted upon by the Military Governor of Oyo State. It is my view therefore that Exhibit P7 was also admissible as secondary evidence under Section 97 of the Evidence Act.”

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The trial Judge had admitted Exhibit P7 in evidence as a private document against the objection of the appellant’s counsel that the document was a photocopy of a public document without certification was inadmissible.

10 The stance of the Court of Appeal was that since it was impossible for the respondent to tender the original, he was at liberty to rely on Section 97(a)(i) and (i) and (c) of the Evidence Act to tender it as a secondary evidence. It is however to be noted that there was no evidence on what provided this impossibility of producing the original or why the certification of the photocopy was not done. Therefore the
15 Court of Appeal anchoring on relevance to take Exhibit P7 is not supported by law precisely Section 97 of the Evidence Act. In this wise the case of *Araka v. Egbue* (2003) 17 NWLR (Pt.848) 1 is helpful as its facts are opposite to the facts on hand. In that case the original letter allegedly written to the Military Governor of Anambra State was not produced in evidence. The evidence proffered by the plaintiff
20 was not that it could not be found and the trial court in spite of photocopy of the document objection against that being admitted in evidence held that the original of the letter having been lost any secondary evidence of the lost document was admissible. The Court of Appeal disagreed and had its position affirmed by the Supreme in this way:

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“The main thrust of the appeal appears to be that if the original of the public document is lost or destroyed thereby rendering the making of a certified copy impracticable, it would be unjust not to admit other form of secondary evidence such as photocopy of the original document. I share the plight of the appellant but it must be borne in mind that the duty of the court is to expound the law and not to expand it. It is not the function of the court to supply omissions in statutes and thereby embark on judicial legislation.....The provision under consideration, that is Section 97(2)(c) of the Evidence Act (supra) has been judicially considered in several decisions of this court.....The decisions in these cases are consistent that only a certified copy is admissible as secondary evidence to prove the contents of a public document. These decisions cannot be faulted.”

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Tobi JSC at P.21 stated:

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“The duty of the court is to interpret the words contained in the statute and not to go outside the words in search of an interpretation which is convenient to the court or to the parties or one of the



5 **parties. Even where the provisions of a statute are hard in the sense that they will do some inconvenience to the party, the court is bound to interpret the provisions once they are clear and unambiguous. It is not the duty of the court to remove the chaff from the grain in the process of interpretation of a statute to arrive at favourable terms for the lawmaker. That will be tantamount to travelling outside the statute on a voyage of discovery. This court cannot embark upon such a journey.**

10 See also: *Dagaci of Dere v. Dagaci of Ebwa* (2006) 7 NWLR (Pt. 979) 382 at 424 - 425; G - B and 445 - 446 H – A, *Minister of Lands Western Nig. v. Azikiwe* (1969) 1 All NLR 4 at 59; *Onobruchere v. Esagine* (1986) 1 NWLR (Pt.19) 799 at 808.

15 The background above stated would have in its wake the fact that the cause of action is in libel and there arises the doubt or question as to whether there had been publication. This is so because Exhibit P7 not being admissible and having been wrongly admitted has suffered the fate of either being expunged or taken as discountenanced and non-existent the natural conclusion is that a claim in libel cannot be established without the offending words having been communicated to
20 a third party. That is the basic ingredient of defamation as publication to a third party is of the very essence.

In this I seek refuge in the case of *Iwueke v. I.B.C.* (2005) 17 NWLR (Pt.955) 447 at 482 wherein this court held thus:

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**“For a plaintiff to succeed in libel, there must be proof by evidence of a third party of the effect of the alleged publication on him, i.e. the reaction of a third party to the publication. Afterwards, libel consists in the publication by the respondent, by means of printing, writing, pictures or the like signs of a matter defamatory to the
30 plaintiff.”**

It naturally flows that in this instance where the document in issue is not really before court and therefore no evidence that the offending words were made known
35 to a third party, then the evidence of the plaintiff of suffering a lot of public disgrace which led to nervous breakdown and public scorn and being put before the whole world as a criminal have no effect since there is no foundation on which the purported injury can be built and assessed.

40 Clearly from all I have set above, there was no basis for the concurrent findings of the two courts below, and therefore no difficulty in going along the well articulated lead judgment in allowing this appeal. I set aside the judgment of the court below which had upheld the decision of the trial court.

45 I abide by the consequential orders earlier made.



AKA' AHS, JSC: I had a preview of the judgment of my learned brother, Galadima, JSC. I agree that the appeal has merit and should be allowed mainly on the ground that Exhibit P.7 which contained the libel ought to have been certified before it is admitted in evidence. Since it was not certified, it is inadmissible and notwithstanding its relevancy could not form part of the evidence on which the learned trial Judge could act to found for the plaintiff/respondent. The respondent as plaintiff during his testimony stated as follows at page 107 of the records:

“Sometime in 1984, December 12, the defendant caused to be written and published a defamatory speech concerning me to the effect that the certificate I was carrying about purporting myself to be an Oba was a forged one.....Sometime in November 1985 after staying in Police custody for six months and on my release not committed any offence including offence of forging certificates concerning my degrees and installation, I was asked to go away and given a photocopy of the letter caused to be written and published by the defendant concerning me. Government gave me another copy of the same letter. So I have two photocopies of the letter. This is the photocopy that I receive.”

Although the lower court correctly overruled the learned trial Judge’s finding that Exhibit P.7 was a private document by virtue of the fact it is a public record kept in Nigeria of a private document which comes within the meaning of Section 109(b) Evidence Act, the court veered off when it agreed with the learned trial Judge’s reasoning that even though the document (Exhibit P.7) did not purport to be the very original document sent to and received and acted upon by the Military Governor of Oyo State, it nevertheless is the exact documents that was given to him by the Security Personnel. The evidence of the plaintiff is not that of a facsimile document made by the same mechanical process. Since it was a photocopy, there ought to be a certification that it was a true copy of the original before it could become admissible. See Section 89 (e & f) Evidence Act 2011.

For this and the more detailed reasons contained in the judgment of my learned brother, GALADIMA, JSC, I find that the appeal has merit and it is hereby allowed. The judgment of the High Court, Oyo State delivered on 30/9/1997 in suit No. I/ 740/90 which was affirmed by the lower court on 9/4/2003 in appeal No. CA/I/16/ 99 are hereby set aside. In its place the plaintiff/respondent’s case is dismissed. Each party is to bear his own costs.

KEKERE-EKUN, JSC: I have had a preview in draft the judgment of my learned brother, GALADIMA, JSC just delivered. I agree with his reasoning and conclusion that there is merit in this appeal and it ought to be allowed. My brief comments are in support of the lead judgment and for emphasis. From the issues formulated by the appellant, I agree with my learned brother in the lead judgment that issues 1 and 4 should be considered together.



I adopt the summary of the facts leading to this appeal already fully set out in the lead judgment. The main issue in contention in this appeal is whether there is any exception to the rule of evidence as provided for in Section 97(1)(e) and (2)(c) of the Evidence Act 1990, applicable at the time the case was heard at the lower court, (now Sections 89(e) and 90(1)(c) of the Evidence Act 2011 as amended) that only a certified true copy of a public document is admissible in evidence.

At the trial court in an attempt to prove the publication of the alleged libel against him, the respondent pleaded a letter dated 12th December 1984 allegedly written by the appellant to the Military Governor of Oyo State containing the libellous words. He subpoenaed an official of the Oyo State Ministry of Chieftaincy Affairs, Governor's Office to tender a certified true copy of the letter. However the respondent rejected the copy of the letter brought by the said official claiming it was different from the actual letter written by the appellant and upon which the Military Governor acted. The letter was admitted in evidence as Exhibit P1. Upon the application of the respondent's counsel the witness was treated as a hostile witness and subjected to cross-examination by the respondent's counsel. Thereafter the respondent tendered Exhibit P7, which he said was a photocopy of the libellous publication handed over to him by the men of the Nigerian Security Organisation (N.S.O.) upon his release from detention and which he contended contained the libellous words complained of.

To succeed in an action for libel the plaintiff must prove the following:

- i. Publication of the material complained of to some person other than the person of whom it is written;
- ii. That the words complained of need not necessarily refer to him by name but would be understood by reasonable people to refer to him; and
- iii. That the publication is defamatory of the plaintiff.

See: *Onu v. Agbese* (1985) 1 NWLR (Pt.4) 704; *Sketch v. Ajagbemokeferi* (1989) 1 NWLR (Pt.100) 678; *Skye Bank Plc. v. Akinpelu* (2010) 9 NWLR (Pt.1198) 179.

In the instant case it was imperative for the respondent to prove that the appellant actually received the letter containing the libellous words. The only way to do so was to produce a copy duly certified by the Governor's office. Exhibit P7, which the respondent tendered and relied on, is a photocopy of the original document allegedly in the possession of the Military Governor.

Sections 97(1)(e), (2)(c) and 109(a)(iii) of the Evidence Act 1990 (now Sections 89(e), 90(1)(c) and 102(a) (iii) of the Evidence Act 2011) provide as follows:



“97 (1). Secondary evidence may be given of the existence, condition or contents of a document when –

5 (e) the original is a public document within the meaning of Section 102.

(2) The secondary evidence admissible in respect to the original documents referred to in the several paragraphs of subsection (1) is as follows -

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(c) In paragraph (e) or (f) a certified copy of the document, **but no other secondary evidence is admissible.**

109. The following documents are public documents –

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(a) documents forming the official acts or records of the official acts of -

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(iii) public officers, legislative, judicial and executive, whether of Nigeria or elsewhere.”

The letter having been addressed to the Military Governor in his official capacity, qualifies as a public document within the meaning of Section 109 of the then applicable Evidence Act (now Section 102 of the Evidence Act 2011 as amended).

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The literal rule of interpretation of statutes is that ordinary words must be given their natural and ordinary meaning. It is only when there is doubt or ambiguity that recourse may be had to other canons of interpretation. See: *A. G. Ogun State v. Aberuagba* (1985) NWLR (Pt.3) 395; *Ndoma-Egba v. Chukwuogor & Ors.* (2004) 2 SC (Pt.1) 107; *Cotecna International Ltd. v. Churchgate (Nig.) Ltd.* (2010) 18

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NWLR (Pt.1225) 346. In the case of *Ahmed v. Kassim* (1958) SCNLR 28 @ 30 C

Foster-Sutton, FCJ held thus:

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“The underlying principle is that the meaning and intention of legislation must be collected from the plain and unambiguous expressions used therein rather than from any notions which may be entertained as to what is just or expedient.”

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This court also held in *Adewunmi v. A.G. Ekiti State & Ors.* (2002) SCNJ 27 @ 50 per Wali, JSC:

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“In cases of statutory construction, the court’s authority is limited. Where the statutory language and legislative intent are clear and plain, the judicial inquiry terminates there. Under our jurisprudence, the presumption is that ill-considered or unwise legislation will be corrected through democratic



process. A court is not permitted to distort a statute's meaning in order to make it conform with the judge's own views of sound social policy."

At page 249 of the record the lower court held:

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"It is true that only certified true copy of public document is admissible in evidence. See Section 97(1)(e) and (2)(c) of the Evidence Act. But in this case it was practically impossible for the plaintiff to obtain a certified true copy of the document since the original appears to have been destroyed, or lost or hidden by those in possession or control over it. And having regard to the evidence of the plaintiff that Exhibit P7, though uncertified, was the exact photocopy of the original document given to him by the security personnel.... Against this background it is my view that the plaintiff was at liberty to resort to Section 97(a)(i) and (ii) (c) of the Evidence Act to tender Exhibit P7 as secondary evidence of the existence and contents of the actual defamatory letter received and acted upon by the Military Governor of Oyo State. It is my view therefore that Exhibit P7 was also admissible as secondary evidence under Section 97 of the Evidence Act. For the foregoing reasons I hold that Exhibit P7 was admissible and rightly admitted by the learned trial Judge."

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The words used in Section 97(2) (c) of the Evidence Act 1990 (section 90(1)(c) of the 2011 Act) are clear and unambiguous and best illustrate the intention of the lawmakers i.e. that the only secondary evidence of a public document admissible

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"As indicated above, Section 97(2)(c) contains the words "but no other kind of secondary evidence is admissible." The word "but" in the context, as a conjunction, means "against what might be expected; in spite of this" and the word is followed by the specific negative expression "no other kind of secondary evidence is admissible" Can this court give another kind of secondary evidence to the very clear words in section 97(2)(c)? I think not."

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In light of the authorities variously referred to, there was no justification for the finding of the lower court reproduced above. There is no exception provided in the statute. Exhibit P7 being an uncertified photocopy of the letter containing the alleged libel was clearly inadmissible in evidence and ought to have been expunged from the record by the lower court. I also resolve issues 1 and 4 in the appellant's favour. Having failed to prove publication of the libellous matter, I agree with my learned brother in the lead judgment that the respondent's case collapses like a pack of cards.

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For these and the more detailed reasons contained in the lead judgment, I find merit in the appeal and allow it accordingly. The judgment of the Court of Appeal, Ibadan Division delivered on 9th April 2003 is hereby set aside. I abide by the order for costs as contained in the lead judgment.

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Cases cited in the judgment

- A. G. Ogun State v. Aberuagba* (1985) NWLR (Pt.3) 395
Adewunmi v. A. G. Ekiti State (2002) 2 NWLR (Pt. 751) 474
Adisa v. Oyinwola (2000) FWLR (Pt. 8) 1349
- 10 *Agha v. IGP* (1997) 10 NWLR (Pt.527) 317
Ahmed v. Kassim (1958) SCNLR 28
Ajakaiye v. Okondeji (Pt 972) 1 SC 92
Akinduro v. Alaya (2007) 15 NWLR (Pt.1057) 312
Anate v. Sanusi (2001) 11 NWLR (Pt. 725) 542
- 15 *Aqua Limited v. Ondo State Sport Council* (1983) 10 - 11 SC 31
Araka v. Egbue (2003) 17 NWLR (Pt. 843)
Broad Bank Nig. Ltd. v. Olayiwola & Sons Ltd & Anor. (2005) All FWLR (Pt. 251) 236
Buhari v. Obasanjo (2005) All FWLR (Pt. 273) 1
- 20 *Concord Press Ltd v. Asaolu* (1999) 10 NWLR (Pt. 621) 123
Cotecna International Ltd. v. Churchgate (Nig.) Ltd. (2010) 4 CLRN 87
Dagaci of Dere v. Dagaci of Ebwa (2006) 7 NWLR (Pt. 979) 382
Daniel v. Adaji (1998) 11 NWLR (Pt. 574) 525
Fatuade v. Onwoamanam (1990) 2 NWLR (Pt. 132) 322
- 25 *Fawehimi v. NBA (No.2)* (1989) 2 NWLR (Pt. 105) 558
Fawehinmi v. I.G.P (2000) 7 NWLR (Pt. 665) 481) 524
Garba v. Federal Civil Service Commission (1988) 1 NWLR (Pt. 71)
Globe Fishing Industries Ltd v. Coker (1995) 7 NWLR (Pt. 152) 265
I.I.G. (Nig) Ltd v. Alao (1990) 3 NWLR (Pt. 141) 773
- 30 *Imana v. Robinson* (1979) 3 – 4 SC 1
Iwueke v. I.B.C. (2005) 17 NWLR (Pt.955) 447
Kubor v. Dickson (2013) 4 NWLR (Pt.1345) 534
Mentiki v. Menkiti (2000) FWLR (Pt. 2) 293
Minister of Lands, Western Nigeria v. Dr. Azikiwe (1969) All NLR 49
- 35 *Minister of Local Government Eastern Nigeria v. D. O. Akpagu* (1964) 1 All NLR 211
Ndoma-Egba v. Chukwuogor & Ors. (2004) 2 SC (Pt.1) 107
Ndulue & Anor v. Ojiakor & Ors (2013) 1 - 2 SC (Pt. II) 1
Nicer Progress Ltd v. N.E.L. Corp. (1989) 3 NWLR (Pt. 107) 68
- 40 *NNPC v. Famfa Oil Ltd* (2012) 5 CLRN 1
Nsirim v. Nsirim (1990) 3 NWLR (Pt.138) 285
Nzekwu v. Nzekwu (1989) 2 NWLR (Pt. 104) 373
Ogbe v. Asade (2009) 12 SC (Pt. III) 37
Ojokolobo v. Alamu (1987) 3 NWLR (Pt. 61) 377
- 45 *Okotie-Eboh v. Manager* (2005) All FWLR (P. 241) 277



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- Olowu v. Abolori* (1993) 5 NWLR (Pt. 293) 255
Omoniyi v. Sodeinde (2013) 13 NWLR (Pt. 836) 53
Omogbe v. Lawani (1980) 3 - 1 SC 108
Onobruhere v. Esigine (1986) 1 NWLR (Pt.19) 799
5 *Onu v. Agbese* (1985) 1 NWLR (Pt.4) 704
Onyali v. Okpala (2001) 1 NWLR (Pt. 594) 282) 303
Osia v. Edjekpo (2000) 10 NWLR (Pt. 720) 233
Oyekanmi v. NAPA (2000) 15 NWLR (Pt. 690) 414
Oyeyipo v. Oyinloye (1967) NWLR (Pt. 50) 356
10 *Savannah Bank v. Ajilo* (1957) 2 NWLR (Pt 57) 421
Sketch v. Ajagbemokeferi (1989) 1 NWLR (Pt.100) 678
Skye Bank Plc. v. Akinpelu (2010) 9 NWLR (Pt.1198) 179
State v. Gwonto (2000) FWLR (Pt. 30) 2583
The Queen v. Omisade & 17 Ors (1962) NWLR 67
15 *Tomtec (Nig.) Ltd. v. F.H.A.* (2009) 12 SC (Pt.III) 162
UTB v. Awan Zigana Ent. Ltd (1994) 6 NWLR (Pt.348) 56
Witt & Busch Ltd v. Good & Trust Inv. Ltd (2004) 8 NWLR (Pt.874) 179

Statutes cited in the judgment

- 20 Sections 93, 94(1), 97, 100,104, 108, 109, 111, 207of the Evidence Act 2004
Sections 89, 90, 102, 201, 231 of the Evidence Act 2011
Section 96 1(e) and (2) (c) of Evidence Act Cap 62 Laws of the Federation of
Nigeria and Lagos, 1958

25 **HIGH COURT**

High Court of Oyo State
P.O. Aderemi, J

COURT OF APPEAL (Ibadan Division)

30

SUPREME COURT OF NIGERIA

Walter Samuel Nkanu Onnoghen, JSC (*Presided*)
Suleiman Galadima, JSC (*Read the lead judgment*)
Mary Ukaego Peter-Odili, JSC
35 Kumai Bayang Akaahs, JSC
Kudirat Motonmori Olatokunbo Kekere-Ekun, JSC

Counsel:

- 40 Michael F. Lana with Oluwole Ilori, David Ashaolu and Chris Idu for the Appellant.
Adekola Olawole with B.A. Aderosin, Olusegun Olubola and Adekola Olawoye
(Jnr) for the Respondent.

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**DENCA SERVICES LTD v. LEO OLEKA & SONS LTD; LEO OLEKA; NIGERIA
CUSTOM SERVICES**

COURT OF APPEAL
5 (LAGOS DIVISION)

CA/L/688/2010
FRIDAY 6TH DAY MARCH, 2015

10 *(IYZOBA; ABUBAKAR; OBASEKI-ADEJUMO, JJ.CA)*

COMMERCIAL LITIGATION - Property Rights - Economic loss resulting from breach of property rights will not necessarily equate to a breach of right to life or dignity.

15

COMMERCIAL LITIGATION - Property Rights - It is breach of fundamental right to detain property for longer than is permitted or reasonable.

20

COMMERCIAL LITIGATION - Jurisdiction - Respondent can challenge jurisdiction even through leave has been granted.

COMMERCIAL LITIGATION - Statute Bar - where the law provides a time limit for bringing an action, proceedings must be brought within the prescribed time.

25

COMMERCIAL LITIGATION - Statute Bar - Act will only be considered continuous if it continues until abated.

PROCEDURE - Rights Enforcement - Claim must be in respect of the fundamental rights entrenched in Chapter IV of the Constitution.

30

PROCEDURE - Rights Enforcement - Compliance with the rules is necessary.

APPEAL - Respondent's Brief - which does not formulate issues or adopt appellant's issues is defective.

35

APPEAL - Respondent's Brief - cannot align with the appellant's.

Facts:

40 The 1st respondent is in the business of haulage of goods and the 2nd respondent is its Managing Director. Through the 2nd respondent, the appellant engaged the services of the 1st respondent to transport a 20ft container from SCOA Kirikiri Terminal to 53 Kosoko Street, Lagos. The appellant had through a waybill misrepresented to the 1st and 2nd respondents that the contents of their 20ft container
45 were padlocks. It turned out that the contents were contraband goods - lace



materials. The truck was arrested in transit by the 3rd respondent claiming that it had received a tip-off that the truck was carrying contraband goods.

5 The 1st and 2nd respondents alleged that the contraband items were released to the appellant but the 3rd respondent refused to release the truck. They further claimed that the 3rd respondent deliberately neglected to carry out any form of investigation in respect of the unlawful arrest and detention of the 1st and 2nd respondents truck. The 3rd respondent detained the truck for two years and refused to release the truck despite series of appeals from the 1st and 2nd respondents. The truck was
10 finally released after the 1st and 2nd respondents instituted the suit at the trial court under the Fundamental Rights Enforcement Procedure Rules.

The appellant raised a Preliminary Objection to the suit on the ground *inter alia* that conditions precedent to the assumption of jurisdiction by the court had not
15 been fulfilled. The 3rd respondent, though duly served did not participate in the trial.

The trial judge heard the Motion on Notice and the Preliminary Objection together, and in a reserved dismissed the Preliminary Objection and granted some of the
20 reliefs sought by the 1st & 2nd respondents including ₦2,000,000 (Two Million Naira) as compensation for the violation of their right to property.

Dissatisfied with the ruling, the appellant appealed to the Court of Appeal.

25 **Held (*unanimously allowing the appeal*):**

[1] Procedure – Rights Enforcement – Claim must be in respect of the fundamental rights entrenched in Chapter IV of the Constitution.

30 The reliefs which an applicant may seek and obtain under Section 46 (1) of the Constitution of the Federal Republic of Nigeria 1999 and in an action commenced under the Fundamental Rights (Enforcement Procedure) Rules must be one of those affecting any of the fundamental rights entrenched in Chapter IV of the Constitution. **(P. 44 lines 1 - 5)**

35 **[2] Commercial Litigation – Property Rights – Economic loss resulting from breach of property rights will not necessarily equate to a breach of right to life or dignity.**

40 Right to property, life and dignity are provided for in sections 44, 33 and 34 of the Constitution. From the facts of this case as deposed to in the supporting affidavit and as summarized earlier in this judgment, the arrest and detention of the truck/trailer of the respondents relates to their property rights and has nothing to do with right to life and dignity of the human
45 person. The 1st and 2nd respondents attempted to bring it in by deposing in



5 paragraph 15 of their affidavit in support of the motion on notice at page 24 of the record “that the applicants, their workers, members of their families and dependants suffered financially, emotionally, economically and physically (with some dead) as a result of the said illegal arrest and detention of the said Truck/Trailer”. This averment is too remote and the facts certainly cannot form the basis of a claim for breach of right to life or dignity of the human person. **(P. 44 lines 14 - 24)**

10 **[3] Commercial Litigation – Property Rights – It is breach of fundamental right to detain property for longer than is permitted or reasonable.**

15 ... the 3rd respondent is authorised under Section 44(2)(k) to take possession of the 1st and 2nd respondents’ truck for the purpose of investigation relating to the contraband goods the truck was caught carrying. Further, by section 169 of the Customs and Excise Management Act Cap C45 Laws of the Federation of Nigeria 2004, the 3rd respondent is entitled in the lawful operation of its duties to seize any vehicle in which goods regarded as contraband pursuant to section 167 of the Customs and Excise Management Act (supra) are conveyed. The arrest and detention was not therefore *ab initio* illegal. See the case of *Nwanna v. A.G. Federation* (2010) 15 WRN 178 @ 187 referred to by learned counsel for the appellant where Mukhtar JCA (as he then was) observed:

25 “An arrest or detention the subject of Fundamental Rights Enforcement Procedure Rules is only that which violates any provision in the Constitution or any Federal or State law for the time being in force”

30 But by the continued detention of the truck for up to two years, especially after the contraband goods were returned, the 3rd respondent removed itself from the protection provided by section 44 (2) (k) of the Constitution.

35 It was also no longer protected under Section 169 of the Customs and Excise Management Act Cap C45 Laws of the Federation of Nigeria 2004 because it was no longer acting in lawful operation of its duties. Its illegal act in detaining the truck for such a long period and after it had released the contraband goods it was conveying was in breach the fundamental rights of the 1st and 2nd respondent as guaranteed by Section 44 of the 1999 Constitution. This action filed under the Fundamental rights Enforcement Procedure Rules was therefore competent. **(P. 45 lines 7 - 32)**

40 **[4] Procedure – Rights Enforcement – Compliance with the rules is necessary.**

45



5 The learned trial judge in his judgment at page 78 on whether or not the suit was statute barred within order 1 rule 3(1) said the law is that non-compliance with any provision of the Fundamental Rights (Enforcement Procedure) Rules cannot defeat an application under the Rules. He relied on the case of *F.R.N. v. Ifegwu* (2003) 15 NWLR (Pt. 842) 113 @ 179 where Uwaifo JSC observed:

10 “The manner in which the court is approached for the enforcement of a fundamental right is hardly objectionable once it is clear that the originating court process seeks redress for the infringement of the rights so guaranteed under the constitution. The court process could come by the Fundamental Rights (Enforcement Procedure) Rules or by originating summons or indeed by writ of summons.....That seems to underline the concerns in regard to redressing a contravention of a fundamental right by liberalizing the type of originating process without the person affected being inhibited by the form of action he adopts. It is enough if his complaint is understood and deserves to be entertained.”

20 It is obvious that the above passage is concerned with the method of commencing a fundamental rights action. It is a misconception for the learned trial judge to interpret the case to mean that non compliance with any provisions of the Fundamental Rights (Enforcement Procedure) Rules cannot defeat an action under the Rules. Of what use are the provisions then? There is a very long line of authorities where suits have been thrown out for failure to comply with the Rules. See *Chukwuogor v. Chukwuogor* (2005) LPELR - CA/C/100/2004; *Onyemaizu v. Orjiakor* (2000) 6 NWLR (Pt. 659) 25 @ 47; *Medeyinlo v. Jembi & Anor* (2011) LPELR CA/L/361/08; *Ezeadukwa v. Maduka* (1997) LPELR-CA/E/201/95; *Ogwuche & Ors v. Mba & Ors* (1994) 4 NWLR (Pt 336) 75 @ 85 E – F.

30 (P. 45 lines 34 - 45; P. 46 lines 1 - 16)

35 [5] ***Commercial Litigation – Jurisdiction – Respondent can challenge jurisdiction even through leave has been granted.***

40 The learned trial judge fell into another serious error when he said at page 79 of the record that since the consideration of whether the suit is statute barred or not is at the stage of obtaining leave which is normally *ex parte*; that once the trial judge is satisfied that leave should be granted or the delay is explained to the satisfaction of the judge, then that should be the end of the matter. That is clearly a wrong principle of law. The mere fact that the application for leave is *ex parte* underscores the fact that the learned trial judge cannot be right. When the motion on notice comes up for hearing and the respondent after reviewing the processes sees a ground that deprived the court of jurisdiction to hear the case, even though leave

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had been granted, the respondent is surely at liberty to raise the issue.
(P. 46 lines 18 - 27)

5 [6] **Commercial Litigation – Statute Bar – where the law provides a time
limit for bringing an action, proceedings must be brought within the
prescribed time.**

10 Order 1 Rule 3 (1) of the Fundamental Right (Enforcement Procedure)
Rules provide that the application for leave to enforce fundamental rights
must be “**made within twelve months from the date of the happening
of the event.....**” In the case of *Egbe v. Adefarasin (supra)* the Supreme
Court held that where the law provides for the bringing of an action within
15 a prescribed period, in respect of cause of action accruing to the plaintiff,
proceedings shall not be brought after the time prescribed by the Statute.
Action brought outside the prescribed period offends against the provision
of the section and does not give rise to a cause of action. In the case of
Araka v. Ejeagwu (supra) @ 865 - 866 H - A Kalgo JSC observed:

20 “Statute-barred” simply means barred by a provision of the statute.
It is usually as to time, i.e. the bar gives a time limit during which
certain actions or steps should be taken, and one is barred from
taking action after the period specified in the statute. Any action
taken after or outside the specified limited time or period is of no
25 avail and has no valid effect. The bar can be lifted or the limit
extended only if the statute allows it to be done. Where there
was no such extension, the action carried out will be invalid, and
the court will treat it as such”

30 A situation similar to the one under consideration came up in the case of
N.D.I.C. v. O’Silvawax Intl Ltd (2006) 7 NWLR (Pt. 980) 588 @ 609 C - D.
The action under the Fundamental Rights (Enforcement Procedure) Rules
was brought sixteen months after the seizure of the respondent’s vehicles.
After leave was granted and the motion on notice was filed, the appellant
35 raised a preliminary objection that the suit was statute barred.

40 The Court of Appeal Enugu Division held that by virtue of Order 1 rule 3(1)
of the Fundamental Rights (Enforcement Procedure) Rules, any application
or suit in contemplation of the fundamental rights enforcement procedure
must be brought within a period of twelve months from the date of the
happening of the event, matter or act complained of or such other period
as may be prescribed by any enactment, or except where a period is so
prescribed, the delay, is accounted for to the satisfaction of the court or
judge to whom the application is made. The respondent having failed to
45 account for the delay, the application was declared incompetent and struck
out. In the some vein, the 1st and 2nd respondents in this appeal did not



account for the delay in bringing their suit 24 months after the cause of action arose. (P. 46 lines 28 - 45; P. 47 lines 1 - 18)

5 [7] **Commercial Litigation – Statute Bar – Act will only be considered continuous if it continues until abated.**

10 In their brief, it was argued for the 1st and 2nd respondent that the act complained of was a continuous one. It was held in *N.D.I.C. v. O'Silvawax Intl Ltd (supra)* that a continuous act is applicable to a case of nuisance which will continue until abated. It does not therefore apply in this type of case where the cause of action accrued on the 8th of April 2005 when the truck was arrested. It is on that date that the right of the respondents to seek redress accrued. They should have sued within 12 months of that date. The action was therefore clearly statute barred. See also *Oladekoyi v. I.G.P.* (2011) 16 NWLR (Pt. 1273) 406 @ 428 E - G. (P. 47 lines 18 - 26)

15 **PER ABUBAKAR, JCA:**

20 Where the law provides for bringing an action within a prescribed period in respect of a cause or matter accruing to the plaintiff, proceedings shall not be brought after the prescribed period. I also agree with my learned brother that, the learned trial judge fell into grave error by refusing to uphold the preliminary objection, certainly under the fundamental Rights enforcement procedure Rules 1979, an aggrieved applicant must institute his action within twelve months from the date the cause of action accrued, having failed to do so, applicants lost the right to institute an action in Court to ventilate their grievance. (P. 47 lines 40 - 45; P. 48 lines 1 - 2)

25 [8] **Appeal – Respondent's Brief – which does not formulate issues or adopt appellant's issues is defective.**

30 The 1st and 2nd respondents' brief was settled by N.N. Nwokorie Esq. The brief is defective. Counsel did not formulate any issues and did not indicate that he was adopting the issues formulated by the appellant. Counsel went on a tangent of his own arguing issues at large when he neither filed a cross appeal nor a respondent's notice. In his reply brief, learned counsel for the appellant relying on the cases of *Orji v. Zaria Industries Ltd* (1992) 1 NWLR Pt. 216) 124 @ 146 and *Opara v. Dowell Schlumberger (Nig.) Ltd* (1995) 4 NWLR (Pt. 390) 440 urged us to strike out the 1st and 2nd respondent's brief.

35 In *Orji v. Zaria Industries Ltd (supra)* @ 146 G, Akpata JSC observed:

40 "It is to be noted that in the respondent's brief issues for determination were not formulated. Neither were the issues



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proffered by the appellant adopted. Besides, counsel for the respondent inevitably fell into a further grave error by basing his arguments on the grounds of appeal without regard to the issues formulated in the appellant’s brief. Failure to formulate issues in a brief is sufficient by itself to render the brief incompetent, and arguments canvassed therein would therefore be of no consequence. The brief becomes irredeemably bad if, as in this case, arguments are not based on any issue or issues or semblance of them.”

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The 1st and 2nd respondent’s brief of argument is irredeemably bad and incompetent. **(P. 42 lines 14 - 36)**

15

[9] Appeal – Respondent’s Brief – cannot align with the appellant’s.

20

The 3rd respondent’s brief is also incompetent. The 3rd respondent who was the 1st defendant in the court below should have filed a notice of appeal if it had planned to file an appellant’s brief. It cannot as a respondent file a brief aligning himself with the case of the appellant. That is referred to as freak advocacy and cannot be allowed. See *Adenuga v. Odumeru* (2002) 8 NWLR (Pt. 821) 163 @ 181 F - G, *Nigerian Bank of Commerce & Industry v. Intergrated Gas (Nig.) Ltd* (2005) 4 NWLR (Pt. 916) 617 @ 639 E – F. See also Order 18 Rules 4(1) & (2) of the Court of Appeal Rules 2011. The 3rd respondent’s brief must also be discountenanced.

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(P. 42 lines 36 - 43)

Obiter:

30

[10] Procedure – Rights Enforcement – Proceedings are now, devoid of technicalities.

35

It is gratifying that under the Fundamental Rights (Enforcement Procedure) Rules 2009 both application for leave (Order 11 rule 2); and limitation of time within which to institute action (Order 111 rule 1) have all been abolished. Under the new law fundamental rights cases can now be heard on their merits devoid of all these vexatious technicalities.

40

The learned trial judge erred in refusing to uphold the preliminary objection of the appellant on the ground that the suit was statute barred. **(P. 47 lines 28 - 35)**

45

IYIZOBA, JCA (Delivering the lead Judgment): At the Federal High Court Lagos, the 1st and 2nd respondents as applicants commenced proceedings in suit no FHC/L/CS/345/07 against the appellant as 2nd respondent and the 3rd respondent herein as 1st respondent for enforcement of their fundamental rights by first filing a



motion *ex parte* for leave on 5/4/07. After leave was granted on 14/5/07, the 1st and 2nd respondents filed their motion on notice in which they prayed for the following reliefs:

- 5 1. “A declaration that the arrest and detention of the applicants Truck/Trailer with Registration Number AW 213 EKY by the respondents from 8th day of April 2005 till date of release is illegal and unconstitutional.
- 10 2. A declaration that the continued arrest and detention of the applicants’ Truck/Trailer since, the 8th day of April 2005 amounted to an illegal and unconstitutional threat to the property and lives of the applicants and their workers without any reasonable or legal justification.
- 15 3. An Order of this Honourable Court awarding the sum of ₦5,000,000.00 (Five Million Naira) general damages in favour of the applicants and against the respondent for their unlawful arrest and detention of the applicants Truck/Trailer rights to their property and since the 8th day of April 2005 amounting to wicked violation of the applicants right to their property and their means of livelihood.
- 20 4. An order of this Honourable Court commanding the second respondent to pay all their outstanding bills to the applicants with effect from the 8th day of April 2005 to date of release of the said Truck/Trailer”.
- 25

30 The 1st respondent is in the transport business of haulage of goods within Nigeria particularly in Lagos State. The 2nd respondent is its Managing Director. On the 8th day of April 2005, the Appellant hired the services of the 1st respondent through the 2nd respondent for the haulage of a 20ft container from SCOA Kirikiri terminal to No. 53 Kosoko Street, Lagos. The Appellant had through a way bill misrepresented to the 1st and 2nd respondents that the contents of their 20ft container were padlocks.

35 It turned out that the contents were contraband goods - lace materials. The truck was arrested in transit by the 3rd respondent claiming that it had a tip off that the truck was carrying contraband goods. The 1st and 2nd respondents claim that it was all a conspiracy as the 20ft container had been in the possession of the 3rd respondent long before then and they decided to release it to the appellant only to

40 turn round and arrest their truck. Even after the arrest, the prohibited lace materials were released to the appellant but the 3rd respondent refused to release the truck. They further claimed that the 3rd respondent deliberately neglected to carry out any form of investigation in respect of the unlawful arrest and detention of the 1st and 2nd respondents truck. The 3rd respondent detained the truck for two years

45 and refused to release the truck despite series of appeals from the 1st and 2nd



respondents. The truck was finally released on the 10th day of May 2007 after the institution of this suit and the service of the processes on the 3rd respondent.

On being served with the Originating Processes, the appellant raised a Preliminary
5 Objection to the suit on the grounds that:

1. The reliefs sought being reliefs relating to temporary possession justified under Section 44 (k) of the Nigerian Constitution, can only be procedurally commenced with a Writ of Summons.
10
2. The applicants/respondents have no right whatsoever breached or likely to be breached with respect to Truck/Trailer with Registration Number AW 213 EKY.
15
3. The provisions of the Federal High Court (Civil Procedure) Rules 2000, which rules regulate the said applicants' reliefs were not followed by the applicants in asking for the reliefs.
20
4. By virtue of the combined effect of grounds 1, 2 and 3 above, the condition precedent to this honourable court assuming and exercising jurisdiction in respect of the said reliefs has not been fulfilled.
25
5. Consequentially, this honourable court lacks jurisdiction to entertain the applicants/respondents claims with respect to the Reliefs.

The 3rd respondent, though duly served did not participate in the trial. The Hon trial Judge A.R. Mohammed J heard the Motion on Notice and the Preliminary Objection together, and in a reserved Ruling on 29/03/10 dismissed the Preliminary Objection and granted reliefs 1 & 2 of the motion on notice dated 17/5/07 and ₦2million as compensation in favour of the applicants against the respondents for the violation of the applicants' right to property guaranteed under section 44(1) of the Constitution of the Federal Republic of Nigeria 1999.
30

Dissatisfied with the ruling, the appellant by Notice of Appeal dated 04/05/10 appealed against the Ruling. From his four grounds of appeal, three issues were formulated as follows:
35

- (a) In view of S. 44(1) & (2)(k) of the Nigerian Constitution, was the applicants/respondents action for arrest and detention of truck number AW 213 EKY competently commenced by way of Fundamental Rights Enforcement Procedure and if so was the action not time barred thus impairing the jurisdiction of the trial court over the action?
40
45



(b) Was the trial court's decision in this suit not perverse, when after exonerating the Appellant from arrest and detention of truck number AW 213 EKY turned around and awarded ₦2million conjunctively to the liability of the Appellant?

5

(c) Whether leave granted *ex parte* to enforce applicants/respondents fundamental rights, ipso facto extinguished Appellant's constitutional right to raise preliminary objection to the initiating procedure to this suit and/or discharged the trial court from its judicial duty to resolve judicially the issues of time-bar and purport of S. 44(2) (k) of the Nigerian Constitution properly raised before it in this action.

10

The 1st and 2nd respondents' brief was settled by N.N. Nwokorie Esq. The brief is defective. Counsel did not formulate any issues and did not indicate that he was adopting the issues formulated by the appellant. Counsel went on a tangent of his own arguing issues at large when he neither filed a cross appeal nor a respondent's notice. In his reply brief, learned counsel for the appellant relying on the cases of *Orji v. Zaria Industries Ltd* (1992) 1 NWLR Pt. 216) 124 @ 146 and *Opara v. Dowell Schlumberger (Nig.) Ltd* (1995) 4 NWLR (Pt. 390) 440 urged us to strike out the 1st and 2nd respondent's brief.

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In *Orji v. Zaria Industries Ltd (supra)* @ 146 G, Akpata JSC observed:

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"It is to be noted that in the respondent's brief issues for determination were not formulated. Neither were the issues proffered by the appellant adopted. Besides, counsel for the respondent inevitably fell into a further grave error by basing his arguments on the grounds of appeal without regard to the issues formulated in the appellant's brief. Failure to formulate issues in a brief is sufficient by itself to render the brief incompetent, and arguments canvassed therein would therefore be of no consequence. The brief becomes irredeemably bad if, as in this case, arguments are not based on any issue or issues or semblance of them."

30

The 1st and 2nd respondent's brief of argument is irredeemably bad and incompetent. The 3rd respondent's brief is also incompetent. The 3rd respondent who was the 1st defendant in the court below should have filed a notice of appeal if it had planned to file an appellant's brief. It cannot as a respondent file a brief aligning himself with the case of the appellant. That is referred to as freak advocacy and cannot be allowed. See *Adenuga v. Odumeru* (2002) 8 NWLR (Pt. 821) 163 @ 181 F - G, *Nigerian Bank of Commerce & Industry v. Intergrated Gas (Nig.) Ltd* (2005) 4 NWLR (Pt. 916) 617 @ 639 E - F. See also Order 18 Rules 4(1) & (2) of the Court of Appeal Rules 2011. The 3rd respondent's brief must also be discountenanced.

40

45 **APPELLANT'S ARGUMENTS:**



On issue no 1, learned counsel submitted that the suit was wrongly commenced under the Fundamental Rights Enforcement Procedure Rules and that the trial court lacked jurisdiction to entertain the suit. Counsel argued that S. 44(1) of the Constitution deals with fundamental right against compulsory acquisition of property and that 1st & 2nd respondents' claim in this suit is for arrest and detention of the truck. The claim was thus not cognizable under S. 44(1), 34 and 35 of the Constitution under which the applicants brought their claims. Counsel argued that the arrest and detention were excusable under S. 44(2) (k) of the Constitution; and that the action should not have been brought under the Fundamental Rights Enforcement Procedure Rules but by ordinary writ of summons. He relied on the following authorities: *Okechukwu .v Etukokwu* (1998) 8 NWLR (Pt. 562) 513 @ 535 Para H; *F.M.C.T. v. Eze* (2006) All FWLR (Pt. 323) 1704 @ 1722 Paras B – H; *Tukur v. Govt. of Taraba* (1997) 6 NWLR (Pt 510) 549 @ 576 - 577.

Counsel further submitted that even assuming without conceding that the suit could have been properly brought under the Fundamental Rights (Enforcement) Procedure Rules 1979, the 1st and 2nd respondents violated Order 1 Rule 3(1) of the Rule which required the application for leave to enforce their Fundamental Rights to be filed within twelve months from the date of the happening of the event. Counsel submitted that the event took place on 8/4/05 and that the application was filed on 5/4/07, 24 months after the event. Counsel submitted that the action is time barred and ought to have been dismissed by the trial court. He cited *Egbe v. Adefarasin* (1985) 1 NWLR (Pt 3) 549 @ 568; *Araka v. Ejeagwu* (2001) FWLR (Pt 36) 830 @ 849 para E.

On issue no 2 learned counsel submitted that the uncontested fact is that, the arrest and detention of the Truck by the 3rd respondent took place on the 8th of April 2005; that the appellant had nothing to do with the arrest.

There was consequently no basis for the award of ₦2m against the respondents, the appellant inclusive. Counsel argued that in making this conjunctive award, the trial court simply visited the “sins” of Nigerian Customs Services (the Respondent) on Denca Services Limited (the Appellant). He urged us to remedy this unjustifiable situation by disentangling the Appellant from this monetary award in the event that the award would stand at all.

On issue 3, learned counsel submitted that the lower court had in its Ruling whilst interpreting Order 1 Rule 3(1) of the Fundamental Right Enforcement Procedure Rules 1979, taken the imperious position “that once the court is satisfied that leave should be granted or the delay for seeking leave is explained, the matter in my view ends there.” Counsel submitted that the fact that leave has been granted cannot be a bar to raising objection to the propriety or otherwise of the institution of the action through the Fundamental Rights Enforcement Procedure Rules.

I have carefully examined the reliefs sought in this appeal which I have set out



earlier in this judgment. The reliefs which an applicant may seek and obtain under Section 46 (1) of the Constitution of the Federal Republic of Nigeria 1999 and in an action commenced under the Fundamental Rights (Enforcement Procedure) Rules must be one of those affecting any of the fundamental rights entrenched in Chapter IV of the Constitution. In the applicant’s written response to the respondent’s preliminary objection at page 48 of the record counsel stated:

“The complaint of the applicants is that their truck/trailer, the mainstay of their sustenance has been illegally and unconstitutionally arrested by the respondents thereby breaching the applicants’ rights to property, life and dignity of their person as guaranteed by the 1999 Constitution under Chapter IV....”

Right to property, life and dignity are provided for in sections 44, 33 and 34 of the Constitution. From the facts of this case as deposed to in the supporting affidavit and as summarized earlier in this judgment, the arrest and detention of the truck/trailer of the respondents relates to their property rights and has nothing to do with right to life and dignity of the human person. The 1st and 2nd respondents attempted to bring it in by deposing in paragraph 15 of their affidavit in support of the motion on notice at page 24 of the record “that the applicants, their workers, members of their families and dependants suffered financially, emotionally, economically and physically (with some dead) as a result of the said illegal arrest and detention of the said Truck/Trailer”. This averment is too remote and the facts certainly cannot form the basis of a claim for breach of right to life or dignity of the human person.

Section 44(1) of the CFRN 1999 provides that:

“No movable 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 purpose prescribed by a law that, among other things-

(a) **requires the prompt payment of compensation therefor;**

(b)

(2) Nothing in subsection(1) of this section shall be construed as affecting any general law-

(a)

(b) to (j)



(k) relating to the temporary taking of possession of property for the purpose of any examination, investigation or enquiry;... .”

5 See *Eronini v. Eronini* (2013) 14 NWLR (Pt. 1373) 32 @ 53 E- G; *Adeyemi-Bero v. L.S.D.P.C.* (2013) 8 NWLR (Pt. 1356) 238 @ 282 C - G. From the above provision, the 3rd respondent is authorised under Section 44(2)(k) to take possession of the 1st and 2nd respondents’ truck for the purpose of investigation relating to the contraband goods the truck was caught carrying. Further, by section 169 of the
10 Customs and Excise Management Act Cap C45 Laws of the Federation of Nigeria 2004, the 3rd respondent is entitled in the lawful operation of its duties to seize any vehicle in which goods regarded as contraband pursuant to section 167 of the Customs and Excise Management Act (supra) are conveyed. The arrest and detention was not therefore *ab initio* illegal. See the case of *Nwanna v. A.G. Federation* (2010) 15 WRN 178 @ 187 referred to by learned counsel for the
15 appellant where Mukhtar JCA (as he then was) observed:

20 “An arrest or detention the subject of Fundamental Rights Enforcement Procedure Rules is only that which violates any provision in the Constitution or any Federal or State law for the time being in force”

But by the continued detention of the truck for up to two years, especially after the contraband goods were returned, the 3rd respondent removed itself from the protection provided by section 44 (2) (k) of the Constitution.

25 It was also no longer protected under Section 169 of the Customs and Excise Management Act Cap C45 Laws of the Federation of Nigeria 2004 because it was no longer acting in lawful operation of its duties. Its illegal act in detaining the truck for such a long period and after it had released the contraband goods it was conveying was in breach the fundamental rights of the 1st and 2nd respondent as
30 guaranteed by Section 44 of the 1999 Constitution. This action filed under the Fundamental rights Enforcement Procedure Rules was therefore competent.

35 The second part of issue 1 is whether the action was time barred. The learned trial judge in his judgment at page 78 on whether or not the suit was statute barred within order 1 rule 3(1) said the law is that non-compliance with any provision of the Fundamental Rights (Enforcement Procedure) Rules cannot defeat an application under the Rules. He relied on the case of *F.R.N. v. Ifegwu* (2003) 15 NWLR (Pt. 842) 113 @ 179 where Uwaifo JSC observed:

40 “The manner in which the court is approached for the enforcement of a fundamental right is hardly objectionable once it is clear that the originating court process seeks redress for the infringement of the rights so guaranteed under the constitution. The court process could come by the Fundamental Rights (Enforcement Procedure) Rules or by originating summons or
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indeed by writ of summons.....That seems to underline the concerns in regard to redressing a contravention of a fundamental right by liberalizing the type of originating process without the person affected being inhibited by the form of action he adopts. It is enough if his complaint is understood and deserves to be entertained.”

5

It is obvious that the above passage is concerned with the method of commencing a fundamental rights action. It is a misconception for the learned trial judge to interpret the case to mean that non compliance with any provisions of the Fundamental Rights (Enforcement Procedure) Rules cannot defeat an action under the Rules. Of what use are the provisions then? There is a very long line of authorities where suits have been thrown out for failure to comply with the Rules. See *Chukwuogor v. Chukwuogor* (2005) LPELR - CA/C/100/2004; *Onyemaizu v. Orjiakor* (2000) 6 NWLR (Pt. 659) 25 @ 47; *Medeyinlo v. Jembi & Anor* (2011) LPELR CA/L/361/08; *Ezeadukwa v. Maduka* (1997) LPELR-CA/E/201/95; *Ogwuche & Ors v. Mba & Ors* (1994) 4 NWLR (Pt 336) 75 @ 85 E – F.

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The learned trial judge fell into another serious error when he said at page 79 of the record that since the consideration of whether the suit is statute barred or not is at the stage of obtaining leave which is normally *ex parte*; that once the trial judge is satisfied that leave should be granted or the delay is explained to the satisfaction of the judge, then that should be the end of the matter. That is clearly a wrong principle of law. The mere fact that the application for leave is *ex parte* underscores the fact that the learned trial judge cannot be right. When the motion on notice comes up for hearing and the respondent after reviewing the processes sees a ground that deprived the court of jurisdiction to hear the case, even though leave had been granted, the respondent is surely at liberty to raise the issue. Order 1 Rule 3 (1) of the Fundamental Right (Enforcement Procedure) Rules provide that the application for leave to enforce fundamental rights must be “**made within twelve months from the date of the happening of the event.....**” In the case of *Egbe v. Adefarasin* (*supra*) the Supreme Court held that where the law provides for the bringing of an action within a prescribed period, in respect of cause of action accruing to the plaintiff, proceedings shall not be brought after the time prescribed by the Statute. Action brought outside the prescribed period offends against the provision of the section and does not give rise to a cause of action. In the case of *Araka v. Ejeagwu* (*supra*) @ 865 - 866 H - A Kalso JSC observed:

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“Statute-barred” simply means barred by a provision of the statute. It is usually as to time, i.e. the bar gives a time limit during which certain actions or steps should be taken, and one is barred from taking action after the period specified in the statute. Any action taken after or outside the specified limited time or period is of no avail and has no valid effect. The bar can be lifted or the limit extended only if the statute allows it to be done. Where there was no such extension, the action carried out will be invalid, and the court will treat it as such”



5 A situation similar to the one under consideration came up in the case of *N.D.I.C. v. O'Silwax Intl Ltd* (2006) 7 NWLR (Pt. 980) 588 @ 609 C - D. The action under the Fundamental Rights (Enforcement Procedure) Rules was brought sixteen months after the seizure of the respondent's vehicles. After leave was granted and the motion on notice was filed, the appellant raised a preliminary objection that the suit was statute barred.

10 The Court of Appeal Enugu Division held that by virtue of Order 1 rule 3(1) of the Fundamental Rights (Enforcement Procedure) Rules, any application or suit in contemplation of the fundamental rights enforcement procedure must be brought within a period of twelve months from the date of the happening of the event, matter or act complained of or such other period as may be prescribed by any enactment, or except where a period is so prescribed, the delay, is accounted for to the satisfaction of the court or judge to whom the application is made. The respondent having failed to account for the delay, the application was declared incompetent and struck out. In the same vein, the 1st and 2nd respondents in this appeal did not account for the delay in bringing their suit 24 months after the cause of action arose. In their brief, it was argued for the 1st and 2nd respondent that the act complained of was a continuous one. It was held in *N.D.I.C. v. O'Silwax Intl Ltd* (*supra*) that a continuous act is applicable to a case of nuisance which will continue until abated. It does not therefore apply in this type of case where the cause of action accrued on the 8th of April 2005 when the truck was arrested. It is on that date that the right of the respondents to seek redress accrued. They should have sued within 12 months of that date. The action was therefore clearly statute barred. See also *Oladekoyi v. I.G.P.* (2011) 16 NWLR (Pt. 1273) 406 @ 428 E - G.

30 It is gratifying that under the Fundamental Rights (Enforcement Procedure) Rules 2009 both application for leave (Order 11 rule 2); and limitation of time within which to institute action (Order 11 rule 1) have all been abolished. Under the new law fundamental rights cases can now be heard on their merits devoid of all these vexatious technicalities.

35 The learned trial judge erred in refusing to uphold the preliminary objection of the appellant on the ground that the suit was statute barred. On that ground, this appeal succeeds and is allowed. The ruling of A.R. Mohammed J is hereby set aside. The aspect of the preliminary objection that the suit is statute barred is upheld: The action is struck out. I make no order as to costs.

40 **ABUBAKAR, JCA:** Where the law provides for bringing an action within a prescribed period in respect of a cause or matter accruing to the plaintiff, proceedings shall not be brought after the prescribed period. I also agree with my learned brother that, the learned trial judge fell into grave error by refusing to uphold the preliminary objection, certainly under the fundamental Rights enforcement procedure Rules
45 1979, an aggrieved applicant must institute his action within twelve months from



Abubakar; Obaseki-Adejumo, JCA

5 the date the cause of action accrued, having failed to do so, applicants lost the right to institute an action in Court to ventilate their grievance. See: *Michael Obiefune v. Alexander Okoye* (1962) All NLR 375, *Fred Egbe v. Adefarasin* (1987) 1 NSSC 463, and *Savannah Bank of Nigeria Ltd. v. Pan Atlantic Shipping* (1987) 1 NSCC 67.

10 For the above reason and the more elaborate reasons set out in the lead Judgment delivered by my learned Brother Iyizoba JCA, I also allow the appeal, set aside the ruling, and order that the action brought under the Fundamental Rights enforcement procedure Rules 1979 be and is hereby struck out. Parties shall bear their respective costs.

15 **OBASEKI-ADEJUMO, JCA:** I have had the benefit of reading in draft the lead judgment of my learned brother Chinwe Eugenia Iyizoba JCA just delivered. I agree with the reasoning and conclusion expressed therein. I wish to add a few words of mine.

20 Section 44 (1) of the Constitution of the Federal Republic of Nigeria (as amended) states:

No moveable property or any interest in an immoveable property shall be taken in 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 purposes prescribed by a law that, among other things-

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- a. **requires the prompt payment of compensation therefore and**
- 30 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**

35 Clearly, the Constitution of the Federal Republic of Nigeria 1999 (as amended) pursuant to Section 43 and 44 thereof safeguards the right of every Nigerian citizen to acquire and own property anywhere in Nigeria. Section 44 (1) as reproduced above provides that where the property of a citizen is sought to be acquired compulsorily; compensation must be paid promptly to the affected owner of the property. However, the provision of Section 44(1) is apparently qualified by

40 subsection 2 of that section which provides:

Nothing in sub-section (1) of this Section shall be construed as affecting any general law -

- 45 a.



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k. relating to the temporary taking of possession of property for the purpose of examination. Investigation or enquiry;

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The above provision is clearly a validation of provision of Section 167 of the Customs and Excise Management Act CAP C45 LFN 2004 which empowers to detain and seize goods that are deemed contraband. Evidently, it is expected that in the performance of this duty, such vehicle that is being used to convey the goods will be seized as well. Section 167 provides thus:

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“Any officer or police officer, or any other person authorized in that behalf by the Board, may at any time seize or detain anything liable to forfeiture under the customs and excise laws or which such officer, police officer or other person has reasonable grounds to believe is liable to forfeiture thereunder”

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From page 6 of the record, the applicants/1st and 2nd respondents sought *inter-alia*: **“a declaration that the continuing arrest and detention of the Applicant’s Truck/Trailer with Registration No AW 213 EKY by the respondents from the 8th day of April 2005 without legal or moral justification is illegal and unconstitutional.”** As Appellant rightly submitted, it is apparent that in the instant case the 3rd respondent’s seizure of the vehicle, subject matter of this suit was done pursuant to the exercise of the power conferred upon them by the Customs and Excise Management Act which comes under the exception provided by Section 44 (2) (k) reproduced above.

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It is particularly for the foregoing and more so the fuller reasons adumbrated in the lead judgment that I also allow this appeal and abide by the consequential orders made in the lead judgment.

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Cases cited in the judgment

- Adenuga v. Odumeru* (2002) 8 NWLR (Pt. 821) 163
Adeyemi-Bero v. L.S.D.P.C. (2013) 8 NWLR (Pt. 1356) 238
Araka v. Ejeagwu (2001) FWLR (Pt 36) 830
5 *Chukwuogor v. Chukwuogor* (2005) LPELR - CA/C/100/2004
Egbe v. Adefarasin (1985) 1 NWLR (Pt 3) 549
Eronini v. Eronini (2013) 14 NWLR (Pt. 1373) 32
Ezeadukwa v. Maduka (1997) LPELR-CA/E/201/95
F.M.C.T. v. Eze (2006) All FWLR (Pt. 323) 1704
10 *F.R.N. v. Ifegwu* (2003) 15 NWLR (Pt. 842) 113
Medeyinlo v. Jembi & Anor (2011) LPELR CA/L/361/08
Michael Obiefune v. Alexander Okoye (1962) All NLR 375
NBCI v. Intergrated Gas (Nig.) Ltd (2005) 5 CLRN 1
N.D.I.C. v. O'Silvawax Intl Ltd (2006) 7 NWLR (Pt. 980) 588
15 *Nwanna v. A.G. Federation* (2010) 15 WRN 178
Ogwuche & Ors v. Mba & Ors (1994) 4 NWLR (Pt 336) 75
Okechukwu .v Etukokwu (1998) 8 NWLR (Pt. 562) 513
Oladekoyi v. I.G.P. (2011) 16 NWLR (Pt. 1273) 406
Onyemaizu v. Orjiakor (2000) 6 NWLR (Pt. 659) 25
20 *Opara v. Dowell Schlumberger (Nig.) Ltd* (1995) 4 NWLR (Pt. 390) 440
Orji v. Zaria Industries Ltd (1992) 1 NWLR Pt. 216) 124
Savannah Bank of Nigeria Ltd. v. Pan Atlantic Shipping & Transport Agencies Ltd
(1987) 1 NSCC 67
Tukur v. Govt. of Taraba (1997) 6 NWLR (Pt 510) 549

25

Statutes cited in the judgment

- Sections 169, 167, 169 of the Customs and Excise Management Act Cap C45
Laws of the Federation of Nigeria 2004
Sections 34, 35, 43, 44 and 46 of the Constitution of the Federal Republic of
30 Nigeria 1999

Rules of Court referred to in the judgment

- Fundamental Rights (Enforcement Procedure) Rules 1979
Fundamental Rights (Enforcement Procedure) Rules 2009
35 Court of Appeal Rules 2011

History:

HIGH COURT

- 40 Federal High Court Lagos
Mohammed, J

COURT OF APPEAL (Lagos Division)

- 45 Chinwe Eugenia Iyizoba, JCA (Presided & Read the lead Judgment)
Tijjani Abubakar, JCA



Abimbola O. Obaseki-Adejumo, JCA

Counsel:

J. O. Mbamalu with O. F. Emodi for the appellant.

5 1st and 2nd respondents not represented.

Toyin Bashorun with O. C. Mbadiwe for the 3rd respondent.

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JOE BEST ESTATE DEVELOPMENT & PROPERTIES LIMITED v. MRS GRACE A. NZEGWU; MRS NKIRU AMOBI (AKA NKIRU C. NZEGWU); REGISTRAR OF TITLE LAGOS STATE; PRIMLAKS FINANCIERS CONSULTANTS LTD; PRIMLAKS NIGERIA

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COURT OF APPEAL
(LAGOS DIVISION)

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CA/L/266/2003
FRIDAY 6TH FEBRUARY, 2015

(BAGE; IYZOBA; OBASEKI-ADEJUMO, JJ.CA)

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COMMERCIAL LITIGATION - Contempt - Court orders must be obeyed unless set aside.

COMMERCIAL LITIGATION - Contempt - Party who flouts order and subsequently appeals against it abuses court process.

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COMMERCIAL LITIGATION - Contempt - Court will generally not hear a party in contempt.

25

COMMERCIAL LITIGATION - Contempt - It is contempt of court for a party to disobey and order or judgment of court or to refuse to act within the time specified by an order or judgment.

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COMMERCIAL LITIGATION - Academic Exercise - Matter is not an academic exercise merely because it raises an academic point except it leads to the making of legal postulations and does not relate to a live issue.

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APPEAL - Preliminary Objection - does not need support of respondent's notice or grounds of appeal.

APPEAL - Preliminary Objection - Purpose is to challenge competence of an appeal and if sustained will terminate the appeal.

APPEAL - Preliminary Objection must be filed and served at least three days before the hearing of the appeal.

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Facts:

The property subject matter of the suit was registered in the name of Theophilus Ifeanyi Nzegwu (now deceased). The 1st respondent is the widow of Late Engr. Theophilus Ifeanyi Nzegwu and was in actual possession of the property in dispute.

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5 Parts of the property were let out to the 4th and 5th respondents. The 2nd respondent claimed that the Late Engr. Nzegwu assigned the property to her. The 2nd respondent was a party to two separate pending suits in which her interest in the property was being disputed. During the pendency of these suits she purportedly sold the property to the appellant. The appellant and the 2nd respondent procured the entry of judgment in suit LD/2220/99 by obtaining a consent judgment vesting the property in the appellant. The appellant caused a writ of possession to be issued against the 2nd respondent for the delivery up of possession of the premises to the appellant.

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Upon becoming aware of the consent judgment, the 4th respondent filed a motion *ex-parte* in suit seeking *inter alia* an order joining it as a party to the suit and a stay of execution of the judgment. The learned trial judge granted the orders sought.

15 The 1st, 4th and 5th respondents filed a fresh suit seeking orders setting aside the consent judgment and writ of possession as well as the sale of the property.

20 In the course of trial of the fresh suit, the trial judge ordered that “No party shall levy execution on the premises in furtherance of suit No. LD/2220/99 pending the hearing and determination of this case which is going on from day to day.”

In spite of the above order, the appellant went ahead to levy execution and subsequently filed an appeal against the order at the Court of Appeal.

25 **Held (*unanimously striking out the appeal*):**

[1] ***Appeal – Preliminary Objection – does not need support of respondent’s notice or grounds of appeal.***

30 A preliminary objection does not need a ground of appeal or a respondent’s notice to support it. (P. 65 lines 9 - 10)

[2] ***Appeal – Preliminary Objection – Purpose is to challenge competence of an appeal and if sustained will terminate the appeal.***

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The purpose of a preliminary objection is to contend that the appeal is defective or incompetent and if sustained the appeal would no longer be heard. A successful preliminary objection terminates the hearing of the appeal. (P. 65 lines 10 - 13)

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[3] ***Appeal – Preliminary Objection must be filed and served at least three days before the hearing of the appeal.***

45 The fundamental requirement is that the preliminary objection must be filed and served on the appellant three days before the hearing of the



appeal thereby removing the element of surprise and giving the appellant enough time to respond. Order 10 Court of Appeal Rules 2011; *Contract Resource Nigeria Ltd & Anor v. UBA Plc* (2011) LPELR-8137 (SC).
(P. 65 lines 13 - 17)

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[4] ***Commercial Litigation – Academic Exercise – Matter is not an academic exercise merely because it raises an academic point except it leads to the making of legal postulations and does not relate to a live issue.***

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The contention of the 1st respondent is that while this appeal was pending, and during the subsistence of the order of Rhodes Vivour J, the appellant without taking any steps to have the order discharged and under the cover of certain alleged judgments of other courts contemptuously flouted the order of Rhodes-Vivour J in respect of which it had appealed. Contempt proceedings were on against it for disobedience of the court order. Having taken laws into its hands, the way it did, what then is the essence of continuing this appeal? 1st respondent argued that it is mere academic exercise and an abuse of the process for the court to continue to hear the appeal.

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In the case of *Agbakoba v. INEC* (2008) 18 NWLR (Pt. 1119) 489 @ 546 - 547 D-G the Supreme Court held that:

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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 in an appeal has become defunct it does not require to be answered or controvert about and leads to making of bare legal postulations which the court should not indulge in.....”

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I do not think this appeal is hypothetical in the sense that it raises a mere academic point because whether the lower court had the jurisdiction to make the order or not is still a live issue. (P. 65 lines 20 - 43)

[5] ***Commercial Litigation – Contempt – Court orders must be obeyed unless set aside.***

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Suffice it to say that even if the claims of the appellant were true (which is not the case) it should not have flouted the court order. An order of a court whether right or wrong must be obeyed unless set aside.
(P. 66 lines 1 - 3)

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[6] Commercial Litigation – Contempt – Party who flouts order and subsequently appeals against it abuses court process.

5 The judgment and order he relied on did not empower him to flout the orders. The appellant should have proceeded to court to have the order discharged. It did not do so. Rather it flagrantly disobeyed the order and re-took possession of the premises. How then can the order be subsisting as argued by the appellant to justify the continuation of this appeal? It is disrespectful on this court for the appellant to have brought an appeal before us and while the appeal was pending to have gone ahead to take laws into its hands and to flout the order he was appealing against. It is an abuse of the process of this court and this court ought to deny it any further hearing. **(P. 66 lines 4 - 12)**

15 [7] Commercial Litigation – Contempt – Court will generally not hear a party in contempt.

20 In the case of *Abeke v. Odunsi* (2013) LPELR-20640 (SC) the Supreme Court *per* Ariwoola JSC on whether a party who is in contempt of court can be heard observed:

25 “...generally, the common law principle which precludes persons in disobedience of the order of the court from being heard in respect of matters in which they stand in disobedience has been settled. In *Hadkinson v. Hadkinson* (1952) 2 All ER 567 at 573: Denning L.J opined thus:

30 ‘I need hardly say that it is very rare for this court to refuse to hear counsel for an appellant. No matter how badly a litigant has behaved, nevertheless, generally speaking, if he has a right of appeal, he has a right to be heard, for the simple reason that, if he is not heard, his right of appeal is valueless....the fact that a party to a cause has disobeyed an order of the court is not itself a bar to his being heard, but if his disobedience is such that, so long as it continues, it impedes the cause of justice in the cause, by making it more difficult for the court to ascertain the truth or to enforce the orders which it may make, then the court may in its discretion refuse to hear him until the impediment is removed or good reason is shown why it should not be removed.

40 There are however a few exceptions to the general rule. The principle does not apply to applications by an alleged contemnor challenging the order on the ground of lack of jurisdiction by the court. There is a clear distinction between the right to be heard in defence of the order made and the right to enforce yet an order whilst in disobedience. The right to

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be heard is clearly different from the right to enforce a right whilst still in disobedience. See First African Trust Bank Limited & Anor v. Basil Ezegbu & Anor (1992) NWLR (Pt. 264) 132, (1993) 6 SCNJ 122 (1992) LPELR 1278.”

5 The relief sought by the appellant in this appeal is an order setting aside
the order of Rhodes Vivour J in suit no LD/3652/99 on the ground *inter alia*
of lack of jurisdiction to make the order. The order was that “No party shall
levy execution on the premises in furtherance of suit No LD/2220/99 pending
10 the hearing and determination of this case...” The appellant disobeyed
the order and went and levied execution on the premises. There is nothing
left for this court to set aside. It is indeed surprising that the appellant did
not on his own discontinue the appeal. Did it expect this court to put a
stamp of approval on its total disregard, disdain and disrespect of the
15 court and due administration of justice? This court has the discretion to
refuse to hear the appellant while in disobedience of the order of Rhodes-
Vivour J. In the exercise of that discretion, this appeal is hereby struck
out with ₦50,000.00 in favour of the 1st, 3rd and 4th respondents.
(P. 66 lines 14 - 45; P. 67 lines 1 - 11)

20 [8] ***Commercial Litigation – Contempt – It is contempt of court for a
party to disobey and order or judgment of court or to refuse to act
within the time specified by an order or judgment.***

25 **PER OBASEKI-ADEJUMO, JCA:**

It is contempt of court to refuse to do an act required by a judgment or
order of court within the time specified therein or to disobey a judgment or
an order restraining a person from doing a specified act.

30 The dignity and honour of the court cannot be maintained if its orders are
treated disdainfully and scornfully without due respect. See *Oko-Osi v.
Akindele* (2013) LPELR - 20353 (CA); *Abbass v. Solomon* (2001) 15
NWLR (Pt 735) 144.

35 In the instant case, the appellant clearly disobeyed the order of Bode
Rhodes-Vivour J. made on 26th of 25 February 2003 that “***no party shall
levy execution on the premises in furtherance of suit No LD/2220/99
pending the hearing and determination of this case which is going
40 from day to day***”. The act of the appellant is undoubtedly unconscionable.

Was the appellant expecting this court to validate anotherwise invalid act
of disrespecting and disobeying the preservative order of the trial court? I
think not. (P. 67 lines 33 - 45; P. 68 lines 1 - 2)

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IYIZOBA, JCA (Delivering the lead Judgment): This is an appeal against the order of Bode Rhodes-Vivour J of the Lagos High Court made on the 26th day of February 2003 in suit No LD/3652/99 staying the execution of the consent judgment of Shitta-Bay J in LD/2220/99 on the ground that the consent judgment was obtained by fraudulent misrepresentation. The facts leading to the making of the order are as follows:

The property known as and called Plot 13034 Akin Adesola Street Victoria Island Lagos State, the subject matter of the suit was registered in the name of Late Engr. Theophilus Ifeanyi Nzegwu under Title No. LO. 7816 of the Register of Deeds kept at Lagos State Lands Registry Alausa Ikeja, Lagos State. The 1st respondent is the wife of Late Engr. Theophilus Ifeanyi Nzegwu and was in actual possession of the property in dispute.

Parts of the property were let out to the 4th and 5th respondents. The 2nd respondent claimed that by virtue of a Deed of Assignment dated 29/7/96 the said late Engr. Nzegwu assigned the said property to her. The 2nd respondent was a party to two separate pending suits in which her interest in the property was being disputed. During the pendency of these suits she purportedly sold the property to the appellant. The appellant and the 2nd respondent procured the entry of judgment in suit LD/2220/99 by obtaining a consent judgment vesting the property in the appellant and in the pretext that the 2nd respondent was in possession of the property, a writ of possession was issued against the 2nd respondent for the delivery up of possession of the premises to the appellant. Upon the execution of the said consent judgment by the appellant against 1st, 4th and 5th respondents who were in actual possession of the property, the said 1st, 3rd and 4th respondents become aware of the consent judgment. The 4th respondent filed a motion *ex-parte* in suit no LD/2220/99 seeking the following orders.

- “1. An order joining Primlaks Financier Consultants Ltd, as an interested party in this suit No LD/2220/99 pending the hearing of the Motion on Notice.
2. An interim order arresting/staying execution of the judgment in Suit No LD/2220/99 pending the hearing of the Motion on Notice.
3. An interim order reinstating the occupants of the entire premises at Plot 1303A Akin Adesola Street, Victoria Island, Lagos State, Victoria Island, Particularly Primlaks Financiers Consultant Ltd into possession of the property unimpeded or unmolested pending the hearing of Motion on Notice.

The learned trial judge (Shitta-Bay J.) heard and granted the said motion *ex parte* as prayed on 3/12/99 and the 1st - 3rd and 4th respondents were immediately put back in occupation of the premises. On 9/12/99 they filed a fresh suit LD/3652/99



claiming as follows:

- 5 (1) An order setting aside the sale of plot 13034 Akin Adesola Street, Victoria Island, Lagos State, Victoria Island by the second defendant to first defendant.
- 10 (2) An order setting aside the consent judgment entered in No. LD/2220/99 by the Lagos High Court on September 20, 1999.
- 15 (3) An order setting aside the Writ of Possession issued in No LD/2220/99 out of the Lagos High Court Registry on November 11, 1999, which writ was sought to be executed on Friday December 1999.
- 20 (4) Aggravated and/or exemplary damages in such sum as may be assessed by the court for the damage caused to the plaintiff and her goods and chattels as a result of the attempted execution by the first defendant of the writ of possession issued out of the Lagos High Registry on November 11, 1999.
- 25 (5) Cost upon a full indemnity basis.

In the course of trial of the suit, Rhodes-Vivour J made the order that **“No party shall levy execution on the premises in furtherance of suit No LD/2220/99 pending the hearing and determination of this case which is going on from day to day.”**

Dissatisfied with the order, the appellant immediately appealed by Notice of Appeal dated and filed on 6/3/03 at page 79 - 82 of the Record which was subsequently amended severally. Out of the four grounds of appeal in the further amended Notice of Appeal dated 8/7/11 and filed on 13/7/11, the appellant in his brief of argument dated 18/3/04 and filed on 19/3/04 formulated the following three issues:

- 35 1. Whether the learned trial judge was right or had the jurisdiction in Suit No. LD/3652/99 to, *suo motu*, stay the execution of the judgment of a Court of Coordination jurisdiction in another Suit No LD/2220/99 after the said judgment had been executed and after the court which delivered the judgment had, in a considered ruling, refused on application for stay of execution of the said judgment.
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- 45 2. Whether in all circumstances of this case the learned trial judge in LD/3652/99 had not become *functus officio* at the time of making the order of 26/2/2003 *suo motu*, staying execution of the judgment in LD/2220/99.



3. Whether the learned trial judge was or rightly exercised his discretion when he, in Suit No. LD/3652/99 stayed the judgment in another suit No LD/2220/99 without hearing the parties and when there was no fact, evidence or application before him to warrant such an order.

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The 1st respondent filed a Notice of Preliminary Objection on the ground that the appeal is an academic exercise or in the alternative an abuse of court process which was argued in the amended brief of argument dated 18/3/11 and filed on 21/3/11. The following two issues were formulated for determination:

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(A) Whether the lower court was right when it directed that parties should take no steps to execute the judgment sought to be set aside.

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(B) Whether it is academic and an abuse of court process for the appellant to appeal against an order of the lower court which has been disobeyed by the appellant.

In their brief, the 4th and 5th respondents formulated one question for determination as follows:

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Whether the trial Judge rightly exercised his discretion by ordering that no party shall levy execution on the premises in furtherance of Suit No LD/2220/99 pending the hearing and determination of this case which is going on from day to day.

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I shall be guided in this judgment by the 1st respondent's issues. I shall begin by considering the preliminary objection raised by the 1st respondent in her amended brief of argument argued as issue B; and then issue A if necessary. In the 1st respondent's brief, the learned counsel contended as follows:

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"On September 30, 1999, the appellant and the 2nd respondent procured the entry of a consent judgment before Justice Shitta-Bay in Suit No. LD/2220/99 in respect of Plot 130A, Akin Adesola Street, Victoria Island, Lagos and sought pursuant thereto to evict the 1st respondent from the said property on December 3, 1999. The said consent judgment is at page 8 of the records.

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On 9th December 1999, the 1st respondent instituted an action against the appellant and the 2nd respondent before Honourable Justice Rhodes-Vivour in Suit No. LD/3652/99 at the Lagos High Court, seeking to set aside the said consent judgment. The writ of summons and Statement of claim is at pages 49 - 53 of the records.

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On 13th December 1999, the Honourable Justice Rhodes-Vivour, upon the 1st respondent's application in Suit No. LD/3652/99, issued an interim *ex-parte* order restraining the first defendant from disturbing the Applicant's possession of Plot 130A, Akin Adesola Street, Victoria Island, Lagos pending the hearing and determination of a motion on notice filed along with the writ of summons and Statement of Claim. The said restraining order is at pages 36 to 37 of the records.

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On the 26th day of February 2003, the Honourable Justice Rhodes - Vivour in Suit No. LD/3652/99 made a further order herein, directing that "**no party shall levy execution on the premises in furtherance of Suit LD/2220/99 pending the hearing and determination of this case which is going on from day to day.**" The said order is at page 78 of the records. The said order was made in open court and in the presence of one Shola Lamid, counsel to the appellant. In the circumstances, the appellant is aware of the order.

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In breach of the said order, and in order to perpetrate a fraud on the 1st respondent, on this Honourable Court and on the administration of Justice in Nigeria, the appellant proceeded before Honourable Justice Shitta-Bey in Suit No. LD/2220/99 on 17th June 2003, by the deliberate misrepresentation and suppression of facts, to obtain an *ex-parte* order directing the Deputy Sheriff of the High Court of Lagos State to enter the 1st respondent's property at Plot 1304 Akin Adesola Street, Victoria Island, Lagos by force in order to obtain possession thereof, and thereby levy execution of the fraudulent Consent Judgment entered on September 20 1999 in Suit No. LD/2220/99.

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On Friday 20th June 2003, the appellant proceeded to take possession of the 1st respondent's property, acting upon the fraudulently obtained order in suit No. LD/2220/99 of 17th June 2003, and in direct contravention of the order of Honourable Justice Rhodes-Vivour made in Suit No. LD/3652/99 herein on the 26th day of February 2003.

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A court will not adjudicate on a matter which is an academic exercise because the court deals with live issues and steer clear of those that are academic. This was decided in *Ogbonna v. President Federal Republic of Nigeria* (1997) 5 NWLR (Pt. 504) 281 @ 287F.

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The court is not interested in determining academic questions, because a resolution of the same in favour of either party to an appeal does not have any effect on the decision of a lower court. This was stated in the case of *Mamman v. Salaudeen* (2005) 18 NWLR (Pt. 958) 478 @ 500B - C & 515 B - D.

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The order of 26th February 2003 by Honourable Justice Rhodes-Vivour in Suit No. LD/3652/99 which is the main issue being challenged in this appeal, has been flouted on 20th June 2003 by ejecting the 1st respondent from the said property.

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The appellant has not shown how it is going to affect it if the present appeal is given in its favour.

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Furthermore, there is no dispute as to the facts that order of Honourable Justice Rhodes-Vivour was made on 26th February 2003 to maintain the status quo in Suit No. LD/2220/99, pending the full determination of Suit No. LD/3652/99 of which the appellant and the 2nd respondent are defendants and there is also no doubt as to the facts that the appellant thereafter the said order of Honourable Justice Rhodes-Vivour, proceeded to disobey this subsisting order on 20th June 2003 by ejecting the 1st respondent from the said property acting upon the fraudulently obtained order in Suit No. LD/2220/99 of 17th June, 2003.

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Success of the appellant in this appeal will not affect the issue of contempt at the lower court which the appellant apparently is trying to run away from as the appellant will still be held for contempt of the lower court because it disobeyed the said order at the material time the order was in force and it does not matter that the said order was eventually nullified by a superior court.

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This is so because an order of a court remains valid until it is set aside. See the case of *Brawal Shipping (Nig.) Ltd v. Aphrodite Ltd* (2004) 9 NWLR (Pt. 879) 462 @ 480B - G. In other words, a party who disobeyed a court order at the material time the order was in force will not be relieved of contempt proceedings against it in the event that the said order was eventually nullified by a superior court.

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A party who is in contempt of a subsisting order is not entitled to be granted court's discretion to enable him continue with the breach as long as the party continues in his contempt of disobeying the orders contained in the ruling of the court. See the case of *Globestar Eng. (Nig.) Ltd v. Malle Holdings Ltd* (1999) 10 NWLR (Pt. 622) 270 @ 284B.

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The essence of this appeal is defeated and it becomes academic as any pronouncement on this present appeal in favour of either of the party would not affect the proceedings in the lower court particularly contempt proceedings in which may be proceeded against the appellant.

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In the alternative, the appeal is an abuse of the process of court. The Supreme Court has said that issuance of a writ of execution and levying



of execution when a stay is properly in place is an abuse of court process. See the case of *Akinyemi v. Soyawo* (2006) 13 NWLR (Pt. 998) 496 @ 514 F - G.

5 In the instant case, the application for the issuance of the writ of execution granted on 17th June 2003 in Suit No. LD/2220/99 and executed on 20th June 2003 when the order of Justice Rhodes-Vivour in Suit No. LD/3652/99 made in the presence of one Shola Lamid, (counsel to the appellant) still subsists was an act of absolute bad faith and abuse of court process.

10 Categories of situations and conditions that ground abuse of process are not closed. In other words, the list is in exhaustive as each incident of abuse of court process has to be established from the circumstances of each particular case. See the case of *Umeh v. Iwu* (2008) 8 NWLR (Pt 1089) 225 @ 243 B - C.

15 In the instant case, the appeal is an abuse of court process as the appellant who had disobeyed the court order in the lower court is now running to this Honourable court for protection to the irritation of the 1st respondent. It is conceded that the appellant has the right to this interlocutory appeal after seeking and obtaining leave to appeal, however, this is done to annoy and irritate the 1st respondent and this amount to abuse of court process as the appeal is based on order of the lower court which the appellant had already disobeyed".

20 In his amended reply brief, learned counsel for the appellant in response argued thus:

25 "The argument of the learned counsel for the 1st respondent on issue 11 of the Amended Brief of argument lack merit and should be discountenanced. The issue raised by the 1st respondent is outside the scope of this appeal and there is no ground of appeal that support the issue. Beside the 1st (sic respondent) did not file respondent Notice that the judgment be affirmed on other ground. The submission of the learned counsel on the preliminary objection is therefore incompetent and should be struck out.

30 The Correct Statement are as set out in Brief Statement of facts in paragraphs 1.1 to 1.13 of the appellant's brief of argument.

35 The 1st respondent earlier filed application for stay of execution of the judgment on LD/2220/99 (Page 33 of the record).

40 The appellant filed preliminary objection against the said application. The Preliminary Objection was predicated on the fact that earlier the 4th and 5th respondent and on behalf of the 1st respondent has earlier upon *ex parte* application obtained from the court and order of stay of execution which was set aside through the appellant's



appeal constituted as CA/L/79/2000 (Page 23 of the record).

5 The court upheld our preliminary objection and the 1st respondent's application was struck out on ground of jurisdiction and *locus* of the 1st respondent and struck out the said Application for stay of execution.

10 The court in LD/2220/99 restores the appellant to possession on 20/6/2003 upon the refusal of the 1st respondent application for stay of execution and pursuant to the said Court of Appeal judgment which found that the judgment in LD/2220/99 had been executed on 3/12/99. The court made this following finding at Page 7 of the said Court of Appeal judgment (page 29 of the record).

15 The order of 17/6/2003 was not an order for possession as wrongly alleged on paragraph 21.6 of Amended respondent Brief the 1st respondent but an order to force open the said premises in dispute.

Besides the 1st respondent cannot complain about this order on this appeal because no appeal was filed against the said order.

20 The submission of the appellant is that the court in LD/3652/99 is *functus officio* and cannot proceed to make the order of 26/2/2003, the same order having been refused by the court in LD/2220/99 to which there is no appeal filed by the 1st respondent.

25 Besides the court has no jurisdiction to make order *suo motu* without hearing the parties particularly the appellant, see the case of *Pavex International Co (Nig) Ltd v. Afribank* (2004) SC (Pt 11) 196 at 216 *Per* A.O Ejiwunmi JSC *supra*.

30 There is clear misconception in the argument of the counsel to the 1st respondent that execution was levied on 20/6/2003 in flagrant disobedience to order of 26/2/2003. Thus submission is far from the truth. The appellant was only restored to possession upon the Court of Appeal setting aside the earlier order of 3/12/99 restoring the 4th, 5th and 1st respondent possession.

35 The 1st respondent admitted this in paragraph 5 of the Statement of claim and page 52.

The Court of Appeal on CA/L/79/2000 had found that the judgment in LD/2220/99 has been executed.

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It is submitted that the consequence of setting aside the said order of 3/12/99 is that the parties were left in the position they were on 3/12/99 which means that the appellant had received possession. See *Pavex v. Afribank Supra*.

45 *The issue of alleged disobedience to order of court was raised by the learned counsel*



for the 1st respondent in LD/2220/99 under and by virtue of her application dated 23/6/2003.

5 The 1st respondent brought application for committal and sequestration of the appellant and its counsel (not the counsel in this suit) see Exhibit 1K 4 of the Counter Affidavit. The application was dismissed on 20/6/2003. The 1st respondent did not file appeal on the said order of 20/6/2003. See Exhibit 1K 5 of the counter affidavit to the preliminary objection.

10 It is submitted that upon the dismissal of the said application on alleged disobedience to order of 26/2/2003, the 1st respondent is barred at all times from bringing up the issue up against save on appeal.

15 See the case of *Ume v. Nigeria Renowned Trading Co. Ltd* (1991) 8 NWLR (Pt. 516) Pg 344 at 354 paragraph C-D

20 *“Dismissal of an action by a court in the context of final disposal of the matter is the most punitive measure against a plaintiff or applicant. This is because he is barred at all times and forever from instituting or commencing the action.”*

25 *“There is procedural distinction between dismissal of matter and striking out. If a matter is dismissed on its merit, it cannot be resuscitate: it finally dies and the pleas of res judicata (if a civil matter) or autrefois acquit or autrefois convict (if a criminal matter) will avail the other party. On the other hand, a matter struck out could be revived by the party.*

30 *This he could do either by repeating the same court process or by an amended form in either case, returning the process in its original or amended content to the cause list.” (Page 353 -354 Para D, Paragraphs H-A).*

35 The 1st respondent preliminary objection is therefore an abuse of the processes of court.

It is clear from the foregoing submission that it is not the appellant who has abused the processes of the court but the 1st respondent.

40 It is submitted that from the issue joined by both parties this appeal is not academic exercise because the order of 26/2/2003 is still subsisting and ought to be set aside.

45 We urge my lords to answer issue II of the 1st respondent brief of argument in the negative”.



This appeal is an interesting case in which Mr. Shola Lamid, learned counsel for the appellant is with due respect, labouring under a very serious misconception of the law or he is perhaps deliberately presenting his case in such a manner as to confuse everyone as to the real substance of his appeal.

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This is why I found it expedient to set down the arguments of both counsel in full. First, Mr. Lamid argued that there is no ground of appeal to support the contention of the 1st respondent on the preliminary objection; and that no respondent's notice to affirm the appeal on other grounds was filed. A preliminary objection does not need a ground of appeal or a respondent's notice to support it. The purpose of a preliminary objection is to contend that the appeal is defective or incompetent and if sustained the appeal would no longer be heard. A successful preliminary objection terminates the hearing of the appeal. The fundamental requirement is that the preliminary objection must be filed and served on the appellant three days before the hearing of the appeal thereby removing the element of surprise and giving the appellant enough time to respond. Order 10 Court of Appeal Rules 2011; *Contract Resource Nigeria Ltd & Anor v. UBA Plc* (2011) LPELR-8137(SC). The preliminary objection meets the requirement of the law and is quite in order.

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The contention of the 1st respondent is that while this appeal was pending, and during the subsistence of the order of Rhodes Vivour J, the appellant without taking any steps to have the order discharged and under the cover of certain alleged judgments of other courts contemptuously flouted the order of Rhodes-Vivour J in respect of which it had appealed. Contempt proceedings were on against it for disobedience of the court order. Having taken laws into its hands, the way it did, what then is the essence of continuing this appeal? 1st respondent argued that it is mere academic exercise and an abuse of the process for the court to continue to hear the appeal.

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In the case of *Agbakoba v. INEC* (2008) 18 NWLP (Pt. 1119) 489 @ 546 - 547 D-G the Supreme Court held that:

"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 in an appeal has become defunct it does not require to be answered or controvert about and leads to making of bare legal postulations which the court should not indulge in....."

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I do not think this appeal is hypothetical in the sense that it raises a mere academic point because whether the lower court had the jurisdiction to make the order or not is still a live issue. I do not however intend to go into the history of the various proceedings in the various courts which the appellant claimed restored him into possession and thereby enabled him retake possession without breaching the



subsisting orders of Rhodes Vivour J. Suffice it to say that even if the claims of the appellant were true (which is not the case) it should not have flouted the court order. An order of a court whether right or wrong must be obeyed unless set aside. The judgment and order he relied on did not empower him to flout the orders. The appellant should have proceeded to court to have the order discharged. It did not do so. Rather it flagrantly disobeyed the order and re-took possession of the premises. How then can the order be subsisting as argued by the appellant to justify the continuation of this appeal? It is disrespectful on this court for the appellant to have brought an appeal before us and while the appeal was pending to have gone ahead to take laws into its hands and to flout the order he was appealing against. It is an abuse of the process of this court and this court ought to deny it any further hearing.

In the case of *Abeke v. Odunsi* (2013) LPELR-20640 (SC) the Supreme Court *per* Ariwoola JSC on whether a party who is in contempt of court can be heard observed:

“...generally, the common law principle which precludes persons in disobedience of the order of the court from being heard in respect of matters in which they stand in disobedience has been settled. In Hadkinson v. Hadkinson (1952) 2 All ER 567 at 573: Denning L.J opined thus:

‘I need hardly say that it is very rare for this court to refuse to hear counsel for an appellant. No matter how badly a litigant has behaved, nevertheless, generally speaking, if he has a right of appeal, he has a right to be heard, for the simple reason that, if he is not heard, his right of appeal is valueless....the fact that a party to a cause has disobeyed an order of the court is not itself a bar to his being heard, but if his disobedience is such that, so long as it continues, it impedes the cause of justice in the cause, by making it more difficult for the court to ascertain the truth or to enforce the orders which it may make, then the court may in its discretion refuse to hear him until the impediment is removed or good reason is shown why it should not be removed.

*There are however a few exceptions to the general rule. The principle does not apply to applications by an alleged contemnor challenging the order on the ground of lack of jurisdiction by the court. There is a clear distinction between the right to be heard in defence of the order made and the right to enforce yet an order whilst in disobedience. The right to be heard is clearly different from the right to enforce a right whilst still in disobedience. See *First African Trust Bank Limited & Anor v. Basil Ezegbu & Anor* (1992) NWLR (Pt. 264) 132, (1993) 6 SCNJ 122 (1992) LPELR 1278.”*

The relief sought by the appellant in this appeal is an order setting aside the order



of Rhodes Vivour J in suit no LD/3652/99 on the ground *inter alia* of lack of jurisdiction to make the order. The order was that “No party shall levy execution on the premises in furtherance of suit No LD/2220/99 pending the hearing and determination of this case...” The appellant disobeyed the order and went and levied execution on the premises. There is nothing left for this court to set aside. It is indeed surprising that the appellant did not on his own discontinue the appeal. Did it expect this court to put a stamp of approval on its total disregard, disdain and disrespect of the court and due administration of justice? This court has the discretion to refuse to hear the appellant while in disobedience of the order of Rhodes-Vivour J. In the exercise of that discretion, this appeal is hereby struck out with ₦50,000.00 in favour of the 1st, 3rd and 4th respondents.

BAGE, JCA: Having read in draft the lead Judgment just delivered by my learned brother CHINWE EUGENIA IYIZOBA, JCA.

I agree with the reasoning and conclusion reached therein and have nothing extra to add.

In conclusion, I too join my learned brother in holding that, the court has a discretion to refuse to hear the appellant while in disobedience of the order of Rhodes-Vivour J. In the exercise of that discretion, this Appeal is also hereby struck out with ₦50,000.00 in favour of the 1st, 3rd and 4th respondents.

OBASEKI-ADEJUMO, JCA: I had the privilege of reading in draft the judgment just delivered by my learned brother, CHINWE EUGENIA IYIZOBA, JCA and I agree with him that this appeal lacks merit and should be struck out. The lead judgment adequately covered the law as applicable and dealt with extensively with the issue at stake in this appeal.

I do not have anything different to add except to reiterate the point he made on the action of the appellant *vis-a-vis* the order of the trial court.

It is contempt of court to refuse to do an act required by a judgment or order of court within the time specified therein or to disobey a judgment or an order restraining a person from doing a specified act.

The dignity and honour of the court cannot be maintained if its orders are treated disdainfully and scornfully without due respect. See *Oko-Osi v. Akindele* (2013) LPELR - 20353 (CA); *Abbass v. Solomon* (2001) 15 NWLR (Pt 735) 144.

In the instant case, the appellant clearly disobeyed the order of Bode Rhodes-Vivour J. made on 26th of 25 February 2003 that “**no party shall levy execution on the premises in furtherance of suit No LD/2220/99 pending the hearing and determination of this case which is going from day to day**”. The act of the appellant is undoubtedly unconscionable.



Was the appellant expecting this court to validate an otherwise invalid act of disrespecting and disobeying the preservative order of the trial court? I think not.

- 5 For the above reason and those expressed in by my learned brother in the lead judgment, I too strike out the appeal and abide by the consequential orders made in the lead judgment.

Cases cited in the judgment

- 10 *Abbass v. Solomon* (2001) 15 NWLR (Pt 735) 144
Abeke v. Odunsi (2013) LPELR 20640(SC)
Agbakoba v. INEC (2008) 18 NWLP (Pt. 1119) 489
Akinyemi v. Soyawo (2006) 13 NWLR (Pt. 998) 496
Brawal Shipping (Nig.) Ltd v. Aphrodite Ltd (2004) 9 NWLR (Pt. 879) 462
Contract Resource Nigeria Ltd & Anor v. UBA Plc (2011) 5 CLRN 16
15 *First African Trust Bank Limited & Anor v. Basil Ezegbu & Anor* (1992) NWLR (Pt. 264) 132, (1993) 6 SCNJ 122 (1992) LPELR 1278
Globestar Eng. (Nig.) Ltd v. Malle Holdings Ltd (1999) 10 NWLR (Pt. 622) 270
Mamman v. Salaudeen (2005) 18 NWLR (Pt. 958) 478
Ogbonna v. President Federal Republic of Nigeria (1997) 5 NWLR (Pt. 504) 281
20 *Oko-Osi v. Akindele* (2013) LPELR - 20353 (CA)
Pavex International Co (Nig) Ltd v. Afribank (2004) SC (Pt 11) 196
Ume v. Nigeria Renowned Trading Co. Ltd (1991) 8 NWLR (Pt. 516) 344
Umeh v. Iwu (2008) 8 NWLR (Pt 1089) 225

25 **Foreign Case cited in the judgment**

Hadkinson v. Hadkinson (1952) 2 All ER 567

Rules of Court referred to in the judgment

Order 10 Court of Appeal Rules 2011

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History:

HIGH COURT

High Court of Lagos State

- 35 *Bode Rhodes-Vivour, J*

COURT OF APPEAL (Lagos Division)

Sidi Dauda Bage, JCA (*Presided*)

Chinwe Eugenia Iyizoba, JCA

- 40 Abimbola Osarugue Obaseki-Adejumo, JCA (*Read the lead Judgment*)

Counsel:

Shola Lamid for the appellant.

Anthony Ezenduka for the 2nd respondent.

- 45 E.T. Olatunji (Mrs.) for the 4th and 5th respondents.



MR. EMMANUEL MADUIKE v. TETELIS NIGERIA LIMITED

COURT OF APPEAL
(LAGOS DIVISION)

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CA/L/339/10
MONDAY 2ND FEBRUARY, 2015

(BAGE; OBASEKI-ADEJUMO; TUKUR, JJ.CA)

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COMMERCIAL LITIGATION – Summary Judgment – is a means of expeditiously disposing of uncontested cases.

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COMMERCIAL LITIGATION – Summary Judgment – Failure to comply with requisite provisions will eliminate the categorization of a judgment as summary.

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COMMERCIAL LITIGATION – Summary Judgment – There are requirements to be fulfilled by the claimant, defendant and judge.

COMMERCIAL LITIGATION – Summary Judgment – is a judgment on the merit which cannot be set aside by the court that awarded it.

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COMMERCIAL LITIGATION – Judgment – Summary judgment can be set aside on appeal while default judgment can be set aside by the same court.

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COMMERCIAL LITIGATION – Default Judgment – is one obtained on the basis of an omission on the part of the defendant.

COMMERCIAL LITIGATION – Default Judgment – is a final judgment that may be set aside on grounds of fraud, non-service or lack of jurisdiction.

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COMMERCIAL LITIGATION – Default Judgment – Appeal against default judgment must be filed within three months.

COMMERCIAL LITIGATION – Reply Brief – must be restricted to answering new issues raised in respondent’s brief.

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COMMERCIAL LITIGATION – Rebuttal – failure to react to an issue is deemed as concession.

APPEAL – Grounds of Appeal – must flow from the decision appealed against.

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APPEAL – Leave – Appeal will be struck out where appellant fails to obtain leave if leave is required.

**Facts:**

The respondent commenced an action against the appellant for the recovery of possession of the respondent's premises which the appellant held as yearly tenant.

5 The appellant failed to file his statement of defence within the time stipulated by the High Court of Lagos State (Civil Procedure) Rules 2004. Subsequently, the appellant filed an application to regularize his statement of defence. This application was however struck out for want of diligent prosecution.

10 The respondent then filed an application for summary judgment which was granted. The appellant subsequently filed an application to set aside the judgment. This application was dismissed.

15 Dissatisfied with the judgment and ruling of the High Court, the appellant appealed to the Court of Appeal. At the Court of Appeal, the respondent filed a preliminary objection challenging the validity of the notice of appeal.

Held (unanimously striking out the appeal):

20 **[1] Commercial Litigation – Reply Brief – must be restricted to answering new issues raised in respondent's brief.**

25 A careful perusal of the appellant's reply brief reveals that the appellant failed to either address or answer the points raised by the respondent in its brief as it relates to the preliminary objection. Rather the appellant embarked on a futile voyage of readdressing issues that he had already addressed in his brief of argument. The law is settled that arguments to be proffered in a reply brief must be limited to answering new issues arising from the respondent's brief not an avenue for an appellant to have another bite at the cherry by extending the scope of his brief of argument. Commenting on the purpose of reply brief, *Per EJIWUNMI JSC in Ikine & Ors v. Edjerode & Ors*(2001) LPELR - 1479 (SC) 13 - 14 paras D - A, stated thus:

35 **“.....it is pertinent to observe that the right of the appellants to file a reply brief is not to be used as a second opportunity to re-argue the argument already proffered for the appellants in the appellants brief. My understanding of a reply brief is for the learned counsel for the appellants to present argument in answer to that of the respondents, and which had not been addressed in the appellants' brief. It is, in my view an unwarranted waste of time of the Court for counsel to represent argument which had already been set down in the appellants' brief.... A reply brief should be strictly limited to finding answers to questions raised in the**

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respondents' brief, and which the appellants had not addressed or dealt with in the appellants' brief"

5 Similar view was re-echoed by the same court, *PER ADEKEYE* JSC in *Longe v. First Bank of Nigeria* (2010) 6 NWLR (Pt.1189) 1 SC.
(P. 79 lines 32 - 45; P. 80 lines 1 - 12)

10 **[2] Commercial Litigation – Rebuttal – failure to react to an issue is deemed as concession.**

Thankfully as noted by the appellant himself in his reply brief that failure in law to rebut or join the argument raised by a party in a proceeding amounts to an admission of the issue raised by the other. Counsel cited *Uboaja v. Akintoye-Sowewimo* (2008) 16 NWLR (Pt.1113) 278 at 291 292 H-A, where the court opined:

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20 **"... it is settled law that where a party fails or neglects to react to an issue in contention between the parties, the party in default is deemed to have conceded the point/issue to his opponent".** (P. 80 lines 14 - 21)

25 **[3] Commercial Litigation – Summary Judgment – is a means of expeditiously disposing of uncontested cases.**

Now, a summary judgment is a procedure for disposing with dispatch, cases which are virtually uncontested. By nature, it is one given in favour of a plaintiff without a plenary trial of the action. Evidently, there is a bypass of the regular procedure of the trial court relating the trial of a matter.

30 The procedure ensures the preclusion of frivolous defences for purpose of mere delay. Primarily, the court takes into consideration the pleadings, the motions and where necessary, additional evidence adduced by parties to determine whether or not there is a genuine issue of material fact, rather than one of law. (P. 80 lines 36 - 44)

35 **[4] Summary Judgment – Failure to comply with requisite provisions will eliminate the categorization of a judgment as summary.**

40 The above provisions clearly states what must be fulfilled before a summary judgment will be entered in favour of a party. Failure to comply with any of the provision will render the judgment so entered to be a judgment other than summary judgment. (P. 82 lines 18 - 20)

45 **[5] Commercial Litigation – Summary Judgment – There are requirements**



to be fulfilled by the claimant, defendant and judge.

5 What then is the duty of the Court, the Plaintiff and the defendant under the summary judgment procedure pursuant to Order 11? In this respect, I call in aid the opinion of my learned brother, *per* Augie JCA in *Emerald Garland Beverages Ltd & Anor v. Maduechesi* (2010) LPELR - 4104 at 18-21, when he stated:

10 "Nonetheless, there are conditions to be fulfilled and procedures to be followed by the Plaintiff, the defendant and the Judge. The plaintiff must -

- 15 a) **Believe that there is no defence to his claim;**
- b) **File his statement of claim, the exhibits, the depositions of his witnesses along with his originating process;**
- c) **File an application for summary judgment;**
- 20 d) **Support the application with an Affidavit; and**
- e) **File a written address in respect thereof**

25 **Where a defendant intends to defend the suit, he must file -**

- 30 a) **His statement of defence;**
- b) **Depositions of his witness;**
- c) **Exhibits to be used in his defence; and**
- d) **A written address in reply to the application for summary judgment.**

35 **Where it appears to a Judge that -**

- 40 a) **A defendant has a good defence, he may be granted leave to defend;**
- b) **The defendant has no good defence, judgment may be entered for the plaintiff;**
- 45 c) **The defendant has a good defence to part of the claim, he may be granted leave to defend that part**



of the claim;

- 5
- d) The defendant had no defence to other parts of the claim, judgment may be entered in favour of the plaintiff for that part of the claim;
- e) Any of several defendants has a good defence, he may be permitted to defend; and
- 10
- f) Any of the several defendants has good defence, the Judge shall enter judgment against him.”
(P. 82 lines 21 - 44; P. 83 lines 1 - 28)

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[6] Commercial Litigation – Default Judgment – is one obtained on the basis of an omission on the part of the defendant.

The position of the law leaves no one in doubt on the point that there is a clear distinction between a summary judgment and a default judgment. I shall adopt the definition of “default judgment” as espoused in *U.T.C (Nig.) Ltd v. Pamotei* (1989) 2 NWLR (Pt.103) 244 at 282 - 283, wherein the Supreme Court, *per* Karibi-Whyte JSC said:

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“The word default qualifies the noun ‘judgment’ as used in this appeal seems to me to mean a judgment obtained by a plaintiff in reliance on some omission on the part of the defendant in respect of something which he is directed to do by the rules. The word is used very widely to signify situations where a person has omitted to do what he is required to do having regard to the law governing his actions to the relations he occupies. In ordinary parlance, it means not doing what is reasonable in the circumstances”

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(P. 83 lines 30 - 43)

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[7] Commercial Litigation – Summary Judgment – is a judgment on the merit which cannot be set aside by the court that awarded it.

Distinguishing between a summary judgment and a default judgment, this court, *per* Augie JCA in *Nasco Town Plc & Anor v. Nwabueze* (2014) LPELR - 22526 at 19 - 20 said:

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“Firstly, a summary Judgment is not the same as a default judgment, which is a judgment rendered in consequence of the non-appearance of the defendant. A Default judgment is entered upon the failure of a party to appear or plead at the appointed time - See *Akinriboya v Akinsole* (1998) 3



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NWLR (Pt. 540) 101. Such judgment, based solely on default of pleadings or non-compliance with the rules of procedure, is not one on the merits and can, on good grounds being shown, be set aside by the Court on application by the defendant - See *Adeloye v. Olona Motors (Nig.) Ltd* (2002) 8 NWLR (Pt.769) 445 and *Malgwi v. Gadazama* (2000) 11 NWLR (Pt. 678) 258”

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He further stated:

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“A summary judgment is one given in favour of a plaintiff without a plenary trial of the action. Although not preceded by a trial, a summary judgment is one on the merits. As Nwadialo explained in *Civil Procedure in Nigeria: 2nd Ed.*, this is because a summary Judgment is based on want of defence to the plaintiff’s claim by the defendant, a full trial of the action cannot alter the situation. A summary judgment, therefore, unlike a default judgment, cannot be set aside by the Court that granted it or any Court. It is only on appeal.”

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In this case, it is apparent that while the provision Order 11 (1) of the rules was complied with by the plaintiff, nothing on record indicates that Order 11 (4) was complied. In fact, an attempt by the appellant/ defendant to regularize his process was struck out by the trial court for want of diligent prosecution before judgment was entered in favour of the claimant pursuant to an application for summary judgment. It seems to me that in the circumstance of this case, the judgment of 22nd May 2008 can best be regarded as a default judgment given in default of pleadings notwithstanding that it was made pursuant to the claimant’s application for summary judgment. A summary judgment is a judgment on the merits based on legal rights from mere matters of procedure. It is not a judgment based on some procedural error as in failure to enter appearance by a party or file necessary pleadings. The trial court seemed to have been under the misapprehension that the judgment is a summary judgment. Even counsel for both the appellant and the respondent argued under the same misconception. (P. 84 lines 3 - 44)

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[8] *Commercial Litigation – Judgment – Summary judgment can be set aside on appeal while default judgment can be set aside by the same court.*

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Moreso, if as counsel and the court put it, though wrongly, then the trial court upon entering the summary judgment is to appeal same and not to file an application to have it set aside by the court as it was done in this



case. By the tenor of the rules, the trial court will only be competent to set aside a judgment given in default and in this case, such judgment can only be set aside under Order 20 (12) of the rules - on ground of fraud, non-service or lack of jurisdiction. (P. 84 lines 44 - 45; P. 85 lines 1 - 5)

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[9] ***Commercial Litigation – Default Judgment – is a final judgment that may be set aside on grounds of fraud, non-service or lack of jurisdiction.***

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Having settled the issue on the nature of the judgment of 22nd may 2008, it is apparent that from the wordings of Order 20 (12) of the High Court of Lagos State (Civil Procedure) Rules, 2004, subject to the power of the court to set aside a default judgment on grounds of fraud, non-service or lack of jurisdiction, such judgment is deemed to be a final judgment.

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(P. 85 lines 7 - 11)

[10] ***Commercial Litigation – Default Judgment – Appeal against default judgment must be filed within three months.***

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Any appeal against such judgment must be brought within three (3) months after the judgment. See Section 24 of the Court of Appeal Act, 2011. Here, the appellant did not appeal against the judgment but filed an application to have same set aside, which was dismissed by the trial court on 30th October 2009. Appellant's notice of Appeal is dated 3rd November 2009 wherein the appellant stated that he is dissatisfied with the judgment of the Trial Court dated 22nd May 2008 as well as the ruling on the application to set aside dated 30th October 2009.

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(P. 85 lines 11 - 18)

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[11] ***Appeal – Grounds of Appeal – must flow from the decision appealed against.***

A careful perusal of the sole ground of appeal therein reveals that the appellant is in fact appealing against the judgment only and not the ruling.

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...As respondent's counsel rightly noted, the law is settled and well defined that ground or grounds of appeal must flow from the judgment appealed against. In *Olonade & Anor v. Sowemimo* (2014) LPELR - 22914 (SC), it was stated that:

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“It is settled principle of law that a ground of appeal must arise, flow from or relate to the judgment of the court appealed from. Any complaint that does not flow from the decision appealed against cannot legitimately be entertained... In *Atoyebi v. Gov. of Oyo State* (1994) 5 NWLR

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(Pt 344) 296 at 305, this Court restated the principle on the point thus: An appeal presupposes the existence of some decision which is appealed against on a given point. Where therefore, there is no complaint in respect of a decision that has arisen from a judgment appealed against, such a decision may not form the basis of an appeal for determination by the appellate court. The appellate jurisdiction of this court *inter-alia* is to review the decision and/or judgments of (the lower Court)...”

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See also *MTN Nigeria Communications Limited v. Abubakar & Anor* (2014) LPELR - 22783 (CA); *Egesi & Ors v. PDP & Ors* (2014) LPELR - 22487 (CA).

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It is evident from the above position of the law and the appellant’s ground of appeal reproduced above that it is the default judgment of the court of 22nd May 2008 that is being appealed against. One cannot but wonder why the appellant included the ruling of 30th October 2009 as the decision he seeks to appeal against. Perhaps the only explanation will be that having being out of time to appeal against the default judgment and not wanting to seek leave of court to appeal same, the appellant sought a backdoor with the inclusion of the ruling as part of the decisions appealed against so as to create an impression that he was still within time to appeal. The fact that the appellant stated in the Particulars of error that the dismissal of his application to set aside the ‘summary judgment’ was “*in total violation of (his) right to fair hearing in accordance with section 36 of the constitution of the Federal Republic of Nigeria and the principle that a litigant cannot suffer for the sins of his counsel*” - See Page 42 of record - does not in any way help the appellant’s case. I need not remind the appellant that ground of appeal is distinct from the particulars of errors alleged. In *Osasona v. Oba Adetoyinbo* (2004) LPELR - 2790 (SC) at 14 - 15, the court *per* Uwaifo JSC opined thus:

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“Now, it should be realized that particulars of the error alleged in a ground of appeal are intended to highlight the complaint against the judgment on appeal. They are the specification of the error or misdirection in order to make clear how the complaint is going to be canvassed in an attempt to demonstrate the flaw in a relevant aspect of the judgment. Particulars are not to be made independent of the complaint in a ground of appeal but ancillary to it. See *Global Fishing Industries Ltd v. Coker* (1990) 7 NWLR (Pt.162) 265 at 300...” [Underline mine]
(P. 85 lines 18 - 19; 31 - 45; P. 86 lines 1 - 31)

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[12] Appeal – Leave – Appeal will be struck out where appellant fails to obtain leave if leave is required.

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From the foregoing, it is clear that nothing on record indicates an appeal against the ruling of the court of 30th October 2009 and since the appellant failed to obtain the leave of the court before filing the notice of appeal against the judgment of the trial court dated 22nd May 2008, this appeal is incompetent and is hereby struck out. (P. 86 lines 33 - 37)

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Obiter:

[13] Court – Conduct of Litigants – Parties and counsel owe the court a duty of respect.

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However, I must not fail to comment on the attitude and conduct of the appellant's counsel in this case. It is a known fact that the appellant's motion for extension of time to file his statement of defence and accompanying processes was struck out for want of diligent prosecution and from the ruling of the trial court refusing the application to set aside the default judgment, the trial court noted that appellant did not make any attempt to even tender the processes with the motion to set aside. In this regard, the words of this court, *per* Pemu JCA in *LASACO v. Deserve Savings & Loans Ltd* (2012) 2 NWLR (Pt.1283) 95 at 114 which I adopt as mine. My learned brother reiterated:

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“It is no gainsaying that counsel owes the court the duty of respect to attend court on dates on which, to his knowledge, a case in which he acts as counsel is set down for hearing. The Rules of Court and Professional Ethics of the Legal Profession require that if for any cogent reason, counsel and his client are unable to appear or to proceed with a trial on a date the suit is fixed for trial, counsel has a duty, to notify the Registrar of the Court, and the opponent party in reasonable time before that date of his inability. *Adeyemi v. Lan & Baker (Nig.) Ltd* (2007) 7 NWLR (Pt.663) 33 at 35.”

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There is no doubt that the trial court after appraising the affidavit evidence before him rightly exercised his discretion to refuse the application to set aside the default judgment. The trial court rightly observed and considered that the appellant's conduct and that of his counsel is not worthy of any humane or sympathetic consideration. (P.86 lines 39-45;P.87 lines 1-18)

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OBASEKI-ADEJUMO, JCA (Delivering the lead Judgment): This is an appeal against the judgment of Honourable Justice A. A. Phillips of the Lagos State High Court delivered on 22nd May 2008 entering final judgment in favour of the respondent/



claimant.

5 The facts of this case seem straightforward. The claimant had commenced an action against the defendant before the lower Court by a writ of summons and statement of claim dated 17th of April 2007 for the recovery of possession of the respondent's premises which the appellant hold of as yearly tenant from March 1998. The appellant failed to file his statement of defence within the time stipulated by the High Court of Lagos State (Civil Procedure) Rules 2004. Subsequently, the appellant filed an application to regularize his statement of defence which was struck out by the lower Court on 22nd May 2008 for want of diligent prosecution. Judgment was entered pursuant to an application for summary judgment filed by the respondent/claimant's counsel. The appellant's application to set aside the judgment was dismissed by the lower Court.

15 Being dissatisfied with the judgment and ruling of the lower Court, the appellant filed an appeal vide a notice of appeal dated 3/11/2009 seeking for an order allowing the appeal, setting aside the judgment of the trial court and ordering a retrial of the matter. Appellant raised just one ground of appeal.

20 In compliance with the rules of court, appellant filed his brief of argument dated and filed on 8/04/2013 and a reply brief dated 14/05/2013 and filed on 16/05/2013. Appellant's brief was settled by Olanlokun Omolodun. The Amended respondent's brief which was settled by Chief Anthony I. Idigbe SAN and Nnamdi Oragwu is dated and filed on 19/02/2014.

25 Appellant's sole issue as raised in his brief is as follows:

Whether the lower Court was right in entering summary judgment against the defendant when crucial proof of the claim was lacking.

30 In the respondent's brief, one issue was also identified for determination of the appeal. But as they are similar to those set out above from the appellant's brief, I do not need to have them reproduced here. However, the respondent in its brief raised a preliminary objection as to the competence of the notice of appeal.

35 It is therefore appropriate that I address the preliminary objection before considering the issues raised by the parties.

40 Respondent's counsel argued that the time stipulated for the filing of an appeal against the decision of a lower Court to the Court of Appeal in respect of final judgment is three months and in respect of ruling the stipulated time is 14 days. Counsel referred to Rule 24 of the Court of Appeal Rules 2004 and the case of *Ifelodun Local Govt v. Bello* (2012) 4 NWLR (Pt.1289) 17 at 21.

45 Counsel submitted that in the instant appeal, the appellant did not bring the appeal



within the time stipulated by law. Counsel noted that it is evident from the grounds of appeal that the appeal in this case is against the judgment of the court delivered on 22nd May 2008 but the notice of appeal was filed on 6th November 2009. He further submitted that the appeal is incompetent and urged the court to dismiss same. Counsel cited *Nwoko v. Azekwo* (2012) 12 NWLR (Pt.1313) 151 at 156.

Counsel further submitted that the appellant in the notice of appeal included the ruling of 30th October 2009 as part of the decision appealed against in order to bring it within the stipulated time to appeal but that the ground of appeal exhibited therein does not cover that ruling of the lower court. Counsel contended that a ground of appeal must be against the decision which the appellant is appealing against and not against any other judgment. On this position, counsel placed reliance on *Adebiyi v. Umar* (2012) 9 NWLR (Pt.1305) 279 at 286. Respondent's counsel submitted that since there is no ground of appeal covering the decision of the lower Court aside the summary judgment entered by the lower Court, it is deemed that the appellant has abandoned it and does not intend to appeal against the decision of the lower Court dismissing the motion to set aside the summary judgment.

It is also the contention of the respondent's counsel that the appellant did not seek the leave of the court to bring this appeal within the stipulated time. Counsel submitted that the court cannot therefore exercise any discretion in this matter because the appellant has not done what the law stipulates. Counsel argued that the position of the law is that when the time, within which to bring an appeal has effluxed, the appellant shall bring a motion for the enlargement of time to the higher court for an extension of time within which to bring such appeal. Counsel cited *NDIC v. Globus Ent. Ltd* (2011) 3 NWLR (Pt.1233) 74 at 78 to submit that in the instant case the appellant did not seek an order of the court for leave to enlarge time within which to file the appeal and urge the court to strike out the appeal for being incompetent.

A careful perusal of the appellant's reply brief reveals that the appellant failed to either address or answer the points raised by the respondent in its brief as it relates to the preliminary objection. Rather the appellant embarked on a futile voyage of readdressing issues that he had already addressed in his brief of argument. The law is settled that arguments to be proffered in a reply brief must be limited to answering new issues arising from the respondent's brief not an avenue for an appellant to have another bite at the cherry by extending the scope of his brief of argument. Commenting on the purpose of reply brief, *Per* Ejiwunmi JSC in *Ikine & Ors v. Edjerode & Ors* (2001) LPELR - 1479 (SC) 13 - 14 paras D - A, stated thus:

“.....it is pertinent to observe that the right of the appellants to file a reply brief is not to be used as a second opportunity to re-argue the argument already proffered for the appellants in the appellants



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brief. My understanding of a reply brief is for the learned counsel for the appellants to present argument in answer to that of the respondents, and which had not been addressed in the appellants' brief. It is, in my view an unwarranted waste of time of the Court for counsel to represent argument which had already been set down in the appellants' brief.... A reply brief should be strictly limited to finding answers to questions raised in the respondents' brief, and which the appellants had not addressed or dealt with in the appellants' brief"

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Similar view was re-echoed by the same court, *per* Adekeye JSC in *Longe v. First Bank of Nigeria* (2010) 6 NWLR (Pt. 1189) 1 SC.

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Thankfully as noted by the appellant himself in his reply brief that failure in law to rebut or join the argument raised by a party in a proceeding amounts to an admission of the issue raised by the other. Counsel cited *Uboaja v. Akintoye-Sowewimo* (2008) 16 NWLR (Pt. 1113) 278 at 291 292 H-A, where the court opined:

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"... it is settled law that where a party fails or neglects to react to an issue in contention between the parties, the party in default is deemed to have conceded the point/issue to his opponent"

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At this juncture, it is important to consider the nature of the proceeding and application before the lower Court that led to this appeal. This is vital for better appreciation of the issues at hand and effective resolution of the preliminary objection. It is common ground that the appellant/defendant failed to file his defence within time and his application to regularize his originating processes was struck out for want of diligent prosecution on 22nd May 2008. It is also undisputed that respondent/claimant filed an application for summary judgment dated 17th April 2007 whereupon the lower Court gave judgment in its favour on 22nd May 2008. It is also evident that the appellant/defendant's application to set aside the judgment was dismissed by the ruling of the court dated 30th October 2009. The indispensable question is thus: what is the nature of the judgment of 22nd May 2008? Is it a summary judgment or a default judgment?

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Now, a summary judgment is a procedure for disposing with dispatch, cases which are virtually uncontested. By nature, it is one given in favour of a plaintiff without a plenary trial of the action. Evidently, there is a bypass of the regular procedure of the trial court relating the trial of a matter.

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The procedure ensures the preclusion of frivolous defences for purpose of mere delay. Primarily, the court takes into consideration the pleadings, the motions and where necessary, additional evidence adduced by parties to determine whether or not there is a genuine issue of material fact, rather than one of law. See *Project Ninethen Limited & Anor v. Aziz/Stacons And Associates* (2014) LPELR 23736;

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Akpan v. Akwa Ibom Property Investment Company Ltd (2013) LPELR-20753; *UBA v. Alhaji Babangida Jargaba* (2007) 11 NWLR (Pt.1045) 247; *Beloxxi Industries Ltd & Anor v. HWA Tai Industries Berhaard Ltd* (2011) LPELR - 3867; *Okambah Ltd v. Alhaji Ganiyu A. Sule* (1990) 11 - 12 SC 47; *Thor Ltd v. FCMB Ltd* (2005) 14 NWLR (Pt.946) 696.

Order 11 of the High Court of Lagos State (Civil Procedure) Rules, 2004 deals with the procedure for summary judgment as it relate to the instant case. It provides:

- 10 **“11 (1) Where a claimant believes that there is no defence to his claim, he shall file with his originating process the statement of claim, the exhibits, the depositions of witness and an application for summary judgment which application shall be supported by an affidavit stating the grounds for his belief and a written brief in respect thereof**
- 15
- (2) A claimant shall deliver to the Registrar as many copies of all copies of all the processes and documents referred to in Rule 1 of this Order as there are defendants**
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- (3) Service of all the processes and documents referred to in Rule 1 of this Order shall be effected in the manner provided under Order 7**
- 25
- (4) Where a party served with the processes and documents referred to in Rule 1 of this Order intends to defend the suit he shall, not later than the time prescribed for defence, file**
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- 30 a) **His statement of defence;**
- b) **Depositions of his witnesses;**
- c) **The exhibits to be used in his defence; and**
- 35 d) **A written brief in reply to the application for summary judgment**
- (5)(1) Where it appears to a judge that a defendant has a good defence and ought to be permitted to defend the claim he may be granted leave to defend**
- 40
- (2) Where it appears to a judge that a defendant has no good defence, the judge may thereupon enter Judgment for a claimant**
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5 **(3) Where it appears to a judge that the judgment has a good defence to part of the claim but no defence to other parts of the claim, the judge may thereupon enter judgment for that part of the claim to which there is no defence and grant leave to defend that part to which there is a defence**

10 **(6) Where there are several defendants and it appears to a judge that any of the defendants has a good defence and ought to be permitted to defend the claim and other defendants have no good defence and ought not to be permitted to defend, the former may be permitted to defend and the judge shall enter judgment against the latter.**

15 **(7) Where provision is made for written briefs under these rules, each party shall be at liberty to advance before a Judge oral submission to expatiate his written brief”**

20 The above provisions clearly states what must be fulfilled before a summary judgment will be entered in favour of a party. Failure to comply with any of the provision will render the judgment so entered to be a judgment other than summary judgment. What then is the duty of the Court, the plaintiff and the defendant under the summary judgment procedure pursuant to Order 11? In this respect, I call in aid the opinion of my learned brother, *per* Augie JCA in *Emerald Garland Beverages Ltd & Anor v. Madubchesi* (2010) LPELR - 4104 at 18-21, when he stated:

25 “Nonetheless, there are conditions to be fulfilled and procedures to be followed by the plaintiff, the defendant and the Judge. The plaintiff must -

- 30 **a) Believe that there is no defence to his claim;**
- b) File his statement of claim, the exhibits’ the depositions of his witnesses along with his originating process;**
- 35 **c) File an application for summary judgment;**
- d) Support the application with an Affidavit; and**
- 40 **e) File a written address in respect thereof**

Where a defendant intends to defend the suit, he must file

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- 45 **a) His statement of defence;**



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- b) **Depositions of his witness;**
 - c) **Exhibits to be used in his defence; and**
 - d) **A written address in reply to the application for summary judgment.**

Where it appears to a Judge that -

- 10
- a) **A defendant has a good defence, he may be granted leave to defend;**
 - b) **The defendant has no good defence, judgment may be entered for the plaintiff;**
 - 15
 - c) **The defendant has a good defence to part of the claim, he may be granted leave to defend that part of the claim;**
 - 20
 - d) **The defendant had no defence to other parts of the claim, judgment may be entered in favour of the plaintiff for that part of the claim;**
 - 25
 - e) **Any of several defendants has a good defence, he may be permitted to defend; and**
 - f) **Any of the several defendants has good defence, the Judge shall enter judgment against him."**

30 The position of the law leaves no one in doubt on the point that there is a clear distinction between a summary judgment and a default judgment. I shall adopt the definition of "default judgment" as espoused in *U. T. C (Nig.) Ltd v. Pamotei* (1989) 2 NWLR (Pt.103) 244 at 282 - 283, wherein the Supreme Court, *per* Karibi-Whyte JSC said:

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"The word default qualifies the noun 'judgment' as used in this appeal seems to me to mean a judgment obtained by a plaintiff in reliance on some omission on the part of the defendant in respect of something which he is directed to do by the rules. The word is used very widely to signify situations where a person has omitted to do what he is required to do having regard to the law governing his actions to the relations he occupies. In ordinary parlance, it means not doing what is reasonable in the circumstances"

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45 See also *Bello v. INEC* (2010) 8 NWLR (Pt 1196) 342 SC; *Emezue & Ors v. Gov.*



of Delta State (2014) LPELR - 23201 (CA).

Distinguishing between a summary judgment and a default judgment, this court, per Augie JCA in *Nasco Town Plc & Anor v. Nwabueze* (2014) LPELR - 22526 at 5 19 - 20 said:

10 **“Firstly, a summary Judgment is not the same as a default judgment, which is a judgment rendered in consequence of the non-appearance of the defendant. A Default judgment is entered upon the failure of a party to appear or plead at the appointed time - See *Akinriboya v. Akinsole* (1998) 3 NWLR (Pt. 540) 101. Such judgment, based solely on default of pleadings or non-compliance with the rules of procedure, is not one on the merits and can, on good grounds being shown, be set aside by the Court on application by the defendant - See *Adeloye v. Olona Motors (Nig.) Ltd* (2002) 8 NWLR (Pt.769) 445 and *Malgwi v. Gadazama* (2000) 11 NWLR (Pt.678) 258”**

20 He further stated:

25 **“A summary judgment is one given in favour of a plaintiff without a plenary trial of the action. Although not preceded by a trial, a summary judgment is one on the merits. As Nwadialo explained in *Civil Procedure in Nigeria: 2nd Ed.*, this is because a summary Judgment is based on want of defence to the plaintiff’s claim by the defendant, a full trial of the action cannot alter the situation. A summary judgment, therefore, unlike a default judgment, cannot be set aside by the Court that granted it or any Court. It is only on appeal.”**

30 In this case, it is apparent that while the provision Order 11 (1) of the rules was complied with by the plaintiff, nothing on record indicates that Order 11 (4) was complied. In fact, an attempt by the appellant/ defendant to regularize his process was struck out by the trial court for want of diligent prosecution before judgment was entered in favour of the claimant pursuant to an application for summary judgment. It seems to me that in the circumstance of this case, the judgment of 22nd May 2008 can best be regarded as a default judgment given in default of pleadings notwithstanding that it was made pursuant to the claimant’s application for summary judgment. A summary judgment is a judgment on the merits based on legal rights from mere matters of procedure. It is not a judgment based on some procedural error as in failure to enter appearance by a party or file necessary pleadings. The trial court seemed to have been under the misapprehension that the judgment is a summary judgment. Even counsel for both the appellant and the respondent argued under the same misconception. Moreso, if as counsel and the court put it, though wrongly, then the trial court upon entering the summary judgment



is to appeal same and not to file an application to have it set aside by the court as it was done in this case. By the tenor of the rules, the trial court will only be competent to set aside a judgment given in default and in this case, such judgment can only be set aside under Order 20 (12) of the rules - on ground of fraud, non-service or lack of jurisdiction.

Having settled the issue on the nature of the judgment of 22nd May 2008, it is apparent that from the wordings of Order 20 (12) of the High Court of Lagos State (Civil Procedure) Rules, 2004, subject to the power of the court to set aside a default judgment on grounds of fraud, non-service or lack of jurisdiction, such judgment is deemed to be a final judgment. Any appeal against such judgment must be brought within three (3) months after the judgment. See Section 24 of the Court of Appeal Act, 2011. Here, the appellant did not appeal against the judgment but filed an application to have same set aside, which was dismissed by the trial court on 30th October 2009. Appellant's notice of Appeal is dated 3rd November 2009 wherein the appellant stated that he is dissatisfied with the judgment of the Trial Court dated 22nd May 2008 as well as the ruling on the application to set aside dated 30th October 2009. A careful perusal of the sole ground of appeal therein reveals that the appellant is in fact appealing against the judgment only and not the ruling.

The ground of appeal states:

“GROUND OF APPEAL:

Error in Law

The learned trial Judge erred in law when he went ahead to enter summary judgment for the respondent without giving opportunity to defendant/applicant to argue his defence and counter claim”

As respondent's counsel rightly noted, the law is settled and well defined that ground or grounds of appeal must flow from the judgment appealed against. In *Olonade & Anor v. Sowemimo* (2014) LPELR - 22914 (SC), it was stated that:

“It is settled principle of law that a ground of appeal must arise, flow from or relate to the judgment of the court appealed from. Any complaint that does not flow from the decision appealed against cannot legitimately be entertained... In *Atoyebi v. Gov. of Oyo State* (1994) 5 NWLR (Pt 344) 296 at 305, this Court restated the principle on the point thus: An appeal presupposes the existence of some decision which is appealed against on a given point. Where therefore, there is no complaint in respect of a decision that has arisen from a judgment appealed against, such a decision may not form the basis of an appeal for determination by the appellate court. The appellate jurisdiction of this court *inter-alia* is to review

**the decision and/or judgments of (the lower Court)...”**

See also *MTN Nigeria Communications Limited v. Abubakar & Anor* (2014) LPELR - 22783 (CA); *Egesi & Ors v. PDP & Ors* (2014) LPELR - 22487 (CA).

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It is evident from the above position of the law and the appellant's ground of appeal reproduced above that it is the default judgment of the court of 22nd May 2008 that is being appealed against. One cannot but wonder why the appellant included the ruling of 30th October 2009 as the decision he seeks to appeal against. Perhaps the only explanation will be that having being out of time to appeal against the default judgment and not wanting to seek leave of court to appeal same, the appellant sought a backdoor with the inclusion of the ruling as part of the decisions appealed against so as to create an impression that he was still within time to appeal. The fact that the appellant stated in the Particulars of error that the dismissal of his application to set aside the 'summary judgment' was "*in total violation of (his) right to fair hearing in accordance with section 36 of the constitution of the Federal Republic of Nigeria and the principle that a litigant cannot suffer for the sins of his counsel*" - See Page 42 of record - does not in any way help the appellant's case. I need not remind the appellant that ground of appeal is distinct from the particulars of errors alleged. In *Osasona v. Oba Adetoyinbo* (2004) LPELR - 2790 (SC) at 14 - 15, the court *per* Uwaifo JSC opined thus:

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“Now, it should be realized that particulars of the error alleged in a ground of appeal are intended to highlight the complaint against the judgment on appeal. They are the specification of the error or misdirection in order to make clear how the complaint is going to be canvassed in an attempt to demonstrate the flaw in a relevant aspect of the judgment. Particulars are not to be made independent of the complaint in a ground of appeal but ancillary to it: See *Global Fishing Industries Ltd v. Coker* (1990) 7 NWLR (Pt.162) 265 at 300...”
[Underline mine]

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From the foregoing, it is clear that nothing on record indicates an appeal against the ruling of the court of 30th October 2009 and since the appellant failed to obtain the leave of the court before filing the notice of appeal against the judgment of the trial court dated 22nd May 2008, this appeal is incompetent and is hereby struck out.

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However, I must not fail to comment on the attitude and conduct of the appellant's counsel in this case. It is a known fact that the appellant's motion for extension of time to file his statement of defence and accompanying processes was struck out for want of diligent prosecution and from the ruling of the trial court refusing the application to set aside the default judgment, the trial court noted that appellant did not make any attempt to even tender the processes with the motion to set aside. In this regard, the words of this court, *per* Pemu JCA in *LASACO v. Deserve*



Savings & Loans Ltd (2012) 2 NWLR (Pt.1283) 95 at 114 which I adopt as mine. My learned brother reiterated:

5 **“It is no gainsaying that counsel owes the court the duty of respect to attend court on dates on which, to his knowledge, a case in which he acts as counsel is set down for hearing. The Rules of Court and Professional Ethics of the Legal Profession require that if for any cogent reason, counsel and his client are unable to appear or to proceed with a trial on a date the suit is fixed for trial, counsel has a duty, to notify the Registrar of the Court, and the opponent party in reasonable time before that date of his inability. *Adeyemi v. Lan & Baker (Nig.) Ltd* (2007) 7 NWLR (Pt.663) 33 at 35.”**

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15 There is no doubt that the trial court after appraising the affidavit evidence before him rightly exercised his discretion to refuse the application to set aside the default judgment. The trial court rightly observed and considered that the appellant’s conduct and that of his counsel is not worthy of any humane or sympathetic consideration.

20 In conclusion, the respondent’s preliminary objection is upheld. Appeal is struck out. I award the cost of ₦50,000 in favour of the respondent.

25 **BAGE, JCA:** Having read in draft the lead Judgment just delivered by my learned brother, Abimbola Obaseki- Adejumo, JCA.

I agree with the reasoning and conclusion reached therein and have nothing extra to add. In conclusion, the respondent’s preliminary objection succeeds. I too award the cost of ₦50,000 in favour of the respondent.

30 **TUKUR, JCA:** I had the privilege of reading in draft the lead judgment just delivered by my brother Abimbola Obaseki-Adejumo JCA.

I agree with the reasoning and conclusion and I adopt same as mine.

35 I abide by the consequential orders made in the lead judgment.

Cases cited in the judgment

- Adebiyi v. Umar* (2012) 9 NWLR (Pt.1305) 279
Adeloye v. Olona Motors (Nig.) Ltd (2002) 8 NWLR (Pt.769) 445
40 *Adeyemi v. Lan & Baker (Nig.) Ltd* (2000) 7 NWLR (Pt.663) 33
Akinriboya v Akinsole (1998) 3 NWLR (Pt.540) 101
Akpan v. Akwa Ibom Property Investment Company Ltd (2013) LPELR-20753
Atoyebi v. Gov. of Oyo State (1994) 5 NWLR (Pt 344) 296
Bello v. INEC (2010) 8 NWLR (Pt 1196) 342 SC
45 *Beloxi Industries Ltd & Anor v. HWA Tai Industries Berhaard Ltd* (2011) LPELR - 3867



- Egesi & Ors v. PDP & Ors* (2014) LPELR - 22487 (CA)
Emerald Garland Beverages Ltd & Anor v. Maduechesi (2010) LPELR - 4104
Emezue & Ors v. Gov. of Delta State (2014) LPELR - 23201 (CA)
Global Fishing Industries Ltd v. Coker (1990) 7 NWLR (Pt.162) 265
5 *Ifelodun Local Govt v. Bello* (2012) 4 NWLR (Pt.1289) 17
Ikine & Ors v. Edjerode & Ors (2001) LPELR - 1479 (SC) 13
LASACO v. Deserve Savings & Loans Ltd (2012) 2 NWLR (Pt.1283) 95
Longe v. First Bank of Nigeria (2010) 6 NWLR (Pt.1189) 1 SC
Malgwi v. Gadazama (2000) 11 NWLR (Pt.678) 258
10 *MTN Nigeria Communications Limited v. Abubakar & Anor* (2014) LPELR - 22783 (CA)
Nasco Town Plc & Anor v. Nwabueze (2014) LPELR - 22526
NDIC v. Globus Ent. Ltd (2011) 3 NWLR (Pt.1233) 74
Nwoko v. Azekwo (2012) 12 NWLR (Pt.1313) 151
Okambah Ltd v. Alhaji Ganiyu A. Sule (1990) 11 - 12 SC 47
15 *Olonade & Anor v. Sowemimo* (2014) LPELR - 22914 (SC)
Osasona v. Oba Adetoyinbo (2004) LPELR - 2790 (SC) 14
Project Ninethen Limited & Anor v. Aziz/Stacons & Associates (2014) LPELR 23736
Thor Ltd v. FCMB Ltd (2005) 14 NWLR (Pt.946) 696; (2005) 7 CLRN 51
20 *U.T.C (Nig.) Ltd v. Pamotei* (1989) 2 NWLR (Pt.103) 244
UBA v. Alhaji Babangida Jargaba (2007) 11 NWLR (Pt. 1045) 247
Uboaja v. Akintoye-Sowewimo (2008) 16 NWLR (Pt.1113) 278

Statute cited in the judgment

- 25 Section 24 of the Court of Appeal Act, 2011

Rules of Court referred to in the judgment

- Order 11, Order 20 (12) of the High Court of Lagos State (Civil Procedure) Rules, 2004
30 Rule 24 of the Court of Appeal Rules 2004

History:**HIGH COURT**

- 35 High Court of Lagos State
A.A. Phillips, J

COURT OF APPEAL (Lagos Division)

- Sidi Dauda Bage, JCA (*Presided*)
40 Abimbola Osarugue Obaseki-Adejumo, JCA (*Read the lead Judgment*)
Jamilu Yammama Tukur, JCA

Counsel:

- Olanlokun Omolodun for the appellant.
45 O. B. Ehiwogwu for the respondent.



DR. ERASTUS AKINGBOLA v. FEDERAL REPUBLIC OF NIGERIA; BAYO DADA

COURT OF APPEAL
5 (LAGOS DIVISION)

CA/L/490/2014
WEDNESDAY 31ST DECEMBER, 2014

(AUGIE; OSEJI; OBASEKI-ADEJUMO, JJ.CA)

10

COMMERCIAL CRIME - Jurisdiction - Federal High Court has jurisdiction to entertain criminal matters arising from banking transactions.

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COMMERCIAL CRIME - Jurisdiction - State High Court cannot try a matter within the exclusive purview of the Federal High Court.

COMMERCIAL CRIME - Jurisdiction depends on the cause of action as disclosed by the information and proofs of evidence.

20

COMMERCIAL CRIME - Jurisdiction - Federal High Court has exclusive jurisdiction over criminal act involving control of capital issues.

COMMERCIAL CRIME - Proofs of Evidence - are summaries of witness statements.

25

COMMERCIAL CRIME - Proofs of Evidence - will be considered by court when its jurisdiction is in question.

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COMMERCIAL CRIME - Proofs of Evidence - are conditions precedent to filing information.

COMMERCIAL LITIGATION - Court - is duty bound to determine matters dispassionately on basis of the processes before it.

35

COMMERCIAL LITIGATION - Court - as an umpire is meant to do substantial justice.

COMMERCIAL LITIGATION - Justice - Failure by court to consider evidence proffered by a party is injustice.

40

APPEAL - Issues - Appellate court will not determine an issue not placed before the lower court.

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COMMERCIAL LITIGATION - Stare Decisis - Lower court must follow decisions of superior court.

**Facts:**

The Central Bank of Nigeria removed the appellant as MD/CEO of Intercontinental Bank Plc.

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Subsequently, criminal charges were brought against him at the State and Federal High Courts. The appellant filed several appeals in respect of these charges.

The present appeal is against the ruling of the Lagos State High Court by which that court assumed jurisdiction over an information filed against the appellant which contained 26 Counts with 18 of them alleging offences of conversion and stealing of various sums of monies belonging to Intercontinental Bank Plc. The appellant had challenged the jurisdiction of the high court citing *inter alia*, abuse of process due to the criminal proceedings already proffered against him at the Federal High Court.

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15

The trial court dismissed the application, holding that it had jurisdiction. Dissatisfied, the appellant appealed to the Court of Appeal.

20 **Held (*unanimously allowing the appeal*):**

[1] *Commercial Litigation – Court – is duty bound to determine matters dispassionately on basis of the processes before it.*

25

A trial Court owes a duty to itself and the parties before it to decide any conflict between them on the basis of the case put before it by them.

When it fails in this duty, the Court has merely decided half the case and not the whole case - see *Olufosoye v. Olorunfemi* (1989) SC (Pt. 1) 29.

30

In this case, the lower Court was not in the position to point fingers because in presuming that the appellant withheld evidence that was right there before it, the lower Court failed in its duty as an unbiased umpire.

35

In its traditional role as an umpire, it has a duty to examine the processes filed by the parties in a matter before it thoroughly and dispassionately, and more importantly, it is expected to balance their competing interests with the utmost sense of responsibility - see *NNPC v. Famfa Oil & Anor* (2009) SC 5 - 6 (Pt. 1) 191. See also *Okoduwa v. State* (1988) 2 NWLR (Pt. 76) 333 at 354, where Nnaemeka-Agu, JSC, observed as follows –

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“There are certain fundamental norms in the system of administration of justice we operate. That system is the adversary system, in contradistinction to the inquisitorial system. In that adversary system, parties with their counsel and the Judge have

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their respective roles to play. Basically, it is the role of the Judge to hold the balance between the contending parties and to decide the case on the evidence brought by both sides and in accordance with the rules of the particular Court and the procedure and practice chosen by the parties in accordance with those rules. Under no circumstances must a Judge under the system do anything, which can give the impression that he has descended into the arena as, obviously, his sense of justice will be obscured”

(P. 103 lines 36 - 44; P. 104 lines 1 - 18)

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[2] Commercial Litigation – Court – as an umpire is meant to do substantial justice.

15

In other words, the duty of the Court as an umpire is to do substantial justice to the parties in the matter before it, and the Parties are entitled to the same level playing ground in our adjudicative system of justice - see *Amasike v. Reg. General*, CAC (2010) 13 NWLR (Pt. 1211) 307 SC, and *Willoughby v. IMB* (1987) 1 SC 137, where Oputa, JSC, very aptly said –

20

“I think it is too late in the day to argue that the Court’s primary function is to do justice between the parties to a dispute. One sided justice will amount to injustice. Now Courts do not administer abstract justice or a “brooding omnipotence in the sky”. The law is made to ensure justice. Rules of Court are handmaids of justice. It is only by the orderly administration of law and obedience to the Rules that legal justice can be attained. When a particular decision is against all known rules; against all known principles then it is, certainly not made in the interest of justice”.

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(P. 104 lines 20 - 33)

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[3] Commercial Litigation – Justice – Failure by court to consider evidence proffered by a party is injustice.

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Very apt, and so simply stated - one sided justice will amount to injustice.

40

One-sided means “*unfairly weighted - dominated by or favouring one side in a competition; bigger on one side: and being on one side* - see Encarta Dictionaries. In this case, the appellant was arraigned before the lower Court and he challenged its jurisdiction on the ground that the subject matter of the alleged offences relates to banking operations, etc., and that the respondent had commenced criminal proceedings against him at the Federal High Court in Charge No FHC/L/CS/443C/2009.

45

The appellant supplied the lower Court with the proof of evidence filed at the Federal High Court so that it may compare it with the one filed before



it and determine whether it had jurisdiction to try the said matter. The proof of evidence was there before it as Exhibits 2, 2A & 2B, but for some reason, the lower Court accused him of not furnishing it with same and presumed that it would have been unfavourable to him, if produced.

5

This, to me, is one-sided justice at its highest because the lower Court considered his Application with the negative impression that he withheld the processes that were actually exhibited before it, which is most unfair. It certainly failed in its duty as an umpire, which is to see and treat both parties the same, and that is an outrage to our collective sense of justice. (P. 104 lines 35 - 45; P. 105 lines 1 - 11)

10

[4] **Commercial Crime – Proofs of Evidence – are summaries of witness statements.**

15

Proofs of evidence are not by themselves pieces of judicial evidence; they are summaries of the statements of the witnesses to be called at the trial by the Prosecution - see *Pius v. The State* (2012) LPELR-9304 (CA) and *FRN v. Wabara & Ors* (2013) LPELR-20083) SC. (P. 106 lines 30 - 34)

20

[5] **Commercial Crime – Proofs of Evidence – will be considered by court when its jurisdiction is in question.**

25

Obviously, the 1st respondent is not seriously contesting this issue, and even if it were, it would not be able to hold up itself under the weight of judicial authorities that support the appellant's position on the subject. Using **Abacha's Case** cited by the appellant as a backdrop, we shall see that proofs of evidence cannot be ignored in Applications such as this.

30

In *Abacha v. State (supra)*, which also dealt with an Application to quash an information, he argued that from the proof of evidence, a *prima facie* case had not been made out against him. The trial Court and this Court refused to quash the Information. However, the Supreme Court in a 4 - 1 decision granted the Application and quashed the Information.

35

Three of our former Chief Justices of Nigeria participated in the Appeal. Belgore, JSC (as he then was) stated as follows in the lead Judgment.....

40

"It is not the law, neither is it the justice, to say once the application is made on Information, and all necessary documents are attached, without more, the Application to prefer charge must be granted..... There must be facts in the proofs of evidence to justify the grant of the Application. Otherwise, indictments will always be allowed to be tried where enough particulars are absent in the proofs of evidence. I must not be understood to hold that

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guilt of the accused must be established before approving the information to file the indictment,- far from it. There must be prima facie case to be tried and the accused must be sufficiently linked to be in a situation where an explanation is necessary from him at the trial”.

Kutigi, JSC (as he then was) quashed the Information because –

10

“Without looking at or reading the proofs of evidence one can easily come to the irresistible conclusion that the Prosecution or the respondent is gambling. It does not appear to know who committed the murder and who to charge in this case. If it does, the information does not point to that direction.....”

15

On his own part. Katsina-Alu, JSC (as he then was) had this to say –

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“The proofs of evidence in this case clearly do not disclose an offence against the appellant and I do think that his trial will amount to an abuse of process. In that case, the Information will be quashed. It is a matter of great joy that the Courts have an inherent jurisdiction to prevent abuse of their process. It must be emphasized here that the judicial power, which is conferred on the Courts is intended to be used in deciding issues in genuine cases or controversies”.

25

This is the Supreme Court talking and from their respective reasoning, we are gratefully guided to an answer to the question before us, which is that in an Application like this that challenges the Jurisdiction of a Court, it would be a huge mistake on its part to disregard the proof of evidence. **(P. 107 lines 7 - 45; P. 108 lines 1 - 9)**

30

[6] Commercial Crime – Jurisdiction – Federal High Court has jurisdiction to entertain criminal matters arising from banking transactions.

35

The 26 Counts in the Information against Nwosu merely alleged stealing, and no more than that; this Court went through the Proof of Evidence, particularly the Report on the Investigators, and concluded as follows –

40

“No doubt, the pith and substance of the complaint of stealing as evidenced by the conversion as instructed into shares, concerns a matter of capital issue, which is Item 12 on the Exclusive Legislative List. By Section 251(1)(s) of the Constitution....the Federal High Court, to the exclusion of any other Court is conferred with the jurisdiction to entertain matters over which only the National Assembly can legislate”

45



The lower Court did not look beyond the Counts against the appellant, and as far as it was concerned, it had jurisdiction to try him for stealing, which is all that mattered, forgetting that the allegations must be proved. This Court asked a key question in *Okey Nwosu's Case*, as follows –

5

“Will there be any evidence at the High Court of Lagos State, which is different from the evidence that will be before the Federal High Court on the existence of the thing stolen....”

10

In other words, the question the lower Court should have asked itself is - will the Prosecution adduce any evidence that would be different from evidence before the Federal High Court as regards the money stolen?

15

However, the lower Court did not look at the Proof of Evidence before it. If it had read it, it would have answered the question in the negative - No. The very fabric of the offence charged in this case - stealing is woven around banking transactions, which are linked to banking rules allegedly violated by the appellant in the process of stealing the Bank's money.

20

The appellant did not walk into the Bank and steal money from its vault; he is accused of using his position as MD/CEO to steal the said monies. For instance, see Exhibit 4 where the Prosecution's key witness stated –

25

“Using his position as the Managing Director of the Bank [he] caused the said funds to be transferred for his use without adequate fund in his domiciliary account thereby granting himself an unauthorized credit facility”

(P. 125 lines 16 - 44; P. 126 lines 1 - 7)

30 [7]

Commercial Crime – Jurisdiction – State High Court cannot try a matter within the exclusive purview of the Federal High Court.

35

The Appellant was already standing trial at the Federal High Court before he was taken to the State High Court to face a Charge of stealing.

40

In *Nwosu's Case*, this Court went below the surface of the said Counts, and excavated the roots on which the allegation of stealing sprang from, only to find that there was nothing connecting it to the State High Court.

45

We have a similar situation; the case before the lower Court is riddled with matters for which the Federal High Court has exclusive jurisdiction, and there is no way a charge of stealing can stand without evidence that can only be looked into and determined solely by the Federal High Court.

45

The long and short of it is that the lower Court fell into serious error when



it failed to abide by the decision of this Court in *Okey Nwosu's Case*, and in clear terms, this issue must be resolved in favour of the Appellant.

(P. 126 lines 30 - 44)

5 [8] ***Appeal – Issues - Appellate court will not determine an issue not placed before the lower court.***

10 As to the issue of abuse of process, the lower Court did not make any pronouncements thereon because it wrongfully held that the said processes were not produced even though they were exhibited before it.

15 I have dealt with all that but it is trite that an appellate Court cannot look into issues that were not thrashed out at the trial Court; and so it will be.
(P. 127 lines 1 - 6)

15 [9] ***Commercial Crime – Jurisdiction – depends on the cause of action as disclosed by the information and proofs of evidence.***

20 **PER OBASEKI-ADEJUMO, JCA:**

20 Therefore, the jurisdiction of a court to hear a case depends on the cause of action as shown in the information filed and proof of evidence and not on the appellant's conception of what the case is or ought to be as set out. See *Chief Lere Adebayo v. State* (2012) LPELR 9464 (CA); *Omnia Nig Ltd v. Dyke* (2007) 15 NLWR (Pt 1058) SC 576 at 598 - 599.
(P. 130 lines 41 - 45)

25 [10] ***Commercial Crime – Proofs of Evidence – are conditions precedent to filing information.***

30 **PER OBASEKI-ADEJUMO, JCA:**

35 The proof of evidence being a compulsory requirement of the law. It must be complied with. See *George v. Dominion Flour Mills* (1963) ANLR 1; *Bamayi v. A.G. Fed* (2001) 12 NWLR (Pt 727) 468.

40 It therefore constitutes a condition precedent to filing an information under the AJCL. It is a determinant of jurisdiction. See *Abacha v. State* (2002) 11 NWLR (Pt 779) 437; *Ikomi v. State* (1986) 3 NWLR (Pt 28) 340.
(P. 131 lines 1 - 7)

45 [11] ***Commercial Crime – Jurisdiction – Federal High Court has exclusive jurisdiction over criminal act involving control of capital issues.***

PER OBASEKI-ADEJUMO, JCA:



5

The documents in the proof of Evidence as highlighted in the lead judgment, all point only to one fact; that it is not a charge for stealing *per se*, under Section 383 - 390 of Criminal Code., it is a actually a charge against the accused wherever he is affiliated with the companies used to perpetrate acts of diversion, conversion of shares, transfer of funds in domiciliary accounts, non approval of banking policy transactions, which appeared to have benefited the accused indirectly.

10

It is the mode and manner of allegedly moving funds from the said bank that determines the specific court's jurisdiction not what the funds were used for, or how it was utilized.

15

Therefore many "vehicles" were utilized and an apt tracing from the proof of evidence (investigator) will involve lifting the veil of the Companies, looking into ownership structures, the extent of involvement, Whether individual liability as against corporate liability - the share holding structure and capital issues from the securities Exchange Control, different banking instruments, diverse banking offences under the BOFI Act and CBN Act - no doubt will involve an area not within the High court's jurisdiction.

20

It involves control of capital issues in the Exclusive legislative list and these offences may only be properly prosecuted at the Federal High Court - by virtue of Section 251(1) E, & D of the 1999 Constitution (as amended).
(P. 132 lines 14 - 35)

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[12] Commercial Litigation – Stare Decisis – Lower court must follow decisions of superior court.

30

I am confused and at the same time alarmed at what the respondent seems to be saying; that the lower Court should be commended and not crucified for refusing to abide by our decision in *Okey Nwosu's Case*? How can a High Court refuse to abide by the decision of this Court on the ground that its decision is based on a decision that has been overruled?

35

Surely, the respondent's stance is nothing but a call to judicial anarchy - see *LMB Ltd. v. PTF* (2006) 5 NWLR (Pt. 974) 463, wherein it was held –

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"The principle of stare decisis, I think, has imposed an obligation on lower Court to be bound by the decisions of higher Courts. Deliberate refusal to so be bound amounts to judicial impertinence, which is capable of enthroning judicial rascality and anarchy in the judicial hierarchy. This must be eschewed and discouraged by Judges".

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All in all, this is actually a call to lower Courts to take up arms against the



documents are made available by the prosecution from the onset of the trial:

- 5 a. *The charge containing the statement and the particulars of the offence.*
- b. *The statements of the prosecution witnesses.*
- 10 c. *The statements of the accused persons.*
- d. *List of exhibits, and.*
- e. *All other relevant documents that the prosecution intends to rely on at the trial.*
- 15

See. *Uwazurike v. A.G. Federation* (2013) LPELR (20392) SC and *FRN v. Ibori* (2014) LPELR (23214) CA. (P. 127 lines 36 - 45; P. 128 lines 1 - 9)

20 **AUGIE, JCA (Delivering the lead Judgment):** The appellant was the Managing Director of Intercontinental Bank Plc., and this is NOT his first journey to this Court. He has filed a number of appeals in relation to criminal charges brought against him at the Federal High Court and Lagos State High Court, after his removal as MD/CEO of the said Bank by the Central Bank of Nigeria [CBN], in August 2009.

25 Some appeals have been determined and others are for Judgment.

For instance, the case of *Akingbola v. The Chairman, EFCC* (2012) 9 NWLR (Pt. 1306) 477, relates to a decision of the Federal High Court while that of *Akingbola v. Federal Republic of Nigeria & Anor* (2012) 9 NWLR (Pt. 1306) 511 dealt with a Ruling of the Lagos State High Court delivered on 31/5/11, wherein the Court dismissed his Application and assumed jurisdiction to entertain an Information against him filed by the Economic & Financial Crimes Commission in Charge No. ID/148C/2011.

30

35 This Appeal is predicated on the said Charge No. ID/148C/2011, and it centers on which Court has jurisdiction to entertain the Information dated 4/5/11 - the Federal High Court or the Lagos State High Court?

40 The said Information filed at the Lagos State High Court contains 26 Counts with 18 of them alleging offences of conversion and stealing of various sums of monies belonging to Intercontinental Bank Plc., against the appellant. By an Application dated 11/3/2014, he challenged the jurisdiction of the Lagos State High Court on the following Grounds-

45



- (i) The Complainant on the Information is the Federal Republic of Nigeria.
- 5 (ii) The 1st defendant is charged with the 2nd defendant before this Hon. Court on the information dated 4/5/11 with 18 of the Counts against the Applicant.
- 10 (iii) The said 18 Counts are on allegations of conversion and stealing of monies belonging to the Bank (defunct) when the Applicant was the Managing Director and Chief Executive of Intercontinental Bank
- 15 (iv) The subject matter of the alleged offences relates to banking operations, control and operation of capital issues and company related matters under the Companies and Allied Matters Act [CAMA] under Section 25 1(1) (d) & (e), (s), (3) of the 1999 Constitution (as amended) and item Nos. 6 12, and 32 of the Exclusive Legislative List in Part 1 of the Second Schedule to the 1999 Constitution (as amended) respectively.
- 20 (v) In 2009, the same Complainant before this Honorable Court initiated and commenced criminal proceedings against the 1st defendant/applicant before the Federal High Court, Lagos in Charge No. FHC/L/CS/443C/09 on substantially/entirely the same subject and allegations which they are prosecuting the Applicant before this Honorable Court.
- 25 (vi) The proceedings in (v) supra have commenced and the Complainant herein has even lodged two appeals to the Court of Appeal against some Rulings of the Federal High Court. The said appeals are still pending at the Lagos Division of the Court of Appeal.
- 30 (vii) The main witnesses listed in the Proof of Evidence at the Federal High Court, Lagos in Charge No. FHC/L/CS/443C/09 are the same witnesses also listed in the Proof of Evidence before this Honorable Court.
- 35 (viii) The same counsel representing the Complainant in Charge FHC/L/CS/443C/09 at the Federal High Court are the counsel appearing before this Honourable Court, prosecuting the Applicant for the same offences as before the Federal High Court.
- 40 (ix) The information before this Court constitutes an abuse of court process.
- 45



The Application was supported by a 31-paragraph Affidavit deposed to by the appellant to which were attached four annexures - Exhibits 1 - 4.

5 In opposing same, the respondent filed a 6-paragraph Counter-Affidavit to that effect; paragraph 3 has sub-paragraphs (a) to (z) and paragraph 4 has sub-paragraphs (a) to (k). In response thereto, the appellant filed an 11-paragraph Further Affidavit with copy of a Charge filed at the Federal High Court between *FRN v. Okey Nwosu & Ors*, attached as Exhibit 5.

10 After the adoption of Written Addresses, the learned trial Judge, Lawal-Akapo, J., delivered his Ruling on 2/5/14, wherein he held thus –

15 *“On issue (i) all the counts listed therein - - has absolutely nothing to do with banking transaction, stocks and shares so as to attract the jurisdiction of the Federal High Court. Counsel attached the unreported Judgment in (the case of) Okey Nwosu v. FRN & Ors. The offences alleged in Okey Nwosu’s case has to do with conversion and purchase of shares and stocks. The offences had their roots in capital market. The Court of Appeal held that since the alleged offences have their root in capital market, the matter is therefore within the purview of the Federal High Court. In the present case, the offences alleged are stealing, receiving and obtaining money under false pretences. This is within the confines of the State High Court and I so hold”.*

20

25 Dissatisfied, the appellant filed two Notices of Appeal but he withdrew the first Notice of Appeal. His Brief of Argument settled by Chief Wole Olanipekun (SAN), Mike Igbokwe (SAN), Dr. Oladapo Olanipekun, Olabode Olanipekun, Ayo Adesanmi. Wole Okenile, Bolarinwa Awujoola and Iseoluwa Akintunde is based on the second Notice of Appeal, which has 14 Grounds of Appeal, and he distilled four Issues for
30 Determination from the said 14 Grounds of Appeal. The four Issues are as follows

35 1. *Considering the clear provisions of Section 251(1), (2) and (3) of the 1999 Constitution and Section 8 (1) of the Federal High Court Act, whether the lower Court did not fall into a grave error by assuming jurisdiction on the Information dated 4/5/2011 filed before it against the appellant.*

40 2. *Having regard to the binding decision of this Court in Nwosu v. FRN - CA/L/601/2011 delivered on 21/11/2013, as well as the Supreme Court decision in Bode George v. FRN (2013) 12 SC (Pt. 1) 1, whether the lower Court did not also fall into serious error by refusing to be bound by the said appellate Courts’ decisions.*

45 3. *Was the lower court right in dismissing appellant’s Application*



when the Information before it constituted a gross abuse of the processes of court and places appellant in double jeopardy.

- 5 4. *Whether the lower Court did not fall into a very serious error in its refusal to countenance the Proof of Evidence submitted to it by the prosecution while treating appellant's Application.*

The 1st respondent formulated 2 Issues in its Brief settled by Emmanuel Ukala (SAN), Godwin Obla (SAN) and Edward C. Okpe, and they are –

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- (i) *Whether the trial Court was right when it held that it had the jurisdiction to determine the counts contained in the Information against the appellant before it.*

15

- (ii) *Whether the information at the trial Court is an abuse to process of Charge No. FHC/L/CS/443C/09 pending at the Federal High Court.*

The 2nd respondent has his Appeal and did not file a brief in this Appeal.

20

In my view, the Issues formulated by the 1st respondent would suffice, but there is no way to go around it; the outcome of this appeal rests squarely on the question of whether this case is any different from *Okey Nwosu's* case, already decided by this Division of the Court of Appeal.

25

However, before we venture into that arena, we need to clear up some ancillary issues, such as the material exhibited at the lower Court. The lower Court categorically stated as follows in its Ruling –

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"Counsel did not furnish this Court in his Affidavit evidence with the charges and proof of evidence in Charge No. FHC/L/CS/443C/2009. It is the law that a piece of evidence which ought to be produced and is not produced will be presumed that if produced will be adverse to the case of the person withholding it. I so presume in this case. See Section 167(d) Evidence Act 2011..... I therefore find and hold that the charges and proof of evidence in Charge No. FHC/L/CS/443C/2009 if produced will be unfavourable to the case of the 1st defendant. Learned Counsel attempted to compare the proof of Evidence in this case with the proof of evidence in Charge No. FHC/L/CS/443C/2009, which is not before the Court. I discontinue this comparison as addresses of Counsel is not substitute for evidence"

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But the "charges and proof of evidence" were exhibited before the Court, and the appellant contends that the lower Court jettisoned his case as it refused to consider the issues before it when it is under a duty to so do, citing *Brawal Shipping Ltd. v.*



F. I. Onwadike Co. Ltd. (2000) 11 NWLR (Pt.678) 387, that Section 167 (d) of the Evidence Act does not apply against him, citing *Okenzua v. Amosu* (1992) 6 NWLR (Pt. 248) 416, and that it breached his right to fair hearing. He further submitted as follows –

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“The Ruling of the lower Court is perverse in every material particular appellant’s counsel referred the Court not only to the application, but also to the supporting affidavit and the 5 exhibits. Counsel went further to submit that the exhibits are in volumes, figuratively describing them as mountain of documents. The exhibits were not only placed before the lower Court, they were copiously referred to in the written address and during the oral adumbration of counsel. May we further refer to paragraph 5 of the affidavit and Exhibits 2, 2A and 2B (the Proof of Evidence before the Federal High Court). Specifically counsel elaborately treated the said exhibits, referred to and made submission on them., supported by decided authorities..... Despite all these, the lower Court castigated and penalized both the appellant and his counsel for not making the said documents/exhibits available to it”

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15

20 A respondents role is to defend the decision appealed against but the 1st respondent did not say a word or even refer to this issue in its brief, and that is not surprising as it must be difficult to defend the indefensible.

25 The lower Court clearly stated that the appellant did not furnish it in his “Affidavit evidence with the Charges and Proof of Evidence in Charge No FHC/L/CS/443C/2009”, and yet, paragraphs 5 - 7 of his Affidavit reads –

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5. That after my removal as the Managing Director/Chief Executive Officer of Intercontinental Bank Plc (now Access Bank Plc) by the Central Bank of Nigeria, the Complainant herein commenced criminal proceedings against me at the Federal High Court Lagos in Charge No. FHC/L/CS/443C/09. Now shown to me, attached hereto and marked as Exhibit 1 is a Certified True Copy of the Amended charge in FHC/L/CS/443C/09.- F.R. N. v. Dr Erastus B.O. Akingbola.

35

40

6. I know as a fact that proceedings in the Charge No. FHC/L/CS/443C/09 have commenced before the Federal High Court after I took my plea.

45

7. I also know as a fact that before the Federal High Court, the Complainants herein filed a proof of evidence which is in three volumes. Now shown to me, attached hereto and marked as Exhibits 2, 2A and 2B respectively are volumes 1, 2 and 3 of the proof of Evidence in Charge No FHC/L/CS/443C/09.



What can I say to this seeming blindness on the part of the lower Court?

The Record of Appeal transmitted from the lower Court to this Court is in 5 Volumes, comprising of 1994 pages altogether. The Proof of Evidence in Charge No FHC/5 FHC/L/CS/443C/2009 filed at the Federal High Court is at pages 504 - 1838 in Volumes 2, 3, 4 and part of Volume 5 of the Record.

At the adoption of Written Addresses, Chief Wole Olanipekun, SAN, promptly informed the Court that he is relying on the appellant's Affidavit "and the 4 Exhibits attached thereto". He also made copious reference to the Exhibits in the Written Address - see page 395 where he argued –

"We adopt the summary as encapsulated in the statement of facts and as borne out very clearly in the proceedings before the Federal High Court in Exhibits 1, 2, 2A and 2B. The Proof of Evidence in Exhibits 2, 2A and 2B all encompass the one before this Court in Exhibit 4. It can conveniently be submitted and we - submit that Exhibit 4 is taken out of Exhibits 2, 2A and 2B"

In the words of the appellant at page 28 of his Brief, "*despite all these, the lower Court castigated and penalized both the appellant and his counsel for not making the said documents/Exhibits available to it*".

It is incredible, and I cannot fathom what the lower Court was up to; not only were the processes before the Court, it went on to reprimand the appellant and invoke Section 167(d) of the Evidence Act against him.

Section 167 of the Evidence Act allows a Court to draw inferences from known facts bearing in mind the common course of natural events, and it creates certain presumptions of fact. For instance, the Court may presume that evidence, which could be produced, and is not produced, would be unfavourable to the person, who withholds it - see S. 167 (d), which is what the lower Court presumed in this case, although the said Charges and Proof of Evidence were actually exhibited before the Court.

A trial Court owes a duty to itself and the parties before it to decide any conflict between them on the basis of the case put before it by them.

When it fails in this duty, the Court has merely decided half the case and not the whole case - see *Olufosoye v. Olorunfemi* (1989) SC (Pt. 1) 29.

In this case, the lower Court was not in the position to point fingers because in presuming that the appellant withheld evidence that was right there before it, the lower Court failed in its duty as an unbiased umpire.



In its traditional role as an umpire, it has a duty to examine the processes filed by the parties in a matter before it thoroughly and dispassionately, and more importantly, it is expected to balance their competing interests with the utmost sense of responsibility - see *NNPC v. Famfa Oil & Anor* (2009) SC 5 - 6 (Pt. 1) 191. See also *Okoduwa v. State* (1988) 2 NWLR (Pt. 76) 333 at 354, where Nnaemeka-Agu, JSC, observed as follows –

10 *“There are certain fundamental norms in the system of administration of justice we operate. That system is the adversary system, in contradistinction to the inquisitorial system. In that adversary system, parties with their counsel and the Judge have their respective roles to play. Basically, it is the role of the Judge to hold the balance between the contending parties and to decide the case on the evidence brought by both sides and in accordance with the rules of the particular Court and the procedure and practice chosen by the parties in accordance with those rules. Under no circumstances must a Judge under the system do anything, which can give the impression that he has descended into the arena as, obviously, his sense of justice will be obscured”*

20 In other words, the duty of the Court as an umpire is to do substantial justice to the parties in the matter before it, and the Parties are entitled to the same level playing ground in our adjudicative system of justice - see *Amasike v. Reg. General*, CAC (2010) 13 NWLR (Pt. 1211) 307 SC, and *Willoughby v. IMB* (1987) 1 SC 137, where Oputa, JSC, very aptly said –

25 *“I think it is too late in the day to argue that the Court’s primary function is to do justice between the parties to a dispute. One sided justice will amount to injustice. Now Courts do not administer abstract justice or a “brooding omnipotence in the sky”. The law is made to ensure justice. Rules of Court are handmaids of justice. It is only by the orderly administration of law and obedience to the Rules that legal justice can be attained. When a particular decision is against all known rules; against all known principles then it is, certainly not made in the interest of justice”.*

35 Very apt, and so simply stated - one sided justice will amount to injustice.

40 One-sided means *“unfairly weighted - dominated by or favouring one side in a competition; bigger on one side: and being on one side* - see Encarta Dictionaries. In this case, the appellant was arraigned before the lower Court and he challenged its jurisdiction on the ground that the subject matter of the alleged offences relates to banking operations, etc., and that the respondent had commenced criminal proceedings against him at the Federal High Court in Charge No FHC/L/CS/443C/2009.

45 The appellant supplied the lower Court with the proof of evidence filed at the Federal



High Court so that it may compare it with the one filed before it and determine whether it had jurisdiction to try the said matter. The proof of evidence was there before it as Exhibits 2, 2A & 2B, but for some reason, the lower Court accused him of not furnishing it with same and presumed that it would have been unfavourable to him, if produced.

This, to me, is one-sided justice at its highest because the lower Court considered his Application with the negative impression that he withheld the processes that were actually exhibited before it, which is most unfair. It certainly failed in its duty as an umpire, which is to see and treat both parties the same, and that is an outrage to our collective sense of justice.

But the lower Court did not stop there; it also refused to look at the Proof of Evidence in the Charge before it, and its reason is as follows –

“Counsel made an analysis and evaluation of some of documentary evidence proposed to be tendered by the Prosecution. I find and I hold that this exercise is premature and cannot be looked into at this stage of the proceedings. It is the law that matters for substantive hearing cannot be delved into at the interlocutory stage”

The appellant argued that it misconstrued the position of the law; that Section 36(6) of the Constitution mandates the Prosecution to avail any person charged with a criminal offence adequate time and facilities for the preparation of his defence, and Proof of Evidence is part of facilities, and there cannot be an Information or Charge without Proof of Evidence; that Section 251(1) of the Administration of Criminal Justice Law states in clear terms that Proof of Evidence, etc., are mandatory components of an Information; that the lower Court failed and refused to comply with its own laws and it is trite that Courts of law must apply the laws of the land, citing *George v. Dominion Flour Mills Ltd.* (1963) 1 All NLR 71, *Gordon v. Police Commissioner* (1910) 2 KB 1080; that the Legislature used the word “shall”, meaning what is to be done is mandatory not permissive, citing *Bamaiyi v. A.G Fed.* (2001) 12 NWLR (Pt. 727) 468, *Ogidi v. State* (2005) 5 NWLR (Pt. 918) 286, so the Proof of Evidence, etc., constitute condition precedent to filing an Information; that the Prosecution sold the strange idea to the Court that it cannot look at the Proof of Evidence, and yet, quoted profusely from it in its Counter-Affidavit thereby approbating and reprobating contrary to admonitions in a legion of cases, including *Odutola Holdings Ltd. v. Ladejobi* (2006) 12 NWLR (Pt. 994) 321 and *Jadesinmi v. Okotie Eboh: In Re Lessey* (1989) 4 NWLR (Pt. 113) 113; and that his Application is not different from any Application to strike out an Information for not disclosing a prima facie case, citing *Ohwovoriole v. FRN* (2003) FWLR (Pt. 141) 2019, *Abacha v. State* (2002) 11 NWLR (Pt. 779) 437, and *Ikomi v. State* (1986) 3 NWLR (Pt. 28) 340.

The 1st respondent, however, submitted that the said conclusion of the lower Court



was reached when it found that counsel was asking it to make an evaluation of the proof of evidence at an interlocutory stage; that its finding that it cannot at that stage look into the proof of evidence and evaluate evidence, is correct in law and cannot be faulted; that it is preposterous for the appellant to submit that it ought
5 to have looked into the proof of evidence; that the documents on their faces clearly disclose the linkages to establish the offences charged and show the existence of *prima facie* case; that it is not the stage to evaluate documents in order to determine if they prove the guilt of the appellant; and that when read with the Statements of its Witnesses, they disclose a case against him.

10

It also argued that he extensively discussed the Administration of Criminal Justice Law of Lagos State but never cited any provision or section of it that insists that a Court must look into the proof of evidence whilst determining its jurisdiction beyond what it had done in its Ruling. In his Reply Brief, the appellant pointed to paragraphs
15 of its brief where the 1st respondent quoted from the proof of evidence, and submitted –

15

“From what has been demonstrated in the reproduced portions of respondent’s Brief and others, whereby the respondent is urging the Court of Appeal to elaborately consider the proof of evidence, the respondent has, either advertently or inadvertently agreed with the appellant that the lower Court erred in its conclusion that it would not look at the proof of evidence. Respondent could not approbate and reprobate. See Odutola v. Ladejobi (2006) 12 NWLR (Pt. 994) 321. In addition, the submission of counsel is as potent as statement on oath. See Tikatore Press v. Umar (1968) All NLR 511”.

20

25

To start with, I must say that this appeal has nothing to do with evidence.

The appellant had only been arraigned before he filed his Application for an order quashing and/or striking out the said Counts in the Information. Proofs of evidence are not by themselves pieces of judicial evidence; they are summaries of the statements of the witnesses to be called at the trial by the Prosecution - see *Pius v. The State* (2012) LPELR-9304 (CA) and *FRN v. Wabara & Ors* (2013) LPELR-20083) SC.

30

35

The bottom line is that the lower Court did not go through the said Proof of Evidence before arriving at its decision to assume jurisdiction, and the issue is whether it was right to disregard the proof of evidence. So, any arguments relating to the issue of evidence will be disregarded.

40

The 1st respondent made it clear from the onset that its position is that the lower Court in determining jurisdiction to entertain the Counts against the appellant should only look at the Counts in the Information and not the Proof of Evidence. However, it went on to state as follows –

45



5 *“In the unlikely event that this Hon. Court decides otherwise and overrules the respondent, the respondent shall in arguing this Appeal make reference to the proof of evidence to elucidate/articulate the respondent’s position that the trial Court has the jurisdiction to entertain the Counts against the appellant”*

10 Obviously, the 1st respondent is not seriously contesting this issue, and even if it were, it would not be able to hold up itself under the weight of judicial authorities that support the appellant’s position on the subject. Using **Abacha’s Case** cited by the appellant as a backdrop, we shall see that proofs of evidence cannot be ignored in Applications such as this.

15 In *Abacha v. State (supra)*, which also dealt with an Application to quash an information, he argued that from the proof of evidence, a *prima facie* case had not been made out against him. The trial Court and this Court refused to quash the Information. However, the Supreme Court in a 4 - 1 decision granted the Application and quashed the Information.

20 Three of our former Chief Justices of Nigeria participated in the Appeal. Belgore, JSC (as he then was) stated as follows in the lead Judgment.....

25 *“It is not the law, neither is it the justice, to say once the application is made on Information, and all necessary documents are attached, without more, the Application to prefer charge must be granted..... There must be facts in the proofs of evidence to justify the grant of the Application. Otherwise, indictments will always be allowed to be tried where enough particulars are absent in the proofs of evidence. I must not be understood to hold that guilt of the accused must be established before approving the information to file the indictment,- far from it. There must be prima facie case to be tried and the accused must be sufficiently linked to be in a situation where an explanation is necessary from him at the trial”.*

30

Kutigi, JSC (as he then was) quashed the Information because –

35 *“Without looking at or reading the proofs of evidence one can easily come to the irresistible conclusion that the Prosecution or the respondent is gambling. It does not appear to know who committed the murder and who to charge in this case. If it does, the information does not point to that direction.....”*

40 On his own part. Katsina-Alu, JSC (as he then was) had this to say –

45 *“The proofs of evidence in this case clearly do not disclose an offence against the appellant and I do think that his trial will amount to an abuse of process. In that case, the Information will be quashed. It is a matter of*



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great joy that the Courts have an inherent jurisdiction to prevent abuse of their process. It must be emphasized here that the judicial power, which is conferred on the Courts is intended to be used in deciding issues in genuine cases or controversies”.

5

This is the Supreme Court talking and from their respective reasoning, we are gratefully guided to an answer to the question before us, which is that in an Application like this that challenges the Jurisdiction of a Court, it would be a huge mistake on its part to disregard the proof of evidence.

10

The issue of jurisdiction is not a trivial thing that can be toyed with lightly. It is either a Court has jurisdiction or it does not have - see *Onwudiwe v. FRN* (2006) 10 NWLR (Pt. 988) 382, where Tobi, JSC, aptly observed –

15

“A party cannot beg or bargain jurisdiction into a matter before a Court of law; so too the adverse party cannot beg or bargain jurisdiction outside or out of a matter. Jurisdiction is an exact law that has to be applied exactly to any given case. It is either a Court has jurisdiction in a matter or it has not. In the determination of a jurisdiction of a Court, the enabling law vesting jurisdiction has to be taken in the light of the relief or reliefs sought. The moment the relief sought comes within the jurisdiction of the Court as adumbrated by the facts, the Court must assume jurisdiction as it has jurisdiction to do so. Of course, the reverse position is also correct and it is that the moment the relief sought does not come within the jurisdiction of the Court, as adumbrated by the facts, the Court must reject jurisdiction as it has no jurisdiction in the matter To that extent, jurisdiction looks almost like an exact formula in calculus, although it is devoid of actual figures and numbers”

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In this case, I agree with the appellant that in the peculiar circumstances of this case, the lower Court needed to have read the proof of evidence.

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However, it seemed to have an aversion to Proofs of Evidence because it turned a blind eye to the Proof of Evidence at the Federal High Court, and refused to look at the Proof of Evidence in the Charge before it.

40

The question to ask now is - what is the effect of its heedlessness? To find answers, we have to look at the case of yet another Bank Chief - Francis Atuche of Bank PHB (now Keystone Bank), who also appealed against a similar Ruling by another Judge of the Lagos State High Court.

45

In *Atuche's Case*, the learned trial Judge deferred taking a decision as to whether or not to apply the decision of this Court in *Okey Nwosu's case*.

In the lead Judgment of this Court, Sankey, JCA, very aptly observed –



5

“The issue of jurisdiction raised by the appellant’s Motion, being crucial and fundamental to the determination of the suit before the lower Court was of paramount importance and it should have been attended to before any further step was taken in the matter. Thus, the failure of the Court below to consider the Motion on its merit, and at the same time and in the same breath acknowledging the decision in Okey Nwosu v. FRN (supra), while proceeding to dismiss the application has invariably occasioned a miscarriage of justice. This is in addition to constituting a breach of the appellant’s right to a fair hearing on his Motion”.

10

So, in *Atuche’s* case, the learned trial Judge acknowledged the decision of this Court in *Okey Nwosu’s* case but refused to consider the question of whether the decision applied to his case and deprived it of jurisdiction.

15 In remitting the case back, the special panel that heard the Appeal held –

20

“.....The choices available to this Court have been strictly restricted to one option, which is to send back the case for re-hearing of the Motion on its merits for the determination of the sole Issue evoked by the relief in the Motion which essentially is: whether the decision in Okey Nwosu v. FRN (supra) operates to deprive the lower Court of jurisdiction to proceed any further with the determination of the criminal charge against the appellant. In the circumstances, the Appeal is meritorious and is accordingly allowed. The Ruling....in respect of the Motion filed....in Charge

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No. ID/154C/2011 between: FRN v. Mr Francies Atuche & 2 Ors is accordingly set aside. The Motion is hereby sent back to the Hon. Chief Judge of the Lagos State High Court for accelerated hearing on the merit before another Judge”.

30 In this case, the situation is not quite the same. The lower Court held –

35

“Counsel attached the unreported Judgment of the Court of Appeal, Lagos Division in Appeal No: CA/L/601/11 - Okey Nwosu v. FRN & Ors. The offences alleged in Okey Nwosu’s case have to do with conversion and purchase of shares and stocks. The offences had their roots in capital market. The Court of Appeal held that since the alleged offences have their root in capital market, the matter is therefore within the purview of the Federal High Court. In the present case, the offences alleged are stealing, receiving and obtaining money under false pretences. This is within the confines of the State High Court and I so hold”

40

The lower Court may not have read the Proofs of Evidence or analyzed the full picture of the matter in its true colours, but it took a definite stand; it decided that the decision in *Nwosu’s* Case does not apply to this case, and it had jurisdiction

45 to try the appellant for the said offence of stealing.



In effect, unlike *Atuche's Case*, we have reason to hold onto the Appeal, and as I said from the very beginning, this appeal turns on the question of whether our decision in *Okey Nwosu's case* is applicable in this case.

- 5 Okey Nwosu, the former Group Managing Director of Finbank Plc., was one of the Bank Chiefs removed by CBN, and arraigned before the Federal High Court and Lagos State High Court to face criminal charges.

10 The Lagos State High Court dismissed his Preliminary Objection, and on appeal to this Court, the appellant contended *inter alia* that the Lagos State High Court was wrong to hold that the Charge against him at the Federal High Court and the Charge against him before the Court were not factually the same; and the Charge before it was not an abuse of process notwithstanding that both Charges arose from the same set of banking transactions arising at the same period of time. In
15 its Judgment delivered on 21/11/2013, this Court *per Bage, JCA*, held as follows –

20 “..... What is, therefore, in existence is the fraudulent conversion of funds of the Banks as instructed, into shares. If the funds in question have turned into shares, which is an issue in the Capital market, can the High Court of Lagos State, therefore, invoke its jurisdiction on such matter, on a charge of stealing. The respondent had admitted that the Control of Capital issues is listed.....as No 12 in the Exclusive Legislative List, and offences relating thereto may only be properly prosecuted at the Federal High Court. Why will the Prosecution then resort to another charge of
25 stealing at the High Court of Lagos State when the existence of the thing said to be stolen is turned under the control of Capital issue? Put it in another way, will there be any evidence at the High Court of Lagos State, which is different from the evidence that will be before the Federal High Court on the existence of the thing stolen. The pith and substance of the complaint of stealing as evidenced by the conversion as instructed into
30 shares, concerns a matter of capital issue, which is Item 12 on the Exclusive Legislative List. By Section 251(1) (s) of the Constitutionthe Federal High Court, to the exclusion of any other Court is conferred with the jurisdiction to entertain matters over which only the National Assembly can legislate”
35

He referred to Section 25 of the Interpretation Act, and further stated –

40 “.....The law has made the prosecution of the offence or offences alleged against the appellant exclusive to the Federal High Court. Any other charge or charges in any other guise relating to the same issue before any other Court is void *ab initio*, and of no effect whatsoever for lack of jurisdiction. The act of the respondents is like putting something on nothing No doubt it will not stay; it will collapse. See the famous dictum of Lord Denning
45 MR. in the case of *UAC v. Macfoy (1961) 3 All ER 169 at 172..... The*



Charges placed at the High Court of Lagos State by the respondent against the appellant is incurably bad for lack of jurisdiction”.

- 5 This is our decision in *Okey Nwosu’s* case that the appellant, a former bank chief, who was arraigned at the Federal High Court for bank-related offences before he was brought to the Lagos State High Court to answer to sundry charges of stealing, and who also challenged the jurisdiction of the Lagos State High Court on similar grounds, is basing his case on.
- 10 He canvassed arguments on the issue of jurisdiction, and in particular –
- Section 251 (1) (d), (e), (s) and (3) of the 1999 Constitution as well as items 6, 12 and 32 of the Exclusive Legislative List of same.
 - 15 - Sections 8(1) of the Federal High Court Act.
 - The doctrine of ‘covering the field’ in legislation - *A.G. Abia State v. AG Federation* (2002) 6 NWLR (Pt. 763) 264 at 431- 432 cited.
 - 20 - The phrase “subject to” in Section 272 of the 1999 Constitution - *Oke v. Oke* (1974) 1 All NLR 443 at 450 and *Labiya v. Anretiola* (1992) 8 NWLR (Pt.258) 139 at 163 - 164 cited.
 - 25 - The effect of the absence of jurisdiction on a proceeding - *Okoye v. Okonkwo* (2006) All FWLR (Pt. 332) 1526, *Okolo v. Union Bank of Nigeria Plc.* (2004) All FWLR (Pt. 197) 981 at 992, *Oloba v. Akereja* (1988) 3 NWLR (Pt. 84) 508, *Madu v. Mbakwe* (2008) 10 NWLR (Pt.1095) 293 at 325 - 326 and *Obada v. Mil. Gov. of Kwara State* (1990) 6 NWLR (Pt. 157) 482 cited.
 - 30 - The basic features of a Court’s jurisdiction set out in the celebrated case of *Madukolu v. Nkemdilim* (1962) 2 All NLR 581 at 589 - 590.
 - 35 - The import of the words “exclusive” and “also” used in Sections 251 (1) and (3) of the 1999 Constitution as Amended.
 - The Latin maxim ‘*expressio unis est exclusio alterius*’ - *Abacha v. FRN* (2006) 4 NWLR (Pt. 970) 239 at 309 - 310 cited.
 - 40 - The Counts against him *vis-a-vis* the Proof of Evidence and the documents produced by the respondent as encapsulated in Exhibit 4 contained at pages 1606 -1838 of Vol. 5 of the record.
 - 45 - The evidence of the key witness - one Abduraheem Yinka Jimoh.



Of course, the respondent proffered its own arguments in response to the appellant's submissions on the issue of jurisdiction, and other issues.

5 But this where I will draw a line in the sand and say, this far and no more; the decision in *Okey Nwosu's case* emanated from this Division where I am the Presiding Justice, and I refuse to comment on issues dealt with in that case on the ground that anything I do say may be construed or seen as an affirmation of the decision or disagreement with the said decision, which is outside my league; it is only the Supreme Court that can do that. So, I will concentrate on what I am constrained to
10 do - resolve the issue before us, and that is whether the decision in the said case applies here.

The appellant's position is that the said decision in *Nwosu's Case* is directly on all fours with the Application and/or Information in this case. He argued that the
15 Information therein are the same in terms of drafting, content, presentation, style and arrangement, as the Information herein; that the Counts against *Nwosu* are simply in respect of stealing, which is the same as the Counts against him; that on the face of the Information in *Nwosu Case*, there is no Count that has to do with conversion and purchase of shares and stocks, and none that says anything
20 relating to capital market; that it was through the Proof of Evidence that this Court rightly came to the conclusion, having perused same, and held thus –

25 *"The Court in determining whether it possesses the jurisdiction over an action initiated before it, has the bounden duty to peruse at the report of the investigators assigned to investigate the petition and what they discovered which formed the basis of the charges preferred against the appellant."*

30 Furthermore, that this Court onto (sic) hold that to determine whether or not the Lagos State High Court has jurisdiction over the offence of stealing, the existence of the things stolen as well as its components must be considered with the report of the investigators before the issue of the Court's jurisdiction would be determined; and that this Court again reproduced extracts from the Reports before arriving at its conclusion.

35 He submitted that *Nwosu's Case* is not only binding on the lower Court but also impeccable, and the decision is sound in law and logic; that what the lower Court did was to circumvent it, citing inapt decisions; that the case of *Alli v. State* (2012) 10 NWLR (Pt. 1309) 589 relied upon, is not even remotely connected or applicable
40 to the Application before it; that what happened here is akin to the background to the decision of the Supreme Court in *Atolagbe v. Awuni* (1997) 9 NWLR (Pt. 522) 536, where the Supreme Court chastised a Kwara State High Court Judge for failing to follow and be bound by a Court of Appeal decision - *Dr. M. Okenjo v. Dr. M Odje & Ors.* (1985) 10 SC. 297 also cited; and that it is trite law that a Court
45 does not expand its jurisdiction but can expound it, citing *Kasiku Farms v. A. G.*



Bendel (1986) 1 NWLR (Pt. 19) 695 and *A.G. Federation v. Abubakar* (2008) 16 NWLR (Pt. 1112) 135 at 158.

5 As expected, the 1st respondent has a contrary view and contends that the said decision is inapplicable. Pointing to the Counts against the appellant, he submitted that his spirited attempt to bring acts for which he was charged within the sphere of banking, is untenable because –

10 - The Information did not charge him for granting unauthorized loans or breaching any of the banking regulations in Nigeria nor with any of the offences contained in Banking and Other Financial Institutions Act.

15 - The fact that the proof of evidence, apart from revealing how he stole and converted the bank's money also revealed that he breached its regulation while purporting to grant loans, is not material or relevant to the Information since he was not charged for breaching any banking regulation at the trial Court.

20 - The offence of stealing/fraudulent conversion of the bank's property, which he was charged with, can only be tried by the lower Court and not the Federal High Court - *Olubeko v. F.R.N.* (2004) LREL 22632, and *Daboh & Anr. v. State* (1977) NSCC 309 cited.

25 - The Supreme Court defined "banking" in *NDIC v. Okem Ent. Ltd.* (2004) 10 NWLR (Pt. 880) 107, and the answer to the question - does any of the acts of stealing or fraudulent conversion of the Bank's money for which the appellant was charged at the lower Court constitute banking within the definition of banking?, is in the negative.

30 It submitted that the appellant's acts, which he is trying to camouflage as acts of banking are Criminal acts that have no real nexus whatsoever with any act of banking; that the appellant cannot act like Pontius Pilate and wash his hands off his huge loss suffered by the bank with respect to his own acts; that *Nwosu's*
35 *Case* is not applicable because the thing allegedly stolen were shares not money; and that it was fund belonging to the bank that was converted into shares, which is why this Court held –

40 *"What is therefore in existence is the fraudulent conversion of funds of the Bank as instructed, into shares, if the funds in question have turned into shares, which is an issue in Capital Market, can the High Court of Lagos State therefore invoke its jurisdiction on such matter, on a charge of stealing"*

45 Furthermore, that another cogent reason why the said decision does not apply is



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that it derived its authority from a decision of this Court in *FRN v. Eze* (1982) 3 NCLR 259 that was set aside by the Supreme Court in *Eze v. FRN* (1987) 1 NWLR (Pt. 51) 506, that the attention of this Court was not drawn to the Supreme Court decision in *Eze v. FRN* (*supra*) and “it is most unlikely that following the ordinary rule of *stare decisis* that [this] Court in *Nwosu’s Case* would have arrived at the conclusion it reached if it was aware of the Supreme Court position in *Eze v. FRN*”. that in the light of the fact that this Court in *Nwosu’s case* relied heavily on the decision of this Court in *FRN v. Eze*, which said decision has been set aside by the Supreme Court in *Eze v. FRN*, the lower Court was right not to have followed the decision of this Court in *Nwosu’s case* even if it were to be applicable, citing *Olutola v. Unilorin* (2004) 18 NWLR (Pt. 905) 416. *Sule Sanni v. Durojaiye Ademiluyi* (2003) 3 NWLR (Pt. 807) 318 & *Bob-Manuel v. Woji* (2010) 8 NWLR Pt. 1196) 260, and that –

“Since the decision of the Supreme Court in the case of *Eze v. FRN* overruled the Court of Appeal decision in *FRN v. Eze* the trial Court had no option but was under an obligation by doctrine of *stare decisis* to follow and kowtow to the Supreme Court decision in *Eze v. FRN*. The trial Court ought to be commended and not be crucified for relying on the Supreme Court decision in *Eze v. FRN* (*supra*)”.

I am confused and at the same time alarmed at what the respondent seems to be saying; that the lower Court should be commended and not crucified for refusing to abide by our decision in *Okey Nwosu’s Case*? How can a High Court refuse to abide by the decision of this Court on the ground that its decision is based on a decision that has been overruled?

Surely, the respondent’s stance is nothing but a call to judicial anarchy - see *LMB Ltd. v. PTF* (2006) 5 NWLR (Pt. 974) 463, wherein it was held –

“The principle of *stare decisis*, I think, has imposed an obligation on lower Court to be bound by the decisions of higher Courts. Deliberate refusal to so be bound amounts to judicial impertinence, which is capable of enthroning judicial rascality and anarchy in the judicial hierarchy. This must be eschewed and discouraged by Judges”.

All in all, this is actually a call to lower Courts to take up arms against the doctrine of *stare decisis*, which is said to be, “the discipline of the law, and what makes the law certain and prevents it from being an ass” - see *Okonjo v. Dr. Mudiaga Odje & Ors* (*supra*), where Eso, JSC, observed –

“In the hierarchy of the Courts in this country, as in all other common law countries, one thing is clear, however unlearned a lower Court considers itself to be and however contemptuous of the higher Court, the lower Court is still bound by the decision of a higher Court. I hope it will never



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happen again whereby the Court of Appeal in this country or any lower court for that matter would deliberately go against the decision of this Court, and in this case, even to the extent of not considering the decisions when those of this court were brought to the notice of that Court This is the discipline of the law; that is what makes the law certain and prevents it from being an ass”.

10

The 1st respondent is, more or less, advocating that a lower Court can sit on appeal over a decision of a higher Court, and choose which of the decisions of a higher Court it will abide by and which one it will not apply, which is an anathema to the doctrine of *stare decisis* - see *Unilag & Ors v. Olaniyan & Ors* (1985) 1 SC 295, where Eso, JSC, very aptly said –

15

“When a lower Court is faced with the construction of a rule in pari materia with one that has been construed by this Court, the lower Court has no option but to follow the principle laid down by this Court in its construction of that rule. What will be left for the lower Court is to apply the laws laid down by this Court to the peculiar facts of the case before it. The lower Court has no business with whether or not the decision of this Court therein is right or wrong. In the hierarchy of Courts, one principle has been established beyond par and that is, that lower Court is bound by decision of the higher Court”

20

25

The 1st respondent also argued that the appellant’s contention that the lower Court circumvented our decision in *Nwosu’s* case, is fallacious; that all that the lower Court did without overruling the said decision was to hold that Section 251(3) of the Constitution does not confer exclusive criminal jurisdiction on the Federal High Court with respect to matters listed in Section 251 of the Constitution; and that nowhere did it state that it was overruling the decision of this Court in *Okey Nwosu’s* case.

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35

It conceded that it is bound to follow the decisions of higher Courts but added that it is not bound under the doctrine of *stare decisis* to follow the decisions of higher Courts when the facts/issues in those decisions does not tally with what is called for determination in the trial Court; that the trial Court is not bound to follow hook line and sinker any decision of a higher Court cited before it especially, where as in this case, the case was clearly distinguishable, citing *C. N. Ekwuogor Inv. (Nig.) Ltd. v. Asco Invest Ltd.* (2011) 13 (Pt. 1265) 565 at 587, and that the lower Court, having found that the Counts against the appellant were for the offence of stealing by conversion, which had nothing to do with, banking, capital market or CAMA was under no obligation to follow the principle of law in *Okey Nwosu’s* Case, which found that the Counts in the *Okey Nwosu’s* Case related to shares and they, therefore, constituted capital market transactions within the exclusive jurisdiction of the Federal High Court.

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5 The appellant countered in his Reply Brief that the respondent deliberately ignored “salient portions” of the Judgment in *Nwosu’s case*. He conceded that this Court referred to *Eze’s case* while reviewing the submissions of counsel, but argued that thereafter, it meticulously considered the Counts, Proof of Evidence, provisions of the Constitution, ingredients of offence, and the fraudulent conversion of funds of Finbank Plc etc., and in doing so, the Court was also guided by Supreme Court decisions, which it referred to constantly and made itself bound by them.

10 The appellant and 1st respondent have made their positions clear, and it must be apparent from what has been said so far that the outcome of this Appeal is inextricably tied to the lower Court’s failure to peruse the Proofs of Evidence before arriving at its decision to assume jurisdiction.

15 The point must be made and made firmly that the decision of this Court in *Nwosu’s Case* was based on the Proof of Evidence, which this Court perused to find that the charge of stealing on the face of the Information, was not what it was cut out to be, but were related to banking matters.

20 In this case, the lower Court did not read the Proofs of Evidence, and yet was quick to hold that the decision in *Nwosu’s case* did not apply because the Counts against the appellant in the Information before it –

25 *“has absolutely nothing to do with banking transaction, stocks and shares so as to attract the jurisdiction of the Federal High Court”.*

30 Apparently, the lower Court took a narrow view of the decision in *Nwosu’s Case*, and restricted it to offences with roots in capital market, without addressing its mind to the fact that the 26 Counts against *Nwosu* alleged stealing *simpliciter*, same as this case, where the Counts against the appellant allege stealing *simpliciter*. For instance, Counts 1 - 3 allege:

STATEMENT OF OFFENCE - COUNT 1

35 Stealing contrary to Section 390 (7) of the Criminal Code Law, Cap 17.....

PARTICULARS OF OFFENCE

40 Dr. Erastus B. O. Akingbola, whilst being the MD/Chief Executive Officer of I. B. Plc., sometime in March, 2009, in Lagos, within the jurisdiction of this Court stole the sum of £8, 540,134 58 (Pounds Sterling) property of Intercontinental Bank Plc. by fraudulently converting same to your own use.

45 **STATEMENT OF OFFENCE - COUNT 2**



Stealing contrary to Section 390 (7) of the Criminal Code Law - - .

PARTICULARS OF OFFENCE

5 Dr. Erastus B. O. Akingbola sometime in July, 2009, - stole the sum of £1.300.000.00 [Pounds] by fraudulently converting same to your own use.

STATEMENT OF OFFENCE - COUNT 3

10 Stealing contrary to Section 390 (7) of the Criminal Code Law - -

PARTICULARS OF OFFENCE

15 Dr. Erastus B. O. Akingbola sometime in March, 2009 in Lagos stole the sum of ₦2,108,135,484,68 property of [the] Bank by fraudulently converting same to the use of Intercontinental Capital Markets Ltd.

20 The appellant set out salient portions of the Proof of Evidence in its brief, which has not been disputed by the respondent, and I will reproduce it –

The Statement of Abdulraheem Yinka Jimoh in Exhibit 4, as follows –

25 *“Shortly after the intervention of CBN in the operation and management of commercial banks in Nigeria in August 2009, one of our correspondent banks (Deutsche Bank London) sent an Anti-Money Laundering (A.M.L.) enquiry on 3/9/2009 to the Bank seeking to confirm that two transactions - £8.5 Million & £ 1.3 Million transferred on behalf of the former MD of the bank Dr. Erastus B. O. Akingbola were genuine and comply with AML requirements. These transactions were carried out in March and July 2009.*
30 *“The process of approving the deposit placement limit in ICML by Dr. Erastus Akingbola on the 11/3/2009 from ₦2 Billion to 5.5 Billion, which enabled the Bank’s treaty to be able to place more funds at the disposal of ICML for lending to Regal Investment Ltd was in itself improper. In*
35 *practice, previous approvals in the bank had been through the Asset and Liabilities Committee (ALCO) and ratification by EXCO as contained in the attached approval memo dated 22/5/2008. Proper approval of the request would have required the approval of ALCO members, not simply the approval of a single member. Had ALCO equally considered this*
40 *application, they would have (at the very least) required proper review of ICML’s claim of a “growing portfolio” before approving the increase and pushing same through the market risk unit of the bank to EXCO for ratification. Details of the composition and duties of ALCO can be found in the Bank’s Market & Liability Risk Policy..... ALCO is made up of*
45 *the following officers of the Bank: CEO, Chief Risk Officer, Chief Financial*



5 Officer: Financial Controller- Corporate Treasurer- Foreign Treasurer: Group Executives for Group Market Risk Management; Enterprise Risk Management; Performance Management; and Key Business Unit Heads. Section 13 of the Market & Liquidity Risk Policy provides an exception to ALCO approval where it states “Whenever circumstances require a prompt action that will violate a provision of this policy but is nevertheless prudent, the CEO and the Board Risk Committee shall be authorized to approve the policy exception. No such exception may be authorized however if it would cause the bank to violate an applicable law or regulation. All

10 authorized exceptions must be reported to the board of directors at its next regularly scheduled meeting and must be affirmed by the board.”
The board’s affirmation of such exceptions must be documented in the minutes for that meeting. From our investigations no such approval was ever sought from the board and as at 11/3/2009, ICML had fully utilized its deposit placement limit of ₦2 Billion with the bank as shown in the attached schedule of placement by IBPLC with ICML”. It was discovered

15 that on 10/3/2009, Regal Inv. Co. Ltd had requested for a placement line from I.C.M.L in the sum of ₦3,200,000,000.00 for which I.C.M.L. granted only ₦2,100,000,000.00 at 30 days maturity effective from

20 13/3/2009 a day after the ₦8,540,134.58 had been transferred out of the banks NOSTRO ACCOUNT. Further investigations revealed that the placement was actually the POFI sources from L.B. Plc.’s Corporate Treasury Department and at the time of request and agreement with Regal Inv. Co. Ltd., I.C.M.L did not have the financial capacity to support the

25 placement being an institution registered for trading in Capital Markets neither was the request considered or approved by its Board (ICML).”
“The procedure adopted in the accounting treatment of the deposits of the bureau de change operators.... is highly irregular and improper

30 There was no signed instruction from Dr Erastus B.O. Akingbola authorizing the above referred transaction. This also is highly irregular/improper banking procedure “There was no loan or facility granted to Dr Erastus B. O. Akingbola to fund the transfer prior to the transaction but he using his position as the Managing Director of the Bank caused the said funds to be transferred for his use without adequate fund in his domiciliary account thereby .granting himself an unauthorized credit facility.”“(Highlight his)”

35

40 On 1/7/2009, the bank’s USD NOSTRO account at Deutsche bank London - - was debited with the sum of USD 2,036,700.00. “On 13/7/2009, the same account was debited with the sum of USD 154,828.50. These two debits amounted to USD2,191,528.80 and was transferred to the GBP NOSTRO account of the Bank at Deutsche bank London in the amount of £1,300.000” “On 13/7/2009, Dr. Erastus B. O. Akingbola issued an instruction that the sum of £1,300,000 only, being the Pounds Sterling equivalent of USD2,191,528.80 only, should be transferred from

45



5 his Account and credited to the Royal Bank of Scotland Account of Fuglers Solicitors. This internal memo from [him] regarding the transfer was not signed and at the date of this instruction, his account balance was £25,209.68. On 13/7/2009, the sum of £1,300,000.00 was transferred to the Royal Bank of Scotland account of Fuglers Solicitors from [the] Bank's NOSTRO account with Deutsche Bank AG but in actual fact Dr. Akingbola has caused the bank's funds to be used as early as 1/7/2009". "Pursuant to our investigations which revealed many, fraudulent manipulations of [the] Bank's General Ledger Time Deposit Account, our investigations were extended to other general ledger accounts wherein we observed that 10 the sum of ₦2,500,000,000.00 was transferred to Skye Bank Plc. on 11/3/2009 by RTGS (Real Time Gross Settlement) in favour of Chartwell Securities Ltd Our investigations revealed that on 27/2/2009. Messrs. Chartwell Securities Ltd issued two Skye Bank Plc's Cheques both 15 of which were dated 27/2/2009 for the sums of ₦1,068,000,000.00 and ₦1,432,000,000.00 only drawn up in favour of Tropics Finance Company Ltd." [All highlight his]

20 "On 20/5/2009 the Financial Controller.....instructed the then GE, Domestic Operationsto debit [the] Bank's Prepayment General Lodger Account with the sum of ₦3,350,000,000.00 for distribution as follows - Intercontinental Homes Ltd ₦350,000,000.00; Intercontinental Securities Ltd ₦500,000,000.00 Intercontinental Capital Markets Ltd, - 25 ₦2,500,000,000.00. Further to the course of investigation we sought clarification on the purpose and utilization of the ₦2,500,000,000.00 from Intercontinental Capital Markets Ltd. The Company (ICML) claimed that the two Skye Bank Cheques issued in favour of Tropics Finance Company Ltd by Chartwell Securities Ltd and eventually credited to Intercontinental Capital Markets Ltd were repayments made by one of their facility customers, Messrs. Tropics Finance Ltd. Our investigation revealed that 30 the ₦2,500,000,000.00 in reference initially was ₦2,000,000,000.00 facility granted to Tropics Finance Co. Ltd on 10/10/2007 Due to accumulated interest over the years, as at May 2009, the facility had risen to ₦2,613,000,000.00. On 15/5/2009 Tropics Finance Company Ltd paid the sum of ₦2,500,000,000.00 as part payment of the facility granted and in 35 June 2009 the sum of ₦35,000,000.00 was paid by Tropics Co. Ltd as full and final payment. The ₦2,500,000,000.00 facility in reference was collateralised with 123,511,868 units of Intercontinental Bank Plc, shares belonging to Mr Peter Akingbola, Mrs. Anthonia T.O. Akingbola and Dr. Erastus B.O. Akingbola who, is both Chief Executive Officer, (CEO) and Chairman of Tropics Finance Company Ltd The personal guarantee of Dr. Erastus S. O. Akingbola was used to secure the facility" (Highlight his)

45 The three Managers Cheques were subsequently drawn up and issued in



5 *the specified company names. This was achieved by debiting [the] Bank's*
general ledger time Deposit Account which pursuant to our
investigation we traced and found them (the specified names) to be domiciled
in Access Bank Plc. We applied to Central Securities Clearing System
Ltd (C.S.C.S) to furnish us with the details of all the Intercontinental Bank
Plc. Shares traded by Tropics Securities Ltd during the relevant period,
which information they supplied to us and we discovered that during the
relevant period Tropics Securities Ltd only traded in Intercontinental Bank
Plc shares to the tune of ₦4,314,436,815.84 only, though have not seen
documentation establishing these transactions nor could we establish
any purpose for these transactions" [Highlight his]

10
15 *Following the discovery of the way which General Ledger (GL) accounts*
were manipulated in order to issue the three Manager Cheques for ₦10
billion to Bakinson Nig Ltd., Tropic Securities Ltd and Tropics Properties
Ltd. Inspection department was mandated to further review the Bank's GL
account for transactions that appear suspicious. These investigations
resulted in the disco very that transfers in the aggregate of ₦8,684,500,000
were made on 11 dates during the period between 13th May 2009 and 30
June 2009 from the prepayment account and all the money were discovered
to be used for the benefit of Companies related to Dr. Akingbola as detailed
below..."

20
25 The appellant also referred to other documents in the Proof of Evidence, which he
argued, clearly evince that the entire Counts revolve around banking transactions
and dealings in shares and stocks, as follows –

- 30 *i. Memo from the Financial Controller to the Corporate Treasurer*
dated 11/5/2009 written by Akin Fabunmi on page 22 about
issuance of shares.
- ii. Cheques on pages 23 and 24 (that) clearly relate to banking*
matters.
- 35 *iii. Letter dated 11/11/2009 from Access Bank officials to the Chief*
Inspector on page 25 headed "Re: Enquiry in respect of IB Plc.
Managers Cheques..." stating the Acc. names, directors &
signatories - a purely banking issue.
- 40 *iv. Letter dated 15/5/2009 to the Group Chief Executive titled*
"Payment for Shares Purchases" on page 26 talking of payment
of shares bought.
- 45 *v. Letter on Intercontinental Home Savings & Loans Ltd letterhead*
to the Chief Inspector of I.B Plc. dated 15/12/20.09 on page 27



relating to transfer of money for the purpose of purchasing shares of blue chip companies.

- 5 vi. *Another letter from Intercontinental Homes Savings & Loans Ltd dated 26/5/2009 on page 28 about money for purchase of blue chip companies.*
- 10 vii. *A letter written on Intercontinental Securities letterhead dated 15/12/2009 on page 31 issuing a cheque in favour of Bankinson Nigeria Ltd.*
- 15 viii. *Letter dated 19/5/2009 from Tropics Securities Ltd on page 32 [that] talks of raising a cheque of ₦267,881,941.50 in favour of Bankinson Nigeria Ltd.*
- 20 ix. *An internal memorandum dated 22/5/2009 on page 33 (that) talks about request that a cheque be issued for ₦267,881,941.50*
- x. *Letter dated 17/4/2007 to the MD of Tropics Security Ltd on page 35 about the advantage of investment opportunities in the Capital Market It is also conveying loan approval of ₦250,000,000 to Tropics Securities Ltd*
- 25 xi. *An I. B. Plc, letter dated 21/12/2009 to the Chief Inspector of First Bank on page 42 [that] talks of the managers cheques.*
- xii. *All the documents, letters and cheques on pages 45 to 61 [that] relate to transfer of funds, which are banking matters.*
- 30 xiii. *Two letters dated 28/12/2007 and titled "Placement Limits for Banks and Discount Houses" on pages 110 - 112 state the details of the limits for their foreign and local currencies trading counterparts. [Highlight his]*
- 35 xiv. *Memo dated 23/11/2007 titled "Trading Products Grid and Dealing Limits for the Bank's Approving officers' on Page 113 with bank transactions –*

40 *"In line with the decision taken at the ALCO meeting of 23/11/2007, please find below details of Trading Products Grid Limits in respect of Foreign and local currencies products that are actively traded.....on a daily basis as well as Dealing Limits for the Bank's approving offices.*

45	Product	Set Limit	Market Size
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Augie, JCA

	Treasury Bills	₦130,000,000,000	₦1,300,000,000,000
	FGN Bonds	₦80,000,000,000	₦800,000,000,000
5	Foreign Bonds	\$50,000,000	N/A
	Inter Bank Discount & Discount House Placement	₦150,000,000,000	₦500,000,000,000
10	Inter Bank & Discount House Borrowings	₦50,000,000,000	₦500,000,000,000
	Foreign Currency Open Positions	\$25,000,000	\$200,000,000 daily
15	Intra Day Limit	\$62,500,000	
	Single Third Currency Limits	\$2,500,000	
20	Risk Assets & BA/GCPS	₦250,000,000,000	₦1,500,000,000,000

25 (xv) *Letter on First Bank Plc. letterhead dated 29/1/2010 on page 45 addressed to the Chief Inspector of I.B. Plc. titled "Re: Enquiry in respect of IB Plc cheques 2113, 9143, 9066, 9047" that states "We refer to your letter dated 21/12/2009 and advise that the Managers Cheques were utilized to liquidate the term loan granted Bakinson Limited " "The above document and two other tables on page 114 reveal beyond any form of doubt that the transactions are banking matters"*

30

35 (xvi) *Letter on Tropics Finance Investment Co. Ltd letter head dated 18/5/2009 to the Treasurer, IB Plc titled "Fixed Deposit Placement" on page 50 [that] states –*

40 *"Kindly debit our special account.....with the sum of ₦1,500,000,000 and place the funds in fixed deposit for 30 days at 18% p.a."*

45 (xvii) *Another letter on Tropics Finance & Investment Co. Ltd letter head to the Manager, I.B. Plc. dated 12/6/2009 and titled "Part Liquidation of Special Account 1 #0111 001000352735 on page 58, which states "Kindly debit our above named account and*



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issue us a cheque for the sum of ₦200,000,000.00 - I.F.O. Tropics Properties Limited” a pure banking transaction that is in the purview of the Federal High Court. Same as a letter dated 8/6/2009 on page 61 of the Proof of Evidence Exhibit 4 with same topic which states “Kindly debit our above named account and transfer the sum of ₦25,000,000.00 - I.F.O. Tropics Security Ltd”

The appellant invited us to look at these Counts vis-a-vis the Proof of Evidence and documents produced by the respondent as encapsulated in Exhibit 4 at pages 10 1606 -1838 of Vol. 5, and further submitted that –

- 15 - Count 1 talks about conversion of the property of the bank so it is a banking matter. The particulars of the offence expressly state that - “Dr. E. B. O. Akingbola, being the Managing Director and Chief Executive Officer of Intercontinental Bank Plc.”
- 20 - Count 2 has similar particulars as Count 1, and it is a banking matter.
- Count 3 follows the same pattern with Counts 1 and 2.
- Count 4 is the same but goes on to allege conversion of the money for the use of Bankinson Nig. Ltd, which are matters covered by CAMA over which the Federal High Court has exclusive jurisdiction.
- 25 - Count 5 also alleges diversion of funds and adds that he is a Director of Tropics Finance Ltd., which are issues outside its jurisdiction.
- Count 6 follows same pattern as Court 5 and alleges his Directorship in the Bank and the said Company Tropics Finance Limited.
- 30 - Ditto for Counts 7, 8, 9, 10, 11, 12, 13, 14, 19, 21, 23 and 25.
- In all the Counts, the Complainant alleges that he used his position as MD/CEO of the Bank and converted and/or stole monies belonging to the said bank in series of banking transactions or dealings that revolve around loans granted to companies in which he is also a Director and in respect of claim of purchase, trading, and payment for shares and stocks of the Bank by the Tropics Securities Ltd.
- 35 -
- 40 - And that a common feature in all the Counts or most of them is that they allege conversion of shares from one company to the other, so *ex facie*, the Counts themselves divest the lower Court of jurisdiction.

The respondent countered that the said Counts do not relate to banking, CAMA or capital market but relate to money belonging to the said Bank; that they never 45 alleged conversion of shares from a company to another; and that the thing converted



or stolen is money not shares belonging to the bank. It referred to the Statement at pages 92 - 105 and argued that –

5 *“A person who stole money from the bank, whether by electronic transfer or by physical breaking into the vaults of the bank or even in the course of a robbery is nevertheless a thief whose offence includes stealing. Such criminal conducts certainly do not fall within the contemplation of banking, foreign exchange and fiscal measures..... Counts 3 - 13, 19, 21, 23, and 25 do not relate to any share or acts of banking The Counts rather relate to how the appellant converted the Bank’s money to his own use and the use of his own companies. These complicated but fraudulent transactions were explained at page 92 - 105 of volume 1 of the Record of Appeal”*

15 The appellant noted in his Reply Brief that though it strenuously argued that the lower Court was precluded from looking at the proof of evidence, the same respondent drew the lower Court’s attention to the proof of evidence at pages 1839 - 1844 of the Record and in its Brief before this Court, the respondent has profusely quoted from the proof of evidence.

20 We are back to the Proof of Evidence, which the lower Court failed and/or refused to scrutinize before it decided that it had jurisdiction to try the appellant for stealing various sums of money belonging to a bank.

25 Its attention was drawn to the decision in *Nwosu’s Case*, which dealt with a similar case involving another Bank Chief, who was removed by CBN, and later arraigned before the two Courts to answer to criminal charges.

30 The lower Court refused to abide by our decision in *Nwosu’s Case* on the ground that this Court held therein that since the alleged offences have their roots in capital market, the matter is within the purview of the Federal High Court. It assumed jurisdiction to try the appellant because -

35 *“In the present case, the offences alleged are stealing, receiving and obtaining money under false pretences. This is within the confines of the State High Court and I so hold”.*

40 But as the appellant rightly submitted, there is no Count in *Nwosu’s case* that mentions *banking transaction, stocks and shares or even offences that have their roots in capital market*. *Nwosu* was charged with stealing; this Court read the Proof of Evidence in that case, and held as follows-

45 *“A person can only be charged with stealing what is in existence It is this, but important element of the offence of stealing, the existence of thing stolen that can determine whether the High Court of Lagos State*



5 *possesses the jurisdiction over the action initiated before it or not. In doing this, it becomes apposite to juxtapose the said element of offence of stealing with the Report of the Investigators..... What is...in existence is the fraudulent conversion of funds of the Banks as instructed, into shares. If the funds.....have turned into shares, which is an issue in the Capital market, can the High Court of Lagos State, therefore, invoke its jurisdiction on such matter, on a charge of stealing. Why will the Prosecution then resort to another charge of stealing at the High Court of*

10 *Lagos State when the existence of the thing said to be stolen is turned under the control of Capital issue?*

Evidently, the lower Court based its decision to assume jurisdiction on what this Court discerned from the Proof of Evidence in *Nwosu's* Case, which it blatantly refused to go through in this case for spurious reasons.

15 The 26 Counts in the Information against *Nwosu* merely alleged stealing, and no more than that; this Court went through the Proof of Evidence, particularly the Report on the Investigators, and concluded as follows –

20 *“No doubt, the pith and substance of the complaint of stealing as evidenced by the conversion as instructed into shares, concerns a matter of capital issue, which is Item 12 on the Exclusive Legislative List. By Section 251(1)(s) of the Constitution....the Federal High Court, to the exclusion of any other Court is conferred with the jurisdiction to entertain matters over*

25 *which only the National Assembly can legislate”*

The lower Court did not look beyond the Counts against the appellant, and as far as it was concerned, it had jurisdiction to try him for stealing, which is all that mattered, forgetting that the allegations must be proved. This Court asked a key question in *Okey Nwosu's* Case, as follows –

30 *“Will there be any evidence at the High Court of Lagos State, which is different from the evidence that will be before the Federal High Court on the existence of the thing stolen....”*

35 In other words, the question the lower Court should have asked itself is - will the Prosecution adduce any evidence that would be different from evidence before the Federal High Court as regards the money stolen?

40 However, the lower Court did not look at the Proof of Evidence before it. If it had read it, it would have answered the question in the negative - No. The very fabric of the offence charged in this case - stealing is woven around banking transactions, which are linked to banking rules allegedly violated by the appellant in the process of stealing the Bank's money.

45



The appellant did not walk into the Bank and steal money from its vault; he is accused of using his position as MD/CEO to steal the said monies. For instance, see Exhibit 4 where the Prosecution's key witness stated –

5 *"Using his position as the Managing Director of the Bank [he] caused the said funds to be transferred for his use without adequate fund in his domiciliary account thereby granting himself an unauthorized credit facility"*

Grounds (vii) and (viii) of the Appellant's Grounds of Objection states –

10

(vii) *The main witnesses listed in the Proof of Evidence at the Federal High Court, Lagos in Charge FHC/L/CS/443C/09 are the same witnesses also listed in the Proof of Evidence before this Honorable Court.*

15

(viii) *The same counsel representing the Complainant in Charge FHC/L/CS/443C/09 at the Federal High Court are the counsel appearing before this Honourable Court, prosecuting the Applicant for the same offences as before the Federal High Court.*

20

The 1st respondent is not contesting these facts and has justified same by arguing that there is no law that forbids it from using the same set of lawyers and witnesses to prosecute separate and different offences against the Appellant at the Federal High Court and at the lower Court.

25

There may not be any law that forbids the 1st respondent from using the same set of witnesses to prosecute the Appellant in two separate Courts, but in the circumstances of this case, there is a lot riding on the said fact.

30

The Appellant was already standing trial at the Federal High Court before he was taken to the State High Court to face a Charge of stealing.

In *Nwosu's Case*, this Court went below the surface of the said Counts, and excavated the roots on which the allegation of stealing sprang from, only to find that there was nothing connecting it to the State High Court.

35

We have a similar situation; the case before the lower Court is riddled with matters for which the Federal High Court has exclusive jurisdiction, and there is no way a charge of stealing can stand without evidence that can only be looked into and determined solely by the Federal High Court.

40

The long and short of it is that the lower Court fell into serious error when it failed to abide by the decision of this Court in *Okey Nwosu's Case*, and in clear terms, this issue must be resolved in favour of the Appellant.

45



Augie; Oseji, JJ.CA

As to the issue of abuse of process, the lower Court did not make any pronouncements thereon because it wrongfully held that the said processes were not produced even though they were exhibited before it.

5 I have dealt with all that but it is trite that an appellate Court cannot look into issues that were not thrashed out at the trial Court; and so it will be.

Before I round up, I must express my view, and how I see things.

10 The same set of Prosecutors arraigned the appellant before two Courts - the Federal High Court and Lagos State High Court; one after the other.

He is being prosecuted for offences allegedly committed when he was MD/CEO of Intercontinental Bank Plc., and this is after he was removed.

15

The Prosecutors had the Proof of Evidence, and had the choice to make; try the appellant for stealing at the State High Court and stay there or try him for bank-related offences at the Federal High Court and stay there. It is most unfair, and smacks of injustice, to drag the appellant from the Federal High Court to the State High Court while the Charge is pending. But that is my own view; I look forward to what the Supreme Court says.

20

In the final analysis, the appeal succeeds, and is therefore allowed.

25 The decision of the lower Court in its Ruling dated 2/5/14 is set aside, and in its place, I hereby strike out the Information dated 4/5/11 preferred against the appellant at the lower Court in Charge No. ID/148C/2011.

30 **OSEJI, JCA:** I have been afforded the opportunity of reading before now, the draft copy of the lead judgment just delivered by my learned brother Amina Adamu Augie JCA.

My lord has in the usual manner dealt exhaustively with all the issues in contention and I whole heartedly agree with the reasoning's and conclusion reached therein.

35

I will however add for purposes of emphasis that a clear distinction must be drawn between a summary trial and a trial on information. While in a summary trial procedure the initial facts available to an accused person are virtually limited to the charge sheet, in a trial on information, the following documents are made available by the prosecution from the onset of the trial:

40

a. *The charge containing the statement and the particulars of the offence.*

45

b. *The statements of the prosecution witnesses.*



- c. *The statements of the accused persons.*
- d. *List of exhibits, and.*
- 5 e. *All other relevant documents that the prosecution intends to rely on at the trial.*

See. *Uwazurike v. A.G. Federation* (2013) LPELR (20392) SC and *FRN v. Ibori* (2014) LPELR (23214) CA.

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The whole gamut of documents that accompanies the charge or information is what is referred to as proof of evidence.

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Authorities also abound, that in a trial on information as in the instant case, the court can peruse the proof of evidence in deciding whether it has jurisdiction to hear the case or whether a *prima facie* case is made out against the accused person. See *Abacha v. State* (2002) 5 NWLR (Pt. 767) 638; *Eze v. FRN* (1987) 2 SCNJ 76; *Uwazurike v. A.G. Federation (supra) Ajidagba v. IGP* (1958) SCNLR 60; *Okoro v. State* (1988) 2 SC (PIII) 83; *Okoli v. State* (1992) 6 NWLR (Pt. 7247) 381 and *Japhet v. The State* (2010) LPELR (4471) CA.

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In *Hembe v. FRN* (2014) LPELR (22705) CA this court relying in the Supreme Court case of *Jimoh Atanda v. A.G. Western Nigeria* (1965) NMLR 225 held that:

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“When judges examine the proofs of evidence and are unable to detect the commission of a crime the state should not be granted leave to prosecute but the application ought to be refused. The courts should not become avenues for prosecuting the innocent instead of prosecuting criminals.”

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See also *Agboola v. FRN* (2014) LPELR (22932) CA. It is my firm view that the above principle of law applies with the same force where the jurisdiction of the court to entertain the case is called to question. The learned trial judge had in his ruling which is the subject of this appeal held thus:

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“Counsel made an analysis and evaluation of some documentary evidence Proposed to be tendered by the prosecuting. I find and I hold that this is premature and cannot be looked into at this stage of the proceedings. It is the law that matters for substantial hearing cannot be delivered at the introductory stage.”

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The above reasoning of the learned trial judge will hold sway in a summary trial procedure but in the instant case the trial is on information where the law requires the filing of proof of evidence which by decided cases should of necessity be perused for the purpose of determining whether the court has jurisdiction or that a

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prima facie case has been made out against the accused person. See *Eze v. FRN (supra)*. The learned trial judge therefore fell into grievous error by refusing to look at the proof of evidence on the ground that it was premature at that stage to do so.

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For this and the fuller reason detailed in the lead judgment, I hold that this appeal is meritorious and it is accordingly allowed.

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The ruling of the lower court delivered on 2-5-2014 is hereby set aside and the information preferred against the appellant in charge No. ID\148C\2011 is hereby struck out.

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OBASEKI-ADEJUMO, JCA: I have read the draft judgment just delivered by my brother Hon. Justice Amina Adamu Augie, JCA and I agree with the lucid reasoning and conclusions and wish to add some words of mine to it.

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The action here is a criminal one brought to determine which court has jurisdiction to entertain the information of 4/5/11. It was initially filed as charge No ID/148C/2011 at the Lagos State High Court under the Administration of Criminal Justice Law 2011. It contains 26 counts, alleging in 18 of them offences of conspiracy and stealing of various sums of monies belonging to International Bank Plc against the appellant.

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The grounds of the application which challenges jurisdiction of the court are:-

- (1) Complaint is the Federal Republic of Nigeria
- (2) 18 counts are on allegation of conspiracy, stealing of monies belonging to the defunct bank.
- (3) Subject matter relates to banking operations, and Control and operation of the capital issues and company related matters under Companies & Allied Matters Act - under Section 251(1) (d) & (e) (S) (3) of 1999 Constitution and items No 6, 12, and 32 of Exclusive legislative list contained in the 2nd Schedule to 1999 Constitution.
- (4) Same complaint in 2009 was initiated at Federal High Court (which are still pending) and 2 appeals have emerged therefrom.
- (5) Main witness as in both suits are the same as listed in proof of Evidence before the High Court.
- (6) Same counsel represents complaint in both courts
- (7) The information before the Lagos court constitutes an abuse of

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court process.

5 It was supported by 31 paragraph affidavit and 4 annexures. Respondent opposed same and in 6 paragraph counter affidavit in opposing the appellant filed 11 paragraphs further Affidavit with a copy of a charge filed at the Federal High Court between *FRN v. Okey Nwosu & Ors* as Exhibit 5.

10 The trial court - refused the application and held that all the counts had nothing to do with the banking transaction, stocks and shares so as to attract jurisdiction of the Federal High Court and held further that the allegation in the suit at hand are stealing receiving and obtaining money under false pretence and that this is within the confines of the State High Court.

15 It is against this decision that this appeal was filed.

20 The salient issue in the analysis of this appeal, is the need to emphasis the importance of considering in details the proof of evidence which is a mandatory requirement of an information filed under the Administration of Criminal Justices law (AJCL) of Lagos State.

In Section 251 (1):

25 "Where an information is exhibited In the High Court under the processes of this law it shall set out:-

- 25 a.
 - b.
 - 30 c.
 - d.
 - e.
 - 35 f. - proof evidence
2. The forms set out to this are forms conforming to that as nearly as shall be, shall be used in the cases to which they are applicableand the particulars."

40 Therefore, the jurisdiction of a court to hear a case depends on the cause of action as shown in the information filed and proof of evidence and not on the appellant's conception of what the case is or ought to be as set out. See *Chief Lere Adebayo v. State* (2012) LPELR 9464 (CA); *Omnia Nig Ltd v. Dyke* (2007) 15 NLWR (Pt 45 1058) SC 576 at 598 - 599.



The proof of evidence being a compulsory requirement of the law. It must be complied with. See *George v. Dominion Flour Mills* (1963) ANLR 1; *Bamayi v. A. G. Fed* (2001) 12 NWLR (Pt 727) 468.

- 5 It therefore constitutes a condition precedent to filing an information under the AJCL. It is a determinant of jurisdiction. See *Abacha v. State* (2002) 11 NWLR (Pt 779) 437; *Ikomi v. State* (1986) 3 NWLR (Pt 28) 340.

In this case, the proof amplifies the statement of offence.

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The proof of evidence certainly will include the report of the investigators assigned to investigate the petition and what they discerned which formed the basis of the charges preferred against the appellants. See *Nwosu v. FRN (supra)*.

- 15 In this case the root of the various counts must be dug into with a clean digger and a shovel to unravel the base when all is poured out for all to see -

The Proof of Evidence as in the "Statement of Abdulraheem Yinka Jimoh" in Exh. 4 in bullet form;

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- "Process of approving placement limit in ICML by appellant from ₦2b to ₦5.5b, enabled the bank's treasury to be able to place more funds at the disposal of ICML for lending to Regal Investment Ltd, was itself improper.

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No approval was sought from the board on utilization of deposit placement of ₦2b with the bank.

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- At time of request and agreement with Regal Investment Co. Ltd, ICML did not have the financial capacity to support the placement being an institution registered for trading in Capital Markets neither was the request considered or approved by its board (ICML).

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- Procedures adopted in accounting treatment of the deposit of the bureau de charge operators - is highly irregular and improper.

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- Using position as Managing Director of the bank to cause funds to be transferred for his use without adequate funds in his domiciliary account thereby granting himself an unauthorized credit facility.

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- Instruction of financial controller to G.E. Domestic operations to debit the Bank's Pre payment General lodgers Account with ₦3,350,000,000.00 for distribution - Intercontinental homes Ltd. ₦350,000,000.00 - Intercontinental Securities Ltd ₦500,000,000 Intercontinental Capital Markets Ltd - ₦2,500,000,000.



- 5 - The ₦2,500,000,000 facility in reference was collateralized with 123, 511, 868 units of Intercontinental Bank Plc shares belonging to Mr. Peter Akingbola, Atonia T.O. Akingbola, & Dr. Erastus. Akingbola - who is both Chief Executive Officer (CEO) & Chairman of Tropics Finance Company Ltd. The personal guarantee of Dr Erastus B.O. Akingbola was used to secure the facility.
- 10 - Transfers in aggregate of ₦8,684,500,000 were made on 11 dates during the period between 13th May 2009 – 30th June 2009. From the repayment account and all the money were discovered to be used for the benefit of companies related to Dr. Akingbola as detailed below.” (underling mine).
- 15 The documents in the proof of Evidence as highlighted in the lead judgment, all point only to one fact; that it is not a charge for stealing *per se*, under Section 383 - 390 of Criminal Code., it is a actually a charge against the accused wherever he is affiliated with the companies used to perpetrate acts of diversion, conversion of shares, transfer of funds in domiciliary accounts, non approval of banking policy transactions, which appeared to have benefited the accused indirectly.
- 20 It is the mode and manner of allegedly moving funds from the said bank that determines the specific court’s jurisdiction not what the funds were used for, or how it was utilized.
- 25 Therefore many “vehicles” were utilized and an apt tracing from the proof of evidence (investigator) will involve lifting the veil of the Companies, looking into ownership structures, the extent of involvement. Whether individual liability as against corporate liability - the share holding structure and capital issues from the securities Exchange Control, different banking instruments, diverse banking offences under
- 30 the BOFI Act and CBN Act - no doubt will involve an area not within the High court’s jurisdiction.
- 35 It involves control of capital issues in the Exclusive legislative list and these offences may only be properly prosecuted at the Federal High Court - by virtue of Section 251(1) E, & D of the 1999 Constitution (as amended).
- See *Hon. Minister for Justice & A.G. Federation v. Hon. A.G. Federation Lagos State* (2013) LPELR - 20974 (SC).
- 40 This certainly has gone beyond the situation envisaged in *N.D.I.C v. Okem Ent.* (2004) 18 NSCQR 42. Control of Capital issues is listed No 12 on exclusive list and Section 251 (1) of Constitution and Section 7 (2) of the Federal High Court Act (2004) Cap F.12 the court is vested with jurisdiction over connected and ancillary matters These facts do not support the charge of stealing *simpliciter* but a much
- 45 more complex multifaceted banking, financial issues interwoven with capital and



companies & allied matters law which the lower court cannot deal with; it will be leaving its comfort zone of jurisdiction and swimming in unknown waters .

See *Gafar v. The Government of Kwara State & Ors* (2007) LPELR-8073 (SC)
5 Where the Supreme Court held that the Federal High Court cannot determine the appellants claim without necessarily wading into the indictment of the appellant in the report of inquiry and the White paper issued there on. In my view, I agree that the proof of evidence was sufficient guide to the court to arrived at a contrary decision that *Nwosu's* case was a proper light to follow.

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For this and other reason in the lead judgment, I too allow the appeal and set aside the ruling dated 2/5/14, I also strike out the information dated 4/5/11 preferred against the appellant at the lower court in charge ID/148C/2011.

15 **Cases cited in the judgment**

A.G. Abia State v. AG Federation (2002) 6 NWLR (Pt. 763) 264

A.G. Federation v. Abubakar (2008) 16 NWLR (Pt. 1112) 135

Abacha v. FRN (2006) 4 NWLR (Pt. 970) 239

Abacha v. State (2002) 5 NWLR (Pt. 767) 638

20 *Agboola v. FRN* (2014) LPELR (22932) CA

Ajidagba v. IGP (1958) SCNLR 60

Akingbola v. Federal Republic of Nigeria & Anor (2012) 9 NWLR (Pt. 1306) 511

Akingbola v. The Chairman, EFCC (2012) 9 NWLR (Pt. 1306) 477

Alli v. State (2012) 10 NWLR (Pt. 1309) 589

25 *Amasike v. Reg. General, CAC* (2010) 13 NWLR (Pt. 1211) 307 SC

Atolagbe v. Awuni (1997) 9 NWLR (Pt. 522) 536

Bamaiyi v. AG Fed. (2001) 12 NWLR (Pt. 727) 468

Bob-Manuel v. Woji (2010) 8 NWLR Pt. 1196) 260

Bode George v. FRN (2014) 1 CLRN 1

30 *Brawal Shipping Ltd. v. F. I. Onwadike Co. Ltd.* (2000) 11 NWLR (Pt.678) 387

C. N. Ekwuogor Inv. (Nig.) Ltd. v. Asco Invest Ltd. (2011) 13 NWLR (Pt. 1265) 565

Chief Lere Adebayo v. State (2012) LPELR 9464 (CA)

Daboh & Anr. v. State (1977) NSCC 309

Dr. M. Okenjo v. Dr. M Odje & Ors. (1985) 10 SC. 297

35 *Eze v. FRN* (1987) 1 NWLR (Pt. 51) 506

FRN v. Eze (1982) 3 NCLR 259

FRN v. Ibori (2014) LPELR (23214) CA

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Gafar v. The Government of Kwara State & Ors (2007) LPELR-8073 (SC)

40 *George v. Dominion Flour Mills Ltd.* (1963) 1 All NLR 71

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Ikomi v. State (1986) 3 NWLR (Pt 28) 340

45 *Japhet v. The State* (2010) LPELR (4471) CA



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- Jimoh Atanda v. A.G. Western Nigeria* (1965) NMLR 225
Kasiku Farms v. AG Bendel (1986) 1 NWLR (Pt. 19) 695
Labiya v. Anretiola (1992) 8 NWLR (Pt.258) 139
LMB Ltd. v. PTF (2006) 5 NWLR (Pt. 974) 463
- 5 *Madu v. Mbakwe* (2008) 10 NWLR (Pt.1095) 293
Madukolu v. Nkemdilim (1962) 2 All NLR 581
NDIC v. Okem Enterprises Ltd & Anor (2004) 11 CLRN 1; (2004) 18 NSCQR 42
NNPC v. Famfa Oil & Anor (2009) SC 5 - 6 (Pt. 1) 191
Nwosu v. FRN & Ors - CA/L/601/2011
- 10 *Obada v. Mil. Gov. of Kwara State* (1990) 6 NWLR (Pt. 157) 482
Odutola Holdings Ltd. v. Ladejobi (2006) 12 NWLR (Pt. 994) 321
Ogidi v. State (2005) 5 NWLR (Pt. 918) 286
Ohwovoriole v. FRN (2003) FWLR (Pt. 141) 2019
Oke v. Oke (1974) 1 All NLR 443
- 15 *Okenzua v. Amosu* (1992) 6 NWLR (Pt. 248) 416
Okoduwa v. State (1988) 2 NWLR (Pt. 76) 333
Okoli v. State (1992) 6 NWLR (Pt. 7247) 381
Okolo v. Union Bank of Nigeria Plc. (2004) All FWLR (Pt. 197) 981
Okoro v. State (1988) 2 SC (Pt II) 83
- 20 *Okoye v. Okonkwo* (2006) All FWLR (Pt. 332) 1526
Oloba v. Akereja (1988) 3 NWLR (Pt. 84) 508
Olubeko v. F.R.N. (2004) LRELRL 22632
Olufosoye v. Olorunfemi (1989) SC (Pt. 1) 29
Olutola v. Unilorin (2004) 18 NWLR (Pt. 905) 416
- 25 *Omnia Nigeria Limited v. Dyktrade Limited* (2007) 9 CLRN 1
Onwujiwe v. FRN (2006) 10 NWLR (Pt. 988) 382
Pius v. The State (2012) LPELR-9304 (CA)
Re: Lessey (1989) 4 NWLR (Pt. 113) 113
Sule Sanni v. Durojaiye Ademiluyi (2003) 3 NWLR (Pt. 807) 318
- 30 *Tika Tore Press v. Umar* (1968) All NLR 511
Unilag & Ors v. Olaniyan & Ors (1985) 1 SC 295
Uwazurike v. A.G. Federation (2013) LPELR (20392) SC
Willoughby v. IMB (1987) 1 SC 137
- 35 **Foreign Cases cited in the judgment**
Gordon v. Chief Commissioner of Metropolitan Police (1910) 2 KB 1080
UAC v. Macfoy (1961) 3 All ER 169
- Statutes cited in the judgment**
- 40 Section 167(d) of the Evidence Act 2011
Sections 36(6), 251 and 272 and Item Nos. 6, 12, and 32 of the Exclusive Legislative List in Part 1 of the Second Schedule to the 1999 Constitution (as amended)
Section 251(1) of the Administration of Criminal Justice Law
Sections 383 - 390 of Criminal Code
- 45 Sections 7 and 8 of the Federal High Court Act



Book referred to in the judgment

Encarta Dictionaries

History:

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HIGH COURT

High Court of Lagos State (Ikeja Division)

Lawal-Akapo, J

10 **COURT OF APPEAL (Lagos Division)**

Amina Adamu Augie, JCA (Presided & Read the lead Judgment)

Samuel Chukwudumebi Oseji, JCA

Abimbola Osarugue Obaseki-Adejumo, JCA

15 **Counsel:**

Chief Wole Olanipekun, SAN with M. I. Igbokwe, SAN; Olabode Olanipekun; Dr. C. O. Ukattah; S. Eze; Bolarinwa Awujola; and Oyemade Ogunlowo for the Appellant.

20 E. C. Ukala, SAN with Chief Godwin Obla, SAN; E.C. Okpe; O. J. Iheko and Damilola Amore for the 1st Respondent.

Prof. Taiwo Osipitan, SAN with Olayemi Badewole; Oluwatosin Daudu and Foluke Toyè-Salami for the 2nd Respondent.

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